SUPREME COURT OF NORWAY

On 4 September 2018, the Supreme Court gave judgment in

HR-2018-1650-A (case no. 18-044407STR-HRET), criminal case, appeal against judgment:

A	(Counsel John Christian Elden)
v.	
The public prosecution authority	(Public prosecutor Frederik G. Ranke)

(1) Justice **Bergsjø:** This case concerns the application of the law, the procedure and the sentence following conviction of participation etc. in the terror organisation ISIL. It particularly discusses the contents of the terms "participate", "recruit" and "provide financial or other material support" in the identical provisions in section 147 (d) of the Penal Code 1902 and section 136 (a) of the Penal Code 2005, and the penalty for violating them.

(2) On 19 September 2016, the public prosecution authority brought charges against B and A. The case heard by the Supreme Court concerns A only. For contextual purposes, I mention all the same that B was indicted under count I for having attempted to join the terrorist organisation ISIL, see section 147 (d) of the Penal Code 1902, cf. section 49 and section 12 subsection 1 (3) (a). The basis for the indictment against B reads:

> **"In early June 2015, he attempted to join the terrorist organisation The Islamic State of Iraq and the Levant (ISIL) in Syria. He started his journey from Norway to an ISIL-controlled area in Syria by travelling from Oslo to Gothenburg in the morning on 8 June 2015. Before that, he had, among other things, chosen the route, bought a plane ticket and equipment for the trip and for his stay with ISIL in Syria. He received a Huawei Ascend Y330 mobile phone and instructions for use upon arrival in Turkey to ensure his transportation across the border to ISIL-controlled areas in Syria. On 8 June 2015 at 06:50, his enterprise was prevented as he was arrested by the police at the gate before boarding SK433 at Landvetter airport.**

ISIL was listed by the UN as a terrorist organisation on 30 May 2013. ISIL was previously a part of Al-Qaida in Iraq that was listed by the UN as a terrorist organisation in October 2004. Al-Qaida in Iraq and ISIL have committed a number of terrorist acts, including in the form of crime against humanity such as deprivation of liberty, torture, killing of civilians and other war crimes with the purpose of creating serious fear in a population."

(3) Under *count II*, A was indicted for having *participated* in ISIL under section 147 (d) of the Penal Code 1902 for the period until 30 September 2015 and under section 136 (a) of the Penal Code 2005 for the period from 1 October until 8 December 2015. The basis for the indictment reads:

"From August 2013 until 8 December 2015 in Oslo and/or in the region of Eastern Norway, he participated in the terrorist organisation ISIL. Among other things, he referred to the 'caliph/emir' of ISIL, Abu Bakr al-Baghdadi, as 'our leader' and stated publicly that 'believers are flowing into the Islamic State to complete their utmost religious duty, i.e. to serve Jihad and Allah'. He arranged and prepared travels for persons who joined or attempted to join ISIL in Syria. This included advice on travel route, practical conditions and needs, purchase of suitable equipment and purchase of or assistance in purchase of tickets, and entrustment of contact details of personnel associated with ISIL. He communicated with such personnel to ensure that the travellers were picked up and taken across the border from Turkey to ISIL-controlled areas in Syria. He helped on various levels when, among others, D (previously E), F, G. H and I, during the period 2013 – 2015, joined, or attempted to join, ISIL in Syria. He disposed over the bank accounts of some of the persons for whom he arranged the travels, and thus made their everyday life in Syria simpler. …"

(4) The basis for the indictment also contains the description of ISIL that is already quoted in count I.

(5) Under *count III*, A was indicted for having *recruited* at least two persons to ISIL, see section 147 (d) of the Penal Code 1902. The basis for the indictment reads:

"From spring 2014 until June 2015, he recruited at least two persons to the terrorist organisation ISIL in this manner:

a) From June 2014 until September 2014, he had a number of meetings and other forms of contact with J and contributed to J joining ISIL. Among other things, he helped purchasing tickets and escorted J to Oslo on 20 September 2014 before J's departure to Sweden. J travelled on via Greece and Turkey to Syria. He was in contact with personnel associated with ISIL to ensure that J was picked up and taken across the border from Turkey to an ISIL-controlled area in Syria. J joined and fought with ISIL until he died in Syria in March 2015.

b) From 8 March until 8 June 2015, he had a number of meetings and other forms of contact with B to make B join ISIL. Among other things, he helped retrieving a plane ticket, made VISA arrangements, fixed a telephone subscription and advised in purchasing of clothes and a video camera. He gave B the cover name 'K' and communicated this to personnel associated with ISIL to ensure that B was picked up in Turkey and taken across the border to an ISIL-controlled area in Syria. He equipped B with a Huawei Ascend Y330 mobile phone to be used on the journey to Syria and later. He participated in escorting B from Oslo to Landvetter airport in Gothenburg in Sweden. On 8 June 2015, B was arrested by the police at Landvetter airport and stopped from joining ISIL in Syria. …"

(6) Count III also contains the description of ISIL that I have already quoted.

(7) Under *count IV*, A was indicted for å having provided *financial and other material support to* ISIL, see section 147 (d) of the Penal Code 1902. The basis for the indictment reads:

> **"a) On 30 August 2013, in the shop Equipnor in Ski, Oppegård, he provided material support to a terrorist organisation by purchasing combat clothing and equipment suitable for military use for D. D used the clothing and equipment while being a part of the terrorist organisation ISIL in Syria from early September 2013 until early February 2014.**
>
> **b) On 4 September 2013 in the shop XXL in Alnabru, Oslo, he provided material support to a terrorist organisation by purchasing a 50-liter backpack, four fleece sweaters and eleven pairs of gloves to D. D used the clothing and equipment while being of a part of the terrorist organisation ISIL in Syria from early September 2013 until early February 2014.**
>
> **c) On 19 April 2014 in Oslo, he provided financial support to a terrorist organisation by transferring NOK 14,000 via Western Union to Q in Turkey for further transfer to L. L was then a part of the terrorist organisation ISIL in Syria.**
>
> **d) On 18 June 2014 in Oslo, he provided financial support to a terrorist organisation by transferring NOK 2,491 via Western Union to R in Russia for further transfer to L. L was then a part of the terrorist organisation ISIL in Syria.**
>
> **e) On 26 June 2014 in Oslo, he provided financial support to a terrorist organisation by transferring NOK 10,000 via Western Union to M in Turkey for further transfer to L. L was then a part of the terrorist organisation ISIL in Syria. …"**

(8) The description of ISIL is also included in this count of indictment.

(9) *Count V* concerns *obstruction of justice* in the form of threats, see section 157 subsection 1, cf. section 263 of the Penal Code 2005. The basis for the indictment against A on this point reads:

> **"On Saturday 5 December 2015 at around 16:00 at the Kiwi shop in Brobekkveien in Oslo, he approached N who was a witness in a criminal case in which he himself was indicted for violation of section 147 (d) of the Penal Code. He asked if N knew who could have snitched on him and/or B, and stated that he, through B's lawyer, would find out who it was and then make sure that he would have O and his brothers following him and end him, or something similar. The statements were suited to induce N to change his statement or refrain from giving new testimonies."**

(10) Under item *VI*, A was indicted for *threats* under section 263 of the Penal Code 2005, because he had acted as mentioned in count V. *Count VII* concerns A's *storage of an electroshock weapon*, see section 33 subsection 1 first sentence of the Weapons Act, cf. section 31 subsection 1 first sentence, cf. section 9 of the Weapons Regulations.

(11) On 4 April 2017, Oslo District Court concluded as follows:

> **"1.1 B, born 00.00 1997, is convicted of violation of section 147 (d), cf. sections 49 and section 12 subsection 1 (3) (a) of the Penal Code (1902) to imprisonment of two – 2 years and ten – 10 – months.**
>
> **A credit of 674 – sixhundredandseventyfour – days is given for time spent in custody. See section 60 of the Penal Code (1902).**

1.2 In accordance with section 35 of the Penal Code (1902) B, born 00.00 1997, is to surrender a Huawei Ascend Y330 mobile phone with serial number xxx with sim card +47 00 00 00 00.

1.3 B is not to pay costs of the proceedings.

2.1 A born 00.00 1985, is acquitted of count III (a) of the indictment.

2.2 A born 00.00 1985, is convicted of violation of

- **section 147 (d) of the Penal Code (1902) until 30 September 2015**
- **section 136 (a) of the Penal Code (2005) from 1 October until 8 December 201**
- **section 157 subsection 1, cf. section 263 of the Penal Code (2005)**
- **section 263 the Penal Code (2005)**
- **section 33 subsection 1 first sentence of the Weapons Act, cf. section 31 subsection 1 first sentence, cf. section 9 of the Weapons Regulations.**

all compared with section 79 (a) of the Penal Code (2005), to nine – 9 – years of imprisonment.

A credit of 487 – fourhundredandeightyseven – days is given for time spent in custody, see section 60 of the Penal Code (1902) and section 83 of the Penal Code 2005.

2.3 In accordance with section 35 of the Penal Code (1902), A born 00.00 1985 is to surrender an electroshock weapon.

2.4 A is not to pay costs of the proceedings."

(12) As set out in the conclusion of the judgment, A was acquitted of one incident of recruitment to a terrorist organisation, see *count III (a).* Apart from that, he was convicted on all counts.

(13) B did not appeal against the judgment. A appealed against the findings of fact in the question of guilt in counts II, III (b), IV, V and VI and the sentence, alternatively the application of the law in the question of guilt in counts II, III b and IV and the procedure in counts II to IV. The prosecution authority, in turn, appealed against the findings of fact in the question of guilt as concerned the acquittal of A under count III (a) of the indictment.

(14) In a decision of 31 May 2017, the court of appeal refused to hear A's appeal against the findings of fact in the question of guilt under counts V and VI, whereas the court of appeal agreed to hear the rest of his appeal. The court also agreed to hear the appeal by the prosecution authority.

(15) On 19 January 2018, Borgarting Court of Appeal concluded as follows:

"A, born 00.00 1985, is convicted of violation of section 147 (d) of the Penal Code (1902) until 30 September 2015 and section 136 (a) of the Penal Code (2005) from 1 October 2015 until 8 December 2015, and of the offences finally adjudicated by Oslo District Court's judgment 4 April 2016, balanced against section 79 subsection 1 (a) and (b) of the Penal Code e (2005) section 79, to imprisonment of 9 – nine – years of imprisonment. Credit is granted of 777 – sevenhundredandseventyseven – days for time spent in custody at the time of the judgment."

(16) In the court of appeal, A was found guilty on all counts. He appealed to the Supreme Court against the application of the law, the procedure and the sentence.

(17) On 20 April 2018, the Supreme Court's Appeals Selection Committee decided:

> **"Leave to appeal against the application of the law and the procedure is granted as concerns violation of section 147 (d) of the Penal Code 1902/section 136 (a) of the Penal Code 2005. In addition, leave to appeal against the sentence is granted. The appeal is to be heard based on the description of the offences on which the court of appeal has based its judgment. Apart from that, leave is not granted.**

(18) *A* has contended that the court of appeal erred in its interpretation of section 147 (d) of the Penal Code 1902 and the corresponding provision in section 136 (a) of the Penal Code 2005. The acts that have been considered proven under counts II to IV of the indictment are not comprised by "participates in", "recruits" or "provides financial or other material support". The requirement of a clear legal basis in Article 96 of the Constitution, Article 7 of the European Convention on Human Rights (ECHR) and Article 15 of the International Covenant on Civil and Political Rights (ICCPR) set limits for the use of the penal provisions. At any rate, it only concerns one separate offence, giving a maximum sentence of six years of imprisonment. The grounds of judgment are inadequate in terms of the conviction of recruitment under count III a of the indictment; in the alternative, the judgment must be set aside on this count. In the further alternative, the sentence is too strict. A's defence has submitted this prayer for relief:

> **"Principally:** **A is to be acquitted of counts II, III and IV, and must otherwise be sentenced in the mildest manner.**
>
> **In the alternative:** **The court of appeal's judgment is to be set aside for count III a.**
>
> **A is to be convicted of violation of 147 (d) of the Penal Code in addition to the violations established by Oslo District Court and must be sentenced in the mildest manner.**
>
> **In the further alternative:** **The sentence is to be reduced."**

(19) *The prosecuting authority* has supported the court of appeal's judgment on all counts and submitted this prayer for relief:

> **"The appeal is to be dismissed. Credit for time spent in custody is 986 days."**

(20) *My view on the case*

(21) The court of appeal has convicted A of having participated in, recruited members into and provided financial and material support to ISIL, see section 147 (d) of the Penal Code 1902 and section 136 (a) of the Penal Code 2005. The provisions stipulate the penalty for participation etc. in a terrorist organisation that has taken steps to achieve its purpose by unlawful means. It is undisputed that ISIL was a "terrorist organisation" during the period the indictment covers. Nor has A disputed that he both knew that ISIL was a terrorist organisation and that the organisation had taken steps to achieve its purpose by unlawful means. The main issue is whether the court of appeal has interpreted and applied the provisions correctly when concluding that A has violated them, and whether the

requirement of a clear legal basis has been met. In addition, it must be considered whether it concerns one or several criminal offences and whether the sentence is correct.

(22) *The background of the case*

(23) Before I elaborate further on the legal issues, I will give a brief presentation of the background of the case. The civil war in Syria started with demonstrations against the Baath regime in March 2011. Hundreds of thousands of people have been killed in the fighting, and it is assumed that around half of the population are refugees. The court of appeal describes ISIL's role as follows:

> **"A number of militant armed opposition groups have been operating in Syria, including ISIL and Jabhat al-Nusrah (the Nusrah front) that are both representatives of extreme Islamism (Salafi-Jihadism). Both groups were listed as terrorist groups by the UN on 30 May 2013. Both have also fought for an Islamic state (caliphate), this time of a worldwide format, headed by a Muslim leader under traditional Islamic law (sharia). The groups promote and glorify the use of violence. They are proclaimed enemies of secular regimes and the western world in general, but also of moderate Sunni Muslims and Shia Muslims, as well as other ethnic groups such as the Kurds. Among the Salafi-Jihadists, martyrdom is considered a religious ideal.**
>
> **Late in June 2014, ISIL leader Abu Bakr al-Baghdadi declared the institution of the "caliphate" in conquered parts of Syria and Iraq, with himself as the leader (caliph Ibrahim).**
>
> **ISIL maintains that all Muslims have a duty to emigrate and contribute to the establishment of the caliphate. ISIL believes that Muslims in the West only have two choices if they wish to avoid eternal perdition: either move to the caliphate or attack western countries. In its fight for territorial control, ISIL has made great use of suicide bombers against the Assad regime, other groups and civilians. Public executions of rebel leaders, war prisoners, journalists, aid workers and others have been carried out to create fear and obedience. The killings have often been filmed and used as propaganda."**

(24) The court of appeal has also emphasised that ISIL has taken responsibility for several terrorist attacks both in Europe and in the Middle East. These include the attack in Paris in January 2015 against the satire magazine Charlie Hebdo, the attack in November against several targets in Paris and two coordinated bombings in Brussels in March 2016.

(25) The court of appeal has concluded that A was a central member of the Sunni-Muslim group *Profetens Ummah* (The Prophet's Ummah) in Norway. The group follows, like ISIL, the fundamentalist ideology Salafi-jihadism. The goal is to satisfy Allah, under a literalistic interpretation of the Koran and a stern practicing of Islam. The members are opponents of democracy, they do not respect Norwegian law "as it is man-made", and they believe in an Islamic state governed by sharia law. Profetens Ummah has used violence-oriented rhetoric and praised terrorist attacks on a number of occasions. It has established ties with similar groups abroad, in particular Islam4UK in the United Kingdom. A emerged as spokesperson of Profetens Ummah in the autumn of 2012, and kept this role until his arrest in December 2015. Many have seen him as the leader of the group.

(26) *General remarks on section 147 (d) of the Penal Code 1902/section 136 (a) of the Penal Code 2005*

(27) With an amendment in 2013, the prohibition against participation etc. in a terrorist organisation was added to section 147 (d) of the Penal Code 1902, which reads:

> **"A penalty of imprisonment for a term not exceeding 6 years shall be applied to any person who forms, participates in, recruits members into or provides financial or other material support for a terrorist organisation, when the organisation has taken steps to achieve the purpose by unlawful means."**

(28) The provision is continued without amendments in section 136 (a) subsection 1 of the Penal Code 2005. Subsection 2 establishes that contribution is not penalised. This does not change the substance of the case; it is rather a consequence of the inclusion of contribution unless otherwise provided, see section 15. Under section 3 of the Penal Code 2005, the criminal legislation at the time of the act applies, and count II of the indictment therefore concerns violation of both section 147 (d) of the Penal Code 1902 and section 136 (a) of the Penal Code 2005. For practical purposes, I will from now on only refer to section 147 (d).

(29) The Ministry of Justice and Public Security presented the need for amendments on this point in a consultation paper from July 2012. On page 26, it stated that the Public Prosecution Authority and the Norwegian Police Security Service (PST) had previously not seen the need for a provision covering participation in a terrorist organisation, but that PST expressed an altered view in a letter of 1 November 2011. In this letter, PST supported a previous statement by the National Authority for Prosecution of Organised and other Serious Crime (*Det nasjonale statsadvokatembetet*). A part of said statement is quoted on page 26 of the consultation paper, and reads:

> **"[I]t should be possible to punish persons who are parts of the group, but whose roles are vaguer, e.g. persons providing general 'spiritual guidance', ringleaders who hide their tracks etc. These may avoid direct participation in the criminal acts, but they are important inspirers/participants and often essential to the group. It would also be highly unfortunate if Norway on this point were to have a 'gap' in terrorist legislation unlike other European countries. Reference is made to the criminalisation obligation in the EU's Framework Decision. This may lead to a conscious establishment of terrorist cells in Norway as an important Schengen country, but without criminalisation of terrorist groups. (…) Norway may thus be perceived as a sort of 'safe haven' where one may issue propaganda within certain limits."**

(30) The said EU Framework Decision was adopted on 13 June 2002. Article 2 covers offences relating to a terrorist group, and Article 2 (2) states that each Member State shall take the "necessary measures" to ensure, among other things, that "participating in the activities of a terrorist group" is punishable.

(31) In Proposition to the Storting No. 131 (2012−2013), page 41, the Ministry comments on the need for a new penal provision that covers participation in terrorist organisations, stressing the importance of deterring terrorist activities to prevent attacks more efficiently. The Ministry regards these organisations as "a major threat to the safety of the public and to democratic values".

(32) In my view, section 147 (d) must be interpreted with the current threat situation in mind. On page 12 of the Proposition, the Ministry refers to PST's open threat assessment of February 2013, see also paragraph 15 of the Supreme Court judgment HR-2016-1422-A, and PST's view of extreme Islamism as the most serious terrorist threat against Norway. PST pointed at the recent growth of violent multi-ethnical Islamic circles in Norway, consisting of young people raised in the country. The assessment was that persons within these circles had an al-Qaida-inspired worldview, glorified violence and held Norway

responsible for a variety of circumstances. The Ministry then stated the following on PST's view of the treat situation:

> **"PST knows that persons from these circles, as well as persons from ethnically homogenous Islamic circles, travel abroad to participate in armed combat and at training camps together with extreme groups. Such staying abroad may in PST's view provide ideological training, combat experience and an extended contact network of extreme Islamists. PST expects that some of them may return to Norway with an increased will and capacity to plan terror attacks. PST also assumes that persons with this type of experience have a lower threshold for using of violence, and that the risk of violence has increased within some of these circles.**

(33) I also mention the statement in paragraph 16 of Supreme Court judgment HR-2016-1422-A regarding the purpose of section 147 (d) of the Penal Code: The purpose is not only to prevent participation and other support to terrorist organisations abroad, but also to "prevent extremist violence in connection with returns to Norway".

(34) *The application of the law – the requirement of a clear legal basis*

(35) The defence has emphasised that the requirement of a clear legal basis in Article 96 of the Constitution, Article 7 of the European Convention of Human Rights (ECHR) and Article 15 of the International Covenant on Civil and Political Rights (CCPR), see also section 14 of the Penal Code 2005 section 14, prevents the conviction of a person of violation of section 147 (d). Although the submissions have primarily been made with regard to count III of the indictment on participation in ISIL, my perception is that they have been made also with regard to count II on recruitment and count IV on material and financial support. I will therefore briefly comment on this requirement before I turn to the individual counts of indictment.

(36) The question regarding the content of said requirement has been discussed in many Supreme Court rulings. In a more recent judgment, HR-2016-2228-A on drink driving with a so-called "Segway", the justice delivering the leading opinion states in paragraph 30 that the requirement of a legal basis in ECHR Article 7 (1)

> **"entails a requirement that the penal provisions are clear, precise and accessible. In short, this means that the acts must be accessible and worded in such a manner that each person may reasonably adjust his or her conduct based on the legislation. In this regard, it has been clarified that a clear wording is not sufficient if other sources of law entail that the state of the law does not give reasonable guidance."**

(37) The same justice then quotes from the European Court of Human Rights' grand chamber judgment 12 February 2008 *Kafkaris v. Cyprus*. From newer case law on this subject, I mention the grand chamber judgment 27 January 2015 *Rohlena v. The Czech Republic,* paragraphs 50−53, with further reference to the grand chamber judgment 21 October 2013 *Del Rio Prada v. Spain.*

(38) I will revert to the requirement of a legal basis with respect to the individual counts of indictment, which I will now consider.

(39) *Application of the law – count II of the indictment on participation in ISIL*

(40) The court of appeal has, in accordance with count II of the indictment, convicted A of participation in ISIL. According to its wording, section 147 (d) covers any person who "participates in" a terrorist organisation. The question is what that entails.

(41) Linguistically, "participates in" is a relatively wide expression – one may take part in activities in various ways. Still, the expression signals that there must be a certain level of activity. A membership may be passive, whereas participation, at least as a starting point, indicates that an activity is carried out.

(42) Preparatory works contribute to some extent to the understanding of the expression. I have already mentioned some general statements in the Ministry's consultation paper from July 2012 and Proposition to the Storting 131(2012−2013), which all the same say something about the interpretation on this point. In this regard, I add that the Ministry on page 41 of the Proposition states that the purpose of the bill was to criminalise "qualified participation" in terrorist organisations. Furthermore, it is stated that the proposition was meant as "a supplement to existing provisions covering any person who commits or plans to commit a terrorist act", and that it was "meant for those who in various manners contribute to upholding a terrorist organisation, for instance by recruiting members, by managing or by providing material support".

(43) In the special remarks to section 147 (d) on page 86 of the Proposition, the Ministry repeats that the provision criminalises qualified forms of participation. Next, the Ministry states on page 87:

> **"Various forms of contribution to the organisation are covered. Participation is very wide-ranging, and may cover any person who procures weapons, digital equipment, chemicals or other tools to facilitate a terrorist act, but who is not so closely connected to the case that he or she can be punished for participation in the act in question. Also, soliciting terrorists act and inspiring others to carry out attacks may under the circumstances be covered."**

(44) I have noted in particular that the Ministry intended that "participant" was to be "very wide-ranging" and cover various forms of contribution to the upholding of terrorist organisations.

(45) The Parliament Standing Committee on Justice endorsed the proposition to criminalise "qualified participation in a terrorist organisation by various forms of active support", see Recommendation to the Storting No. 442 (2012−2013) page 8. When the Committee also stated that "membership is not covered", I interpret this to mean that passive members of a terrorist organisation are not covered by the option "participates in". In other words, active participation is required.

(46) Against this background, I conclude that "participates in" is a wide expression meant to cover various forms of contribution to the organisation's activities. The active contributions to the upholding of the terrorist organisation are the ones covered. As I understand the wording and the statements in the preparatory works, a person who only passively supports the organisation in the form of a "membership" is not covered. Furthermore, my interpretation is that not any active contribution to the organisation is punishable. When both the Ministry and the Standing Committee on Justice hold that only "qualified" participation is punishable under the option, it must mean that a threshold must be exceeded. Minor or peripheral contributions are not covered. Based on the statements in

the preparatory works, this threshold is not very high. I see nothing that indicates that a membership or public support is a requirement for conviction for participation. Similarly, a contributor must be convicted of participation even if it cannot be proven that he or she, in whichever manner, has been accepted as a participant in the organisation.

(47) I now turn to the court of appeal's application of the law to the facts on this point. Early in its discussion, the court of appeal gave the following summary of these facts:

> **"As the court of appeal will revert to, A engaged in activities consisting of providing persons with various forms of assistance with travels to Syria/Iraq, primarily to fight for ISIL. Media exposure made it possible for radical extremists domiciled in the eastern area of Norway to contact him. Then A, at various levels, supported already existing views on jihad and then rendered possible the journey through planning, financial contributions and contacts at the border between Turkey and Syria. He complied with the wishes of the foreign fighters, and maintained their interests in Norway, while they were operating in Syria. A undoubtedly knew throughout the entire indictment period that ISIL was a terrorist organisation and that his activities in Norway, like similar activities in other western countries, were important contributions to ISIL's ideological and military success in the region."**

(48) After this introduction, the court of appeal has given a thorough and detailed account of A's activities supporting ISIL and Norwegian "Syria goers" and "foreign fighters". I refer to this presentation and will only emphasise some main points:

(49) I find that the assistance to and preparations made for Norwegian foreign fighters are essential in the assessment. The court of appeal has considered it proven that A assisted D, L, P, G, H and I in various ways. He was fully aware that D and L were going to Syria to join and fight for ISIL, and he assisted them both, financially and otherwise. I will revert to this assistance. Similarly, he helped P financially and otherwise so that he could join and fight for ISIL in Syria, and financially while he was there. A discussed views on ISIL and Syria with P and said that he could have a woman sent to him. Furthermore, he made travel arrangements for G, procured a less traceable mobile phone and kept in touch with G while he was in Syria. A made travel arrangements for H and took part in I's attempt to join ISIL by telling him about the route and finding contact persons. According to the court of appeal, A was, through his network, essential for each of the said persons' opportunity to join ISIL in Syria.

(50) In addition, the court of appeal states that A disposed over the bank accounts of each of the Syria goers while they were in Syria, and that he regularly submitted employment status cards to NAV (Norwegian labour and welfare administration) for at least some of them. He also functioned as a link between foreign fighters and their families, and he organised legal assistance for some of them.

(51) The court of appeal also states that A issued propaganda material and declared his support to ISIL. He idolised ISIL and the caliphate by posting videos and by giving interviews in various media. He demonstrated personal and sincere support to ISIL's acts in Syria and Iraq and to terrorist attacks in the West. According to the court of appeal, A also publicly requested "(Sunni) Muslims to go to the caliphate and fight the infidel". He gave interviews to international media in which he recognised the caliphate, ISIL and the killing of war prisoners. The court of appeal considers it proven that he used media consciously, and that his outgoing personality attracted people with a wish to realise their more or less defined desires to become foreign fighters in Syria.

(52) I add that the defence has held that these utterances are protected by the freedom of expression and religion, and that they are lawful. If the statements regarding the establishment of a caliphate had stood alone, such a view may well have succeeded. But here, the utterances were part of a context involving support to both ISIL and the organisation's killing of war prisoners. Hence, I find that the utterances must be included in the overall assessment of whether A has violated section 147 (d) by being a participant in ISIL.

(53) The court of appeal has summarised A's role as follows:

> **"The above presentation shows a number of different aspects of the activities A deliberately carried out to promote ISIL's interests and development of the Islamic State. He undoubtedly acted as adviser, organiser, facilitator, agent and gate-opener, particularly by helping foreign fighters to reach ISIL and by helping them in Syria under ISIL's command. In this respect, he had contacts in a number of countries, including the United Kingdom, Denmark, Sweden, Turkey and Syria."**

(54) Following an overall assessment of these facts, I have no doubt that A carried out such activities that he must be regarded as having participated in ISIL. He facilitated several foreign fighters' joining of ISIL in Syria. Thus, he operated actively on the "inside" of the organisation and decidedly differently than he would have had he only supported the organisation or its purpose. His activities clearly exceed the threshold set out in the preparatory works that participation must be qualified; hence, this is not a borderline case.

(55) In my view, the requirement of a clear legal basis, as I have already discussed, does not prevent conviction under count II. A's acts are clearly within a natural understanding of "participate in" and the qualification mentioned in the preparatory works. The penal provision on this point is sufficiently clear, precise and accessible.

(56) *The duration* of the participation is an issue to be considered in the sentencing. Like the court of appeal and the parties before the Supreme Court, I should nevertheless comment on when the participation started and when it ended with regard to the discussion I have just finished.

(57) The court of appeal has concluded that A became a member of ISIL in August 2013, when he helped arranging D's and L's travels to Syria. It has also concluded that A was a member when he was arrested and later remanded in custody in December 2015, despite the activities following the arrest of B in June 2015 being limited to two text messages and one press release. A, on the other hand, has asserted that he did not become a member until in June/July 2014, and that he could no longer be regarded as a member after B was arrested.

(58) In my view, it cannot be decisive that the activity during the autumn of 2013 and the summer/autumn of 2015 was so modest that it, considered in isolation, may not have exceeded the threshold for being regarded as participation. It is clear, following an *overall* assessment of all activities during the entire period, that A participated in ISIL. Hence, it is natural to set the start and end date at the first and the final activity included in the assessment. Thus far, I agree with the court of appeal's principal approach to the duration of the participation. Furthermore, I support the conclusion that A was a member until December 2015. The practical consequence thereof is that he must also be convicted of violation of section 136 (a) of the Penal Code 2005.

(59) However, as to when the participation actually started, I have come to a different result than the court of appeal. This is because A has been convicted of providing financial and material support to D and L under count IV of the indictment. The same assistance was taken into account in the assessment of when the participation under count II started, and the court of appeal's view that A became a member from that moment comes from that activity alone. I thus find that one must disregard the assistance to D and L when determining the duration. In my opinion, A did not become a member until the year-end 2013/2014 when he provided various help to P.

(60) A's appeal against the application of the law under count II of the indictment can thus not succeed; however, I find that the period of participation was shorter than concluded by the court of appeal.

(61) *The application of the law – count III of the indictment on recruitment into ISIL*

(62) In accordance with count III of the indictment, A has been convicted of recruiting J and B into ISIL. Under section 147 (d), anyone who "recruits members" into a terrorist organisation is liable for penalty. This must mean that contributing to the growth of an organisation in the form of new members – i.e. recruiting new members – is punishable. The wording does not specify limits for how the recruitment must take place to be covered by this option.

(63) In Proposition to the Storting No. 131 (2012–2013), the Ministry states the following in the special remarks to section 147 (d) on page 87:

> **"Recruitment typically covers the procurement of people. This does not apply to humanitarian aid to civilians in terrorist-controlled areas, for instance doctors working in hospitals in such areas. However, this is not obvious in cases where such activities are primarily carried out for recruitment purposes."**

(64) The court of appeal has found that not only pure recruitment activities, but also other activities primarily carried out for recruitment purposes, may be covered by the recruitment option. I concur.

(65) I also mention the European Convention on the Prevention of Terrorism of 16 May 2005 No. 104. Article 6 of the Convention concerns recruitment and states among other things that "'recruitment for terrorism' means to solicit another person to commit or participate in the commission of a terrorist offence". Solicit can be translated to *anmode*, *oppfordre* or *kreve*.

(66) The court of appeal has summarised its understanding of the recruitment option as follows:

> **"The court of appeal concludes that recruitment into a terrorist organisation within the meaning of section 147 (d) of the Penal Code (1902), may take place by the entry into of an agreement or by (direct verbal) persuasion, as mentioned in Proposition to the Storting No. 44 (2015–2016), but that this is not a prerequisite for being covered by this option. The provision must also capture the subtle psychological persuasion that ultimately makes each 'recruit' decide to join and fight militarily for ISIL, as the court of appeal believes A has exercised towards B and J. At least it must be characterised as punishable recruitment when such psychological persuasion/active inducement is combined with specific and vital help with travelling to Syria, crossing the border from Turkey and joining ISIL. The fact that other persons and events have contributed to the**

> **decision cannot imply release from criminal liability for the person that has been the dominating cause."**

(67) I mainly endorse the court of appeal's summary of the content of "recruits members". It requires active inducement, and I cannot see the relevance of whether the influence is "subtle" or more direct. Practical help in connection with a foreign fighter's joining of a terrorist organisation is not sufficient in itself. The assistance may however be part of an overall assessment of whether recruitment has taken place within the meaning of the provision.

(68) As for the application of the law to the specific facts, the conviction under *count III (a)* relates to the recruitment of J. A was, as mentioned, acquitted of this offence in the district court.

(69) As set out in the court of appeal's judgment, J went to Syria and joined ISIL in September 2014. In its assessment of A's role in this regard, the court of appeal assumes that he had extensive contact with J for about a year, and that this was during the period A was an active member in ISIL. In the judgment, J is described as a vulnerable person and inferior to A. J changed his behaviour after having met A, and went from being a moderate Muslim to becoming stricter in his interpretation of the Koran. The court of appeal concludes that he was "induced by A to go to Syria". A "supplied J with all the radical ideas he proclaimed both publicly and internally in Profetens Ummah".

(70) In the judgment, the court of appeal also considers it proven that A gave extensive help to J in connection with the trip to Syria. He bought J a train ticket to Gothenburg and was present when he left Oslo, at which point he also delivered a bag to him. A paid for an e-visa to J and helped him with the issuance of a new passport. He also changed mobile phones with J, so that J could have a phone that was not easily traceable. A also helped establishing a new telephone subscription for J. After J had left Norway, A established contact with one or more persons that were to help get J into Turkey from Rhodes. A gained access to and control over J's bank account.

(71) The court of appeal has summarised its view on the evidence as follows:

> **"Of course, the court of appeal cannot rule out that J was inspired to go to Syria/ISIL by other persons within the Muslim circles, for instance in the ICC mosque where he served his community sentence. But the court of appeal is convinced that it was the influence from and inducement by A that ultimately made J decide to go. And it was A's travel arrangements that actually made it possible for J to have his wish fulfilled."**

(72) Against this background, the court of appeal has concluded that A deliberately recruited J into ISIL. I agree with this application of the law. Based on A's influence, inducement and practical assistance, it must be concluded that he recruited J into ISIL. The requirement of a clear legal basis does not prevent conviction.

(73) As for the recruitment of B, see *count III (b)* of the indictment, the court of appeal considers it proven that B converted to Islam in 2012/2013, but that he at first was negative to ISIL and the Nusrah front. However, his attitude changed in a radicalisation process after he met A in March 2015. At that time, B was 17 years old, unemployed and under the supervision of the child welfare service. The court of appeal has concluded that A's contact with B was not motivated by a wish for friendship, but a plan to induce B to go to Syria. In

that regard, the court of appeal has emphasised the age difference – in March 2015, A was 29 years old – and the fact that they were in a superior-inferior relationship.

(74) The court of appeal has described the manner in which A made B go to Syria as "artful", and held that A exploited B's wish to defend Muslims in Syria by steering him towards the terrorist organisation ISIL. A used B's vulnerability and made him believe that it was his religious duty to fight for ISIL in Syria. The court of appeal has concluded that B was not emotionally ready to go to Syria until he met A, and that A offered him the safety he had previously lacked.

(75) The court of appeal has also considered it proven that A "almost completely" arranged B's trip to Syria, specifying it as follows:

> **"He prepared the route, ordered tickets, tried to procure a visa, went along buying clothes, told B what to bring, went along buying a camera, fixed a mobile phone to use in Turkey/Syria and downloading of various applications, mobile phone subscription, instructions on how much money to bring, how to get from Rhodes to Marmaris and how much the ferry would cost, what to do upon arrival in Gaziantep, that he had to buy a Turkish sim card when arriving in Turkey and that he should cut his hair and dress "western" to avoid attention during his travel."**
>
> **Furthermore, it was A that drove B to the airport where A got hold of the plane tickets with which there had been some problems. He also helped B checking in. A had established some contact points on the way into Syria, given B necessary kunya (surname/nickname) and helped filling out a visa application form. B was also instructed to contact A as soon as he had procured a Turkish sim card, after which A would send him the number of his contacts on the border for B to call for pickup…."**

(76) A has apparently been an essential factor in B's decision to go to Syria and join ISIL. I agree with the court of appeal that A's overall focus on B must be regarded as "deliberate psychological persuasion/active inducement to get the vulnerable B to travel to Syria and become a foreign fighter for ISIL". When considered in conjunction with the various ways A made travel arrangements, the court of appeal has in my view correctly concluded that A recruited B into ISIL in accordance with section 147 (d). The requirement of a clear legal basis does not prevent conviction on this point either.

(77) The appeal must be dismissed also with regard to the application of the law under count III.

(78) *The application of the law – count IV on financial and material support to ISIL*

(79) I now turn to considering the application of the law with regard to the conviction under count IV of the indictment on financial and material support to ISIL. Under count IV (a) and (b), A has been convicted of having provided material and financial support to ISIL by purchasing combat clothing and various clothes and equipment to D while D was fighting with ISIL in Syria. Count IV (c) to (e) concerns the material support to L while he was a foreign fighter for ISIL in Syria.

(80) It has not been disputed that A's support falls under "financial or other material support" in section 147 (d). Hence, I find no reason to elaborate further on what that entails. However, A has disputed that the payments were made to a "terrorist organisation", which is a condition. In that respect, A has referred to the fact that the amounts in count VII (c) to (e)

were transferred to third parties, and that there is no evidence that L actually received the money.

(81) It is not a requirement for conviction that the support has been given directly to the terrorist organisation; it is sufficient that it has been given to a participant of the organisation, for instance a foreign fighter, to the benefit of the organisation. Material support in the form of equipment is thus indirectly useful to the organisation as it does not need to procure, store and distribute the same equipment to the foreign fighter. Similarly, money transfers to foreign fighters are the same as supporting the organisation as such transfers release funds for other purposes. Of relevance here is the Supreme Court judgment HR-2016-1422-A concerning, among other things, attempts to provide material support to ISIL by sending equipment to an ISIL participant in Syria. The Supreme Court heard only the appeal against the sentence. However, the court of appeal had considered it an attempt to support ISIL, although the equipment was meant for a specific foreign fighter.

(82) As for the submissions concerning the money transfers in count VII (c) to (e), the indictment is based on the belief that the transfers were made to third parties "for further transfer" to L. The court of appeal considers it proven that the money "has…. come to L's use, and thus also ISIL's use, when the payments were made upon L's instruction". I agree with the court of appeal that this is sufficient for concluding on violation of section 147 (d).

(83) The requirement of a clear legal basis does not prevent conviction on this count either, and the appeal against the application of the law must be dismissed.

(84) *The procedure – grounds of the judgment under count III a*

(85) The defence contends that the court of appeal's grounds of judgment with regard to the conviction of recruitment of J, see count III of the indictment, are not sufficient, and that the grounds are subject to strict requirements when the defendant has been acquitted in the district court.

(86) In cases heard by a composite court (*meddomsrett*), the grounds of judgment under section 40 subsection 4 of the Criminal Procedure Act "shall state the main points in the court's assessment of the evidence". The judgment must demonstrate why a certain piece of evidence has been relied on. As the matter stands in the case at hand, I confine myself to referring to Supreme Court judgment HR-2017-1246-A paragraph 11 with a further description of the contents of this requirement.

(87) The requirements for the court of appeal's grounds of judgment are the same regardless of whether the convicted person was acquitted or convicted in the district court. Supreme Court judgment Rt-2011-1403, paragraph 10, reads:

> **"The convicted person was acquitted in the district court and convicted in the court of appeal. Based on the defence's submission that this calls for stricter requirements for the grounds of judgment in the court of appeal, I find that the requirements for the grounds are the same in this situation as in situations where the convicted person was also convicted in the district court. In cases where the convicted person was also convicted in the district court, the court of appeal may to a certain extent refer to the grounds there, but that does not principally change the requirement for grounds of judgment in the court of appeal."**

(88) I find it clear that the court of appeal's grounds of judgment are sufficient, and that the defence's submissions cannot succeed. In my discussion of the application of the law under count III (a) of the indictment, I have only briefly summarised the court of appeal's account for why it convicted A of recruitment of J. The account in the court of appeal's judgment is very thorough and covers four and a half pages. It leaves no doubt as to whether the court of appeal has applied the correct standard of proof or as to why A was convicted. The appeal against the procedure can thus not succeed.

(89) *One or several criminal offences?*

(90) In the alternative, the defence has submitted that A can only be convicted of one violation of section 147 (d) of the Penal Code 1902 and section 136 (a) of the Penal Code 2005. The main view seems to be that if A is convicted of participation based on an assessment of his arrangements for and support to foreign fighters, he cannot simultaneously be convicted of recruitment and financial and material support, respectively.

(91) Here, I refer to Supreme Court judgment Rt-2005-1524, concerning the same issue in connection with a drug offence under section 162 of the Penal Code 1902. The justice delivering the leading opinion emphasised in paragraph 12 that section 162 "refers to several acts to distinguish between what is punishable and what is not", and that it was not a question of "separate options, but various ways in which the penal provision can be violated". In paragraph 13, he held that it must be "specifically determined whether it is natural to consider the offences as one compound offence or as separate offences".

(92) In Rt-2006-964 paragraph 15, the justice delivering the leading opinion endorsed these considerations and added:

> **"Whether or not the acts are to be judged as one or as several separate offences must be based on an overall assessment, mainly considering the specific circumstances in the individual case. Central aspects are differences in the nature of the act and the distance in time and place for the execution of the acts."**

(93) Matningsdal, *Straffeloven, Alminnelige bestemmelser, Kommentarutgave* 2015 (Commentary on the general provisions of the Penal Code) page 747, states that it is "primarily when the violations affect the same aggrieved person or the same public interest, that it in practice may be relevant to consider several criminal acts as one offence". But this cannot apply without exceptions. When, as in this case, it is a question of doubling the sentence under section 61 of the Penal Code 1902 and section 79 (a) of the Penal Code 2005, it is essential whether or not one should consider the acts as separate offences to obtain the increased punishability.

(94) Like the court of appeal, I have concluded that A's participation, recruitment and financial and material support in this case must be considered as separate offences. The court of appeal has indeed emphasised recruitment and several forms of support in its assessment of whether the provision on participation has been violated. But the recruitment of J and B – which is the reason for A's conviction under count III of the indictment – has not been included in the assessment of count II on participation. I have also found that the assistance to D and L, see count IV, cannot justify participation from as early as August 2013 under count II. A could moreover have been a member without recruiting, and without giving financial or material support. And the other way around: he would not necessarily have

been a member if he had violated one of the three other options in section 147 (d). The punishability increases considerably if a participant also recruits new participants or provides such support to other participants that the provision covers. To obtain this increased punishability, the acts under counts II, III and IV must be considered as several individual offences. The maximum penalty will thus be twelve years, see section 61 of the Penal Code 1902 and section 79 (a) of the Penal Code 2005.

(95) The defence has submitted that there cannot, in any case, be eight separate offences, as concluded by the court of appeal, since the recruitment in count III is one offence. The same must apply to the material support in count IV (a) and (b) and the financial support in count IV (c) to (e).

(96) It may well be that the acts in count IV (a) and (b) should not have been considered two separate offences. However, when the maximum penalty all the same is twelve years, this has no practical impact on the sentencing. I will not go further into this issue.

(97) *The sentencing*

(98) I now turn to the sentencing, and repeat that the maximum sentence under section 147 (d) of the Penal Code 1902 and section 136 (a) of the Penal Code 2005 is six years of imprisonment. It increases to twelve years when multiple offences have been committed, see section 61 of the Penal Code 1902 and section 79 (a) of the Penal Code 2005. The court of appeal has imposed a sentence of nine years of imprisonment. In the appeal, A has submitted that the sentence under any circumstances is too strict, whereas the prosecution authority has not asked the Supreme Court for a longer sentence.

(99) My first remark is that the conviction under counts II to IV of the indictment concerns different forms of assistance and support to ISIL, described in Supreme Court judgment HR-2016-1422-A paragraph 20 as one of the worst terrorist organisations of our time. Organisations such as ISIL represent a big threat to public security and to our democratic values. For reasons of general deterrence, the offences of which A has been found guilty must be punished severely.

(100) Like the court of appeal, I consider the participation in ISIL the most serious offence, see count II of the indictment. When assessing the penalty for participation, the "duration of the participation, the tasks that were carried out, the role in the organisation and the terrorist organisation in question" are essential, see HR-2016-1422, paragraph 18. That case concerned participation as foreign fighters in ISIL over a period in the excess of eleven months, see paragraph 27. The two convicted persons had no leading roles, but they are described in paragraph 25 as "common soldiers". The Supreme Court saw no reason to deviate from the court of appeal's sentence of four years and six months of imprisonment.

(101) In my view, A's participation in ISIL is a far more serious offence than that committed by a single foreign fighter convicted of participation, but who has not had a leading role. I endorse the following summary by the court of appeal:

> **"Over a period of around two years, A has functioned as an inspirer, mentor, advisor, organiser, facilitator, agent and courier for foreign fighters in Syria. The legislature appears to have been particularly preoccupied with prosecuting ringleaders such as A. Several of those A has helped, including L, P and J, have lost their lives in Syria. It is**

likely that the foreign fighters assisted by A have caused great suffering to both civilians and ISIL's opponents."

(102) The court of appeal has held that the sentence for this count alone would be up to six years of imprisonment. I agree that the starting point must be in the higher end of the penalty scale, but I will refrain from fully exploiting this scale. There are more serious forms of participation that are covered by provisions with a higher maximum penalty, such as section 133 of the Penal Code on terrorist conspiracy. I find nevertheless that it should be possible to impose a stricter sentence both for participation of a longer duration and for persons with even more leading positions. I have also applied a shorter participation period than the court of appeal and would suggest a sentence of up to five years and six months of imprisonment for this offence.

(103) The recruitments of B and J in count III of the indictment are also serious offences. Here, I emphasise the fact that B had not yet turned 18 when A started inducing him to join ISIL as a foreign fighter. B was stopped at the airport in Gothenburg. J died in battle for the organisation. The court of appeal's sentence of four years of imprisonment, considered in isolation, is not at all too strict.

(104) For count IV of the indictment on financial and material support to ISIL, the court of appeal sentenced A to one year of imprisonment. On this point, I refer to Supreme Court judgment HR-2016-1422-A in which a sentence of six to seven months of imprisonment was suggested for attempts to send equipment to a foreign fighter in Syria, see paragraph 33. A is convicted of executed offences that are far more serious. This form of support is an important contribution to the upholding of the terrorist organisation. I find that the support alone would have given a somewhat stricter sentence than that imposed by the court of appeal.

(105) Furthermore, a sentence must be imposed for violation of section 157 subsection 1, cf. section 263 of the Penal Code 2005 in the form influencing of a witness, see count V of the indictment, and for threats against the same witness, see section 263 of the Penal Code and count VI of the indictment. I have based my sentence partially on Supreme Court judgments Rt-2003-1163 and Rt-2011-1022. The court of appeal has considered it an aggravating factor that the threat was made against a seventeen-year-old by a prominent person within the extremist Islamic circles in Norway. I agree. A sentence of six to seven months of imprisonment would be suitable for these offences alone.

(106) The possession of an electroshock weapon referred to in count VII of the indictment, of which A has been finally convicted in the district court, is an offence punished with fines. It will have no practical impact on the aggregate sentence.

(107) The court of appeal sentenced A to nine years of imprisonment. As the prosecution authority has not asked for a longer sentence, it is not relevant to assess whether the period of imprisonment should be extended, see Supreme Court judgment HR-2018-847-A paragraph 21 with further reference to HR-2017-2415-A paragraphs 24 and 25. Consequently, the sentence is nine years of imprisonment.

(108) Finally, I mention that the court of appeal has referred to section 79 (b) of the Penal Code. The provision is not applicable in this case. It only applies when the act has been committed "after the sentence for the previous act has been executed in whole or in part". In this case, the unconditional part of Borgarting Court of Appeal's sentence of 22 June

2015 was regarded as served in custody. The sentence has thus not been "executed", see Supreme Court judgment Rt-1970-278 and Matningsdal, *Straffeloven, Alminnelige bestemmelser, Kommentarutgave* 2015 (Commentary on the general provisions of the Penal Code) page 755.

(109) Against this background, the appeal is dismissed. Credit for time in custody is currently 1,006 days.

(110) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. Credit for time in custody is 1 006 – onethousandandsix − days.

(111) Justice **Berglund:** I agree with the justice delivering the leading opinion in all material respects and with his conclusion.

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

(113) Justice **Møse:** Likewise.

(114) Justice **Utgård:** Likewise.

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

J U D G M E N T :

1. The appeal is dismissed.

2. Credit for time in custody is 1 006 – onethousandandsix − days.