SUPREME COURT OF NORWAY

On 23 March 2018, the Supreme Court gave judgment in

HR-2018-572-A (case no. 2017/1659), civil case, appeal against judgment,

The state represented by the Immigration Appeals Board	(Attorney General represented by Kari Sigurdsen)
v.	
A B C	(Counsel Vera Vikki)

V O T I N G :

(1) Justice **Falch:** The case concerns the validity of a revocation of refugee status and residence permit in Norway, see the Immigration Act section 37 subsection 1 c.

(2) A came to Norway and applied on 14 June 2011 for refugee status and residence permit for herself and her daughter C, who was five and half years old. A stated that she, in 2004, had fled from Afghanistan to Iran together with her partner B who was also C's father. In 2010 and 2011, they were allegedly on their way towards Norway, but lost each other in Greece.

(3) The Norwegian Directorate of Immigration (UDI) approved the application on 12 October 2011. A and her daughter were recognised as refugees and granted a three-year residence permit in Norway pursuant to the Immigration Act section 28 subsection 1 b, subsections 2 and 6, among others. The permit was granted because of the unstable situation in her domicile, the Jaghuri district in Afghanistan and the applicants' risk of being subjected to inhuman treatment there. They could also not have enjoyed efficient protection in any other Afghan region, since A was a single female without a male care person in a safe environment. In its decision, UDI made it clear that "if her partner should turn up, the permit might be revoked."

(4) A and C settled in X in the municipality of Y, where C started school in the first grade. A attended an introduction program for immigrants to learn Norwegian and gain work practice.

(5) B came to Norway the following year, and on 27 July 2012, he also applied for refugee status and residence permit. The application was rejected by UDI on 3 December 2012. His appeal was rejected by the Immigration Appeals Board (UNE) on 2 September 2013, with the justification that the conditions in the Immigration Act section 28 were not met.

(6) On 14 February 2013, UDI revoked A's and her daughter's refugee status and temporary residence permit pursuant to the Immigration Act section 37 subsection 1 e, on the grounds that B had arrived in Norway so that A was no longer a single female without a network. UDI held that if the Jaghuri district was unsafe, internal flight to Kabul was an alternative.

(7) On 2 September 2013, UNE rejected A's and her daughter's appeal, on the same day as it finally rejected B's application. UNE held that since the family had now been united, the circumstances based on which A and her daughter had been granted a residence permit were no longer present. UNE also found that they were no longer protected against refoulement pursuant to the Immigration Act section 73, cf. section 28, assuming that that the safety situation in the Jaghuri district had improved and stabilised. Residence permits pursuant to section 38 were refused.

(8) UNE has on a number of later occasions, most recently on 12 March 2015, rejected applications for a review of the decisions. In its rejection of 20 February 2015, UNE specified that the family were not being consigned to internal flight, but to be returned to their domicile in the Jaghuri district.

(9) On 14 February 2015, the family was escorted to Kabul in Afghanistan.

(10) On 7 April 2015, the family brought an action against the state before Oslo District Court which gave judgment on 20 November 2015 concluding as follows:

> **"1. UNE's decision of 2 September 2013 regarding C and the subsequent decisions of 6 October 2014, 16 January 2015, 2 February 2015, 20 February 2015 and 12 March 2015 are invalid.**
>
> **2. UNE's decision of 2 September 2013 regarding A and the subsequent decisions of 6 October 2014, 16 January 2015, 2 February 2015, 20 February 2015 and 12 March 2015 are invalid.**
>
> **3. UNE's decision of 2 September 2013 regarding B and the subsequent decisions 20 February 2015 and 12 March 2015 are invalid.**
>
> **4. The state represented by UNE is within two weeks to pay to the three claimants represented by Humlen & Rieber-Mohn costs of NOK 243 460 – twohundredandfortythreethousandfourhundredandsixty."**

(11) The state appealed to Borgarting Court of Appeal which gave judgment on 27 June 2017 concluding as follows:

> **"The appeal is dismissed."**

(12) The court of appeal held that UNE had applied the Immigration Act section 37 subsection 1 e incorrectly. Since the family was not consigned to internal flight, UNE should have assessed whether significant and non-temporary changes had taken place in the Jaghuri district. The court of appeal found that the latter had not been substantiated. While not relevant to the outcome of the case, the court of appeal also found that the decision was invalid due to UNE's failure to consider whether the revocation of the permits was proportionate.

(13) The state has appealed the judgment to the Supreme Court based on the court of appeal's application of the law.

(14) The appellant – *the state represented by UNE* – has mainly contended the following:

(15) UNE's decisions contains no errors, and the court of appeal's judgment was an incorrect application of section 37 subsection 1 e. It is sufficient for revoking a refugee status and a residence permit that the circumstances as a result of which a foreign national was recognised as a refugee are no longer present, which implies that B's arrival in Norway was sufficient reason for the revocation.

(16) Moreover, the court of appeal has incorrectly concluded that a requirement of proportionality must be read into the provision. Proportionality must, if relevant, be assessed pursuant to the Constitution article 102 and the European Convention on Human Rights (ECHR) article 8 – not pursuant to the Immigration Act section 37 subsection 1 e.

(17) Finally, no violation of the Constitution section 102 or ECHR article 8 has taken place. A and her daughter were not so-called "settled migrants", and there are no other reasons for them to be comprised by these provisions. Under no circumstances – following an assessment of proportionality – have the provisions been breached.

(18) The state represented by the Immigration Appeals Board has submitted this prayer for relief:

> **"The judgment of the court of appeal is to be set aside."**

(19) The respondents – *A, B and C* – have mainly contended the following:

(20) The court of appeal's decision was a correct application of the Immigration Act section 37 subsection 1 e. UNE should have assessed whether significant and non-temporary changes had taken place in the applicants' home country. Since the court of appeal found this was not the case, UNE's decision was invalid. The internal flight alternative was not considered, which in any case would have had to be considered in light of the instruction from the Ministry of Justice and Police Security of 30 January 2015.

(21) The court of appeal has also correctly concluded that a requirement of proportionality exists under section 37 subsection 1 e, in the same way as under other provisions in the Immigration Act, the Constitution and the ECHR. Legal safeguards concerns are strong.

(22) Finally, a refoulement of the family was a violation of the Constitution article 102 and the ECHR article 8, which UNE did not consider. The mother and daughter were indeed "settled migrants", and sending them home was a disproportionate interference with their

privacy. They had a residence permit, they had not committed any crimes, they were well-integrated and the conditions in their home country were still unstable. The concerns for the child's best interests weigh heavily in this assessment.

(23) A, B and C have submitted this prayer for relief:

> **"The appeal is to be dismissed."**

(24) *I have concluded that* the appeal must be dismissed.

(25) The appeal concerns the interpretation and application of the Immigration Act section 37 subsection 1 e, reading as follows:

> **"Besides revocation under section 63, refugee status and a residence permit under section 28 and 34 may also be revoked if the foreign national:**
> **…**
> **e) can no longer refuse to avail himself or herself of the protection of the country of nationality, because the circumstances in connection with which he or she was recognised as a refugee under section 28 or received protection under section 34 are no longer present, […]".**

(26) This provision reproduces the Refugee Convention from 1951 article 1C no. 5, reading as follows (extract):

> **"This Convention shall cease to apply to any person falling under the terms of section A if:**
> **…**
> **(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;…"**

(27) I find that the conditions in section 37 subsection 1 e must be interpreted in the same way as the conditions in the article 1C no. 5, see Proposition to the Odelsting no. 75 (2006–2007) page 105. I will revert to this.

(28) It is set out in the Immigration Act – and in the Convention – that a condition for revocation is that the "circumstances" as a result of which the foreign national was recognised as a refugee "are no longer present". In other words, a certain change must have taken place, and the change must have had the result that the foreign national can no longer be "unwilling to avail himself or herself of the protection of the country of his nationality". This latter requirement for *consequence* reflects the purpose of the Convention, which in the Supreme Court ruling in Rt-2010-858 para 41 is described as follows:

> **"The purpose of the Convention is to give protection – often referred to as surrogate protection – to persons who cannot obtain this in their country of origin. When the situation changes to such an extent that the person's protection can be regained, the need for asylum ceases to exist."**

(29) I also mention that the Court of Justice of the European Union itself, when interpreting the parallel provision in Council Directive 2004/83/EC article 11 subsection 1 e, expressed in similar terms in its ruling of 2 March 2010 in the united cases C-175/08, C-176/08, C-178/08 and C-179/08, *Abdulla and others versus Germany*. This is

demonstrated in particular by the Court's use of the term "causal connection" in para 66. Paras 65 and 66 read:

> **"Article 11(1) (e) of the Directive, in the same way as Article 1(C)(5) of the Geneva Convention, provides that a person ceases to be classified as a refugee when the circumstances as a result of which he was recognised as such have ceased to exist, that is to say, in other words, when he no longer qualifies for refugee status.**
>
> **By stating that, because those circumstances 'have ceased to exist', the national 'can no longer … continue to refuse to avail himself or herself of the protection of the country of nationality', that article establishes, by its very wording, a causal connection between the change in circumstances and the impossibility for the person concerned to continue to refuse and thus to retain his refugee status, in that his original fear of persecution no longer appears to be well founded.."**

(30) B's arrival in Norway constituted undoubtedly a change. A was no longer a single female without a male care person. It is undisputed that if B had come to Norway already in 2011, none of them would have been recognised as refugees or granted a residence permit, but instead been consigned to internal flight in Afghanistan. In fact, the decision from 2011 granting the residence permit made it explicitly clear that the permit could be revoked if B turned up in Norway.

(31) In its ruling in Rt-2010-858, the Supreme Court held that changes in personal affairs were comprised by the Refugee Convention article 1C no. 5. Hence, such changes are also comprised by the Immigration Act section 37 subsection 1 e, which implies that the change in question – B's arrival – could, as a starting point, entail revocation of A's and her daughter's refugee status and residence permit.

(32) But in line with what I have said, B's arrival is not sufficient to revoke the refugee status and residence permit. In addition, the consequence would have had to be that A and her daughter, at the time of the revocation, could not refuse to avail themselves of the protection in their home country. This also implies that UNE, to justify the revocation, would have had to conclude that A's and her daughter's reunion with B implied that they could obtain protection in Afghanistan.

(33) UNE did not consider whether this requirement for consequence was met, neither in the revocation decision from 2013 nor in the subsequent decisions in which UNE refused to reverse the revocation. Such application of section 37 subsection 1 e is incorrect.

(34) In its decision of 20 February 2015, UNE emphasised that A and her daughter were not consigned to internal flight in Afghanistan:

> **"It is noted that [A] and her family have not been consigned to internal flight, but rather to return to their family at their stated domicile. The issue affecting internal refugees and their lack of network, UNHCR's recommendations regarding internal refugees and the Ministry's instructions regarding the Immigration Act section 28 subsection 5, are thus not relevant in these cases."**

(35) This entails that the decision is not based on the assumption that the reunion made it possible for A and her daughter to enjoy protection in Afghanistan in the form of internal flight.

(36) What UNE *did* conclude was that the family could return to their domicile in the Jaghuri district without being subjected to such persecution or inhuman or degrading treatment that would give them status as refugees under the Immigration Act section 28. This conclusion differed from that given in the residence permit from 2011, where UDI considered the applicants' domicile to be "unsafe", so that a return to this area "could not be recommended". But if a revocation pursuant to section 37 subsection 1 e is substantiated by changes that have taken place in the domicile, the "circumstances" present when A and her daughter were granted a residence permit in 2011 can "no longer [be] present" there.

(37) UNE did not consider whether these conditions had been met, as opposed to the court of appeal that concluded that they had not. The court of appeal stated that a "significant and non-temporary change" had to have taken place to the safety situation in the Jaghuri district during the period from 2011, when A and her daughter were granted the residence permit, until 2015, when they were sent back.

(38) The state has submitted that section 37 subsection 1 e does not contain any such requirement for significant and non-temporary changes, and that the judgment of the court of appeal must therefore be set aside.

(39) The condition that the circumstances that led to recognition as a refugee "are no longer present" – or "have ceased to exist" pursuant to the Convention – means that a change must have taken place that is so *significant* that protection can be enjoyed in the home country. In my opinion, this condition also implies that the change that has taken place must be sufficiently *consolidated*, so that the foreign national, who is prepared to stay in Norway, is not consigned to a life that may easily result in new flight and right to refugee status. In the Supreme Court ruling in Rt-2010-858 para 42, the condition is expressed as follows:

> **"It has been recognised that changes in the home country – to safeguard the refugees' need to settle – must be of a certain strength and durability before the refugee status can be revoked."**

(40) I cannot see how "of a certain strength and durability" actually means something other than "significant and non-temporary".

(41) This interpretation is supported by "Guidelines on International Protection" by the UN High Commissioner for Refugees from 10 February 2003. It states that the Refugee Convention article 1C no. 5 is to be interpreted to mean partially that the changes in the country of origin must be of a "fundamental nature", so that the refugee cannot continue to refuse to enjoy the protection of his or her country of nationality, and partially that the changes "should be given time to consolidate" before any refugee status can be revoked.

(42) The state has submitted that the European Court of Justice has interpreted the condition differently in the mentioned *Abdulla and others v. Germany*, where paras 72 and 73 read:

> **"Furthermore, Article 11(2) of the Directive provides that the change of circumstances recorded by the competent authorities must be 'of such a significant and non-temporary nature' that the refugee's fear of persecution can no longer be regarded as well founded.**
>
> **The change of circumstances will be of a 'significant and non-temporary' nature, within the terms of Article 11(2) of the Directive, when the factors which formed the basis of**

> **the refugee's fear of persecution may be regarded as having been permanently eradicated. The assessment of the significant and non-temporary nature of the change of circumstances thus implies that there are no well-founded fears of being exposed to acts of persecution amounting to severe violations of basic human rights within the meaning of Article 9(1) of the Directive."**

(43) As it appears, the European Court of Justice interprets the Directive's condition that the change must be "of such a significant and non-temporary nature" that the fear of persecution can no longer be regarded as well founded. The Court holds that this condition is met if the factors justifying the foreign national's fear of persecution "may be regarded as having been permanently eradicated". Thus, as I see it, specific requirements for significant and non-temporary changes also apply within the EU.

(44) In general, I find that the conditions for revoking a refugee status and residence permit pursuant to section 37 subsection 1 e, are not a direct mirroring of the conditions for granting the same pursuant to section 28. A person who has been recognised as a refugee has obtained a slightly higher level of safety than a person who has not.

(45) Against this background, I cannot see that the court of appeal has interpreted section 37 subsection 1 e incorrectly when finding that during the period in question, a "significant and non-temporary" change must have taken place to the safety situation in the Jaghuri district.

(46) I have thus concluded that the court of appeal's application of the law is correct, and that the appeal must be dismissed.

(47) As mentioned in the introduction, the court of appeal also found that UNE applied the Immigration Act section 37 incorrectly when stating that UNE had not made a proportionality assessment, particularly in light of A's and her daughter's settlement in Norway. I will therefore consider whether section 37 subsection 1 e contains such a requirement of proportionality, even though it will not influence my decision.

(48) The wording of the provision does not contain any such requirement. According to the preparatory works, the standing committee proposed to "quote" the Refugee Convention's conditions for revocation in the Immigration Act, rather than just referring to them, as had been done in the previous act. The Ministry supported this, see Proposition to the Odelsting no. 75 (2006-2007) pages 104 and 105. I thus find that the preparatory works clarify that the conditions for revocation must be interpreted in the same way as those in the Convention, which do not contain such a requirement of proportionality.

(49) The respondents have referred to the requirements of proportionality in the Constitution article 102, ECHR article 8 and other provisions in the Immigration Act, in particular section 70. I do not consider this to be essential. The two first-mentioned provisions indicate that a proportionality assessment must be made if revocation pursuant to the Immigration Act section 37 constitutes interference with privacy. However, one cannot derive therefrom that such a requirement must also be read into section 37 subsection 1 e. In the Immigration Act section 70, the requirement of proportionality follows directly from the wording of the provision, which is not the case for section 37.

(50) Finally, the respondents have contended that a requirement of proportionality must be read into the provision based on concerns for legal safeguards. I do not consider that to be

essential either. I mention in particular that section 37, in this context, must be read in conjunction with other provisions that the foreign national may assert in connection with revocation, among them the mentioned rules in the Constitution and ECHR. Moreover, the immigration authorities should in such cases always consider whether a residence permit should be granted on humanitarian grounds pursuant to the Immigration Act section 38. Thus, in my view, there are no material concerns for legal safeguards suggesting – without basis in the provision or in its preparatory works – that a requirement of proportionality must be read into section 37 subsection 1 e.

(51) Against this background, I conclude that Immigration Act section 37 subsection 1 e does not contain any requirement of proportionality.

(52) Consequently, I vote for this

J U D G M E N T :

The appeal is dismissed.

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

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

(55) Justice **Høgetveit Berg:** Likewise.

(56) Justice **Indreberg:** Likewise.

(57) Following the voting the Supreme Court gave this

D O M :

The appeal is dismissed.