SUPREME COURT OF NORWAY

JUDGMENT AND ORDER

given on 23 June 2021 by a division of the Supreme Court composed of

Justice Bergljot Webster
Justice Aage Thor Falkanger
Justice Arne Ringnes
Justice Espen Bergh
Justice Borgar Høgetveit Berg

HR-2021-1345-A, (case no. 20-174954SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 22 September 2020

A
B
C
Selvhjelp for Innvandrere og Flyktninger
(SEIF) (intervener)
Norwegian Organisation for Asylum Seekers
(NOAS) (intervener)
D (intervener) (Counsel Georg Schjerven Hansen)

v.

The State represented by
the Immigration Appeals Board (The Office of the Attorney General represented by Kaija Marie Folkestad Bjelland)

(1) Justice **Høgetveit Berg:**

Issues and background

(2) The case concerns a refusal of an application for a residence permit under the rules on family reunification. The key issue is whether it would be offensive to Norwegian public policy – *ordre public* – to recognise a marriage contracted as a minor in Syria as a basis for residence in Norway.

(3) B was born on 00.00.1999. On 00.00.2012, the day before she turned 13, she married her cousin D – in Syria. D was then 25 years old. The marriage was legally contracted under Syrian law.

(4) On 00.00.2013, B gave birth to their son C. She was then 13 years old. On 00.00.2015, at the age of 16, she gave birth to their daughter A.

(5) After the wedding, B lived with her family in law on the countryside outside of X. B and D lived together for a period of around three and a half years, from January 2012 to August 2015. However, D left home for long periods to work in Lebanon. He stayed in Lebanon for two to four months at a time, and in Syria for a maximum of one and half month at a time. To avoid being summoned to fight in the Syrian civil war, D fled to Norway in 2015. He has residence in Norway as a refugee.

(6) On 21 September 2017, via the Norwegian embassy in Beirut in Lebanon, B applied for a residence permit in Norway for herself and the two children, C and A. The basis for the application was family reunification with D. All four are Syrian citizens.

(7) The Norwegian Directorate of Immigration (UDI) denied the application for family unification on 14 December 2017. Following an appeal, the Immigration Appeals Board (UNE) reached the same result in a decision of 10 March 2019. UNE argued that it would obviously be offensive to Norwegian public policy – *ordre public* – if the marriage was recognised as a basis for residence, see section 18 a subsection 1 fourth sentence of the Marriage Act. UNE did not consider its result a violation of Article 8 of the European Convention on Human Rights (ECHR) on the right to respect for family life. Furthermore, UNE found that a residence permit could also not be granted under section 41 of the Immigration Act concerning cohabitants. UNE then discussed whether a residence permit could be granted on grounds of strong humanitarian considerations, see section 49 of the Immigration Act, but found that this was not the case.

(8) On 12 March 2019, B and the two children issued a notice of action against the State. UNE handled the notice simultaneously with a request that the decision of 10 March 2019 be reversed. In a new decision of 7 May 2019, UNE denied the request for reversal. B and the children then brought an action.

(9) On 2 March 2020, Oslo District Court ruled as follows:

> "1. The Immigration Appeals Board's decision of 10 March 2019 and its subsequent decision of 7 May 2019 are invalid.
>
> 2. The State represented by the Immigration Appeals Board is to pay costs of NOK 216 360 – to B, C and A within two weeks of the service of the judgment."

(10) The District Court found that UNE had made procedural errors in its reasoning relating to Article 8 of the ECHR, which might have influenced its result.

(11) The State appealed to Borgarting Court of Appeal. In a new decision of 9 July 2020, UNE upheld its decision of 10 March 2019. Now, the issue of the right to respect for family life – Article 8 of the ECHR – was discussed in more detail. B and the children added the validity of this new decision as a new claim in the Court of Appeal.

(12) The Court of Appeal was in doubt regarding its result, but concluded that the three decisions were valid. On 22 September 2020, Borgarting Court of Appeal ruled as follows:

> "1. The Court of Appeal finds in favour of the State represented by the Immigration Appeals Board.
>
> 2. Costs are not awarded in either the District Court or the Court of Appeal."

(13) B, C and A appealed the Court of Appeal's judgment to the Supreme Court. In the Court of Appeal, Article 8 of the ECHR had been added to the basis for the invalidity claim. The appeal to the Supreme Court also included a request for a declaratory judgment stating that UNE's decision was incompatible with Article 8 of the ECHR. The Supreme Court's Appeals Selection Committee referred the appeal on 29 January 2021, but did not consider the possibility to refer the new claim.

(14) In the Appeals Selection Committee's ruling of 10 May 2021, D was not permitted to join the case as a party, but, together with the Norwegian Organisation for Asylum Seekers (NOAS) and *Selvhjelp for innvandrere and flyktninger* (SEIF), he was permitted to act as intervener for the appellants.

The parties' contentions

(15) The appellants – *B, C and A* contend:

(16) The conditions for a residence permit in section 40 of the Immigration Act are met. B wishes to continue her established family life that started when she, at her own will, married in 2012. She and the two children have a very difficult life in an unsafe part of Syria.

(17) A residence permit granted under section 40 will not be offensive to *ordre public*, see section 18 a subsection 1 fourth sentence of the Marriage Act. B was over 18 when she applied. A key factor must be which effects a recognition of the marriage will have *today*.

(18) The decisions to deny B and the children residence in Norway will result in a permanent division of the family. B and D had been married for more than eight years at the date of the last decision, and they have two children together. They married before the riots and war broke out in Syria, and thus before the family had any affiliation to Norway. In 2012, applying for family immigration in Norway was not a scenario the couple could imagine. A decision to deny B and the children residence is an unsuitable means to prevent future child or forced marriages. Recognising the marriage as the formal basis for a residence permit would not be perceived as offensive.

(19) In any case, B is entitled to residence under section 41 of the Immigration Act. She has joint children with the sponsor and wishes to continue living with him. The statutory provision cannot be interpreted restrictively, which means that an *ordre public* reservation applies also here.

(20) We are dealing with an established family life protected under Article 8 of the ECHR. B and her husband lived together for three and a half years before he fled from Syria. The question is whether the family life is protected based on the situation at the date of the decision – and not based on the events in 2012. Since B's has status as a refugee, it is impossible to continue the family life in Syria. The decisions are not the result of a "fair balance" of the interests of the appellants and the State. The decision is incompatible with Article 8 of the ECHR.

(21) The appellants have a legal interest in obtaining a declaratory judgment of violation of the ECHR. The conditions for objective accumulation are met.

(22) Under any circumstance, the result of UNE's decisions is unreasonable differentiation. Case law shows that UNE has granted a residence permit in all other cases involving Syrian couples where the female was a minor when the marriage was contracted.

(23) B, C and A ask the Supreme Court to rule as follows:

> "1. The Immigration Appeals Board's decision of 9 July 2020 is invalid.
>
> 2. The Immigration Appeals Board's decision of 9 July 2020 is a violation of Article 8 of the ECHR.
>
> 3. The State represented by UNE is liable for costs in the District Court, Court of Appeal and the Supreme Court."

(24) The interveners – *D, Norwegian Organisation for Asylum Seekers (NOAS) and Selvhjelp for innvandrere og flyktninger (SEIF)* – support the appellants' contentions.

(25) The respondent – *the State represented by the Immigration Appeals Board* – contends:

(26) Recognising the marriage between B and D as a legal basis for residence under section 40 of the Immigration Act would obviously be offensive to Norwegian *ordre public*. The marriage must therefore be disregarded under section 18 a subsection 1 fourth sentence of the Marriage Act. The primary consideration here is the situation at the time of marriage. When B is not entitled to a residence permit, her children are also not entitled to a residence permit under section 42 subsection 1 of the Immigration Act.

(27) Children must be protected from marriage and sexual abuse. This is a basic legal principle in Norway. *Ordre public* must be determined based on the view on child marriage and sexual activity with children on which Norwegian criminal law is based. It is a crime to marry a child or contribute to the marrying of a child, see section 262 subsection 2 of the Penal Code. Sexual activity with children under the age of 14 is considered sexual assault under section 299. When the sexual assault involves intercourse, the penalty is imprisonment for a term of between three and 15 years, see section 300.

(28) B's young age and the large age difference between her and D suggest that the marriage cannot be acknowledged. The long time that has passed since the marriage is only due to B's young age at the time of marriage, which means that the time aspect cannot be emphasised. A residence permit with a legal basis in section 40 of the Immigration Act must therefore be ruled out.

(29) Nor does B have a right of residence under section 41 of the Immigration Act concerning cohabitants. Systemic considerations suggest that section 41 must be interpreted so as not to provide a basis for family reunification when the cohabitation takes the form of a marriage that cannot be recognised due to *ordre public*. If section 41 of the Immigration Act were to apply here, section 40 and the *ordre public* reservation would have no effect in cases where children given away in marriage have had children themselves.

(30) Section 49 of the Immigration Act – on residence on the grounds of strong humanitarian considerations – is also not a basis for family reunification in the case at hand. The court may only consider whether the decision constitutes abuse of power or whether it violates the right to family life under Article 8 of the ECHR. UNE's decisions are not a result of unreasonable differentiation. They are manifestly different from other cases where marriages to minors in Syria have led to residence permits based on family reunification. We are in any case not dealing with a breach of a clear system.

(31) UNE's decisions do not constitute a violation of Article 8 of the ECHR. The State is committed under international law to work against child marriage. One may ask whether there is a family life at all worthy of protection under Article 8. Questions may also be raised about the territorial application of the ECHR. Based on the individual circumstances in the case, the State consents to the application of the ECHR. UNE's decisions are in any case the result of a fair balancing of the interests of the individual and the interests of society. The appellants cannot assert rights under Article 3 of the UN Convention on the Rights of the Child.

(32) The request for a declaratory judgment of violation of Article 8 of the ECHR is new in the Supreme Court. In case the Supreme Court permits objective accumulation, the State finds that the appellants do not have a legal interest in obtaining such declaratory judgment.

(33) The State represented by the Immigration Appeals Board asks the Supreme Court to rule as follows:

> "1. The appeal is dismissed.
>
> In case the Supreme Court permits objective accumulation:
> 2. Principally: The claim submitted in item 2 is inadmissible.
> 3. In the alternative: The Supreme Court finds in favour of the State represented by the Immigration Appeals Board.

In all cases:

4. The State represented by the Immigration Appeals Board is awarded costs in the Supreme Court."

My view

Residence permit on grounds of family reunification – general remarks

(34) According to section 40 of the Immigration Act, the spouse of a sponsor – the person with whom the applicant wishes to reunite, see section 39 of the Immigration Act – is entitled to a residence permit on more specific terms, for instance if both parties are aged 18 or over and they intend to live together. Children under the age of 18 are entitled to a residence permit when both parents hold or are granted a residence permit under section 40, see the Immigration Act section 42 subsection 1.

(35) The Immigration Act does not regulate in detail the age for marriage with respect to marriage as a basis for residence, but is supplemented by the Marriage Act on this point. The age for marriage in Norway is 18, see section 1 a of the Marriage Act. Exceptions apply for a marriage contracted abroad. Such a marriage is accepted in Norway if it has been validly contracted in the country of marriage, see section 18 a subsection 1 first sentence. However, a foreign marriage is not recognised in Norway if it "would obviously be offensive to Norwegian public policy (*ordre public)*", see section 18 a subsection 1 fourth sentence of the Marriage Act.

(36) If the applicant is not married to the sponsor, a residence permit may be granted under section 41 of the Immigration Act. According to section 41 subsection 1, an applicant who has lived in a permanent and established relationship for at least two years with a sponsor, is entitled to a residence permit if the parties intend to continue living together. An applicant who has not lived together with the sponsor is entitled to a residence permit on certain terms if the parties have joint children, see section 41 subsection 2. It is a condition for the grant of a residence permit that both parties are aged 18 or over, see section 41 subsection 4.

(37) If strong human considerations so indicate, a residence permit may be granted regardless of whether the conditions in sections 40 and 41 are met, see section 49 of the Immigration Act. The applicant is not entitled to such a permit; this is subject to the free discretion of the immigration authorities. A refusal of an application for residence under section 49 may therefore only be set aside in the event of procedural errors or abuse of power.

(38) I add that international provisions may be applicable when using all of these legal bases, see section 3 of the Immigration Act and section 2 of the Human Rights Act. In addition, the superior requirements of the Constitution must be observed. Article 8 of the ECHR and Article 102 of the Constitution on the right to family life and Article 104 on the best interests of the child may thus set limits for the application of the law. The same applies to Article 3 of the UN Convention on the Rights of the Child. I also mention Article 19 of the same Convention, imposing the State Parties to take measures to protect all children from all forms of physical or mental violence, injury or abuse, maltreatment or exploitation, including sexual abuse. This also includes child marriages. Furthermore, Article 24 (3) imposes the State Parties to take all effective measures with a view to abolishing traditional practices prejudicial to the health of children. Finally, I mention Article 16 (2) of the UN Convention on the

Elimination of All Forms of Discrimination against Women, stating among other things that the betrothal and the marriage of a child shall have no legal effect, and that a minimum age must be specified by law.

The legal framework for the **ordre public** *assessment in cases covered by section 40 of the Immigration Act, cf. section 18 a subsection 1 fourth sentence of the Marriage Act*

(39) Section 18 a of the Marriage Act, incorporated in 2007, reads as follows in subsection 1 first and fourth sentence:

> "A marriage that is contracted outside Norway shall be recognised in the realm if the marriage has been validly contracted in the country of marriage. … However, a marriage shall not be recognised if this would obviously be offensive to Norwegian public policy (*ordre public*)."

(40) The wording implies that the threshold is high for not recognising a marriage validly contracted abroad, as that would "obviously be offensive to Norwegian public policy". This has to do with our social values and legal principles, our views on human dignity and general sense of justice.

(41) I add that the *ordre public* assessment under section 18 a subsection 1 fourth sentence of the Marriage Act is subject to administrative discretion, and that the courts have unlimited jurisdiction to review the application of the law. This is not only the case in the field of immigration law, but also in other contexts where it may be relevant to reject the marriage as offensive to *ordre public*. The Supreme Court must thus on an independent basis consider whether UNE had a legal basis for refusing to grant a residence permit on these grounds.

(42) The special remarks in the preparatory works to section 18 a subsection 1 fourth sentence of the Marriage Act are very brief, stating only that the provision is a codification of older law. I therefore quote from what was once set out in Proposition to the Odelsting no. 100 (2005–2006) page 12:

> "A marriage contracted abroad will not be recognised if this would be offensive to our fundamental legal principles and standards of value, also referred to as *ordre public*. Examples of *ordre public* cases are those involving coerced or otherwise non-consensual marriages or marriages where the parties are very young. It is not established how young the parties must be before the marriage is rejected. The assessment must be based on an age that is well below the Norwegian minimum age for marriage, including the age for which exemption has been granted under section 1 subsection 3 of the Marriage Act. Marriages between parties aged 11–12 will clearly not be recognised in Norway. According to the Marriage Act, an exemption has generally not been granted to applicants under the age of 17. However, there are examples of 15- and 16-year-olds being allowed to marry. In the Ministry's opinion, an age lower than 15 must clearly be considered offensive to *ordre public*."

(43) Here, the Ministry refers not only to recognition of marriages contracted abroad, but draws a parallel to dispensation practice for marriages contracted in Norway. The content of Norwegian domestic law has no direct effect on the content of the *ordre public* principle, but may function as a reference point in the assessment.

(44) Apart from this, the preparatory works say nothing regarding the content of the *ordre public* reservation. By an amendment Act 11 June 2021 no. 63, which has not yet entered into force, section 18 a subsection 1 fourth sentence of the Marriage Act has been moved to a new subsection 2. Nor are the preparatory works to this amendment, to which I will return, of any direct help to the interpretation. One must therefore turn to what generally characterises *ordre public*, or what characterises it in other contexts. A basic starting point is formulated in Rt-2009-1537 *The Bookseller in Kabul* paragraph 37:

> "An *ordre public* reservation is a condition that the foreign law must give way if the application of thereof will give a result in strong conflict with our sense of justice".

(45) This starting point is reiterated in Rt-2011-531 *War criminal* paragraph 52. Hence, we are not to assess the foreign legal rule in itself, but *the result* of this rule being recognised in Norway. *Ordre public* may be described as a safety valve to prevent that recognition of rules from foreign legal systems has unacceptable effects in the individual case.

(46) An assessment of the result cannot be detached from the individual case. It must be carried out in a factual context and in relation to the individual legal effect involved. The assessment of the result is therefore not only an assessment of whether it is generally offensive that the marriage is recognised, but also of whether it is offensive that the individual legal effect of the marriage is accepted. In our case, the *ordre public* reservation therefore relates to whether it "would obviously be offensive" to grant the appellants a residence permit under sections 40 and 42 of the Immigration Act on the basis of the marriage.

(47) As for the scope of the *ordre public* assessment under section 40 of the Immigration Act, cf. section 18 a of the Marriage Act, UNE writes the following in its decision of 10 March 2019:

> "As concerns the wider understanding of the *ordre public* reservation in international private law, we emphasise that it is the effect and result of the recognition of the marriage that must be contrary to the Norwegian sense of justice. In this case, the question is whether recognising the marriage with family immigration as a result will obviously conflict with important objectives and values in our legal system. Consequently, it requires not only an assessment of the situation at the time of marriage, but also an assessment of the effects of such a recognition at the time of the decision.
>
> The Board has also noted the following statement from Professor Helge J. Thue in 'Recognition of marriages contracted abroad', Journal for issues of family law, inheritance law and child welfare law 01/2003:
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> > 'The marriage has countless legal effects. And it is the individual effect, or effects, that must be offensive to *ordre public*. It is generally accepted law, also internationally, that it is not the foreign rule in question that is to be reviewed under the *ordre public* principle, but the relevant effects of it."

(48) I agree with this. The issue is thus not whether the marriage contracted in Syria should be recognised, with all legal effects. The issue is whether the particular legal effect, *residence permit on grounds of family reunification,* may be refused because the marriage *came to be* in such a manner that it would obviously be offensive to grant the application *today*.

(49) The assessment must also include the specific effects of a residence permit in the case at hand – and the specific effects of refusing it – and whether either result will obviously be offensive to Norwegian public policy. When limiting the *ordre public* assessment in this way, other

rules will also be relevant. If family reunification is the proper result under other sets of rules that prevail over formal law, there will be little room for non-recognition based on the *ordre public* reservation.

(50) One must also consider the age of the parties, both at the time of the marriage and at the time of the application, including whether they were, and are, equal in age and development, whether they have subsequently adjusted to being married, and whether they currently want a family life and have joint children. The factual and legal consequences of not recognising the marriage, including whether that would divide the family, are equally important.

(51) In its decision of 9 July 2020, UNE refers to its decision of 10 March 2019. The latter is based on Instruction GI-13/2016 from the Ministry of Justice and Public Security, dated 20 December 2016. The following is stated in section 3 of this Instruction:

> "In cases subject to the Immigration Act, UDI and UNE must, when assessing the *ordre public* principle in section 18 a subsection 1, generally apply a minimum age of 16 before recognising a marriage contracted abroad at a time where neither party had an affiliation to Norway and where one or both of them were a minor.
>
> The marriage may exceptionally be recognised even if one or both parties were under the age of 16 when the marriage was validly contracted abroad. Then, one must assess whether the parties are equal in age and development, and their age at the time of the application. The older the parties, and the longer time passed since the marriage was contracted, the less offensive it may seem to Norwegian public policy to acknowledge the marriage. In this assessment, one should also consider whether the parties have joint children, and it must always be assessed whether a refusal to acknowledge the marriage may amount to a violation of the right to family life under Article 8 of the European Convention on Human Rights (ECHR)."

(52) Indeed, one may question whether these starting points are fully compatible with the legal framework for the *ordre public* reservation, which I have presented. The quotation may be read as if the heart of the assessment is the marriage itself, and not the potential legal effects of the marriage in the individual case. It may also be read as an overview of certain relevant aspects. However, like the Court of Appeal, I believe that other factors must also be considered, for instance circumstances related to the marriage itself and the application for family reunification.

The Norwegian rules on age for marriage and the new and stricter rules for acknowledging foreign marriages.

(53) As mentioned, the age for marriage under Norwegian law is not decisive for the content of *ordre public*, but it constitutes a reference point for the assessment.

(54) Before the amendment in 2018, the County Governor could grant exemptions for marriages in Norway by reducing the age for marriage from 18 to 16 if there were "strong reasons" for doing so. Before 2007, the County Governor could grant exemptions without a lower age limit, if there were "extraordinary reasons". These were narrow legal bases for exemption. In connection with the amendment in 2018, which removed the basis for exemption, the Family and Culture Committee stated in Recommendation to the Storting 267 L (2017–2018) that very few marriages had been contracted in recent years where one of the parties was under the

age of 18, and that the amendment should mainly be a signal that Norway does not accept child marriages.

(55) In continuation of this, the Family and Culture Committee also made a statement on marriages contracted abroad, see the Recommendation's page 3:

> "The Committee believes that a prohibition may be required against recognising any marriage contracted with a party under the age of 18, regardless of where the two parties live. In this way, couples who claim to have been married abroad before one or both parties reached the age of 18 will not have their marriage recognised by Norwegian authorities. The Committee believes one should determine whether the dramatic consequence of not recognising a child marriage should be overridden by the consideration of preventing more child marriages. Such marriages constitute abuse no matter where they are contracted."

(56) Against this background, the Government submitted Proposition to the Storting 135 L (2020–2021) on stricter rules for marriages contracted with a minor under foreign law. The Family and Culture Committee considered the Proposition in Recommendation to the Storting 460 L (2020–2021). The majority supported the Proposition, while the minority wanted even stricter rules. With certain exceptions, the Amendment Act of 11 June 2021 no. 63 has not yet entered into force.

(57) The *ordre public* reservation is continued in section 18 a subsection 2 of the Marriage Act, but due to the new rules, its area of application has become narrower in practice.

(58) In connection with the amendment, a special rule was added as a new section 18 c regarding recognition of marriage for parties without affiliation to Norway at the time of the marriage:

> "A marriage that is validly contracted under foreign law between parties that were neither Norwegian citizens nor permanent residents in the realm at the time of the marriage will not be recognised in the realm if one or both parties were under the age of 18 at the time of the marriage.
>
> The County Governor may nonetheless recognise the marriage if the parties are aged 18 or above, if they were above 16 at the time of the marriage, and if the party who was a minor at the time of the marriage wants the marriage to be recognised. The County Governor may also recognise a marriage if there are strong reasons for doing so. Section 18 b subsection 2 second to fourth sentence applies accordingly."

(59) The legal regulation is thus formally turned around. Marriages contracted abroad before the age of 18 are generally *not* recognised, unless the County Governor consents thereto, and the party who was a minor so wishes. This applies to parties that were between 16 and 18 at the time of the marriage. If the minor was under the age of 16 – as in the case at hand – there must in addition be "strong reasons". In practice, this requirement will replace the current *ordre public* reservation. Another result of this amendment is that the applicant will not be entitled to have the marriage recognised, as such recognition is subject to the County Governor's discretion.

(60) Furthermore, a new subsection 2 is added to section 4 of the Marriage Act. According to this provision, the parties to a marriage that is not recognised in Norway may marry if the conditions for marriage are otherwise met.

The individual* ordre public *assessment

(61) The parties agree that the marriage between B and D is valid under Syrian law. Since D has status as a refugee, the appellants are in principle entitled to a residence permit in Norway under sections 40 and 42 of the Immigration Act. The question is whether the marriage in this context must be rejected, as recognising it as a basis for a residence permit would obviously be offensive to public policy, see section 18 a subsection 1 fourth sentence of the Marriage Act.

(62) B turned 13 the day after she married D. This is five years younger than the current Norwegian age for marriage. At the time of the marriage in 2012, it was possible under Norwegian law to marry from the age of 16 with the consent of the County Governor. The preparatory works to the Marriage Act suggests a lower limit of "11–12 years". Although such an age limit cannot be absolute, the age in itself strongly indicates that the marriage should not be recognised. At the same time, the newly adopted section 18 c subsection 2 second sentence of the Marriage Act also does not set an absolute age limit for such recognition.

(63) In its decision of 10 March 2019, UNE points out that D is more than twelve years older than B, and that the two were not equal when they married:

> "The presumption of coercion is stronger the lower the age at the time of the marriage, and is amplified by the large age difference between the parties. The Board believes that the appellant's age was so low that she practically was not competent to make such a serious vital choice as a marriage is, and that she cannot have possessed such personal maturity and position in the family that she had a real opportunity to oppose pressure and expectations from others in her community regarding marriage."

(64) I generally agree with this. Nonetheless, in her application for a residence permit, B stated that as a twelve-year-old she wished to marry D and that she was not pressured into it. Like the Court of Appeal, which instead of hearing the parties' testimonies ruled after direct presentation of evidence, I trust that B's statement is based on her current feelings about the events in 2011 and 2012 when the marriage was agreed upon and contracted. However, in my view, this is without a doubt a forced marriage under Norwegian law.

(65) Norway has a clear obligation under international law to prevent the abuse of children in the form of child and forced marriage. I refer to UNE's statement in its decision of 10 March 2019:

> "Among other things, the UN Universal Declaration of Human Rights of 1948 states that 'Marriage shall be entered into only with the free and full consent of the intending spouses.' The UN Convention on Consent to Marriage of 1962 also imposes State Parties to ensure complete freedom in the choice of a spouse, as well as to eliminate child marriages and the betrothal of young girls before the age of puberty. The freedom to choose a spouse and to enter into marriage with free and full consent is also enshrined in Article 16 of the UN Convention on the Elimination of All Forms of Discrimination against Women and Article 23 of the International Covenant on Civil and Political Rights of 1966. Furthermore, the UN Convention on the Rights of the Child of 1989 requires State Parties to take effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children (Article 24 (3)). In addition, the authorities are required to protect children from all forms of sexual exploitation and abuse (Article 34). UNE points out that child and forced marriages in practice entail coerced sexual activity."

(66) In my view, considerable weight must be given to the fact that the marriage, in addition to being forced at first, involved sexual abuse of B. Norway is obliged under Article 34 of the Convention on the Rights of the Child to take measures to prevent such abuse. B gave birth to the first child when she herself was a child. It is also relevant in the assessment that intercourse with children under 14 years of age counts as sexual assault according to Norwegian criminal law – with a minimum penalty of three years of imprisonment, see section 300 of the Penal Code. Repeated abuse counts as aggravated sexual assault with a maximum penalty of 21 years of imprisonment, see section 301 subsection 2 (d) of the Penal Code.

(67) Intercourse with a girl at such a young age often leads to pregnancy without her body being ready for it. This may lead to various health problems, as well as death, see for instance Joint general recommendation No. 31 from the Committee on the Elimination of Discrimination against Women/general comment No. 18 from the Committee on the Rights of the Child (CEDAW/C/GC/31-CRC/C/GC/18), page 7:

> "Child marriage is often accompanied by early and frequent pregnancies and childbirth, resulting in higher than average maternal morbidity and mortality rates. Pregnancy-related deaths are the leading cause of mortality for 15-19 year old girls (married and unmarried) worldwide. Infant mortality among the children of very young mothers is higher (sometimes as much as two times higher) than among those of older mothers."

(68) UNE concluded that it would obviously be offensive to Norwegian public policy to recognise the marriage and give it legal effect under section 40 of the Immigration Act, at the time of the marriage in 2012. I agree.

(69) The question is nonetheless whether the development after the marriage in 2012 provides a basis for concluding otherwise.

(70) In my view, it is of great relevance that B was above 18 at the time of the application and 21 at that time of the last decision. During the entire application process, she has declared that she wants to continue living with her husband. Like the Court of Appeal, I trust that B has a genuine wish to come to Norway with her two children to live with her husband.

(71) The facts that, at the time of UNE's decision, more than eight years had passed since the marriage was contracted and that B is now well above the Norwegian age for marriage, suggest that recognising the marriage as a basis for a residence permit in Norway now seems clearly less offensive.

(72) The State has acknowledged before the Supreme Court that there must be a time limit, but has also pointed out that the time lapse cannot be emphasised, since the chief part of it is from before B reached the age of 18. In my view, one cannot disregard the eight years passed between the marriage and the last decision, or the fact that the private parties have always adjusted to married life. Indeed, in an *ordre public* assessment, due regard must be had to the long period during which what is considered abuse under Norwegian law took place. However, the situation was different at the time of the application and the decisions. In my view, it is essential that the parties could have married today. A residence permit will not constitute a new assault on B.

(73) D has status as a refugee because he cannot return to Syria. UNE has therefore assumed that refusal of a residence permit for B and the children in Norway will lead to a *permanent division of the family*. In its decision of 9 July 2020, UNE writes that this is a weighty consideration not easily overridden by the State's interests. UNE further states that the general starting point is that it is in the children's best interest to grow up with both parents, unless something else emerges in the specific case. I agree. Even though the oldest child was two and a half years old and the youngest only three months when their father fled Syria, and after that were together only for a short time in Turkey, there is nothing to suggest that growing up with both parents will not be best for the children.

(74) The best interests of the child – i.e. the principle that children's interests shall be a fundamental consideration for actions and decisions that affect them, see Article 104 subsection 2 of the Constitution – must be given significant weight. The State's arguments why the marriage is offensive to Norwegian *ordre public* are unquestionably built on the same principle. First, a decision that is favourable to one child may have the result that *other* children are exploited by spouses or parents seeking to obtain a residence permit for the family, see Proposition to the Odelsting no. 75 (2006–2007) page 160 and Rt-2012-1985 paragraph 114. Secondly, as illustrated by the case at hand, a decision accepting a child marriage in one specific case may be a breach of the general commitment to prevent child marriages. With regard to Article 8 of the ECHR, UNE writes the following in its decision of 9 July 2020:

> "Protecting children from marriage and sexual activity are fundamental principles in Norwegian society and of great societal importance. As mentioned above, Norway is committed to sending a clear signal condemning child marriage as a harmful practice. Reference is made to the UN Universal Declaration of Human Rights of 1948, the UN Convention on the Consent to Marriage of 1962, Article 16 of the UN Convention on the Elimination of All Forms of Discrimination against Women and Article 23 of the International Covenant on Civil and Political Rights of 1966.
>
> The strict penalties for both child marriage and sexual activity with children demonstrate the position of these principles in Norwegian society and how seriously the Norwegian State takes such abuse.
>
> The above shows, in UNE's view, that there are weighty considerations suggesting that marriages contracted with children should not form a basis for family immigration and that refusing such immigration lies within the state's margin of discretion.
>
> After an overall assessment of the conflicting interests, UNE believes that the outcome in this case depends on a fair balance between the State's interest in protecting children from sexual abuse and marriage and the appellants' and the sponsor's interest in enjoying a family life in Norway.
>
> In UNE's opinion, the consideration for the children and the appellants' life situation balanced against the opposing interests suggests that a refusal of a residence permit will not amount to a violation of Article 8 of the ECHR."

(75) UNE fails to mention that the reason for the long-term split of family was that B's husband had asylum in Norway and therefore could not return to Syria. When the division of a family relates to the need for asylum, case law of the European Court of Human Rights indicates that it takes more for the refusal of a residence permit to be considered the result of a fair and

balanced assessment. As I do not need to consider the application of Article 8 of the ECHR or Article 102 in the case at hand, I will leave it at that.

(76) The issue to consider under section 18 a subsection 1 fourth sentence of the Marriage Act is slightly different from that under Article 8 of the ECHR and Article 2 of the Constitution. As mentioned, the question is whether the result of applying generally applicable Norwegian rules will obviously conflict with Norwegian sense of justice. In my view, when emphasising the considerations in favour of rejecting the marriage due to *ordre public*, it is essential whether the decision in the individual case is suited to reach the more general political goal.

(77) As mentioned, Norway has a clear obligation under international law to work against both forced marriage and sexual abuse of children. All political parties agree on this, see also the newly adopted amendments to the Marriage Act. The appellants and their interveners concur, but maintain that the refusal of a residence permit in this specific case is an unsuitable tool for preventing future child and forced marriages.

(78) Admittedly, granting a residence permit in the case at hand may send an unfortunate signal. However, the risk that more forced marriages are contracted abroad based on knowledge from this particular case is quite small. I also agree with the appellants that it is unlikely that there will be fewer child marriages in Syria anytime soon if a residence permit is refused in the case at hand. The situation that has occurred can also not be ignored. The fact that the couple cannot be considered to have had a wish to evade Norwegian marriage law must be given significant weight. A residence permit in Norway was not in their minds when they married in 2012.

(79) Finally, I mention the newly adopted section 4 subsection 2 of the Marriage Act. According to this provision, the parties to a marriage that is not recognised in Norway may marry if the conditions for marriage are otherwise met. The provision is built on the premise that, generally, it is not obviously offensive that a child marriage is "repaired".

(80) In summary: On the one hand, a residence permit in this case will indirectly sanction a conduct that in Norway is widely considered completely unacceptable. On the other hand, a residence permit in Norway was not an issue when the couple married in 2012. The long time passed, B's age at the time of the application and her current genuine wish to continue living with her husband all suggest that denying B and the children residence because of the marriage will disturb our sense of justice. Without a residence permit, the family will be permanently divided. This will have negative consequences, not least for the children who will be deprived of the possibility to grow up with both parents. A recognition of the marriage does not imply a continuation of the abuse of B – perhaps on the contrary. To be denied residence may constitute a new burden for B - in addition to the previous abuse.

(81) Against this background, I find that it is not obviously offensive to Norwegian public policy to recognise the marriage between B and D under otherwise applicable rules for residence on the grounds of family reunification. UNE's decision is therefore invalid.

(82) Hence, it is not necessary for me to discuss whether the decisions are invalid for violating Article 102 of the Constitution and Article 8 of the ECHR, or the geographical application of the ECHR. It is also not necessary to discuss whether we are dealing with a family life under the ECHR or section 41 of the Immigration Act, or whether abuse of authority has taken place with regard to the application of section 49 of the Immigration Act.

Declaratory judgment of violation of Article 8 of the ECHR?

(83) The substantive claim in the case is that the decision from UNE is invalid. The appellants have succeed on this point – based on Norwegian legal rules. In addition, the appellants have requested a declaratory judgment of violation of the ECHR. As mentioned, it is not necessary for the result to review the issue of invalidity for a violation of Article 8 of the ECHR. Can the applicants request such declaratory judgment when there is otherwise no reason to consider such a violation?

(84) I refer to the preparatory works to the Dispute Act, Proposition to the Odelsting no. 51 (2004–2005) side 154:

> "If a claimant invokes several different legal bases in support of a claim, it often occurs that one basis will succeed, while others may not. In such cases, the courts will, according to normal procedural rules – which are continued in the Proposition – find in favour of the claimant on grounds that appear clear, and not spend time assessing the other grounds. This contributes to more efficient court proceedings overall. If the claimant, in support of his claim, has asserted violations of both human rights and national rules, it may well be that the application of the Convention on Human Rights becomes questionable and unclear, while the claimant must clearly succeed because national rules have been violated. Here, the court should be able to rule based on the national rules only without taking an independent position on possible violation of human rights. Such a ruling will clarify the application of the Convention. The premise, of course, is that a possible violation of human rights will not give the claimant a wider claim than what a violation of the national rules would give. Nonetheless, it is conceivable that the need for clarification of the law compels the court to take a position on the issue exclusively related to human rights."

(85) Subsequent case law on the possibility to request a declaratory judgment of violation of the ECHR has been regarded as inconsistent. However, it is still a basic requirement that the claimant demonstrates a *genuine need* to have the claim decided against the defendant, see section 1-3 subsection 2 of the Dispute Act. I refer to the Supreme Court rulings Rt-2015-921 paragraph 82 and HR-2016-2178-U paragraph 20, among others.

(86) The appellants have not demonstrated a concrete need for a declaratory judgment of violation of the ECHR that goes beyond the request that UNE's decision be ruled invalid. Therefore, I cannot see – at least not in the case at hand – that there is a basis for departing from the general principle that the courts are only to consider what is necessary to rule on the merits of the case. When I have found that the decision is invalid under domestic law, a consequence of the request for such declaratory judgment would be that the court has a *duty* to consider this issue in the form of an *obiter dictum*. That would be inconsistent with the system.

(87) The request for a declaratory judgment of violation of the ECHR is therefore inadmissible.

Costs

(88) The appellants have succeeded, except as concerns the declaratory judgment for violation of the ECHR. This issue has nonetheless been subordinate, and the appellants must be considered to have succeeded "in the main", see section 20-2 subsection 2 of the Dispute Act. There is no reason to depart from the general rule that the successful party is entitled to have its costs compensated by the opposite party.

(89) The appellants have claimed costs of NOK 216 250 in the District Court, NOK 131 250 in the Court of Appeal and NOK 366 019 in the Supreme Court – in total NOK 713 519. The amounts are mainly legal fees, VAT and court fees. The State has no objections to the size of the claim. I find that the claim should be accepted, see section 20-5 of the Dispute Act.

(90) I vote for the following

J U D G M E N T A N D O R D E R :

1. The Immigration Appeals Board's decision of 9 July 2020 not to reverse the decision of 10 March 2019 is invalid.

2. The request for a declaratory judgment of violation of the ECHR is inadmissible.

3. The State represented by the Immigration Appeals Board is liable for costs in the District Court, the Court of Appeal and the Supreme Court, and is to pay to B, C and A NOK 713 519 within two weeks of the service of the ruling.

(91) Justice **Bergh:** I agree with Justice Høgetveit Berg in all material respects and with his conclusion.

(92) Justice **Falkanger:** Likewise.

(93) Justice **Ringnes:** Likewise.

(94) Justice **Webster:** Likewise.

The Supreme Court gave the following

J U D G M E N T A N D O R D E R :

1. The Immigration Appeals Board's decision of 9 July 2020 not to reverse the decision of 10 March 2019 is invalid.

2. The request for a declaratory judgment for violation of the ECHR is inadmissible.

3. The State represented by the Immigration Appeals Board is liable for costs in the District Court, the Court of Appeal and the Supreme Court, and is to pay to B, C and A NOK 713 519 within two weeks of the service of the ruling.