SUPREME COURT OF NORWAY

J U D G M E N T

given on 15 April 2021 by the Supreme Court composed of

Justice Magnus Matningsdal
Justice Aage Thor Falkanger
Justice Knut H. Kallerud
Justice Arne Ringnes
Justice Cecilie Østensen Berglund

HR-2021-797-A, (case no. 20-182212STR-HRET)
Appeal against Borgarting Court of Appeal's judgment 20 August 2020

X AS	(Counsel Brynjulf Risnes)
v.	
The Public Prosecution Authority	(Counsel Kristian Jarland)

This is a translation of the ruling given in Norwegian. The translation is provided for information purposes only.

(1) Justice **Ringnes:**

Issues and background

(2) The case concerns the question whether an enterprise penalty may be imposed on a limited liability company for having employed a foreign national without a residence and work permit in Norway, see section 28 cf. section 27 of the Penal Code cf. section 108 subsection 3 (a) of the Immigration Act.

(3) X AS was incorporated in August 2018 by A, who is the chair and owner of all the shares in the company. The intention was to help her friend B to start a business of his own.

(4) B did not have a residence and work permit in Norway. He was expelled and escorted to Iran on 26 February 2009 after his application for a work permit under family reunion had been finally rejected. In October 2009, he returned to Norway. The Directorate of Immigration rejected his application for asylum and residence on humanitarian grounds, and the rejection was upheld by the Immigration Appeals Board on 27 June 2012. Subsequent applications for revocation have failed.

(5) B was employed as general manager in X AS from 1 September 2018 until he was arrested by the National Police Immigration Service 22 July 2019 during a control. He was sent back to Iran two days after his arrest.

(6) An optional penalty writ (*forelegg*) was issued to X AS for violation of section 108 subsection 3 (a) of the Immigration Act. The basis for the optional penalty writ is described as follows:

> "During the period from Saturday 1 September 2018 until 22 July 2019 at --- in Oslo, B was employed with X AS despite the lack of a work permit."

(7) X AS did not accept the optional penalty writ, and it was brought before the District Court for adjudication and took the place of an indictment, see section 268 of the Criminal Procedure Act.

(8) X AS was acquitted by Oslo District Court's judgment 16 January 2020. The District Court concluded

> "… that in a case like the present where it is clear who has committed the criminal act, it will normally determine whether the enterprise should be punished that the person meets the requirement of subjective culpability as is required in the penal provision that has been violated."

(9) The company was acquitted because the chair, A, had not met the culpability requirement in section 108 subsection 3 (a) of the Immigration Act on gross negligence. The District Court also found that B, in the capacity of general manager, had not acted "on behalf of" X AS, see section 27 of the Penal Code, when working in the company despite the lack of a residence and work permit.

(10) On 20 August 2020, Borgarting Court of Appeal ruled as follows:

> "X AS, organisation number 000000000, is convicted of violation of section 108 subsection 3 (a) of the Immigration Act, cf. section 27 of the Penal Code, and ordered to pay a fine of NOK 250 000 – twohundredandfiftythousand."

(11) The Court of Appeal endorsed the District Court's legal starting point and found, like the District Court, that an enterprise penalty could not be based on A's conduct, as she had not acted with gross negligence. However, the Court of Appeal found that an enterprise penalty was appropriate, as B, in the capacity of general manager, had acted on behalf of the company and exercised gross negligence.

(12) X AS has appealed to the Supreme Court, challenging the application of the law in the determination of guilt, in the question of criminal liability and when measuring the sentence.

(13) The hearing has been held by video conference in accordance with section 3 of Temporary Act of 26 May 2020 No. 47 on adjustments to the procedural set of rules as a consequence of the Covid-19 outbreak.

My opinion

Can criminal liability be based on A's conduct if she has not acted grossly negligently with regard to B's lack of residence and work permits?

(14) Section 27 subsection 1 of the Penal Code reads:

> "When a penal provision is violated by a person who has acted on behalf of an enterprise, the enterprise is liable to punishment. This applies even if no single person meets the culpability or the accountability requirement, see section 20."

(15) The penal provision on which the indictment is based, is section 108 subsection 3 (a) of the Immigration Act, which prescribes punishment for any person who "with intent or gross negligence makes use of a foreign national's labour when the foreign national does not hold the permit required under the Act".

(16) Section 27 replaced section 48a in the Penal Code 1902. Unlike section 27, section 48a set out that the enterprise can be punished "even if no single person *can be punished* for the violation" (emphasis added). This wording implied that the provision could also cover anonymous and cumulative errors. When a known single person acted on behalf of the enterprise, an enterprise penalty could not be imposed unless that person had exercised such subjective culpability as the penal provision required, see the Supreme Court ruling in Rt-2002-1312 on page 1318 with a further reference to the preparatory works. The Supreme Court has not examined whether that was applicable also in other contexts.

(17) In the preparatory works to section 27 of the Penal Code, the provision in subsection 1 second sentence that an enterprise penalty may be imposed even when no single person meets the culpability requirement, is justified as follows, see Proposition to the Odelsting no. 90 (2003–2004) page 242:

> "The Ministry proposes in this Proposition that intent must be the primary form of culpability for personal criminal liability, and that gross negligence as a starting point is necessary where liability for negligence is preferred. If such culpability requirements are to apply also to enterprise penalties, the possibility to impose such a penalty will be more limited than under the current status of the law …
>
> The Ministry finds that operating with enterprise penalties has worked well, and considers an effective enterprise penalty an important factor in the new Penal Code. In the Ministry's view, it would be unfortunate if the fact that an individual perpetrator cannot be punished due to lack of culpability should always have the effect that a penalty cannot be imposed on the enterprise on whose behalf the person has acted. The Ministry would also consider it unfortunate if the rules on subjective culpability proposed in the Proposition should limit the possibility to impose an enterprise penalty. Against this background, the Ministry proposes that it shall not be a condition for imposing an enterprise penalty that persons having acted on behalf of the enterprise meet the requirement of subjective culpability and that no such requirement shall apply in connection with anonymous or cumulative errors. But an enterprise penalty should not – as is currently the case – be possible if the violation appears to be an unforeseen accident or a result of force majeure."

(18) After the quoted passage, it is set out that the level of culpability is significant to the question whether an enterprise penalty "should" be imposed in the individual case. However, no provision to this effect was established in section 28. By an amendment of 19 June 2009 no. 74, however, it was added in section 28 b that emphasis must be placed on "whether a person acting on behalf of the enterprise has acted culpably". The purpose stated in the preparatory works was "to maintain the considerations behind the presumption of innocence in Article 6 (2) of the ECHR and Article 14 (2) of the SP", see Proposition to the Odelsting no. 22 (2008–2009) page 397.

(19) Hence, according to the wording in section 27 and the preparatory works to the provision, strict criminal liability applies to enterprises, but exceptions must be made for unforeseen accidents and force majeure. As the case stands, I have no reason to discuss the interpretation of this exception.

(20) The question is whether such strict liability is compatible with the concept of criminal liability under Article 6 no. 2 and Article 7 of the European Convention on Human Rights (ECHR), as currently established in the Grand Chamber judgment by the European Court of Human of 28 June 2018 *G.I.E.M. S.r.l. and Others versus Italia*.

(21) In this case, three applications had been joined. They all concerned the state's confiscation of property developed in conflict with Italy's nature conservation law. Italian law did not prescribe punishment for legal persons, and confiscation could be carried out regardless of any culpability of persons representing the companies responsible for the illegal building. From paragraph 241, the judgment deals with the conditions for punishment under Article 7 of the ECHR. In paragraph 241, the Grand Chamber bases itself on judgment 20 January 2009 *Sud Fondi S.r.l. and Others versus Italy* and refers to paragraph 116 therein, which reads:

> "As regards the Convention, Article 7 does not expressly mention any mental link between the material element of the offence and the person deemed to have committed it. Nevertheless, the rationale of the sentence and punishment, and the 'guilty' concept (in the English version) and the corresponding notion of '*personne coupable*' (in the French version), support an interpretation whereby Article 7 requires, for the purposes of

> punishment, an intellectual link (awareness and intent) disclosing an element of liability in the conduct of the perpetrator of the offence, failing which the penalty will be unjustified."

(22) Then, the Grand Chamber states in paragraph 242:

> "The Grand Chamber endorses the analysis to the effect that the rationale of the sentence and punishment, and the 'guilty' concept (in the English version) with the corresponding notion of '*personne coupable*' (in the French version), support an interpretation whereby Article 7 requires, for the purposes of punishment, a mental link."

(23) The Grand Chamber's statements imply, as I understand them, that it is a condition for punishment that the perpetrator has met the requirement of subjective culpability. In other words, punishment cannot be imposed on purely objective grounds. But the judgment can hardly be interpreted so as to prevent the use of certain objective requirements for criminal liability, such as that in section 22 subsection 4 of the Road Traffic Act concerning mistaken belief with regard to the concentration of alcohol, see Matningsdal *Straffeloven* [the Penal Code] Commentary, section 21 note 5, Juridika, revised 1 July 2020.

(24) The consequence of the Grand Chamber judgment is thus that section 27 cannot be applied in accordance with its wording and the precondition of strict liability in the preparatory works. However, the Court of Appeal has assumed that an enterprise penalty in this case necessitates gross negligence, as that is the culpability requirement in section 108 subsection 3 (a) of the Immigration Act. I disagree with that being the consequence of the Grand Chamber judgment, according to which a "mental link" is required between the act and the factual circumstances that demonstrates criminal liability. This condition will also be met if an enterprise penalty can be imposed in connection with ordinary negligence. I also mention that according to section 3 of the Human Rights Act, the provisions in the ECHR shall take precedence over any other provisions in Norwegian legislation "that conflict with them". Gross negligence is therefore not needed to eliminate the conflict. When, moreover, the preparatory works clearly show that the legislative intent was to establish objective criminal liability, this must be decisive, and not the fact that the culpability requirement differs depending on whether it concerns an enterprise or a physical person. Of interest here, is also the corresponding solution in the Supreme Court's plenary ruling in Rt-2005-833 paragraph 88 concerning section 195 subsection 3 of the Penal Code 1902, stating that mistaken belief with regard to the age of the aggrieved person does not preclude criminal liability.

The question whether the chair, A, has acted negligently

(25) The defence counsel contends that the Court of Appeal's judgment must be set aside if the Supreme Court finds that A's negligence is decisive. I do not agree. The Court of Appeal has made a thorough assessment of A's guilt. The majority – the professional judges and four lay judges – found "after an overall assessment, with some doubt" that A's

> "… failure to verify whether B had a work permit may in this case be considered negligent, but not grossly negligent."

(26) The majority emphasised employers' strict responsibility to verify whether the foreign employees have a right to work in Norway. On the other hand, several factors indicated that A had reason to rely on B's information that he had a work permit in Norway, including that he was a registered employee and had a tax card.

(27) I agree that A acted negligently when failing to verify B's work permit, but that this negligence, based on the facts highlighted by the majority of the Court of Appeal, cannot be characterised as gross. The objective requirements for criminal liability in section 108 subsection 3 (a) of the Immigration Act are also present, which means that all requirements for imposing an enterprise penalty are met.

The question whether an enterprise penalty should be imposed

(28) Section 28 of the Penal Code provides a list of factors to be considered when deciding whether the enterprise should be punished under section 27, and in connection with sentencing.

(29) The defence counsel has remarked that section 108 subsection 3 (a) of the Immigration Act is aimed at non-serious players making use of cheap foreign labour, and that this factor is not present in the case at hand. It is noted that A hired B to help him into employment, that he has received an appropriate salary and that tax has been deducted. In the light of this, it is contended that neither the preventive effect of the penalty, see section 28 (a) of the Penal Code, nor the severity of the offence, see (b), suggests an enterprise penalty.

(30) The penal provision in section 108 subsection 3 (a) of the Immigration Act is "clearly aimed at employers that systematically use cheap labour by foreign nationals without necessary permits", see Norwegian Official Report 2004: 20 page 361. However, its area of application is not limited to this.

(31) The requirement in section 55 of the Immigration Act of a residence permit in order to take up employment is essential in Norwegian immigration policy, and the Immigration Act's prohibition against the use of illegal labour is to safeguard important immigration policy considerations. Use of illegal labour is also hard to disclose, and considerations of general deterrence stand out in the assessment of whether an enterprise penalty should be imposed on businesses making use of the labour of foreign nationals residing unlawfully in Norway.

(32) I my view, these considerations are crucial, and I conclude at an enterprise penalty should be imposed on X AS. I will return to the significance of some of the factors in section 28 of the Penal Code in my assessment of the size of the fine.

The size of the fine

(33) The fine stated in the optional penalty writ was NOK 25 000. The optional penalty writ also contained the following information:

> "The fine stated in the optional penalty writ is conditional on acceptance of the optional penalty writ. This means that the fine is the result of a sentence discount granted on those grounds.
>
> X AS is informed that if the optional penalty writ is not accepted, which means that the case will be decided in court, the sentence discount is lost. The court will be requested to set the fine at NOK 30 000, and costs to the public authorities will be demanded in addition".

(34) The defence counsel has stated before the Supreme Court that he was called by the prosecutor the day before the main hearing and notified that the District Court would be requested to set the fine at NOK 500 000. The same amount was requested in the Court of Appeal.

(35) The court is not bound by the Public Prosecution Authority's contentions, see section 38 subsection 2 second sentence of the Criminal Procedure Act. It also follows from the Supreme Court's grand chamber judgment in Rt-2009-1336 that the court is not bound by the Public Prosecution Authority's pledge to request a certain penalty in return for the person charged pleading guilty.

(36) The rule must be that neither the court nor the Public Prosecution Authority is bound by the amounts stated in an optional penalty writ. The vast majority of criminal cases are decided temporarily by an optional penalty writ, which is an offer-and-acceptance system different from sentencing. When deciding whether to accept the penalty writ, the person charged may normally expect that the Public Prosecution Authority will request a penalty in line with what it is stated the optional penalty writ. The person charged should also be able to trust that the Public Prosecution Authority has made a thorough assessment not only of the requirements for criminal liability, but also of what is an appropriate fine, so that he may have an idea of the risk of not accepting the optional penalty writ. In my view, this implies that the amount set forth in the penalty writ should be attributed large weight.

(37) In the case at hand, as mentioned, the company was offered to accept a fine of NOK 25 000, and notified of the Public Prosecution Authority's intent to request a fine of NOK 30 000 if the case had to be decided in court. Nonetheless, in the District Court and the Court of Appeal, the Public Prosecution Authority requested an amount almost 17 times the amount stated in the optional penalty writ. This increase was due to the Public Prosecution Authority's failure to consider Oslo Police District's fines directive when issuing the optional penalty writ. The Public Prosecution Authority thus abandoned a "pledge" that the company had a reasonable expectation to rely on.

(38) Even though the Public Prosecution Authority is not formally bound, it should at least at the outset be precluded from changing the amount signalled in the optional penalty writ. This situation would be different if it should turn out that the factual circumstances vary considerably from those forming the basis for the Public Prosecution Authority's optional penalty writ. In my view, the fact that an internal directive has been overseen clearly does not mean that the Public Prosecution Authority is free to change its view. I will emphasise this when setting the fine in the case at hand, even though the court is not bound by the amount signalled in the optional penalty writ.

(39) As for the size of the fine, I also note that B received appropriate salary, and that tax deductions were made. The company thus obtained no financial benefits, and the employment relationship bore no signs of exploitation. The chair, A, has not acted with gross negligence. The consideration of the severity of the offence and the level of culpability, see section 28 (b), therefore suggests that the fine should not be set too high. Nor can I see that the other factors mentioned in section 28 indicate a high fine.

(40) Against this background, the fine should be set at the amount stated in the optional penalty writ – NOK 30 000.

Conclusion

(41) I have arrived at the conclusion that X AS should be ordered to pay an enterprise penalty of NOK 30 000.

(42) I vote for the following

J U D G M E N T :

The Court of Appeal's judgment is changed, as the fine is set to NOK 30 000 – thirty thousand.

(43) Justice **Falkanger:** I agree with Justice Ringnes in all material respects and with his conclusion.

(44) Justice **Kallerud:** Likewise.

(45) Justice **Østensen Berglund:** Likewise.

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

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

J U D G M E N T :

The Court of Appeal's judgment is changed, as the fine is set to NOK 30 000 – thirty thousand.