SUPREME COURT OF NORWAY

J U D G M E N T

given on 19 December 2022 by a division of the Supreme Court composed of

Justice Ragnhild Noer
Justice Arne Ringnes
Justice Ingvald Falch
Justice Espen Bergh
Justice Erik Thyness

HR-2022-2418-A, (case no. 22-069974STR-HRET)
Appeal against Borgarting Court of Appeal's judgment 6 April 2022

I	
A	(Counsel Magnus André Nordhus, Nils Christian Nordhus)
v.	
The Public Prosecution Authority	(Counsel Geir Evanger)
II.	
The Public Prosecution Authority	(Counsel Geir Evanger)
mot	
A	(Counsel Magnus André Nordhus, Nils Christian Nordhus

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 raises the question of whether housework and childcare in Syria while cohabiting with spouses who were members of the terrorist organization ISIS is punishable as participation in a terrorist organisation, and, if so, of what is the correct punishment for the offense.

(3) On 4 February 2021, A, formerly B, was indicted for violation of section 147 d of the Penal Code for the period from 21 June 2013 until 30 September 2015, and for violation of section 136 a of the Penal Code 2005 for the period from 1 October 2015. The provisions prescribe punishment for any person who "participates in … a terrorist organisation". The basis for the indictment reads:

> "During the period from June 2013 to March 2019 in Syria, she participated in the terrorist organisation ISIS. After she had travelled from Norway to Syria in the winter of 2013, she moved in with her husband C, with whom she later had a child. C had joined and sworn allegiance to ISIS, and he took part in armed missions for the organisation. By looking after their child and carrying out various tasks at home, she made it possible for C to take an active part in fighting for ISIS. While being married to C, she also spoke positively about ISIS and life in Syria to women in Norway with the aim of persuading them to marry foreign fighters in the organisation. After C died while manufacturing bombs for ISIS in April 2015, she received financial support from the organisation for a period until she, in late autumn 2015, married and had a child with D, who was also a member of ISIS. D participated actively in armed missions for the organisation in addition to being a Sharia judge in ISIS. By looking after their child and carrying out various tasks at home, she also facilitated D's active fighting for ISIS. After D died in battle in March 2017, she married E, who was also an ISIS member and a friend of D. During the entire period until she was removed by Kurdish forces and brought to the Al Hol camp, she stayed in an ISIS controlled area together with people affiliated with the organisation."

(4) The prosecutor has stated that the part where she, while being married to C, "spoke positively about ISIS and life in Syria to women in Norway with the aim of persuading them to marry foreign fighters in the organisation", was not a topic during the proceedings in the District Court and the Court of Appeal.

(5) On 4 May 2021, Oslo District Court convicted the defendant according to the indictment and sentenced her to three years and six months of imprisonment. The reasoning was that she had been "a supporter who facilitated jihad (holy war), provided good care at home for her three husbands and made it possible to foster the next generation of ISIS recruits". The defendant had "made active and qualified contributions to upholding the terrorist organisation". Neither necessity nor the ordinary unlawfulness reservation was applicable in the District Court's opinion.

(6) A appealed against the District Court's judgment to the Court of Appeal. The appeal challenged the findings of fact and the application of the law in the issue of guilt, the procedure (flawed reasoning) and the sentence. The appeal proceeded to a hearing.

(7) On 6 April 2022, Borgarting Court of Appeal handed down a judgment sentencing the defendant to two years and six months of imprisonment. The conclusion of the judgment reads:

> "A, born 00.00.1990, is convicted of violation of section 147 d see section 12 subsection 1 (3) (a) the Penal Code 1902 and section 136 a, cf. section 5 subsection 1 (a), cf. (10) of the Penal Code 2005 and sentenced to two years and six months of imprisonment.
>
> A deduction of 402 days is granted for time spent in custody on remand."

(8) The Court of Appeal's majority – consisting of two professional judges and three lay judges – found that the defendant's actions met the requirement for participation in a terrorist organisation in section 147 d of the Penal Code 1902 and section 136 a of the current Penal Code, and that she acted with intent. A minority of two lay judges found that her role as a wife with responsibility for housework and childcare was not covered by the concept of participation in these penal provisions, and that she should be acquitted.

(9) The Court of Appeal was also divided in its assessment of the duration of the criminal offense, which was dealt with as part of the sentencing issue. A majority of six judges found that the defendant from April 2015, when her husband C died, had been a victim of human trafficking. A majority of four judges – two professional judges and two lay judges – found that A was in a state of necessity from this point, and that the criminal offence ceased in April 2015. When determining the sentence, this majority gave mitigating weight to the fact that the defendant involuntarily lived with C from the turn of the year 2013/2014 until he died in April 2015.

(10) Two lay judges pointed out that the defendant was in a forced situation from the turn of the year 2013/2014, and that the criminal offence ceased from this point. One lay judge concluded that the defendant had been Syria of her own free will during the entire period, and that necessity could not be claimed for any part of the duration.

(11) A has appealed the Court of Appeal's judgment to the Supreme Court. The appeal challenges the application of the law in the issue of guilt, the Court of Appeal's procedure and the sentence. The Public Prosecution Authority has submitted a cross-appeal challenging the sentence, including the application of the law in the issue of punishment.

(12) The Supreme Court's Appeals Selection Committee has granted leave to appeal as concerns the Court of Appeal's application of the law, the sentence and to some extent the procedure. The Public Prosecution Authority's cross-appeal has also proceeded.

My opinion

Facts

(13) The Court of Appeal has given this general description of the facts:

> "The overall facts of the case are not in dispute. In 2011, A became associated with Islam Net and in 2012, with *Profetens Umma* [the Prophet's Ummah]. In connection with that, she met C, who was a leading figure in *Profetens Ummah*. C travelled to Syria in October 2012. In January 2013, A and C married religiously over the internet. In February 2013,

> A also travelled to Syria. She lived with C in various places in Syria and gave birth to a son in November 2014. C died in April 2015. In September 2015, A married D from Egypt, who was a Sharia judge. In August 2016, A had a daughter. D died in March 2017. In September 2017, A married E, who was also from Egypt. A moved around a lot in Syria as ISIS was driven back by Syrian forces. She ended up in Baghouz, which is located in southeastern Syria, near the border with Iraq. In March 2019, A came to the Al-Hol refugee camp, in northeastern Syria. In January 2020, A came to Norway."

The concept of participation in section 147 d of the Penal Code 1902 / section 136 a of the Penal Code 2005

(14) Section 147 d of the Penal Code 1902 reads:

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

(15) The provision was added by Act of 21 June 2013 no. 85 and entered into force on the same day. Section 147 d was later replaced by the identical provision in section 136 a of the Penal Code 2005. Participation is not punishable under any of the provisions. The indictment describes a continuous criminal offence, and section 136 a is applicable to the parts of the offence committed after the new Penal Code entered into force on 1 October 2015, see section 3 of the Penal Code.

(16) The provisions apply to acts committed abroad by a Norwegian national, see section 12 subsection 1 (3) (a) of the Penal Code 1902 and section 5 subsection 1 (a) of the Penal Code 2005, cf. (10).

(17) Possible criminalisation of participation in terrorist organisations was discussed in 2007, but no bill was proposed. The reason was that such a provision would raise fundamental concerns and be difficult to enforce, see Proposition to the Storting 131 L (2012–2013) page 36 with further reference to Proposition to the Odelsting No. 8 (2007–2008).

(18) Based on a revised view from the Norwegian Police Security Service (PST), the issue was raised once again in 2012. I refer to the account of the legislative history in HR-2018-1650-A paragraphs 29 to 31. The Ministry's assessment of the need to criminalise participation in a terrorist organisation is found in Proposition to the Storting 131 L (2012–2013) on page 41:

> "Terrorism must be fought and terrorist acts must be prevented. Therefore, the Ministry finds that it is important to counteract terrorist organisations. In this Proposition, it is therefore proposed to criminalise qualified participation in terrorist organisations, see draft section 147 d to the Penal Code 1902 and section 136 a to the Penal Code 2005. The bill is primarily a supplement to existing provisions covering persons who commit or are planning to commit a terrorist act. This is aimed at those who in various ways contribute to creating and upholding a terrorist organisation, for instance by recruiting members, managing, or providing material support."

(19) The Ministry continues by stating that "[t]errorist organisations are considered a large threat to public security and democratic values", and counteracting the existence of terrorist organisations is "a crucial measure to prevent terrorist acts".

(20) The content of the condition for criminal liability "participates in" is summarised in the mentioned judgment HR-2018-1650-A paragraph 46:

> "Against this background, I conclude that 'participates in' is a wide expression meant to cover various forms of contribution to the organisation's activities. The active contributions to the upholding of the terrorist organisation are the ones covered. As I understand the wording and the statements in the preparatory works, a person who only passively supports the organisation in the form of a 'membership' is not covered. Furthermore, my interpretation is that not any active contribution to the organisation is punishable. When both the Ministry and the Standing Committee on Justice hold that only 'qualified' participation is punishable under the option, it must mean that a threshold must be exceeded. Minor or peripheral contributions are not covered. Based on the statements in the preparatory works, this threshold is not very high. I see nothing that indicates that a membership or public support is a requirement for conviction for participation. Similarly, a contributor must be convicted of participation even if it cannot be proven that he or she, in whichever manner, has been accepted as a participant in the organisation."

(21) The preparatory works – Proposition to the Storting 131 (2012–2013) – mention more examples of acts that may be covered by the participation concept, see the comments on page 87:

> "Various forms of contribution to the organisation are covered. Participation is very wide-ranging, and may cover any person who procures weapons, digital equipment, chemicals or other tools to facilitate a terrorist act, but who is not so closely connected to the case that he or she can be punished for participation in the relevant act. Also, soliciting terrorist acts and inspiring others to attack may under the circumstances be included. Recruitment typically covers persuasion of people to participate. This does not apply to humanitarian aid to civilians in terrorist-controlled areas, for instance doctors working in hospitals in such areas. However, this is not obvious in cases where such activities are primarily carried out for recruitment purposes."

(22) On page 27, it is specified that no proposition is made to criminalise presence in a place where terrorist training is being carried out, for instance by journalists and "persons who have been lured there with no possibility to leave."

Whether caring for one's own children and housework should count as participation

(23) A main question is whether *caring for one's own children and housework* performed by the spouse of a participant in a terrorist organisation should count as participation in a terrorist organisation.

(24) In the light of the wording in section 147 d of the Penal Code 1902 and section 136 a of the Penal Code 2005, as well as the Supreme Court's interpretation of "participates in" in HR-2018-1650-A paragraph 46, there would be no conflict with the requirement of a legal basis if such acts were punishable under these penal provisions.

(25) The issue is not addressed in the Proposition. The examples mentioned in the preparatory works have little in common with housework and caring for one's own children. Nor do the preparatory works contain any assessment of the application of Article 8 of the European

Convention on Human Rights (ECHR) or other human rights obligations that emerge when activities related to home and family are criminalised, see section 2 of the Penal Code.

(26) In my view, the silence of the preparatory works cannot be taken as evidence that the legislature has meant that such activities should not generally be considered participation in a terrorist organisation. When the penal provision was prepared and adopted, it was – as far as I understand – not common that women travelled abroad to marry foreign fighters and take on domestic responsibilities there. The legislature therefore had no cause to discuss the issues raised in this regard.

(27) At the outset, the issue of whether caring for one's own children and performing various tasks at home are covered by the concept of participation must be assessed based on the general criteria laid down by the Supreme Court in HR-2018-1650-A paragraph 46. As stated there, "'participates in' … is a broad concept meant to cover various forms of contributions to the organisation's activities". It must involve active contributions to the upholding of the terrorist organisation. The contribution must be *qualified* – i.e. exceed a certain threshold – and minor or peripheral contributions are not covered.

(28) In addition to arguments regarding the wording, the legislative history and the preparatory works, the defence counsel has presented several sources of law supporting the view that housekeeping cannot under any circumstances be considered participation in a terrorist organisation.

(29) *First*, the defence counsel has referred to the Swedish consultation paper *Proposed amendment to the Terrorist Offences Act* (2022:000). A penal provision is proposed therein against participation in a terrorist organisation "in a manner suitable to promote, strengthen or support the organisation". The following arguments are presented on page 150:

> "When it comes to family matters, it should not be an offense merely to care for one's own children and manage one's own household. Educational elements within the limits of raising one's own child may hardly also constitute participation in a terrorist organisation (see also Article 8 of the European Convention on the right to protection of private and family life). However, taking care of the children of other members of the organisation in a way that is similar to day-to-day childcare or carrying out tasks in their household or teaching groups of children the terrorist organisation's ideology, would constitute participation."

(30) *Second*, the defence counsel has referred to a report from 2019 by the UN Special Rapporteur for Human Rights, setting out the following with regard to Belgium's anti-terrorism legislation that criminalises membership in a terrorist organisation:

> "The Special Rapporteur warns of expansive interpretations of the provision and stresses that conduct criminalized as a terrorist offence must be restricted to activities with a genuine link to the operation of terrorist groups. She highlights that construing support to terrorist organizations in an overbroad manner may effectively result in criminalizing family and other personal relationships. She notes that the support related to ensuring that a person enjoys 'minimum essential levels' of economic and social rights, including the rights to food, health and housing, should not be criminalized as support to terrorism. A's States cannot lawfully restrict these rights below the minimum core, this would run afoul of the State's obligations under international human rights law."

(31) *Third*, the defence counsel has referred to Erling Johannes Husabø, *Terrorism in Norwegian criminal law. An analysis of chapter 18 of the Penal Code,* 2018 chapter 10.6, pages 261 to 262. There, the author discusses the issue of restrictive interpretation of section 136 a based on the non-statutory unlawfulness reservation, and states the following on page 262:

> "A similar question is the extent to which family members may support a person whose participation in a terrorist organisation is known to them. As long as it involves help and support that is normal for a family, it would be unnatural to consider it material support to the actual terrorist organisation. Typical examples are cooking, laundry and looking after the children in the family. The doubt increases slightly if the family is far away and a family member sends equipment to a person who participates in a terrorist organisation. In such situations, actions such as sending warm clothes is more likely to be considered unlawful support to the organisation as well. On the other hand, ensuring food for one's own is such a basic family duty that it can hardly be considered unlawful. Nor does sending a good book to the person concerned contain elements of risk that section 136 a is meant to cover. However, sending equipment that is particularly suitable for carrying out acts of terrorism constitutes unlawful material support even if the recipient is a family member."

(32) The defence counsel has also invoked the "Riga Protocol" of 22 October 2015, a protocol to the Council of Europe Convention on the Prevention of Terrorism of 16 May 2005, and Directive (EU) 2017/541 of the European Parliament and the Council of 15 March 2017 on combating terrorism. However, these rules are of such a general nature that they give no guidance on the interpretation issue at hand. Finally, the defence counsel has invoked an order by the Federal Court of Justice of Germany of 22 March 2018, which also gives no significant guidance.

(33) Criminalisation of spouses' housework interferes with the right to respect for family life under Article 102 of the Constitution and Article 8 of the ECHR. The proportionality assessment under Article 8 (2) implies that a fair balance must be struck between national and public security and the right to respect for family life. This balancing of interests means – as it also appears from my quotes from foreign sources of law – that there is a high threshold for criminalising housework and childcare carried out by the wife of a foreign fighter.

(34) In my view, *caring for one's own children* cannot be considered participation in a terrorist organisation. Care and consideration for children constitute the core of parental responsibility, see section 30 of the Children Act. A criminalisation of this would be incompatible with the principle of the best interests of the child in Article 104 subsection 2 of the Constitution and in Article 3 of the Convention on the Rights of the Child, and with the right to respect for family life in Article 8 of the ECHR.

(35) Also, I cannot see that *the role as a wife and homemaker* – considered in isolation – is punishable as participation in a terrorist organisation. Marriage is at the core of family life, and affiliating oneself to a terrorist organisation through marriage is not, in itself, sufficient to constitute participation.

(36) In my view, however, *the role as a wife and homemaker may be included as an element* in a broader assessment of whether the defendant is a participant in the terrorist organisation in which her husband is participating as an active foreign fighter. This particularly true in situations where the defendant, in addition, supports her husband's terrorist activities. Depending on the circumstances, the contribution may then become so extensive that her

overall conduct must be considered active support for terrorist activities, and thus a *qualified contribution* to the upholding of the terrorist organisation.

(37) The criminal liability must be based on an individual and nuanced assessment in the light of the purpose of the defendant's actions and the context in which they are committed. In this regard, the Court of Appeal emphasises the features and structure of the relevant terrorist organisation and the circumstances surrounding the defendant's contributions. I agree that these are crucial factors in the assessment.

(38) The purpose of the penal provision is both to prevent participation and other support to terrorist organisations abroad and to prevent extremist violence upon return to Norway, see HR-2016-1422-A paragraph 16. ISIS – the organisation in question – is a terrorist organisation responsible for gruesome actions. It has created fear and suffering and is regarded as one of the worst terrorist organisations of our time. If the defendant's actions, after an individual and overall assessment, must be considered a sufficiently qualified contribution to the upholding of this terrorist organisation, the consideration of combating terrorism should be decisive in the proportionality assessment under Article 8 (2) of the ECHR.

Individual assessment

Life with C from 21 June 2013 to the turn of the year 2013/2014

(39) I will first assess whether the defendant's tasks and role from 21 June 2013 – when section 147 d of the Penal Code 1902 entered into force – and until the turn of the year 2013/2014 are covered by the objective substance of the offence in the provision. From this turn of the year, the defendant's situation changed radically, which is significant for the application of the law. I will return to this.

(40) Before I assess whether the conditions for criminal liability are met, I will reproduce parts of the Court of Appeal's description of the defendant's background and development until she travelled to Syria. The following is set out in the judgment:

> "A was born in Pakistan 00.00.1990 and came to Norway with her family in 1995. She is the oldest of five children. She went to Rommen elementary and lower secondary school. She graduated at Sogn High School in scientific subjects. Then, in 2010, she started her studies at Oslo Met.
>
> According to A, she became affiliated with Islam Net in the spring of 2011, where she was gradually given various responsibilities. Religion became important to her after she joined Islam Net, and she started wearing a hijab and all-covering clothes. In 2011, she was F's girlfriend for a couple of months.
>
> In the spring of 2012, she left Islam Net and joined *Profetens Ummah*. There, she became a follower of Salafi-jihadism, an ideology based on a literalistic interpretation of the Koran. It was through *Profetens Ummah* that A met C, who was a key person in the group. A has stated that she and C became a couple in the late summer of 2012, and that C proposed to her before he went to Syria in October 2012. A's father, G, did not consent to her marrying C.

> A once again came in touch with C in November 2012, and they had many long conversations on the phone/Skype. She was aware that C had joined the Nusra Front, and that he participated in battles for them against the Assad regime. Among other things, C told A that he had participated in the beheading of a general in the Assad forces. She was pleased about this and supported it. She had not heard of ISIS.
>
> During the conversations with C in November and December 2012, she decided to travel to Syria. She was very much in love with C and wanted to help him in his fight by being with him in Syria. She also wanted to do something for the Syrian population, including opening an orphanage. C had been negative about this, but she hoped that she would be able to discuss it with him after she arrived. Another purpose of going to Syria was that she wanted to do hijra, which means moving from the unbelievers to the believers.
>
> In a police interview, A has stated that she believed an Islamic state – a caliphate – would soon be established. However, before the Court of Appeal, she stressed that an Islamic state governed by sharia is not the same as ISIS.
>
> A believes that she was aware that she had to wear a niqab in Syria. She knew she could not go out alone, without C accompanying her. She did not think she would be locked up. She thought she might be allowed to visit her family when she wanted."

(41) The Court of Appeal's summary reads:

> "The Court of Appeal finds it proven that A, before she travelled to Syria, had become strongly religious based on a literal interpretation of the Koran. She had joined *Profetens Ummah* whose rhetoric was violence-oriented. Overall, her postings on social media and the presented statements from her conversations with C show that A was strongly radicalised and accepted the use of extreme violence. She supported, and had envisioned, the creation of an Islamic state – a caliphate.
>
> A was aware that C had joined the Nusra Front in Syria, and that this organisation had been listed by the United States as a terrorist group and a branch of al-Qaeda. C had told her that in Syria, they would have a house with a garden, and maybe a car. A purpose of going to Syria was to support C in his fight with the Nusra Front against the Assad regime. She stated in the Court of Appeal that she felt that this was her fight, also for the Syrian population. Also, she wanted to do hijra by moving to a country where she could practice her faith based on a literal interpretation of the Koran. The Court of Appeal also assumes that she hoped to be able to help the Syrians in their fight against the Assad regime, concretised by her desire to establish an orphanage. She was, however, aware that C was negative about this and that she travelled to a society with strong restrictions on women's freedom of action and movement.
>
> Furthermore, the Court of Appeal assumes that she had no plans to return to Norway. She had moved for good. However, it cannot be taken as a fact that she burned all bridges to Norway, in the sense that she acknowledged that she would never see her family again, or that she would never get permission from C to travel back to Norway, neither for a visit or permanently."

(42) I add that C, in April/May 2013, shifted from the Nusra Front to ISIS. The Court of Appeal assumed that the defendant did not have a say in this decision, and that she cannot be considered to have agreed to it.

(43) It is clear that the requirements in section 147 d of the Penal Code 1902 for a *"terrorist organisation"* and that *"the organisation has taken steps to realise its purpose by illegal means"* are met. I endorse the Court of Appeal's summary in this regard:

> "The Court of Appeal believes [...] that both the Nusra Front and ISIS already in June 2013 were terrorist organisations that had taken steps to realise their objectives. Both organisations aimed to establish an Islamic state. However, ISIS was somewhat more brutal than the Nusra Front, as the Nusra Front in the short term was more focused on military combat against the Assad regime, and was not active outside Syria's borders."

(44) The question is then whether the defendant during the period from June 2013 until the turn of the year 2013/2014 was *a participant* in the terrorist organisation ISIS.

(45) The activities she carried out were ordinary housework – such as cleaning and cooking.

(46) The Court of Appeal's majority found, as mentioned, that the defendant was a participant, with this justification:

> "The majority of the Court of Appeal, Judge Lund, Judge Wiettemann and lay judges Muribø, Thorstensen and Bjørnbak, point to the fact that it has been proven that A wanted to perform hijra, so that one of her purposes of moving to Syria was to exercise her faith based on a strictly conservative and literal interpretation of the Koran. She was affiliated with *Profetens Ummah*, which supported violent struggle and terrorist acts to impose Islamic rule based on Sharia. She also supported the Nusra Front, which, in the same way as ISIS, was a terrorist organisation with the exercise of violence as an essential tool. She travelled to Syria to support C, who was a foreign fighter, in his combat with the Nusra Front against the Assad regime. She considered this her mission. She was aware that in Syria, she would be absorbed into a patriarchal system and subjected to C in marriage, and that women in society had strong restrictions on their freedom of action and movement, so that her main task would be housekeeping. She knew that she and C would have a house down there.
>
> Both ISIS and the Nusra Front were terrorist organisations, see the Court of Appeal's previous account of this. Before she travelled, A was aware that the United States had put the organisation on its terrorist list. In May 2013, the Nusra Front was also listed as a terrorist organisation by the UN. Both ISIS and the Nusra Front were based on a strongly conservative religious practice, involving holy war (jihad) against the infidels with extensive use of violence. A's form of participation in a terrorist organisation did not change by C's shift to ISIS. The majority of the Court of Appeal has found it proven that she voluntarily stayed in an ISIS controlled area even after C went over to ISIS, and after section 147 d of the Penal Code 1902 entered into force. This took place on the same terms as when she travelled. She still supported C's mission as a foreign fighter and contributed in the same manner. In the majority's view, it is therefore not relevant to the issue of guilt that A travelled to Syria before the criminal ban entered into force and that she, when travelling, was planning to join the Nusra Front, not ISIS.
>
> At the outset, the majority of the Court of Appeal believes that travelling to and staying in Syria on such terms imply that a person becomes a participant in a terrorist organisation. This is something completely different and goes beyond simply being present as a wife of a participant in an illegal organisation, carrying out ordinary marital duties such as housework and childcare. By travelling to an area in Syria controlled by the Nusra Front, A actively associated herself with a terrorist organisation. When an Islamic state is to be created based on a puritanical and literal interpretation of the Koran, it is also important that all roles necessary to achieve this be fulfilled, including those of a wife and mother.

> Thus, in the majority's view, A cannot avoid being considered a participant by pointing out that she did not participate in specific acts of terrorism, but only did housework. The way the terrorist organisation was structured, A became a participant according to section 136 a of the Penal Code by traveling to an area in Syria controlled by the organisation, to live with and support a foreign fighter and the society to which they belonged."

(47) I agree with this conclusion and mainly also with the majority's reasoning. In my view, these are the central facts:

(48) The defendant travelled to Syria with the purpose of supporting C's mission as a foreign fighter. In that respect, she made an active and voluntary choice to affiliate herself with a terrorist organisation. As set out in my quote from the Court of Appeal's judgment, her "form of participation in a terrorist organisation […] did not change by C's transfer to ISIS". And after the penal provision on participation entered into force 21 June 2013, she voluntarily chose to continue supporting C. The Court of Appeal found that "[s]he still supported C's mission as a foreign fighter, and she contributed in the same manner". This support was carried out by filling the important role assigned to women in ISIS. Here, I refer to the expert report from Professor Brynjar Lie, of which the Court of Appeal has quoted parts:

> "Under ISIS's caliphate, women travelling from abroad were primarily to take on the role of a homemaker and mother. This was not presented as a passive role in the shadows of ISIS's male fighters. On the contrary, the women were constantly singled out as invaluable supporters who 'made jihad possible', who laid the foundations not only for ISIS's male recruits to be well looked after at home and highly motivated to participate at the front, but also for a new generation of jihadists who could fill the ranks of the fallen ISIS fighters. Being the faithful wife of ISIS's mujahideen and raising the next generation of ISIS recruits were among these women's most important roles …"

(49) Thus, the defendant's role and task in the terrorist organisation were to provide vital support to the foreign fighter C by doing housework and taking good care of him at home. In my view, the Court of Appeal is accurate in stating that "[t]his is something completely different and goes beyond simply being present as a wife of a participant in an illegal organisation, carrying out ordinary marital duties such as housework and childcare".

(50) In the light of the structure of ISIS and the women's role in it, and in the light of the defendant's express support of C, I find that her actions constituted active and qualified contributions to the upholding of the terrorist organisation, see the summary in HR-2018-1650-A paragraph 46, and that the requirement in section 147 d for participation in a terrorist organisation was met during this period.

Life with C from the turn of the year 2013/2014 to April 2015

(51) At the turn of the year 2013/2014, the defendant wished to travel home to Norway, and she actively tried to make this happen. The Court of Appeal states that she, together with her father, made several plans to exit Syria. However, her attempts to leave failed because C did not permit it. Briefly put, her life with her husband went from voluntary to involuntary.

(52) She did continue to carry out tasks as a homemaker, but this was a result of coercion and not free will. The consequence is, as I understand the Court of Appeal's findings of fact, that her support of her husband's mission as a foreign fighter then fell into the background or possibly disappeared completely. All that was left were the domestic tasks.

(53) As I have now demonstrated, the defendant's participation during the preceding period must be considered to be at the lower end of what is punishable under section 147 d. On those grounds, I find that the defendant's actions during the period from the turn of the year 2013/2014 and until C died in April 2015, were not sufficiently qualified to give rise to criminal liability for participation.

The period from April 2015 to March 2019

(54) The Court of Appeal found that A was a victim of trafficking from C's death in April 2015 until she arrived at the Al Hol camp in March 2019, and that, due to necessity, she was not criminally liable. The conclusion was thus that the criminal offence ceased in April 2015. In the Supreme Court, the Public Prosecution Authority agrees that A was a victim of trafficking during this period, but that this is not sufficient to avoid punishment. In the Public Prosecution Authority's view, the fact that she was a victim of trafficking can only be considered a mitigating factor in connection with the sentencing for this period.

(55) The Court of Appeal's majority has given this description of the defendant's situation after C died:

> However, the majority of the Court of Appeal finds that from April 2015 – when C died – A must be considered to have been a victim of trafficking, in that she was exploited or coerced into forced labour. After C died, she tried once again to leave Syria. However, that proved impossible. As a woman and widow with children in ISIS, she was clearly in a very vulnerable situation. To avoid punishment and being placed in the women's houses (the madhafas) or being forcibly married, she had no realistic choice but to remarry, in line with ISIS's philosophy, view of the role of women in society and the need to recruit women into building and upholding the state. She was held against her will in one of the worst terrorist organisations of our time. The majority of the Court of Appeal finds that when the role of a woman subordinate to her husband – with a severely limited freedom of action and movement and with a duty to do housework and look after children – is combined with the fact that she is detained and will face serious penalties if she tries to leave, this constitutes forced labour under section 257 of the Penal Code. This involves a form of coercion and exploitation of A for forced labour by ISIS that is covered by section 257 of the Penal Code. It is not necessary to point out any specific persons as responsible for the exploitation."

(56) It is not necessary for me to consider whether the defendant during this period was a victim of trafficking and whether she was in a situation of necessity, as the Court of Appeal concluded. Based on the description of her situation, it clear to me that she does not meet the requirement for participation in a terrorist organisation. I refer to my previous comments regarding the application of section 147 d from the turn of the year 2013/2014 when A lived together with C.

Summary

(57) My conclusion thus far is that the defendant must be considered a participant in a terrorist organisation, and is thus liable for punishment under section 147 d of the Penal Code 1902 for the six-month period she voluntarily stayed in Syria – from late June 2013 until the turn of the year 2013/2014. For the remainder of the indictment period, her stay was involuntary, and she can thus not be punished under this provision for this period.

The issue of exemption from punishment due to trafficking

(58) The defence counsel contends that the defendant must be acquitted because she was a victim of trafficking, invoking the "non-punishment" principle in Article 26 of the Council of Europe's Convention on Action against Trafficking in Human Beings. Norway has ratified the Convention, which has entered into force. Article 26 reads:

> "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so."

(59) First, I note that this international law principle does not entail a duty for the Parties not to indict or convict victims of trafficking. But the Parties have a responsibility to ensure a legal basis in national legislation to avoid that victims of trafficking are punished for unlawful activities committed under force, see Proposition to the Storting (2) (2007–2008) page 17. In this context, the Proposition mentions the two reasons for exemption, necessity and self-defence, and section 61 of the Penal Code regarding waiver of sentencing.

(60) To justify that the defendant was a victim of trafficking, the defence counsel has mentioned C's exploitation of her vulnerable situation for forced labour and sex, see section 224 subsection 1 of the Penal Code 1902.

(61) Based on my conclusion thus far, the question of whether the defendant was a victim of trafficking is only relevant for the period from June 2013 until the turn of the year 2013/2014 – the period for which she, in my view, falls under the concept of participation in section 147 d of the Penal Code 1902. During this period, the defendant was staying voluntarily in Syria, and her life with C was voluntary.

(62) The defence counsel contends that the victim's consent to exploitation is irrelevant for whether trafficking has occurred. I do not consider it necessary to elaborate on this aspect. In Proposition to the Odelsting No. 62 (2012–2003) page 109, it is stated that "[e]xploitation of a vulnerable situation means using situations to such an extent that the person concerned no longer has any real and acceptable choice, other than to submit to the 'principals'". As I understand the Court of Appeal's findings of fact, no such submission took place during the initial period. The defendant performed the tasks she had freely chosen and had no wish to escape.

(63) In my view, this is sufficient to conclude that the defendant during the period from June 2013 until the turn of the year 2013/2014 was not a victim of criminal trafficking. Hence, there is no reason to consider whether there is a reason for exempting her from punishment.

The procedural appeal: Should the Public Prosecution Authority have assessed whether the defendant was a victim of trafficking?

(64) The defence counsel's contention on this point is rooted in Article 4 of the ECHR and judgment from the European Court of Human Rights (ECtHR) of 16 February 2021 in *V.C.L and A.N v. the United Kingdom*. It follows from paragraph 160 of the judgment that the prosecution has a duty to assess whether a suspect has been a victim of trafficking as soon as there is a "credible suspicion" of this.

(65) The Public Prosecution Authority has pointed out that the case has demanded a broad investigation. A number of interviews have been held with the defendant and witnesses, and data obtained from communication control have been examined. In retrospect, the Public Prosecution Authority finds that much suggests that the PST and the Public Prosecution Authority should have paid more attention to the issue of victimhood, but that this has not been significant for the indictment issue.

(66) I confine myself to pointing out that the issue of trafficking has been a topic in all three court instances. A possible error during the investigation cannot be assumed to have affected the result to the detriment of the defendant.

(67) The defendant's contention of procedural errors cannot therefore succeed.

The sentence

(68) The maximum sentence for violation of section 147 d of the Penal Code is six years of imprisonment.

(69) In HR-2016-1422-A, the Supreme Court determined the sentence for two individuals who had joined ISIS in Syria as foreign fighters. The offence was committed over a period of 11 months – similar to the offence in our case. In paragraph 24, their role is described as follows:

> "… both swore allegiance to ISIS in the spring of 2013 and subjected themselves to the organisation's command. Their tasks was mainly of a military nature, they bore weapons and must be considered as foreign fighters. It has not been proven that they participated directly in acts of war."

(70) The third defendant had tried to send material support to a foreign fighter, including military clothes. Here, the sentence was initially set at six to seven months of imprisonment, see paragraph 33.

(71) In paragraph 18, the Supreme Court highlighted the duration of the participation, the tasks performed, the role of the organisation and which terrorist organisation it concerned. In the individual sentencing of the two foreign fighters, Justice Webster took as her starting point four years and six months of imprisonment, see paragraph 28, stating among other things that "[a]ffiliation with such an organisation as a foreign fighter suggests using the higher end of the punishment scale."

(72) The starting points for the sentencing in that case provide little guidance for the case at hand. Participation as a foreign fighter is considerably more severe than the role of the defendant in our case. Also, the duration of the offence is shorter – six months. Nor can I see how the

starting point for sentencing the person who tried to send clothes may be of guidance. This is an attempt to commit an act of a different and less serious nature than participation in ISIS.

(73) On the one hand, when determining the basis for the sentence, the seriousness of the crime must be emphasised and considerations of general deterrence must carry much weight. On the other hand, it is also significant that the defendant's contributions were modest and at the lower end of what constitutes participation under section 147 d, and that the offence was not particularly long lasting. Taken as a whole, I find at that two years and six months of imprisonment would be a correct starting point.

(74) I will now consider the mitigating circumstances, and start by mentioning that the defendant has cooperated with PST. The amount of information she has provided has contributed to clarification of the case, and also to clarification of other cases. This has been emphasised by the prosecutor, and must, in my opinion, be given significant weight.

(75) According to section 78 (g), it is also a mitigating factor if the offender himself/herself has been severely affected by the offence.

(76) There is no doubt that the consequences for the defendant of travelling to Syria and marrying C, and of assuming the role of a participant, have been extremely harsh. As accounted for, from the turn of the year 2013/2014, her stay in Syria was involuntary. For more than five years, she lived in a forced situation. The defendant has stated that C was violent towards her and abused her sexually, and that she repeatedly was forced to have sex also with her second husband. The Court of Appeal's majority found that the defendant from April 2015 – when C died – was a victim of trafficking, in that she was exploited for forced labour. As mentioned, the Public Prosecution Authority has supported this conclusion before the Supreme Court.

(77) It should also be mentioned in the overall picture that C, in August 2014, also married another Norwegian woman. Around the same time as the defendant gave birth to a son, the son of the other wife died, allegedly by injuries inflicted by C. This must have been a shock also for the defendant.

(78) In March 2019, the defendant arrived at the Al-Hol refugee camp, where she stayed until January 2020, when she came to Norway. I take as a fact that the conditions in this camp are dangerous and inhumane for both children and adults. According to information provided, the defendant is currently severely traumatised.

(79) I find it clear that the very harsh consequences the defendant has suffered for her actions over a long period must be given significant weight as a mitigating factor in the sentencing.

(80) Section 78 (h) of the Penal Code also presents good prospects for rehabilitation as a mitigating factor. In my view, this, too, implies a reduction in the sentence. I understand from the Court of Appeal's findings of fact that the defendant is now regretting her actions. When she came back from Syria, she consented to a care order for her two children. According to information provided, she cooperates well with the child welfare services.

(81) I emphasise that the defendant, through her efforts to escape from Syria to Norway, has contributed to giving her children a safe upbringing in Norway, and prevented them from living under harmful conditions in refugee camps.

(82) Another mitigating factor is that the offence was committed a long time ago, see section 78 (e), and that the defendant went to Syria and became affiliated with ISIS before participation in a terrorist organisation had been criminalised, see HR-2016-1422-A paragraph 29.

(83) Overall, I therefore find that a considerable deduction must be granted for mitigating factors. In my view, the appropriate sentence is one year and four months of imprisonment.

(84) A deduction of 402 days must be granted for pre-trial detention. It follows from section 60 subsection 1 first sentence of the Penal Code 1902 that the sentence may be deemed to be served in its entirety during this detention. In section 83 subsection 2 last sentence of the Penal Code, which is a continuation of previous case law, it is specified that this may be done "[e]ven if the deprivation of liberty was somewhat shorter than the imposed penalty". When assessing how much time is left of the sentence after a deduction is granted for time served in custody, there is no room to take into account the possibility of probationary release, see HR-2022-1303-A paragraph 32 with further references.

(85) After a deduction for the time the defendant has spent in custody on remand, around two and a half months of the sentence remain. In my view, the sentence should be deemed to have been served in its entirety through the deprivation of liberty.

Conclusion

(86) My conclusion is that the sentence should be set at one year and four months of imprisonment, which must be deemed to have been served in its entirety through the deprivation of liberty. For the sake of simplicity, I find it appropriate to draft a new judgment:

(87) I vote for this

J U D G M E N T :

A, born 00.00.1990, is convicted of violation of section 147 d of the Penal Code 1902, cf. section 12 subsection 1 (3) (a) and sentenced to one year and four months of imprisonment, which in its entirety is deemed to have been served through deprivation of liberty, see section 60 subsection 1 of the Penal Code 1902.

(88) Justice **Thyness**:

Dissent

(89) I have concluded that A should be acquitted.

(90) I agree with Justice Ringnes's general account of the concept of participation in section 147 d of the Penal Code 1902 and section 136 a of the Penal Code 2005, and that caring for one's own children is not covered by this. However, my opinion differs from his with respect to the significance of the role as a spouse/cohabitant and of doing housework in the shared home. In my view, this cannot be punished as participation in a terrorist organisation.

(91) Firstly, I refer to the *wording*. The provisions prescribe a penalty for anyone who "forms, participates in, recruits members into or provides financial or other material support to a terrorist organisation". The examples mentioned in the text imply that a certain proximity between the defendant's actions and the terrorist organisation's activities is required to establish criminal liability. I also refer to Justice Ringnes's statement, with reference to HR-2018-1650-A, that there must be active contributions to the maintenance of the terrorist organisation. Housework in one's own home does not, in my view, constitute a sufficiently direct and active contribution to the terrorist organisation.

(92) The way I read *the preparatory works*, they indicate the same. Proposition to the Storting 131 L (2012–2013) sets forth on page 87 that a participant in a terrorist organisation may be

> "… anyone who procures weapons, data materials, chemicals or other equipment for the purpose of committing a terrorist act, but without being so connected to the case that he or she can be punished for participation in the relevant act. Depending on the circumstances, this may include encouraging terrorist acts and inspiring others to carry out operations.

(93) The acts mentioned here are different from those involved in our case, in that they are directly linked to the activities of the terrorist organisation.

(94) Moreover, the preparatory works specify that only "*qualified forms*" of participation in a terrorist organisation are covered, see Proposition to the Storting 131 L in the special comments to section 147 d. In my view, leading an ordinary married life and doing housework in the shared home can hardly be considered a qualified form of participation in the terrorist organisation in which the spouse is active. For that, the link to the organisation's activities is too remote.

(95) In my assessment, I emphasise *the clarity requirement* in criminal law, see the Supreme Court judgment HR-2020-2019-A paragraphs 15–20. I do not find that ordinary married life and housekeeping are covered by a normal linguistic understanding of participation in a terrorist organisation, nor is this mentioned in the preparatory works. The question then is whether the clarity requirement is met. The requirement must be assumed to be particularly strong when people's fundamental rights are interfered with, here in the form of the right to respect for private life, see Article 102 of the Constitution and Article 8 of the ECHR.

(96) Moreover, punishing someone for doing housework means criminalising the leading of an ordinary married life. To avoid punishment, the person concerned is in practice forced to *terminate the cohabitation, if possible*. In my view, this illustrates the problematic aspects of counting housework or other forms of care for closely related persons as participation in a terrorist organisation, at least not when this is not combined with other more qualified contributions to the organisation.

(97) I also refer to what Justice Ringnes has cited from *Terrorism in Norwegian criminal law. An analysis of chapter 18 of the Penal Code,* see paragraph 31, the Swedish consultation paper *Proposition for Amendment Act to the Terrorist Offences Act* (2022:000), see paragraph 29 and the report from the UN Special Rapporteur for Human Rights from 2019, see paragraph 30. As I interpret these sources, they are all rooted in the ideas that I have now expressed.

(98) Justice Ringnes stresses the importance of preventing persons from joining terrorist organisations. I agree that this is a factor of weight. However, the extent to which one should criminalise activities that may be useful for such organisations is a legislative issue and

cannot, as I read the sources of law, change the conclusion. Such criminalisation also raises complex legal and ethical questions, including whether ordinary criminal intent is sufficient for conviction in such cases, and the distinction between on the one hand primary contribution, which is punishable, and on the other hand contribution that is not punishable under the provisions at issue.

(99) In summary, I find that ordinary housework as a part of married life does not in itself meet the requirement of participation in a terrorist organisation.

(100) As I interpret the sources of law, it takes more. The person concerned must have supported the organisation or participated in its activities in a more direct manner than merely filling the role of a spouse or cohabitant and doing housework for a partner who participates in the organisation. As for the objective terms of the penal provision, a personal desire or motive to support the terrorist organisation cannot compensate for the absence of sufficient factual contributions.

(101) The defendant in the case at hand was not a member of ISIS and had not pledged allegiance to the organisation. During her life with her husband in Syria, her only contribution to the organisation was being present and doing housework in the couple's shared home. When she travelled to Syria and moved in with her husband, the provision on participation in a terrorist organisation had not been adopted. Nor had travel to another country for terrorist purposes been criminalised, see section 136 b of the current Penal Code. Although she shared her husband's religious and political views and supported him, she cannot, in my view, be convicted of participation in the terrorist organisation.

(102) Since I am outvoted, I will consider the sentence on the basis of the majority's conclusion in the issue of guilt, see section 32 subsection of the Criminal Procedure Act.

(103) The Supreme Court's previous case law related to section 147 d of the Penal Code 1902 deals with more direct support to terrorist organisations than in our case, and not punishment for actions that are part of a person's private life. I therefore find limited guidance in case law as to which sentence to impose in the case at hand.

(104) Although, with regard to sentencing, I base my view on the majority's view that A's housework in the home shared with C constitutes participation in a terrorist organisation, the relevant actions must be deemed to be at the lower end of what the penal provision covers. I reiterate that she had travelled to Syria and established her married life with C before the provision entered into force. Against this background, and taking the mitigating factors into consideration, I find that a penalty of six months is adequate.

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

(106) Justice **Bergh:** Likewise.

(107) Justice **Noer:** I agree with Justice Thyness in all material respects and with his conclusion.

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

J U D G M E N T :

A, born 00.00.1990, is convicted of violation of section 147 d of the Penal Code 1902, cf. section 12 subsection 1 (3) (a) and sentenced to one year and four months of imprisonment, which in its entirety is deemed to have been served through deprivation of liberty, see section 60 subsection 1 of the Penal Code 1902.