Unofficial translation

SUPREME COURT OF NORWAY

On 31 January 2012, the Supreme Court passed judgment in

HR-2012-00248-A (Case No. 2011/1673), civil case, appeal against judgment,

A	
B	(counsel Brynjar Meling – for examination)
v	
The State (Immigration Appeals Board)	Office of the Attorney General (counsel Pål Wennerås)

V O T I N G :

(1) Judge **Matheson:** The case concerns the validity of the Immigration Appeals Board's decision to refuse asylum – more precisely, whether it is the situation at the time of flight or on the date of the decision that shall form the basis for the application of article 1 A (2), second paragraph, of the Refugee Convention concerning dual nationality.

(2) A was born in 1984 and is an ethnic Serb from the municipality of X in Kosovo. She has no connections with Serbia.

(3) A's spouse, B, was born in 1979 of an ethnic Serbian mother and a Croatian father. He is therefore regarded as an ethnic Serb and Croat. B grew up in the municipality of Y in Kosovo.

(4) The couple fled Kosovo and came to Norway together on 26 September 2007. They applied for asylum since they feared for their lives and their safety in Kosovo. In A's case, this fear is based on her Serbian ethnicity and her husband's Croatian origin. Their relationship is not accepted in their country of origin. B's fear is based on the fact the Albanians view him as a Serb whereas the Serbs view him as a Croat.

(5) On 17 February 2008, Kosovo's parliament unanimously declared independence from Serbia. Furthermore, on 20 February the same year, the parliament passed laws on nationality, diplomatic immunity, establishment of a police force, etc.

(6) On 18 February 2008, the Serbian parliament decided to rule Kosovo's declaration of independence as invalid. In Serbia's view, Kosovo is still Serbian territory, and the citizens of the country are still regarded as Serbian nationals.

(7) Norway recognised the republic of Kosovo as an independent state by the Royal Decree of 28 March 2008.

(8) On 8 May 2008, the Directorate of Immigration (UDI) rejected A's and B's applications for asylum. Following an appeal, the Immigration Appeals Board (UNE) upheld the rejections in its decision of 27 November 2008. The couple requested unsuccessfully that the decisions be reversed.

(9) In its rulings, the Board concluded that the couple were protected against return to Kosovo. However, the Board found that Kosovo and Serbia – through Norway's recognition of Kosovo as an independent state – were two separate states, and that the inhabitants of the republic of Kosovo were nationals of both Kosovo and Serbia.

(10) The Board found further that Serbia did not return ethnic Serbs to Kosovo, and that the couple would be provided with available and effective protection by the Serbian authorities. The applicants were thus, pursuant to article 1 A (2), second paragraph, of the Refugee Convention, directed to seek protection in Serbia, as their second country of nationality.

(11) Following the decision of the Board, the couple were obliged to leave Norway voluntarily. On 31 March 2009, A and B instituted invalidity proceedings against the State (the Immigration Appeals Board). They also requested an interim ruling against implementation of the Board's decision. This request was subsequently withdrawn since the immigration authorities had decided to postpone implementation until the District Court had passed judgment.

(12) A and B submitted, inter alia, that they had had refugee status since fleeing from Kosovo. They considered that they had a right to asylum pursuant to section 17, cf. section 16, of the Immigration Act of 1988 and article 1 A (2), first paragraph, of the Refugee Convention, since, in their view, there was no available and effective protection for them in Serbia should they return there.

(13) The proceedings were coupled with a similar case, but were halted pending the decision in a parallel dispute. On 21 May 2010, following initiation, Oslo District Court passed judgment with the following conclusion in respect of the appellants:

> **"1. The request regarding an interim ruling is set aside.**
>
> **2. The State (Immigration Appeals Board) is found not liable.**
>
> **3. No order is made as to the costs."**

(14) The couple appealed the judgment to Borgarting Court of Appeal which, on 15 August 2011, passed the following judgment:

> **"1. The appeal is rejected.**
>
> **2. No order is made as to the costs of the Court of Appeal."**

(15) A and B have appealed the Court of Appeal's judgment to the Supreme Court. The appeal concerns the application of law and the assessment of evidence.

(16) On 10 November 2011, the Appeal Committee of the Supreme Court decided as follows:

> **"The appeal is allowed to be heard in respect of the Court of Appeal's general interpretation of section 16, first paragraph, of the Immigration Act, cf. article 1A of the Convention relating to the Status of Refugees. Leave to appeal is otherwise refused."**

(17) The status of the case is the same for the Supreme Court as for the Court of Appeal.

(18) The arguments of the appellants – *A and B* – may be summarised as follows:

(19) The appellants fled Kosovo long before it declared its independence from Serbia and adopted its own nationality legislation. The couple therefore had only one nationality when they applied for asylum in Norway. Their refugee status should consequently have been decided pursuant to article 1 A (2), first paragraph, of the Refugee Convention. The second paragraph applies to persons who *have* more than one nationality. The provision applies to situations where there are two or more states and two or more nationalities at the time of flight.

(20) The purpose of the Convention to provide protection indicates that it is the situation at the time of flight that must be decisive. If the need for protection ceases to exist during the period between the flight and the Board's decision, this is covered by article 1 C (5) of the Convention concerning cessation of refugee status.

(21) This interpretation is supported by section 17 of the Immigration Act of 1988, which states that any refugee who *is* in the realm or at the Norwegian border has on application the right to asylum. This wording indicates that the assessment of refugee status is to be linked to periods prior to the person's arrival in this country, and thus prior to the date of the decision.

(22) This is not altered by the fact that state practice generally bases the assessment of refugee status on the situation on the date of the decision. State practice does not take into account the situation in the current case, namely that the applicants passively and involuntarily obtained their second nationality after their flight.

(23) The Board's decision was thus based on incorrect application of the law and is therefore invalid.

(24) The appellants have submitted the following claim:

> **"1. The decision of the Immigration Appeals Board of 27 November 2008 and the subsequent decision of 11 February 2009 in the case concerning reversal shall be ruled invalid.**
>
> **2. The respondent shall be ordered to pay the costs for all instances with statutory interest from the date stipulated for payment until payment takes place."**

(25) The arguments of the respondent – *the State (Immigration Appeals Board)* – may be summarised as follows:

(26) The decision is valid. Article 1 A (2) of the Convention must, on the basis of the wording and the purpose, be understood to mean that refugee status and nationality are to be decided on the basis of the situation on the date of the decision and not at the time of flight. This interpretation is reinforced by an entirely unequivocal state practice, including EU Directive 2004/83, by the view taken by the United Nations High Commissioner for Refugees and by other sources of law.

(27) The respondent has submitted the following claim:

> **"The appeal shall be rejected."**

(28) *I have concluded* that the appeal must be rejected.

(29) The disputed decisions were made pursuant to the Immigration Act of 1988. The right of asylum is regulated by sections 16 and 17 of this Act. Section 17 states that any refugee who is in the realm or at the Norwegian border has on application the right to asylum (refuge) in the realm. The provision does not state what date shall be decisive determination of refugee status.

(30) Who shall have refugee status is regulated by section 16. The provision is worded as follows:

> **"A refugee within the meaning of the Act is any foreign national who falls under Article 1 A of the Convention relating to the Status of Refugees of 28 July 1951, cf. the Protocol of 31 January 1967."**

(31) Section 28 of the current Immigration Act of 15 May 2008 No. 35 – by means of an abbreviated reproduction of and reference to article 1 A of the Refugee Convention – contains regulation corresponding to that of sections 16 and 17 of the Act of 1988 regarding who shall have the right of residence as a refugee. I will return later to the importance of the travaux préparatoires to the Act of 2008 for the question of interpretation in the current case.

(32) Owing to the reference technique chosen by the legislator, article 1 A of the Refugee Convention determines who shall have refugee status pursuant to Norwegian law. This case is associated with article 1 A (2), first and second paragraph. The first paragraph defines refugee as any person who

> **"(a)s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."**

(33) The provision states 1 January 1951 as the cut-off date for events that can be taken into account as a basis for refugee status. However, pursuant to the protocol of 31 January 1967, which is also referred to in the provision of the Immigration Act, the states have committed themselves to applying the Convention regardless of this time limit.

(34) The second paragraph then states as follows:

> **"In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."**

(35) Paragraph 106 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (2003) states as follows regarding the content of the provision:

> **"This clause, which is largely self-explanatory, is intended to exclude from refugee**

> **status all persons with dual or multiple nationality who can avail themselves of the protection of at least one of the countries of which they are nationals. Wherever available, national protection takes precedence over international protection."**

(36) The issue of the case concerns whether the Court of Appeal applied the law correctly when it found that, pursuant to the Convention – and thus pursuant to the Immigration Act –the date of the decision, and not the date of the appellants' flight from Kosovo is decisive for determining which country they are nationals of.

(37) The date used as a basis for assessing whether a person has refugee status in relation to the country of which he is a national pursuant to the first paragraph is necessarily the same date that must be used as a basis in assessing whether he is a national of more than one country pursuant to the second paragraph. Determination of the date decisive for this assessment is dependent on an interpretation of the Convention.

(38) Articles 31–33 of the Vienna Convention of 1969 on the Law of Treaties state principles for interpretation of treaties. It follows from article 31 No. 1 that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Although Norway has not acceded to this Convention, the provisions referred to express customary international law, cf. page 858, paragraph 38, of Norwegian Supreme Court Reports Rt. 2010. The wording and purpose of the Convention are thus prominent elements of the interpretation of treaties pursuant to international law.

(39) Article 1 A (2), second paragraph, of the Refugee Convention applies to persons who *have* more than one nationality. The provision refers to the countries of which the person concerned *is* a national. Pursuant to the first paragraph, this refers to the situation when the applicant *is* outside the country of his former habitual residence and *is* unwilling to return to it. In my view, the use of the present tense here provides in itself a basis for assuming that article 1 A (2) refers to the situation on the date of the decision.

(40) This interpretation is reinforced by the fact that, during the drafting of the Convention, it was proposed that refugee status should include persons who "have had, or have" a well-founded fear of persecution, cf. the Draft Convention relating to the status of refugees, included under Agenda item 32 in the United Nations Official Records of the General Assembly, Fifth Session, 1950, Annexes Volume I, Document A/1385 Appendix II, page 10. However, the final proposal for the wording was modified to the current wording in the Convention, cf. Document A/C.3/L.131/Rev.1, which is included in the minutes on page 20. According to James C. Hathaway, *The Law of Refugee Status* (1991), page 69, this was because, during the drafting of the Convention, it had been agreed that

> **"... past persecution should be omitted in favour of the 'well founded fear of being persecuted' standard, involving evidence of a present or prospective risk in the country of origin."**

(41) The wording must consequently be understood to mean that it was not intended that refugee status should be determined on the basis of a situation that existed prior to the date of the decision.

(42) To interpret the wording as meaning that the situation on the date of the decision shall be decisive for the assessment of refugee status harmonises well with the understanding that the purpose of the treaty is to provide protection to persons who cannot obtain this in their country of origin, cf. also Norwegian Supreme Court Reports Rt. 2010, page 858, paragraph 41. The purpose of protection does not require that significance be accorded to historical circumstances if these no longer make international protection necessary.

(43) Considerations of efficiency and legal practicality also indicate that the assessment should be based on the current situation. The decision concerning whether the applicant is to be regarded as a refugee may be made more difficult if the situation at times prior to the date of the decision should be decisive for refugee status – with the difficulties that might arise in furnishing evidence.

(44) By way of summary, the wording and purpose of the Convention clearly indicates that it is the situation on the date of the decision that must be decisive for the assessments to be made pursuant to article 1 A (2), first and second paragraph – i.e. regarding both whether a well-founded fear exists that the country of which the person concerned is a national is unable to provide effective protection and whether the person concerned is a national of more than one country. Although this case only concerns the latter question, the same date shall – as previously mentioned – be used as a basis when assessing both questions.

(45) As pointed out in Norwegian Supreme Court Reports Rt. 2010, page 858, paragraph 43, in interpreting a treaty, the implications of wording and purpose considerations may only exceptionally be regarded as having to give way to other sources of law. However, in this case, the situation is that other sources of law, such as state practice and the practice of foreign courts, the view of the United Nations High Commissioner for Refugees and international legal theory, unequivocally confirm the interpretation that I have already expressed.

(46) As regards state practice, I shall confine myself to referring to the travaux préparatoires of the Immigration Act of 2008, where it is stated that this practice has placed more or less exclusive weight on the risk apparent on the date of the decision in a forward-looking perspective, cf. Official Norwegian Report 2004:20 *Ny utlendingslov* [A New Immigration Act], page 120. In Proposition No.75 (2006–2007) to the Odelsting, page 88, the Ministry subscribed to this description. This provides further confirmation that it is the date of the decision that shall determine the assessment pursuant to article 1 A (2).

(47) In this connection, I perceive EU Directive 2004/83/EC as a confirmation of what is state practice at the European level. The Directive provides minimum rules for the member countries' legislation on classification of nationals of third countries as refugees. In Article 2 (b), the catalogue of definitions refers to the United Nations Refugee Convention, and "refugee" is defined in the same way as in article 1 A (2), first paragraph, of the Refugee Convention (see the article 2 (c) of the Directive). With regard to the date that shall form the basis for the assessment of refugee status, the Directive indicates that assessment of an application for international protection is to be carried out on an individual basis and includes taking into account "all relevant facts as they relate to the country of origin at the time of taking a decision on the application", cf. article 4 (3) (a). This provides yet another confirmation that it is the date of the decision that shall form the basis.

(48) As an extension of state practice, it is natural to draw attention to the judgment of the British House of Lords dated 10 March 2005 (Hoxha), which subscribed to the understanding that the perspective shall not be retrospective but shall concentrate on the risk of current or future persecution in the applicant's country of origin. Paragraph 12 states as follows with reference to James Hathaway's description of the history of the Convention, of which I provided an account above:

> **"As Professor Hathaway explains at p 68, the compromise that emerged from the drafting process when the definition of the purposes of the Convention was being formulated was to reject the past assessment of risk and to establish instead present or prospective assessment of risk as the norm for refugee protection.... The words 'or had' which had been included in para 6B of the Statute were omitted from art 1 A (2) of the Convention. It is plain from the drafting history that this was no accident...."**

(49) I would further mention that the House of Lords in a judgment of 2 April 1998 (Adan) referred to the difficulty of associating the assessment with the situation at other times than on the date of the decision. On this, the following opinion was given:

> **"For a test which required one to look at historic fear, and then ask whether that historic fear which, ex hypothesi, no longer exists is nevertheless the cause of the asylum-seeker being presently outside his country is a test which would not be easy to apply in practice. This is not to say that historic fear may not be relevant. It may well provide evidence to establish present fear. But it is the existence, or otherwise, of present fear which is determinative...."**

(50) The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention, cited by me above, states that national protection "wherever available" takes precedence over international protection. The handbook should generally be ascribed considerable weight. For further references, see Norwegian Supreme Court Reports Rt. 2010, page 858, paragraph 44. What protection is "available" is in my view a current assessment that can only be made on the basis of the situation on the date of the decision.

(51) Regardless of the consequences of wording and purposes, A and B have, with reference to the provision of article 1 C concerning grounds for cessation of refugee status, submitted that the assessment of refugee status is to be made on the basis of a situation prior to the date of the decision. I do not agree that this provision changes the consequences of an interpretation of article 1 A (2).

(52) Refugee status may for example, pursuant to article 1 C (5), cease to apply to a person "because the circumstances in connection with which he has been recognised as a refugee have ceased to exist". Although a refugee is "something one is", and not a status one acquires by means of a decision, the term "recognised" cannot be cited in support of the view that the system of the Convention involves assessing on the date of the decision whether a previously "recognised" – i.e. established – refugee status is to cease. This would violate the system of the Convention. The term "recognised" here refers to the asylum decision. The UNHCR Procedural Standards for Refugee Status Determination (2005) state precisely that cessation does not form part of the refugee status determination process. The purpose of the document is to provide a basis for a common understanding of the term "refugee" by UNHCR employees and partners in states party to the Convention. Section 4.3 states as follows:

> **"Cessation does not form part of the refugee status determination process. Article 1 C of the 1951 Convention can only be applied to a person who has been recognised as a refugee. It is not an exclusion clause and should not be applied at the eligibility stage, where the relevant inquiry is first, whether the applicant meets the criteria for inclusion under Article 1 A (2) of the 1951 Convention..."**

(53) Finally, I would mention that there is general agreement in international legal theory that refugee status pursuant to article 1 A (2) requires a well-founded fear on the date of the decision. Among the various authors on this topic, I refer to James Hathaway, page 68, whom I cited above. I refer also to Andreas Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary,* page 449, note 625. A somewhat more all-embracing view of the international theory was expressed in the House of Lords judgment of 2 April 1998 (Adan). Here it was stated that "[s]o far as I am aware the suggestion that anything other than a current fear of persecution will suffice has never even been mooted"; in other words that no legal theoretician has ever maintained otherwise than that refugee status must be decided on the basis of the situation on the date of the decision.

(54) I must mention here that Terje Einarsen in *Retten til vern som flyktning* [The right to protection as a refugee] (2000), page 506, and in Vigdis Vevstad (ed.) *Utlendingsloven – Kommentarutgave* [The Immigration Act – Commentary Edition] (2010), page 183–184, expresses a divergent view. I cannot see that there is any legal basis for this.

(55) The appeal must therefore be rejected. No claim is made for costs.

(56) I vote for this

JUDGMENT :

The appeal is rejected.

(57) Judge **Falkanger:** I am in all important respects and in the conclusion in agreement with the judgment delivered by the first judge to deliver judgment.

(58) Acting Judge **Arnesen:** I concur.

(59) Judge **Noer:** I concur.

(60) Judge **Matningsdal:** I concur.

(61) Following the voting, the Supreme Court passed this

J U D G M E N T :

The appeal is rejected.