Translation from Norwegian

[Coat-of-arms of the Kingdom of Norway]

THE SUPREME COURT OF NORWAY

On 21 December 2012, the Supreme Court handed down a judgment in

HR-2012-02398-P (case no. 2012/688), civil action, appeal against a judgment.

A B C D	Advocate Arild Humlen
The Norwegian Association for Asylum Seekers (NOAS) (third-party intervener)	Advocate Jan Fougner
v.	
The State, represented by the Immigration Appeals Board	Assistant Attorney General Tolle Stabell Assistant counsel: The Attorney General, represented by Advocate Kine E. Steinsvik

V O T I N G

1) Justice **Webster**: This case concerns the validity of the rejection of an application for asylum and residence in Norway for an Iranian family with children who, at the time of the decision, had lived here for a long time. The case raises questions as to whether the judicial review is to be based on the facts at the time of the decision or of the

judgment. It further raises questions regarding the interpretation of the special protection provided for children by section 38, subsection 3, of the Immigration Act, including the competence of the judiciary to review decisions.

(2) A and B were married in Iran in 2002. Their son C was born in 2003. In November/December 2004, the family left Iran. B came to Norway with her son and applied for asylum in December 2004. As grounds for asylum, she stated that the family was persecuted in Iran on account of their religion. When she arrived in Norway, she presented a false passport, but stated that she had identity documents in Iran, and that she had asked her family to send them to her.

(3) Her spouse A came to Norway from Germany on 9 May 2005 and applied for asylum. In his application, he stated that his spouse belonged to the Yaresan religion, also called Ahl-e Haqq, and that he had converted to this faith in 2004. He stated that Yaresan was not approved by the Iranian authorities. His family are Shia Muslims, and strongly opposed his marriage to B on account of her religion. In the asylum interview, he stated that he worked in the Revolutionary Guard in 2004. When it was learned that he had converted, he had to quit his job, and the married couple left the place where they were living. A arrived in Norway without a passport or other identity documents except for certificates from schools in Iran.

(4) By a decision of 21 June 2005, the Directorate of Immigration rejected the application submitted by B and her son C. The Directorate found that B could not be regarded as a refugee, as there was not sufficient proof that she would be persecuted if she were to return to her country of origin. After a concrete overall assessment, the Directorate further found that there were no strong humanitarian considerations that could justify granting residence on humanitarian grounds. A's application for asylum was also rejected. The Directorate found it unlikely that he had converted to Yaresan while working for the Revolutionary Guard. A was not granted residence on humanitarian grounds either.

(5) The family appealed the administrative decisions. Among other things, they pointed out that the son C had tested positive on a tuberculosis test in May 2005, and that he was undergoing treatment. He had been infected either just before he came to Norway or during his stay at the asylum reception centre. The Directorate of Immigration consented to the deferment of implementation until a final decision had been made on the appeal, but found no grounds to reverse its earlier decision in the case. By a decision of 8 February 2006, the Immigration Appeals Board disallowed the appeals, but granted an extension of the departure deadline until 20 March 2006 when C's treatment would presumably have been completed.

(6) On 8 March 2006, the family petitioned for a reversal of the decision and applied for deferred implementation of departure. Deferred implementation was granted until a decision had been made on the petition for reversal. In July 2006, the petition for reversal was partly allowed in so far as the family was granted a temporary permit to stay in the country for one year as from the date of the decision. The reason given was that C had been found to have tubercular meningitis. The Appeals Board's grounds in respect of this point are as follows:

> **"The Board further observes that, to the Board's knowledge, there is a well developed system of health services in Iran, and treatment can be provided for**

> **tuberculosis. In the Board's assessment, however, it is in C's best interests that he is able to complete the treatment that he has begun here in Norway. C knows the physicians who are treating him, and he has shown good signs of recovery. The Board cannot rule out the possibility that returning him to Iran could result in the tuberculosis treatment not being carried out satisfactorily. In this connection, the Board has taken account of the fact that C's parents have, on an earlier occasion, failed to attend a treatment session and as such have shown a lack of willingness to pursue treatment. In the Board's assessment, the possibility cannot be discounted that returning to Iran before the treatment is completed will lead to further interruptions in the treatment of C's disease.**
>
> **Based on consideration of the child's best interests in this particular case, it is therefore, in the Board's assessment, most appropriate to grant a temporary permit in order to enable C to complete the treatment that he has begun.**
>
> **The Board notes that the Board's practice in similar cases argues against granting such a temporary permit. However, the Board has taken account of the special circumstances in the case in question, and has concluded that a temporary permit should be granted.**

…

> The permit is temporary. The permit may not be renewed and does not provide a basis for family reunification or a **resettlement** permit; cf. section 21 subsection 7 first and second sentences of the Immigration Regulations.

(7) The daughter D was born on *.*.2007.

(8) Since then, the family has applied for a reversal of the rejections four times, most recently on 30 April 2009. This petition, too, was rejected by the Immigration Appeals Board by a decision of 9 July 2009. The family has been obliged to leave the country since 11 October 2007. They have not presented any identity documents or procured travel documents. The Embassy of Iran in Oslo does not issue travel documents to its nationals unless they voluntarily wish to return to Iran. Since the family has not cooperated, it has not been possible to return them.

(9) In the autumn of 2010, the Immigration Appeals Board initiated a project to clarify practice. The reason for doing so was that the Board thought that practice in cases involving children who had been in Norway for a long time had become stricter, and that it was not entirely consistent. Around 40 cases were considered. Of these, around one third of the decisions were reversed after a new assessment.

(10) On 16 November 2010, Family A/B filed a writ of summons with the Oslo District Court, requesting that the Immigration Appeals Board's decision of 7 September 2009 be found invalid.

(11) According to the Immigration Appeals Board's internal guidelines, notification of a lawsuit is to be regarded as a request for reversal. The case was considered once again by the Board, which on 29 November 2010 decided not to reverse its earlier decisions. The Board's consideration was basically limited to assessing the issue of residence on humanitarian grounds under section 38 of the new Immigration Act. It was emphasised, however, that there were no grounds for asylum. Neither the general security situation in Iran nor individual circumstances satisfied the conditions for being granted asylum. When considering the issue of residence on humanitarian grounds, the interests of the children were particularly assessed, cf. section 38 subsection 3 of the Act, cf. section 8-5 of the Regulations. The Supreme Court

justices were informed that the case was part of the project to clarify practice. C's case was thus among the two thirds of the cases in the project in which the decisions were not reversed. It is the decision of 29 November 2010 that is the object of judicial review.

(12) In a judgment delivered on 7 March 2011, the Oslo District Court did not find for the family. The conclusion of the judgment is as follows:

> **"1. The Court finds for the State, represented by the Immigration Appeals Board.**
>
> **2. A and B are sentenced to pay court costs in the amount of NOK 62 125 – sixty-twothousandonehundredand twenty-five – kroner to the State, represented by the Immigration Appeals Board."**

(13) A and B appealed the judgment to the Borgarting Court of Appeal. On 6 February 2012, the Borgarting Court of Appeal delivered a judgment (LB-2011-86996) with the following conclusion:

> **"1. The appeal is dismissed.**
>
> **2. A and B are ordered, jointly and severally, to pay to the State, represented by the Immigration Appeals Board, legal costs in the Court of Appeal in the amount of NOK 62 500 - sixty-twothousandonehundredand twenty-five – kroner. The time limit for performance is two weeks from the service of this judgment."**

(14) A and B have appealed the Court of Appeal's assessment of evidence and application of law to the Supreme Court. In the appeal, they point out, among other things, that the family's fear of persecution has increased due to an amendment to the Iranian penal code in February 2012. They argue that a mandatory death penalty was introduced for persons who have lapsed from the official religion, and that this constitutes a great risk for A.

(15) On 3 August 2012, the Appeals Selection Committee of the Supreme Court decided to proceed with parts of the appeal subject to the following limitation:

> ***"The Appeals Selection Committee of the Supreme Court* finds that the appeal should be allowed to proceed insofar as concerns the issue of whether, when reviewing the validity of the Immigration Appeals Board's administrative decisions, importance may be attached to facts that have arisen since the Board's last decision, cf. Rt-2012-667.**
>
> **The Appeals Selection Committee further finds that the appeal should be allowed to proceed insofar as concerns the arguments regarding residence under section 38 of the Immigration Act, on the grounds of the children's connection with Norway, except that the argument regarding arbitrary discrimination should not be allowed to proceed."**

(16) The appeal was otherwise not allowed to proceed.

(17) On 8 August 2012, the Chief Justice decided that the case was to be decided in plenary, cf. section 5 subsection 4 last sentence and section 6 subsection 2 of the Courts of Justice Act. It has been heard in conjunction with case 2012/1042 (HR-2012-2399-P), which raises similar issues.

Translation from Norwegian

(18) The Norwegian Association for Asylum Seekers – NOAS – has declared third-party intervention in support of the appellants. The intervention was allowed by a ruling of 10 October 2012 of the Appeals Selection Committee.

(19) The main arguments of the appellants – A, B, C and D – were as follows:

(20) The son C is legally entitled to residence in Norway under section 38 subsection 1, cf. subsection 3, of the Immigration Act, cf. section 8-5 of the Immigration Regulations. The child's best interests shall be a primary consideration, and C has a strong interest in being allowed to remain in Norway. This interest cannot be given lower priority under reference to considerations of general deterrence and immigration regulation.

(21) In cases concerning residence permits for children, the courts may review all aspects of the assessment under section 38 of the Immigration Act. The provision must be interpreted in accordance with Article 3 (1) of the Convention on the Rights of the Child (CRC). General Comment No. 6 (GC-2005-6-CRC) of the UN Committee on the Rights of the Child shows that only considerations based on rights may take precedence over the child's best interests. The fact that general considerations of immigration regulation have prevailed over C's interests therefore constitutes an incorrect application of the law. The requirement that the child's best interests shall be a primary consideration is a legal norm that must be reviewed in full by the judiciary.

(22) Even assuming that judicial review is subject to a limitation, the decision is invalid in any event because C's best interests have been inadequately assessed and weighed. The Immigration Appeals Board has attached decisive importance to considerations which the Government has emphasised are to carry less weight when assessed against the strong interests of "long-term resident children" in being allowed to remain in the country. This means that the assessment is flawed. In any case, the Immigration Appeals Board has not assessed C's best interests in a correct way. The assessment of the child's best interests is thus contrary to Article 3 of the CRC.

(23) According to the preparatory works, weight must also be given in assessments under section 38 to the connection that a child develops while residing illegally in the country. The fact that the Immigration Appeals Board simultaneously ascribes importance to the unlawful residence as a consideration of immigration regulation is a contradiction in terms. The child cannot be blamed for his or her parents' choices.

(24) It is pleaded that when examining the validity of the Immigration Appeals Board' decisions, courts may also base their review on facts that have arisen after the decision was made. Even if sources of law do not provide an entirely clear picture, grounds may be found in preparatory works, case law and theory to support the argument that courts may base their review of validity on the facts at the time of judgment. In certain cases, it follows directly from the Act that the basis is the date of judgment. But also otherwise both the role of the courts and the purpose of the Dispute Act argue in favour of basing the review on an assessment of present facts (ex nunc assessment). Furthermore, in the interests of procedural economy, the court should evaluate any new facts that might have arisen since the administrative hearing of the case. The public administration has no obligation to consider a reversal, and the hearing of a possible petition for reversal may take a long time.

(25) Consideration for Norway's fulfilment of its international human rights obligations also militates in favour of an assessment of the facts obtaining at the time of judgment. The European Court of Human Rights conducts an ex nunc assessment, and in accordance with the principle of subsidiarity, Norwegian courts should do the same.

(26) For asylum seekers, the basic situation is that "a refugee is something one is, not a status that one acquires by an administrative decision", cf. Rt-2012-139 paragraph 52. A decision to grant asylum is a decision subject to strict statutory conditions in which considerations of immigration regulation have no place. The area of asylum therefore lends itself well to an assessment of facts obtaining at the time of judgment. Consequently, in such cases, courts should consider the situation as it is at the time of judgment and not at the time the administrative decision was made. Since courts do not render judgment on the merits of the case, this means that a decision that is found to be invalid must go back to the public administration. Thus, the public administration, in any case, has the final say on the decision.

(27) This means that the judgment of the Court of Appeal must be quashed, and that the Court of Appeal must carry out a new assessment in which it also takes into consideration the recently adopted amendment to the Iranian penal code whereby persons who have lapsed from the official religion shall be sentenced to death.

(28) The appellants have submitted the following claim for relief:

> **"Principally**
>
> **1. The Immigration Appeals Board's decision of 29.11.2010 not to reverse its earlier rejection of an application for asylum and residence on humanitarian grounds to be found invalid.**
>
> **2. Costs in the District Court and the Court of Appeal to be awarded.**
>
> **In the alternative**
>
> **1. The judgment of 6 February 2012 of the Court of Appeal to be quashed."**

(29) The third-party intervener – the Norwegian Organisation for Asylum Seekers – has, on the whole, endorsed the arguments of the appellants, and has called particular attention to the following:

(30) The view taken by the State means that a connection with Norway will never, on its own, be able to justify residence under section 38 of the Immigration Act. This clearly conflicts with the principle of the child's best interests, because the connection in these cases will in practice always be due to an illegal stay.

(31) General considerations of immigration regulation cannot prevail over the child's best interests; only considerations that are based on rights may be given precedence. This must apply in general and not only for unaccompanied children outside their country of origin – an issue addressed directly in the UN Committee on the Rights of the Child's General Comment No. 6. Since section 38 of the Immigration Act requires that the child's best interests must be a "primary consideration", this must be given

genuine substance. Special requirements are laid down regarding the assessment of proportionality. This assessment may be reviewed by the judiciary, and the requirements are not satisfied in the Immigration Appeals Board's decision not to grant C a residence permit. Consequently, the decision is invalid.

(32) With regard to the issue of which facts are to serve as the basis for the review of a decision's validity, it is argued that there is a particular need for "ex nunc review" in the area of immigration. The consequences of making the wrong decision may be irreparable. The public administration is under no obligation to assess new facts, and has little capacity to review new circumstances because the immigration authorities are burdened with many cases.

(33) Normally, it will be sufficient to check past practice, but there are no constitutional obstacles or precedent that prevent the judiciary from reviewing the validity of a decision based on the facts at the time of judgment. The Supreme Court has in practice adopted a pragmatic approach depending on what is needed in the individual cases.

(34) In any case, judicial review of the observance of human rights should be based on an "ex nunc assessment". The need for an "ex nunc assessment" is just as great in immigration cases as, for instance, in cases concerning compulsory commitment to care which are heard under chapter 36 of the Dispute Act. The fact that the European Court of Human Rights carries out an ex nunc assessment must also carry weight.

(35) The third-party intervener has submitted the following claim for relief:

> **"1. The decision of the Immigration Appeals Board of 29 November 2010 to be found invalid (non-binding).**
>
> **2. In the alternative: The judgment of the Court of Appeal to be quashed.**
>
> **3. The State to pay NOAS' costs in the Supreme Court."**

(36) The respondent – the State, represented by the Immigration Appeals Board – has submitted the following main arguments:

(37) Section 38 of the Immigration Act is a key instrument for regulating immigration to Norway. Put somewhat extremely, it is a question of whether immigration policy is to be enforced by the immigration administration or the judiciary. The wording, the preparatory works to section 38 of the Immigration Act and case law presuppose limited review also in cases affecting children. Moreover, policy considerations also argue in favour of limited review. The threshold for granting a residence permit on humanitarian grounds is determined by clear political assessments in an area where the law presupposes political steering.

(38) It follows from the wording of the Act – and Article 3 (1) of the CRC on the Rights of the Child – that the child's best interests must be a "primary consideration". This wording does not entail that consideration for the child must be the sole or the decisive consideration. Nor are there any grounds for only taking account of rights-based counter-considerations. It is the statements of the UN Committee on the Rights of the Child in its General Comment No. 5 (GC-2003-5-CRC) that are relevant to our case, not No. 6 as cited by the appellants. Neither the preparatory works to the CRC nor to

the Immigration Act indicate that the wording should be interpreted in any other way. Case law is also based on the interpretation that can be inferred from the wording.

(39) C's best interests have been given sufficient weight in the Immigration Appeals Board's decision and properly assessed and weighed against other considerations. The decision cannot be set aside as invalid.

(40) With regard to the question of which facts the judiciary is to use as the basis for judicial review, it is argued that there is no reason to depart from the succession of clear Supreme Court decisions which affirm that courts do not take into consideration any circumstances that have arisen following the last administrative decision in the case, unless there is special legal authority to do so.

(41) A general departure from this practice in all areas of public administration will constitute an unfounded breach of the fundamental principle that the judicial review of the validity of administrative decisions is carried out as a subsequent review. A consequence of courts reviewing new facts will be that the courts will be imposing prior constraints on the exercise of authority that by law lies with the public administration. Moreover, the question concerns not only the relationship between the executive and the judiciary, but also the relationship between the judiciary and the legislature.

(42) Nor do our human rights obligations or the fact that the European Court of Human Rights carries out an "ex nunc assessment" warrant a change in the practice that has hitherto been followed for immigration cases. There is no reason to make a different rule for these cases than for other administrative cases.

(43) In accordance with internal rules and established practice, the Immigration Appeals Board considers petitions for the reversal of decisions, including when they are based on circumstances that have arisen since the case was last heard. The Immigration Appeals Board has a legal obligation to consider petitions for reversal – in any case when it is claimed that the decision will otherwise constitute a human rights violation. In asylum cases, this follows directly from the Immigration Act section 73, cf. section 90 last subsection. This means that the new circumstances invoked by A will be reconsidered by the public administration. There is thus no need for the court to review the question first. Any new refusal to reverse the decision may also be brought before the courts. There is therefore no real need to depart from practice.

(44) The respondent has submitted the following claim for relief:

"The appeal to be dismissed."

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

(46) The issue to be decided in this case is whether the decision not to grant A, B and their two children residence in Norway is invalid. I will first consider the question of which facts are to serve as the basis for the review. I will then examine the interpretation of section 38 of the Immigration Act, cf. Article 3(1) of the CRC, and will in this connection consider how extensive the scope of judicial review should be. Finally, I

will consider whether the decision of the Immigration Appeals Board in the case satisfies the requirements that can be inferred from the rules.

(47) Shall the facts at the time of the decision or judgment serve as the basis for reviewing the decision's validity?

(48) The question is whether the judiciary, when reviewing the validity of the decision, has the right and obligation to take into consideration facts that have arisen since the public administration made its decision.

(49) Two different types of new facts are of relevance to this case. Firstly, time passes while the case is being processed. The family – and the children in particular – will form stronger ties to Norway. As a result of the gradual strengthening of this attachment, interests may be weighed differently than at the time of the decision. Secondly, A has invoked the adoption in February 2012 of an amendment to the Iranian penal code entailing a mandatory death penalty for persons who have lapsed from the official religion (apostates). If this is correct, this new fact that has been invoked could confer entitlement to asylum under section 28 of the Immigration Act. The question is thus whether account should be taken in the judicial review of validity of the new facts that have been invoked, or whether the family must first request a reversal, so that the issues are considered by the public administration before they are assessed, if relevant, by the judiciary.

(50) I will begin by mentioning that a distinction is traditionally made between new legal facts and new evidentiary facts. New legal facts are new facts that have direct and immediate legal consequences, while new evidentiary facts are new evidence that proves the legal facts, cf. Norwegian Official Report NOU 2001:32B Rett på sak Volume B page 703. In principle, new evidentiary facts that shed light on the circumstances at the time of the administrative decision may be invoked, cf. Rt-2007-1815 paragraph 34. The question is whether new legal facts may be invoked to the judiciary, i.e. new operative facts which have arisen since the administrative decision and which have therefore not been considered by the public administration. In some cases, differentiating between what is a new legal fact and what is a new evidentiary fact may prove to be problematic. The effect of the invoked legislative amendment imposing a mandatory death penalty on apostates is unquestionably a new legal fact – a new ground for requesting asylum in Norway. The further passing of time could also constitute a new legal fact. The question is whether these new facts which the administration has not considered may be taken into account when the judiciary assesses the validity of the rejection of the petition for reversal.

(51) This issue was recently considered by the Supreme Court in the judgment in Rt-2012-667. The case concerned the validity of the rejection of the application of a Sri Lankan family for a residence permit on humanitarian grounds. After the Court of Appeal had rendered judgment in the case, the family's under-age son was granted Norwegian citizenship. The question was whether this subsequent fact should be included in the validity review. The Supreme Court split into three factions. Two judges – with the third-voting judge as spokesman – concluded that the review should be based on the facts at the time of the judgment, and that this had to apply in general to all administrative decisions unless there was some special ground to the contrary. Two judges – with the first-voting judge as spokesman – concluded that the courts normally review administrative decisions on the basis of the facts at the time of the decision, but

that in the area of immigration law the review had to be based on the facts at the time of the judgment. Norway's human rights obligations were cited as a particular ground for this. One judge – the second-voting judge – concluded that case law showed that the judiciary reviews administrative decisions on the basis of the facts existing at the time of the decision, and found no reason to depart from this position in respect of immigration cases.

(52) It is because of the three different views in the Sri Lanka case that it was decided to hear the present case in plenary. I therefore find it necessary – independently of the recently delivered judgment – to carry out a new assessment of the issue.

(53) The actual right of review has a constitutional grounding. The more detailed limits must be established in practice, and neither constitutional nor international law imposes any constraints on the way this system is to function. The question of the competence of the judiciary therefore basically depends on the way the individual provisions are interpreted. In some cases, the legislation – either directly or indirectly – provides sufficient guidance to resolve the issue. In the case of certain administrative decisions, courts are required by law to assess the situation at the time of judgment. This applies, among other things, to cases regarding administrative decisions on coercive measures in the health and social welfare sector which fall within the scope of chapter 36 of the Dispute Act. Under section 36-5 subsection 3 of the Act, the court shall review all aspects of the case. There is no doubt that this means that courts must review the case as it stands at the time of judgment. In other cases, it is clear that the review must be based on the facts at the time of the decision. A professional who is not given a licence because he is not qualified cannot, for instance, obtain a ruling invalidating such a decision by pointing out that he has subsequently obtained the necessary qualifications. The question is then what the basis is to be when the Act does not provide any answer. I will begin by addressing the issue in general, after which I will examine whether cases concerning human rights issues are in a special category.

(54) Judicial review of the validity of administrative decisions is based on court-created law. Case law therefore provides a key point of departure when making an assessment.

(55) Until the mid-1900s, it was a controversial issue of legal theory whether courts had any power at all to rule an administrative decision invalid in a case where the assessment was based on incorrect facts. Morgenstierne, Norsk forfatningsrett 1927 Volume II page 83, found that when courts had competence to review the "lawfulness of administrative decrees", only "this facet – the legal aspect" was subject to review, and not its "other aspects, particularly to the extent that it manifests itself as a result of a discretionary decision". On the other hand, Skeie, Den Norske Civilproces 1929 Volume I page 93, stated that "an administrative decree" becomes unlawful, both when "it is based on erroneous grounds», and when "an incorrect legal norm" is applied. Like Morgenstierne, Castberg, Innledning til forvaltningsretten 1955 page 201, found that "as a general rule it can be assumed that it does not affect the validity of the administrative act if it was issued on the basis of a misapprehension of the facts of the case". Castberg pointed out that it "[would] highly impair the efficiency of the public administration if a lawful administrative act were to be overruled by the judiciary on the grounds that it had been issued on the basis of an incorrect factual

assumption". However, the recommendation of the Administration Committee, which was submitted in 1958, is based on the view that courts may review facts. On page 371, it is emphasised that "it is our legal position that courts may review the facts on which the decision is based and assess all aspects of existing evidence on a completely free basis. This also applies to the factual basis for the public administration's discretionary decisions."

(56) An obvious explanation for the fact that the issue in the present case was not addressed in theory or case law until the end of the millennium is that many people found it self-evident that a review of administrative decisions must be carried out on the basis of the facts at the time of the decision. In any case, there is – as I will demonstrate – scant support in sources of law for any other solution.

(57) The only judicial decision that can be claimed to support the opposite view is the decision in Rt-1949-564. It concerned the validity of an administrative decision regarding the expropriation of office premises for Statistics Norway. The Supreme Court stated that it found it "quite clear that the appellant has not provided any proof that can constitute grounds for setting aside the decision of the Ministry of Finance, neither with regard to the facts on which the decision is based, nor with regard to the actual assessment…". It was then added:

> **"What I have stated here is, in my opinion, entirely sufficient to preclude the appeal from succeeding. In addition, however, there is the fact that, during the proceedings, the central government authorities have assigned new tasks to Norway Statistics which necessitate further expansion. For the 1949-50 budget period, therefore, wages have been appropriated for a total of some 390 employees, ordinary and extraordinary. I do not agree with the appellant's claim that no account may be taken of this last factor in this case."**

(58) The statement regarding the subsequent circumstances is clearly an obiter dictum, in the sense that it was not necessary for the outcome of the case. For that matter, the new facts were additional information that confirmed the information that served as the basis at the time the decision was made.

(59) In the Administration Committee's recommendation, the judgment and the question of whether judicial review is to be based on the facts at the time of the decision or the judgment, is commented on only in a footnote on page 378:

> **"It might be asked whether courts in an administrative case can base their review on the facts obtaining at the time judgment is rendered, or whether it must make its decision on the basis of the facts when the administrative decision was made. In a judgment in Rt-1949-564 et seq., cf. in particular page 566, the first solution was adopted. The case concerned the expropriation of office premises for Statistics Norway. In the course of the proceedings, Statistics Norway had been given new tasks and consequently needed even more office space. The court did not deem that it was precluded from taking this new fact into consideration.**
>
> **The view on which the judgment is based appears to be in accordance with recent decisions by the German Federal Administrative Court. Cf. Verwaltungsarchiv 1957 p. 170 et seq."**

(60) The question was not discussed during the further legislative work.

(61) Neither the decision in Rt-1949-564 nor the question raised in the cited footnote seems to have left any lasting mark on subsequent practice and theory. Admittedly, there is a statement in Rt-1960-1374 – which was emphasised by the third-voting judge in Rt-2012-667 – to the effect that "material that has emerged since the contested administrative decision was made" should be taken into consideration. But if the judgment is read in context, it is evident that reference is being made to new evidentiary facts relating to the circumstances at the time of the decision.

(62) In the period up until the turn of the millennium, there are - as far as it has been possible to ascertain – decisions of relevance for our question. In Rt-2001-995, the Supreme Court assessed, based on principle, whether the court, when it finds a decision invalid, may render judgment on the merits or whether it must content itself with declaring the decision invalid and then leave it to the public administration to make a decision. The decision does not directly concern our question, but the grounds are nonetheless of interest. The case concerned the validity of a social security law ruling involving a decision that was subject to statutory conditions – i.e. a case in which the party was entitled to the benefit if the statutory conditions were satisfied. After a review of case law, the first-voting judge expresses the opinion that courts may not render judgment on the merits unless it is explicitly stated in law. Reference is made to the difference between Chapter 30 and Chapter 33 of the Civil Procedure Act in effect at the time. Chapter 30 concerned lawsuits regarding the "lawfulness" of administrative decisions in general, cf. section 435 (1). The judgment reads as follows:

> **"The use of the word "lawfulness" clearly pulls in the direction of a review of legality and is not, in any case, an argument in support of competence to make a new decision based on the merits."**

(63) It is then emphasised that in the case of reviews under chapter 33, which applied to applications regarding administrative decisions on loss of liberty and other coercive measures, the court should, on the other hand, review all aspects of the case, cf. section 482. The judgment reads as follows:

> **"This is to be interpreted such that the court may basically be said to have the same competence as the public administration to, for instance, make decisions regarding the scope of the right of contact in cases concerning deprivation of parental rights or to make a decision to discharge a person from compulsory mental health care. The same applies to decisions regarding release from preventive supervision. However, cases concerning coercive measures are very atypical of administrative cases, and by their very nature border on judicial activity. In such cases, the court shall further make the decision that appears to be the right one at the time of the decision, cf. Rt-1991-973 as an example. Thus the task of the court has clearly been displaced in relation to the ordinary review of administrative acts, a development that is primarily justified by the special considerations of due process that apply here" (underlined here).**

(64) The reference to the fact that the court shall in these cases make the decision that appears to be right at the time of its decision shows that this is deemed to be an exception from the general rule that otherwise applies, namely that the decision should be based on the facts at the time of the administrative decision. The same assumption seems to apply when reference is made, during the review of policy considerations, to the fact that "the task of the judiciary should be to carry out a subsequent review of the extent to which the administrative decision is correct in form and in substance". The court shall thus scrutinise the assessments made by the public administration. This

must clearly imply that it is the decision based on the facts existing at the time of decision that is to be reviewed.

(65) The principle that the judiciary shall not render judgment on the merits has been endorsed by the Civil Procedures Committee, cf. NOU 2001:332A Rett på sak Volume A page 195, and by the Ministry, cf. Proposition to the Odelsting No. 51 (2004-2005) (Ot.prp.nr.51) page 146. It has also been adhered to in case law; see for example Rt-2009-170.

(66) Rt-2003-460 is the first decision that directly addresses our question. The case concerned a request for an interim injunction in an immigration case in which an application for a residence permit had been rejected. The Court of Appeal had found that it should assess not only whether the administrative decision at the time of decision had been proven invalid on a balance of probabilities, but that new circumstances also had to be taken into consideration in the review. In this respect, the Supreme Court's Appeals Committee pointed out that the District Court mainly had to limit its review to facts that existed when the decision was made in January 2002, and that subsequent circumstances could not be included. It concludes that "[i]n concluding that account can also be taken of subsequent circumstances, the Court of Appeal has attached importance to facts to which it was precluded from giving weight in this case".

(67) This decision was followed up in Rt-2007-1815. The case concerned the validity of a National Insurance Court ruling on the rejection of a claim for a disability pension. The Court of Appeal had found that the National Insurance Court's ruling should be reviewed without drawing "any decisive distinction between information that was available to the National Insurance Court and information that may be said to be new". To this the Supreme Court comments in paragraphs 33 and 34:

> **"I do not agree with the opinion expressed by the Court of Appeal. In my view, the basis for reviewing whether decisions in national insurance cases are valid must be the facts that were available to the authority concerned at the time of the decision. This is also the basis generally used in administrative law, cf. in this conjunction also the decision of the Supreme Court's Appeals Committee included in Rt-2003-460. One might well say that this is precisely a consequence of the judiciary being tasked with reviewing administrative decisions.**
>
> **However, case law offers a certain possibility of submitting evidence that sheds light on the factual situation at the time the decision was made."**

(68) In paragraph 45, the consequences of this view are applied by disregarding information to the effect that, subsequent to the decision of the National Insurance Court, the applicant had undergone treatment for alcohol abuse and had spent time in a psychiatric institution.

(69) The judgment expresses a clear view on this question and builds on the same underlying argument as in Rt-2001-995, namely that the court is responsible for carrying out a subsequent review. The statement of grounds is brief, but principled and in line with earlier case law. I consider it a clear precedent that justifies basing the judicial review on the facts at the time of the administrative decision.

(70) This view is also reiterated in Rt-2009-1374. The case concerned the review of the Immigration Appeals Board's decision not to grant a residence and work permit on humanitarian grounds. In paragraph 40, it is specified that "the assessment of the decisions must be made on the basis of the information available and the situation that existed at the time of the decision". A number of facts are subsequently discussed in paragraph 53, some of which had apparently emerged during the judicial hearing. Among other things, reference is made to the fact that "no information had been provided, either at the time of the various administrative decisions or subsequently during the judicial hearing" concerning the family's situation in Iran. In my opinion, the wording refers to information that sheds light on the situation at the time of the decision. It is difficult to reconcile any other interpretation with the general statement that the assessment was to be carried out on the basis of "the information available and the situation that existed at the time of the decision".

(71) The view that it is the facts at the time of the administrative decision that must be assessed also forms the basis for the Appeals Selection Committee's decision of 12 September 2011 regarding the submission of evidence in HR-2011-1694-U paragraph 5.

(72) However, there are certain Supreme Court decisions that leave it an open question whether they are to be based on the facts at the time of the administrative decision or the time of judgment. The appellants have argued that this indicates that the state of the law has not been clarified. In my opinion, however, the review so far shows that the current state of the law is clear, and these decisions do not change this starting point. Nonetheless, I shall examine them briefly.

(73) In Rt-2009-851, the Supreme Court found that an administrative decision whereby a divorced, casteless Indian woman was not granted a renewal of her work and residence permit in Norway was invalid. The parties disagreed as to the point in time that was to serve as the basis for the assessment of facts. It was argued that the European Court of Human Rights makes an "ex nunc assessment", and that Norwegian courts should do the same. However, the question was not a key issue in the case in question, and the Supreme Court did not find it necessary to take a stand on the importance of the practice of the European Court of Human Rights. But when the first-voting judge states in paragraph 48 that he adheres "in the following to the interpretation of the law expressed in Rt-2007-1815 paragraph 33", this must be understood as an endorsement of the view that the basic principle is that the judicial review shall be based on the facts at the time of the administrative decision. Thus there are no grounds for interpreting the decision as meaning that it leaves the general basic principle in Norwegian law an open question.

(74) In Rt-2011-750 paragraph 9, the Appeals Selection Committee maintained the view expressed, among other things, in Rt-2003-460 and Rt-2007-1815:

> **"The Appeals Selection Committee wishes to begin by noting that the Interlocutory Appeals Committee of the Supreme Court in Rt-2003-460 in a case concerning the validity of the rejection of an application for a residence permit states in paragraph 14 that the District Court had to 'limit its review to the facts available at the time the administrative decision was made'. In Rt-2007-1815, in a case concerning a disability pension, the Supreme Court has maintained this view, but in paragraph 34 the first-voting judge states that there is nonetheless 'a certain opportunity to submit evidence that sheds light on the facts of the case at the time of the administrative decision'. In the opinion of the Appeals**

> **Selection Committee, none of the exhibits satisfy this condition, since they concern the children's subsequent situation. They can therefore not be submitted under reference to the clarification provided in Rt-2007-1815."**

(75) In paragraph 10, the question of whether the practice of the European Court of Human Rights could argue in favour of the opposite solution was then left open. The case was to be heard by a division of the Supreme Court, and the Committee was of the opinion that the question had to be clarified in the appeal proceedings. In other words, the decision is primarily an affirmation of the legal principle applied in the earlier decisions.

(76) Nor was any decision reached when the case was heard by the division of justices on whether the submission of additional information was allowed, cf. Rt-2011-948 paragraph 62:

> **"Further material has been submitted to the Supreme Court to shed light on how the current situation has affected the boys' behaviour, but I cannot see that the new information places the case in a new light, and thus find no reason to come to a decision on whether and in such case under which circumstances the Supreme Court will have the opportunity in reviews of legality to take account of such additional information."**

(77) The object of proof – the way in which the boy's behaviour had been affected – indicates that the issue in question was the tenability of the public administration's prognoses. And the requirement for prognoses is that they must be reasonable at the time they are made, cf. inter alia, Rt-1982-241, the Alta case. On page 266, it is emphasised that if the prognosis was reasonable, "it would hardly be a question of regarding the decision on the development project as invalid on grounds of incorrect factual assumptions even if the situation were to develop differently or if more recent knowledge were to make it possible to make better prognoses." The same must apply in cases in the area of immigration law. In any event, the wording of Rt-2011-948 paragraph 62 cannot be cited in support of leaving open to discussion the fundamental view in case law that it is the facts at the time of the administrative decision that are to be reviewed.

(78) There are also certain Supreme Court decisions concerning expulsion decisions where it might seem that the facts have been assessed on the basis of the circumstances at the time of the judgment. I am referring to Rt-2005-229, Rt-2008-560 and Rt-2009-534. In Rt-2009-534 paragraph 56, for example – under the question of whether expulsion will be a disproportionate measure – it is stated that " [a]s the case now stands, it must be found that the children will continue to reside in Norway with their father…". However, none of the decisions discuss whether the review of the administrative decision shall be based on the facts at the time of the decision or at the time of the judgment. Therefore, I cannot see that any particular importance can be ascribed to these decisions compared with the clear decisions that I have examined.

(79) In my opinion, Supreme Court case law clearly demonstrates that judicial review is based on the facts at the time of the administrative decision, unless the opposite follows from a logical interpretation of the law.

(80) In the course of the proceedings, an overview of the law of other countries has been presented. A number of countries have administrative courts that have a role which differs from that of Norwegian courts. The solution chosen in these countries therefore

offers us little guidance. The Danish system is probably the one that most closely resembles the Norwegian system, and can therefore be of interest. In that system, there is greater opportunity than in Norway to give weight to new legal facts. However, the situation is not clear-cut, and in the area of immigration law – which our case concerns – there is a trend in the opposite direction. All in all, it is my view that foreign law offers little guidance for the solution of our question.

(81) In sum, the sources show that the general principle up until Rt-2012-667 has been that judicial review of the validity of an administrative decision has been based on the facts at the time of the decision, but that, as a basic principle, new evidence that sheds light on the situation at the time of the decision may be submitted. I cannot concur in the view of the third-voting judge in Rt-2012-667 paragraph 56 when he states that case law relating to our question is unfounded and reflects "uncertainty and a lack of clarification". In my view, the picture provided by sources of law as regards the general issue is clear, and I cannot see that any reasons have been put forth that warrant a departure from the solution – even in a plenary hearing.

(82) Do Norway's human rights obligations argue in favour of courts in some areas nonetheless basing their review on the facts at the time of the judgment?

(83) The first-voting judge in Rt-2012-667 is of the opinion that in the light of Norway's human rights obligations – in particular the ECHR – an "ex nunc assessment" must be used as a basis in immigration cases. I will begin by underscoring that neither the UN Convention on the Rights of the Child nor the ECHR requires that courts must carry out an "ex nunc assessment" in connection with the review of administrative decisions.

(84) Article 13 of the ECHR lays down that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority …". It is up to the individual state to determine how it wishes to organise the review in a satisfactory manner, cf. the decision of the Grand Chamber of the European Court of Human Rights in the case of Kudla v. Poland (EMD-1996-30210) of 26 October 2000 paragraph 157:

> **"The 'effectiveness' of a 'remedy' within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the 'authority' referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so ..."**

(85) I also refer to the Grand Chamber decision in the case of Kuric and others v. Slovenia (EMD-2006-26828-2) of 26 June 2012 paragraph 369 which states, among other things:

> **« As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief ... »**

(86) Furthermore, it follows from the case law of the European Court of Human Rights that the right of review must be organised in such a way as to also include new facts. I refer to the Grand Chamber judgment of 23 June 2008 in the case of Maslov v. Austria (EMD-2003-1638), which states in paragraph 93:

> **« In this connection the Court would point out that its task is to assess the compatibility with the Convention of the applicant's actual expulsion, not that of the final expulsion order. ... Consequently, in such cases it is for the State to organise its system in such a way as to be able to take account of new developments. »**

(87) The aggregate of these decisions shows that even if new circumstances that are invoked must be reviewed before a person is sent out of the country, it is not required that this be done by the judiciary.

(88) There is no dispute over the fact that the Immigration Appeals Board's hearing satisfies the requirements as regards an effective right of review by a national authority, as these requirements are set out in the case law of the European Court of Human Rights. The Immigration Appeals Board is to be regarded as a court under the ECHR system, and the decisions of the Board are based on an "ex nunc assessment". Moreover, the immigration authorities have an obligation to consider new facts that are invoked. When it is argued that the foreign national will be subject to persecution if he is returned, this follows from section 73 of the Immigration Act, which prescribes that a foreign national may not be sent to an area where he or she will be placed in a situation that confers a right of asylum. It is further stated in section 90 last subsection that the police must submit any new circumstances which are invoked by the foreign national, and which may constitute grounds for asylum, to the immigration authorities before the person may be removed from the realm. But it is clear, also in cases other than asylum cases, that the Immigration Appeals Board has an obligation to consider a petition for reversal of a decision on the merits of the case if there is a genuine risk of a human rights violation. This follows from the state's obligation to prevent a breach of Norway's human rights obligations.

(89) The fact that there is an obligation in these cases to hear petitions for reversal also follows from the Immigration Appeals Board's internal guidelines of 22 November 2011. Point 1.5 provides that a petition for reversal shall be considered on its merits unless it is to be rejected. A petition can only be rejected in three cases: where new information is submitted which is to be dealt with as a new asylum case at first instance, where the foreign national has left the country and the case must begin with a new application, and where the petition contains certain specified errors of form. In the first two instances, the case is thus heard anew by the Directorate of Immigration with the right to appeal to the Immigration Appeals Board, and in the latter instances, an assessment must always be made of whether there is an obligation to change the earlier decision. In such case, the request must be considered on its merits despite the grounds for rejecting it, cf. the guidelines point 1.2 second paragraph.

(90) For the sake of completeness, I would also mention that the validity of a decision to reject a petition for reversal is subject to judicial review, cf. Rt-2012-681.

(91) The Supreme Court justices were informed that A has submitted a petition for reversal based on the new statutory provisions in Iran that he has invoked. It is obvious that the Immigration Appeals Board, on the basis of both section 28, cf. section 73 and section

90, of the Immigration Act, and the obligation to prevent violations of Norway's human rights obligations, must hear this petition for reversal. The Board's legal representative has stated that the Board concurs in this, and has informed the Court that the administrative authority is in the process of verifying the information regarding the situation in Iran.

(92) Consequently, the obligation set out in the Convention regarding an effective right of review is fulfilled by the system we have in Norway today. The question is therefore merely whether policy considerations, in cases concerning human rights, nonetheless warrant making a departure from the traditional line of thinking that it is the facts at the time of the administrative decision that are to be reviewed.

(93) Two factors in particular have been emphasised: the European Court of Human Rights carries out an ex nunc assessment, cf. inter alia the Grand Chamber judgment of 23 June 2008 in the case of Maslov v. Austria (EMD-2003-1638), and Norwegian courts should have no less opportunity than the European Court of Human Rights to prevent human rights violations. Secondly, it is argued that the subsidiary principle, i.e. the principle that "the system of appeal to the enforcement authorities is subsidiary and intended to provide protection if states do not assure the rights of individuals that are protected by convention", cf. the Grand Chamber decision in Rt-2010-1170 paragraph 82 – calls for the judiciary in Norway to base its review on an "ex nunc assessment".

(94) However, the same considerations that serve as grounds for the general rule that judicial review shall be based on the facts at the time of the administrative decision also apply when it is a question of whether an administrative decision breaches our human rights obligations. If a new fact is invoked while the case is being heard by the judiciary, steps must be taken to ascertain whether the arguments submitted are correct, and in such case ascertain the substance of the new facts, what relevance they have for the case that is being heard and the effect of an administrative decision in one direction or the other in terms of setting a precedent. These are tasks that are basically of an administrative nature, cf. also Rt-2001-995, page 1002.

(95) To ensure that a case receives an adequate hearing, therefore, new facts must first be heard by the administrative authority, and the judicial review must be subsequent. This means that the new facts are dealt with in the same way as for parties who have not legally contested the administrative decision.

(96) It is, moreover, uncertain how much can be gained in terms of time by basing judicial reviews on an ex nunc assessment. The main rule is that the court does not render judgment on the merits, but contents itself with ruling the decision invalid, cf. Rt-2001-995. Thus, the case must in any event be returned to the administrative authority for a new hearing. In this connection, I would also emphasise that any judgment of invalidity based on new circumstances invoked only means that an obligation is imposed on the administrative authority to reconsider the case. As already pointed out, however, the Immigration Appeals Board has an obligation in any event to consider reversing a decision when new legal facts are invoked. It is therefore difficult to see what further legal safeguards are achieved by the judiciary first determining that the new circumstances may be relevant and then ruling the administrative decision invalid.

(97) The first-voting judge in Rt-2012-667 seems to take the view that the consequences of a change of practice can be limited to immigration cases. However, I find it difficult to

see that the reasoning leading to his conclusion can be limited to the area of immigration. The arguments will have equal validity in every case in which human rights are invoked. The consequences of this point of view thus become complex.

(98) In my opinion, the main rule has the best rationale, also when breaches of Norway's human rights obligations have been invoked. In the light of this, I find no reason to depart from the basic principle that has followed from practice up until the decision in Rt-2012-667. The conclusion is thus that the judicial review of the validity of an administrative decision, also in cases involving human rights, including immigration cases, must be based on the facts at the time of the decision.

(99) With regard to the present case, this means that the amendment to Iranian law invoked by A may not be taken into consideration as part of the present case, but the question must instead be reviewed by the administrative authority – as he has already requested. In addition, this view entails that, where the children are concerned, the court shall assess the validity of the administrative decision on the basis of their connection with Norway at the time of the decision, not their present connection.

(100) Section 38 of the Immigration Act read in conjunction with Article 3 (1) of the Convention on the Rights of the Child – including the framework for judicial review

(101) Section 38 of the Immigration Act regulates the authority to grant a residence permit to foreign nationals on the grounds of strong humanitarian considerations or a particular connection with the realm – referred to in brief as residence on humanitarian grounds. The provision reads as follows:

> **"A residence permit may be granted even if the other conditions laid down in the Act are not satisfied provided there are strong humanitarian considerations or the foreign national has a particular connection with the realm.**
>
> **To determine whether there are strong humanitarian considerations, an overall assessment shall be made of the case. Importance may be attached, inter alia, to whether**
>
> **(a) the foreign national is an unaccompanied minor who would be without proper care if he or she were returned,**
> **(b) the foreign national needs to stay in the realm due to compelling health circumstances,**
> **(c) there are social or humanitarian circumstances relating to the return situation that give grounds for granting a residence permit,**
> **(d) the foreign national has been a victim of human trafficking.**
>
> **In cases concerning children, the best interests of the child shall be a fundamental consideration. Children may be granted a residence permit pursuant to the first paragraph even if the situation is not so serious that a residence permit would have been granted to an adult.**
>
> **In the assessment of whether to grant a permit, importance may be attached to considerations relating to immigration control, including**
>
> **(a) possible consequences for the number of applications based on similar grounds,**
> **(b) social consequences,**

> **(c) the need for control, and**
> **(d) respect for the other provisions of the Act.**
>
> **When there is doubt regarding the identity of the foreign national, when the need is temporary, or when other particular grounds so dictate, it may be determined that**
> **(a) the permit shall not provide the basis for a permanent residence permit,**
> **(b) the permit shall not provide the basis for residence permits pursuant to chapter 6 of the Act for the foreign national's family members,**
> **(c) the permit may not be renewed, or**
> **(d) the validity period of the permit shall be shorter than one year.**
>
> **The King may by regulations make further provisions.**

(102) Subsection 1 sets out the rule prescribing when residence may be granted on humanitarian grounds, while subsections 2 to 5 specify certain discretionary factors that will be of relevance to the assessment. According to the wording, importance "shall" be attached to some of the discretionary factors, while the administrative authority is free to choose to attach importance to other factors. It is the considerations in subsections 3 and 4, in particular, that are key to our case. It follows from subsection 3 that the child's best interests "shall" be accorded weight as a "primary consideration", while subsection 4 states that weight "may" be given to considerations of immigration control.

(103) The provision in subsection 3 is supplemented by section 8-5 of the Immigration Regulations, which provides that:

> **"In the assessment of strong humanitarian considerations under section 38 of the Act, particular importance shall be attached to children's connection with the realm."**

(104) Both section 38 subsection 3 of the Act and section 8-5 of the Regulations implement Article 3 (1) of the UN CRC, which reads as follows:

> **"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."**

(105) The CRC has also been generally incorporated into Norwegian law, cf. section 2 subsection 4 of the Human Rights Act, and in the event of conflict shall take precedence over provisions in other legislation, cf. section 3 of the Act. This also follows from section 3 of the Immigration Act.

(106) Section 38 subsection 1 continues section 8 subsection 2 of the former Immigration Act. The provision has been expanded somewhat to include in the Act the most practical considerations to which importance can be attached. However, these amendments have not resulted in any substantive differences between the new and the old statute.

(107) It follows from section 75 subsection 1 of the Immigration Act that the Storting shall approve the main principles for immigration control. It was proposed that the provision be omitted in the new Immigration Act, but the Ministry was of the opinion that it should be retained so as to ensure that there was no doubt as regards the

Storting's influence on immigration control, cf. Proposition to the Odelsting No. 75 (2006-2007) (Ot.prp.nr.75) page 45. The Storting endorsed this view, cf. Recommendation to the Odelsting No. 42 (2007-2008) (Innst.O.nr.42) page 8.

(108) Thus the basic principle is that within the framework of Norway's international obligations, it is a political question how many persons are to be granted residence in the country on humanitarian grounds. The threshold is determined by the balancing of policy considerations, cf. for example, Norwegian Official Report NOU 2004:20 Ny utlendingslov (A New Immigration Act) page 264, and it is of consequence to the overall immigration situation, cf. Proposition to the Odelsting No. 75 (2006-2007) (Ot.prp.nr.75) page 152. The need to coordinate Norwegian practice with practice in the other European countries is also stressed in the Proposition, because "a separate Norwegian policy in this area would probably swamp reception capacity completely and would soon have to be reversed".

(109) The purpose of the Immigration Act is to "provide the basis for regulating and controlling the entry and exit of foreign nationals and their stay in the realm, in accordance with Norwegian immigration policy and international obligations", cf. section 1. Section 38 of the Act is an important instrument in this connection, both for promoting considerations of immigration regulation and for fulfilling our international obligations, such as Article 3 (1) of the CRC. The provision also allows for efforts to promote another stated objective, namely that "Norway is to pursue a humane immigration and refugee policy based on the principles of solidarity and due process", cf. Proposition to the Odelsting No. 75 (2006-2007) (Ot.prp.nr.75) page 152. It is emphasised that it is important to take special account of categories of people who are particularly vulnerable, such as children and persons who have been subjected to serious abuse.

(110) This area of law is generally characterised by difficult assessments of a typically political nature. This applies, not least, to the two key conflicting considerations in our case, namely the best interests of the child and consideration of immigration regulation. Both considerations are the subject of a broad discussion in the preparatory works, which clearly show how difficult it is to weigh the interests of an individual child against immigration regulation considerations. Below I will examine the key preparatory works and take a closer look at the assumptions on which this assessment has been based.

(111) In Proposition to the Odelsting (2006-2007) (Ot.prp.nr.75) page 159, it is emphasised that in accordance with Article 3 of the CRC, the child's best interests are a primary consideration. It is further pointed out that the child's best interests are not always clear-cut:

> **"The principle of the child's best interests applies to all children in all contexts, and the concept therefore cannot be precisely defined. In assessing the child's best interests, one can be faced with a number of dilemmas. It cannot generally be assumed that it will always be in the best interests of the child (and its family) to be granted residence in Norway. Even if the welfare and security situation in Norway is considerably better than in the vast majority of countries from which asylum seekers come, this does not necessarily mean that being allowed to stay is in the child's best interests. There are also clear benefits attached to growing up in a place where one's roots, networks and sense of belonging are strong.**

…

In many cases, it is nonetheless evident that it will be in the child's best interests if the child and, if relevant, its family are granted a residence permit. This must be considered on a case-by-case basis. The weight accorded to the child's best interests must therefore be determined by a discretionary assessment based on a variety of factors such as the child's age, the child's integration in the course of its stay in Norway as well as through schooling, etc., the child's care situation in the event of return, other aspects of the social and human rights situation in the event of return, etc."

(112) On page 166, the Ministry points out that it is particularly unfortunate for families to live in an uncertain situation, and that the child cannot be blamed for the situation:

"In the case of families with children, it is particularly unfortunate if it takes a long time for the situation to be clarified. The children may suffer very negative effects, particularly in cases where the parents are incapable of coping with the situation of protracted uncertainty as regards the family's future. It is important to emphasise in this respect that the children themselves are innocent of any blame for their current life situation. It is the parents who must assume responsibility for the fact that the family applied for asylum and then failed to return to their country of origin after a final rejection even though voluntary return was possible."

(113) Thus the child must not be "punished" for the situation in which his or her parents have placed it. However, and I shall come back to this question, this does not mean that considerations of immigration regulation cannot be a decisive factor in assessments of whether children who have been in Norway for a long time and their families are to be granted a residence permit.

(114) Nor can consideration of the child's best interests be seen in isolation in relation to an individual child. A decision that is favourable for one child may result in other children being exploited by parents who have a strong desire to secure a residence permit for the family, cf. page 160 of the Proposition:

"Although consideration for the child in a specific case may argue in favour of granting a residence permit, considerations of general deterrence may in such cases warrant refusing a permit. Unless a restrictive practice is pursued in these cases, it may have negative consequences for other children in the sense that it will influence parents in other cases to follow the same course of action."

(115) When assessing whether to grant a residence permit under section 38, weight may thus be given to the consequences the decision could have for other children.

(116) As far as considerations of immigration regulation are concerned, the basic principle on page 152 of the Proposition is that:

"when we are not subject to the constraints of Norway's international obligations and it is no longer a question of protection against future danger, an assessment needs to be made in relation to consideration of immigration regulation. As the Immigration Law Committee has emphasised in its report, granting a residence permit to a significantly larger number of those who succeed in making their way to Norway than we currently do is not a practicable solution. Firstly, it would not be an effective measure for solving the problems in the parts of the world that asylum-seekers leave. The key instrument for the Norwegian authorities' efforts in respect of disadvantaged population groups in the third world is development

assistance policy."

(117) A number of considerations of immigration regulation are listed in section 38 subsection 4. Under letter (a), importance may be attached to possible consequences for the number of applications based on similar grounds. This means that the weight of considerations of immigration regulation could vary, cf. page 153 of the Proposition where it is stated:

> **"It is, moreover, the Ministry's view that the proposed provision will make it possible to pursue a flexible practice depending on the degree to which considerations of immigration regulation apply. In this connection, it is important to be strongly aware of the need to balance strong humanitarian considerations with considerations of immigration regulation. If granting a permit will not result in a potentially significant increase in the influx of immigrants or have special consequences for other cases pending decision, it may be possible to grant permits to a greater degree than in cases where strong considerations of immigration regulation apply."**

(118) The consequences arising from an administrative decision will thus be a pivotal factor when determining how much weight is to be given considerations of immigration regulation. This must be seen in conjunction with the principle of equality applied by the Norwegian public administration. This means that when a residence permit is granted in one case, a residence permit must be granted in other similar cases. On page 154 of the Proposition, it is stated:

> **"The Ministry would emphasise that it is primarily consequences which can be linked to the threshold for granting and refusing a permit, among other things on the grounds of principles of equal treatment, that may be of significance for immigration regulation."**

(119) This means that the fewer consequences the granting of a residence permit has for other cases, the greater leeway there will be for giving weight to individual considerations. Consideration for the child's best interests is therefore more likely to be a decisive factor when weighed against considerations of immigration regulation when there are special circumstances attaching to the child, than when the child is in a normal situation that does not differ from the situation of the majority of children who apply for a residence permit.

(120) Another consideration of immigration regulation that is emphasised in section 38 subsection 4 (d) is that of respect for the other provisions of the Act. In this connection, the Proposition differentiates between persons who cooperate on their return after their application for a residence permit is rejected with final effect, and persons who do not do so. If a long period of time elapses during which the foreign national is unable to return to his or her home country despite making every possible effort to return, section 8-7 of the Immigration Regulations provides an opening for granting a residence permit. For those who do not cooperate, it is stated on page 166:

> **"The basic principle that must be adhered to is that persons who have received a final rejection of an application for a residence permit have an obligation to leave the country within the time limit for departure that has been set by the immigration authorities. A breach of the obligation to leave the realm constitutes a breach of the provisions of the Immigration Act which may result in both a penalty and expulsion. It will send conflicting signals if permanent arrangements are established whereby a residence permit may nevertheless be granted in this**

> **type of case. It could also be perceived as extremely unfair in relation to those who comply with their obligation to leave the realm.**
>
> **If the possibility is allowed of granting a formal residence permit to persons who do not cooperate on their own return, this could be both a pull factor that increases the influx to the country and an incentive to more persons not to cooperate on their own return. The potential impact in this connection is considerable, because there are already a large number of persons who do not wish to leave voluntarily even if this is possible, in addition to which there are major problems involved in carrying out forced returns to countries such as Somalia and Iraq.**

(121) As is evident from the above quotation, the Ministry issues a clear warning against having "permanent arrangements whereby a residence permit may nevertheless be granted" to persons who fail to comply with their obligation to leave the realm. It further warns against "allowing for a formal residence permit for persons who do not cooperate on their own return." It is pointed out in the Proposition that such a rule, which implies that if one "holds out" long enough a residence permit will be granted, has obvious negative ramifications. It is further stated that, in addition to the fact that such a rule will have the effect of increasing the influx of immigrants to the country and counteract their cooperation on returning, it is not advisable from the standpoint of control to have a large number of persons without residence status in the country.

(122) The fundamental distinction between those who cooperate on returning and those who do not was endorsed by a majority of the Storting. In this respect, Recommendation to the Odelsting No. 42 (2007-2008) (Innst.O.nr.42) pp 26-27 reads as follows:

> **"With regard to persons who are long-term residents of Norway, the Committee's majority, the members from the Labour Party, the Conservative Party, the Socialist Left and the Centre Party, support the view that a clear distinction must be made between those who cooperate on returning after their application has been finally rejected, and those who do not cooperate.**
>
> **The majority agrees that special regulatory provisions should be made in respect of the former group regarding the possibility of a residence permit, while a basic principle should be maintained in respect of the latter group to the effect that no residence permit shall be granted."**

(123) As far as balancing the child's best interests and considerations of immigration regulation is concerned, it is logical to start by consulting the preparatory works of section 8-5 of the Immigration Regulations. On 5 April 2006, an act of legislation was proposed by a member of the Storting – a "Document 8 bill" – regarding measures for children who had lived in an asylum reception centre for a long time (Doc.No. 8:69 (2005-2006)). Under the bill, families with children who had spent more than three years in a reception centre were to have their cases heard again with a strong presumption of a residence permit being granted. In a letter dated 31 May 2006 from the Minister of Labour and Social Inclusion, this bill met with objections:

> **"The Government is prepared to find solutions to prevent children and families with children from spending a very long period of time in an asylum reception centre after applying for asylum.**
>
> **...**

> **With regard to the group that has received a final rejection, it is important to emphasise that the basic principle must be that everyone is obliged to respect the administrative decision that has been made, and that those whose applications have been rejected should be expected to take the initiative themselves to travel back to their country of origin.**
>
> **...**
>
> **In the light of this, I cannot support the solution proposed by representatives Tørresdal and Lilletun. A solution of this nature will signal that if families with children 'hold out' long enough, they will eventually be granted a residence permit. This will in turn entail a risk of parents using their children as a means of obtaining a residence permit.**
>
> **It is the Government's policy, when assessing strong humanitarian considerations, to carry out an independent assessment based on the children's situation, in which a residence permit may be granted if the children have developed a strong connection with the realm as a result of a long period of residence. No absolute requirement may be laid down as regards the duration of residence, but it must be assumed that children are likely to develop such a connection more quickly than adults."**

(124) The letter concludes with a number of proposals for measures to remedy the situation. The Document 8 bill was not approved by the Storting. The Government's proposal was circulated for consultation on 1 November 2006. Among other things, it was proposed to add a new section 21 b in the Immigration Regulations, which has now been maintained in the current section 8-5. The comments in the preparatory works of section 21 b must thus be regarded as relevant to the interpretation of section 8-5. It is made clear in the consultation document that, where children were concerned, a departure would be made from the earlier legal position whereby no weight was given to any connection that was developed after a final rejection. The child's best interests were, in principle, to be accorded special weight regardless of the conduct of the parents during the period of residence. However, it was emphasised that the parents' failure to cooperate could militate against granting a residence permit. The decision had to be made on the basis of a case-by-case assessment. The draft of a new section 21 b was only to regulate the weighting of a child's connection with the realm, and said "nothing as to whether or not a permit is to be granted". It further underscores that "the situation is still such that asylum seekers and other persons whose application is finally rejected shall abide by the rejection and leave Norway of their own accord".

(125) The appellants argue that since weight is to be accorded to the connection that a child has developed during an illegal stay, the illegal stay cannot be cited as a consideration of immigration regulation that militates against the granting of a residence permit. The preparatory works show that this line of argument is not tenable. The further connection that a child develops during an illegal stay can be the determining factor when this consideration is weighed against considerations of immigration regulation. However, the legislator has implied that account can also be taken of illegal stays. No permanent arrangement has been intended whereby a residence permit is to be granted after a specific period of time despite an illegal stay. The decision whether to grant a permit must be based on a case-by-case assessment and weighing of considerations.

(126) The views resulting from the consultation document were followed up in Proposition to the Odelsting No. 75 (2006-2007) (Ot.prp.nr.75) page 160:

> **"The Ministry emphasises that the detailed weighing of the child's best interests against considerations of immigration regulation must be carried out in each individual case. It would constitute a breach of the convention to attach decisive weight to considerations of immigration regulation if this is not justifiable in relation to the child's best interests. However, the Ministry would underscore the importance of the administrative authority carrying out a thorough assessment of all aspects of the child's situation that may have a bearing on the case, and the assessments that have been made being clearly apparent in the administrative decision…".**

(127) The Ministry emphasises that Article 3 (1) of the CRC does not give any instructions as to how individual cases must be decided, and underscores on page 160 that there is latitude for the possibility that counter-considerations may be decisive:

> **"After the administrative authority has taken the child's best interests into consideration in an individual case, Article 3 of the CRC does not provide any absolute instructions as to how an individual case is to be decided. It will therefore be possible, in principle, to accord as much or even more weight (underlined in this document) to counter-considerations, such as the need for controlled, regulated immigration.**

(128) Consideration of the child's best interests may, however, result in a residence permit being granted at some point in time, cf. page 166 of the Proposition:

> **"However, consideration for the children may at some point in time warrant a formalisation of their stay. Reference is made in this connection to the regulatory amendment made on 1 June 2007, whereby a child's connection with the realm shall be accorded special weight when assessing whether a permit shall be granted pursuant to section 8 subsection 2 of the Immigration Act.**

(129) In conclusion on the same page, the following summing-up is made:

> **"When the different considerations that are relevant here are weighed against each other, the Ministry is still of the opinion that it is necessary to maintain a restrictive policy in respect of those who do not cooperate on returning. The Ministry therefore does not propose that any further regulatory provisions be made regarding permits for foreign nationals who do not cooperate on returning. However, the administrative authority will not be precluded from granting permits under the provision in section 38 subsection 1 of the Bill in specific cases where special considerations apply."**

(130) In the Committee deliberations in the Storting, the majority supported the view expressed in the Proposition, cf. page 26 of Recommendation to the Odelsting No. 42 (2007-2008) (Innst.O.nr.42). A majority noted that the more important the decision for the child's situation, the higher the threshold for giving weight to considerations of immigration regulation. Another majority emphasised that in certain contexts, the child's best interests will be so weighty that it will not be possible to attach decisive weight to considerations of immigration regulation.

(131) On 8 June 2012, the Ministry of Justice and Public Security presented a white paper on children seeking asylum (Meld.St.27 (2011-2012). The main impression given by the white paper is that the Government endorses the current regulatory framework and considers that the current practice should be continued, albeit with some slight differences. The white paper states that administrative practice has been "on the borderline" of what was intended by the legislator in some areas. In the preparatory

works of the Immigration Act, it is underscored that the distinction is essentially made between persons who cooperate on their return to their country of origin and those who do not cooperate. The white paper presupposes a further differentiation, where those who do not cooperate shall be assessed differently depending on how actively they resist returning. The situation in our case, where the family has not helped to obtain travel documents, and is therefore unreturnable, is not commented on in the white paper.

(132) The white paper and the Committee's comments must be interpreted in the light of the political nature of considerations of immigration regulation, cf. section 1 of the Immigration Act. As far as the differentiation between those who engage in active resistance and those who resist passively is concerned, I perceive this to be a guideline for expected future administrative practice.

(133) The appellants and the third-party intervener have claimed that holding the children vicariously liable for the parents' breach of immigration legislation is tantamount to "punishing" the children for something the parents have done. This approach is wrong. The argument that children cannot be evaluated without taking account of their parents' illegal stay is linked to the supposition that, if this is not done, the children are likely to be used by their parents as a "means" of obtaining a residence permit by refraining from complying with their obligation to leave the country, with the unfortunate consequences that this could have for other children. I refer to my report in connection with the Storting's deliberations on this topic in Proposition to the Odelsting No. 75 (2006-2007) (Ot.prp.nr.75). This consideration has, moreover, been accepted by the European Court of Human Rights in case 47017/09 (EMDN-2009-47017), Butt v. Norway, as regards the relationship to Article 8 of the ECHR, cf. paragraph 79.

(134) All in all, the preparatory works – and the subsequent work in the white paper on children seeking asylum (Meld. St. 27 (2011-2012)) – show that the child's best interests shall be a weighty consideration. Importance shall be attached to the connection that has developed also while the child has resided illegally in the country. However, the child's best interests can be weighed against any conflicting interests. Considerations of immigration regulation may be so weighty that they must prevail over the child's best interests, cf. the earlier citation from page 160 of the Proposition to the Odelsting No. 75 (2006-2007) (Ot.prp.nr.75). But the greater the weight given to the child's interests, the less possibility there is of taking account of other considerations, and under the circumstances the child's best interests may be such a weighty consideration that it must prevail, regardless of any other counter-considerations that may apply.

(135) The appellants have argued that the requirements set out in Article 3 (1) of the CRC go beyond what may be inferred from section 38, section 8-5 of the Regulations and the preparatory works. I do not agree. The wording of Article 3 (1) shows that the child's best interests shall be a primary consideration, but it is not the only one and nor is it always the decisive consideration, cf. Rt-2009-1261 paragraph 31 and Rt-2010-1313 paragraph 13. As stated in the explanation in Rt-2009-1261 paragraph 32, this wording was chosen precisely because it was to allow for other weighty interests. It is evident from the preparatory works of the Convention, second reading (1988-1989), point 121 – which dates from the period immediately prior to the adoption of the Convention –

that there was agreement as to the interpretation on which Norwegian law has been based:

> **"With regard to the revised text ... a number of delegations questioned whether the best interest of the child should be the primary consideration in all actions. It was generally noted that there were situations in which the competing interests, inter alia, of justice and of the society at large should be of at least equal, if not greater, importance than the interests of the child."**

(136) The UN Committee on the Rights of the Child issues General Comments on the interpretation of the CRC. I refer to Rt-2009-1261 paragraphs 35 to 44 regarding the background for and the significance of these comments as a source of law. General Comment No. 5 (GC-2003-5-CRC) deals with measures for implementing the CRC. Point 12 emphasises the necessity of developing a children's rights perspective throughout the government administration, parliament and the judiciary in order to ensure effective implementation of the Convention. And in connection with Article 3 (1), it is emphasised that "[e]very legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision …". In my opinion, the requirements set out in section 38 of the Immigration Act regarding the need to consider the child's best interests accord well with these views of the Committee on the Rights of the Child.

(137) The appellants and the third-party intervener have, however, pointed out that General Comment No. 6 (GC-2005-6-CRC) requires that considerations that are to take precedence over the child's best interests must be rights-based. The comment concerns the treatment of unaccompanied and separated children outside their country of origin, and does not apply to the situation in our case, where the children are accompanied by their parents. However, it is argued that the same considerations apply, and that the comment must therefore serve as the basis for assessment in this respect as well. I do not agree. General Comment No. 6 addresses an issue where children are in a particularly vulnerable situation that is essentially different from cases where the child is accompanied by his or her parents. In the CRC, it is a basic assumption that parents have the primary responsibility for their children, cf. Article 18, and that children are best off with their parents. I refer to Sandberg et al., Barnekonvensjonen, Barns rettigheter i Norge (Convention on the Rights of the Child, Children's Rights in Norway), 2nd edition 2012, page 294. After discussing the situation of unaccompanied minors and the significance of Rt-2009-1261, she writes:

> **"In cases where the child has come to Norway with his or her family, the assessment must be different, because the basic assumption is that the child will remain with his or her family, regardless of the outcome of the case. General Comment No. 6 of the Committee on the Rights of the Child applies only to unaccompanied minors, and the possibility that considerations of immigration regulation can be decisive for whether the whole family is granted a residence permit here can hardly be ruled out. On the other hand, such considerations cannot be allowed to take precedence as a general rule over the child's best interests. Considerations of that nature, too, must be considered on a case-by-case basis."**

(138) I support this view. There are no grounds for applying General Comment No. 6 outside its scope.

(139) For the sake of completeness, I would mention that the comments of the Committee on the Rights of the Child on Norway's report for 2010 could lead to another result. In these comments, the Committee appears to think that the principle that the child's best interests must be a primary consideration has not been applied in full in all areas in Norway, and immigration cases are mentioned as an example; see the Committee's concluding observations of 29 January 2010 point 22. In point 52 (j), the Committee recommends ensuring "a primary consideration of the best interests of the child and his or her affiliation to Norway whenever decisions about the child's future are under consideration". In my opinion, this recommendation does not go beyond what clearly follows from section 38 of the Immigration Act as it must be interpreted on the basis of preparatory works and practice. There are no grounds to maintain that the statement must always be interpreted as meaning that the child's best interests must always prevail over considerations of immigration regulation.

(140) Scope of the judicial review

(141) I shall first discuss the judicial review of decisions pursuant to section 38 in general, and then the review of decisions that concern children in particular, cf. section 38 subsection 3.

(142) As a point of departure, the courts' competence of review depends on an interpretation of each individual legal provision. Section 38 subsection 2 of the Immigration Act is a "may" provision. It provides the authorities with *the power* to grant a residence permit when there are humanitarian considerations. Unless Norway's international obligations provide otherwise, no one has a *right* to residence in Norway by virtue of this provision. Thus, the wording shows that the discretion to be used is a so-called "free discretion". In such cases, the courts may review the public administration's application of the law, including the relationship to our human rights obligations. The review also covers the handling of the case and whether the decision is based on correct facts. However, the concrete discretionary judgment is not reviewed beyond a control of whether it is sufficiently wide in scope and rational and that the result does not appear obviously unreasonable, cf. Rt-2012-paragraph 68.

(143) It is evident from the preparatory works of the Act that the intention is that free discretion is to be exercised. In Norwegian Official Report NOU 2004:20 *Ny utlendingslov* (A New Immigration Act) it is emphasised on page 264 that the provision in section 38 allows ample scope for discretion and that the threshold when assessing reasonableness is primarily a political question. This is also presumed in Proposition to the Odelsting No. 75 (2006-2007) (Ot.prp.nr.75) page 16, and on page 160 it is noted that "it is the ordinary scope and principles of the courts' competence of review that apply as regards the content of the immigration authorities' free discretion pursuant to this provision".

(144) The same follows from Supreme Court case law. As mentioned, section 38 subsection 1 of the Immigration Act is a continuation of the former Immigration Act's section 8 subsection 2. With regard to the latter provision, the Supreme Court has established that it "cannot be understood so as to mean that subsection 2 allows for judicial reviews of the public administration's application of the conditions 'strong humanitarian considerations' or the foreign national's 'particular connection

with the realm", cf. Rt-2008-681 paragraph 46. The same must apply to the understanding of section 38 subsection 1.

(145) The question is then whether the review is different for decisions that affect children, cf. section 38 subsection 3 of the Act and section 8-5 of the Regulations. By way of introduction, there is reason to emphasise that within the limits of Norway's obligations under international law and the framework for judicial review established by law, it is a political issue to establish the limits according to which a residence permit may be granted on grounds of humanitarian considerations also as far as children are concerned.

(146) The wording of section 38 subsection 3 of the Act – and of section 8-5 of the Regulations – does however show that the public administration's use of discretionary judgment is not as free for decisions that affect children as it would otherwise be pursuant to section 38. It is required that the best interests of the child be a primary consideration and that particular importance be attached to the child's connection with the realm. The question of whether the concern for the child's best interests and the reference to the Convention on the Rights of the Child would indicate a more wide-ranging review competence was discussed in Rt-2009-1261 paragraphs 75 to 77. In the judgment, it is concluded in paragraph 77 that "[t]he courts' task is …. to control the administration's general understanding of the concept of 'the best interests of the child' in the relevant area, and that this consideration has been properly assessed and balanced against any counter considerations. On the other hand, the specific assessment of the best interests of the child and the specific balancing of interests come under the scope of the administration's free exercise of discretion".

(147) It is true that the above decision concerned section 8 subsection 2 of the former Immigration Act, but I believe a corresponding restriction must apply to judicial review pursuant to section 38 subsection 1 of the Immigration Act, cf. section 8-5 of the Regulations.

(148) The intervener has argued that in cases pursuant to section 38 of the Immigration Act, courts may review the proportionality of the decision. To support this view, reference has been made to the Recommendation to the Odelsting No. 42 (2007–2008) (Innst.O.nr.42) page 26, where it is stated that "the more important the decision is for the child's situation, the higher the threshold for giving weight to considerations of immigration regulation". The statement provides a guideline for the discretion that immigration authorities are to exercise when balancing the child's best interests against considerations of immigration regulation. It does not allow for the courts to review the discretion beyond what can be deduced from the wording.

(149) In sum, this means that the courts can fully review whether or not the administration has interpreted the act correctly. That the best interests of the child, including its connection with Norway, must be properly assessed and balanced against any counter considerations, means that it must appear from the decision that the best interests of the child have carried weight as a primary consideration. The courts of law cannot review the specific balancing of interests.

(150) It has been objected that the courts cannot check whether importance has been

attached to the concern for the child as a primary consideration without reviewing the discretion as such. I do not agree with this. The courts must be able to perform their control on the basis of the grounds stated in the decision. I make reference to the Immigration Regulations section 17-1a, which stipulates that decisions affecting children as a general rule shall state the grounds of the decision so that it will be clear what assessments have been made of the child's situation, including how the best interests of the child have been given weight. Such grounds will be sufficient for the control to be performed by the court.

(151) Against this background I will now proceed to assess the validity of the decision in question.

(152) Assessment of the decision of 29 November 2010

(153) I will begin by specifying that only the question of the validity of the rejection of the petition for a reversal as a consequence of the children's connection with Norway is to be assessed. The question of asylum has been definitively decided by a court of appeal judgment, and the new elements that have been invoked must be assessed by the administration in connection with the petition for reversal that has been submitted. It is the children's connection with the realm at the time of decision that is to be taken into consideration; that is, their connection as per 29 November 2010.

(154) The Board starts its discussion of residence permits on humanitarian grounds by presenting the contents of section 38 in general and of its subsection 3 in particular. The wording of the Act is taken as a point of departure and the Board emphasises that the decision will depend on an overall assessment. The Board points out that in cases that affect children, the child's best interests shall be a primary consideration, and that this entails that a child may be granted a residence permit even if a residence permit would not have been granted to an adult on those same grounds. It is then specified that the child's interests are a central consideration, but that also in relation to children importance may be attached to considerations relating to immigration control. Furthermore, reference is made to the Immigration Regulations section 8-5, which stipulates that particular importance shall be attached to the child's connection with the realm in the assessment of whether there are strong humanitarian considerations. This is further elaborated on:

> **"It is stated in annex 8 to the circular concerning the entry into force of the new Immigration Act, A-63/09, that the children's connection with the realm shall be assessed on the basis of a number of elements, including the duration of their stay here, age, kindergarten/school, leisure activities, knowledge of the Norwegian language, and whether other circumstances indicate that the child has a particular connection with the Norwegian society. Both legal and illegal stays shall be included; however, what is to be considered a long period of stay must be assessed individually and may vary from one case to another. It is furthermore stated that the requirement in terms of the period of stay cannot be fixed in absolute terms, but that as a general rule, a stay of less than three years will not be sufficient. An assessment shall be made of whether a residence permit may be granted if there are strong humanitarian considerations, and considerations relating to immigration control and general deterrence may indicate that a permit should not be granted. A concrete assessment must be made of the child's connection and of the arguments that speak for and against the granting of a permit."**

(155) On the basis of what I have stated earlier about the understanding of section 38, this is an expression of a correct interpretation of this provision.

(156) With regard to the daughter D, who was somewhat older than three and a half years at the time of decision, the Board found that she did not have such a connection to Norway that would provide the basis for a residence permit. Reference is made to her very tender age, and that although she was born in Norway and has lived here her entire life, it follows from precedent decisions that a stay of this length for such a young child will not in itself be sufficient to obtain a residence permit on grounds of connection to Norway. Her connection will primarily be to her parents and immediate family. In my opinion, these grounds show that D's interests have been adequately assessed in line with the Act and the guidelines in its preparatory works.

(157) As regards the son C, the Board finds that he has a connection that may provide the basis for a residence permit:

> **"C, who now is about 7 years and 7 months old, has now been in Norway for almost 6 years. To the Board's knowledge, he has been in kindergarten and he has attended school since reaching school age. He is well integrated into the local community, has many friends, participates in leisure activities and masters the Norwegian language well.**
>
> **Against this background, the Board believes that as a point of departure, C satisfies the requirements in the Act and the Regulations and the practice that has developed in relation to children's period of stay and connection that indicate that a residence permit may be granted pursuant to section 38 subsection 1 cf. subsection 3 of the Immigration Act, cf. section 8-5 of the Immigration Regulations."**

(157) The appellants have pointed out that it follows from article 12 of the CRC that C should have been heard and that this constitutes a procedural error. The Immigration Appeals Board must be understood as stating that it would be in C's best interest to be allowed to stay in the country, and I cannot see that this point of departure or the contents of the decision would have been different if C had been heard. I would add that the child's interests have been defended by the family's lawyer.

(159) The Board then goes on to discussing the considerations relating to immigration control:

> **"It is stated in the consultation document from the Ministry of Labour and Social Inclusion of 01.11.2006 and circular A-25/2007 that illegal stays and the lack of cooperation on the part of the parents towards making a return possible, verifying identities etc., are considerations relating to immigration control that militate against granting a permit on the grounds of a child's attachment developed after a final decision has been issued, and that it will depend on an overall assessment whether a permit should be granted."**

(160) Next, the Board examines the family's legal and illegal stays in Norway. The illegal stay is stated to be one month longer than it actually was. At the time of decision, the family had stayed illegally in Norway for about three years and one month. This error of one month cannot have been of significance for the content of the decision.

(161) The Board furthermore states:

> **"In this connection, we also note that the complainants previously, after the final rejection, have been granted a temporary permit to make it possible to carry out necessary health treatment of C. The permit was granted on the clear condition that it would not constitute a basis for any renewal and that the duty to leave the realm would be reestablished once the permit expired. Consequently, the case has certain similarities to for instance cases regarding residence permits for studies and other cases where time-limited permits are granted for a specific purpose, where the condition is that the person must leave the realm upon the expiry of the permit.**
>
> **The complainants have failed to fulfil their duty to leave the realm voluntarily during the periods this duty has existed. In the Board's assessment, they have also committed a gross breach of trust, as they after first having received a rejection were granted a temporary permit for the sole purpose of allowing C to receive treatment and become well enough to be able to return to the home country, not to return home. Moreover, they have not contributed towards any return, since they have not presented ID or travel documents that could facilitate such a solution."**

(162) At the time, the reason given in the petition for a reversal was the need to complete the treatment in Norway. C received a treatment that he could have received in his home country. Consequently, he had no entitlement to being granted a residence permit in Norway. Whether he contracted the infection in Norway is of no legal significance in this context. When a temporary permit was nonetheless granted, the Board took into consideration the fact that the parents previously had shown a lack of will to go through with the treatment. It is a clear precondition for the decision that the family would leave the country at the expiry of the period. It is thus correct when it is argued in the decision that the case has certain similarities to permits for studies and other cases where time-limited residence permits are granted for a specific purpose. In my opinion, the label "breach of trust" is justifiable. Another matter is that the expression "gross breach of trust" may seem too strict a description, when the family is compared to others who have a duty to leave the country and who fail to do so even if it would have been possible.

(163) The decision's discussion of the immigration control considerations does however show that this somewhat strict characterisation has not been decisive for the outcome. In this respect, the following is stated:

> **"In the opinion of the Board, the considerations relating to immigration control are important elements of assessment in a case like this, and it is the Board's assessment that they should be an impediment to granting a permit in this case. Reference is made to what is stated about this above. Additionally, the complainants have violated the provisions of the Immigration Act regarding the duty to leave the country after a final rejection has been issued. The conditions for expelling the complainants pursuant to the Act's section 66 (a) are thus fulfilled. The concern for the respect for the other provisions of the Act thus indicate that a permit should not be granted, cf. the Act's section 38 subsection 4 (d). Furthermore, the concern for the possible consequences for the number of applications based on similar grounds is an element in cases like this, cf. the Act's section 38 subsection 4 (a).**
>
> **For reasons of immigration control, a unanimous Board has found that a permit should not be granted. The Board is of the opinion that in a case like this, considerations of immigration control must carry more weight than and have preference to considerations relating to the child's connection with the realm."**

(164) Following this, the Board finds that the concern for C is not a strong argument against such an outcome:

> **"Nor does the children's connection, seen in conjunction with the children's overall situation indicate, in the Board's view, that there are strong humanitarian considerations pursuant to the Act's section 38 subsection 1 cf. subsection 2. Reference is made to the fact that the children will return to their home country together with their parents. And there is not sufficient information in the case to indicate that the parents will not be capable of providing them with sufficient and necessary care. In their home country they also have, according to the information provided, a network of family members. The Board presumes they will be capable of providing the necessary support and help. This assessment has taken into consideration that the threshold for obtaining a residence permit is lower for children than for adults."**

(165) As stated in the decision, reference is made to the Act's section 38 subsection 4 (a) – "possible consequences for the number of applications based on similar grounds" – and (d) – "respect for the other provisions of the Act" - as far as the immigration control considerations are concerned. These are central immigration policy concerns that have a sound basis in the facts of the case. I make reference to what I have stated earlier about these assessment elements. Finally, I make reference to the fact that the administration also has performed a check of whether it would be defensible to send the children to Iran. I cannot see any flaws in the discretionary assessment that must lead to invalidity. Nor can I see the decision as being founded on an incorrect interpretation of article 3, paragraph 1 of the Convention of the Rights of the Child. In my opinion, the decision's statement of grounds shows that C's interests have been adequately assessed within the framework of the Act and Norway's international obligations. Following the above, I cannot see there being any flaws in the decision that must cause it to be invalid.

(166) Following the above, the appeal must be dismissed.

(167) I vote for this

J U D G M E N T :

The appeal is dismissed.

(168) Justice **Bårdsen:** I have a different opinion than the first-voting judge on the main question of the case. In my opinion, the Immigration Appeals Board's decision of 29 November 2010 to not grant family A's petition for a reversal is invalid.

(169) I shall first discuss whether the courts of law, when performing their review, are allowed to take into consideration factual circumstances that have arisen after the decision was made. In the case at hand, the question is in particular whether it may be of significance for the validity of the rejection that Iran in February 2012 – according to what has been claimed in the appeal – supposedly introduced a mandatory death penalty for Muslims abandoning their religion. There is also the question of whether a strengthened connection with Norway in the more than two years that have passed since the Immigration Appeals Board reached its last decision, may be of significance for the assessment of the decision to refuse a residence permit

under section 38 of the Immigration Act. As will become evident below, this choice of point in time for realising the assessment is however of no significance for my opinion on the question of validity.

(170) I concur with what the first-voting judge has said about the general system for judicial review of administrative decisions. There will however be areas where particular considerations indicate that the judicial review should be done on the basis of an ex nunc assessment. In Rt-2012-667 paragraph 30, I argued that this is the case for decisions to refuse a residence permit on humanitarian grounds pursuant to section 38 of the Immigration Act. And I presumed that there were good reasons to indicate a similar outcome in other immigration law cases – including cases concerning asylum.

(171) The question of an ex tunc or ex nunc assessment has been considerably better elucidated now in the plenary case than in the case reported in Rt-2012-667. My conclusion is however that the solution of which I made myself a spokesman should be upheld.

(172) In my opinion, I started from the fact that the European Court of Human Rights applies an ex nunc assessment in their processing of complaints with claims of violations of, *inter alia*, Articles 3 and 8 ECHR in connection with expulsion and removal. The judgment of 4 December 2012 in *Butt v Norway* paragraph 52 provides a very recent illustration, when the European Court of Human Rights therein emphasises that its task "is to assess whether the applicant's deportation, if implemented, would be compatible with the Convention". The need for such a review by the ECtHR virtually follows from the situation and the nature of these rights: it may lead to irreparable damage and denial of justice if the ECtHR were to disregard facts that are relevant under the Convention by making reference to these facts having occurred after the final domestic decision, cf. the judgment of 20 September 2011 in *A. A. v. the United Kingdom,* paragraph 67.

(173) In the judgment of 23 June 2008 in *Maslov v. Austria,* paragraph 93, the ECtHR emphasised that Member States must organise their decision-making systems in immigration law cases in such a way "as to be able to take account of new developments". In this connection, the ECtHR made reference to the judgment by the European Court of Justice in Joined Cases *Orfanopoulos and Olivieri* (C-482/01 and C-493/01), wherein it was established that Council Directive 64/221 Article 3 "precludes a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters which occurred after the final decision of the competent authorities".

(174) I find that in immigration law cases there is no general requirement under the Convention of a hearing by a court of law, or of courts to perform an updated assessment of the factual basis of a decision in connection with a validity review. What is decisive is whether the national decision-making system as a whole guarantees that the factual basis of the decision is up to date at the time of its implementation. In stating this, I have in mind not only the possible occurrence of entirely new legal facts. The mere circumstance that time has passed may also turn out to be relevant for the overall assessment, for instance when there is a question of

a strong connection with the realm.

(175) The normal situation would be that subsequent developments would give rise to a new application, a petition for the reversal of an earlier decision or that the immigration authorities raise the matter on their own initiative. In this connection I make reference to the Directorate of Immigration's internal guidelines for the processing of petitions for reversals of 22 November 2011, where it is stated in point 1.1 that "The Immigration Appeals Board has a duty to reply to, but not necessarily assess on their merits, petitions for reversals of the Board's own decisions". In point 1.5 it is stated that as a general rule, petitions for reversals should be assessed on their merits. In the same point it is furthermore stated that if "a lawsuit is filed against the Immigration Appeals Board in a case where a petition for reversal has been received but not replied to, the petition shall to the extent possible be assessed on its merits and replied to before the court hearing".

(176) The guidelines as a whole give the impression that the Immigration Appeals Board attaches great importance to a processing of petitions for reversal that should be efficient and guarantee due process. It is however uncertain to what extent these guidelines give the foreign national a right to demand that the Immigration Appeals Board consider a reversal. Until today it has been unclear to what extent there is a duty on other grounds for the immigration authorities to consider reversal in cases where no need for protection can be alleged under the Immigration Act section 28, cf. sections 73 and 90. I make reference to Norwegian Official Report NOU 2010: 12 page 108 and to the pointing out thereof by the first-, second- and third-voting judges in Rt-2012-667, in paragraphs 28, 47 and 58, respectively.

(177) The first-voting judge found that the immigration authorities have a duty to assess on its merits a petition for reversal "if there is a real risk of a human rights violation". I support such a duty and I consider the first-voting judge's clarification to be a contribution towards a strengthening of due process that will reduce the need to allow new circumstances to be argued before the courts. However, in my opinion one cannot disregard that an ex nunc assessment in court is the solution that best responds to the concern that the final outcome of an immigration law case should be consistent with Norway's international obligations. In this respect I make reference to the Dispute Act section 1-1, which, *inter alia*, emphasises that it is an object of the Act to "safeguard the need of individuals to enforce their rights".

(178) My main reason for stating that the courts in immigration law cases should rely on an ex nunc assessment is found in Rt-2012-667 paragraph 27:

> **"The circumstance that the European Court of Human Rights reviews the human rights aspects of the case on the basis of the situation at the time of its processing of the complaint, suggests that even Norwegian courts must base their review on the circumstances as they are at the time of the review of the case. In this respect I make reference to Article 13 ECHR regarding the *right to an effective national remedy* for any individual who can reasonably claim that his Convention rights are being violated, and to the State's fundamental *obligation to respect and secure* the rights under the Convention, cf. Article 1. On the basis of the Convention's system, and its presuppositions of cooperation between national courts and the European Court of Human Rights, it is – in my opinion – unsatisfactory if the**

> **national judicial review has a narrower scope, or is less in-depth, than a possible subsequent review by the European Court of Human Rights. The Convention's principle of *subsidiarity* indicates that Norwegian courts at the very least have such competence of review as is required to ensure that it is not necessary to apply to the European Court of Human Rights to obtain the legal protection stipulated by the Convention. On this point I refer to the Supreme Court's Grand Chamber judgment found in Rt-2010-1170 paragraphs 82 and 85".**

(179) This is still my opinion.

(180) Let me add that the provision regarding the duty to exhaust all domestic remedies under the Convention's Article 35 paragraph 1 before an application can be heard on its merits by the ECtHR, cannot reasonably be understood as meaning that the foreign national, after having his case decided by the Immigration Appeals Board and then heard by the three court instances, must ask the immigration authorities to consider a reversal and then have to bring a new invalidity action and possibly an appeal.

(181) Thus, my reason for stating that courts in their judicial review of immigration law cases may consider new circumstances is based on the concern for the fulfilment of Norway's human rights obligations and the connection to the international enforcement. However, as I point out in my opinion in Rt-2012-667 paragraph 30, the consequences will necessarily be somewhat more wide-ranging: the competence to consider also altered circumstances cannot exist only to the extent that the new circumstances are of significance for the human rights assessment. The consequence thereof would be that the review of a single decision would have to be done partly on the basis of an ex tunc assessment and partly on the basis of an ex nunc assessment – depending on whether the fact concerned is relevant in human rights terms. In practice, such a division is not realistically feasible. One might also experience the paradox that a decision found to be in violation of the Convention nonetheless would have to be considered valid and have legal effects. If the courts must limit themselves to reviewing the decision on the basis of the circumstances at the time of decision, a similar ambiguity may arise where the foreign national both files an action for invalidity and demands a separate judgment stating that the decision, or its execution, violates the Convention. Such an independent action for violation of the Convention must be decided on the basis of an ex nunc assessment, or alternatively on the basis of the situation at the time the removal took place. I make reference to case 2012/1042 (Ø-2012-02399-P), which will be voted on later today.

(182) If the courts upon an ex nunc assessment find that new circumstances, when seen in conjunction with the original grounds, are of such a nature that there is a realistic possibility of the decision having a different outcome, it is my opinion that the decision should be declared invalid. In that case, the immigration authorities will have a duty to assess the case again and to reach a new decision on an updated and independent basis. The question of whether the courts in such cases should apply an ex nunc or an ex tunc assessment is in reality a question of whether the courts shall be able to order the Immigration Appeals Board to consider a reversal on the basis of new circumstances. It is clear that the courts are competent to deliver a judgment to this effect if a separate action is filed against the Immigration Appeals Board's decision to not want to consider reversal on the basis of circumstances which occurred during the period between the decision and the rejection of the petition for

reversal, cf. Rt-2012-681 paragraph 31. It is difficult for me to understand why the courts should not have the same competence where the question of a duty to consider reversal arises in connection with a review of the decision's validity.

(183) In its review of validity, the Court of Appeal has applied an ex tunc assessment. When considered independently, there are thus grounds for setting aside the judgment of the Court of Appeal. When I nonetheless do not vote therefor, it is because I believe the decision not to reverse the rejection of the application for a residence permit on humanitarian grounds is invalid. I shall now proceed to the question of validity.

(184) I shall first present my understanding of the central legal provisions and their interrelationship.

(185) Article 3 (1) of the Convention on the Rights of the Child establishes that the best interests of the child shall be a primary consideration in all actions concerning children. Section 38 subsection 1 of the Immigration Act states that in cases concerning children, "the best interests of the child shall be a fundamental consideration". This provision contributes towards the implementation of article 3 (1) of the CRC and it is interpreted and applied in compliance with it. The Immigration Regulations section 8-5 stipulates that in the assessment of whether a residence permit should be granted, "particular importance shall be attached to the children's connection to the realm". This is a concretisation of the standard in section 38 subsection 3 of the Immigration Act, cf. article 3 (1) of the CRC.

(186) I take as my point of departure the understanding of article 3 (1) that is expressed in Rt-2010-1313 paragraph 13:

> **"From this provision follows, in my view, a duty to... clarify what are the child's best interests and how they can be safeguarded, and a duty to make the outcome of these assessments a central part of the decision-making basis. What best serves the child's interest is however not the only and not always the decisive consideration. The wording in article 3 (1) that the best interests of the child shall be a 'primary consideration' was chosen precisely to emphasise this, cf. Rt-2009-1261 paragraphs 31 - 32. However, the provision presupposes that great importance should be attached to the child's best interests, when these are weighed against other interests."**

(187) It is thus not the case that the child's best interests have absolute priority. However, nor is it the case that these interests are just one among several elements to be subjected to an overall assessment. The balancing standard in article 3 (1) of the Convention on the Rights of the Child establishes that what serves the best interests of the child, everything taken into account, shall receive particular emphasis and be at the forefront; it shall be "primary". However, legitimate and weighty interests – good and strong arguments – may pave the way for other solutions than the one that is in the child's best interest. In this respect, the core of this balancing standard is a requirement of *rationality* and *proportionality* if the child's best interests are set aside.

(188) I find it clear that considerations of immigration control are rational. This is also presupposed in the Immigration Act's section 38 subsection 4, which precisely

states that "importance may be attached to" such considerations. In particular, the Act mentions considerations of control and enforcement, societal consequences of a particular practice, and the consequences for the number of other applications based on similar grounds.

(189) In Rt-2009-1261 paragraph 62, the first-voting judge emphasises in particular "immigration policy considerations that are not altogether general, but based precisely on a desire to protect other children from ending up in that same situation". I agree that such considerations carry more weight than ordinary considerations of enforcement and control. Their weight may however vary, depending, *inter alia*, on the alternatives. I have taken note of the following from Report to the Storting No. 27 (2011–2012) (Meld. St. 27) page 56:

> **"To ensure that children do not remain in Norway for a disproportionate period of time without a residence permit, it is of decisive importance to process applications for asylum rapidly, and that those who receive a final refusal either return home voluntarily or are removed as soon as possible after the refusal. The Government believes that this must be the main focus in the further work relating to long-term resident children."**

(190) The balancing standard in article 3 (1) indicates that the child's interests can hardly be set aside *completely* on account of considerations of immigration control. For instance, removal cannot take place unless satisfactory care is provided for the child also after the removal, cf. the Committee on the Rights of the Child, General Comment No. 6 (2005) paragraph 85, as far as unaccompanied children are concerned. In Proposition to the Odelsting No. 75 (2006– 2007) (Ot.prp. nr. 75) page 160, the Ministry states on a more general note that it "would amount to a violation of the Convention to attach decisive importance to considerations of immigration control if this is unjustifiable in light of the child's best interests". The same is stated in Report to the Storting 27 (2011–2012) (Meld. St. 27) on page 11.

(191) The concern for the solution that serves the child's interests *best* is however not eliminated by the conclusion that a removal would be defensible in the sense that the child would not be subject to an unacceptable risk of injury or lack of care following its removal. Even in such situations, the elimination of the outcome that would be in the child's best interest must be founded on relevant and sufficiently weighty considerations. This applies not least if time passes and the child through language, culture, personal and social ties and its own identity, amongst other things, is integrated into the country of residence. A point will be reached where the concern for this attachment as such will warrant granting a residence permit, even though a removal, when considered in isolation, would be justifiable. The European Court of Human Rights' judgment of 4 December 2012 paragraph 76 illustrates this reasoning in relation to paragraph 1 of article 8 of the Convention.

(192) It is not uncommon for children to experience difficulties because of their parents' unwise, unconscionable or illegal choices. In immigration law cases there is for instance an evident risk that parents use their children as a shield, with the hope of gaining a more favourable position also for themselves. In this respect, the issues regarding so-called "anchor children" are particularly illustrative.

(193) In the Convention on the Rights of the Child, the underlying principle is the child's independent legal position. It is thus not unproblematic to apply a general identification between children and their parents, in the sense that the parents' omissions in terms of leaving the country would, ipso facto, prevent the children from being granted a residence permit after a long period of stay in Norway.

(194) The wish to remove the incentive for using delaying tactics to postpone the exit caused by the fact that even unlawful stays are reckoned, may however – as I have already mentioned – be taken into consideration. However, it takes quite a lot for this concern to be a decisive objection, once the child's connection, when considered in isolation, is sufficiently strong to warrant a residence permit. The European Court of Human Rights' judgment in *Butt v. Norway* illustrates the Court's approach to the parallel question under paragraph 2 of article 8 of the Convention; see in particular paragraphs 79 to 86. The Court accepted the Court of Appeal's general approach that strong immigration policy considerations "would in principle militate in favour of identifying children with the conduct of their parents". It was however pointed out that "the need to identify children with the conduct of their parents could not always be a decisive factor". Taking into consideration the Butt siblings' strong ties to Norway, the Court found it to be "questionable whether general immigration policy considerations would carry sufficient weight to regard the refusal of residence 'necessary in a democratic society'", and that the circumstances of the case "militate strongly against identifying the applicants' conduct with that of their mother".

(195) Furthermore, I make reference to the Immigration Appeals Board's practice memorandum of 2009 regarding the significance of long periods of stay in Norway, where, *inter alia*, the following is stated in point 7.1.1, in connection with the so-called "suspended children project":

> **"In general, ... immigration policy considerations were given little weight in the suspended cases. It was presumed that an unlawful stay per se would be an argument against granting a permit, but that this circumstance cannot be given decisive importance when it is the total period of stay that shall be considered when the child's connection is assessed. Additional reference was made to the fact that unlawful stays and the failure to leave the country within the established time limit are immigration policy issues that are common to most of the suspended cases, and that children cannot be blamed for their parents' failure to comply with final decisions that entail a duty to leave the realm."**

(195) Otherwise, the Immigration Appeals Board's practice has probably varied, but for my purpose it is unnecessary to present a more detailed review here. It is however of interest to examine the understanding that the Government and the Storting have had – and have always had – of the central provisions that form the basis of the Immigration Appeals Board's practice, especially linked to the central balancing of the child's best interests and various immigration policy considerations. In Report to the Storting 27 (2011–2012) (Meld. St. 27) page 56, the Ministry underlines that "the period of stay as an asylum seeker and the period of stay subsequent to the final refusal are to count". On the same page of the report the Government also emphasised the following:

> **"As previously described, the more recent jurisprudence of the Immigration Appeals Board may suggest that in some cases, more importance is attached to**

> **immigration control considerations than what was presupposed when the regulatory framework was adopted, while the jurisprudence also seems to lack uniformity.**
>
> **…**
>
> **It is especially with regard to the assessment of unlawful stays and failure to comply with time limits for exit that the Government believes that parts of the jurisprudence are in the fringes of what was the purpose of the provision."**

(196) The Government then emphasises in particular that exceeding time limits for exit and unlawful stays are to be considered "less weighty immigration control considerations".

(197) The Storting's Standing Committee on Local Government and Public Administration supported the Government's understanding of the rules, summing them up as follows in the Recommendation to the Storting 57 S (2012–2013) (Innst. 57 S):

> **"*The Committee* agrees with the Government's view that the more recent jurisprudence of the Immigration Appeals Board suggests that in some cases, more importance is attached to immigration control considerations than what was presupposed when the regulatory framework was adopted, while the jurisprudence also seems to lack uniformity. The Committee has taken note that the Government will contribute to reducing the number of children remaining in an unsettled situation, through various measures. One of the measures is a clarification of section 8-5 of the Immigration Regulations, in which the child's age and total stay in the country are central. Importance shall be attached to the fact that children of school age are presumed to have a stronger connection with Norway than younger children, to whether the child has attended kindergarten/school, speaks Norwegian, participates in leisure activities, has friends and in other ways has a particular connection with Norwegian society. Another important specification is that both the child's period of stay as an asylum seeker and the period of stay subsequent to the final refusal are to count.**
>
> ***The Committee's majority*; all except the member belonging to the Christian Democratic Party, additionally makes reference to the Government's specification that the child's best interests at some point in time must take precedence over immigration policy considerations, and furthermore that unlawful stays and exceeding time limits for exit per se shall carry less weight than active resistance against return, use of a false identity, active avoidance of return, failure to notify the police of a change of residence and violations of the Penal Code. It is at the same time specified that the failure to give notice of a change of residence is less serious than going into hiding, and that when deciding the consequences of a violation of the Penal Code, the seriousness of the crime must also be taken into consideration. *The majority* supports such a specification of the contents of section 8-5 of the Regulations."**

(199) In my opinion, these statements are in line with the balancing standard in article 3 (1) of the Convention on the Rights of the Child. For the case now to be decided by the Supreme Court, it is of particular interest that the outcome that is in the child's best interest is difficult to set aside by making reference to the fact that the child's connection to Norway has been established through unlawful stay and because the parents have remained passive and have not contributed towards leaving the country.

(200) Before I examine the decision concerned in further detail, I will discuss the competence of review.

(201) In cases concerning administrative decisions, the courts generally have the competence to review whether the factual basis underlying the decision is correct, whether the public administration's application of the law is correct, and whether the processing of the case has been compliant with statutory and non-statutory requirements. When the decision is based on a discretion that is not an application of the law – so-called free discretion – the review of the discretion as such is limited to the question of whether there is an exercise of authority, and whether the discretion has been exercised in compliance with incorporated human rights conventions.

(202) In Rt-2008-681 paragraph 46, the Supreme Court established that an assessment pursuant to section 8 subsection 2 of the then Immigration Act as to whether "strong humanitarian considerations" or the foreign national's "particular connection with the realm" indicated that a residence permit should be granted, was an assessment belonging to the public administration's free discretion. The same will apply pursuant to section 38 subsection 2 of the current Act, which stipulates that a residence permit "may" be granted.

(203) In cases concerning children, section 38 subsection 3 of the Immigration Act stipulates – as has been mentioned – that the best interests of the child shall be "a fundamental consideration", cf. article 3 (1) of the Convention of the Rights of the Child. It is also stipulated in section 8-5 of the Immigration Regulations that in the assessment, "particular importance shall be attached to the children's connection to the realm". The circumstance that the child's best interests have been particularly highlighted in this way, and the support for this in article 3 (1) of the Convention of the Rights of the Child, indicate that there should be a more extensive judicial review of the discretion as such. I make reference to Rt-2009-1261 paragraphs 76 and 77. There, the Supreme Court points out that the courts are to review whether the public administration has had a correct understanding of the concept "the child's best interests". This is in keeping with the general principle that courts can review whether or not the public administration has interpreted correctly the act that provides the legal basis for the decision. As regards the discretionary balancing – the discretionary assessment of "may" pursuant to section 38 subsection 1 of the Immigration Act – the first-voting judge in the 2009 case states that the courts are to review whether the child's best interests have been "properly assessed and balanced against any counter considerations". Thus, the review is not restricted to assessing whether it would be justifiable to send the child out of the country. In this respect, I make reference to the Immigration Regulations section 17-1 a, which stipulates that decisions affecting children as a general rule shall specify "what assessments have been made of the child's situation, including how the best interests of the child have been given weight". This encompasses not only a review of whether the immigration authorities have attached weight to irrelevant or unlawful considerations. The review may also examine whether the child's best interests have been satisfactorily clarified and highlighted and whether they have been given the position and weight for the purpose of the balancing of interests that follow from the child's best interest being "a fundamental consideration". The first-voting judge in Rt-2009-1261 emphasises in his summary in paragraph 77 that the "specific assessment of the best interests of the child and the specific balancing of interests", "come… under the scope of the

administration's free exercise of discretion". I agree with this delimitation and I apply it.

(204) In the assessment of the validity of the Immigration Appeals Board's decision of 29 November 2010, I have taken particular note of C's situation; consequently, I shall concentrate on him.

(205) At the time of decision, C was seven years and seven months old. He had lived in Norway for almost six years. The decision of the Immigration Appeals Board describes that C attended kindergarten and then school, that he is well integrated into the local community, has many friends, participates in leisure activities and masters the Norwegian language. The Immigration Appeals Board furthermore found that C "as a point of departure satisfies the requirements in the Act and the Regulations and the practice that has developed in relation to children's period of stay and connection that indicate that a residence permit may be granted". It is reasonable to understand the Immigration Appeals Board's decision to mean that the outcome that is best for C, all things considered, is for him to be allowed to stay in Norway.

(206) The refusal is – as way I understand the decision – founded on two considerations in particular.

(207) Firstly, the Immigration Appeals Board refers to the fact that parts of the period of stay – about three years – have been unlawful, and the Board characterises this as a "gross violation of the Immigration Act, which according to jurisprudence will constitute grounds for expulsion". Secondly, the Immigration Appeals Board points out that parts of the lawful stay were based on a temporary permit granted to make it possible to carry out the treatment of C's tuberculosis, thus having certain similarities to for instance cases regarding residence permits for studies and other cases where time-limited permits are granted for a specific purpose, where the condition is that the person must leave the realm upon the expiry of the permit. Next, it is stated:

> **"The complainants have failed to fulfil their duty to leave the realm voluntarily during the periods this duty has existed. In the Board's assessment, they have also committed a grave breach of trust, as they after first having received a rejection were granted a temporary permit for the sole purpose of allowing C to receive treatment and become well enough to be able to return to the home country, not to return home. Nor have they contributed towards any return, since they have not presented ID or travel documents that could facilitate such a solution."**
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> **In the opinion of the Board, the considerations relating to immigration control are important elements of assessment in a case like this, and it is the Board's assessment that they should be an impediment to granting a permit in this case."**

(208) In my opinion, it is not right to attach independent importance to the fact that the failure to leave the country may possibly be a "gross violation of the Immigration Act" that may constitute grounds for expulsion of the parents. Attaching such independent importance to the violation of the law as such is incompatible with the premise that also the period of stay subsequent to the final refusal is to count. One quite simply cannot have a situation where the stronger the connection becomes, the more weighty the immigration control considerations that militate against granting a

residence permit – signifying that the increased connection is virtually "cancelled out". I make reference to what I have stated earlier about these questions.

(209) In my view, the Immigration Appeals Board has also adopted an incorrect approach when it compares the temporary residence permit in order to treat C's tuberculosis to "permits for studies and other cases where time-limited residence permits are granted for a specific purpose". It is stated in the Immigration Appeals Board's decision of 19 July 2006 that C contracted tuberculosis in Norway or during the journey to Norway, and that the disease was not the reason why C and his parents came here. It is furthermore stated:

> **"The Board notes that tuberculosis is a potentially life-threatening disease. International guidelines and recommendations instruct national authorities to commence treatment and provide the patient with follow-up with a view to preventing outbreaks of the disease and the development of resistant bacteria. Tuberculosis is defined as a disease that is a peril to the general public, and in Norway the treatment of tuberculosis is regulated by the 1994 Act relating to control of communicable diseases. The Act's purpose is, *inter alia*, to prevent the outbreak of communicable diseases and prevent such diseases from being carried out of Norway.**
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> **The Board further observes that, to the Board's knowledge, there is a well developed system of health services in Iran, and treatment can be provided for tuberculosis. In the Board's assessment, however, it is in C's best interests that he is able to complete the treatment that he has begun here in Norway. C knows the physicians who are treating him, and he has shown good signs of recovery. The Board cannot rule out the possibility that returning him to Iran could result in the tuberculosis treatment not being carried out satisfactorily. In this connection, the Board has taken account of the fact that C's parents have, on an earlier occasion, failed to attend a treatment session and as such have shown a lack of willingness to pursue treatment. In the Board's assessment, the possibility cannot be discounted that returning to Iran before the treatment is completed will lead to further interruptions in the treatment of C's disease.**

(210) Thus, the situation was that C had to be treated and that the treatment – according to the Immigration Appeals Board's own assessment of the circumstances – should take place in Norway. Since there was an obvious possibility that the disease had been contracted in Norway, Norwegian authorities had a particular responsibility for handling the disease and the risk of contagion. There is thus no reason to disregard, or attach less importance to, this period of stay. Characterising the parents' continued stay after the treatment was completed as a "gross breach of trust" is not very appropriate. The continued stay was not lawful, but in this sense it is no different from the other periods of unlawful stay.

(211) We are then left with the fact that some periods of the stay in Norway have been unlawful, and that the parents have not contributed towards a voluntary exit. Unlawful stays and the failure to cooperate may be given significance. However, as I pointed out in my discussion of article 3 (1) of the Convention on the Rights of the Child and its implementation in the Act and Regulations, these circumstances can hardly be decisive in cases where the child's strong attachment to Norway indicates it should stay here. In my opinion, it seems obvious that the Immigration Appeals Board's assessment would have had a different outcome if it had been based on the above view. The grounds given in the decision at least create considerable doubt

whether C' best interests have been treated as being as fundamental as required under article 3 (1) of the CRC – whether this has been adequately assessed and weighed. Consequently, the decision is invalid.

(212) My conclusion on this point depends on one's stance on the question of an ex tunc or an ex nunc assessment. It is however self-evident that C's additional connection with the realm through the more than two years that have passed since the Immigration Appeals Board's decision, means that the concern for him must be expected to bear even more weight now than the last time the case was pending before the Board.

(213) I have understood the appellants as submitting that the Board's decision is invalid also on account of being in breach of article 8 of the ECHR. We here have the connection that the European Court of Human Rights, when interpreting and applying article 8, draws on article 3 of the CRC, cf., *inter alia*, the judgment of 28 June 2011 in *Nunez v. Norway*, paragraph 84. Since I have already concluded that the decision is invalid, I shall not examine further the questions the case raises under the ECHR.

(214) I shall decide on the claim for costs that NOAS has submitted, on the basis of my opinion on the outcome of the claims that are the subject matter of the case. Since I am in minority I will not discuss the matter in depth. I do however find reason to comment upon the State's opposition to NOAS being awarded costs on the grounds that counsel Fougner has accepted the assignment *pro bono*. The State argues that as a consequence, NOAS has not had any expenses in connection with the case and can thus not claim costs.

(215) I do not agree with the State. The purpose of accepting a procedural assignment *pro bono* is to benefit the party on whose behalf the assignment is to be performed, not the opposite party. The general rule must thus be that when the action or appeal prevails and costs are to be awarded, the counsel will – to the degree this constitutes a basis for liability for costs for the unsuccessful party – be able to claim ordinary fees.

(216) Justice **Skoghøy:** I have arrived at the same result as the second-voting judge, Justice Bårdsen. Like him, I believe that the validity of the Immigration Appeals Board's decision to refuse asylum and residence on humanitarian grounds must be assessed on the basis of the facts existing at the time of the court's hearing of the case; however, in contrast to him I believe this applies not only to the review of decisions in immigration law cases. In my opinion, the main rule for judicial review of administrative decisions must be that the review must be done on the basis of the facts available at the time the case is closed for judgment. Unless there is a specific legal provision to the contrary, courts must thus consider not only new information about the facts at the time of decision (new evidentiary facts), but also subsequent legally relevant circumstances (new legal facts). The distinction between new legal facts and new evidentiary facts can be rather subtle, and it is hard for me to see any rational reason to let this distinction be decisive for what can be submitted in terms of new facts.

(217) As was pointed out by the Dispute Act Committee in the Norwegian Official Report NOU 2001: 32 *Rett på sak* Volume A page 188, actions regarding public law issues may be roughly divided into two categories – invalidity actions and enforcement actions. By "validity action" is meant an action regarding the "lawfulness of a specific or general exercise of authority". By "enforcement action" is meant an action that ”seeks the enforcement of public law provisions towards private legal persons or public bodies".

(218) When adjudicating an enforcement action, it is clear that courts must consider the facts available at the time the case is closed for judgment. The question is whether a different rule shall apply for the adjudication of validity actions.

(219) Modern Norwegian administrative law is largely based on the Recommendation from the Committee for the report on a more adequate public administration framework (the Public Administration Committee), submitted in 1958. As regards the judicial review of the factual part of the public administration’s decision, the Committee states on page 371:

> **"On this point, the position under Norwegian law is that courts may review the facts underlying the decision and assess the existing evidence fully and freely. This also applies to the factual basis of the public administration’s discretionary decisions."**

(220) There is no distinction made between legal facts that existed when the administrative decision was issued and legal facts occurring subsequently. The question of whether the review should be limited to the legal facts that existed at the time the public administration issued its decision, is commented on specifically on page 378 note 288:

> **"It might be asked whether courts in an administrative case can base their review on the facts obtaining at the time judgment is rendered, or whether it must make its decision on the basis of the facts when the administrative decision was made. In a judgment in Rt-1949-564 et seq., cf. in particular page 566, the first solution was adopted. The case concerned the expropriation of office premises for Statistics Norway. In the course of the proceedings, Statistics Norway had been given new tasks and consequently needed even more office space. The court did not deem that it was precluded from taking this new fact into consideration.**
>
> **The view on which the judgment is based appears to be in accordance with recent decisions by the German Federal Administrative Court. Cf. Verwaltungsarchiv 1957 p. 170 et seq. Cf. Verwaltungsarchiv 1957 p. 170 et seq."**

(221) The Supreme Court judgment in Rt-1960-1374 is also based on the view that judicial review of administrative decisions shall be done on the basis of the facts at the time of the judgment. The case concerned the validity of a decision by the Ministry of Transport and Communications to refuse an application for a renewal of a taxi licence. The grounds given for the refusal were mainly that the applicant had failed to maintain his taxi material in an adequate condition. After the State won the case before the District Court, the Court of Appeal found in favour of the taxi owner. In the assessment of what the maintenance had been like, the Court of Appeal attached importance to, *inter alia*, evidence that had emerged after the Ministry’s decision

had been issued. The State appealed to the Supreme Court, submitting, *inter alia*, that it must be ”clear that the Ministry’s decision must be assessed on the basis of the information available when the said decision was made". The Supreme Court found that the Ministry’s decision must be declared invalid because it "rested on a flawed factual basis". Being seconded by the four other judges, the first judge to deliver his opinion stated, *inter alia*:

> **"From what I have already stated it will be evident that a solution to the question of invalidity like the one of which I am a proponent will not entail any expansion of the right of review that the courts, according to our jurisprudence, have in relation to administrative decisions. It must be considered firmly established that the courts may review the correctness of the factual basis underlying such a decision. And in my opinion it must be clear that the courts upon such review may – and must – take into consideration also material that has emerged after the contested administrative decision was made."**

(222) It is true that the above did not seem to be a case of new legal facts, but new evidence of legal facts that existed at the time of decision. The question of whether the new pieces of information by their nature were only new evidentiary facts is however not discussed. The Supreme Court states as a clear and general postulate of law that the courts when reviewing administrative decisions “may – and must – take into consideration also material that has emerged after the contested administrative decision was made”. The way this rule is phrased means that it also encompasses new legal facts.

(223) Between 1960 and 2003 there are no rulings by the Supreme Court that discuss the question of what point in time should be applied for the courts’ review of the facts in an administrative decision. In the order by the Appeals Committee of the Supreme Court in Rt-2003-460, it is however stated, without any further grounds given, that the judicial review of a refusal of an application for a residence permit should be done on the basis of the circumstances that existed at the time the decision was made. This point of view was reiterated in the Supreme Court judgment in Rt-2007-1815. In the judgment, which concerned the review of a order issued by the National Insurance Court, it is stated that the review of administrative decisions must be done on the basis of "the facts as they appeared before the body concerned at the time of decision", and that this is "the general principle within administrative law" (paragraph 33). This view has generally been applied in subsequent decisions; see for instance Rt-2009-1374 paragraph 40.

(224) The case law has however not been consistent and it has been marked by uncertainty and a lack of clarification. When reviewing decisions regarding expulsion, the issue of proportionality has according to virtually established case law been assessed on the basis of the circumstances at the time of the judgment. Rt-2005-229, Rt-2007-667, Rt-2008-560 and Rt-2009-534 may be mentioned as examples from recent years. The only judgment regarding expulsion in which this has not been applied is Rt-2011-948. There, the Supreme Court did not find reason "to decide on whether and, if so, under which circumstances the Supreme Court in its legality review would be allowed to take into consideration such additional information" (paragraph 62). Uncertainty has been expressed also in other immigration law cases. In Rt-2009-851, which concerned a refusal of renewal of a work and residence permit, the Supreme Court mentioned that the European Court of Human Rights in its

assessment of proportionality under articles 3 and 8 of the ECHR, seems to apply "the time of the removal, alternatively the time of the court hearing". As the question did not become an issue in the said case, the Supreme Court in the judgment chose however to adhere to the perception of the law that had been expressed in Rt-2007-1815 (Rt-2009-851 paragraphs 47–48).

(225) In support of the submission that judicial review of administrative decisions must be done on the basis of the facts at the time of decision, the State has made reference to statements in the plenary judgment in Rt-1982-241 (the Alta case). On page 266 of the said judgment it is stated that forecasts of the consequences of hydropower developments will be uncertain and that "the case processing [must] be adequate if the forecasts are justifiable at the point in time at which they have to be made". This statement is however linked to an attack on the licensing authorities' case processing, and in my opinion it has no relevance for deciding which point in time should be applied when assessing whether the decision is based on correct facts. I cannot see that it was submitted in the Alta case that any new legal fact had occurred after the decision to allow the development had been made.

(226) The question of the point in time to be applied for considering the facts when reviewing the validity of administrative decisions was discussed in principle for the first time in Rt-2012-667. In the said judgment, only one judge found that the review should be based on the facts at the time of decision. Two judges concluded that the general rule is that the review must be done on the basis of the facts at the time the case is closed for judgment, while two judges concluded that this should apply in immigration law cases.

(227) Judicial control of the public administration has been developed through case law, and courts have a responsibility to adapt judicial review to developments in society and the needs that exist at any given time. Now that the Supreme Court is convened in a plenary sitting to decide what point in time should be applied when reviewing the facts underlying an administrative decision, the question must in my opinion be decided on the basis of which solution, based on the current perception of the law, best satisfies the needs to which judicial review is intended to meet.

(228) It is a fundamental purpose of all civilised legal proceedings to facilitate the elucidation of the case in such a way that as many as possible of the decisions that are reached are substantively correct, cf. section 1-1 of the Dispute Act. To achieve this purpose, the Dispute Act's section 21-4 subsection 1 imposes upon the parties a duty to "ensure that the case is properly and completely explained". Pursuant to section 21-4 subsection 2, the parties also have a duty to provide information about circumstances that favour the opposite party's case. These provisions are based on "the principle of substantive truth". In the preparatory works of the Act it is specified that the duties stipulated in section 21-4 are also incumbent upon the public administration when reviewing the validity of an administrative decision; see Norwegian Official Report NOU 2001: 32 *Rett på sak* Volume B page 947. An action regarding the validity of an administrative decision is not a theoretical exercise, but a dispute concerning a real legal claim – often of an interventionary nature or of major importance to citizens in economic or welfare terms. If new, relevant factual circumstances have arisen after the decision was issued, the citizens of a state governed by law should be entitled to have the dispute settled on the basis

of the facts existing at the time of the court hearing.

(229) As previously mentioned, it is clear that enforcement actions are to be decided on the basis of the facts available at the time the case is closed for judgment. It is often possible to combine validity actions with enforcement actions. It is for instance not impractical to submit a claim for the preliminary determination of an issue in a validity action. If the validity action is to be decided on the basis of the facts at the time of decision, this would lead to the actions having to be decided on the basis of the facts at different points in time. This might lead to judgments with conclusions that are mutually contradictory.

(230) This contradiction would be particularly conspicuous in cases where the administrative decision concerns issues that are regulated by international human rights instruments, and where a claim of human rights violation is submitted in addition to an invalidity claim. If different points in time are used for the assessment of the facts in the two actions, one may wind up with a situation where the State because of subsequent legal facts is sentenced for a violation of the Convention, but acquitted in the validity action because there was nothing wrong with the decision when it was issued. In such a case, the acquittal will not provide a correct impression of the legal status at the time of the judgment. The judgment would be misleading and create ambiguity and it is difficult to see what interest the State might have in such a judgment.

(231) Additionally, citizens may in some cases have the choice between bringing the case before the courts as a validity action or as an enforcement action. If the review of a validity action is to be limited to the facts at the time of decision, in cases where a relevant subsequent fact has occurred there will be an incentive to bring the action as an enforcement action, even if a validity action would have been the most suitable.

(232) The fact that disputes under public law must be decided on the basis of the facts available at the time the case is closed for judgment must be understood as subject to the modifications that follow from the procedural rules. As with the processing of private law actions, the general rules of preclusion of circumstances that are not invoked in time apply, cf. the Dispute Act section 9-16, section 16-6 subsection 3 and section 30-7. And upon an appeal to the Supreme Court, the Court's Appeals Selection Committee may, pursuant to section 30-4, refuse the submission of new legal facts before the Supreme Court, with the consequence that those facts may become the subject of a new action. The point of departure must however, in my opinion, be that not only enforcement actions, but also validity actions, must be decided on the basis of the circumstances at the time the case is closed for judgment.

(233) In support of the submission that judicial review of administrative decisions should be done on the basis of the facts at the time of decision, the State has mainly submitted five policy arguments:

- The judicial review is limited to the decision's validity, and it is a conceptually necessary consequence thereof that the review must concern the facts at the time of the decision.
- The Supreme Court's judgment in Rt-2001-995 established that the

judicial review of the public administration is a subsequent review of legality, which indicates that the review of facts must be linked to the time of the decision.

- If the courts can rely on subsequent legal facts, the case will be decided on the basis of facts the public administration has not had a sufficient basis for assessing.
- If a decision containing a prohibition or imposing a duty upon the private party is declared invalid, one will be left without any decision until the public administration has made a new decision, and this may cause harm to society and to other private parties.
- The authority that the public administration has to reverse the decision provides sufficient protection for citizens.

(234) In my opinion, none of these arguments are tenable.

(235) Declaring a decision invalid means that it is not binding and that, in future, the decision may have no effects linked to its substance., cf. Jan Fridthjof Bernt, *Hvorvidt er det hensiktsmessig å sammenfatte rettsvirkninger av feil i forvaltningsvedtak ved hjelp av ugyldighetsbegrepet?* (Is it suitable to summarise the legal effects of errors in administrative decisions by means of the concept of invalidity?), *Tidsskrift for Rettsvitenskap* 1981 page 104 ff., Jan Fridthjof Bernt and Kai Krüger, *Ugyldighetsbegrepet i kontraktsretten og forvaltningsretten* (The concept of invalidity in contract law and administrative law), in *Samfunn, rett, rettferdighet, Festskrift til Torstein Eckhoff* (Society, law, justice, Festschrift to Torstein Eckhoff), Oslo 1986, page 86 ff. and Hans Petter Graver, *Alminnelig forvaltningsrett* (General administrative law), 3rd edition, Oslo 2007, page 583 et seq. No deduction can be made, based on the concept of invalidity, regarding which point in time should be applied for the assessment of the facts. It is also methodologically incorrect to draw legal conclusions on the basis of more or less established concepts ("jurisprudence of concepts"). If the concepts applied do not reflect the solutions that have the strongest arguments in their favour, it is not the solutions that are to be adapted to the concepts, but the use of concepts that must change. In light of the above, the State's argument based on conceptual logic is to be rejected as clearly untenable.

(236) Nor can I see that the fact that the judicial review of the public administration is a subsequent legality review may lead to the conclusion that the assessment of facts must be linked to the time of decision.

(237) The general opinion prior to the Supreme Court judgment in Rt-2001-995 was that the courts, in cases where a decision based on a discretion subject to statutory restrictions is affected by grounds for invalidity, could deliver a judgment prescribing the contents of the new decision ("merits judgment"), cf. Arvid Frihagen, *Forvaltningsrett* (Administrative Law), Volume III, 4th edition, Bergen 1992, page 214, Torstein Eckhoff and Eivind Smith, *Forvaltningsrett* (Administrative Law), 6th edition, 2nd print run, Oslo 1999, page 639, Erik Boe, *Subsumsjonsdom – Domstolenes kompetanse til å bestemme utfallet av en rettstvist når forvaltningen har truffet et ugyldig forvaltningsvedtak* (Subsumption judgments – the courts' competence to decide the outcome of a legal dispute when the public administration has issued an invalid administrative decision), Lov og Rett, 2002 pp.

259–294, and the Supreme Court judgment in Rt-2000-452 on page 465. This perception was based on the view that the subject matter in such cases is the claim the decision concerns. It then appeared logical that the courts could also consider facts that had occurred after the administrative decision was made. However, by an order in Rt-2001-995 the Supreme Court found that courts as a general rule cannot issue a merits judgment, but must limit themselves to declaring the decision invalid. This judgment has been echoed in subsequent decisions; cf. Jens Edvin A. Skoghøy, *Tvisteløsning* (Dispute Resolution), Oslo 2010, pp. 349–350. The grounds for this solution is primarily a suitable distribution of tasks between the courts and the public administration, and it is based on the view that the subject matter of a review of an administrative decision is the decision, not the claim the decision concerns. The question is whether this change in the view of what constitutes the subject matter in dispute should have a bearing on which point in time should be applied for the assessment of the facts.

(238) The question of whether the subject matter in dispute is the claim or the decision is of consequence for, *inter alia*, whether a judgment will become final and binding. If the subject matter in dispute is the claim, only changes in the legal facts linked to the claim may constitute a basis for a new action. If the subject matter in dispute is the decision, it is not only substantive changes in legal facts that may form the basis of a new action, but also decisions that assess or reject a petition for reversal, cf. Rt-2012-681 with references to earlier case law. The change in view of what constitutes the subject matter in dispute can however, in my opinion, not have a bearing on which point in time should be applied for the assessment of the facts. The assessment of evidence cannot be characterised as an exercise of administrative authority, and if the courts set aside an administrative decision if legal facts have occurred that may influence the contents of the decision, this does not mean that the courts are interfering with the public administration's exercise of discretion. To the extent that the change in view of what constitutes the subject matter in dispute were to be granted significance, it would be rather in the direction of expanding the courts' authority to review the facts. When the courts cannot decide the contents of the new decision, but must content themselves with declaring the previous decision invalid, the case must be reheard by the public administration, and through its new hearing the public administration will have the opportunity to make up an independent opinion of the significance of the new circumstances.

(239) In support of the view that courts as a general rule can only deliver a judgment declaring invalidity, the judgment in Rt-2001-995 cites, in addition to the concern for the distribution of labour between the courts and the public administration, that a certain authority to issue a merits judgment might lead to an inflation of the case, since the parties then would have to prepare the case with a view to a potential merits judgment, cf. Rt-2001-995 on page 1003. The State has submitted that also this consideration militates against granting the courts authority to consider subsequent legal facts. I do not agree with this. It is true that if the court is allowed to consider subsequent facts, the case may become more extensive than it would otherwise have been. These are however facts that are necessary to reach a correct decision; consequently, this would not be an unnecessary inflation of the case.

(240) It is also difficult for me to understand the view that the case, if courts are

allowed to consider subsequent legal facts, will be decided on the basis of facts the public administration did not have a sufficient basis for assessing.

(241) It follows from section 11-1 subsection 3 of the Dispute Act that the courts cannot base their rulings on facts in respect of which the parties have not had the opportunity to comment. This is a central element of the adversarial principle. In the case of the judicial review of an administrative decision, the agency that made the decision shall be a party to the action or be represented by a superior ministry. If a new factual circumstance has occurred whose significance the public administration needs to assess, the public administration will in this way have sufficient time to do so during the processing of the action – and may if necessary ask for a postponement.

(242) Moreover, new legal facts will not become principally different from new evidentiary facts. There is no doubt that unless there is a specific legal provision to the contrary, evidence of legal facts that existed when the public administration made its decision may be presented during the court hearing. The public administration cannot be seen to have a greater need to assess the significance of legal facts occurring after the administrative decision was made than that of legal facts that existed at the time of the decision, but which the public administration was unaware of at the time.

(243) The State has in its closing argument before the Supreme Court argued, *inter alia*, that if a decision containing a prohibition or imposing a duty upon the private party were to be declared invalid on grounds of a subsequent circumstance, one will be left without any decision until the public administration has made a new decision, and in the State's view this would be unfortunate, as it might cause considerable harm to society and to other private parties.

(244) However, I do not find this argument convincing either. Firstly, the value of the argument is limited to concern prohibitions and other burdensome administrative decisions. Our case regards the refusal of a request for a beneficial administrative decision. Secondly, the decision will lapse only when the judgment becomes final and binding. Thus, the public administration will have time to consider and make a new decision before the previous decision lapses. Thirdly, quashing a decision due to new legal facts will be no different than quashing it for other reasons. Also in cases where a burdensome administrative decision is declared invalid for a reason other than new legal facts (for instance because of procedural errors or new information about the facts at the time of the decision), the decision will lapse when the judgment becomes final and binding. Quashing due to new legal facts will thus be no different than quashing for other grounds of invalidity. If there in certain areas of public administration were to be a particular need to maintain a prohibition after it has been declared invalid, this must be solved through special provisions for that particular area of public administration.

(245) Finally, the State has, in support of the submission that the courts should disregard subsequent circumstances, made reference to the public administration's authority to reverse an administrative decision pursuant to section 35 of the Public Administration Act. In my opinion, however, referring citizens to petitioning for a reversal will not provide a satisfactory solution. Within the field of immigration law administration, without any statutory basis a system has been established that ensures that petitions for reversal are assessed. There is however no general duty to

assess petitions for reversal. Pursuant to section 35 of the Public Administration Act, the public administration *may* reverse an individual decision if, *inter alia*, the decision "must be deemed invalid". In Rt-1998-623, the Supreme Court presupposed that if an administrative decision is declared invalid by judgment, the public administration will have a duty to consider a reversal. A claim to the effect that the decision is invalid is however not sufficient to trigger a duty to consider a reversal. To the extent that no special provisions exist, the public administration's duty to consider a reversal depends on – according to what has been considered applicable law until now – a rather complex assessment; for further details, see Graver, op.cit. page 548.

(246) Even if a general duty were introduced – by statute or a Supreme Court judgment – to consider a reversal if a petition to that effect is submitted, I fail to see that the institution of reversal would provide citizens with sufficient protection. When an action has been brought concerning the decision's validity, it is natural for the public administration to adopt a defensive position, and for reasons of potential liability for costs, amongst other things, it is to presumed – on the basis of a realistic assessment – that it will take a lot for the public administration to reverse the decision as long as the decision is subject to legal action. For the citizens to be guaranteed *a genuine right to have the case assessed on the basis of the facts existing at the time of the court hearing*, they must be allowed to bring new factual circumstances into the lawsuit. In addition, there are reasons of procedural economy. If the public administration refuses to consider or denies reversal, an action may be brought regarding the validity of that decision. It will then be easy to fall into the situation that before or shortly after the first case ends, a new lawsuit is filed regarding the same or virtually the same substantive issue.

(247) Information has been presented to the Supreme Court as to how subsequent legal facts are treated in some countries when judicial reviews of administrative decisions are performed. The information about how subsequent facts are treated in states with administrative courts is however of little interest, as administrative courts often have unlimited competence and also replace our system of administrative appeal. Nor do I find the information presented regarding English law to be of particular interest. In contrast to here in Norway, the English courts' competence to review the public administration's assessment of facts is limited, in which case it is highly logical that the limited review competence of English courts as a general rule is linked to the circumstances at the time of the decision.

(248) Of the countries regarding which information has been presented, only Denmark has a system for the review of administrative decisions that is comparable to ours. The general perception in Denmark is that for the review of administrative decisions it is permitted to present not only new information about legal facts existing at the time of the decision, but also, to the extent there are no specific legal provisions to the contrary, legal facts that have occurred subsequently ("nova"), cf. Bent Christensen, *Forvaltningsret. Prøvelse* (Administrative Law. Review), 2nd edition, København 1994, pp. 37–40, Hans Gammeltoft-Hansen et al, *Forvaltningsret* (Administrative Law), 2nd edition, Copenhagen 2002, pp. 815–816, Jens Garde et al, *Forvaltningsret. Almindelige emner* (Administrative law. General subjects), Copenhagen 2004, pp. 373–375, and Sten Bønsing, *Almindelig Forvaltningsret* (General Administrative Law), 2nd edition, Copenhagen 2012, pp. 381–382. It is true

that recent rulings by the Danish Supreme Court in immigration law cases provide that the judicial review in principle shall consider the circumstances at the time of the decision, cf. the legal journal *Ugeskrift for Retsvæsen* 2006 page 639, 2006 page 2666, 2007 page 1336, 2008 page 2516 and 2011 page 3083. This has however been based on an interpretation of the applicable statutory authority for judicial review. Notwithstanding this, in expulsion cases it has been presumed that the proportionality assessment pursuant to the ECHR must be performed on the basis of the circumstances at the time of the judgment, cf. the Danish Supreme Court's judgment of 1 June 2012 (case 10/2011).

(249) In many lawsuits concerning administrative decisions, subsequent legal facts will not be relevant for the decision. This applies e.g. in cases where there is a question of what the legal situation was like at a given point in time, and in cases where the law stipulates permanent requirements for possessing a licence, for instance a driving licence or a licence to practice as a medical doctor or as an advocate. If a permit is revoked because a permanent requirement is not fulfilled, it is evident that the decision cannot be declared invalid if the requirement is later fulfilled. One may also imagine cases where a new legal fact is so fundamentally different from the fact that was invoked during the public administration's hearing of the case that it must be considered to form the basis of a new claim, and that a new application must therefore be submitted. Also in cases where the new legal fact occurs long after the public administration made its decision, any claim based on the new circumstances should be treated as a new claim. Unless a natural interpretation of the legal provision concerned indicates otherwise, the main rule should however in my opinion be that the judicial review of public law claims – as for private law claims – must be done on the basis of the circumstances at the time of the court's hearing of the case. There is no reason to apply a point in time for the assessment of facts in validity actions that is different from that applied in enforcement actions. The goal must be to provide conditions that enable the courts to reach as many substantively correct decisions as possible. Unless there is a specific legal provision to the contrary, when an administrative decision is subject to judicial review, the invocation of relevant legal facts that have occurred after the decision was made must also be permitted.

(250) As regards the validity of the decision concerned, I concur with the second-voting judge, Justice Bårdsen, and I agree with the essentials of the grounds he has presented. The same applies to his opinion on NOAS' claim for costs.

(251) Justice **Falkanger:** As regards the question of whether the validity of the Immigration Appeals Board's decision must be assessed on the basis of the legal facts available at the time of the court's hearing of the case, I concur with the third-voting judge, Justice Skoghøy, and I agree with the essentials of the grounds he has presented. Given the way the case has been explained, I must presume that the Court of Appeal's failure to assess the new legal fact may have influenced the outcome of the case. Consequently, it is my opinion that the judgment of the Court of Appeal must be quashed. It is thus not necessary for me to discuss the other issues raised by the case; however, I do find reason to state that with regard to these questions – under the presupposition that the case is assessed on the basis of the facts at the time of the decision – I concur in the essentials with the first-voting judge, Justice Webster.

Translation from Norwegian

(252) Justice **Bull:** I concur with the first-voting judge, Justice Webster, as regards the question of whether the facts at the time of the decision or at the time of the judgment should be considered in the judicial review of the decision's validity. For the rest, I concur in all essentials and as regards the conclusion with the second-voting judge, Justice Bårdsen.

(253) Justice **Tjomsland:** I concur in all essentials and as regards the conclusion with the first-voting judge, Justice Webster.

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

(255) Judge **Utgård:** Likewise.

(256) Justice **Stabel:** Likewise.

(257) Justice **Øie:** Likewise.

(258) Justice **Tønder:** Likewise.

(259) Justice **Endresen:** Likewise.

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

(261) Justice **Matheson:** Likewise.

(262) Justice **Normann:** Likewise.

(263) Justice **Noer:** Likewise.

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

(265) Justice **Bergsjø:** I concur in all essentials and as regards the conclusion with the second-voting judge, Justice Bårdsen.

(266) Chief Justice **Schei:** Likewise.

(266) After voting the Supreme Court delivered this

J U D G M E N T :

The appeal is dismissed.

True transcript certified: