



THE SUPREME COURT OF NORWAY

On 31 October 2017, the Supreme Court gave judgment in

HR-2017-2078-A, (case no. 2017/670), civil case, appeal against judgment

The state represented by
the Immigration Appeals Board

(Attorney General represented by Anders
Wilhelmsen)

v.

A

B

C

Self-help for Immigrants and Refugees
(SEIF) (intervener)

(Counsel Mads Andenæs)

Norwegian Organisation for Asylum
Seekers (NOAS) (intervener)

(Counsel Anders Christian Stray Ryssdal)

The UN High Commissioner for Refugees
(intervener)

(Counsel Brynjulf Risnes)

V O T I N G :

- (1) Justice **Kallerud**: The case concerns rejection of applications for travel documents for refugees. The main question is whether it is in accordance with the UN Refugee Convention article 28 to refuse to issue travel documents to refugees with lawful residence in Norway, because there is doubt regarding their identities.
- (2) The case before the Supreme Court concerns three persons who are registered in Norway under the names of A, B and C. All three have refugee status in Norway and residence permits on that basis, see the Immigration Act section 28 subsection 1 a. However, they have been denied travel documents for refugees because the immigration authorities find that they have not substantiated that the identities claimed are correct.

- (3) The respondent stating to be A, born 00.00.1972 and an Eritrean citizen, was stopped by the customs when arriving by train from Stockholm on 31 December 2010. He identified himself with an Ethiopian passport under the name of D, born 00.00.1979. During an interview, he stated that the passport was false. He further explained that during his stay in Greece, he had claimed the false identity, E, to Greek authorities. He also presented a deportation document from Greece under the name of F born 00.00.1977. Finally, he has stated that he, on his journey to Europe, used a Sudanese passport under the name of G. Hence, he has acted under a total of five identities.
- (4) As documentation for the identity he is now stating – A – he has presented an Eritrean national identity card bearing this name, but where the date of birth is stated to be 00.00.1976. The correct date of birth according to A is 00.00.1972. He has also presented a marriage certificate, but there the date of birth is stated to be 00.00.1972. Furthermore, he has presented a copy of a military service certificate.
- (5) The immigration authorities found that A's identity information had not been substantiated, but trusted nevertheless that he was an Eritrean citizen. Due to the security situation in Eritrea, the Norwegian Directorate of Immigration (UDI) granted A a residence permit in Norway as a refugee by a decision of 19 May 2011. By a decision of 17 February 2012, the Immigration Appeals Board (UNE) dismissed A's appeal against the refusal to issue travel documents. Following a notice of action, UNE reconsidered A's case, but declared in its decision of 22 October 2014 that there was no basis for reversal.
- (6) The respondent stating to be B, born 00.00.1984 and an Eritrean citizen, applied for asylum in Norway on 9 October 2007. During his police interview, he claimed to be born on 00.00.1987, while during his asylum interview, he stated the date of birth I have already mentioned, and with which he is registered in Norway.
- (7) Searches for his fingerprints in international registers showed that he had been registered as an asylum seeker in Italy on 20 July 2007 under the identity of H, born 00.00.1988. The searches also revealed that he had been granted a residence permit in Italy from 22 August 2007 until 21 August 2008. To avoid being sent back to Italy, he damaged his fingertips hoping that Norwegian authorities would not discover that he was previously registered as an asylum seeker there. He explained to the court of appeal that he – like many other asylum seekers – claimed a false identity before Italian authorities because he would rather seek asylum in Norway.
- (8) To prove the identity claimed before the Norwegian authorities – B – he has presented school documents, member cards from a student organisation and his mother's national identity card. In UNE's decision of 22 October 2014, it is set out that "documents from Eritrea are generally not sufficiently verifiable to serve as adequate documentation for the appellant's identity".
- (9) B's application for asylum in Norway was rejected in 2008. Italian authorities were, in accordance with the Dublin II Regulation, deemed to have accepted to receive him, but he was not returned to Italy in time. Thus, UDI passed a new decision on 15 July 2010 granting him residence permit in Norway as a refugee. Although the immigration authorities found that B's identity had not been substantiated, they trusted that he was from Eritrea and in need of protection. His application for a travel document for refugees

was rejected due to the doubt regarding his identity. By its decision of 25 August 2011, UNE dismissed his appeal against the rejection of his application for travel documents.

- (10) Following a notice that a writ would be issued, UNE reconsidered B's case, but declared in its decision of 22 October 2014 that there was no basis for reversal.
- (11) The respondent stating to be C, born 00.00.1977 and an Iraqi citizen, applied for asylum in Norway on 9 July 2002.
- (12) In the court of appeal's summary of C's background and the processing of his case, the following is set out:

"He claimed to be a Feyli Kurd, and that he feared Iraqi authorities after he, in May 2002, was sentenced to imprisonment of 25 years for treason. On 18 November 2005, he stated to UDI that he was homosexual and that he sought asylum for that reason too. In the meantime, it had been discovered that C, in 1998, had sought asylum in the Netherlands under a different identity (I, born 00.00.1975), and that he had been registered in Germany under a third identity (J, born 00.00.1985). He had handed in a new application for asylum in the Netherlands in 2003, only to be returned to Norway.

By its decision of 12 April 2006, UDI rejected the application for asylum and residence permit in Norway. The decision was appealed to UNE, which by its decision of 27 August 2007 dismissed the appeal. C's petition for reversal was also dismissed.

C then brought an action against the state represented by UNE contending that UNE's decisions were invalid. He no longer argued that he was entitled to asylum or protection from being returned because he was a Feyli Kurd and therefore convicted for treason in Iraq. On the other hand, he claimed that he had a well-founded fear of persecution by the Iraqi government and his family or clan in Iraq because of his homosexuality. UNE no longer contested that C was a homosexual, but held that the risk of persecution had not been sufficiently substantiated."

- (13) Both the district court and the court of appeal ruled in favour of the state. However, the Supreme Court concluded in its judgment in Rt-2012-494 that the court of appeal's judgment had to be set aside. In para 57, it is stated that if "fear of persecution is the reason why the applicant chooses to hide his sexual identity, the requirement for a 'well-founded fear of persecution' must be deemed fulfilled". The court of appeal therefore applied the law – without considering the cause – concluding that C in the event of a possible return to Iraq had to be expected to adjust his way of life so as to avoid persecution, see paras 60 to 62.
- (14) Following this, UNE granted C a residence permit in Norway as a refugee in its decision of 22 August 2012. In its decision of 17 October 2012, UDI refused to issue a travel document since there was doubt regarding C's identity. The decision was appealed to UNE, which dismissed the appeal in its decision of 11 November 2013. This decision referred to earlier decisions concluding that C had claimed other identities before Dutch and German authorities, and that he had given conflicting information about his parents, wife and children to Norwegian and Dutch authorities. He had not presented any documents to verify his identity.
- (15) Following a notice of action, UNE reconsidered C's case, but found, in its decision of 22 October 2014, that there was no basis for reversal.

- (16) A, B and C – together with a number of other refugees in a similar situation – brought an action to Oslo District court claiming among other things that the rejections of the applications for travel documents were invalid.
- (17) By Oslo District Court's judgment of 2 November 2015, UNE's rejection of the applications for a travel document was declared invalid for all the applicants. In the court of appeal's view, the fact that several identities had been claimed was not a "compelling reason" for rejecting the applications under the Refugee Convention article 28. In addition, the court of appeal found that all claimants had substantiated their identity.
- (18) The state appealed the district court's judgment to Borgarting Court of Appeal, which dismissed the appeal on 13 February 2017. The court of appeal concluded that a general doubt regarding a refugee's identity is not a "compelling reason" required under the Refugee Convention article 28 for refusing to issue travel documents. In the court of appeal's view, serious and extraordinary circumstances had to be demonstrated with respect to each refugee. That was not the case here. For instance, there were no indications that the refugees were being prosecuted in other countries, were connected to international terrorist networks or involved in human trafficking. The court of appeal concluded that the decisions thus had to be declared invalid. With regard to the three persons concerned in the Supreme Court case, the court of appeal did not specifically consider whether their identity had been verified.
- (19) UNE has appealed the court of appeal's judgment to the Supreme Court. The appeal concerns the application of the law and includes only the three parties where the court of appeal did not specifically address whether their identity had been verified.
- (20) The Norwegian Organisation for Asylum Seekers (NOAS), Self-help for Immigrants and Refugees (SEIF) and the UN High Commissioner for Refugees have acted as interveners for the respondents.
- (21) The appellant – *the state represented by UNE* – has mainly contended:
- (22) None of the respondents have proved their identity. This is especially clear as regards A and C, who have claimed five and three different identities respectively, and who have lived for longer periods under other identities in other European countries. But also with regard to B, *it is more likely* that the identity he has claimed before the Norwegian authorities is false. He denied having applied for asylum in India and for having had his fingerprints taken there, and he tried to conceal this by damaging his fingertips. The documents he has presented are of little evidential value. At the police registration, he stated a different date of birth than at the asylum interview.
- (23) Doubt with regard to identity falls within the term "compelling reasons of national security or public order" in the Refugee Convention article 28. It is a general and basic condition for right to issuance of a travel document that the applicant provides proof of his identity. On a national level, this is set out in the Passport Act section 3, internationally in a number of recommendations and action plans etc., from the EU, the UN and the International Civil Aviation Organization (ICAO), among others.

- (24) Identity checks and measures to prevent the use of false identity documents are crucial in the combat against serious crime. The Norwegian authorities' refusal to issue a travel document on the rare occasions that a refugee cannot prove his or her identity is imperative to maintain national security and public order. If the respondents should succeed, travel documents will be issued showing an identity that is probably false. That would undermine the trust in Norwegian travel documents and legitimise the use of a false identity.
- (25) It does not follow from the wording in the Refugee Convention that there must be other individual reasons for refusing to issue travel documents than doubt regarding identity. Such a requirement can also not be derived from other sources. The court of appeal is wrong on this point. And in any case, it is impossible to control whether there are individual circumstances to consider, such as crimes committed and risk of future offences, when the authorities do not even have a reliable identity to deal with.
- (26) The immigration authorities acknowledge that it can be difficult for asylum seekers to prove their identity adequately, and this is taken into account in practice. In some cases – such as the one at hand – it must be assumed that the applicant has a need of protection despite the fact that his or her identity has not been verified. It is acknowledged that the lack of valid identification is a considerable disadvantage. But this is not solved by issuing a travel document showing an identity that is probably false. The basic problem is the unknown identity, not the lack of travel documents. The issue is given attention in the ongoing work connected to the issuance of national identification certificate.
- (27) The state represented by UNE has submitted this prayer for relief:
- "1. Judgment is to be given in favour of the state represented by UNE.**
 - 2. Costs are not to be awarded."**
- (28) The respondents – *A, B and C* – have mainly contended the following:
- (29) The Refugee Convention article 28 must be interpreted strictly according to its wording. The wording is the binding norm, and no other sources or interpretation factors can be applied. There is no room for a dynamic interpretation, and the state cannot exercise discretion. The Norwegian regulations – the Immigration Act section 64, the Immigration Regulation section 12-1 subsection 1 b and UDI's directive – do not satisfactorily capture the strict wording in the Refugee Convention article 28. However, this is of less importance since the respondents' entitlement to travel documents follows directly from the wording of the Refugee Convention article 28, cf. the Immigration Act section 3.
- (30) The entitlement to documents is also related to the freedom of movement pursuant to, among others, the Norwegian Constitution article 106, but this is overshadowed by the strict requirements in the Refugee Convention, cf. the expressions "compelling" and "require".
- (31) As the court of appeal correctly holds, a travel document can only be denied in serious and extraordinary situations. A general doubt regarding identity does not fall within the scope of "national security or public order". Additionally, there are no "compelling reasons" which "otherwise require" that the immigration authorities reject applications for

travel documents from refugees unable to prove their identity. Travel documents may – as the court of appeal holds – only be denied if the authorities can substantiate that for this particular applicant there are specific circumstances that make it necessary to refuse to issue travel documents based on the concern for public safety or public order.

(32) Also, all three respondents have substantiated their identity. Here, it is sufficient to refer to the district court's assessment of evidence.

(33) A, B and C have submitted this prayer for relief:

"The appeal is to be dismissed.

The respondent are to be awarded costs before the Supreme Court."

(34) The intervener *Self-help for immigrants and refugees (SEIF)* supports the respondents' arguments and has submitted this prayer for relief:

"The appeal is to be dismissed.

The intervener Self-help for immigrants and refugees (SEIF) are to be awarded costs before the Supreme Court."

(35) Also, the intervener Norwegian Organisation for Asylum Seekers (NOAS) has mainly endorsed the respondents' arguments. NOAS has also emphasised the following:

(36) Norwegian authorities have accepted that the respondents have a need for protection. On this basis, they have been granted residence permits in Norway, and it must be expected that they remain residents here indefinitely. A travel documents for refugees is the only valid identification document that can be issued. When they are denied this, they are excluded from travelling abroad, which they generally need to do more than others. Also their chances of being integrated in the Norwegian society are materially reduced, which is otherwise an important goal for the authorities. Without a travel document, it is, among other things, impossible to use general bank services, they cannot have a drivers' licence, they cannot purchase real property and they cannot have jobs requiring a certificate of good conduct. The consequences may in practice only be avoided by issuing a travel document.

(37) The state has not demonstrated any genuine risk that Norwegian travel documents lose their status if issued to this small group of refugees. Nor has it been documented that travel documents with a false identity have actually been used to commit crimes, or that the crime rate will increase if travel documents are issued to refugees whose identities have not been substantiated.

(38) The limit set by the Norwegian government – travel documents are only issued on identities that have been substantiated, that is, by more than 50 percent – has no legal basis. The limit is completely inappropriate. It is meaningless considering combat against crime etc. to issue a travel document to a person whose identity has been substantiated by 51 percent, while refusing to issue the same document when a person's identity has been substantiated by 49 percent.

(39) The intervener NOAS has submitted this prayer for relief:

"1. The appeal is to be dismissed.

2. Norwegian Organisation for Asylum Seekers are to be awarded costs before the Supreme Court."

(40) The intervener *UN High Commissioner for Refugees* has among other things emphasised that the Refugee Convention article 28 gives an individual right to each refugee. Special emphasis must be placed on the fact that refugees normally lack documents that may contribute to establishing their identity. The provision must be interpreted restrictively. Each applicant's situation must be assessed individually. The state carries the burden of proof.

(41) The High Commissioner is not familiar with any widespread misuse of travel documents, and no risk in that regard has been documented in the case at hand. No "compelling reasons" are demonstrated for refusing to issue travel documents to the respondents.

(42) The UN Commissioner for Refugees has not submitted any prayer for relief.

(43) Certain new documents have been presented and a judicial taking of evidence has been carried out on behalf of the Supreme Court. Except from the number of parties being reduced, the case remains mainly the same as before the lower instances.

(44) *My view on the case*

(45) The court of appeal has given this account for the *significance of travel documents*:

"Similar to a passport, a travel document gives the refugees a right to cross country borders. To be in possession of a travel document is therefore a condition for being able to travel abroad and visit family and others who do not live in Norway. As a travel document is currently the only valid identification document for refugees in Norway, it is also important for the refugees' possibilities to participate in society. A driver's licence cannot be issued to refugees without a travel document. A travel document is also a condition for having payment cards with a photo issued and for receiving a 'BankID'. Without a travel document it is not possible for the refugees to purchase real property, raise bank loans have jobs requiring a certificate of good conduct."

(46) The parties have not had strong objections to this description, which I find adequate also after the thorough review during the hearing before the Supreme Court.

(47) Thus, it is clear that not having travel documents issued is a serious disadvantage to the respondents.

(48) I mention that all respondents have had Schengen uniform-format residence cards issued pursuant to the Immigration Act section 64 a. Thus, they have received "identity papers" meeting the requirements in the Refugee Convention article 27. But this document is not generally accepted as anything but a proof of lawful residence in Norway.

(49) The relevant part of *the Refugee Convention article 28* reads:

"The Contracting States shall issue to refugees lawfully staying in their territory travel

documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents."

(50) In the Norwegian translation provided in Proposal to the Storting no. 135 from 1952, on ratification of the Convention, the terms *tvingende hensyn* [compelling reasons], *nasjonal sikkerhet* [national security] and *offentlig orden* [public order] are used.

(51) The following is set out in the Immigration Act section 3:

"The Act shall be applied in accordance with international provisions by which Norway is bound when these are intended to strengthen the position of the individual.

(52) Refugees' right to a travel document pursuant to the Refugee Convention article 28 is undoubtedly a rule having as its object to "strengthen the position of the individual".

(53) As concerns the meaning of the provision in the Immigration Act section 3, the following is set out in Proposition to the Odelsting no. 75 (2006-2007):

"The provision is a continuation of the applicable Act section 4, and governs the relationship to international provisions. Norway's obligations under international law have an impact in relation to the Immigration Act if this is to the advantage of the immigrant. The provisions in the draft are of course worded with the aim of being in accordance with these provisions, but if there is doubt regarding the application of a provision, section 3 implies that one must use the interpretation option that has the effect that international law is not breached. International provisions by which Norway is bound are, hence, to be applied for interpretation and supplementation of the Act, in replacement of or with an impact on provisions that may point in the opposite direction."

(54) The interpretation the Refugee Convention article 28 is thus central to the case at hand, see also the Supreme Court judgment in HR-2017-569-A para 38. Before I deliberate on the interpretation, I will briefly comment on the *Norwegian acts and regulations* related to article 28.

(55) The Immigration Act section 64 subsection 1 first sentence reads:

"A foreign national who is granted a residence permit under section 28 shall upon application also be granted a refugee travel document for travel outside Norway provided no special reasons argue against it."

(56) The preparatory works of the provision barely mentions the Refugee Convention article 28.

(57) Official Public Report NOU 2004:20 "New Immigration Act" page 359 gives the impression that Norway, under article 28, is obliged to issue travel documents to refugees.

(58) The Report then sets out the following:

"After having considered overlapping concerns, the committee proposes that the provisions on travel documents for refugees and immigrants' passports are continued in a new act. This involves at the same time a continuation of the provisions on when travel documents/immigrants' passports can be denied and confiscated. The committee deems

this important. For reasons of deterrence in particular, it ought not to be normal procedure to issue travel documents to persons whose identity the immigration authorities do not know, such as earlier asylum seekers having operated with several identities and/or having failed to document their identity without giving an acceptable explanation. Considerations of deterrence also entail that the authorities should handle all misuse strictly."

- (59) The meaning of "reasons of deterrence" and "considerations of deterrence" is not provided, and the deliberation is aligned with the terms used in article 28.
- (60) The committee's proposal was followed up in Proposal to the Odelsting no. 75 (2006-2007). The ministry also did not discuss article 28, and the proposal to continue the then practice has not been commented on. In the special motives on page 432, however, it is set out that "doubts regarding the immigrant's identity" will "still make it possible to refuse to issue of travel documents".
- (61) In the Immigration Regulation section 12-1, further provisions are given on exemptions from the right to have a travel document issued. Pursuant to litra b, travel documents may – like under the previous regulation – be denied when "there is doubt regarding identity of the immigrant".
- (62) Further guidelines are given in UDI's directive RS 2012-009. It is set out in item 8 on page 28 that if there is "doubt regarding the identity of the immigrant", an application for a travel document should "as a main rule be rejected". Furthermore, it is stated that "doubt regarding the identity" means that "the identity has not been substantiated"; that is, the identity is most likely false.
- (63) The rejections of the respondents' applications are in accordance with these guidelines; the immigration authorities find that it is more likely that the identities claimed in Norway are not true. On this basis, no travel documents have been issued.
- (64) The state has informed the Supreme Court of the fact that most refugees are able to substantiate their identity and receive travel documents although 90 percent of the asylum seekers do not present what is regarded as valid identification. During the period from 2014 until September 2017, asylum was granted to almost 23,000 refugees. At the same time, travel documents were issued to all but 64 persons.
- (65) The respondents' cases are stated to be rather typical for cases where travel documents are normally denied: Despite the fact that the authorities find that the applicants' identities have not been verified, their need of protection has been sufficiently clarified. Refugee status is thus granted, but the doubt regarding their identity has the effect that their applications for a travel document are rejected. Also, as it is has been stated, it is normal that the doubt with regard to identity the immigration authorities believe exists is due to the applicants' use of different identities in other European countries before they came to Norway.
- (66) I will then revert to the *interpretation of the Refugee Convention article 28*.
- (67) In the Supreme Court judgment in HR-2017-569-A para 44, the following is stated regarding the principles for interpretation of the Refugee Convention:

"The Convention must be interpreted in accordance with the principles in the Vienna Convention of 23 May 1969. The starting point is the natural understanding of the wording, read in the context in which it is placed and in light of the object of the Convention, see the Supreme Court judgment in Rt. 2012 page 494 para 33. It is set out in articles 31 and 32 of the Convention that other sources of law will have limited relevance to the interpretation. This entails that there is little room for a dynamic interpretation.

- (68) Hence, the wording is central to the interpretation.
- (69) Pursuant to article 28, the Convention States *shall* as a starting point issue travel documents to refugees lawfully staying in their territory. This is the right of each refugee, and can only be denied in the events stated in the exemption.
- (70) The natural interpretation of the wording in article 28 is that much is required before a travel document to a refugee with a residence permit can be denied.
- (71) In a joint document issued by the ICAO and the UNHCR in October 2013 – "Guide for Issuing Machine Readable Convention Travel Documents for Refugees and Stateless Persons" – it is stated on page 11 that the exemption should be interpreted and applied "restrictively" and that it only concerns "grave and exceptional circumstances". The same is held by the UNHCR in the case at hand. The court of appeal has used the term "serious and extraordinary situations". I agree that this wording – allegedly used for the first time by Professor Atle Grahl-Madsen in his comments to the Refugee Convention of 1963 page 14 – gives a good starting point for interpretation of the restricted scope of the exemption.
- (72) Also, the preparatory works of the Convention strengthen the impression that this concerns a narrow exemption. A rejection based on doubt regarding the immigrant's identity seems, however, not to have been discussed.
- (73) The term "special reasons" in the Immigration Act section 64 does not match the content of the Refugee Convention article 28. Nor the provision in the Regulation – that travel documents "can be denied" when "there is doubt regarding the immigrant's identity" – gives any guidance as to the subject to consider pursuant to article 28, see the Immigration Act section 3.
- (74) The wording states directly that only circumstances that are within the scope of "*national security or public order*" may serve as a basis for not issuing travel documents. And these circumstances must be of such strength that "*compelling reasons ... require*" that travel documents are not issued to a refugee applying for it.
- (75) The wording of article 28 does not entail a requirement that the state can only reject an application for travel documents if it can be substantiated that the applicant would constitute a specific danger to national security or public order if he had travel documents issued. The wording implies that there must be "*compelling reasons of national security or public order*" for rejecting an application. If so is the case, it has no significance if this basis for rejection applies to more refugees. However, article 28 gives an individual right

for each refugee, and it must be assessed individually whether the asserted reason applies with the necessary strength for this applicant.

- (76) In the assessment whether the doubt regarding identity falls within the scope of the exemption in the Convention, I take as a starting point that it is a general and basic requirement that anyone applying for a travel document must establish his or her identity.
- (77) For issuance of Norwegian passports, this follows from the Passport Act section 3 stating that it is a "condition for entitlement to a passport that "the applicant provides proof of his or her identity". An Addendum to the Refugee Convention contains guidelines as to the form of the travel document. In its preamble, it is stated that the travel document is issued "in lieu of" a national passport. It is therefore reasonable to apply the same principles with regard to these documents as with regard to a passport.
- (78) The primary purpose of a passport and other travel documents issued by the authorities is to serve as proof of identity to enable the authorities of the country to which the owner travels to maintain immigration control, see the preparatory works of the Passport Act, Proposition to the Odelsting no. 62 (1996-1997) page 1. On these grounds, it would be contrary to the document's central function – proof of identity – if the authorities were to issue a passport based on an identity that is most probably false.
- (79) In my view, this starting point alone is enough to establish that doubt regarding identity – i.e. it being more likely that the identity the applicant claims when applying for a travel document is false – gives basis for refusing to issue travel documents to refugees. It affects no doubt the national – and international – security and order that travel documents are only issued when it at least has been held that the identity most likely is correct. Moreover, at least when it is more likely that the identity claimed in the application for a travel document is false, there are "compelling reasons" for rejecting the application: It is imperative that a public travel document is not issued that would show an identity that the issuer believes is most likely false.
- (80) Particularly due to the highly difficult situation the doubt regarding identity creates for this group of refugees, I will deliberate more closely on the significance of travel documents only being issued to persons whose identity has been established.
- (81) There is a number of documents nationally and internationally that stress the significance of the trust in identity documents. The use of false identification in connection with serious crime is highlighted in particular. I will now give some examples of such documents for illustration purposes.
- (82) In Resolution 1373 (2001) from the UN Security Council, it is set out that all States, to prevent the movement of terrorists must have "effective border controls and controls on issuance of identity papers and travel documents". In "the Bangkok Declaration" – issued during the UN's 11th Congress on Crime Prevention and Criminal Justice – the following is set out in para 27:

"We are conscious of the crucial importance of tackling document and identity fraud in order to curb organized crime and terrorism. We seek to improve international cooperation, including through technical assistance, to combat document and identity fraud, in particular the fraudulent use of travel documents, through improved security

measures, and encourage the adoption of appropriate national legislation."

(83) An Action Plan from the European Commission of 8 December 2016 mentions "concrete measures to improve the security of travel documents". In the Commission's press release, the following is set out:

"Travel document security is an important factor in the fight against terrorism and organised crime and contributes to improving border protection and migration management ..."

(84) One out of four key areas concerns "[r]egistration of identity". Here, the States are requested to consider, among other things, "... how best to avoid issuing authentic documents based on false identities". The Action Plan itself points out "the crucial importance of secure travel and identity documents wherever it is necessary to establish beyond doubt a person's identity ...".

(85) In the ICAO's "Guide for Assessing Security of Handling and Issuance of Travel Documents" from January 2010, it is stated in Part 1 regarding "best practices" that most countries operate with three necessary conditions for issuing a travel document. The first condition is the establishment of "... evidence of the applicant's identity, i.e. this is a real identity and the applicant is in fact the claimed individual".

(86) In the joint document issued by the ICAO and the UNHCR in October 2013 – "Guide for Issuing Machine Readable Convention Travel Documents for Refugees and Stateless Persons" – which I have already addressed, a reference is made in the paragraph concerning "[e]ntitlement process" on page 10 to refugees' right to travel documents pursuant to article 28. It is stated that in order to determine eligibility for a machine readable document, it is necessary for the national authorities to "verify an applicant's identity". Hence, it may seem as if the issuers of such a document acknowledge that machine readable travel documents, at least, are not to be issued unless the applicant's identity has been established.

(87) There are a number of Norwegian reports etc. leaving much of the same impression as the international documents I have mentioned. In Proposition 90 L (2015–2016) regarding amendments in the Immigration Act, it is mentioned on page 150 that widespread use of false identities is a "serious security threat".

(88) Finally, I will mention that in the Supreme Court judgment Rt-2006-1121, there are some statements with a certain transfer value to the issues in the case at hand. The case concerned sentencing of a convicted person who had let others use his passport. After highlighting the importance of general deterrence in such cases, the following is stated in para 14:

"In addition, leaving one's passport to others entail a serious risk. The passport can be misused on one or more occasions, by one or more persons, with the consequence that country borders may be crossed illegally and uncontrollably. Next, dangerous situations may occur if there is doubt regarding persons' identity. Misuse of passports and lost passports are an increasing problem for the authorities, and it is an increasingly demanding task to prevent it. The punishability is thus not related to whether or not the passport has been misused, or where or in which way it has happened, but to the potential risk created".

- (89) Against this background, I find that both internationally and nationally, false identification documents are deemed to constitute a serious security issue. Significant efforts are made to improve document security. If the Norwegian authorities were to issue travel documents that are deemed most likely to show a false identity, this would be clearly contrary to the work otherwise done in this respect, nationally and internationally.
- (90) In my view, there is a genuine risk that the trust in Norwegian travel documents would be undermined if travel documents were issued to persons whose identity has not been substantiated. The parties have not documented reliable examples of any country issuing travel documents, which are also regarded as identification papers, to persons whose identity has not been established. It has been stated that in Sweden and Finland, travel documents are also issued to persons whose identity has not been verified, but with a note regarding this on the document. Whether or not such a document can be used as a travel document has not been stated.
- (91) In my view, the provisions on freedom of movement in the Norwegian Constitution article 106, in Protocol no. 4 of the European Convention of Human Rights article 2 or the UN Covenant on Civil and Political Rights article 12 cannot be applicable for the case at hand. The way I interpret article 28, I assume that it gives a more far-reaching right than the provisions mentioned.
- (92) Consequently, my *conclusion* is as follows: If it is more likely that the refugee is claiming a false identity, it is in accordance with the Refugee Convention article 28 to refuse to issue a travel document. Such doubt regarding identity constitutes a "compelling [reason] of national security or public order" which makes it imperative to refuse to issue a travel document.
- (93) In my understanding, the court of appeal bases its conclusion on the idea that doubt regarding the refugee's identity in the sense that it is more likely that the identity claimed is false, is not in itself a "compelling reason" for rejection. According to my interpretation of the Convention, this application of the law is wrong.
- (94) However, the respondents have contended that the decisions denying them travel documents are in any case invalid, as they have substantiated their identity. I will now turn to this matter.
- (95) *The validity of the decisions in the respondents' cases*
- (96) First, I will highlight some of the general aspects that, in my view, must be emphasised in the assessment whether an application for a travel document can be rejected because the identity of the applicant has not been established.
- (97) As emphasised by the High Commissioner for Refugees, among others, refugees do normally not have travel documents. It may also be difficult for them to prove the identity otherwise. In Proposition to the Odelsting no. 75 (2006–2007) page 51, it is set out that even if the clear main rule is that immigrants applying for residence in Norway must document their identity, it must nevertheless be accepted that in a number of cases, there will be uncertainty attached to their identity. The individual assessment must be made

against this background, see also UDI's directive RS 2012-009, in particular page 4 and page 8 et seq.

- (98) Since issuing travel documents can only be refused for "compelling reasons of national security or public order", it is clear that such refusal can only be maintained as long as the hindrance is present. Even if there was reason to refuse issuance at the time of the first application, it must be considered whether this is still the case in connection with later applications and reversal assessments.
- (99) Moreover, the Refugee Convention article 25 orders each Convention State to provide necessary "administrative assistance" to refugees residing in the territory. I assume that this also entails an obligation for the authorities to assist the refugee with establishing a sufficiently secure identity, if that is practically possible.
- (100) The decisions of 22 October 2014, where UNE following a notice of action refused reversal for all three respondents, are the latest decisions passed in the case. I therefore use these as a basis for my assessment of the decisions' validity.
- (101) The decisions give an account of the relevant factual circumstances, to which no objections have been made before the Supreme Court.
- (102) According to the decisions from 2014, UNE finds that no new information has emerged that removes the hindrance for issuing travel documents. UNE also accounts for which examinations have been made, for instance of certain documents presented, and argues why other documents have not been examined more closely.
- (103) In the decisions, it is stated that it is possible to apply for a travel document for one single travel. I add that it is also possible to apply for a travel document for travels to certain countries. This is set out in the Immigration Regulation section 12-2 subsection 5 and section 12-6 subsection 6 and is further addressed in UDI's directive RS 2012-009 page 29. None of the respondents have asked for a travel document with such restrictions.
- (104) *A*
- (105) *A* has claimed a total of five identities and lived in Greece for years under identities different from the one he is now claiming. He has not presented any documents or otherwise substantiated that the identity he stated last is the correct one.
- (106) In my view, it is clear that his identity has not been substantiated.
- (107) *B*
- (108) *B* claimed to be *H* before Italian authorities and was granted a residence permit in Italy under this identity effective 22 August 2007 until 21 August 2008. Both in Italy and in Norway, he stated that his birthday was 17 February, but the birth year varies. In Norway, he allegedly also stated a different date of birth at the police registration than at the asylum interview.

- (109) B's situation differs from that of the two other respondents, as he has only claimed two different identities. As a starting point, it is difficult to say that one of the two identities is truer than the other. I have no basis for reviewing the immigration authorities' opinion that the documents he has presented from his home country have little credibility, and I leave it open whether these documents can serve as proof at all.
- (110) After two and a half months in Italy, B travelled to Norway, despite the fact that his residence in Italy was still lawful. Thus, he has not stayed for a long period of time in a another European country under an identity that is different from the one he claimed before Norwegian authorities. He has lived in Norway for ten years, during which period there have been no indications of him having used other identities. No information has emerged of him having engaged in criminal activities or being prosecuted abroad. Nor have other circumstances been brought to light indicating that he has been using a false identity during the last ten years.
- (111) In my view, in the assessment of whether B's identity had been substantiated at the time of the last decision, one must consider the fact that he has used the other identity for a short period of time compared to his long residence in Norway under the same identity. I find that this time aspect in B's case is sufficient to establish, however weakly, that it is more likely that the identity under which he is applying for a travel document is true. According to government practice, a travel document is to be issued in such a situation.
- (112) Consequently, I have concluded that UNE's decision as far as B concerns is invalid.
- (113) C
- (114) C has stated three different identities. He has resided in the Netherlands under the identity I born in 1975 and in Germany with the identity J born in 1985. In Norway, he stated the name he is using at present and a date of birth in 1977. He has not presented any documents or otherwise substantiated that the last identity stated is the correct one.
- (115) In my view, his identity has not been substantiated.
- (116) Consequently, I have concluded that UNE's decision must be declared invalid as far as B concerns. I assume that it is correct to declare both UNE's decision on the merits of 25 August 2011 and the refusal to carry out a reversal of 22 October 2014 as invalid.
- (117) Otherwise, I have concluded that judgment must be given in favour of the state.
- (118) Finally, I will emphasise that the case illustrates a serious and unsolved issue: A small group of refugees with lawful residence in Norway, and who must be expected to stay here indefinitely, lack access to important benefits and possibilities that the public in general take for granted. In addition to the material disadvantages in everyday life, this situation may easily create problems for these refugees' integration in the Norwegian society. The problem is rooted in the uncertainty regarding their identity. This is not solved by issuing a travel document where the identity is likely to be false. Ensuring that this group of citizens in Norway have access to, at least, the most crucial benefits which they currently lack is a task for the government.

- (119) B has succeeded in his alternative submission as to why he should have a travel document issued, and is entitled to compensation for costs before the Supreme Court as submitted in his prayer for relief. In a joint statement of costs for the three respondents, a total of NOK 225,000 including VAT is claimed. I assume that the work is distributed more or less equally among the three respondents, and costs are awarded in the amount of NOK 75,000.
- (120) The state has not claimed legal costs.
- (121) Considering my result, there is no basis for awarding costs to the interveners that have claimed this.
- (122) I vote for this

J U D G M E N T :

1. The Immigration Appeals Board's decisions of 25 August 2011 and 22 October 2014 rejecting B's application for a travel document for refugees are invalid.
 2. Otherwise, judgment is given in favour of the state represented by the Immigration Appeals Board.
 3. The state represented by the Immigration Appeals Board will pay to B costs of NOK 75,000 – seventyfivethousand within 2 – two – weeks from the service of this judgment.
 4. Otherwise, costs in the Supreme Court are not awarded.
- (123) Justice **Indreberg**: I have concluded that the state's appeal must be dismissed also when it comes to A and C.
- (124) Like the court of appeal, I read the Refugee Convention article 28 so that it does not exclude doubt regarding identity as a basis for denying a refugee a travel document. However, since the Convention only allows exemptions from the government's obligation to issue a travel document when it is imperative out of concern for the state's security or public order ("ordre public"), an individual assessment must be made also in the event of doubt regarding identity to determine whether issuing a travel document represents such a risk that there are compelling reasons for refusing.
- (125) The state has asserted that when the identity has not been verified, it is not possible to make an individual assessment. For instance, one does not know whether the refugee has a criminal background or is part of a terrorist network under a different identity.
- (126) This may sometimes be the situation. For that reason specifically, doubt regarding identity cannot be excluded as a basis for refusal. But I have problems understanding that it will always be the case that such doubt involves a genuine risk that the person in question represents a risk of the scope the Convention refers to if she or he has a travel document issued. It is true that the refugees who have been denied a travel document have acted

with at least two different identities after arriving in Europe. Such a conduct makes it hard to practice immigration control, and it is not wanted. However, I find that one cannot automatically conclude that the person lacks credibility and certainly not that the person constitutes a risk of the scope the Convention refers to. A broader perspective must be applied.

- (127) The state has further contended that the trust in Norwegian travel documents will be at risk if travel documents are issued to refugees whose identity cannot be substantiated by more than 50 percent. Based on the presentation of evidence, the court of appeal did not deem this to be the case, stressing among other things that it concerns a small number of persons. I will also add that in the 1990s, the practice was more liberal, without indications of a reduced trust by foreign authorities in Norwegian travel documents. In my view, it is difficult to find a legal basis in the strict wording of the Convention for not making a more thorough assessment of the risk of issuing travel documents while referring to assumptions regarding such general effects.
- (128) The justice delivering the leading opinion mentions that since the travel document is a substitute for a passport, it is reasonable as a starting point to demand that the applicant proves his or her identity, see the Passport Act section 3. I believe one should be careful about doing that. International conventions are autonomous. The practice with issuing travel documents was implemented due to the refugees' unique situation. They are not only prevented from applying for a passport in their home country, but they often lack documents, and documents with the necessary verifiability may be hard to procure.
- (129) In the Immigration Appeals Board's decisions against the respondents, no individual assessment has been made as to whether there are compelling reasons for denying them travel documents. The decisions are thus based on an interpretation of the law that I deem contrary to the Refugee Convention article 28, and they are thus invalid.
- (130) **Justice Noer:** I agree with the justice delivering the leading opinion, Justice Kallerud, in all material aspects and with his conclusion.
- (131) **Justice Bergh:** Likewise.
- (132) **Justice Tønder:** Likewise.
- (133) Following the voting, the Supreme Court gave this judgment:

J U D G M E N T :

1. The Immigration Appeals Board's decisions of 25 August 2011 and 22 October 2014 rejecting B's application for a travel document for refugees are invalid.
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this judgment.

4. Otherwise, costs in the Supreme Court are not awarded.