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-2012-02399-P (case no. 2012/1042), civil action, appeal against a judgment.

A B C	Advocate Håkon Bodahl-Johansen –(qualifying test case) Assistant counsel: Advocate Anders Løvlie
The Norwegian Association for Asylum Seekers (NOAS) (third-party intervener)	Advocate Jan Fougner
v.	
The State, represented by the Immigration Appeals Board	The Attorney General (Civil Affairs), represented by Advocate Kine E. Steinsvik Assistant counsel: Assistant Attorney General Tolle Stabell The Attorney General, represented by Advocate Marius Emberland

V O T I N G :

(1) Justice **Matningsdal:** This case concerns the validity of a refusal to reverse a decision rejecting an application for residence on humanitarian grounds for a family from Bosnia-Hercegovina that had had children in Norway. At the time of the decision, the eldest child had lived in Norway for more than seven years. The case was heard in conjunction with case 2012/688, which raises largely the same issues as in the present case and which was put to the vote earlier today. In addition to the issues that are common to both cases, a request has been put forward in the present case for a declaratory judgment for violation of article 8 of the ECHR and article 3 of the Convention on the Rights of the Child (CRC).

(2) B and A were born in 1970 and 1973 respectively in the Republic of Bosnia, currently Bosnia-Hercegovina, in the former Yugoslavia. B is Croatian, while A is half Croatian, half Serbian. B has two children from previous relationships, born in 1988 and 1995, who live in Bosnia-Hercegovina.

(3) The couple, who had cohabited in their country of origin, came to Norway on 28 February 2003 without valid travel documents and applied for asylum on the same

day. They stayed at the asylum reception centre at X, and on 17 September 2003 their daughter C was born. In February 2012, while they were still living at the asylum centre, they had another daughter.

(4) The Directorate of Immigration rejected their asylum applications in two separate decisions on 18 November 2003. The grounds for refusal were that they did not meet the conditions for being regarded as refugees, nor were they entitled to protection against removal because they risked losing their lives or being subjected to inhuman treatment on returning to their country of origin. Furthermore, following a specific overall assessment, the Directorate found that there were no strong humanitarian considerations or any particular connection with Norway that could justify residence on humanitarian grounds. The time limit for leaving the country was fixed at 2 December 2003.

(5) The decisions were appealed, but the Directorate of Immigration found no grounds for reversing them as the appeals did not contain any new information. On 1 February 2005, the Immigration Appeals Board adopted a decision disallowing the appeals and repeating the family's obligation to leave the country voluntarily.

(6) However, the family did not comply with its obligation to leave Norway and applied several times for a reversal of the Immigration Appeal Board's decision, the first time on 6 September 2006. In the same year, on 31 August, the Ministry of Labour and Social Inclusion had instructed the Directorate of Immigration and the Immigration Appeals Board to suspend cases in which children had applied for asylum or a residence permit on other grounds and who would have a total period of stay in Norway on 1 April 2007 of three years or more. These instructions also included cases where the application had been refused with final effect. The background for the instructions was that the Ministry was working on an amendment of the Immigration Regulations to the effect that special importance should be attached to children's connection with the realm, acquired through a long period of residence, in the general assessment of whether or not to grant a residence permit. As C had at this point in time lived in Norway for more than three years, the Board suspended further work on the case, pending the announced amendment of the Immigration Regulations.

(7) These amendments came into force on 1 June 2007. On 10 September 2007, following a new review, the Immigration Appeals Board refused to allow the petition for a reversal. The obligation to leave the country was repeated.

(8) The family remained in Norway, however, and applied again on 18 February 2010 for a reversal of the refusal of a residence permit. The justification for the petition was their daughter C's connection with Norway. The Immigration Appeals Board rejected the petition by decision of 15 May 2010. The Board pointed out that a time limit for leaving the country had been fixed earlier and underlined that the family was staying illegally in Norway.

(9) On 4 November 2010, the family notified the Immigration Appeals Board that an action would be brought to try the validity of the May decision; see section 5-2 of the Dispute Act. Pursuant to the Immigration Appeal Board's internal guidelines, such notice must be regarded as a petition for a reversal. Therefore the Board decided on

22 November 2010 to postpone implementation of the decision of 1 February 2005 pending a new assessment.

(10) The Writ of Summons to the Oslo District Court of 11 December 2010 concerned the validity of the refusal of 15 May 2010 to reverse the decision.

(11) The reversal petition was reviewed and decided at a Board meeting by a Board chair and two Board members. On 15 December 2010, the Immigration Appeals Board decided unanimously not to allow the reversal petition and fixed the time limit for leaving the country at 17 January 2011. I would mention that it has been stated that this decision formed part of the same project of clarifying practice as referred to in the first-voting judge's vote in case 2012/688 (HR-2012-02398-P), paragraph 11.

(12) Having requested deferred implementation, in vain, the family filed a petition for an interim injunction at the Oslo District Court. By order of 17 February 2011, the petition was dismissed.

(13) In the main action before the District Court, the claimant requested that the Board's decisions of 15 May and 15 December 2010 be ruled invalid. On 31 May 2011, the Oslo District Court pronounced a judgment with the following conclusion:

> **"1. The court rules in favour of the State, represented by the Immigration Appeals Board.**
>
> **2. Legal costs are not awarded."**

(14) The judgment was appealed to the Borgarting Court of Appeal, which pronounced a judgment (LB-2011-135931) on 12 March 2012 with the following conclusion:

> **"1. The appeal is dismissed.**
>
> **2. B and A to pay, jointly and severally, legal costs in the Court of Appeal of forty-one thousand four hundred kroner – 41 400 – to the State, represented by the Immigration Appeals Board, within two – 2 – weeks of the service of judgment."**

(15) On 26 March 2012 the family was removed to Bosnia-Hercegovina by the Police Immigration Service.

(16) The Court of Appeal's judgment was appealed to the Supreme Court. The appeal concerns the Court of Appeal's application of the law relating to section 38 of the Immigration Act; see article 3 of the CRC. Furthermore, it is argued that the Immigration Appeals Board's decision was based on incorrect facts, that it was highly unreasonable and constituted wrongful discrimination.

(17) The Supreme Court Appeals Committee granted leave to appeal "as regards the application of the law relating to section 38 of the Immigration Act; see article 3 of the CRC". Otherwise, leave to appeal was not granted.

(18) The Chief Justice has decided that the case will be decided in plenary session; see section 5 subsection 4 last sentence and section 6 subsection 2 of the Courts of

Justice Act. As mentioned above, it has been reviewed in conjunction with case 2012/688 (HR-2012-02398-P).

(19) By the Appeals Committee's order of 10 October 2012, NOAS – the Norwegian Organisation for Asylum Seekers – was granted permission to act as intervener for the benefit of the appellants.

(20) By decision of 1 November 2012, the Appeals Committee permitted the appellants to submit two new claims by requesting a declaratory judgment to the effect that the removal of C was in conflict with article 8 of the European Human Rights Convention, the ECHR, and article 3 of the UN Convention on the Rights of the Child, the CRC.

(21) The appeal hearing was concluded on 23 November 2012. The European Court of Human Rights (hereinafter the ECHR) pronounced a judgment in the case of *Butt v. Norway* on 4 December 2012. On the same day the counsels were given an opportunity to comment to the extent they considered this judgment to be of consequence to the cases that are to be decided in plenary session. Comments have been made in statements of case from the parties and the intervener.

(22) The appellants – *B, A and C* – submit that the Immigration Appeals Board's decision of 15 December 2010 is invalid. To the question of whether the decision's validity is to be reviewed on the basis of the facts of the matter at the time of the decision or of the judgment, the same submissions were presented as in case 2012/688 (HR-2012-02398-P). The same applies to the understanding/interpretation of section 38 of the Immigration Act in conjunction with article 3 of the CRC. With regard to these points, I refer to the account of the first-voting justice in the Supreme Court judgment in the above-mentioned case.

(23) The following has been argued about the specific issues of the present case:

(24) The grounds contain no satisfactory assessment of C's connection with Norway. Nor have her integration and connection with the country been weighed against the consequences for her of a return to Bosnia-Hercegovina. Furthermore, she has not been heard, as required under article 12 of the CRC and section 17-3 of the Immigration Regulations. These deficiencies show that the Immigration Appeals Board did not make a proper assessment of the child's best interests.

(25) In any case, she had such a connection with Norway when she was expelled that her expulsion was a breach of her right to a private life under article 8 of the ECHR. This is a broad concept and also includes the right to "personal and social ties". Practice in the European Court of Human Rights does not prevent a child staying illegally in a country from being protected by the provision. Norwegian courts should not maintain an attitude of restraint and leave the Human Rights Court to lead the way on this issue. A declaratory judgment may be pronounced for this breach of the Convention.

(26) The removal of C was also in conflict with article 3 of the CRC. The preparatory works of the Norwegian Human Rights Act show that the incorporation of this Convention in Norwegian law is intended to show that Norway takes its obligations

under the Convention seriously. The need for effective protection means that a declaratory judgment for of article 3 of the CRC can be given in this case.

(27) B and others have submitted the following claim for relief:

> **"1. The Immigration Appeals Board's decision of 15 December 2010 not to reverse former rejections of a residence permit on humanitarian grounds to be ruled invalid**
>
> **In the alternative: The Court of Appeal's judgment to be quashed.**
>
> **2. The removal of C on 26 March 2012 to be held to be in conflict with article 3 of the UN Convention on the Rights of the Child.**
>
> **3. The removal of C on 26 March 2012 to be held to be in conflict with article 8 of the EHRC.**
>
> **4. The State, represented by the Immigration Appeals Board, to compensate C, B and A for the costs of the case in the Oslo District Court in the amount of NOK 124 630."**

(28) With respect to the question of whether the assessment of the decision's validity should be based on the facts of the case at the time of the decision or of the judgment, the intervener - *the Norwegian Association for Asylum Seekers* – has pleaded the same as in case 2012/688 (HR-2012-02398-P). The same applies to the interpretation of section 38 of the Immigration Act in conjunction with article 3 of the CRC. I will restrict myself to referring to the account of the first-voting justice in that case.

(29) The Norwegian Organisation for Asylum Seekers has submitted the following claim for relief:

> **"1. The Immigration Appeals Board's decision of 15 December 2010 to be ruled invalid (non-binding).**
>
> **2. In the alternative: The Court of Appeal's judgment to be set aside.**
>
> **3. The removal of C to be ruled to be contrary to article 3 of the CRC.**
>
> **4. The removal of C to be ruled to be contrary to article 8 of the EHCR.**
>
> **5. The State to cover NOAS' legal costs in the Supreme Court."**

(30) The respondent – *the State, represented by the Immigration Appeals Board* – has also presented the same submissions as in case 2012/688 (HR-2012-02398-P) with regard to the question as to which facts should form the basis for the review of the decision's validity and to the question of how to interpret section 38 of the Immigration Act in conjunction with article 3 of the CRC. I will restrict myself to referring to the account of the first-voting justice in the Supreme Court judgment in that case.

(31) The following has been submitted about the specific issues in the present case:

(32) Both the case history and the decision show that the best interests of the child have been properly assessed and balanced against other considerations as a primary consideration, in accordance with the requirements resulting from section 38 of the Immigration Act; see article 3 of the CRC.

(33) Article 8 of the ECHR is not applicable in C's case. According to practice in the European Court of Human Rights, a requirement for protection under this provision is that the person concerned has lawful residence. For persons without lawful residence, there can only be a violation of the Convention if the decision results in a separation from the family – which is not the case here. Under any circumstances, the removal is in accordance with the conditions in article 8 (2) of the ECHR for permitted interferences.

(34) The respondent disputes that a declaratory judgment can be given for a breach of article 3 of the CRC. This provision is only a guideline for the exercise of discretion and does not establish individual rights. Therefore, no legal claim exists for which a judgment can be given pursuant to section 1-3 of the Dispute Act. Furthermore, there has been no infringement of article 3 of the CRC.

(35) The State, represented by the Immigration Appeals Board, has submitted the following claim for relief:

> **"1a. Principally: the request for a declaratory judgment for breach of article 3 (1) of the Convention on the Rights of the Child to be dismissed.**
>
> **1b. In the alternative: the Court to rule in favour of the State, represented by the Immigration Appeals Board, in the allegation of a breach of article 3 (1) of the Convention on the Rights of the Child.**
>
> **2. The Court to rule in favour of the State, represented by the Immigration Appeals Board, in the allegation of a breach of article 8 of the European Convention on Human Rights.**
>
> **3. The appeal to be dismissed."**

(36) *I have come to the conclusion* that the appeal and the requests for a declaratory judgment cannot succeed.

(37) The question is whether the Immigration Appeals Board's refusal of 15 December 2010 to reverse its decision of 1 February 2005, in which the appellants were not granted residence on humanitarian grounds, is invalid. At the time of the decision of 15 December 2010, the daughter of the family was 7 years and 3 months old and was in the second grade in a Norwegian school. When the family had to leave the country in March 2012, she was 8 years and 6 months and had lived in Norway for the same length of time. At the time of the decision in December 2010, the family had stayed illegally in Norway for approximately 4 years and 10 months, while the period of illegal stay at the time of removal was 6 years and 2 months.

(38) This case raises a number of legal issues. Several of them were decided in the Supreme Court judgment today in case (HR-2012-02398-P).

(39) Firstly, it was decided that the decision should be reviewed on the basis of the facts of the case at the time of the decision and not at the time of the judgment. In the assessment of the decision's validity, the court must therefore disregard C's strengthened connection after 15 December 2010.

(40) There has also been a legal clarification of the content of section 38 of the Immigration Act in conjunction with article 3 of the CRC. I refer to the thorough review of this question by the first-voting judge in the above-mentioned judgment. With respect to the framework for the courts' review, she referred to the first-voting judge's summing up in Rt-2009-1261 paragraphs 75 to 77, where it is concluded in paragraph 77 that "[t]he courts' task is …. to control the administrative authority'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 administrative authority's free exercise of discretion". The first-voting judge in case 2012/688 (HR-2012-02398-P) thereafter summarised the review as follows:

> **"In sum, this means that the courts of law can fully review whether or not the administrative authority 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 has carried weight as a primary consideration. Within these frameworks, the courts of law cannot review the specific balancing of interests."**

(41) I will base myself on these frameworks in my review of the decision in the present case.

(42) Even if this is shown in the first-voting judge's vote in case 2012/688 (HR-2012-02398-P), I would mention that both section 38 subsection 3 of the Immigration Act and section 8-5 of the Immigration Regulations implement article 3 (1) of the UN Convention on the Rights of the Child, 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."**

(43) Moreover, I would mention that the Act must be applied in accordance with "international provisions by which Norway is bound when these are intended to strengthen the position of the individual", also pursuant to section 3 of the Immigration Act.

(44) *Is the Immigration Appeals Board's decision of 15 December 2010 invalid?*

(45) The question will then be whether the Immigration Appeals Board's decision of 15 December 2010 is invalid when we base our assessment on these points of departure.

(46) The Board begins its assessment under section 38 of the Immigration Act by stressing that in cases concerning children "special weight must be given to the connection the child has acquired with Norway". It states that section 8-5 of the Immigration Regulations does not in itself provide grounds for residence, but it indicates a separate issue for consideration in deciding whether or not to grant a residence permit to families with children. Furthermore, the Board states that "connection with the realm" means a connection resulting from a long period of stay and that the duration of this stay will be a central element in the assessment of whether this requirement has been met.

(47) Next, the Board examines the various elements of connection C has. It points out that she was born here, has attended nursery school for many years and that she was in the second grade in the primary school. At the same time, the Board underlines that due to her young age, her connection has been primarily with her parents. Then the Board writes:

> **"Based on information available in the case, the Board also assumes that she has a connection with her surroundings, as she attended nursery school for several years, is currently in school and speaks Norwegian."**

(48) I think it is evident that the Board assumed that it would be in C's best interest to be allowed to remain in the country and that she has built up such a connection with the realm that this *may* be decisive to the decision.

(49) Then the Board continues:

> **"All the same, even if we assume that C has built up a connection with the realm, the Board agrees that this does not mean that a permit *must* be granted, but that it is an element in the overall assessment that must carry special weight; see the foregoing. Also other considerations can carry weight in the overall assessment."**

(50) Then the Board balanced the importance of C's connection with Norway against immigration policy considerations that must be taken into account. It reached the conclusion that immigration policy considerations are "strongly present in a case such as this", that "greater weight" had to be given to these considerations in the overall assessment of this case and that they "indicate" that a permit should not be granted. The Board points out in this connection that the family had not complied with their obligation to leave the country, although they had been informed of this obligation several times, and that the family had stayed illegally in Norway for a total of more than 4 years and 10 months. The Board then continues:

> **"Pursuant to article 3 (1) of the CRC, the best interests of the child must be a primary consideration in all actions concerning children. However, that the best interests of the child must be an important consideration does not mean that immigration policy considerations and other considerations cannot be relevant and decisive."**

(51) As shown in the judgment in case 2012/688 (HR-2012-02398-P), the Immigration Appeals Board's conclusion that immigration policy considerations can be "decisive", based on an overall assessment of the case, is not contrary to section 38 subsection 3 of the Immigration Act in conjunction with article 3 (1) of the CRC.

(52) In my opinion, it could undoubtedly be said that the decision has some structural weaknesses: as shown by the exposition above, the need to make the child's best interest a primary consideration was only emphasised expressly *after* the Board had referred to the need for an overall assessment. But on the other hand, it was emphasised in the overall assessment as a special consideration that C has built up a connection with the country, which is the crucial consideration in the assessment of the "best interests of the child".

(53) Consequently, I do not consider it doubtful that the Board relied on a correct interpretation of section 38 of the Immigration Act in its assessment of whether a residence permit should be granted. It is expressly underlined in the decision that in cases affecting children, the child's best interests must be a primary consideration, that when examining whether a permit should be granted, special importance must be attached to the child's connection with the country, but that in given circumstances, considerations of immigration regulation can have decisive importance also in such cases.

(54) The decision also shows that the best interests of the child – C's connection with the country – were given weight and were properly assessed and balanced against counter considerations. As the case stands, there is good cause to attach weight to the family's failure to comply with their obligation to leave Norway. As mentioned above, the courts cannot review the concrete weighing of interests that was made.

(55) It follows from the CRC that the administrative authority must also make an assessment of justifiability. The Board did make such an assessment. The following is stated about this:

> **"C will return to the country of origin with her parents, and no information has been produced to suggest that they will not be able to give her proper care or that it would for other reasons not be prudent to send her back to the country of origin. Even though Bosnia-Hercegovina still has a number of social challenges, these challenges are not so great that returning to that country would not be prudent. Nor does the Board find the information that C has little knowledge of the language of her country of origin to be decisive in its assessment of the best interests of the child in this case, and it observes that it must be assumed that she will adjust to her mother tongue relatively quickly."**

(56) This quote shows that the Board has stressed that the child will return to her parents' country of origin together with her parents and that this will not, in the Board's opinion, give rise to any special problems. The courts cannot review the balancing of the conflicting considerations.

(57) The appellants have pointed out that it follows from article 12 of the CRC and section 17-3 of the Immigration Regulations that C should have been heard and that it constitutes a procedural error that she was not given an opportunity to state her views directly to the Board. As I have already pointed out, it must clearly be assumed that in its overall assessment pursuant to section 38 subsection 3, see subsection 1, of the Immigration Act in conjunction with article 3 of the CRC, the Immigration Appeals Board's starting point was that it would be in C's best interests to continue to live in Norway and to maintain the connection she had established. There is no basis for assuming that the decision would have been a different one if the child had been heard. I would add that the child's interests have been safeguarded by the family's lawyer.

(58) In its discussion of considerations relating to immigration regulation, the Board stated:

> **"The Board observes in particular that the appellants were contacted by the Police Immigration Service on several occasions and were asked to obtain travel documents. Obtaining such documents is considered to be possible, but requires the applicant to appear in person at the Embassy, something which the appellants have been unwilling to do. In the Board's opinion, such procrastination when it comes to the obligation to leave the country should not be rewarded with a permit on grounds of immigration policy considerations."**

(59) The appellants have argued that the Immigration Appeals Board relies on incorrect facts when it is underlined that the family was contacted by the police on several occasions during their stay. The Court of Appeal did not take a position on this disagreement, as it could not see that the information in question could be considered to have affected the content of the decision.

(60) The information referred to by the Board appears in a police report dated 25 November 2010. As the Court of Appeal did not take a position on whether or not the family was contacted by the police, and the State did not follow up this submission in the Supreme Court, I can see no reason for giving weight to this circumstance in my assessment. Therefore, like the Court of Appeal, I will not take a position on what the situation was, as I too cannot see that this circumstance can have affected the content of the decision. I observe the following as regards this:

(61) Based on the wording of the decision, it might seem, seen in isolation, as if it is the disregard for the allegedly repeated requests from the police that constitutes "such procrastination". However, this is a formulation that was carried over from the prior decision of 15 May 2010. There the following is stated:

> **"Thus, the appellants have stayed unlawfully in Norway for a total of more than 4 years. In the Board's assessment, such procrastination when it comes to the obligation to leave the country should not be rewarded with a permit on grounds of immigration policy considerations."**

(62) As the police memo was only made available in November 2010, the view on which the Board based its assessment of 15 May 2010 – that procrastination had already occurred at that time – must necessarily have referred to the fact that the family did not leave the country in spite of repeated orders to do so. This must still have been the

most prominent fact of the case when the new decision was adopted seven months later. The information in the police memo, which showed a police initiative in the spring of 2010, cannot have motivated the decision of 15 December 2010.

(63) I would add that the obligation to leave the country also entails an independent duty to obtain the necessary travel documents. An inquiry to the embassy of one's own country is an obvious follow-up of this duty, regardless of whether or not the Police Immigration Service had expressly requested this to be done.

(64) As I have underlined previously, the decision must make it clear that the best interests of the child have been properly assessed and balanced against any counter considerations, and that this has been given weight as a primary consideration. Against the background of this review, I find it to be evident that the decision of 15 December 2010 meets this requirement and that it is thereby valid.

(65) *Does the removal of C breach article 8 of the ECHR?*

(66) The appellants have claimed a declaratory judgment to the effect that the removal of C breaches article 8 of the EHCR concerning the right to a private life. I agree that procedurally such a judgment may be given, if applicable.

(67) By way of introduction, I would mention that, based on the appellants' pleadings before the Supreme Court, it is unclear whether they argued that also the decision of 15 December 2010 is in breach of article 8 of the ECHR. As I have come to the conclusion that the removal of C – which temporally follows the decision – is clearly not incompatible with article 8, there is no reason to go any further into this. The preceding decision cannot be in breach of the Convention as long as the subsequent removal does not breach article 8.

(68) After this, I will examine whether the removal was incompatible with article 8 of the ECHR, which reads:

> **"Right to respect for private and family life**
>
> **1. Everyone has the right to respect for his private and family life, his home and his correspondence.**
>
> **2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."**

(69) As the family was removed jointly, this is not a question of whether the removal infringes the right to respect for C's "family life". The question is whether or not her right to "respect for her private life" was infringed because her habitual life and her connection with Norway were disrupted as a result of her removal.

(70) The Convention's concept of "private life" has a broad scope. I refer in this connection to the Grand Chamber judgment of the European Court of Human Rights of 18 October 2006 in the case of *Üner v. the Netherlands* concerning expulsion, where the following is stated in paragraph 59:

> **"... Article 8 also protects the right to establish and develop relationships with other human beings and the outside world ... and can sometimes embrace aspects of an individual's social identity."**

(71) It is further stated in the same place that

> **"... it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of Article 8. Regardless of the existence or otherwise of a 'family life', therefore, the Court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life."**

(72) This shows that expulsion may be a breach of private life.

(73) From the period before December 2012, no decision by the European Court of Human Rights has been found which concludes that the expulsion of an immigrant without lawful residence in the country has infringed the respect for his/her "private life".

(74) The European Court of Human Rights concluded in the judgment of 4 December 2012 in the case of *Butt v. Norway* that it would constitute a breach of article 8 of the ECHR if Norway were to return to Pakistan two persons who were born there of Pakistani parents and who are now 27 and 26 years of age. As this case is central to the present case, it is necessary to go into the facts at issue in that case.

(75) The two persons, who were born in 1985 and 1986, came to Norway with their mother in 1989. In February 1992 they were granted a residence permit on humanitarian grounds pursuant to section 8 subsection 2 of the Immigration Act then in force. However, in the summer of 1992 the mother and the children returned to Pakistan and only came back to Norway at the turn of the year 1995/1996. The Directorate of Immigration, which was ignorant of this fact, granted them a settlement permit in August 1995; see section 12 of the Immigration Act then in force. When the Directorate of Immigration discovered that this settlement permit had been granted on the basis of incorrect information, it was withdrawn in January 1999, and they were refused at the same time continued residence in Norway. Since then the two have stayed in Norway without a residence permit.

(76) A factor of special interest to our case is that the mother disappeared at the turn of the year 2000/2001 and that the two children were unable to contact her until she was admitted to hospital in 2004. In May 2001, when they were to be deported to Pakistan, the police came to the conclusion that this would be a disproportionate measure, as they had no contact with the mother or their family in Pakistan. During this period they lived with an uncle and aunt in Oslo.

(77) In September 2005 the mother was expelled to Pakistan, and she died in August 2007. Throughout this period, The children lived in Norway. The Court states the following about their connection with Norway in paragraph 76 of the judgment:

> **"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."**

(78) Thus, this decision is also based on a situation where persons without lawful residence in the country can establish, depending on the circumstances, a "private life" which is protected by article 8 of the ECHR. However, with reference to the degree of protection, what the ECHR states after this in paragraph 77 is of central importance:

> **"As to the issue of compliance, the Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of an alien to enter or to reside in a particular country..."**

(79) This same point of view has been underlined in a number of earlier decisions, which I see no reason to enter into.

(80) Furthermore, practice in the European Court of Human Rights shows that it is of great importance to protection under article 8 that the person in question is a "settled migrant". This is also illustrated by the case of *Butt v. Norway*. As shown by the quote from paragraph 76 of the judgment, the Court came to the conclusion that the Butt siblings had established a "private life" in Norway. Whether or not they could be regarded as "settled migrants" is examined in paragraph 78. Here the Court underlines that bearing in mind that their stay in Norway had been illegal since 1996, they could not "be viewed as 'settled migrants' as this notion has been used in the case-law". Thus, a continuous illegal stay in Norway for close to 17 years did not qualify them to be

regarded as "settled migrants". With reference to the Court's prior practice, the Court concluded in paragraph 79 that only in "exceptional circumstances" would expulsion from the realm be incompatible with article 8.

(81) In coming to the conclusion that "exceptional circumstances" were present, the Court appears to have attached importance to "the unusually long duration of the applicants' unlawful stay in Norway", and that it was for this reason "questionable whether general immigration policy considerations would carry sufficient weight to regard the refusal of residence 'necessary in a democratic society'…" (paragraph 86). Another key factor appears to have been that a very long time passed before the immigration authorities withdrew the settlement permit (paragraph 81), and that it was not until May 2001 that the two children became aware of their illegal stay in Norway. The Court therefore underlined that "[i]t thus appears that their family- and other social ties in the host State had already been formed when it was brought to their attention that the persistence of those ties would be precarious" (paragraph 82).

(82) Furthermore, they could not be blamed for not having obtained the necessary travel documents before reaching the age of maturity, as they were dependent on assistance from the mother, whose place of residence was unknown (paragraph 83). And after they had reached the age of majority, the immigration authorities had made no attempts at sending them to Pakistan (paragraph 84). They had gradually established "strong family and private life ties to Norway" (paragraph 87), while their connection with Pakistan was at the same time not "particularly strong". They had not seen their father since 1996 and their mother had died, and they would "encounter social and professional difficulties" if they were expelled to Pakistan (paragraph 88).

(83) In the assessment of whether the removal of C violated article 8 of the ECHR, it will also be of interest to compare her case with a case in which the European Court of Human Rights concluded that article 8 had not been violated. I refer to the Court's decision of 7 October 2004 in the case of *Dragan and others v. Germany*. The applicants were a woman, born in 1957, and two children, born in 1985 and 1987. They came from Romania and in 2004 they had lived in Germany for 14 years. The applicants had no longer any ties to Romania, as the mother had renounced her citizenship in Romania – which had corresponding consequences for the two children. The children, who were 19 and 17 years of age in 2004, had undergone all their schooling in Germany. In spite of this, the Court concluded that their appeal against the refusal of residence in Germany was evidently baseless and it dismissed the appeal. Having underlined that the ECHR does not guarantee a foreign national's right to enter or be resident in a given state and, furthermore, that article 8 "does not guarantee any right to choose the most suitable place to develop family life", the Court states the following, translated to Norwegian:

> **"The Court notes that the applicants never obtained a residence permit in Germany. All their applications for this had been refused. Consequently, the applicants were obliged to leave German territory, pursuant to article 42 (1) of the Immigration Act… Nevertheless, it proved to be impossible to expel them because the applicants had renounced their Romanian citizenship in 1992 and 1993 respectively, with the consent of the Romanian authorities, and because the Romanian State refused for a long time to readmit their former nationals. However, these obstacles to returning the applicants did not have the**

> **consequence that the German authorities dropped the claim that they are obliged to leave German territory. Their return thereby does not constitute an act that comes within the scope of the provision in article 8 (1) concerning respect for family life. The fact that the applicants refuse to return to Romania and intend to remain in Germany is not relevant in this context..."**

(84) This decision shows that a very great deal will be required for a removal of immigrants who are not "settled migrants" to be in violation of article 8.

(85) As I have already underlined, no decision has been found before the Butt case in which the European Court of Human Rights has held that persons who are not "settled migrants" have all the same established a "private life" in the sense of the Convention. As C's stay in Norway is far shorter than that of the Butt siblings, it cannot be assumed that she has established a "private life" in Norway. However, I will leave this question open, as no "exceptional circumstances" are present in her case at any event, as I will now substantiate.

(86) C's stay in Norway is also of considerably shorter duration than that of the children in the Dragan case. And several of the years concern a period when her emotional and social ties were primarily to her parents. She was returned with her parents to a country where she has two half siblings. And, much the same as the situation in the Dragan case and partly different from the Butt case, the parents have all the time been aware of their obligation to return to Bosnia-Hercegovina. I would point out that every time they were refused residence in Norway, they were informed of their obligation to leave the country – an obligation they always failed to fulfil. The question will therefore be whether C can be held responsible for her parents' knowledge and breaches. The Court states the following about this in the case of *Butt v. Norway* paragraph 79:

> "**In this regard the Court has noted the general approach of the Borgarting High Court that strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for the children .. The Court, seeing no reason for disagreeing with this general approach, ..."**

(87) Admittedly, the Court states in paragraph 80 that "the need to identify children with the conduct of their parents could not always be a decisive factor ". When the Court found in the Butt case that the children should not be held vicariously liable for their parents' conduct, the justification for this was that "in the concrete case there had been no such risk of exploitation as mentioned above since the applicants had reached the age of majority and their mother had died". Thus, the Butt case differs clearly from our case, which is by no means atypical, as the parents had for years failed to comply with their obligation to leave the country – as is the case with a great many other families. In this case, where we must, as underlined by the Court in paragraph 90 of the Butt case, "strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' interests in remaining in Norway in order to pursue their private- and family life, on the other hand", I have come to the conclusion that no "exceptional circumstances" are present in this case in

any event. Accordingly, the removal of the family to Bosnia-Hercegovina did not infringe C's rights under article 8 of the ECHR.

(88) *Can a declaratory judgment be given to the effect that the removal of C infringes article 3 of the CRC?*

(89) In my opinion, no right to a declaratory judgment for breach of article 3 of the CRC can be inferred from our international obligations. The question will therefore be whether it follows from section 1-3 of the Dispute Act that a declaratory judgment may be requested for such a violation. Under subsection (1) of this section, the assumption is that a "legal claim" must exist, and under subsection (2), there must be a "genuine need" to have the claim decided. It will therefore be natural to examine the preparatory works of section 1-3 of the Dispute Act and the conclusions drawn from them in practice and theory.

(90) In NOU *[Official Norwegian Reports]* 2001:32A Rett på sak *["To the heart of the matter"]* Volume A, the Civil Procedure Committee discussed in part II item 4.3 the situation in respect of international conventions. Separate reviews of convention breaches were discussed in relation to the ECHR and the International Covenant on Civil and Political Rights (ICCPR), and it was pointed out that article 13 of the ECHR and article 2 (3) of the ICCPR both require an effective, national remedy. It is pointed out in the same place that "[d]etermining the authority and form of the remedy will in principle be up to each state party to the convention… Thus, no general requirement is established for access to court in human rights cases…"

(91) By Act of 1 August 2003 no. 86, the Convention on the Rights of the Child was included in section 2 of the Human Rights Act. It thereby became directly applicable as Norwegian law, so that in the event of conflict, the Convention takes precedence over any other Norwegian legislation; see section 3 of the Act. Ot.prp. *[Proposition to the Odelsting]* no. 45 (2002-2003) contains statements about the significance of the fact that the CRC is placed on a par with the two above-mentioned Conventions. The following is stated on page 25:

> **"The incorporation of the Convention on the Rights of the Child is the method of incorporation that will have the strongest signal effect both nationally and internationally. By incorporating the CRC, the Norwegian authorities clearly show that Norway takes the Convention seriously and that we fulfil, formally speaking, the Convention's requirements. This can be an advantage to Norway in its international human rights work directed at children. It will be easier to make requirements of other states when we ourselves have incorporated the Convention, thereby making it directly applicable in Norwegian law. By incorporating the CRC, Norway also follows up the special appeal that was made by the Committee on the Rights of the Child on this point.**
>
> **By incorporating the CRC, we will also safeguard the need for an all-embracing presentation of children's rights in Norwegian law. It will be easier to read the provisions in their proper context, and the Act will provide a more consistent overview of the rights of children. Furthermore, the incorporation of the Convention will have the result that the CRC will in itself appear to be a form of "catalogue of rights" in Norwegian law…"**

(92) It is underlined on the same page that by being incorporated, the Convention will also be brought "into line with the human rights conventions that have already been incorporated".

(93) On the other hand, there is nothing in the Proposition to suggest that the right to a separate declaratory judgment for infringement of the Convention was examined in connection with this. On pages 41-43 of the Proposition, the relationship with the Dispute Act then in force is discussed, with no mention being made of the question of an effective remedy. Furthermore, the quotes above make good sense even if the incorporation did not also have the procedural consequence that it will be possible to request a separate judgment for infringement of article 3 of the CRC. I cannot see that it can be assumed from the statement in the preparatory works concerning the general status of equality with other incorporated conventions that it should be possible to give a separate declaratory judgment also for breaches of the CRC, and in any case not for breaches of the principle in article 3. Also breaches of this Convention can be examined by a review of the validity of the relevant decision.

(94) In Rt-2003-301, the Supreme Court came to the conclusion that a declaratory judgment can be requested for infringement of the ECHR. However, this discussion was related to conventions that require an effective national remedy for implementation of the convention – which is the case for both the ECHR, see article 13, and the ICCPR, see article 2 paragraph 3; see in particular paragraphs 28 and 39 of the judgment.

(95) Thus, it had been assumed already when the Ministry of Justice presented Ot.prop. no. 51 (2004-2005) concerning the Dispute Act that it was the ECHR requirement for an effective remedy that was the rationale for the special right to bring an action in connection with a allegation that this convention had been infringed. This is subsequently followed up by the Ministry in the Proposition. The Ministry states on page 154:

> **"It is often asserted that a provision in a human rights convention has been contravened in the course of the courts' proceedings, for example because the legal process is alleged to violate the right to a quick and fair trial pursuant to article 6 (1) of the ECHR, or because the reading of statements to the police has been permitted in a criminal case, in breach of article 6 (3) d) of the ECHR. In the Ministry's opinion, it is clear that we should not open the door to a new, independent action on the issue of whether the courts' review met the requirements of the human rights conventions, even in cases where the courts themselves have omitted to take a position on the human rights issue. When a judgment in a case has become final and enforceable, the question of whether the hearing was in breach of a provision in a human rights convention must be decided, if applicable, by an appeal to the treaty body.**
>
> **On the other hand, there are cases where there is no other remedy for reviewing a human rights breach than an action before the courts of law. Like the committee, the Ministry considers it to be clear that it must be possible to bring such an action <u>when the human rights convention in question requires an effective remedy,</u> <u>as is the case with respect to article 13 of the ECHR and</u>**

> **article 2 (3) of the ICCPR. Here the Ministry also refers to the decision in Rt-2003-301, which concerned an action for a review of whether the implementation of an investigation pursuant to section 4-3 of the Child Welfare Act was in conflict with the ECHR, see 11.8.1 above. The Ministry agrees with the Committee that this can conveniently be achieved within the framework of the general conditions for bringing an action in section 1-3 of the bill (my underlining).**

(96) As pointed out above, the CRC had already been incorporated in the Human Rights Act at this point in time. However, unlike the ECHR and the ICCPR, the CRC does not require an effective remedy, nor is it mentioned in the Proposition in this connection.

(97) The question of the requirement for an effective remedy was dealt with at length in Schei et al. The Dispute Act, commented edition, 2007 pages 39-40, under the marginal heading "[c]onditions for bringing an action and the human rights conventions". The following is stated on page 39:

> **"Also the requirement in article 13 of the ECHR and article 2 (3) of the ICCPR for an effective national review of whether any rights under the convention have been violated will have the consequence that it must be possible in many cases to bring such issues before the courts of law, …"**

(98) Furthermore, the following is stated on page 40: "[b]ut there is also reason to underline, particularly in cases where it is likely that a violation of the convention may have occurred, that the considerations behind the principle of subsidiarity in article 13 of the ECHR suggest a course in the direction of a broad and effective national review of whether a breach of the convention has occurred". Also the discussion in the same book, pages 52-56, on the question of requesting a separate declaratory judgment, is exclusively related to the ICPR and the ECHR. The CRC is not mentioned.

(99) This review shows that the justification for the right to request a separate declaratory judgment for breaches of the ECHR and the ICCPR is the right to an effective remedy and the need to take account of the subsidiarity principle. In my opinion, this question was not placed in any different posture after the statement in Rt-2011-1666 paragraph 32, where the right to give a declaratory judgment for "breaches of an incorporated human rights convention" is repeated as being established Norwegian law. The case concerned questions under article 5 of the ECHR.

(100) As shown by the judgment earlier today in case J 2012/688 (HR-2012-02398-P) and by my vote in the present case, I would add that it will not be decisive merely to state that a specific solution will be in the child's best interests. I therefore find it difficult to see that this can involve any real "legal claim", as the child's best interests in article 3 of the CRC will be a central, but not necessarily decisive element in any overall assessment. Nor can I see that there is any "genuine need" for the courts to review this question separately.

(101) This review of the preparatory works does not give, as I have already underlined, any indications that the legislature aimed to allow a right to request a separate declaratory judgment for breaches of the CRC. Nor does this follow from jurisprudence, in my

opinion. Therefore, I think that the most loyal conclusion would be to conclude that the question of a breach of the CRC must be reviewed in accordance with the general basic rule in Norwegian law, in which an assessment of legal issues is made in the grounds for judgment and forms part of the review of the subject-matter in dispute in the case. In this connection, it has also carried weight that it seems to be difficult to anticipate what consequences it would have if we were to allow – and then with a general scope – requests to be brought also for a separate declaratory judgment for breaches of article 3 of the CRC.

(102) My conclusion is consequently that the request for a declaratory judgment to the effect that the removal of C was in breach of article 3 of the CRC must be dismissed.

(103) No order as to costs has been requested.

(104) I vote for the following

JUDGMENT:

1. The request for a declaratory judgment for breach of article 3 (1) of the Convention on the Rights of the Child is rejected.

2. The Court finds for the State, represented by the Immigration Appeals Board in the allegation of a breach of article 8 of the ECHR.

3. Otherwise the appeal is dismissed.

(105) Justice **Bårdsen:** I have reached a different conclusion from that of the first-voting judge. The Immigration Appeals Board's decision of 15 December 2010 not to allow the petition for a reversal from the family C is in my opinion invalid. I have furthermore reached the conclusion that article 3(1) of the CRC and article 8 of the ECHR have been breached.

(106) My view on article 3 (1) of the CRC, section 38 subsection 3 of the Immigration Act and section 8-5 of the Immigration Regulations appears from my vote in case no. 2012/688 (HR-2012-2398-P) earlier today. I have also there explained my view on the courts' competence when it comes to reviewing the Immigration Appeals Board's decisions. I refer to this and also now rely on this same view. The choice between an ex tunc or an ex nunc assessment is not decisive in the case at hand.

(107) It is primarily C's situation that is of interest and I will focus on her. It appears from the decision that she was born in Norway in 2003 and, based on what the Immigration Appeals Board writes, it is my understanding that she was in all respects a well-integrated girl when the Immigration Appeals Board rejected the petition for a reversal in December 2010.

(108) The decision is neither very concrete nor very informative when it comes to the circumstances surrounding C. It is an established fact that at no point in time was she given the opportunity to communicate her experience, her thoughts and feelings to the Immigration Appeals Board. I would here like to point to article 12 of the CRC on

children's right to be heard. This right applies regardless of whether the authorities assume that the child has little to contribute, cf. the *General Comment* no. 12 (2009) paragraphs 19 and 20 of the Committee on the Rights of the Child (OHCHR).

(109) It is not unambiguously clear whether the Immigration Appeals Board considered C's connection with Norway to be so strong that it would, seen in isolation, indicate the granting of a residence permit. And the Board has not drawn any concrete conclusion as regards which solution would be in her best interest. However, when seen in context, the reasons of the Immigration Appeals Board must be understood to mean that C had developed such a strong attachment to Norway that, all in all, it would be in her best interest if she was allowed to remain here with her family. Also the State has before the Supreme Court relied on such an interpretation.

(110) The reasons for not granting a residence permit given by the Immigration Appeals Board are as follows:

> **"The Board agrees that immigration policy considerations are strongly present in a case as the one at hand and that these considerations must carry more weight in the overall assessment in this matter. Reference is made to the fact that the appellants did not comply with the obligation to leave the country when they received the final decision on 1 February 2005, before the matter was suspended on 15 September 2006. Nor did the appellants comply with the duty to leave the country after it was decided at a Board meeting not to reverse the decision. The appellants have thus stayed illegally in the country for more than 4 years and 10 months. The Board specifically points out that the appellants have on several occasions been contacted by the Police Immigration Service and requested to obtain travel documents. The obtaining of such documents is considered to be feasible, but the applicants are required to present themselves at the embassy, something that the appellants have been unwilling to do. In the Board's opinion, immigration policy considerations indicate that such procrastination of the duty to leave the country should not be rewarded with a permit."**

(111) It is unclear whether it is correct that the family was contacted "on several occasions" by the Police Immigration Service with a request to cooperate in obtaining travel documents. I will not go into detail here. It has under any circumstances been ascertained that initiatives, if any, on this subject did not take place until after March 2010. I find it difficult to see how this element can carry any weight, beyond what is otherwise implicit in the fact that the family stayed on in the country and did not contribute to their leaving the country.

(112) I refer to my vote in case no. 2012/688 (HR-2012-2398-P), where I emphasized that illegal stay and failure to cooperate in leaving the country may carry weight in the weighing of interests under article 3 (1) of the CRC, but that the solution that is in the best interests of long-term resident children with a strong connection with the realm can hardly be disregarded on the grounds that the child's connection with Norway has been/is established by an illegal stay and because the parents have been passive and not cooperated in leaving the country. The Immigration Appeals Board' basis has been the principle that "the immigration policy considerations are strongly present in a case

such as the one at hand", and has found "that these considerations must carry more weight in the overall assessment in this case". This makes it uncertain whether the Board has relied on a correct standard of judgement. The rationale certainly creates considerable doubt as to the question whether C's best interests have been treated as so primary a consideration as article 3 (1) of the CRC requires - whether this has been properly assessed and the conflicting interests duly weighed. The decision must accordingly be found invalid.

(113) C and her family were removed to Bosnia-Hercegovina in March 2012. They have requested a judgment to the effect that this was a violation of Article 3 (1) of the CRC and Article 8 of the ECHR.

(114) Under section 1-3 of the Disputes Act, an action can be brought before the courts relating to a "legal claim". The provision comprises disputes as to whether something is "legal" or "unlawful", cf. Skoghøy, *Tvisteløsning* (Dispute Resolution) (2010) page 360 *et sec.* with further references. In Rt-2011-1666 paragraph 32, it is in line with this provision determined as "established law that a *declaratory action* may be brought requesting a judgment to the effect that an incorporated human rights convention has been breached, cf. Rt-2003-301 paragraph 39". The right to file an action thus follows directly from Norwegian domestic law, totally independently of the extent to which the relevant conventions require a court hearing in case of an alleged breach of the convention.

(115) The State has alleged that it is nevertheless not possible to obtain a judgment for violation of article 3 (1) of the CRC. It has been argued that the convention rule is an overall guideline that does not give grounds for immediate rights or obligations. The question whether article 3 (1) has been violated is, in the State's opinion, not suited to be decided separately.

(116) The way I see it, this is partly a question as to whether the actual norm in article 3 (1) of the CRC imposes concrete obligations on the States parties to the individual child. This depends on an interpretation of the Convention and is normally referred to as a question whether the norm is "justiciable".

(117) The CRC establishes "the Rights of the Child". It follows from article 2 that the States "shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction". Furthermore, article 4 first sentence establishes that the States "shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention". In the Committee on the Rights of the Child's *General Comment* no. 12 (2009) paragraph 18 it is emphasized that [t]he Convention recognizes the child as a subject for rights, and the nearly universal ratification of this international instrument by States parties emphasizes this status". It is in my view beyond all doubt that the Convention aims at individual rights for the individual child.

(118) The wording in article 3 (1) is vague and general. This is not unusual in a human rights context. And the actual linguistic formulation naturally does not deprive the norm established on the basis of the wording of its nature of being legally binding for the State. This also goes for the fact that the norm indicates a balancing of conflicting considerations and interests. It should on this point be sufficient to refer to the fact that

the question as to whether article 8 of the ECHR relating to the right to private and family life has been violated, amongst other things, depends on whether the measure was necessary and proportional.

(119) Article 3 (1) has a bearing on the interpretation of the other provisions of the Convention and on all national measures that concern children. It has common denominators with *inter alia* the general discrimination prohibition in article 2 and children's general right to be heard in article 12. To me it seems rather strange why such general norms would not also be in the nature of Convention obligations to the individual child. Nor have I found any indications to the contrary in convention law sources. On the contrary, in the OHCHR's *General Comment* no. 5 (2003) paragraph 6, it is stated that "it is clear that many other articles, including articles 2, 3, 6 and 12 of the Convention, contain elements which constitute civil/political rights".

(120) Provided that article 3 (1) of the CRC imposes concrete obligations on the States parties to the individual child, the question is whether it is nevertheless necessary to make reservations for the possibility of judicial enforcement of these by the courts in Norway. This is normally referred to as a question as to whether the norm is "self-executive", and depends on what position the Convention right has in Norwegian law.

(121) In the OHCHR's *General Comment* no. 5 (2003) paragraph 19 it is stated that the Convention States' general execution duty in article 4 entails that the Convention States "need to ensure, by all appropriate means, that the provisions of the Convention are given legal effect within their domestic legal system". The committee further emphasises that it is particularly important" to clarify the extent of applicability of the Convention in States where the principle of 'self-execution' applies and others where it is claimed that the Convention 'has constitutional status' or has been incorporated into domestic law". Furthermore, in paragraph 24, the OHCHR stresses that the execution obligations under the Convention also include making effective national remedies available:

> **"For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties."**

(122) In connection with the incorporation of the CRC the Ministry emphasised in Proposition to the Odelsting no. 45 (2002-2003) page 25 the following:

> **"Incorporation of the CRC is the incorporation method that gives the strongest signal effect at national as well as international level. By incorporating the CRC, Norwegian authorities show clearly that Norway is taking the Convention seriously and that, formally speaking, we satisfy the requirements of the Convention. This may be an advantage for Norway's international human rights work aimed at children. It will be easier to stipulate requirements vis-à-vis other states when we have ourselves incorporated the Convention, thereby making it directly applicable in Norwegian law. By incorporating the CRC Norway also follows up on the OHCHR's specific requirements on this point."**

(123) The CRC was thus meant to be "directly applicable". And on page 25 of the proposition the Ministry assumed that it would be given effect "on a par with the already incorporated human rights conventions" and be accorded «the same formal legal position« as these. The Ministry did not want "an unfortunate distinction between the already incorporated conventions and children's conventions" that might "be perceived as a signal that the CRC is not as important as these". On page 57 of the Proposition, the Ministry specifically emphasised that the incorporation would make the CRC "appear in itself as a catalogue of rights in Norwegian law".

(124) It is an established fact that in this connection the problems relating to "self-execution", cf. Proposition to the Odelsting No. 45 (2002-2003) pages 16 and 26, cf. also Recommendation to the Odelsting No. 92 (2002-2003) page 3, were known. But nevertheless, no reservations were made with regard to the fact that certain Convention provisions were not to have any immediate effect under domestic law. On the contrary, the Convention was in its entirety to have the force of Norwegian law. This also comprises article 3 (1).

(125) I do not rule out that as far as the rights in the Convention that are of an economic, social or cultural nature are concerned, it is necessary to link the execution closer to supplementary national bases in law, cf. the CRC article 4 2nd sentence and Rt-2001-1006, page 1015. However, there is no basis for such limitations as regards article 3 (1), certainly not in the context with which our case is concerned. I would add that the requirement for a legal interest in section 1-3 of the Disputes Act will comprise legal actions where the interpretation and application of article 3 (1) of the CRC may perhaps not be suited for a separate decision.

(126) In this light, it is my opinion that a judgment can be rendered to the effect that article 3 (1) of the CRC has been violated, in line with what was established in Rt-2011-1666 paragraph 32 as the general and established system for the incorporated human rights conventions.

(127) The family A had to leave the country in March 2012, and has not been able to return. Accordingly, they have a legal interest in an assessment of the question as to whether the removal was in conformity with article 3 (1) of the CRC.

(128) The point of departure for the assessment is the situation as it was in March 2012, when the family was removed. C was eight and a half years old. It is natural to assume that her connection with Norway at that time was even stronger than when the Immigration Appeals Board made its last decision, approximately one and a half years earlier. However, it has not been documented that the Immigration Appeals Board conducted a new and formalised assessment of C's situation in connection with the removal. Nor was she heard, as article 12 of the CRC requires.

(129) I have concluded that the decision not to reverse the refusal of the application for a residence permit for the family C is invalid. The rationale for the refusal is uncertainty as to whether the Immigration Appeals Board used the correct norm for balancing the conflicting interests and whether it regarded C's best interests as such a primary a consideration as required by article 3 (1) of the CRC. It is not in accordance with article 3 (1) to let such a decision form the basis for a removal. The breach of the Convention is aggravated by the fact that in connection with the removal a renewed

and overall assessment of C's situation, where also she was heard, was not formalised.

(130) In this light a judgment should be delivered to the effect that the removal constituted a violation of article 3 (1) of the CRC.

(131) A judgment is also requested for violation of Article 8 of the ECHR. The conditions for requesting such a judgment are satisfied. The question is whether there has been a violation.

(132) I emphasise that the family is together and that it is not alleged that there is any interference with family life. The question is whether the protection of private life in article 8 comprises the personal and social ties which C has established during the eight and a half years she has lived in Norway.

(133) Offhand it might seem strange to regard such ties as part of private life. But the European Court has in several decisions opened the door to this, cf. for example the judgment of 24 November 2009 in *Omojudi v. the UK* paragraph 37. In these cases it has been a question of "settled migrants", as the first-voting judge has explained in more detail. The European Court of Human Rights has not in the past brought connection by a temporary, tolerated or illegal stay in under the protection of private life in article 8. I refer by way of illustration to the dismissal decisions of 16 June 2009 in *A.M. and others v. Sweden* and of 7 October 2004 in *Dragan and others v. Germany*.

(134) However, in the Human Rights Court's judgment 4 December 2012 in *Butt v. Norway* paragraph 78 it was assumed that protection of private and family life under article 8 on this point is not limited to personal and social ties for "settled migrants". I understand the judgment to mean that also a connection created by a temporary, tolerated or illegal stay – if it is sufficiently strong – will in principle be comprised by the protection of private and family life under article 8 (1). However, the court emphasizes in paragraph 79 that e.g. deportation or orders for removal will only "in exceptional circumstances" be in violation of article 8, given that many immigration-regulating considerations will normally carry considerable weight in the proportionality assessment which shall, regardless, be undertaken under article 8 (2).

(135) In many respects the Butt case is different from the case now pending before the Supreme Court. There is particular reason to note that the appellants came to Norway in 1989 when they were three and four years old and subsequently - except for the period from the summer of 1992 to January 1996 – they lived here until adulthood together with their aunt and uncle. Their mother went into hiding at the turn of the year 2000-2001 and died in Pakistan seven years later. The siblings' connection with Norway was thus very strong and also consisted of family ties.

(136) Even if C was born in Norway and lived here until her removal, her connection is clearly weaker and it is limited to personal and social ties. However, in my view, it must be assumed that also children of her age are able to establish personal and social ties comprised by the right to private and family life in Article 8 (1) of the ECHR. And I find it difficult to understand that C's connection with Norway, as it was described by the Immigration Appeals Board and must be assumed to have developed after the

Board's last decision, would not be of the duration, quality and strength needed in order for the removal to be considered an interference with her right to a private and family life.

(137) It is a minimum requirement for this interference to come under the Convention that it is "in accordance with the law", cf. article 8 (2). This condition is not satisfied in C's case. If the decision is invalid, the removal has not been in accordance with the law. This makes it unnecessary for me to go into the question as to whether the interference was necessary and proportional, thus the balancing of the pros and cons? where the European Court's reservation for "exceptional circumstances" is particularly relevant.

(138) My conclusion in the light of the above is that a judgment must also be rendered to the effect that the removal constituted a violation of article 8 of the ECHR.

(139) Justice **Matheson:** I concur in all essentials and as regards the conclusion with the first-voting judge, Justice Matningsdal, with the exception of the question as to whether it is possible to request a declaratory judgment for violation of article 3 of the CRC. In my view, the action can under the CRC be allowed to go forward, but the court must find for the State.

(140) There is in my opinion no reason to discriminate between the CRC, the ECHR and the International Covenant on Civil and Political Rights (ICCPR) in the question as to the right to obtain a declaratory judgment. The CRC has no explicit provision about the right to an effective remedy, but a loyal compliance with the Convention obligations suggests that anyone who feels that the rights under the Convention are/have been violated must be allowed to have this tried.

(141) In my view, article 3 (1) of the CRC gives the child - as a correlate to the principle that the administrative authority shall treat the child's best interests as a primary consideration – a claim in law for such an assessment in actual fact being conducted, as well as the norm of the Convention being respected in the actual evaluation. I have therefore reached the conclusion that a legal action concerning a violation of article 3 (1) of the CRC satisfies the condition in section 1-3 no. 1 of the Disputes Act that there must be a "claim in law".

(142) In addition to what I have now mentioned to justify my view, I concur in all essentials with what the second-voting judge, Justice Bårdsen, has stated regarding the right to render a declaratory judgment for violation of article 3 of the CRC.

(143) As regards the concrete evaluation of the question as to whether the norm of the Convention has been satisfied in connection with the removal, this will have to be undertaken within the same parameters for a judicial review as those applicable to a review of the decision not to grant a residence permit. On this point I refer to paragraph 40 of the first-voting judge's vote. The evaluation must be based on the situation at the time of removal.

(144) The removal of C is based on the decision of 15 December 2010. As has already come to light, the decision satisfies in my view the CRC's requirement that the child's best interests shall be a primary consideration. With such a point of departure the evaluation that must be made in connection with the removal can be limited to a

review of whether the situation has changed significantly. The decision was implemented 1 year and 3 months after it was made. As a basis for the submission of a violation of the Convention the appellants have not pointed out any other factors than the time element and that during the period of time until the removal the child had developed a further attachment to Norway.

(145) I cannot see that the time element we are looking at here means that a separate new review of the child's best interests should have been undertaken. For the record, I would mention that the Court of Appeal considered this issue based on the situation at the time the judgment was rendered - which was 14 days prior to the removal - and stated in that connection:

> **"It has now been a further 15 months since the Immigration Appeals Board made its decision not to reverse the decisions. C is now eight years and seven months old. Her connection with the local community at X must be assumed to have grown stronger. However, C's clear primary attachment is still to her parents and the Court of Appeal finds that the time that has elapsed has not in any decisive way changed the evaluation and balancing of the pros and cons? of C's situation in December 2010 undertaken by the Immigration Appeals Board. As will appear from the Board's decision, nor are there any circumstances in Bosnia-Hercegovina that suggest that C will not be given proper care when she returns there with her parents. This latter point has, incidentally, not been contested either."**

(146) In the light of the above, the court must find for the State in the question as to whether the removal of C violates article 3 (1) of the CRC.

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

(148) Justice **Utgård:** Likewise.

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

(150) Justice **Øie:** Likewise.

(151) Justice **Tønder:** Likewise.

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

(153) Justice **Webster:** Likewise.

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

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

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

(157) Justice **Indreberg:** I concur in all essentials and as regards the conclusion with the third-voting judge, Justice Matheson.

(158) Justice **Falkanger:** Likewise.

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

(160) Justice **Bull:** Likewise.

(161) Justice **Bergsjø:** Likewise.

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

(163) **After the voting, the Supreme Court delivered the following**

JUDGMENT:

1. The request for a declaratory judgment for breach of article 3 (1) of the CRC is dismissed.

2. The Court finds for the State, represented by the Immigration Appeals Board, regarding the allegation of a breach of article 8 of the ECHR.

3. Otherwise the appeal is quashed.