SUPREME COURT OF NORWAY

On 8th November 2007, the Supreme Court delivered the following judgement in

HR-2007-1869-A, case no (2007/207), civil appeal against conviction

A	(Counsel Mr Harald Stabell)
v.	
The Norwegian State, represented by the Ministry of Labour and Social Inclusion	(Attorney General Mr Tolle Stabell, assisted by Counsel Mr Christian H.P. Reusch)

J U D G E M E N T :

(1) Mr Justice **Flock**: The case concerns the validity of an administrative decision pursuant to section 30 subsection 2 a) of the Immigration Act to expel a foreign national on the grounds that expulsion is necessary in the interests of national security.

(2) A was born on ** 1956 in Northern Iraq. He came to Norway on 30th November 1991 together with his wife and three children as a UN quota refugee. The Norwegian Directorate of Immigration found that A satisfied the conditions to be recognized as a refugee and he and his family were granted refugee status by an administrative decision dated 13th April 1992. A was granted a residence and work permit, which was subsequently renewed several times. In 1998, he was granted a settlement permit in Norway. His wife and the four children that he had at the time were granted Norwegian citizenship in 2000. Later that year, A's own application for Norwegian citizenship was rejected. In Norway, A is known as B.

(3) When A came to Norway, the information he gave to the immigration authorities about his background and situation in Northern Iraq was very limited. On the basis of

the information which is now available, his background can briefly be summarized as follows:

(4) As a youth, A was an active member of an international Islamist Sunni movement known as the Society of the Muslim Brothers,. In 1974, he enrolled at a war college established by the Kurdistan Democratic Party. Later in the 1970s, he completed high school education and then studied Arabic and Sharia law. During the Iran-Iraq war which started in 1980, A was unwilling to do military service for Iraq and he fled across the mountains to Iran. While in Iran, he joined forces with other Iraqi Kurds to form an armed resistance movement in Kurdistan. After a while, he became the imam of the mosque in the refugee camp at which he was staying.

(5) In 1984, A moved to Pakistan and stayed there for four years, during which time he continued with his education and studies. After a while, he became involved in work for Kurdish refugees and in 1988 he returned to Iran to continue working from there. He became involved with the Islamic Movement of Kurdistan, IMK, a movement whose goal was to free the Kurdish people and to apply Sharia law in Kurdistan and Iraq. In 1989, A was elected to the IMKs parliament. In 1991, he returned to Iraq where he participated in combats against the government army. Earlier the same year, he had applied on behalf of himself and his family for residence in a third country through the United Nations High Commissioner for Refugees. This is the background for his arrival in Norway in November 1991.

(6) However, after A and his family were granted refugee status in Norway in April 1992, A did not remain in the country. A returned to Iraqi Kurdistan as early as May 1992 where he participated in the election for the autonomous region's first parliament. He continued his work for IMK and became deputy head of the military office of the IMK. In the summer of 1992, his whole family travelled to Iraq and did not return to Norway until the Spring of 1993. In the following years up until 2000, A remained mostly in Norway where he worked, among other things, as an Islamic preacher. However, during this time he also made many trips to Iraq.

(7) In 2001, IMK was split into four fractions and A was elected leader of one of them. On 10 December 2001, there was another another reorganization and Ansar al-Islam was founded by the merger of the militant Jund al- Islam group with the fraction headed by A. A was elected as leader of the organization, whose goal was to create an

independent Islamic state in Northern Iraq. It is reported that, shortly afterwards, a community based on Sharia law was established in an area outside one of the villages.

(8) On 17th May 2002, A travelled to Norway for a planned holiday. He attempted to return to Iraq in August the same year but was taken into custody in Iran and then sent to the Netherlands. He remained in prison in the Netherlands until January 2003 when he was returned to Norway.

(9) After the US invasion of Iraq in March 2003, Ansar al-Islam has identified the US and their allies as its main adversaries. There is evidence that Ansar al-Islam and/or former members of the organization are responsible for several bombings and other terrorist attacks, including the bomb attack against the socialist party Patriotic Union of Kurdistan (PUK) on 4th February 2004 where more than 100 people were killed and over 200 wounded. By this time, the UN Security Council sanctions committee had already decided to add Ansar al-Islam to its list of entities and individuals who are linked with Al-Qaeda. This list is part of the UN's effort to combat terrorism and effectively obliges all UN member states to take certain measures.

(10) After giving notice in September 2002, the Norwegian Directorate of Immigration decided on 19th February 2003 to revoke A's refugee status and travel documents, settlement permit, residence permit and work permit. The decision was also made to expel him from Norway and to register him in the Schengen Information System. The decision was made pursuant to an instruction issued by the Ministry of Local Government and Regional Development pursuant to section 38 subsection 1 of the Immigration Act.

(11) A appealed against the decision to the Immigration Appeals Board. Before his appeal was decided, he instigated civil proceedings against the Norwegian state claiming that the administrative decision was invalid. The Immigration Appeals Board delivered its decision in the administrative appeal on 12th May 2005. The appeal was rejected. Like the decision of the Norwegian Directorate of Immigration, the appeal decision held that expulsion was necessary on the grounds of national security pursuant to section 30 subsection 2 a) and section 29 subsection 1 d) of the Immigration Act, and that A had committed serious and/or repeated breaches of the Immigration Act that justified expulsion, see section 29 subsection 1 a) of the Immigration Act. The decision of the

Immigration Appeals Board was also made pursuant to an instruction from the Ministry of Local Government and Regional Development.

(12) The appeal decision stated that Norway's obligations pursuant to Article 3 of the European Convention on Human Rights (ECHR) prevented it from returning A to his home country because of the situation in Iraq. The Immigration Appeals Board therefore decided at the same time that expulsion would be suspended until the Ministry found that the situation in Iraq had improved.

(13) After the Norwegian Directorate of Immigration had delivered its decision to expel in February 2003, A was accused, among other things, of offences in breach of the terrorism provisions in section 147 a) of the Penal Code. In that connection, he was detained in custody for a short period. The criminal charges were subsequently dropped. On 2nd January 2004, he was arrested and charged with two counts of aiding and abetting attempted murder in Iraq in connection with attempts by others to detonate hand grenades and suicide bombs. The charges also included breach of section 233 a cf. section 12 no.4 a) of the Penal Code on incitement to bodily harm or murder. These charges were also subsequently dropped after A had been detained in custody for approximately six weeks.

(14) On 27th September 2005, the Oslo District Court pronounced the following judgment in the civil proceedings that A brought against the Norwegian state regarding the validity of the expulsion decision (case no. TOSLO-2004-42285):

> **« 1. The Norwegian state, represented by the Ministry of Local Government and Regional Development, shall be acquitted.**
>
> **2. No order for costs. »**

(15) The District Court held that the decision to expel in the interests of national security was valid, and that it was therefore unnecessary to consider whether the expulsion was also justified by A's serious and/or repeated breaches of the Immigration Act.

(16) A appealed against the Oslo District Court's judgment to the Borgarting Court of Appeal. In the meantime, responsibility for immigration issues was transferred from the Ministry of Local Government and Regional Development to the Ministry of Labour and Social Inclusion. On 20th November 2006, the Court of Appeal pronounced the following judgment (case no. LB-2005-172948):

« 1. The judgment of the District Court is affirmed.

2. A is ordered to pay to the Norwegian state, represented by the Ministry of Labour and Social Inclusion, the state's costs for proceedings before the Court of Appeal in the amount of 290 000 – two hundred and ninety two – Norwegian kroner no later than 2 – two – weeks from service of this judgment, together with interest pursuant to the Interest on Late Payments Act section 2 subsection 1 first sentence calculated from the due date until payment is made. »

(17) Like the District Court, the Court of Appeal held that the expulsion decision was valid, and found it unnecessary to consider whether there were justifiable grounds for expulsion pursuant to section 29 subsection 1 a) of the Immigration Act on account of serious and/or repeated breaches of the Immigration Act.

(18) A has appealed the Court of Appeal's judgment to the Supreme Court. The Appeals Selection Committee referred the matter for adjudication by the Supreme Court on 4th May 2007. At the same time, the Appeals Selection Committee decided to limit the appeal for the time being to the issue of validity of the Immigration Appeals Board's decision on the grounds of national security, see section 392 subsection 3 of the Civil Procedure Act. Leave to appeal was refused in so far as the decision relates to validity on account of serious and/or repeated breaches of the Immigration Act.

(19) The judgments of both the District Court and the Court of Appeal contain relatively detailed accounts of the facts and the parties' arguments. The case before the Supreme Court is essentially the same as before the lower courts both factually and legally.

(20) The appellant – A – has essentially argued as follows:

(21) The Court of Appeal has correctly stated that the question whether the courts have power to review an administrative authority's concrete assessment of whether an expulsion is necessary in the interests of national security depends on an interpretation of section 30 subsection 2 a) and section 29 subsection 1 d) of the Immigration Act. However, the Court of Appeal's finding that it has no power to review the immigration authority's concrete assessment of whether expulsion is necessary in the interests of national security, is wrong. There is no legal authority to justify an exception from the general rule that the courts have power to review an administrative authority's application of law to the facts of the case. A refers in particular to the Supreme Court judgment reported in Rt-1995-1427. In the present case, the immigration authority's

exercise of discretion is more bound by law than in that case. In addition, there are a number of other factors that indicate that the courts should have power to review the administrative authorities' specific application of the law.

(22) Both the decision of the Norwegian Directorate of Immigration and the appeal decision of the Immigration Appeals Board were made pursuant to instructions issued by the Government. In reality, there has been no appellate review as required by section 28 of the Public Administration Act. This impairment to the due process of law must be corrected by a full judicial review of the administrative decision.

(23) It is apparent from the appeal decision that the immigration authorities have relied in part on classified information which, for that reason, is not described in the decision. A is therefore deprived of his right of access to information and of his right to refute this part of the factual basis for the decision. Consent to witness testimony about this information has also been denied pursuant to section 204 no.1 of the Civil Procedure Act, and the impairment this implies to the due process of law must be compensated by full powers of judicial review. The decision must be reviewed on the basis of the facts that have been disclosed.

(24) Expulsion is the Immigration Act's strictest form of sanction, and an expulsion decision will impose considerable strain on A and his family. Even if the decision is not implemented as a result of the situation in Iraq, A will be deprived of fundamental rights, such as the right to work and to leave the country. Even if his situation is not so grave that the decision is a violation of ECHR Article 3, the situation can border on the kind of humiliating treatment that this Article protects against.

(25) Expulsion will also be an infringement of the right to family life etc. which is protected by ECHR Article 8 no. 1. A full judicial review of the decision will ensure a proper assessment of whether expulsion in this case "is necessary in a democratic society in the interests of national security", see Article 8 no. 2, and thus implies a substantive review of the resolution as required by ECHR Article 13.

(26) A disputes that the criteria in the Immigration Act for expulsion are satisfied. Counsel's arguments on this point were limited to referring to the arguments cited by the District Court which, among other things, stated:

- that although he was the leader of Ansar al-Islam from when it was founded on 10th December 2001, A's influence over this organization ceased when he resigned on 17th May 2002,

- that neither the activities of Jund al-Islam prior to the formation of Ansar al-Islam, nor the activities of the latter organization after A no longer had any influence can be taken into account when assessing the security risk that A supposedly poses,

- that there is no evidential proof that A has been in Afghanistan, and that in view of the meeting date and the purpose of these meetings, it is irrelevant to the case that A had meetings with Abdullah Azzam and Osama bin Laden,

- that A's involvement in IMK and later in Ansar al-Islam was a purely Kurdish affair, with no bearing on national security in Norway,

- that A's various public statements express political and religious beliefs that are protected by freedom of religion and freedom of speech, and do not pose any threat to national security either in isolation or in conjunction with other aspects,

- that the outcome of police investigations, where the criminal charges were dropped without prosecution for any criminal offense, is also relevant when considering the security risk that is central to the present case.

(27) A has entered the following plea:

> **« The judgment of the Borgarting Court of Appeal dated 20th November 2006 shall be quashed, and the case shall be referred to the Court of Appeal for retrial. »**

(28) The respondent – the Norwegian state represented by the Ministry of Labour and Social Inclusion – has essentially argued as follows:

(29) The main question before the Supreme Court is whether the Court has power to review whether the relevant legal provisions on expulsion can be applied to A. The parties agree that the courts have no power to review the discretion granted by the word "may" in the relevant provision of the Act. The Court of Appeal – like the District Court – has held correctly that the courts' power of review is limited to questions of procedure, interpretation of the law and whether the decision is based on a correct set of facts. However, the courts do not have power to review the application of the law.

(30) The nature of the decision suggests that the courts should not have power to overrule the administrative authority's application of the law. The decision is based on assessments of security policy, where various alternative courses of action will have to be weighed against each other. The courts cannot be expected to possess the necessary

expertise in such matters, as opposed to the Ministry, which in this case has used its authority to instruct the Immigration Appeals Board.

(31) None of the special circumstances that A has argued in support of an extended power of judicial review should lead to a different result. The state acknowledges that not least where intrusive measures are exercised against individuals it is desirable that the courts have full power to review all aspects of the administrative authority's decision. Nevertheless, a limited power of judicial review must be accepted in cases like the present one. In the present case, the expulsion decision is based not only on disclosed information, but also on information provided by the Norwegian Police Security Service (PST) which is not described in the decision and not disclosed to the court either, see section 204 no. 1 of the Civil Procedure Act. Supreme Court practice accepts that the consequence in such cases may be that judicial control of the decision is limited, see the Lysestøl case reported in Rt-1987-612. Although there is classified information in the present case, the administrative authority has had a large amount of information from open sources on which to base its decision. This information is sufficient for a finding that that the statutory conditions for expulsion are satisfied.

(32) If the Supreme Court finds it necessary to examine in more detail whether in this case it is necessary to expel A for reasons of national security, the state argues in the alternative that the conditions for expulsion are satisfied. The Supreme Court should exercise caution when assessing the application of law. It should give considerable weight to the assessment made by the administrative authority - in this case the Ministry - in the appeal decision.

(33) In the event the Supreme Court makes an assessment of whether the statutory conditions are satisfied, the state has emphasized the following:

(34) The travaux preparatoires to the Immigration Act state that the term «national security» is also intended to include other compelling social considerations. The term is a legal standard and its content is not necessarily the same in all legislation where it is used.

(35) It is not necessary to prove that A has committed any particular criminal offences. What is relevant is to assess the future risk under the assumption that he is not expelled. It is clearly not required to quantify the risk precisely. The magnitude of the

harm that can be inflicted will easily be great if such risk should materialize, which suggests that even a lower risk should be sufficient to satisfy the statutory conditions. In any event, the administrative authorities should be given a reasonable margin of discretion in such cases.

(36) Several factors make Norway a potential target for international terrorist activities. Among other things, Norway is both politically and militarily engaged in controversial conflict areas in Afghanistan, and has considerable investments in the energy industry in several countries.

(37) A's affiliation to Ansar al-Islam is a key issue in this assessment. While A was leader, the organization formed a Talibanistic government in a small area of Northern Iraq which employed systematic and grave breaches of human rights. The group made suicide vests and trained suicide bombers. There is information to prove that terrorists with ties to Al-Qaeda were stationed in the area prior to the time when Ansar Al-Islam was formed, including while A was there. The group still exists but now under a different name. It is responsible for many and terrible terrorist attacks in Northern Iraq. Attempted terrorist attacks in Europe have so far been averted.

(38) Information about when A resigned as leader of Ansar al-Islam is inconsistent, but the timing is not crucial. The appeal decision correctly emphasizes that he can still exercise real influence over the group, not least if the expulsion decision is declared invalid. A has understandably not found it in his interest to maintain obvious contact with the group after the expulsion proceedings commenced in autumn 2002.

(39) A confesses to a branch of Sunni Islam that defends the use of extremist acts, violence and suicide bombers. It is characterized by a conservative and literal interpretation of the Koran, where "jihad by the sword" is regarded as a personal obligation of each individual to combat the influence of Western cultures. A has demonstrated, both in words and deeds, that he is not content to fight only for the Kurdish cause, but that he has a broader perspective. He is a person of considerable influence. He has the influence to incite to terrorist activities and to draw such activities to Norway. In support of its view, the state has referred to a large amount of evidence that I do not go into in further detail here.

(40) The Norwegian state, represented by the Ministry of Labour and Social Inclusion, has entered the following plea:

> **« 1. The judgment of the Court of Appeal shall be affirmed.**
>
> **2. The Norwegian state, represented by the Ministry of Labour and Social Inclusion, shall be awarded costs for the proceedings before the District Court and the Supreme Court. »**

(41) My view of the case

(42) I find that A's appeal must be rejected.

(43) As already mentioned, the Supreme Court's adjudication of the case is limited to the issue of validity of the Immigration Appeals Board's decision in so far as it is based on considerations of national security. Both section 30 subsection 2 a) and section 29 subsection 1 d) of the Immigration Act contain provisions on this. The first of these provisions concerns foreign nationals «holding a settlement permit etc.» and is therefore applicable in A's case, while the second of these provisions applies to foreign nationals who do not hold such a permit.

(44) *The courts' power of review – the facts*
According to the Immigration Appeals Board's decision, the facts of the present case are sufficient for a finding that the statutory condition - that expulsion is necessary in the interests of national security – is satisfied. The key issue is whether A would represent a risk to national security if he is not expelled. Although this question concerns a situation in the future, the answer must largely be based on information about things that have happened in the past. Is there information about A which gives grounds to conclude that he poses such a risk?

(45) Almost all of the information about A's activities and operations - both before and after he came to Norway in 1991 – can be found in written sources. These include not least sources of which he is the instigator, either as author, or in the form of speeches and transcripts of interviews.

(46) In the proceedings before the Supreme Court, A has not opposed the facts that form the basis of the Immigration Board's appeal decision. The District Court corrected two items that are irrelevant to the validity of the decision, see page 55 of the judgment.

However, A has a very different view from the Norwegian state about the conclusions that can be drawn from the available information.

(47) First of all, there is disagreement about how long A is alleged to have been the leader of Ansar al-Islam and what influence he has exercised or exercises over the fractions that are continuations of or splinter groups of Ansar al-Islam after he undoubtedly resigned as leader. There is also disagreement about the ties between Ansar al-Islam and Al-Qaeda, and whether A now supports Al-Qaeda's views and the activities that it carries out. I will revert to this question.

(48) In its judgment, the Court of Appeal has simply found that the courts cannot review the conclusions drawn by the Immigration Appeals Board from the evidence that has been presented, "apart from assessing whether they appear to be clearly untenable", because the immigration authorities are differently and better qualified than the court to review and interpret the material on which the decision is based.

(49) I disagree. As I come back to in a few moments, this reason would be more relevant in relation to other parts of the assessment of whether a foreign national ought to be expelled or not. However, the Court of Appeal's statement is tied directly to the assessment of the evidence on which the decision is based. This is an assessment which the courts have full power to review, and I cannot find that the power of review can be limited by introducing the kind of threshold that the concept of "clearly untenable" would imply. However, this does not mean that the courts, in factually complicated expulsion cases concerning interests of national security, should not exercise some restraint in reviewing the administrative authorities' assessment of the evidence if the assessment appears to be defensible.

(50) *The power of judicial review – the specific application of the law to the facts*
The main legal issue of dispute is whether, in cases where an expulsion decision has been made, the courts have power to review the administrative authority's specific assessment of whether "considerations of national security make this necessary". Like the District Court, the Court of Appeal expressed the view that the courts do not have full powers of review in this regard. The Court of Appeal writes:

> **« The Court of Appeal emphasizes that the words «national security» indicate a relatively discretionary assessment. The assessment of whether the foreign national in question – in this case A – represents a risk for**

national security is essentially a question of security policy. This is reinforced by the fact that the provision requires that expulsion can occur when expulsion is "necessary" in the interests of national security. Ot.prp. no. 38 (1995-1996) at page 10 and page 12 emphasizes that political considerations are central to the assessment, and this is repeated in Ot.prp. no. 17 (1998-1999) at page 17. The courts are poorly suited to make such political assessments. »

(51) I disagree that the courts in this case lack the power to review the specific application of the law, as the Court of Appeal espouses.

(52) The power of the courts to review an administrative authority's application of the law to the facts in decisions that interfere in individual rights is an important guarantee of due process of law. There are limited exceptions to this principle, amongst others where the assessment required by the law is largely discretionary in nature, and in cases where the decision depends on the assessment of technical issues into which the courts cannot be expected to have the necessary insight.

(53) In an individual case, the question of the courts' power of review must be determined on the basis of the wording of the relevant statute. The provision in question in our case provides that a foreign national can be expelled «when considerations of national security make this necessary». The key concept is «considerations of national security».

(54) As mentioned, the Court of Appeal's interpretation of the law has not been appealed. There is thus no doubt that the risk of terrorist activities of importance for Norwegian security interests may affect national security in such a way that it can warrant expulsion pursuant to section 30 of the Immigration Act. I consider it appropriate to refer to Ot.prp. no. 75 (2006-2007) concerning a new Immigration Act, which proposes to replace the term "national security" with "fundamental national interests". In this regard, I cite from page 385:

« The term "fundamental national interests" is a more appropriate term that more clearly reflect the interests one wishes to protect. The term "national security", at least interpreted in a narrow or traditional sense, is somewhat out of date in light of recent developments, particularly with regard to terrorist activities, where the object is not always to target national security as such but to instill fear among the civilian population or to inspire or motivate extremist acts without actually committing specific acts. The term "fundamental national interests" must be

interpreted in light of the overall development in society and changes in the international threat, and is dynamic in nature. »

(55) I add that the term "national security" is not static either. In its judgment, the Court of Appeal referred to the administrative appeal decision, where the interests that otherwise fall within the scope of the term "national security" are summarized as follows:

> **« Firstly, we can assume that it protects foreign interests in Norway. It must also be assumed to cover Norwegian interests abroad, at least insofar as the interests are of such a nature that they are of importance to national security. In general, purely foreign interests abroad will fall outside. However, threats against Norway's allies abroad ought to be covered in view of Norway's international commitments. The final delimitation of the term will depend on an assessment of all of the circumstances, where the vital question will be what impact the threats against Norway's allies will have - directly or indirectly - for Norwegian security interests. »**

(56) It follows that the question whether consideration of national security make the expulsion necessary normally requires a relatively broad assessment, where different interests can be affected. This does not prevent the courts, at least to some extent, from exercising judicial control of the administrative authority's specific application of the law. The way I see it, the assessment falls naturally into two parts:

(57) Firstly, it must be determined whether the foreign national could pose a threat to any of the interests covered by the term "national security" if he is not expelled. The courts must have power to review this part of the application of the law.

(58) Secondly, it must be determined whether any such threat necessitates such a strong reaction as expulsion. I guess that the situation might easily be that the administrative authority has various options as to the sanctions it can use and that these must be weighed against each other. In my opinion, the assessment of whether expulsion in each individual case is necessary must be entrusted to the administrative authority to decide in the final instance, and the courts shall not be entitled to review this decision except where there is abuse of authority.

(59) This assessment is thus the same as the administrative authority's assessment of whether or not to expel, see the wording of the Immigration Act which provides that the foreign national "may" be expelled if the conditions are met. As a general rule, the

courts have no power to review this discretion either. At the same time, there will presumably be little of this discretion left when expulsion requires that such a reaction is "necessary".

(60) *Whether the conditions for expelling A are satisfied*
I turn now to the question of whether the conditions for expulsion are satisfied in A's case. As mentioned, the Supreme Court has power to review whether A - if he is not expelled - would pose a threat to any of the interests that are covered by the term "national security". This must be determined on the basis of the information that has been presented about A and which gives more detailed information both about the operations / activities he has been involved in during the different phases of his life, and not least about the views that he has expressed over the years.

(61) Before I get into this, I note that questions have been raised about the standard of proof that is required in a case of this nature. Or put another way: what likelihood there must be that A either himself or through others could cause a terrorist act that would threaten national security if he is not expelled. A has in this connection pointed out that the charges against him of complicity in the acts that I mentioned earlier have been dropped on the grounds of insufficient evidence.

(62) I find reason to point out that the relevant provisions of the Immigration Act sections 29 and 30 do not require that a foreign national must have committed criminal acts in order to be expelled. The provisions provide for a discretionary assessment of a future risk, in this case the risk that criminal acts - acts of terrorism - may be committed in the future. In exercising this discretion, the standard of proof required must be determined on the basis of the actions to which the risk refers. Where there is a risk of terrorist acts of any extent, even a limited yet real risk of such acts could feasibly threaten national security in such a way that the condition for expulsion can be met.

(63) In order to get the clearest possible impression of A, the Immigration Appeals Board has in its decision gone a long way back in time to 1982. The information stems partly from tape recordings of speeches that A has held in Iraq and partly from explanations that he has given during interrogation in Norway. He was a member of the Muslim Brotherhood (Ikhwan al-Muslim) in the 1980s. in 1989, he was elected to the Islamic Movement of Kurdistan (IMK), where he was wanted as a director. In or about 1990, he became leader of a new group, the Islamic Group of Kurdistan (IGK) and, after a

split, head of yet a new group, Islah, before he became the first leader of Ansar al-Islam when it was founded on 10th December 2001.

(64) The appeal decision states the following about the evidential material from this period:

> **«There is also a series of tape recordings of speeches that the complainant has held where he has encouraged suicide bombings and where he issues guidelines on hostilities and training in the use of explosives. Translations of these speeches have been put to the complainant during court proceedings and he has confirmed that the speeches are held by him. Some of these speeches / videos are from before Ansar al-Islam was founded.»**

(65) On the basis of the existing evidence, the Immigration Appeals Board found that Ansar al-Islam was "an extreme Islamist organization" which, after training soldiers, carried out or attempted to carry out several suicide attacks. I find that the evidence is sufficient to justify this conclusion. The conclusion has since been reinforced, among other things, by court judgments in Sweden and Germany.

(66) The Swedish case was first the subject of a comprehensive discussion in a criminal case before the Stockholm District Court, which pronounced its judgment on 12th May 2005 (case no. B 2965-2004). Following an appeal, the Svea Court of Appeal gave its ruling on 3rd October 2005 (B 3687-05). Both courts found it to be proven that the two defendants, among other things, had transferred money to representatives of Ansar al-Islam. At page 49 of its verdict, the District Court stated that there could be "no doubt that Ansar al Islam / Ansar al-Sunna satisfied the requirements in Article 2 of the EU Framework Decision to be deemed to be a terrorist organization." The Court of Appeal agreed with this and sentenced the defendants to five years and four years and six months imprisonment respectively.

(67) In the so-called Lokman-judgment from 2006, the Munich Higher Regional Court (Oberlandesgericht) sentenced a Kurd to seven years imprisonment for participation in a foreign terrorist organization. The organization in question was Ansar al-Islam.

(68) There is dispute over precisely how long A was the leader of Ansar al-Islam. A has stated that his leadership ceased when he left Iraq on 17th May 2002. However, there is information to suggest that he continued as leader - or at least held a leadership position - also for a period after this. The Immigration Appeals Board held that the question how long A was formally the leader is not crucial to the case and that the

crucial issue is A's ideological affiliation and the subsequent real influence he exerted over the organization, its members and supporters. The Immigration Appeals Board also held that A still has some connection to Ansar al-Islam, or to groups that are a continuation of this organization. On the basis of the evidence that has been submitted, I find that this conclusion is justified.

(69) The Immigration Appeals Board also held that there is reason to believe that «Ansar al- Islam/continuations/fractions of the group and the complainant have ties with the Al-Qaeda network». In its reason, the Board refers among other things to the following:

- that A, both in statements and in his book "In My Own Words" has stated that he has been present at a meeting with Osama bin Laden and at meetings with other people who hold quite senior positions within Al Qaeda,

- that in a recorded speech, bin Laden has praised Ansar al-Islam, and that A has in clear terms expressed his admiration for bin Laden / Al Qaeda, and

- that the UN Sanctions Committee decided, with effect from 24th February 2003, that Ansar al-Islam should be included on the list of organizations that are considered to cooperate with Al Qaeda.

(70) In my view, the Immigration Appeals Board's conclusion was justified by the evidence also on this point.

(71) In its decision, the Immigration Appeals Board referred to a number of sources that suggest that Europe may have been an interesting target area for the kind of group to which A is linked. The sources include various articles in the press which describe actions in different countries in this part of the world. At page 78 of his book, "In My Own Words", A describes a conversation with a key figure in the Al Qaeda environment, who advised "to turn to Europe and try to establish contact with Muslim immigrants, workers and students there". The statement referred to financial aid. It is also clear that high-ranking representatives of Al Qaeda have threatened action on several occasions, particularly directed at Norway, among others.

(72) Information that has become available after the Immigration Appeals Board made its decision sheds more light on this point in our case. According to the Lokman case, one of the defendants who apparently threatened action against Norway, Ayman al-Zawahiri, attended the negotiations between the various groups prior to the formation

of Ansar al-Islam in December 2001. The other defendant, Abu Musab al-Zarqawi, is believed to be behind many attacks against civilians and representatives of the international community in Iraq and can be linked to Ansar al-Islam through a variety of sources. The Lokman ruling also states that after the invasion of Afghanistan, Zarkawi resided at times in the Ansar al-Islam area. This was also confirmed by A during the preparation of the case before the Supreme Court. I find reason to mention that after Zarkawi's death, A referred to him in very appreciative terms in an article in an Arab publication in June 2006, and pointed out, among other things, that he was the architect behind 800 suicide attacks over a three-year period.

(73) I add that through interviews and the like in various news media, including international TV channels and websites, A has expressed himself in such a manner that it is tempting to regard him as a mouthpiece for extremist and violent Islamic groups.

(74) Having reviewed the facts, the Immigration Appeals Board stated that it was necessary to exercise strict critical control of the sources, amongst other things because some of the sources could be interested in harming Ansar al-Islam and the complainant. It also emphasized that it had not been possible at the appeal stage to assess whether all of the information was correct, and that the important issue in its assessment was «the wealth of source s and information, given over a long period of time, and from different quarters and all pointing in the same direction».

(75) Thereafter, the Immigration Appeals Board concluded as follows with regard to the question whether A represents a risk to national security:

> **«Having considered the appeal, we find that there is reason to fear that the complainant has such connections to terrorist activities and terrorist networks that his presence in Norway contributes to increasing the threat to national security. The security of the nation may be endangered by the complainant's presence in Norway in that he can attract terrorist operations against Norway. The possibility that the complainant himself, or someone on his behalf or upon his initiative, will commit terrorist acts in Norway directed at Norwegian or foreign interests cannot be ruled out either.»**

(76) I note that the wording of the standard of proof in the last sentence of the citation is not accurate, and that the standard to which it refers can appear to be too low. I refer to

what I have already said about the standard of proof. I also refer to the decision of the Immigration Appeals Board, which emphasizes that in matters of this nature one must undertake an overall assessment of the totality of the evidence rather than assessing the strength of each piece of information.

(77) In my opinion, there is without doubt sufficient evidence to find that A represents a risk to national security because of the possibility that he might attract terrorist activities against Norway, and because he himself or through others, may be linked to terrorist activities in this country, for example in the form of funding. The risk also applies to foreign interests abroad that are important for Norwegian security interests, such as allied interests in Afghanistan.

(78) Accordingly, I find that the Immigration Appeals Board has not erred in its application of the statutory conditions on «national security» when it has found that it is satisfied in A's case. As already mentioned, the courts have no power to review the question whether expulsion is the appropriate reaction and I do not therefore discuss it further.

(79) *The question of proportionality – ECHR Article 8*
Both sections 29 and 30 of the Immigration Act provide that a foreign national cannot be expelled if «this would be a disproportionately severe reaction against the foreign national himself or the closest members of his family». However, the provision does not apply if expulsion is necessary for reasons of national security.

(80) This does not disentitle A and his family to the protection provided by ECHR Article 8 on the right to respect for private and family life, and the UN Convention on the Rights of the Child. However, Article 8(2) provides that exceptions can be made when this is in accordance with the law and is necessary in a democratic society in the interests of certain named social considerations, including the interests of national security. I refer to the District Court's discussion of this issue, and limit myself to pointing out that in this case there can be no doubt that the interests of Norwegian society in the expulsion that has been decided outweigh by far the interests that A and his family have in being allowed to stay. The fact that the expulsion cannot at present be implemented on account of the situation in Iraq is irrelevant in this consideration.

(81) *The Civil Procedure Act section 204 no. 1 – classified evidence*
It follows from what is stated above that the Immigration Appeals Board's decision has been reviewed on the basis of the evidence that has been submitted to the Supreme

Court. I emphasize that to the extent that the Court has relied on evidence from open sources obtained after the Immigration Appeals Board made its decision, this evidence has served to corroborate the facts on which the Immigration Appeals Board's decision is based.

(82) As a consequence of the prohibition against evidence in section 204 no.1 of the Civil Procedure Act, the Supreme Court has, like the lower courts, only been able to rely on unrestricted evidence. This is different to the evidence on which the appeal decision was based. In the present case, the evidence from open sources provides a sufficient basis on which to review the Immigration Appeals Board's application of the law. The Supreme Court has been able to fully exercise its power of review of administrative action and has not needed to consider what implications it would have on the power of judicial review if the unrestricted sources had been insufficient to review the administrative decision. I limit myself to the following comments with regard to this question:

(83) In the case reported in Rt-1987-612 which concerned the legality of alleged telephone tapping, the Supreme Court found that the information which would enable an independent judicial review had been withheld from the courts pursuant to section 204 no. 1 of the Civil Procedure Act. A substantial review was therefore not possible. However, the Supreme Court held that the right of the state to withhold information could not entail that the court must find in favour of a private party who alleges that the decision to tap his telephone was invalid. The Court referred to the guarantees of due process established by the requirement that telephone tapping cannot take place without the consent of the courts, and that there is a complaints procedure before the Parliamentary Intelligence Oversight Committee. The defendant filed a complaint with the European Commission on Human Rights. The Commission held that the complaint was inadmissible on the grounds that it was manifestly ill-founded since the interference was necessary in a democratic society, see ECHR Article 8 no. 2.

(84) I also refer to the judgment reported in Rt-2006-1300, where the Supreme Court emphasized that the Ministry's refusal to consent to testimony being given about classified information, see the Civil Procedure Act section 204 no. 2, could be reviewed by the courts pursuant to section 204 no. 2 subsection 2.

(85) The decision to expel A is an interference in his right to family life which is protected by ECHR Article 8. In general, even though the interests of national security are at threat, the decision must be subject to «some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information». I refer to the judgment of the European Court of Human Rights of 20th June 2002 in the case of Al-Nashif against Bulgaria paragraph 123 (ECtHR-1999-50963). When discussing whether there was a violation of Article 13, the Court stated that as long as Al-Nashif had an "arguable" claim that there was a violation of his right to respect for family life, he was entitled to an effective remedy pursuant to Article 13. This required as a minimum that « the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance ». I refer to paragraph 137 of the judgment.

(86) In so far as an expulsion order of the kind we have before us in the present case cannot be reviewed by the courts because material information has been classified in the interests of national security, it is not entirely clear in view of the guarantees of due process of law that are referred to in this judgment whether Norwegian legislation satisfies the requirements of the European Convention of Human Rights.

(87) On this basis, I find that item 1 of the Court of Appeal's judgment must be affirmed.

(88) *Costs*
A has been granted free legal aid for the proceedings before the Supreme Court. The case has raised questions of principle importance regarding the power of judicial review of administrative action, and I find that no costs should be ordered before any instance.

(89) I vote for the following

JUDGMENT:

1. The judgment of the Court of Appeal – item 1 of the judgment – shall be affirmed.

2. No order for costs before any instance.

(90) Mr Justice **Endresen**: I agree on the whole and with the result of the first voting Justice.

(91) Mrs Justice **Stabel**: Likewise.

(92) Mrs Justice **Gussgard**: Likewise.

(93) Mr Justice **Lund**: Likewise.

(94) After the passing of votes, the Supreme Court delivered the following

JUDGMENT

1. The judgment of the Court of Appeal – item 1 of the judgment – shall be affirmed.

2. No order for costs before any instance.