SUPREME COURT OF NORWAY

On 18 December 2015, the Supreme Court delivered judgment in

HR-2015-02524-P, (case no. 2015/203), civil case, appeal against judgment,

The State represented by the Immigration Appeals Board	(Attorney General Fredrik Sejersted) Assisting counsel: (Marius Emberland) (Marius Stub)
vs.	
A B C D	(Counsel: Christian Hauge)
The Norwegian Organisation for Asylum Seekers (NOAS) (accessory intervener)	(Counsel: Jan Fougner)
Save the Children (accessory intervener)	(Counsel: Mads Andenæs – qualifying test case)

O P I N I O N :

(1) Justice **Utgård:** The case concerns the validity of decisions to refuse asylum, cf. section 28 of the Immigration Act, alternatively, of decisions to refuse to grant a residence permit on humanitarian grounds, cf. section 38 of the Immigration Act. In particular, it is a question of how to place emphasis on consideration for the "best interests of the child". The case also raises questions about content of the constitutional review of the criterion "is not unreasonable" in section 28, subsection 5 of the Immigration Act regarding internal flight.

(2) The decision concerns a family with spouses A and B and their two daughters, D born 00. --- 2006, and C, born 00. --- 2009. The daughters were six and two years old at the time of the decisions.

(3) B and A are from Afghanistan and are Afghan citizens. They belong to the ethnic group the Hazaras, who are Shiite Muslims, while the majority of the population in Afghanistan are Sunni Muslim. Both were born in the Qarabagh district of the Ghazni province and both fled to Iran. They fled from Afghanistan at different times. B has informed that he fled when he was 4 years old, i.e., in 1983. A has informed that she fled when she was 16-17 years old, i.e., in 2000-2001. B and A were neighbours in Tehran. They married there and then moved to Khoramabad, which is also in Iran. In 2010, they travelled together from Iran, via Turkey to Greece. The family split up when travelling to Norway in 2011.

(4) A applied for asylum on 24 June 2011. She informed that she had arrived in Norway that same day. The youngest daughter, C. travelled together with her mother.

(5) A applied for asylum on 1 August 2011. He informed that he had arrived in Norway the previous day. The oldest daughter, D, came to Norway together with her father.

(6) Section 28 of the Immigration Act sets out the main criteria for being approved as a refugee and being granted asylum. Section 28, subsections 1 and 2 state that:

> "**[1] A foreign national who is in the realm or at the Norwegian border shall, upon application, be recognised as a refugee if the foreign national**
>
> **a) has a well-founded fear of being persecuted for reasons of ethnicity, origin, skin colour, religion, nationality, membership of a particular social group or for reasons of political opinion, and is unable, or, owing to such fear, is unwilling to avail himself or herself of the protection of his or her country of origin, cf. Article 1 A of the Convention relating to the Status of Refugees of 28 July 1951 and the protocol of 31 January 1967, or**
>
> **b) without falling within the scope of (a) nevertheless faces a real risk of being subjected to a death penalty, torture or other inhuman or degrading treatment or punishment upon return to his or her country of origin.**
>
> **[2] A foreign national who is recognised as a refugee under the first paragraph, shall be entitled to a residence permit (asylum)."**

(7) Section 28, subsection 1, litra a) of the Immigration Act, cf. subsection 2, provides protection to foreign nationals who for particular reasons have a "well-founded fear of being persecuted" and who cannot obtain protection in their country of origin, as this is regulated under Article 1 A of the Convention relating to the Status of Refugees.

(8) Section 28, subsection 1, litra b) of the Immigration Act, cf. subsection 2, provides protection to foreign nationals who would otherwise face a real risk of serious harm or treatment in their country of origin. This particularly concerns serious harm or treatment proscribed by Article 3 of the European Convention on Human Rights (ECHR), Article 7 of the UN Convention on Civil and Political Rights (CCPR) and Article 3 of the UN Convention against Torture.

(9) A foreign national who comes under one of the two alternatives in subsection 1, has under subsection 2 the right to asylum, which is a special type of residence permit.

(10) When making an assessment pursuant to subsection 1, it must be taken into account whether the foreign national is a child, cf. section 28, subsection 3 of the Immigration Act. I assume this shall also apply to other parts of the asylum assessment.

(11) It must also be considered whether the foreign national can obtain effective protection in other parts of his or her country of origin - as an internal refugee. The regulations regarding internal flight are set out in section 28, subsection 5, which reads as follows:

> **"[5] The right to be recognised as a refugee under subsection 1 does not apply if the foreign national may obtain effective protection in other parts of his or her country of origin than the area from which the applicant has fled, and it is not unreasonable to direct the applicant to seek protection in those parts of his or her country of origin."**

(12) Section 28, subsection 7 states that if an application for asylum is denied, the case shall automatically be reviewed under the regulations relating to residence permit on humanitarian grounds in section 38, where the subsections 1-4 read as follows:

> "**Section 38 Residence permit on the grounds of strong humanitarian considerations or particular connection with Norway**
>
> **[1] A residence permit may be granted even if the other conditions laid down in the Act are not satisfied provided there are strong humanitarian considerations or the foreign national has a particular connection with the realm.**
>
> **[2] To determine whether there are strong humanitarian considerations, an overall assessment shall be made of the case. Importance may be attached to, among other things, whether**
>
> **a) the foreign national is an unaccompanied minor who would be without proper care if he or she were returned,**
>
> **b) the foreign national needs to stay in the realm due to compelling health circumstances,**
>
> **c) there are social or humanitarian circumstances relating to the return situation that give grounds for granting a residence permit, or**
>
> **d) the foreign national has been a victim of human trafficking.**
>
> **[3] In cases concerning children, the best interests of the child shall be a fundamental consideration. Children may be granted a residence permit under the first paragraph, even if the situation is not so serious that a residence permit would have been granted to an adult.**
>
> **[4] In the assessment of whether to grant a permit, importance may be attached to considerations relating to immigration control, including**
>
> **a) possible consequences for the number of applications based on similar grounds,**
>
> **b) social consequences,**
>
> **c) the need for control, and**
>
> **d) respect for the other provisions of the Act.**"

(13) On 23 September 2011, the Directorate of Immigration (UDI) turned down the family's asylum application, alternatively, residence on humanitarian grounds, cf. sections 28 and 38 of the Immigration Act. UDI concluded that family could receive effective protection in Kabul and that this would not be an unfair alternative, cf. the regulations regarding internal flight in section 28, subsection 5 of the Immigration Act.

(14) The family appealed the administrative decision to the Immigration Appeals Board (UNE), who dismissed the appeal in a decision of 14 January 2013. The case was heard at a meeting of the Immigration Appeals Board.

(15) The family had submitted a claim for refugee status under section 28, subsection 1, litra a) of the Immigration Act. A unanimous Immigration Appeals Board dismissed the application. The grounds state the following, among other things:

> "**The appellants have argued that they fear they will face persecution if they return to Afghanistan, because they are Hazara. The Immigration Appeals Board is aware that, historically speaking, the Hazara have been in a vulnerable situation in Afghanistan. During the Taliban's rule from 1996 to 2001, thousands of Hazara were killed. However, given the development since 2001, in the current situation, there are no grounds for concluding that the Hazara minority are being persecuted or victimised because of their ethnicity. Refer, among other things, to UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan (December 2010).**
>
> **As mentioned, the appellants' statements that they risk persecution by their families because they have run away and married, against their family's wishes, have not been adequately substantiated.**
>
> **There is therefore no evidence that the appellants risk persecution on convention grounds on their return to Afghanistan. The criteria for regarding them as refugees pursuant to section 28, subsection 1, litra a) of the Immigration Act have not been met.**"

(16) The Immigration Appeals Board stated separately that they did not believe the parents' statements.

(17) UNE then discussed whether the family had the right to asylum pursuant to section 28, subsection 1, litra b) of the Immigration Act, which authorises such a right to those who face a risk of specific serious harm or treatment other than as stated under litra a). The decision states the following regarding this:

> "**UNE considers the general security situation for civilians in Afghanistan, based on country information from Landinfo, UNHCR, other UN organisations, other countries' immigration administrations, governmental and non-governmental organisations, research institutions and various news outlets, among others. The security situation in Qarabagh/Ghazni is currently such that section 28, subsection 1, litra b) of the Immigration Act is considered to preclude the appellants from being returned there.**"

(18) UNE therefore concluded that the family has the right to protection under section 28, subsection 1, litra b) of the Immigration Act.

(19) UNE then discussed the question of internal flight and stated:

> **"The right to be recognised as a refugee under the subsection 1 does not, however, apply if the foreign national may obtain effective protection in other parts of his or her country of origin than the area from which the applicant has fled, and it is not**

> **unreasonable to direct the applicant to seek protection in those parts of his or her country of origin, cf. section 28, subsection 5 of the Immigration Act and section 7-1 of the Regulations."**
>
> **The condition of** "**effective protection**" **implies that the area to which the person is being returned must be safe and accessible. The Appeals Board finds that the appellants can obtain effective protection in other parts of their country of origin than Qarabagh/Ghazni. For example, the appellants can live in the city of Kabul.**
>
> **The general security situation in the city of Kabul is considered to be stable, and to have been so for some time. UNE is aware that attacks occur in the city, primarily targeting Afghan officials and the international presence. Civilians are also affected to some extent randomly in these attacks. However, these problems are of not such a nature and scope that return is not deemed to be justifiable. Kabul is also accessible for the family.**"

(20) After having concluded that internal flight to Kabul was safe and accessible, the Immigration Appeals Board discussed whether internal flight had to be deemed unreasonable. The Immigration Appeals Board was divided on this issue.

(21) The majority of the Immigration Appeals Board concluded that the situation in Kabul was not such that it was unreasonable to direct the family to seek internal flight there, and stated that fundamental consideration for the best interests of the child did not imply that internal flight was unreasonable. The minority of the Immigration Appeals Board concluded that the situation in Kabul was so difficult that internal flight was unreasonable.

(22) The Immigration Appeals Board was divided in the same way on the question of residence on humanitarian grounds, cf. section 38 of the Immigration Act.

(23) Hereinafter, when discussing the decision by UNE it is the majority decision to which I am referring.

(24) On 8 February 2013, UNE dismissed an appeal for reversal of the decision, as no new information had been presented.

(25) On the same day, B, A, D and C issued a claim through Oslo District Court.

(26) On 4 September 2013, the District Court delivered judgment with the following conclusion of judgment:

> **"1. The Immigration Appeal Board's decision of 14 January 2013 and the decision of 8 February 2013 are invalid.**
>
> **2. The State represented by the Immigration Appeals Board is ordered within 14-fourteen-days from service of the judgment, to pay the claimants' costs of NOK 130,500 - one hundred and thirty thousand five hundred Norwegian kroner - as well as the court fee.**"

(27) The District Court concluded that the asylum statements from the family about fleeing from forced marriages were very unlikely, and the court did not find the statements credible. The criteria under the alternative in section 28, subsection 1, litra a) of the Immigration Act were therefore not met. It was not contested that the criteria under section 28, subsection 1, litra b) were met. The court concluded that the grounds for the decision were flawed in that it had not been discussed whether it was in the best interests

of the child to be directed to seek internal flight in the parents' country of origin, compared with the situation of residence in Norway. The court also concluded that flaws in the discussion of the children's situation were continued in the decision regarding residence on humanitarian grounds pursuant to section 38.

(28) The State, represented by the Immigration Appeals Board, appealed the judgment to Borgarting Court of Appeal, which on 10 November 2014 delivered judgment with the following conclusion of judgment:

> **"1. The appeal is dismissed.**
>
> **2. The State represented by the Immigration Appeals Board is ordered to pay costs totalling 180,000 - one hundred and eighty thousand Norwegian kroner - to B and A within 2-two-weeks of service of the judgment.**
>
> **3. No change is made in the District Court's cost decision.**"

(29) The Court of Appeal found that the courts have full right of judicial review pursuant to section 28, subsections 1 and 5 of the Immigration Act. The Court of Appeal did not believe the statements from the parents and in the same way concluded that the asylum criteria under litra a) had not been met.

(30) In connection with the question of internal flight in section 28, subsection 5, it was stated that it seems "to be undisputed that the situation in Kabul at the time of the decision was not such that it would be generally unjustifiable to return the asylum seekers there". However, based on an assessment of the best interests of the child, UNE should have examined the situation for the children in Kabul against the situation in Norway.

(31) The Court of Appeal concluded that adequate grounds had not been given for the asylum decision and that it was difficult to assess whether the application of the law was correct and whether the judgment was justifiable. The court also concluded that UNE had used the wrong facts as regards consideration for D's health. The decision in the asylum case was therefore invalid.

(32) The judgment also finds that the decision to refuse residence on humanitarian grounds is invalid.

(33) The State represented by the Immigration Appeals Board has appealed the Court of Appeal's judgment to the Supreme Court. The appeal concerns the application of law and assessment of evidence by the Court of Appeal.

(34) After the case was heard in chamber, the court decided on 21 August 2015 that the case should be decided by the Supreme Court as a strengthened court, cf. section 6, subsection 2, second sentence of the Courts of Justice Act. On 31 August 2015, the Chief Justice decided that the case should be heard by the Supreme Court in plenary session, cf. section 6, subsection 2, final sentence of the Courts of Justice Act.

(35) The UN High Commissioner for Refugees (UNHCR) and the organisation Self Help for Immigrants and Refugees (SEIF) have submitted written opinions to the Supreme Court for clarification of public policy, cf. section 15-8 of the Dispute Act.

(36) The Norwegian Organisation for Asylum Seekers (NOAS) and Save the Children has declared accessory interveners in favour of the respondents. In the decision by the Appeals Selection Committee of 23 October 2015, accessory interveners from both were allowed.

(37) The appellant - *the State represented by the Immigration Appeals Board* - has mainly argued the following:

(38) UNE's decision, where the applications for asylum and for residence on humanitarian grounds have been denied, is valid. The same applies to the decision to refuse reversal of the decision. The criteria for asylum pursuant to section 28, subsection 1, litra b) of the Immigration Act on their own have been met, but the family can be directed to seek internal flight to Kabul, cf. section 28, subsection 5 of the Immigration Act.

(39) The decision must be reviewed based on the situation at the time of the decision, cf. the plenary judgments in Rt. 2012 page 1985 – children who have been in Norway for a long period I – and Rt. 2012 page 2039 – children who have been in Norway for a long period II – paragraph 39.

(40) Section 28, subsection 5 of the Immigration Act states, among other things, that it is not "unreasonable" to direct the foreign national to seek internal flight. When assessing this criterion, only conditions in the return country shall be taken into consideration. The Convention on the Rights of the Child does not alter the assessment topic for children so that a comparison is made of the conditions in Kabul with the conditions in Norway. The application of law by the Court of Appeal is therefore wrong on this point.

(41) Section 7-1 of the Immigration Regulations contains a more detailed regulation of the unreasonableness assessment under section 28, subsection 5 of the Immigration Act. This provision has the required statutory authority.

(42) UNE has used the correct understanding of the burden of proof when dealing with the unreasonableness criterion for internal flight.

(43) UNE's decision is based on correct facts. This applies equally to the circumstances related to D's health.

(44) It was not wrong pursuant to Article 12 of the Convention on the Rights of the Child that D, who had not turned 6 years of age at the time of the appeal hearing, was not allowed to be heard by the Immigration Appeals Board. She was represented at the hearing. The parents were present and the family attended with a lawyer.

(45) The courts cannot review the unreasonableness assessment in section 28, subsection 5 of the Immigration Act, over and above what follows from the doctrine concerning abuse of authority. The assessment topic is discretionary and is related to immigration policy. The convention obligations implemented in section 28, subsection 1, litra b) do not include a limitation about whether internal flight is unreasonable, and Norwegian law goes further here than civil law requires.

(46) The grounds for the asylum decision are very detailed and thorough, and must clearly be adequate.

(47) The decision to turn down the application for residence on humanitarian grounds pursuant to section 38 of the Immigration Act is also valid. The grounds for the decision are adequate. The assessment must take into account that this is not a borderline case.

(48) The State, represented by the Immigration Appeals Board, has made the following request:

> "**The court finds in favour of the Norwegian State represented by the Immigration Appeals Board.**"

(49) The respondents – *A, B, D and C* – have mainly argued the following:

(50) UNE's decision, where the applications for asylum and for residence on humanitarian grounds have been denied, is valid. The same applies to the decision to refuse reversal of the decision. There is now a new General Comment No. 14 from the UN Children's Committee, which may give a basis for this.

(51) A present time assessment must be made when examining the best interests of the child, cf. UN Convention on the Rights of the Child Article 3. The courts have full judicial powers to decide what is in the best interests of the child.

(52) UNE has misinterpreted section 28, subsection 5 of the Immigration Act. When assessing whether internal flight is unreasonable for the child, the situation for the child in Norway and the actual place of return must be compared. This follows in particular from the principle of the best interests of the child, cf. Article 3 of the UN Convention on the Rights of the Child.

(53) Section 7-1 of the Immigration regulations, which refers to the assessment topic and the threshold for the unreasonableness assessment under section 28, subsection 5 of the Immigration Act, sets out a high threshold, contrary to the legal basis. Therefore, the regulations are invalid.

(54) UNE has also applied the wrong burden of proof rule when using the unreasonableness criterion. The State has the burden of proof that the internal flight is not unreasonable.

(55) UNE has used the wrong facts as regards D's mental illness (PTSD). This is evident from a statement submitted to the Supreme Court by the child's psychologist, and which sheds light on the conditions at the time of the decision.

(56) UNE's decision is nevertheless invalid due to procedural errors. It was wrong of the Immigration Appeals Board not to hear D, as requested by the lawyer.

(57) The grounds for the asylum decision are flawed as regards the children.

(58) The courts have full judicial powers when reviewing the unreasonableness criterion in section 28 (5) of the Immigration Act. The courts may review the whole asylum assessment, including the question of whether internal flight is unreasonable. Under a full review, the Supreme Court must, based on the information in the case, find that internal flight is unreasonable.

(59) Alternatively, the decision must be revoked because the grounds for the decision are too flawed for it to be reviewed pursuant to section 28 (5).

(60) The decision to refuse a residence permit on humanitarian grounds pursuant to section 38 of the Immigration Act is inadequately founded as regards the assessment of the best interests of the child. In this part of the decision, a comparison shall at least be made with the conditions in Norway and this has not been done. This implies that the decision pursuant to section 38 is invalid.

(61) Respondents A, B, D and C have made the following request:

> **"1. The appeal is dismissed.**
>
> **2. The State represented by the Immigration Appeals Board is ordered to compensate B, A, C and D's costs for the Supreme Court.**"

(62) The accessory intervener, the *Norwegian Organisation for Asylum Seekers (NOAS)*, agrees with the viewpoints of the respondents and in particular has pointed out the child's right to be heard, cf. Articles 12 and 3 of the UN Convention on the Rights of the Child, compared with the UN Committee on the Rights of the Child's General Comments No. 12 and No. 14.

(63) NOAS has made the following request:

> **"1. The appeal is dismissed.**
>
> **2. The State represented by the Immigration Appeals Board is ordered to pay the costs for the Supreme Court.**"

(64) The accessory intervener, Save the Children Norway, agrees with the respondents and in particular holds that the comments from the UN Committee on the Rights of the Child are an authoritative interpretation of the UN Convention on the Rights of the Child. Based on the purpose of the UN Convention on the Rights of the Child and the Refugee Convention, the principle of the best interests of the child must also be incorporated in the interpretation of the Refugee Convention.

(65) Save the Children Norway has made the following request:

> **"1. The appeal is dismissed.**
>
> **2. The State represented by the Immigration Appeals Board is ordered to pay the costs for the Supreme Court.**"

(66) *My opinion of the case*

(67) As is evident from what I have said previously, UNE found that the family basically has a right to protection as refugees pursuant to section 28, subsection 2 of the Immigration Act, cf. sub-section 1, litra b). They have, however, still not been granted asylum, because UNE believes that it is safe for the family to return to other parts of Afghanistan than

where they originally came from and that it is not unreasonable to direct them to internal flight pursuant to section 28, subsection 5.

(68) *The timing of the review*

(69) The family has argued that as long as the case concerns the best interests of the child pursuant to Article 3 of the UN Convention on the Rights of the Child, it implies a present time assessment so that the circumstances that exist after the date of the decision by UNE must be taken into consideration. I refer here to the plenary judgments in Rt. 2012 page 1985 – child who has been in Norway for a long period I – paragraph 153 and Rt. 2012 page 2039 - child who has been in Norway for a long period II - paragraph 39, which state that it is the conditions at the time of the decision that are decisive. The judgments state that this also applies when taking into account circumstances related to the best interests of the child.

(70) No evidence has been submitted that gives grounds to consider this issue differently than the Supreme Court has done in these plenary judgments, and therefore I will not discuss this further.

(71) *Internal flight and the UN Convention on the Rights of the Child*

(72) The family argues that the UN Convention on the Rights of the Child requires that when assessing whether it us unreasonable for the family to travel to Kabul, UNE must compare the conditions for the children in Kabul with the conditions for the children in Norway. The State argues that only the conditions in Kabul should be considered when making an assessment regarding internal flight, and that the conditions for the children in Norway are not relevant until under the decision regarding residence on humanitarian grounds.

(73) I will begin by considering how this question is dealt with in the Act and in the legislative history. The wording of section 28, section 5 clearly indicates that the unreasonableness assessment is related to the conditions at the place of internal flight. That this was the intention of the Ministry is evident from Proposition no. 75 (2006-2007) to the Norwegian Odelsting, pages 98-99 and page 415. I quote the following from page 98:

> "**The Ministry notes that the right to international protection is subsidiary in relation to the possibility of protection in the country of origin. People, who can achieve the necessary protection through moving to another area in their country of origin than where they risk persecution, have therefore basically no right to protection in Norway.**"

(74) In conclusion during the discussion of internal flight, the Ministry stated the following on page 99:

> "**It is noted that the internal flight alternative is part of the protection assessment. It is therefore the conditions when the applicant returns to Afghanistan that are decisive and not whether he or she has achieved a connection to Norway or in other respects would be able to have a better humanitarian situation here.**"

(75) The Ministry also states on page 92 of the Proposition that there must be a lower threshold for children than for others, and this is also stated on page 414 in the special legislative history for section 28, subsection 3. However, the Proposition provides no basis for the assessment topic to be expanded for the children so that a comparison should also be made with the conditions in Norway.

(76) The question is then whether anything else follows from a majority recommendation from the Standing Committee on Local Government and Public Administration in Report O. no. 42(2007-2008), page 21. Before I quote from this report, I would like say something about its background.

(77) A decision by the Grand Board at UNE in 2006 dealt with an asylum case relating to internal flight involving children. In its decision, the Grand Board concluded that, based on Article 3 of the UN Convention on the Rights of the Child, in cases concerning children, there should be a comparison of the conditions in Norway with the conditions at the area of internal flight. The decision is - in a paragraph about the applicable law - discussed as follows on page 96 of the proposition:

> "**The Grand Board believes that the guidelines from UNHCR in the document on internal flight from 2003, items 24-30, essentially provide an appropriate and correct framework for the assessment of reasonableness. The Grand Board emphasises that in the assessment of reasonableness related to the internal flight alternative, no importance shall be attached to an appellant's connection to Norway as a result of an application for asylum, but that there is an exception from this as regards children.**"

(78) I would like to quote the following from the Standing Committee on Local Government and Public Administration's majority recommendation:

> "***The majority*** **notes that people who can achieve the necessary protection by moving to another part of their country of origin than where they risk prosecution, basically have no right to protection in Norway.** ***The majority*** **points out that the draft legislation has been formulated in accordance with the guidelines issued by UNHCR, which state that the relevant internal flight area must be both safe and accessible (the relevance assessment) and that it must be considered whether it is reasonable to direct the foreign national to take up residence in the relevant area (the reasonableness assessment).** ***The majority*** **has also noted that the Grand Board has handed down a precedent decision where it has been assumed that the clarifications made in UNHCR's guidelines essentially provide an appropriate and correct framework for the content of the discretionary reasonableness assessment. The Grand Board has also placed great emphasis on the human rights perspectives and fulfilment of such rights when using the internal flight alternative.**"

(79) The majority of the Standing Committee also stated that it had noted what the Grand Board had said about the guidelines from UNHCR. The majority of the Standing Committee also pointed out that it had attached great importance to the human rights perspective.

(80) In my view, the statements from the majority of the Standing Committee cannot be interpreted in such a way that by not saying anything about the assessment topic for children, the Standing Committee gave credence to what the Grand Board had said about this. It must apply so much more when it would mean an amendment in relation to the proposal in the bill.

(81) The wording of the Act and legislative history provide no basis for making a comparison of the conditions in Kabul with the conditions in Norway, also with respect to the children. Asylum shall be granted on the basis of the need the foreign national has for protection, due to the situation in his or her country of origin. It is then unnatural to draw the conditions in the country where asylum is being sought into the assessment. Such conditions belong under the assessment of residence on humanitarian grounds, which

shall be made in all these cases if the application for asylum is not granted, cf. section 28, subsection 7).

(82) In the internal flight assessment, I will consider whether the protection under Article 3 of ECHR requires an assessment between the conditions in the internal flight area and the conditions in the country of asylum. As mentioned, the decision in our case regarding status as a refugee is based on section 28, subsection 1, litra b) of the Immigration Act. I find that this concerns possible violations of Article 3 of ECHR. Of special interest then is the judgment of 9 April 2013 by the European Court of Human Rights (ECtHR) in the case of *H. and B vs. the United Kingdom*, where in paragraph 91 it is stressed that internal flight can be accepted in relation to Article 3. I also refer to ECtHR's Grand Chamber judgment of 4 November 2014 *Tarakhel vs. Switzerland*, where the parties raised questions relating to the UN Convention on the Rights of the Child. ECtHR confined itself to pointing out the contents of Article 22 of the UN Convention on the Rights of the Child, which directly applies to refugees. The UN Convention on Human Rights does not provide support for making an assessment between the conditions in the country of asylum and the country of origin in the event of internal flight. That the threshold for the conditions at the place of return under the Convention could be different in the event of internal flight for children together with their parents or for children alone, compared with the threshold for adults on their own, is in accordance with what follows from section 28, subsection 3 of the Immigration Act.

(83) I will then consider the UN Convention of the Rights of the Child, which takes precedence over other law, cf. section 2 no. 4 of the Human Rights Act. Article 3 no. 1 of the UN Convention on the Rights of the Child reads as follows:

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

(84) In my view, this implies that the topic of the decision is not changed, but that the best interests of the child must be a primary consideration in the decision, cf. Rt. 2012 page 1985 – child who has lived for a long time in Norway I – paragraph 135.

(85) A change in the assessment topic would mean that the right to asylum would have a completely different content and nature for families with children. It would not be possible to reconcile this with the Refugee Convention.

(86) Based on this, great importance must be attached to consideration of the child when assessing the return situation in Kabul, which also follows from ordinary Norwegian legislation, cf. section 28, subsection 3 of the Immigration Act. It would take less stress for internal flight to be considered unreasonable for a child than say for a young man.

(87) In the UN Convention on the Rights of the Child, Article 22 applies directly to the question of asylum. Article 22 states nothing about whether the assessment of asylum applications for children shall be done on the basis of other criteria than those that otherwise apply under the Refugee Convention.

(88) The information on state practice that has been submitted to the Supreme Court does not give grounds for concluding that there is any customary international law that completes the contents of the Convention in this area. On the contrary, the information on state

practice shows that many countries share UNE's point of view in this case. This applies to Belgium, Canada (with certain reservations), Finland, Germany, Ireland, Sweden and Switzerland. In an area such as this, there are grounds for attaching great importance to state practice. Anything else would allow asylum seekers to choose a country that has a more liberal interpretation than others.

(89) Based on this, I cannot see that UNE misinterpreted section 28, subsection 3, cf. Article 3 of the UN Convention on the Rights of the Child, when in its assessment of whether internal flight would be unreasonable, UNE only considered the conditions in the internal flight area.

(90) *About whether section 7-1 of the Immigration Regulations has sufficient legal basis*

(91) Section 28, subsection 8 of the Immigration Act states that the "further provisions may be made in respect of the application" of section 28, among others. The family argues that section 7-1 of the Immigration Regulations does not have sufficient authorisation in section 28, subsection 8 and therefore is invalid.

(92) Section 7-1 of the Immigration Regulations reads as follows:

> "**Even if section 28 of the Immigration Act is applicable when considering returning an applicant to the area from which he or she fled, it shall only be deemed to be unreasonable to direct the foreign national to seek protection in safe and accessible parts of his or her country of origin, if the situation upon return will be such that the person concerned meets the criteria for being granted a residence permit under section 38 of the Act. In the assessment of whether the criteria for granting a residence permit under section 38 of the Act have been met, the fact that the foreign national has no connection with a safe and accessible part of his or her country of origin is not in itself sufficient.**"

(93) The background for the regulations can be found in the consultation letter from the Ministry of Labour and Social Affairs, dated 19 November 2008. It was pointed out that in two cases, the Grand Board at UNE had concluded that the threshold for granting asylum, despite there being an internal flight alternative, would be lower than for granting residence on humanitarian grounds. Therefore, the Ministry proposed an amendment to the regulations to establish the same threshold as in section 38 for cases regarding internal flight under section 28, subsection 5. This was done through section 21, litra d) in the regulations relating to the Immigration Act of 1988 and the contents of these regulations have then resulted in section 7-1 of the regulations relating to the applicable Immigration Act.

(94) Even though the wording of the regulations is not the most favourable, the meaning is clear. It is only unreasonable to direct a foreign national to internal flight if the return situation is such that the person concerned meets the criteria regarding strong humanitarian considerations in section 38 of the Immigration Act. It is the threshold here that is used in the decision pursuant to section 28 that shall also be decisive when considering whether internal flight is unreasonable. Conditions that do not concern the return situation, such as connection to Norway or that the material or humanitarian situation is better here in Norway than in the country of origin, shall not be of importance when assessing internal flight.

(95) The regulations are within the wording of section 28, subsection 8 in that they regulate further how the Act should be practised. The preparatory works of the Act include statements regarding aspects that should be of importance. I will not discuss to what extent these are binding on a legal basis and to what extent they express pure political views. The regulations concern the threshold and the further assessment topic, which it is clear the regulatory control power can regulate.

(96) Section 7-1 of the Immigration Regulations therefore has authority in the Act. The decision is therefore not invalid because UNE has used this as a basis in the unreasonableness assessment.

(97) *The question of the scope of the right of judicial review for "unreasonable" in section 28 (5).*

(98) The criterion in section 28, subsection 5 that the foreign national "can achieve effective protection", includes a requirement that internal flight must be accessible and safe. In this case, it has not been disputed that these criteria have been met or that the courts can review both the statutory interpretation and specific application of law for these criteria. Therefore, it is not disputed that the courts can fully review the human rights aspect of the decision. However, there is disagreement about whether the courts can review the application of law as regards the criterion that internal flight must not be unreasonable. The courts' judicial powers must be decided on the basis of an interpretation of each statutory provision, cf. the plenary judgment in Rt. 2012 page 1985 – child who has lived for a long time in Norway I – paragraph 142.

(99) The further assessment must be made on the basis of the nature of the right to be reviewed. As stressed in several places in the preparatory works, the provisions relating to internal flight are part of the protection of refugees. Thus, a foreign national only has the right to protection if he cannot obtain this in any part of his or her country of origin. When section 28, subsection 5 begins with "the right to be recognised as a refugee under the first paragraph shall not apply if the foreign national may obtain effective protection in other parts of his or her country of origin", this implies that the foreign national has no right to asylum, even if the criteria in subsection 1 and 2 on their own have been met. In my view, subsection 5 regulates a condition for asylum, which is that the foreign national cannot obtain protection - anywhere - in his or her country of origin. Therefore, it is not correct to characterise the provision relating to internal flight as an exception from the right of asylum.

(100) A foreign national does not have a legal position as an asylum seeker until his or her application for asylum has been approved, based on an overall assessment of section 28, subsection 1, cf. subsections two and five. Until then, he or she has no legal position that can be intervened in. An asylum application may be turned down both because the criteria pursuant to the first paragraph have not been met, and because there are grounds for directing the foreign national to internal flight pursuant to subsection 5. If return to the internal flight area is accessible in a safe way, it is not necessary to examine whether the conditions in section 28, subsection 1, litra a) and b) have been met.

(101) I will now discuss the nature of the condition "not.... unreasonable" in view of the legislative history and preparatory works to the Act.

(102) The provisions relating to asylum under the Immigration Act of 1988 only apply to refugees under the Refugee Convention. The Act contains no provision relating to internal flight. In NOU 2004: 20 page 122 the following is stated following an explanation of UNHCR's guidelines on internal flight:

> "**Neither in terms of the relevance assessment nor the reasonableness assessment is there any conflict of a principle nature between the recommendations provided by UNHCR and the starting points that apply to the assessment in Norwegian practice. However, each criterion has not been defined in the same clear way in Norwegian law. In Norwegian practice, the subject of assessment is not usually emphasised in any other way than by asking whether the asylum seeker can avoid persecution by taking up residence in another part of his or her country of origin, and whether this can be done without the applicant finding him or herself in a situation that would give grounds for residence pursuant to section 8, subsection 2 of the Immigration Act.**

(103) A convention refugee with the possibility for internal flight was therefore assessed on the basis of whether the conditions in the internal flight area would give grounds for residence on humanitarian grounds, cf. section 8, subsection 7.

(104) For foreign nationals who fall outside the definition of refugee pursuant to the Refugee Convention, but who still could not return to their country of origin without been subject to persecution, as is the case for the family in our case, no provision relating to internal flight applied. This only concerned an assessment of residence on humanitarian grounds pursuant to section 8, subsection 2. Whether it was reasonable for the foreign national to take up residence in other parts of his or her country of origin, was then part of the overall assessment.

(105) The reasonableness assessment pursuant to section 8, subsection 2 of the Immigration Act concerned free administrative discretion, cf. Rt. 2012 page 1985 – children who have been in Norway for a long period I – paragraph 146 with further reference to Rt. 2009 page 1261, paragraph 75 to 77. This includes both the "can" assessment and the contents of the phrase "strong humanitarian grounds" and "special connection to the realm". Whether it was a question of internal flight of refugees under the Refugee Convention or residence on humanitarian grounds for a foreign national, who could not return to his or her country of origin without the risk of persecution, the court was to make its reasonableness assessment according to the provisions for review of free administrative discretion.

(106) Adoption of section 21 d) of the Immigration Regulations to the Act of 1988 did not involve any change compared with what I have explained as regards refugees under the Refugee Convention. The purpose of the regulations was to establish that the threshold for the reasonableness assessment in connection with internal flight was to be the same for convention refugees as for foreign nationals with residence on humanitarian grounds.

(107) NOU 2004: 20 includes a proposal regarding enactment of internal flight as regards convention refugees, cf. section 39 no. 4 of the draft bill. In the comments on the provisions, the following is stated regarding the reasonableness assessment:

> "**When making this assessment, it shall be decided whether humanitarian grounds indicate that it would be inadvisable to direct the applicant to take up residence in the relevant internal flight area. Many of the same aspects would be relevant in this assessment of whether permission should be granted because strong reasonable grounds so indicate, cf. section 47, subsection 1 of the draft.**

(108) The reference to section 47, subsection 1 of the draft corresponds to section 38, subsection 1 of the Immigration Act regarding residence on humanitarian grounds.

(109) The internal flight provision was adopted in the Act of 2008. The provisions in section 28, subsection 5 were given almost identical wording as section 39 no. 4 of the draft. Initially in the Ministry's assessment on page 98 of the proposition, it is stated that:

> "**Reference is made to the Standing Committee's comments under section 6.2.6 on page 121 of the report and the special comments on the provision relating to internal flight.**"

(110) In my view, based on this, there is no doubt that the reasonableness assessment in section 28, subsection 5 of the Immigration Act should be such as was discussed in the NOU as applicable practice and as it was proposed in section 39 no. 4 of the draft, cf. my quotes from the comments on the provisions. The amendments the Ministry proposed compared with the draft - that pursuant to litra b) refugees should also be included under the internal flight provisions and that individual factors should also be included in the reasonableness assessment - does not change this. It is therefore natural to interpret the Act so that the character of free administrative discretion for the reasonableness assessment should be continued. The preparatory works to the Act do not give the impression that court's review of the reasonableness assessment should be practised differently than previously.

(111) In proposition to the Norwegian Odelsting no. 75 (2006-2007) page 99, talks a little about the trial basis:

> "**As mentioned, the Standing Committee has proposed that a residence permit shall only be granted pursuant to the general provision on strong humanitarian grounds if there are individual factors that make it unreasonable to direct the applicant to internal flight. However, the Ministry refers to what is stated in UNHCR's guidelines that when assessing the Refugee Convention, the applicant's**
>
> **'age, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects' shall be taking into consideration.**
>
> **The Ministry emphasises that the guidelines from UNHCR are not binding for Norwegian immigration authorities. However, the Ministry believes that the principle the referenced guidelines suggest here; to also attach importance to the applicant's individual circumstances, should be included in the reasonableness assessment. The topic of discretion will be whether being directed to internal flight is unreasonable or not, and then individual circumstances of significance for the return situation should then be considered.**"

(112) The Law Committee had advocated that only objective circumstances at the place of return should be taken into consideration, see NOU 2004: 20, page 397. In the quoted text, the Ministry endorses the "principle" to which the guidelines give voice. For my part I cannot see that there is anything other than this, that importance should be attached to individual considerations of the kind emphasised in the guidelines from UNHCR. That there should be a child-sensitive assessment is evident from age being pointed out as one of the considerations. The topic of discretion should be whether internal flight is unreasonable and all that has been said about this is that both general and individual circumstances of the return situation shall form the basis of the decision.

(113) In this case, the guidelines from UNHCR of 23 July 2003, paragraph 23 have been discussed. These guidelines refer to the following question as clarification of whether internal flight is unreasonable:

> **"Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?"**

(114) The question is then whether such a requirement follows from the Immigration Act of 2008. NOU 2004: 20 page 122, from which I have already quoted, the unreasonableness criterion has not been defined on the basis of the guidelines from UNHCR, but through reference to the rules on humanitarian grounds. The criteria set by UNHCR have not been discussed in the Ministry's proposal in the proposition other than stating that the principle relating to attaching importance to individual circumstances must be included in the assessment, cf. the quote from page 99 of the proposition. For the sake of order, I would like to remind that the reports from UNHCR are of a guiding and informative character, cf. Article 35 of the Refugee Convention and the protocol from 1967 Article II. As I read them, the preparatory works do not give any detailed guidance on the concept of "unreasonable".

(115) The wording of the Act and the legislative history point towards the unreasonable criterion being subject to free administrative discretion. As the topic of discretion is also vague, without appreciable guidance as regards the importance of various aspects of the assessment and completely without guidance as regards the threshold assessment, I believe that anything else would not be natural. This also concerns a topic that requires broad social assessments, which in my view the administration is better suited to deal with than the courts of law. In connection with this, I would also like to point out that when the matter concerns mass administration, the administration is more able to take care of similarity considerations than the courts of law. The courts of law cannot have as good insight in practice. If the courts are to review the exercise of discretion on its own, this could easily result in the practice becoming fragmented.

(116) In my view, we are in a social area that is central to the government's right to govern, i.e., a decision on who shall have access to the realm, over and above those who have a right to protection under international law. By its nature, this is primarily a political assessment. The assessments, which cannot only be done in individual cases, but primarily for overriding decisions - raise fundamental requirements for general societal assessments and priorities. Through section 7-1 of the regulations, the threshold, which may vary according to social factors and political assessments, has expressly been subject to free administrative discretion.

(117) My conclusion so far is that it is free administrative discretion to exercise the unreasonableness criterion in section 28, subsection 5, with the limitation in the right of judicial review by the courts that this entails.

(118) In practice, the courts of law can review both the interpretation and specific application of law, as long as international law - the Human Rights Conventions and the Refugee Convention, set out conditions. The question is how far do such conditions extend? If the protection for foreign nationals extends further than required by the conventions, is this a additional national condition that national authorities can regulate fully? I will therefore discuss further to what extent do the UN Convention on the Rights of the Child, ECHR and the Refugee Convention require that internal flight must not be unreasonable.

(119) The best interests of the child, cf. Article 3 of the UN Convention on the Rights of the Child, does not indicate full review, cf. everything I have discussed about the plenary judgments from 2012.

(120) In that case, UNE considered the question of refugee status first and then decided on the question of internal flight. In our case, it has been accepted that the family has a right to protection under section 28, subsection 1, litra b) of the Immigration Act. Reference is made to Article 3 of ECHR as grounds for this protection. ECtHR has concluded there is an opportunity to build on internal flight where this is accessible and safe, without any criteria requiring that this shall not be unreasonable, cf. ECtHR's judgment of 28 June 2011 *Sufi and Elmi vs. the United Kingdom*, paragraph 294 and the judgment of 9 April 2013, *H. and B. vs. the United Kingdom*, paragraph 91. According to this practice, the threshold for internal flight must be that this must not entail a real risk of a breach of the protection under Article 3 of ECHR, cf. the final paragraph where it is asked whether internal flight would "expose him to a real risk of being subjected to treatment proscribed by that provision". In my view, this expresses what can be called the human rights protection. Protection over and above this - i.e. that internal flight "is not unreasonable" - is related to the contents of the Act that go beyond what the protection under the Convention implies.

(121) To a certain extent, it has been argued that under the Refugee Convention there is also protection against internal flight that is unreasonable. I will therefore discuss what right of judicial review there is in relation to section 28, subsection 1, litra a).

(122) The status as a refugee under Article 1 A of the Refugee Convention concerns the relationship between states. The protection under the Convention for an individual foreign national lies in that the expulsion - included internal flight - requires that the area to which the person concerned is returned must be accessible and safe, cf. the "non-refoulment" provision in Article 33 no. no. 1 of the Refugee Convention. As a result of the nature of the Convention Law, the State has considerable freedom to regulate who shall be granted refugee status in Norway, cf. NOU 2004: 20 page 102 – 103 with further reference to Rt. 1991, page 586. This freedom must also include the question of how to decide when someone should be granted refugee status, including the question of whether discretion regarding the "unreasonable" criterion is free administrative discretion or judicial discretion. Therefore, conclusions cannot be drawn from Article 1 A of the Refugee Convention or use of the provisions in section 28, subsection 1 of the Immigration Act as a method of judicial review in Norwegian law.

(123) Our case concerns asylum pursuant to litra b), based on the protection pursuant to Article 3 of ECHR. This protection does not preclude a provision regarding referral to internal flight, where the only assumption is that this is accessible and safe.

(124) As I have discussed previously, it cannot then be argued that consideration for human rights calls for full review of the unreasonableness criterion.

(125) Based on this, I have concluded that the courts of law cannot review the actual judgment as regards whether internal flight is "unreasonable" other than pursuant to the provisions regarding review of free administrative discretion.

(126) *Burden of proof*

(127) The family has argued that UNE has used the wrong burden of proof when applying the unreasonableness criterion.

(128) UNE concluded that the parents in the case withheld information about the relatives they have in Afghanistan and where these live. As a result of this, UNE believed that the parents could not have the benefit of doubt, and that their view that they lack a network could not be of importance in the assessment of whether internal flight is reasonable.

(129) Based on general principles for assessment of evidence, the rule should be that an asylum seeker must demonstrate as most likely that the criteria for asylum have been met. However, in an asylum case in Rt. 2011, page 1481, the Supreme Court, based on the Norwegian legislation is such cases, has stated that when assessing whether there is a real risk of persecution, the asylum statement must be used, as long as it is reasonably probable, and the application has also helped to provide information in the case as far as is reasonable and possible.

(130) According to this principle, the State must substantiate that the place of internal flight is accessible and safe. However, there is not the same reason to reverse the burden of proof as regards the unreasonableness requirement. Here it is the asylum seeker who has the best basis for providing information, at least regarding personal and family matters. When, as in this case, it has also been found that the asylum seekers have not helped to provide information regarding these questions, but on the contrary have withheld information, it must be correct of UNE to not allow them to have the benefit of doubt.

(131) *Incorrect facts*

(132) As I have mentioned previously, it is the date of the decision that is decisive when reviewing the case. Under case law, it is possible to provide new evidence that shed lights on the actual situation at the time of the decision, cf. Rt. 2012 page 1985 – child who has lived for a long time in Norway I – paragraph 81, cf. Rt. 2007 page 1815, paragraph 34. I will not discuss the contents of this exception further.

(133) In this case, the State has had no objections to new information being submitted about D's condition and her treatment needs.

(134) The Committee discusses D's condition as follows:

> "**The Majority has noted the information that D was once briefly eparated from her father while they were in a park in Athens. What actually happened is not known, as D has not wanted to speak about it. The Majority finds, however, that the incident has been a traumatic experience for her. The Majority furthermore finds that it has been difficult for D to be separated from her mother for a period. The Majority also points to the presented information which, among other things, indicates that D has struggled with nightmares and a fear of being alone and of dark rooms. She also supposedly suffered a stress reaction when the family's application for asylum was denied by UDI.**
>
> **The Majority cannot see that the presented information about D's problems indicates that it is unreasonable to direct the family to seek protection by way of internal flight. In particular, the Majority points out that D will complete the return with her parents. It has not been documented that she needs medical / psychological treatment and she functions well in school and day care. It is understandable that D has a strong desire to**

> **remain in Norway, but this alone is not sufficient to indicate that a return is inadvisable or unreasonable.**"

(135) In her statement of Of 25 June 2014, Psychologist Elisabeth B. Hooper, who has treated D, has given the following conclusion:

> "**The diagnostic evaluation of D is based on her having been traumatised following an incident in Greece while she was fleeing, and the she has developed symptoms consistent with PTSD as a result of this. D has had problems talking about the incident. In a conversation on 7 April 2014, she explained that she was taken to a dark place by two men and that she was later returned.**
>
> **D has had persistent symptoms following the described incident. The symptoms involve nightmares and fear, she talks to the all and has been afraid of Afghan men and other situations that remind her of the incident in Greece. She has relived this episode in her nightmares. These symptoms are typical for PTSD. Her symptoms have varied with the decision regarding the family application for asylum and expulsion of a neighbour boy at the asylum centre, but they have persisted since the incident. As mentioned above, this variation does not imply that the diagnosed criteria are not deemed to be met.**"

(136) Psychologist Hooper also says that D requires treatment and that she also required treatment at the time of the decision.

(137) The information from Psychologist Hooper largely coincides with the grounds on which UNE has based its decision. The new evidence does not change to any appreciable extent - if this is used as a basis - the facts on which the decision has been based.

(138) According to UNE's guidelines on health-related matters, dated 11 January 2012, there is also a high threshold for when health considerations shall be decisive. Section 4.2.1 states the following:

> "**In practice, there must be a serious mental disorder for this alone to give grounds for residence in Norway.**
> …
> **In practice, less serious disorders such as mild and moderate depression, anxiety, obsessive-compulsive disorder and common forms of post-traumatic stress disorder (PTSD) on their own due not provide grounds for residence.**"

(139) Section 7 of the guidelines states that there is a lower threshold for children than for adults with similar illnesses.

(140) In view of the stringent requirements, any minor changes in the view of D's psychological state have clearly no bearing on the content of the decision on this point.

(141) UNE's decision is therefore also not invalid on this basis.

(142) *If D had been given the opportunity to speak directly to UNE*

(143) Before the appeal hearing, the family's lawyer requested that the oldest daughter, D, be allowed to make a statement at the appeal hearing. The chairman of the Immigration Appeals Board refused this on the grounds stated in the decision as follows:

> "**On 5 December 2012, Attorney Alv Stangeland made an oral request to the Immigration Appeals Board (UNE) to hear the appellant's daughter A [mistakenly written instead of D]. In a decision of 7 December 2012, the chairman of the**

> **Immigration Appeals Board stated that the child should not be heard due to her age. It was also pointed out that there was no reason to believe that hearing the child at the appeals hearing would be assumed to have relevance for the case.**"

(144) At the time of the appeal hearing in UNE, D still had a few days to go before she turned 6.

(145) The family have argued that it was a violation of the UN Convention on the Rights of the Child that D was not allowed to attend and give a statement at the appeal hearing.

(146) Article 12 of the UN Convention on the Rights of the Child reads as follows:

> "**1. The parties shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.**
>
> **2. For this purpose, the child in particular shall be provided the opportunity to be heard in any judicial and administrative proceedings that concern the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.**"

(147) Article 12 of the UN Convention on the Rights of the Child grants a child the right to be heard in judicial and administrative proceedings if the child is "capable of forming his or her own views." In the Convention it is the same whether the child is to be heard directly or through a representative or a separate body. In both cases, this shall take place in accordance with the procedural rules of national law.

(148) I cannot see that the general provision in Article 3 no. 1 regarding the best interests of the child, can affect the content of Article 12 no. 2, which is a specific and special provision for its area. However, the purpose of the provisions in Article 12 is of course to protect the rights of the child, among other things, after Article 13 has been met.

(149) The family have referred to the General Comments from the UN Committee on the Rights of the Child to support that the child had a right to be heard directly by the Immigration Appeals Board.

(150) The UN Committee on the Rights of the Child has been set up pursuant to Article 43 of the UN Convention on the Rights of the Child and in its own procedural rules has determined that it will issue General Comments, read more about this in Rt. 2009 page 1261, paragraph 33-39.

(151) Regarding the weight of the General Comments, I would like to point out was is stated in plenary judgment Rt. 2012 page 1985 – children who have been in Norway for a long period I – paragraph 136 with further reference to Rt. 2009 page 1261, paragraph 40-44. Paragraph 41 of the judgment of 2009 states the following:

> "**It is....clear that the committee states are generally not binding under international law.**"

(152) In paragraph 44, the first voting justice holds the following:

> "**...The decisive factor will still be how clearly it must be considered to express the supervisory bodies' understanding of the parties' obligations under the Conventions. In particular, it must be considered whether the statement must be seen as an interpretation statement, or more as advice on optimum practice in the Convention's area. Secondly, it must be considered whether the statement suits the relevant facts and jurisdiction. The latter is of particular important for general statements which are not related to individual cases or country reports and which therefore have not been subject to dialogue between the Committee and the affected state.**"

(153) In General Comment No. 12 (2009), paragraph 21, the UN Committee on the Rights of the Child states that the right to be heard shall apply notwithstanding the age and in paragraph 20 it is said that the states must assume that the child can express its own views, without the child having to prove this. In paragraph 35, the UN Committee on the Rights of the Child follows up by saying that the child has a choice:

> **"After the child has decided to be heard, he or she will have to decide how to be heard: 'either directly, or through a representative or appropriate body'. The Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings."**

(154) In my view, this must be deemed to be a statement from the UN Committee on the Rights of the Child about how the legal situation should develop. I cannot see that the view is anchored in the wording of the Convention. As the UN Committee on the Rights of the Child states later in General Comment No. 14 (2013), "the best interests of the child" is a complex and flexible term. I would like to quote the following from page 32:

> **"The concept of the child's best interests is complex and its content must be determined on a case-by-case basis. It is through the interpretation and implementation of article 3, paragraph 1, in line with the other provisions of the Convention, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof. Accordingly, the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child. For collective decisions —such as by the legislator —the best interests of children in general must be assessed and determined in light of the circumstances of the particular group and/or children in general. In both cases, assessment and determination should be carried out with full respect for the rights contained in the Convention and its Optional Protocols."**

(155) This is in accordance with the requirement that interpretation of a Convention shall be "in good faith" in Article 31 no. 1 of the Vienna Convention on the Law of Treaties.

(156) Following incorporation of the UN Convention on the Rights of the Child in Norwegian law, section 17 of the Public Administration Act reads as follows:

> "**The administrative body shall ensure that the case is clarified as thoroughly as possible before the decision is made. It shall ensure that minor parties are given the opportunity to express their views, if they are capable for forming their own views on what the case concerns. Importance shall be attached to the minor's views in accordance with their age and maturity.**"

(157) Proposition to the Norwegian Odelsting no. 45 (2002 - 2003) page 61 states the following regarding this provision:

> "**Section 17, subsection 1, new second sentence states that the administration shall ensure that a child who is a party in a case is given the opportunity to express his or her views, if the child is capable of forming his or her own views. There is no fixed aged limit for when this obligation is triggered. The public administration must consider specifically in relation to the nature of the case to what extent the child can be able to form his or her own views. For example, very young children could express their views on choice of technical aids for disability, while children rarely will have the expertise to comment on very technical / financial issues. The provision does not imply that the administrative body must always hear the child directly. This must also be adjusted to the nature of the decision, and the child's age and development. It will often be enough that the child's views are obtained via the person who is representing the child in the administrative case. If there is a conflict of interests between the child and the guardian, the administrative body has a greater challenge to obtain the views directly from the child or via another person than the guardian.**

(158) I will not discuss the Public Administration Act further. In immigration cases, the right of children to give their statement is regulated in section 17-3 of the Immigration Regulations, whose legal authority derives from section 81, subsection 2, of the Immigration Act. On its Proposition no. 75 to the Odelsting (2006–2007), pages 328–329, the Ministry discusses the special considerations and conflicting interests that apply if children are to be interviewed directly. The proposition reads:

> **"... in many asylum cases involving children over a certain age, separate interviews [will be] necessary. On the other hand, one must take great care so that the child in the asylum case does not end up in a high-pressure situation, whereby the child feels responsible if the family's applications are denied. One must emphasize that the purpose of the interview is to shed light on the child's own situation only, and not to determine whether the parents' grounds for seeking asylum are credible. Furthermore, conducting separate interviews with accompanying children will in many cases be clearly unnecessary, and some parents may not want their children to be interviewed. Similarly, in deportation cases involving one of the child's parents, the parents may have differing opinions in terms of whether the child should be interviewed, and it may be evident that a separate interview with the child is not necessary. In many deportation cases, the child's interests will, in practice, be presented in writing by one of the attorneys on the case, and the administration has taken these submissions into account.**

(159) In conclusion, the Ministry provides the following:

> **"In lieu of a general provision in the act regarding the child's right to be heard, the Ministry believes that the issue of children's right to be heard is better regulated by regulations and guidelines, and that said regulation must be adapted to the different types of case and application situations. Consequently, the Ministry proposes a special statutory provision for a regulatory framework, cf. section 81, subsection 2, of the Ministry's draft legislation."**

(160) Section 17-3 of the Immigration Regulations provides that children who have reached the age of seven, and younger children who are able to form their own point of view, shall be given the opportunity to be heard. At the time of adoption, the provision read as follows:

> **"Children who have reached the age of seven, and younger children who are able to form their own point of view, shall be informed and given the opportunity to be heard before a decision is made in cases concerning them under the Immigration Act.**
>
> **A child may be interviewed orally or in writing or through his/her parents, representative or others who are qualified to make a statement on the child's behalf.**

> **How the child is to be interviewed must be assessed in light of the nature of the case and the application situation. The Directorate of Immigration will make supplementary guidelines on how the child's right to be heard shall be implemented, duly adapted to the various types of case and application situation."**

(161) As I see it, there are no binding international precedents stipulating a different interpretation of the convention than the one expressed in section 17-3 of the Immigration Regulations. And pursuant to section 17-3, it falls to UNE to determine the manner in which to hear the child, "adapted to the various types of case and application situation".

(162) Section 104 of the Constitution was not yet adopted at the time UNE made its decision, and it consequently follows from Rt. 2015, p. 921, paragraph 67, that this constitutional provision does not apply to the present case. Nor do I see how this provision, if it were to apply, would have strengthened the children's position compared to their previous standing, cf. Report no. 186 to the Storting (2013–2014), p. 30.

(163) The chairman of the Immigration Appeals Board made the decision not to hear D's statement at the hearing, as evidenced by my quote from the decision.

(164) The primary purpose of the oral proceedings was to establish whether the parents' statements regarding their grounds for seeking asylum could be taken into account. The fact that D had health problems was not in dispute, nor was her desire to live in Norway. Both parents and an attorney were present for the proceedings. I do not see any conflicts of interest between D and her parents, and one must necessarily assume that both the parents and the attorney therefore represented the entire family. As such, D was provided with the opportunity to have her opinion heard in accordance with the law. In this situation, there are no grounds on which to object to the chairman's decision to not allow D to present her statement in person.

(165) Consequently, in my view, this point also fails as a potential basis on which to invalidate UNE's decision.

(166) *Question of insufficient justification provided in the decision, pursuant to section 28 pertaining to the child's best interest*

(167) I have taken into account that the courts may review UNE's decision pursuant to the provisions pertaining to discretion, and assessed the shortcomings otherwise claimed. In the following, I address the issue of potential shortcomings in the decision pursuant to section 28.

(168) Initially, I point out that section 7-1 of the Immigration Regulations must be taken into account in any assessment of whether internal flight is unreasonable. In UNE's decision, the legal basis for internal flight is summarized as follows:

> **"Pursuant to section 7-1 of the regulations, directing a party to seek protection by way of internal flight is only unreasonable if the situation upon return will be such that the person concerned meets the criteria for being granted a residence permit under section 38 of the Act. As such, it is only unreasonable to direct a party to seek protection by way of internal flight if the foreign national, given his or her situation upon return, would qualify for a residence permit under the current practice or section 38 of the Act. Other aspects not pertinent to the situation upon return, such as the party's connection to Norway, or the fact that the party would be materially or socially better off in Norway**

> **than in his or her country of origin, are not taken into account in an assessment of internal flight. Such aspects may instead be taken into account in a subsidiary assessment of residence on humanitarian grounds pursuant to section 38 of the Act. If the foreign national has no established connection with the internal flight area, this is not in itself sufficient for internal flight to be deemed unreasonable.**
>
> **The threshold for granting residence pursuant to section 38 of the Act shall be lower for children than for adults, cf. subsection 4. The Immigration Appeals Board has taken into account that the threshold for directing children to seek protection by way of internal flight is lower than for adults, cf. section 7-1, first sentence, of the Immigration Regulations."**

(169) The content of Article 3 of the Convention on the Rights of the Child has been discussed several times in Supreme Court decisions. The plenary decision in Rt. 2012, p. 1985 (Child who has lived for a long time in Norway I), involved the requirement to provide justification pursuant to section 38 of the Immigration Act, where the topic of assessment is different from the current discussion. This judgment, however, still offers certain direction for assessment pursuant to section 28. After a comprehensive review, the justice delivering the leading judgment provides a summary in paragraph 149, which reads:

> **"... that the courts may fully review the administrative body's interpretation of the law. In that considerations for the best interests of the child, including the child's connection to Norway, must be soundly assessed and weighed against any conflicting considerations, the decision must specify that considerations for the best interests of the child has been taken into account as a basic consideration. The courts may not review the specific balance of interests."**

(170) The requirement to provide justification has been addressed in recent decisions, specifically Rt. 2015, p. 93, and Rt. 2015, p. 155. These cases involved an expulsion order and an extradition order, respectively, and in both instances the courts have full jurisdiction to engage in judicial review. I will there fore not discuss these judgments in more detail.

(171) Section 17-1a of the Immigration Regulations establishes specific provisions for justification in decisions involving children. At the time of adoption, the provision read as follows:

> **"Decisions that affect children shall specify what assessments have been made of the child's situation, including how the best interests of the child have been given weight, unless this is deemed unnecessary."**

(172) The family has argued that it is not evident from UNE's decision what the best interests of the child are. In its introduction to the assessment of whether directing the family to seek protection by way of internal flight is unreasonable, the Immigration Appeals Board states:

> **"The threshold for granting residence pursuant to section 38 of the Act shall be lower for children than for adults, cf. subsection 4. The Immigration Appeals Board has taken into account that the threshold for directing children to seek protection by way of internal flight is lower than for adults, cf. section 7-1, first sentence, of the Immigration Regulations."**

(173) Consequently, UNE has taken into account the fact and emphasized that the threshold for directing a party to seek protection by way of internal flight is higher for children than for

adults. The assessment generally makes it clear that the case involves a family with children.

(174) Also, the Immigration Appeals Board specifically addressed several aspects relevant to the children. I quote from the decision:

> **"The majority cannot see that any evidence/documentation has been presented, indicating that the appellants' care-giving abilities have been diminished as a result of their various mental health issues. Nor are there any indications that they do not provide their children with adequate care. On the contrary, they appear to be good parents, who want the best for their children. As previously mentioned, the appellants will be able to seek medical treatment for their health issues in Kabul.**
>
> **The majority has noted the information that D was once briefly separated from her father while they were in a park in Athens. What actually happened is not known, as D has not wanted to speak about it. The majority finds, however, that the incident has been a traumatic experience for her. The majority furthermore finds that it has been difficult for D to be separated from her mother for a period. The majority also points to the presented information, which, among other things, indicates that D has struggled with nightmares and a fear of being alone and of dark rooms, and that she supposedly suffered a stress reaction when the family's application for asylum was denied by UDI.**
>
> **The majority cannot see that the presented information about D's problems indicates that it is unreasonable to direct the family to seek protection by way of internal flight. In particular, the majority points out that D will complete the return with her parents. It has not been documented that she needs medical/psychological treatment, and she functions well in school and day care. It is understandable that D has a strong desire to remain in Norway, but this alone is not sufficient to indicate that a return is inadvisable or unreasonable.**
>
> **The majority furthermore points out that the children will have the right to attend school in Kabul. There are no special remarks regarding C's situation.**
>
> **The majority has taken into account that the children have never lived in Afghanistan, that they are girls, that the family will soon have an infant to care for, and that the infant mortality rate in the country is high. The majority does not see, however, how these circumstances are relevant for the assessment of whether *internal flight* is unreasonable. Under these circumstances, the family's situation would be the same in Qarabagh/Ghazni as in city of Kabul, with the exception that Kabul's health services are better developed than in the rest of the country.**
>
> **Having taken this into account, the majority fails to see how considerations for the best interests of the children indicate that internal flight is unreasonable. Nor can the majority see any other circumstances by which the family necessarily must be deemed to be particularly vulnerable."**

(175) The family has furthermore argued that C's circumstances have not been sufficiently assessed. C was two years old at the time of the decision. It is evident from the decision that UNE did take C's circumstances into account. Some of the discussion covers both girls. Then, the Immigration Appeals Board states, as evidenced by my quote above, that there were no special remarks regarding C's situation.

(176) The family did not point out any specific factors in C's situation, which are different from the circumstances that would apply to all young girls in Kabul.

(177) In its assessment, the Immigration Appeals Board concluded as follows:

> **"Having taken this into account, the majority fails to see how considerations for the best interests of the children indicate that internal flight is unreasonable."**

(178) In my view, the justification provided pursuant to section 28 are comprehensive and thorough. UNE discussed the aspects pertaining to the children, as pointed out by the family. The incident in Athens was discussed, as was the concerns for D's mental health. The Immigrant Appeals Board has taken into account that she has a strong desire to remain in Norway.

(179) In my view, the decision offers sufficient substantiation for a sound and comprehensive assessment of the children's interests given the subject matter under review. Nor can there be any doubt that consideration for the best interests of the children has been taken into account as a basic consideration.

(180) As a result, I have concluded that the justification provided for the decision, pursuant to section 28, subsection 5, was not flawed.

(181) *Question of insufficient justification provided in the decision, pursuant to section 38 pertaining to the child's best interest*

(182) The family has argued that UNE's decision to deny the application for residence on grounds of strong humanitarian considerations or special connections to the realm, cf. section 38 of the Immigration Act, is invalid due to insufficient justification. The question is whether the justification given is sufficient in terms of considerations for the best interests of the child, cf. section 38, subsection 3, of the Immigration Act, which reads:

> **"In cases concerning children, the best interests of the child shall be a fundamental consideration. Children may be granted a residence permit under the first paragraph even if the situation is not so serious that a residence permit would have been granted to an adult."**

(183) Above, I already quoted Rt. 2012, p. 1985 (Children who have lived for a long time in Norway I), paragraph 149, in which the requirements to provide justification is discussed.

(184) Section 17-1 of the Immigration Regulations was amended by regulation on 8 December 2014. I interpret the regulatory amendment as an update, as a consequence of, inter alia, the plenary judgments of Rt. 2012, p. 1985 (Children who have lived for a long time in Norway I) and Rt. 2012, p. 2039 (Children who have lived for a long time in Norway II), where the application of General Comments no. 5 (2003) and no. 12 (2009) from the UN Committee on the Rights of the Child was a central issue.

(185) The family has referred to statements by the UN Committee on the Rights of the Child in General Comment no. 14 (2013), issued on 29 May 2013, which they argue go further in expressly recommending that the best interests of the child must be assessed and taken into account than do the previous General Comments. Item 6, litra c) of General Comment No. 14 establishes that in decisions involving children, the decision-making process must include an evaluation of "the positive impact (positive or negative) of the decision on the child or children concerned". Furthermore, the provision establishes that the decision must explain how "the child's interests have been weighed against other considerations". I find it difficult to determine whether this is an expression of the Committee's interpretation of prevailing law, or an objective. In any event, I do not

believe the basis for these statements is sufficient to change the conclusions from the plenary judgments of 2012.

(186) In reviewing the justification provided, one must take into account the administrative practice in immigration cases pursuant to section 38. In this regard, I refer to a report published by UNE on 17 June 2013, entitled "Children in Flight - One Year Later". This report established that the current practice

> **"...in general premises that families with children, who have lived in Norway a minimum of 4.5 years and attended school in Norway for 1 year, have a connection to the realm that may constitute strong humanitarian considerations pursuant to section 38 of the Act."**

(187) What UNE in reality is expressing here, is how one "in general" weighs considerations for the best interests of the child against considerations of immigration policy. Consequently, for a family with children to be granted residence despite having stayed in the realm and attended school here for a shorter duration than the one specified, special circumstances must be present, lending greater weight to considerations for the best interests of the child.

(188) In terms of the practice of granting residence on grounds of mental disorders, I refer to my previous statements that granting residence pursuant to section 38 is normally reserved for serious mental disorders.

(189) On this basis and background, I have reviewed the decision to deny the family residence pursuant to section 38. I find it logical to present UNE's conclusions to this question in their entirety:

> **"When the conditions for granting asylum have not been met, UNE must, pursuant to section 28, subsection 7, of the Act, consider whether the applicant should be granted residence pursuant to section 38 of the Act, i.e. "residence on grounds of humanitarian considerations". Under and pursuant to this provision, residence may be granted when strong humanitarian considerations so indicate, or when the foreign national has a particular connection to the realm. To determine whether there are strong humanitarian considerations, an overall assessment shall be made of the case, cf. subsection 2. In cases concerning children, the best interests of the child shall be a fundamental consideration, cf. section 38, subsection 2, of the Act and Article 3 of the Convention on the Rights of the Child. Children may be granted a residence permit even if the situation is not so serious that a residence permit would have been granted to an adult.**
>
> **In the assessment, importance may be attached to considerations relating to immigration control, including possible consequences for the number of applications based on similar grounds, social consequences, the need for control, and respect for the other provisions of the Act, cf. section 38, subsection 4.**
>
> **The majority does not find that strong humanitarian considerations are present in this case, and does not see any basis on which to grant residence on such grounds. The minority disagrees. Both the majority and the minority refer to their votes in the assessment of the question of internal flight. The majority adds that the children's connection to the realm in this case is not sufficiently strong to justify attaching particular importance to this aspect in the assessment of whether strong humanitarian considerations are present, cf. section 8-5 of the Immigration Regulations. Also, the majority points out that considerations relating to immigration control advise against granting residence, cf. section 38, subsection 4, litras a) and b), of the Act.**

The appellants do not have any particular connection to the realm indicating that residence should be granted. Residency as asylum seekers does not normally serve as a basis for developing a particular connection. There are no grounds on which to apply a different interpretation in this case."

(190) The introductory paragraph of the decision is equivalent, in terms of both form and content, to the conclusions of the Supreme Court in Rt. 2012, p. 1985 (Children who have lived for a long time in Norway I), paragraph 154, and Rt. 2012, p. 2039 (Children who have lived for a long time in Norway II), paragraph 46, regarding judicial usage. The present case, as opposed to the two cases from 2012, specifically mentions that considerations for the best interests of the child shall be a fundamental consideration, and that the threshold [for granting residence] shall be lower for children than for adults.

(191) The Immigration Appeals Board's decision does not specify what is in the child's best interests. The respondents have, with reference to Rt. 2012, p. 1985 (Children who have lived for a long time in Norway I), paragraph 149, argued that the decision thus does not meet the condition that "the decision must specify that considerations for the best interests of the child has been taken into account as a basic consideration".

(192) I do not share this view. The specific review in Rt. 2012, p. 1985 (Children who have lived for a long time in Norway I), shows that it is sufficient for this consideration to be demonstrated by an interpretation of the decision. This conclusion was expressed by the Supreme Court's majority opinion, but it is particularly evident in the minority opinion, cf. paragraph 205.

(193) The Immigration Appeals Board did not expressly state what would be in the child's best interests in Rt. 2012, p. 2039 (Children who have lived for a long time in Norway II) either. In paragraph 48, the justice delivering the leading judgment states that he finds that "the Immigration Appeals Board clearly has concluded that it would be in C's best interests if she were to be allowed to remain in the realm". The minority opinion clearly shares the same view, cf. paragraph 109.

(194) The determining factor must therefore be whether one, following a specific assessment of the decision as a whole, can determine what is in the child's best interests, and whether this consideration has been taken into account in accordance with the principles I have described above.

(195) In the present case there can be no doubt, even if it is not expressly stated, that it would be in the child's best interests to remain in Norway. The family's financial and humanitarian circumstances are obviously much better in Norway than they are in Kabul. This premise is so self-evident that it need not be expressed in the decision. Indirectly, the Immigration Appeals Board has emphasised this aspect by pointing out that considerations relating to immigration control advise against granting residence.

(196) In its specific assessment of the children, UNE's majority opinion simply referred to the assessment of the children's circumstances pursuant to section 28, subsection 5. This assessment pertained to the question of whether directing the children to seek protection by way of internal flight would be unreasonable, given the situation that awaited them in Kabul.

(197) In its discussion pursuant to section 28, subsection 5, the Immigration Appeals Board addressed several considerations relevant to the children, which I accounted for in connection with the discussion of the grounds for that discussion. These points must be interpreted as part of the basis for the Immigration Appeals Board's assessment pursuant to section 38.

(198) The Immigration Appeals Board added that the family did not have a particular attachment to the realm, and thus did not qualify for residence on such grounds. This decision must be seen in light of the condition that, for children, having lived in the realm for four and a half years and having attended school here for a year, "in general" would be required for being granted residence. At the time of the decision, the family had lived in Norway for approx. one and a half years, which fell so far short of this condition that further justification was not necessary for the court to review the decision in this regard. Nor did the children suffer from any medical problems that would serve as a basis on which to further justify the decision. In my view, one should be able to simplify the process of providing justification in cases where residence on grounds of humanitarian considerations clearly will not be granted in accordance with the current practice.

(199) While the presentation in this case is not exemplary, the decision as a whole demonstrates that the Immigration Appeals Board carried out a sufficiently comprehensive assessment in its decision regarding residence.

(200) At the same time, the justification for the decision must be seen in light of the matters in dispute. The minutes from the Immigration Appeals Board hearing shows that the primary topic of discussion was the parents' grounds for seeking asylum. The parents' connections to Kabul through family members and other social networks were also addressed. In light of the family's relatively short period of residence in the country, approx. one third of the period required for a residence permit, as well as their health problems falling well below the threshold for granting residence, the question of residence on grounds of humanitarian considerations would necessarily not have been a central topic of discussion. As such, the justification for the decision must be viewed differently than if residence on grounds of humanitarian considerations had been the salient point of discussion.

(201) Overall, the decision shows that UNE has applied the correct interpretation of the condition to consider the child's best interests, and of the particular importance to attach to this aspect. The assessment is sufficiently comprehensive for other aspects as well. The courts do not have jurisdiction to review the balance of conflicting considerations, outside of what follows from general provisions concerning the review of discretionary decisions.

(202) The justification provided is, in my opinion, sufficient to review the decision. The weaknesses in the decision's composition have not, in my view, had any decisive effect on the content of the decision, cf. section 41 of the Public Administration Act.

(203) Consequently, my position is that the decision made pursuant to section 38 cannot be invalidated as a consequence of insufficient justification.

(204) *Conclusion*

(205) UNE's decisions of 14 January 2013 and 8 February 2013 are valid, and the Supreme Court finds in favour of the State of Norway, represented by UNE.

(206) The appeal has been successful, but the State of Norway has not claimed costs of action.

(207) I vote for the following

JUDGMENT:

The Supreme Court finds in favour of the State of Norway, represented by UNE.

(208) Justice **Bergsjø:** I have concluded that the decision concerning residence on grounds of humanitarian considerations must be deemed invalid, but that the State of Norway's appeal is successful in terms of the decision concerning asylum.

(209) In line with the justice delivering the leading judgment, I believe UNE's decision is not flawed in its *application of the law*. Consequently, I agree that any connection to Norway and the family's situation here cannot be included in an assessment concerning internal flight pursuant to section 28, subsection 5, of the Immigration Act. In line with the leading justice, I furthermore believe that section 7-1 of the Immigration Regulations has sufficient authorisation in section 28, subsection 8, of the Act, and that UNE's decision thus is based on correct principles concerning the burden of proof.

(210) I agree with the leading justice that the circumstances at the time of the decision must be taken into account during the review. In line with the leading justice, I furthermore agree that the decision is not invalid as a consequence of UNE taking into account the *wrong facts*, and that the Immigration Appeals Board failing to allow D to give her statement to the board did not constitute a *procedural error*.

(211) My opinion differs, however, from that of the leading justice on whether the *jurisdiction of the courts to engage in judicial review* extends to the question of whether internal flight is unreasonable, cf. section 28, subsection 5, of the Immigration Act. In my view, this question concerns administrative discretion that, in principle, may be fully reviewed. One should, however, show restraint in such review. In my view, it would not be unreasonable to direct the family to seek protection by way of internal flight in this case, and UNE's decision concerning asylum is valid. Contrary to the leading justice, I am of the opinion that the decision is invalid as a consequence of *insufficient justification provided for the assessment of residence on grounds of humanitarian considerations*, cf. section 38 of the Immigration Act.

(212) In the following, I first address the jurisdiction to engage in judicial review. Then, I assess the validity of the decision concerning asylum, before addressing the part of the decision concerning residence on grounds of humanitarian considerations. Here, I first discuss the requirements established for justification, and then I assess UNE's decision specifically.

(213) *Jurisdiction of courts to engage in judicial review of assessments concerning unreasonability pursuant to section 28, subsection 5, of the Immigration Act*

(214) The respondents are recognised as refugees pursuant to section 28, subsection 1, litra b), of the Immigration Act. UNE did, however, conclude that the internal flight exception, as established by subsection 5 of the provision, does apply, in that it is not unreasonable to direct the family to seek protection in Kabul. The question is how far the jurisdiction of

the courts to engage in judicial review extends in this assessment of unreasonability; is the assessment covered by free administrative discretion, or may the assessment be fully reviewed?

(215) In my view, this problem must be analysed in more detail. As previously mentioned, I agree that section 7-1 of the Immigration Regulations has sufficient statutory authority. From this it follows that the Ministry had the authority to tie the threshold applied in the assessment of unreasonability to the criterion of "strong humanitarian considerations", as provided by section 38 of the Immigration Act. Now, the question of how far this statutory authority extends, is a question of how much leeway the *Ministry* has in making this type of regulation. The problem in the present case is how far the courts may go in reviewing whether *UNE* has applied the provisions of the Act and Regulations correctly. There is no conflict between the authority to regulate the condition concerning unreasonability on the one hand and a full judicial review of UNE's decision on the other.

(216) The leading justice addressed whether our obligations under international law also cover the condition concerning unreasonability. In my view, this is not a relevant concern. If such international obligations exist in an area of law, it speaks in favour of full jurisdiction. On the other hand, the absence of international obligations does not indicate free administrative discretion. In such situations, the extent of the jurisdiction to engage in judicial review is limited by the arrangement adopted by the legislator.

(217) In general, a foreign national shall, upon application, be recognised as a refugee if the conditions of section 28, subsection 1, litra a) or b), of the Immigration Act have been satisfied. Refugee status entitles the individual to a residence permit pursuant to subsection 2 of the provision. The right to be recognised as a refugee does not apply, however, if the foreign national can be directed to seek protection by way of internal flight. I refer to section 28, subsection 5, which reads:

> **"The right to be recognised as a refugee under the first paragraph shall not apply if the foreign national may obtain effective protection in other parts of his or her country of origin than the area from which the applicant has fled, and it is not unreasonable to direct the applicant to seek protection in those parts of his or her country of origin."**

(218) This provision refers to the right to be recognised as a refugee "under the first paragraph". The right thus applies regardless of whether the need for protection follows from litra a) or b). First, the provision establishes a condition of relevance, which specifies that the area where the individual may be directed seek protection by way of internal flight must be safe and accessible to him or her. Second, subsection 5 also establishes a condition of reasonability.

(219) Before I address the jurisdiction of the courts to engage in judicial review of the application of the unreasonability condition, I point out that foreign nationals may also be granted residence on grounds of humanitarian considerations pursuant to section 38 of the Immigration Act. The leading justice quoted subsections 1–4. For context, I would like to repeat subsection 1, which reads:

> **"A residence permit may be granted even if the other conditions laid down in the Act are not satisfied, provided there are strong humanitarian considerations or the foreign national has a particular connection with the realm."**

(220) Subsection 2 establishes that an overall assessment shall be made of the case to determine whether "strong humanitarian considerations" are present. The assessment criteria provided are distinctly discretionary in nature. Subsection 3 establishes that the best interests of the child shall be a fundamental consideration, and that children may be granted a residence permit even if the situation is not so serious that a residence permit would have been granted to an adult. Subsection 4 then reads:

> **"In the assessment of whether to grant a permit, importance may be attached to considerations relating to immigration control, including**
>
> **a) possible consequences for the number of applications based on similar grounds,**
>
> **b) social consequences,**
>
> **c) the need for control, and**
>
> **d) respect for the other provisions of the Act."**

(221) The assessments required by section 38 may only be reviewed pursuant to the provisions that apply to so-called free administrative discretion, cf., inter alia, Rt. 2008, p. 681, paragraph 46, and Rt. 2012, p. 1985 (Children who have lived for a long time in Norway I), paragraph 142.

(222) On this basis, I address the question of judicial review raised by the present case. My discussion is based on Rt. 1995, p. 1427, the so-called Nature Conservation judgment. On page 1436, the justice delivering the third opinion expressed the following on behalf of the majority opinion:

> **"If the statutory conditions for an administrative decision have been satisfied, the courts should have jurisdiction to fully review said decision, provided there are no clear indications to the contrary."**

(223) I also refer to Rt. 2007, p. 257. This decision concerns the interpretation of section 7 of the Planning and Building Act in force at the time, which provided that exemptions from the planning provisions could be granted when "special circumstances" so indicated. On the jurisdiction to engage in judicial review, the leading justice stated the following in paragraph 40, concerning the basis for the assessment:

> **"When the legislator has established a condition for granting exemptions, one may naturally assume that this condition is a material limitation in jurisdiction, which may be reviewed by the courts, in other words a discretionary application of the law.**

(224) The provision on internal flight in section 28, subsection 5, establishes statutory conditions that apply to the administrative decision. The conclusion that it would not be unreasonable to direct the foreign national to seek protection by way of internal flight, is a condition for withholding the rights that generally follow from section 28, subsections 1 and 2. In my view, this condition represents a material limitation in jurisdiction, which would normally be subject to full judicial review. The general principle of full judicial review thus normally applies to any and all applications of the provision. Exemptions require specific justification.

(225) A limited jurisdiction to engage in judicial review could follow from *an interpretation of the jurisdictional basis*, cf., inter alia, Rt. 2012, p. 1985 (Children who have lived for a long time in Norway I), paragraph 142, and HR-2015-2252-A, paragraph 30. Particular importance shall be attached to the nature of the topic of assessment. This follows from the Protection of nature judgment, but also from Rt. 2012, p. 18. In paragraph 41, the leading justice states:

> **"The wording of subsection 1 establishes a number of discretionary topics, where the specific assessment must be carried out on the basis of professional and political discretion. It follows from, inter alia, Rt. 2000, p. 1056 (Gausi), on page 1063, that the courts in such cases may review the administrative body's general interpretation, but not the specific application of the law in the form of the discretion that has been exercised."**

(226) Another established starting point is that the courts do have jurisdiction to review the specific subsumption in cases concerning our *human rights obligations*. On this basis, it has been established that the courts do have full jurisdiction to review whether the conditions of section 28, subsection 1, litras a) and b) have been satisfied. On the same grounds, the assessment of relevance pursuant to section 28, subsection 5, is a discretionary decision that is subject to full judicial review. Consequently, there is no limitation in the jurisdiction of the courts to review whether the internal flight alternative is safe and accessible.

(227) In my view, the jurisdiction of the courts to engage in full judicial review follows from the *wording and context* of the Act. First, I refer to the fact that section 28 is part of Chapter 4, entitled "Protection". This title serves as an indication that the chapter regulates questions concerning rights. In comparison, section 38, which is subject to free administrative discretion, is part of Chapter 5, concerning rights of residence in the realm. Listing the sections under different chapters is indication that the nature of the sections is different.

(228) Section 28, subsection 1, establishes that a foreign national "shall" be recognised as a refugee, provided the conditions in litras a) and b) have been satisfied. Again, a comparison with section 38 is telling. According to this section, a residence permit "may" be granted if strong humanitarian considerations so indicate, or if the foreign national has a particular connection with the realm. This use of "may" and "shall" usually indicates either free administrative discretion or discretionary application of the law, cf. HR-2015-2252-A, paragraph 33. This issue was addressed in paragraph 142 of the judgment concerning children with long residence I, where the leading justice states:

> **"Section 38, subsection 1, of the Immigration Act is a "may" provision, under which the authorities may choose to grant residence on grounds of humanitarian considerations when strong humanitarian considerations are present. Unless Norway's international obligations stipulate otherwise, no individual shall have the right to be granted residence in Norway under this provision. Consequently, the wording is indication that any discretion exercised pursuant to this provision falls under the category of 'free administrative discretion'."**

(229) Section 38 furthermore establishes a number of assessment criteria of a distinct discretionary and political nature: Subsection 4, for example, emphasises considerations related to immigration control. In comparison, the wording of section 28, subsection 1, seen in light of subsection 2, is a provision concerning rights. As previously discussed,

the courts may fully review whether the conditions of litra a) or b) have been met, and this premise is not in dispute.

(230) In my view, this establishes a central premise for the assessment of whether the unreasonability criterion, as provided by subsection 5, is subject to free administrative discretion. The internal flight provision does not stand alone; it is part of the assessment of the need for protection, cf. Proposition to the Odelsting no. 75 (2006–2007), p. 99. One clear signal in this regard, is the statement made by UNHCR in its guidelines, issued on 23 July 2003: "[T]he concept of an internal flight or relocation alternative is not a stand-alone principle of refugee law." I also refer to UDI's memorandum on practices and procedures, dated 19 December 2014, which establishes that an internal flight assessment "is part of the overall assessment of whether an applicant is entitled to protection (asylum)...". Subsection 5 is a systematic exemption from subsection 1, which is a provision on rights. I struggle to find any logic in, or relevant justification for, any claim that the grounds for asylum is subject to full judicial review, whereas the exemption regarding internal flight is not.

(231) Also, as previously mentioned, subsection 5 provides that the internal flight alternative must be safe, accessible and reasonable. Assessments into the first two conditions are subject to full judicial review. Given the context established by section 28, I cannot see how the condition of unreasonability is any different.

(232) To be fair, one could argue that the term "unreasonable", linguistically speaking, indicates a discretionary decision. It does, however, point to a legal—and not administrative—standard. For that reason alone, the discretionary aspect cannot be a determining factor. Also, while the term does indicate a certain level of discretion, it does not prevent the provision from constituting a limitation of jurisdiction. As previously established, such material limitations in jurisdiction are subject to full judicial review. The Supreme Court's decision in HR-2015-2252-A is highly indicative in this regard. In paragraph 31, the leading justice states:

> **"The term 'special circumstances' is, in itself, general and distinctly discretionary in nature, and it offers little guidance for the content of a potential judicial review. However, the term is presented as a condition for when the administrative body has jurisdiction, and conditions of this nature would normally be regarded as a limitation of jurisdiction, which is subject to judicial review by the courts, ..."**

(233) My conclusion so far is that the wording of the Act and the context of the provisions clearly demonstrate that the courts have full jurisdiction to engage in judicial review of assessments into the unreasonability condition established by section 28, subsection 5.

(234) The question is whether another solution can be derived from the fact that section 7-1 of the Immigration Regulations refers to section 38 of the Act. In my view, this is not the case. As taken into account by the leading justice above, this reference cannot be interpreted as covering all aspects of section 38; it is limited to the criterion of "strong humanitarian considerations". This follows from the Ministry's invitation to submit comments of 19 November 2008. The jurisdiction to engage in judicial review is, as previously mentioned, derived from the jurisdictional basis, in this case section 28, subsection 5, of the Immigration Act. Jurisdiction is dependent on the legislator's premises. While the statutory authority derived from section 28, subsection 7 does give the Ministry leeway to regulate this issue, it does not change the system of judicial review

established by the legislator. Furthermore, section 7-1 of the Immigration Regulations alludes to a language of rights, in that it refers to the "conditions for a residence permit". Consequently, the wording of the provision does not give any clear indications in favour of limited jurisdiction.

(235) I have found that the Act's *history and preparatory works* lends support to my view. In its argumentation, the State of Norway heavily emphasised the state of the law prior to the adoption of the Immigration Act of 2008. As previously mentioned by the leading justice, there were no codified regulations concerning internal flight in Norwegian law. It was possible to direct applicants to seek protection by way of internal flight within the framework of our international obligations. Residence based on an assessment of reasonability could be granted pursuant to the provisions concerning residence on grounds of humanitarian considerations, cf. section 8, subsection 2, of the Immigration Act (1988). This limited judicial review, cf., inter alia, Rt. 2008, p. 681, paragraph 46.

(236) In my view, this cannot be used to draw any conclusions concerning the scope of judicial review today. I point out that in its Official Norwegian Report (NOU) 2004:20, the Committee, broadly speaking, recommended a continuation of the state of the law at the time. It proposed an internal flight exemption for convention refugees in section 39, subsection 4, of the draft legislation. For other asylum seekers, protection would be contingent upon their persecution throughout their entire country of origin, cf. p. 394 of the report. If returning them to a different part of the country was deemed unreasonable, they could, pursuant to the draft legislation, apply for residence on grounds of humanitarian considerations.

(237) The Ministry wanted a different solution, however, and expressly distanced itself from the Committee's proposal. Proposition to the Odelsting no. 75 (2006–2007), p. 98, reads as follows:

> **"The Ministry cannot see why the provisions regarding internal flight should not also apply to situations where there is a risk of losing one's life or being subjected to inhumane treatment for reasons other than the ones listed in the Refugee Convention, cf. section 28, subsection 1, litra b), and it proposes that the same provisions apply in these situations as well. The Ministry proposes that the provision be moved from the Committee's proposed section 39 (equivalent to section 30 in the Ministry's draft legislation) to section 28 of the Ministry's draft legislation."**

(238) The Standing Committee on Local Government and Public Administration supported the Ministry's draft legislation in its Report to the Odelsting no. 42 (2007–2008). The legislator purposely deviated from the previous arrangement in a conscious effort to effect change. The internal flight provision was subsumed under the protection clause of section 28, and made to apply to cases under both litra a) and litra b). Consequently, the former state of the law cannot be used to lend support to the claim that the assessment of unreasonability is subject to free administrative discretion. On the contrary, the Act's history argues for the opposite.

(239) Moreover, the preparatory works to the Act do not, in my view, show any indication that the judicial review of the assessment of unreasonability, as established by section 28, subsection 5, was intended to be limited. In this regard, I refer to the unequivocal expression that assessments into granting residence on grounds of humanitarian considerations shall be subject to free administrative discretion, cf. Proposition to the

Odelsting no. 75 (206–2007), p. 160. If the Ministry had intended for the same to apply to assessments of unreasonability pursuant to section 28, subsection 5, it would be natural to include a statement to this effect.

(240) The discussion of assessment topics pursuant to the two provisions also indicate a difference between the two in the right of courts to engage in judicial review. On p. 152, the Ministry states the following, inter alia, concerning residence on grounds of humanitarian considerations:

> **"The threshold for granting residence on grounds of humanitarian considerations clearly has a political aspect, and will affect total immigration to the realm.**
>
> **The degree to which practices can be controlled through legislation is, however, limited. Legislators emphasised this in the preparation of the current legislation. On the one hand, the exemption provision cannot foreclose the possibility of attaching decisive importance to individual circumstances following a specific and discretionary assessment. On the other hand, the provision cannot be so broad that it becomes legally binding; any considerations indicative of granting residence must be weighed against considerations relating to immigration control."**

(241) As an extension of this, the Ministry stated that other countries have also "needed to implement wide discretionary regulations". Moreover, the Ministry emphasises that cases and assessments are complex, and repeats the need to weigh individual considerations against considerations related to immigration control.

(242) The discussion concerning the internal flight provision in section 28, subsection 5, however, stands in stark contrast to this. The Ministry makes no references to political considerations or distinctly discretionary assessments. On the contrary, its motives appear to be borne out of a philosophy of rights. Proposition to the Norwegian Odelsting no. 75 (2006–2007), p. 98, reads as follows:

> **"The Ministry notes that the right to international protection is subsidiary in relation to the possibility of protection in the country of origin. Individuals who can find the protection they need by taking up residence in another part or area of their country of origin than the one in which they risk persecution, do generally not qualify for protection in Norway. Considerations concerning protection of the law and equal treatment, however, demand that certain criteria be established for the assessment of whether the applicant can be directed to seek protection by way of internal flight. The Ministry agrees with the Committee that the exemption from the right to protection, as represented by the principle of internal flight, ought to be incorporated into the Act."**

(243) These statements clearly lend support to the position that discretion exercised in assessments of the internal flight alternative is subject to full judicial review—even assessments of whether directing an applicant to internal flight would be unreasonable. Assessments are limited to the circumstances in the internal flight area. The Ministry do not invite a broad weighing of interests or assessments of a political nature; it emphasises protection of the law for the individual. In my view, it is important to note that there is no room for considerations related to immigration control in applying section 28, subsection 5, to the individual case.

(244) I have found that Rt. 1975, p. 603, the so-called Swingball judgment, lends further support to my view. This case concerned jurisdiction to review the Norwegian Industrial Property Office's decision of whether the conditions of the Patents Act that the invention

must be new and represent an inventive step, had been met. On p. 606, the leading justice stated:

> **"Moreover, I point out that the discretionary assessment exercised by the patent authorities pursuant to section 2 of the Act has to be characterised as a discretion of subsumption In each individual case, the Act does not allow any room for considerations of suitability: Provided that the conditions of the invention being new and representing an inventive step have been satisfied, the applicant is "entitled" to a patent, cf. section 1. As previously mentioned, I have concluded that this discretion is subject to judicial review."**

(245) Similarly, section 28 of the Immigration Act does not allow for considerations of suitability. Moreover, if the conditions of subsection 5 have not been met, it triggers rights for the foreign national pursuant to subsections 1 and 2.

(246) In conclusion, neither the wording of the Act nor its the preparatory works contain any indication that judicial review is limited as regards the condition of unreasonability. Existing precedent seems to favour unlimited judicial review, and the nature of the assessment topic does not indicate any restrictions. Given the above, I have concluded that this type of discretion generally is subject to full judicial review.

(247) There is, however, good reason to show restraint in reviewing whether internal flight would be an unreasonable alternative. In the Swingball judgment, the Supreme Court justified its restraint by referring to the Property Office's unique knowledge of the field and broad range of experiences. Similarly, UNE has heard a large number of cases and developed considerable experience and expertise, not least in terms of social and geographical issues. This enables UNE to assess each individual case in context, ensuring equal treatment. The courts, however, only hear individual cases and thus do not have the same ability to see the big picture. In my view, this, in addition to considerations for maintaining a rational immigration administration, indicates restraint in reviewing UNE's decisions. In a perspective of ensuring protection of the law, the most important factor is to ensure a sound administrative procedure. Consequently, it would often be expedient to exercise judicial review on the basis of the decision that has been made and the justification provided in said decision. On this background, I proceed to assessing the validity of the decision concerning asylum.

(248) *Validity of the decision concerning asylum*

(249) As I concluded above, it is often expedient in cases concerning asylum to base the review on the justification provided in the decision. In my view, the justification provided by UNE in its decision concerning asylum pursuant to section 28 of the Immigration Act is not flawed. I thus agree with the leading justice on this issue.

(250) The question before me then becomes whether it is unreasonable to direct the family to seek protection by way of internal flight in Afghanistan. This assessment must take into account the situation at the time of the decision, cf. Rt. 2012, p. 1985, paragraph 98, and the framework for the judicial review is provided by section 7-1 of the Immigration Regulations. This problem is aptly summarised by UNHCR in its guidelines, issued on 23 July 2003, paragraph 23, referenced by the Ministry in its Proposition to the Odelsting no. 75 (2006–2007), on p. 96 and elsewhere:

"Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?"

(251) The topic of assessment is thus limited to the situation in the internal flight area. In its guidelines, UNHCR provides detailed accounts of the aspects that ought to be included in this type of assessment, specifically "personal circumstances", "past persecution", "safety and security", "respect for human rights" and "economic survival". I have taken these aspects into account in my assessment.

(252) From Article 3, no. 1, of the UN Convention on the Rights of the Child, it follows that the best interests of the child shall be a primary consideration in all actions concerning children. As of May 2014, the same principle has been laid down in the Norwegian Constitution by section 104, subsection 2, yet it does not apply to the present case. The Supreme Court has discussed the contents of this principle in several decisions concerning immigration law, such as Rt. 2015, 1985; Rt. 2012, p. 2039; Rt. 2015, p. 93; and Rt. 2015, p. 155. These cases have involved weighing conflicting interests against each other, with the best interests of the child on one side and another consideration, e.g. considerations related to immigration control, on the other. Assessing the alternative of internal flight pursuant to section 28, subsection 5, does not involve weighing interests against each other in this way. As I have previously described, the topic of assessment is the situation in the internal flight area only. This entails that the guidelines for taking into account the best interests of the child, as established by the judgments mentioned, do not automatically apply. In my view, the situation in the internal flight area must be assessed from a child's perspective, or as previously described: One must carry out a child-sensitive assessment of the situation in the internal flight area, specifically Kabul.

(253) In my specific assessment of the internal flight alternative, I have emphasised UNE's view of the situation in Kabul. I have also taken into account UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan, issued 17 December 2010. These guidelines were in effect at the time of the decision. The introduction to these guidelines establishes that internal flight is considered a reasonable alternative for those who have a social network in the country. However, the guidelines also stipulate that nuclear families may make it—"subsist"—even without such a network. Any doubts as to whether the Zade/Rezaei family would be able to seek assistance and protection from family members in Afghanistan, does not, therefore, preclude their return.

(254) The security situation in Kabul is better than in the rest of the country. Health services are available, though their quality varies. Children in Afghanistan have the right to attend school, and in this area, too, Kabul performs better than the rest of the country. The situation for girls in Afghanistan is generally difficult, but no particular importance is attached to this factor in an assessment of internal flight as an alternative.

(255) Moreover, I build on UNE's information that B would be able to provide for his children and his spouse. He has completed seven years of school, and he has long-standing experience as a shoemaker. Kabul's population has increased significantly, but information from the Norwegian Country of Origin Information Centre (Landinfo) suggests men with his background will be able to find work and provide for their families. The family will furthermore be entitled to a considerable reintegration allowance, which would serve as a key contribution in a long transitional period. Therefore, neither the

children, nor the parents, would have any immediate needs. I have concluded that B and A are good care-givers for their children.

(256) There are some concerns for D's health. I do not, however, have any information that would lead me to reject UNE's assessment that a return nevertheless is not unreasonable, having taken her health issues into account. Her mental health issues are not severe.

(257) As previously mentioned, one must exercise restraint in reviewing UNE's assessment. Overall, I have not identified any information that would lead me to reach a different conclusion than that of UNE concerning the assessment of asylum, and I believe this part of the decision is valid.

(258) *Procedural error in the assessment of residence on grounds of humanitarian considerations—the requirement to provide justification*

(259) As I mentioned in the introduction to my opinion, I believe that UNE's decision is invalid as a consequence of insufficient justification provided for the assessment of residence on grounds of humanitarian considerations, cf. section 38 of the Immigration Act. First, I consider the requirements for such justification.

(260) The leading justice has accounted for the legal bases. Therefore, I limit myself to pointing out that section 25 of the Public Administration Act establishes general provisions for the contents of the justification provided in administrative decisions. In cases concerning children, one must view this requirement to provide justification in light of Article 3, no. 1, of the Convention on the Rights of the Child, which, as previously mentioned, establishes that the best interests of the child shall be a primary consideration in all actions concerning children. This is expressed in section 38, subsection 3, of the Immigration Act. And, as I have previously mentioned, the same principle has now been laid down in the Norwegian Constitution by section 104, subsection 2.

(261) Section 17-1a of the Immigration Regulations establishes specific provisions for justification in decisions concerning children. As established by the leading justice, the provision at the time of the decision read as follows:

> **"Decisions that affect children shall specify what assessments have been made of the child's situation, including how the best interests of the child have been given weight, unless this is deemed unnecessary."**

(262) By Regulation no. 1519 of 8 December 2014, this provision was amended, and subsection 1 now reads as follows:

> **"Decisions that affect children shall specify:**
>
> **a) which assessments that have been made of the child's situation, including how the best interests of the child have been taken into account,**
>
> **b) which considerations relating to immigration control that have been taken into account, and**
>
> **c) how possible conflicting interests have been weighed against each other."**

(263) Subsection 2 allows for exemptions to be made, but this is not relevant for the present case.

(264) The Ministry commented on the proposed amendment in a discussion paper, dated 6 June 2014. It follows from this paper that the intention behind the amendment was to clarify the state of the law, not to effect changes in policy. In this regard, I refer to the Ministry's statement in Item 5.2, which establishes that the intention behind the proposed amendments to section 17-1a was "to clarify which aspects to take into account in decisions affecting children". The Ministry refers, inter alia, to Rt. 2012, p. 1985 (Children who have lived for a long time in Norway I). In my view, the new wording of the regulatory provision is an expression of the requirement to provide justification already in effect at the time the decisions in the present case were made.

(265) The requirement to provide justification, and how this relates to Article 3, no. 1, of the Convention on the Rights of the Child, was addressed in Proposition to the Odelsting no. 75 (2006–2007), p. 160. Here, the Ministry states:

> **"The Ministry points out that considerations for the best interests of the child must be weighed against considerations related to immigration control on a case-by-case basis. It would violate the Convention to place decisive emphasis on considerations related to immigration control if this is unjustifiable on grounds of considerations for the best interests of the child. The Ministry does, however, emphasise the importance of a carrying out a comprehensive administrative assessment of all aspects to the child's situation that may be relevant for the case, and that the assessments performed are evident in the decision, cf. Chapter 17.1.7."**

(266) In Chapter 17.1.7, the Ministry adds that it is "particularly important that the decisions presents the assessments that have been carried out concerning the child's rights, including the child's best interests pursuant to Article 3 of the Convention on the Rights of the Child, and how considerations for the child's interests have been weighed against any conflicting considerations". I refer to p. 331 of the Proposition.

(267) The majority opinion of the Standing Committee on Local Government and Public Administration supported these assessments. Its Report to the Odelsting no. 42 (2007–2008), p. 10, reads as follows:

> **"Another majority opinion, ..., point out that the provisions also require the administrative body to carry out a comprehensive assessment of all aspects to the child's situation that may be relevant for the case, and that the assessments performed are evident in the decision. This majority opinion would like to emphasise that it is particularly important that the decisions present the assessments that have been carried out concerning the child's rights, including the child's best interests pursuant to Article 3 of the Convention on the Rights of the Child, and how considerations for the child's interests have been weighed against any conflicting considerations".**

(268) The requirement to provide justification was, as mentioned by the leading justice, addressed in Rt. 2012, p. 1985 (Children who have lived for a long time in Norway I), paragraphs 149–150. In paragraph 149, the leading justice states:

> **"In that considerations for the best interests of the child, including the child's connection to Norway, must be soundly assessed and weighed against any conflicting considerations, the decision must specify that considerations for the best interests of the child has been taken into account as a basic consideration."**

(269) This is further expounded in paragraph 150, where the leading justice refers to section 17-1a of the Immigration Regulations. She emphasises that in decisions concerning children "one shall, as a main rule, provide justification, so that it is evident which assessments have been carried out of the child's situation, including how considerations for the best interests of the child have been taken into account". The leading justice points out that such justification would be *sufficient* for any judicial review exercised by the courts. The inverse of this position is not openly expressed, but nevertheless applies: In order for the courts to exercise its right of judicial review efficiently, it is also *necessary* that these minimum requirements be satisfied.

(270) In its General Comment no. 14, the UN Committee on the Rights of the Child accounted, inter alia, for the requirements that apply to justifications that, in the Committee's interpretation, follow from Article 3, no. 1, of the Convention on the Rights of the Child. In Item 6, the Committee establishes that in decisions involving children, the decision-making process must include an evaluation of "the positive impact (positive or negative) of the decision on the child or children concerned". As an extension of this, the Committee states that the justification of a decision concerning children must show that the best interests of the child have been taken into account. The Committee goes on to state that the decision must explain how the child's rights have been respected, as well as how "the child's interests have been weighed against other considerations".

(271) The Committee's General Comments are not binding, but they still carry considerable weight. I point out that the ECtHR consistently refers to these comments in its accounts of prevailing law under the Convention on the Rights of the Child, cf. for example its judgment of 21 July 2015 in *G.S. vs. Georgia*, paragraphs 32–33, and its Grand Chamber judgment of 3 October 2014 in *Jeunesse vs. the Netherlands*, paragraph 74. The supreme courts of other states are referencing these General Comments in their assessments. In several decisions, the UK Supreme Court has emphasised how General Comment no. 14 is an authoritative source of guidance on how to apply Article 3, no. 1. One such example is its judgment of 18 March 2015 in R vs. Secretary of State for Work and Pensions, paragraph 105.

(272) The recommendation to emphasise the Committee's General Comments in any interpretation of the Convention must be seen in light of how the comments are based on the collective experience of the Committee and the special role assigned to the Committee as the primary international monitoring body under the Convention on the Rights of the Child. As pointed out in Rt. 2009, p. 1261, paragraph 144, and further supported by Rt. 2012, p. 1985, paragraph 136, its authority may, however, vary. Its authority depends, among other things, on how clearly the relevant comment expresses the Committee's views of the legal obligations of the parties. I found General Comment no. 14 to offer good guidance on how to assess the various requirements established by Article 3, no. 1, of the Convention on the Rights of the Child concerning justification in cases affecting children.

(273) On this basis, I hereby summarise the requirements for justification when cases concerning residence on grounds of humanitarian considerations involve children: The decision must show that consideration for the best interests of the children has been taken into account as a basic consideration. The child's interests must therefore be identified and described, and one must carry out an assessment of all aspects to the child's situation

that may be relevant for the case. The decision must show how the child's interests have been weighed against other considerations.

(274) As I have already discussed, these requirements are necessary in order for the courts to exercise its right of judicial review efficiently. There is, however, another side to the requirements for justification, which is also important. These requirements contribute to structuring the decision-making process, thereby ensuring that all relevant considerations are taken into account. The justification serves to both safeguard and document that the best interests of the child are sufficiently taken into account, given that they are a basic consideration.

(275) Before I discuss UNE's justification in the present case, I would like to point out that we must make sure our demands are not unrealistic. Efficiency in administrative procedure is generally a key concern, and one must be able to simplify justifications in less complex cases. UNE's recent practices demonstrate that it is not difficult to satisfy the requirements I have set up.

(276) On this general basis, I shall now move on to assess UNE's justification for their assessment of residence on grounds of humanitarian considerations.

(277) *Procedural error in the assessment of residence on grounds of humanitarian considerations—a specific review*

(278) The leading justice has already accounted for the contents of UNE's decision on this issue. For context, I first repeat that the Immigration Appeals Board listed the general conditions for being granted residence pursuant to section 38 of the Immigration Act. Their specific justification reads as follows, in its entirety:

> **"The *majority* does not find that strong humanitarian considerations are present in this case, and does not see any basis on which to grant residence on such grounds. The *minority* disagrees. Both the majority and the minority refer to their votes in the assessment of the question of internal flight. The majority adds that the children's connection to the realm in this case is not sufficiently strong to justify attaching particular importance to this aspect in the assessment of whether strong humanitarian considerations are present, cf. section 8-5 of the Immigration Regulations. Also, the majority points out that considerations relating to immigration control advise against granting residence, cf. section 38, subsection 4, litras a) and b), of the Act.**
>
> **The appellants do not have any particular connection to the realm indicating that residence should be granted. Residency as asylum seekers does not normally serve as a basis for developing a particular connection. There are no grounds on which to apply a different interpretation in this case."**

(279) The majority opinion refers to its justification for the assessment of the internal flight alternative, which complicates the decision. This in itself, however, is not decisive. As the leading justice pointed out, the contents of the decision overall determines whether the requirements for providing justification have been satisfied.

(280) In its assessment of the internal flight alternative, the majority opinion discusses aspects that are also relevant to the assessment of residence on grounds of humanitarian considerations. The majority opinion addresses D's health problems, the children's right to attend school in Afghanistan, the fact that the children are girls, and the fact that they have never lived in the country in question. The high infant mortality rate is also

mentioned. The majority opinion elaborates on D's health problems to a certain extent, but the other aspects are subjected to a cursory discussion only. The discussion of C's situation is limited to noting that there are no remarks regarding her situation. The decision does not provide a good comparison of the children's situations in Norway and Kabul, respectively.

(281) Please call to mind that the topics for assessment differ under section 28, subsection 5, and section 38. In the assessment of the internal flight alternative, the attention is focused exclusively on the internal flight area. In comparison, one must, in assessing residence on grounds of humanitarian considerations pursuant to section 38, weigh the best interests of the children against other, possibly conflicting, considerations. This weighing of considerations is not included in the decision. Outside of referring to section 38, subsection 4, litras a) and b), the decision makes no note of considerations related to immigration control and how these are weighed against the best interests of the children. Nor have the children's best interests been sufficiently identified and described. Also, their connection to Norway has not been described outside of the fact that they have not lived here long enough to qualify them for a residence permit on grounds of humanitarian considerations due to residence alone. On this basis, I believe that the justification does not satisfy the established requirements. Consequently, the decision is flawed as a consequence of a procedural error concerning this issue.

(282) The question then becomes whether the error may have had a decisive effect on the contents of the decision, cf. section 41 of the Public Administration Act. As stated in Rt. 2009, p. 661, paragraph 71, it is sufficient that there is a "not too remote possibility" that the error may have had effect. The leading justice elaborates on this issue in paragraph 72:

> **"Whenever the procedural error has led to a flawed or false factual basis on an issue relevant to the decision, or the error otherwise involved setting aside basic requirements for sound processing, it generally does not take much."**

(283) In this context, I would like to return to the leading justice's summary of the jurisdiction of the courts to engage in judicial review and requirements for justification in paragraph 149 of Rt. 2012, p. 1985 (Children who have lived for a long time in Norway I). As previously mentioned, she points out that while the courts do not have jurisdiction to review the specific weighing of considerations, they can review whether the children's best interests have been sufficiently taken into account and weighed against any conflicting considerations. Also, she goes on to state that the decision must show that consideration for the best interests of the children has been taken into account as a basic consideration. The justification given in UNE's decision does not provide a sufficient basis on which to exercise the judicial review intended. In my view, this in itself is sufficient to invalidate the decision.

(284) Given the above, I vote that UNE's decisions of 14 January and 8 February 2013 are deemed invalid so far as the denied application for residence on grounds of humanitarian considerations. The court finds in favour of the State of Norway in other respects.

(285) Justice **Ringnes:** I have concluded that the appeal must be rejected.

(286) In line with Justice Bergsjø, who delivered the second opinion, I have concluded that the decision concerning residence on grounds of humanitarian considerations pursuant to

section 38 of the Immigration Act, must be deemed invalid due to insufficient justification. I furthermore share his view of the jurisdiction of the courts to engage in judicial review of the internal flight alternative pursuant to section 28, subsection 5, of the Immigration Act. In line with the second opinion, I furthermore support the leading opinion's conclusions in terms of which aspects to emphasise in an assessment of whether the internal flight alternative is "unreasonable", what the effects of section 7-1 of the Immigration Regulations are, the fact that UNE has based its assessments on the correct principles concerning the burden of proof, and the fact that the judicial review must take into accounts the circumstances at the time of the decision.

(287) However, in my view, D's right to be heard pursuant to Article 12 of the Convention on the Rights of the Child has been set aside, and, as a consequence, both the decision to deny asylum pursuant to section 28 and the decision to deny residence on grounds of humanitarian considerations pursuant to section 38 are invalid. For this reason, I do not discuss whether the facts on which the decisions are made, are correct. Nor do I address the specific assessment of whether it is unreasonable to direct the family to seek protection by way of internal flight in Afghanistan. I do, however, support the justice delivering the second opinion, Justice Bergsjø, in his statements concerning the standards established by Article 3, no. 1, of the Convention on the Rights of the Child.

(288) The right of the child to be provided with an opportunity to be heard is established by Article 12 of the UN Convention on the Rights of the Child. The Convention's requirements are highlighted and specified in section 81 of the Immigration Act and sections 17-3 and 17-4 of the Immigration Regulations, as well as in the internal guidelines of the Immigration Appeals Board. Furthermore, section 17, subsection 1, of the Public Administration Act establishes general provisions concerning the right of children to express their opinions in administrative cases. I shall return to the contents of these provisions.

(289) Article 12 of the Convention on the Rights of the Child establishes that children who are capable of forming their own views shall have the right to express those views in all matters affecting the child, and the views of the child shall be given due weight in accordance with the age and maturity of the child. A similar provision was incorporated into the Constitution in connection with the constitutional revision of 2014, and section 104, subsection 1, now reads:

> **"Children have the right to respect for their human dignity. They have the right to be heard in questions that concern them, and due weight shall be attached to their views in accordance with their age and development."**

(290) In its General Comment no. 12 (2009), the UN Committee on the Rights of the Child accounted for its interpretation of the requirements that follow from Article 12. I share the view of the justice who delivered the second opinion, in terms of the legal authority provided by the Committee's comments, cf. paragraphs 271 and 272 above. In the second paragraph of the Comment, the Committee emphasises that the right of children to be heard expresses "one of the fundamental values of the Convention". Particularly relevant to the present case is the Committee's statement in paragraph 74, specifying that Article 3 and Article 12 have complementary roles, in the sense that the right to be heard aims to ensure that the best interests of children is a basic consideration in all decisions affecting children.

(291) In paragraph 21, the Committee emphasises that the right to be heard is not subject to an age limit, and paragraph 20 specifies that "States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity". Consequently, a *young age* is not a determining factor for whether the child has a right to express his or her opinion. A specific assessment must be carried out, and the determining factor is whether the child is able to form his or her own opinion. section 17 of the Public Administration Act and section 17-3 of the Immigration Regulations are based on this understanding; children younger than seven shall be provided with the opportunity to express their opinions. In this context, I refer to Proposition to the Odelsting no. 45 (2002–2003) (Incorporation of the Convention on the Rights of the Child into Norwegian law), where Item 5.3.3.2 specifies that "[i]f a child is mature enough to request a right, one must assume that the child is also mature enough to exercise it".

(292) D was only a few days shy of turning six years old at the time of the oral proceedings, and the family's counsel presented a request for her to give a statement. In my view, it is fairly obvious that a child at this age is normally able to present views and relevant information on aspects that specifically relate to the child's own situation and experiences. This is not merely relevant for the information alone, but also for the *importance* attached to aspects related to the child's situation.

(293) There are no indications that D was not mature enough to form an opinion on aspects relevant for the Immigration Appeals Board's assessment of the asylum application and the issue of residence on grounds of humanitarian considerations. When the Chairman of the Immigration Appeals Board denied her request to give a statement, he referred to her age and stated that "there was no reason to believe that hearing the child's statement in the proceedings could be presumed to have an effect on the outcome of the case". In doing so, the Chairman made assumptions concerning the outcome of the child's statement, thus depriving her of the *opportunity* to shed light on the case and her right to exercise a *fundamental right as a party to the case*. In my opinion, this violates a central aspect of Article 12 of the Convention on the Rights of the Child, which establishes that the child's request to express his or her opinion shall be met with respect, and that the child shall be provided with the opportunity to express his or her views so far as this is possible, sound and relevant.

(294) This leads me to the question of whether it was sufficient that D was represented by her parents and counsel in the proceedings before the Board.

(295) Article 12, no. 2, establishes that the child shall be provided with the opportunity to be heard, either directly or through a representative. The Committee's starting point in this regard is that the child has the right to choose, and the Committee recommends that the child be given the opportunity to be directly heard, cf. paragraph 35.

> **"After the child has decided to be heard, he or she will have to decide how to be heard: 'either directly, or through a representative or appropriate body'. The Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings."**

(296) Whether a child is to be given the opportunity to express his or her views orally or in writing, and whether the child's views shall be heard directly or through a representative, will depend on the nature of the case, whether the administrative procedure otherwise

calls for a written or oral hearing, and what the child's best interests are. In this context, I refer to Article 12, no. 2, which establishes that the child shall be heard "in a manner consistent with the procedural rules of national law", and to the comprehensive assessment required pursuant to section 17-3, subsection 2, of the Immigration Regulations.

> **"A child may be interviewed orally or in writing or through his/her parents, representative or others who are qualified to make a statement on the child's behalf. How the child is to be interviewed must be assessed in light of the nature of the case and the application situation. The Directorate of Immigration will make supplementary guidelines on how the child's right to be heard shall be implemented, duly adapted to the various types of case and application situation."**

(297) A young child may not always be capable of personally evaluating how the hearing can take place, and the circumstances may very well be such that the child's interests are best preserved by an adult representative. The preparatory works emphasises that great care must be taken to prevent the child from finding itself in a high-pressure situation, cf. Proposition to the Odelsting no. 75 (2006–2007), Item 17.1.6.4.

(298) Characteristic to the present case, however, is that oral proceedings were held, and that the child, through the family's counsel, requested to be heard during the proceedings before the Immigration Appeals Board. In this type of situation, the threshold for depriving the child of her right to exercise her rights as a party to the case must be high. There are no indications that considerations for D's interests or the hearing of the case justified her being denied the opportunity to present her views orally before the Board. In this context, I refer to the Immigration Appeals Board's new internal rules of procedure, dated 18 September 2015, which provide that "an oral hearing of the child would be most relevant, in that the case is heard in oral proceedings before the Board with the claimant/child in attendance".

(299) Given the above, I have concluded that the Immigration Appeals Board, in failing to hear D directly, committed a procedural error. The question then becomes whether this error invalidates the decisions to deny asylum and residence on grounds of humanitarian considerations.

(300) Pursuant to section 41 of the Public Administration Act, an administrative decision for which the rules of procedure have not been observed, shall nevertheless be valid "when there is reason to assume that the error cannot have had a decisive effect on the contents of the administrative decision". In Rt. 2009, p. 661, paragraph 71, the justice delivering the leading opinion maintains that a preponderance of evidence suggesting that the error had an effect is not required; "[i]t is sufficient that there is a "not too remote possibility" that the error may have had effect. Paragraph 72 further expounds on this interpretation:

> **"The assessment must be based on the facts of the case, including the type of procedural error committed and the nature of the decision. Whenever the procedural error has led to a flawed or false factual basis on an issue relevant to the decision, or the error otherwise involved setting aside basic requirements for sound processing, it generally does not take much."**

(301) For me, it is a determining factor that the right to express one's views is a fundamental right as a party to a case. As such, the bar should not be set too high in assessing whether failing to allow a party to exercise this right may have affected the outcome of a decision. There is little doubt that the decision would have been invalidated had an adult in an

equivalent situation been denied the opportunity to present her views with reference to the fact that she was represented by a representative or counsel. In my opinion, the present case does not justify a different interpretation simply because the party in question was just under six years old, and I refer to my previous discussion of the weight of the child's statement. As I have argued, D's situation was relevant to the Immigration Appeals Board's assessment of the asylum application and the question of granting residence on grounds of humanitarian considerations.

(302) As such, I believe that the procedural error necessarily must constitute grounds on which to invalidate both the decision to deny asylum and the decision to not grant residence on grounds of humanitarian considerations.

(303) I vote that the appeal must be rejected.

(304) Justice **Øie:** Concerning the outcome, I agree with the justice delivering the leading opinion, Justice Utgård. This means that I vote to find in favour of the State of Norway, in that neither the decision to deny asylum nor the decision to deny residence on grounds of humanitarian considerations is flawed.

(305) For the majority of questions raised by the present case, I furthermore agree, in all material respects, with the justification provided by the leading justice. I do however, agree with the justice delivering the second opinion, Justice Bergsjø, in that the assessment of whether directing the family to internal flight pursuant to section 28, subsection 5, is unreasonable involves the exercise of discretion that , in principle, is subject to full judicial review, and I second his justification concerning this issue. After deliberation, I am aware that this is a view shared by the majority of the court's justices. In line with Justice Bergsjø, I also believe that the outcome of such a judicial review would be that it, in the present case, is not unreasonable to direct the family to seek protection by way of internal flight.

(306) Justice **Matheson:** I agree with the justice delivering the fourth opinion, Justice Øie.

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

(308) Justice **Matningsdal:** Concerning the outcome and all material respects, I agree with the justice delivering the leading opinion, Justice Utgård.

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

(310) Justice **Tønder:** Likewise.

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

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

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

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

(315) Justice **Arntzen**: Likewise.

(316) Justice **Skoghøy**: Concerning the outcome and all material respects, I agree with the justice delivering the third opinion, Justice Ringnes.

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

(318) Justice **Bårdsen**: Likewise.

(319) Justice **Falch**: Likewise.

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

(321) After voting, the Supreme Court delivered the following

JUDGMENT:

The Supreme Court finds in favour of the State of Norway, represented by UNE.

True transcript: