SUPREME COURT OF NORWAY

On 29 January 2015, the Supreme Court delivered the following judgment and ruling in

HR-2015-00206-A, (case no. 2014/1583), civil case, appeal against judgment.

A	
B	
SEIF (accessory intervener)	(Counsel Rasmus Asbjørnsen)
v.	
the Norwegian State represented by the Immigration Appeals Board	(Attorney General represented by counsel Håvard H. Holdø - qualifying test case)

GROUNDS FOR THE JUDGMENT:

(1) Justice **Bårdsen:** The case concerns a judicial review of the administrative decision on expulsion of a Kenyan citizen A, and an associated rejection of an application for family reunification.

(2) A is the sole carer for her daughter B, who will soon be five years old. B is a Norwegian citizen from birth. At the time of the administrative decision, B was around three years old. If the mother is expelled, B must either leave Norway with her mother to an uncertain future in Kenya, or remain in Norway under the care of the Child Welfare Services. In particular, the case concerns the question of whether the administrative decision on expulsion violates B's citizenship rights or her right to a private and family life and therefore is null and void, cf. section 70 of the Immigration Act. It has been requested to be determined by judgment that the administrative decisions violate B's rights under the European Convention on Human Rights (ECHR).

(3) The background of the case is as follows:

(4) A - hereafter referred to as the mother or A - was born in Kenya on --.-- 1980. She travelled to Norway on a visitor's visa in the summer of 2007 and in February 2008 she applied for asylum. The application for asylum was rejected by the Norwegian Directorate of Immigration - UDI - on 18 November the same year. On 20 January 2010, the Immigration Appeals Board - UNE - dismissed the appeal against the rejected application and set a time limit for A to leave Norway by 21 March. A petition to set aside the administrative decision was unsuccessful. However, A did not leave Norway and since then has remained here continuously, periodically in hiding from the Immigration authorities.

(5) On --.-- 2010, A gave birth to her daughter B. B acquired Norwegian citizenship from birth, as her father - C - is a Norwegian citizen, cf. section 4 (1) of the Norwegian Nationality Act. B has never had any contact with her father, who has renounced parental responsibility. The father has a maintenance obligation, cf. section 67 of the Children Act. However, there is no indication that he fulfils this obligation.

(6) On 20 May 2011, A applied for a residence permit on the grounds of family reunification. In the application, A used the same identity as in her visa application in 2007, and as in the case herein. In an attachment to the application, the organisation "Selvhjelp for innvandrere of flyktninger" (SEIF) informed that A had provided incorrect information regarding her identity and date of birth in her application for asylum in 2008.

(7) On 11 July 2012, UDI made the administrative decision to expel A, with a five-year ban on entry and registration in the Schengen Information System, cf. section 66 (1) (a) of the Immigration Act. Registration in this system means that A may be denied entry into the whole Schengen area during the period the ban applies. As grounds for expulsion, it was pointed out that A had provided incorrect information, that she had "evaded implementation of an administrative decision by not leaving Norway within the time limit, and that she was staying in Norway unlawfully" for a period of around one year and two months. The decision refers to section 108 (2) of the Immigration Act, which provides for punishment in the form of fines and a term of imprisonment of up to six months for the relevant violations. I find that in referring to this provision, UDI intended to state the appropriate penalty clause, if the violations were to be sanctioned with punishment.

(8) UDI's administrative decision on expulsion states the following regarding the daughter B:

> **"In this case, the child has been born in Norway and is a Norwegian citizen. However, the child is too young to have established an independent connection to Norway beyond this. The child is at an age where attachment to the parents is the primary consideration and she would easily adapt to the conditions in her mother's native country. We would like to point out that there is no documentation that the father has contact with the child."**

(9) In another administrative decision made on the same day, the application for a residence permit on the grounds of family reunification was rejected with reference to the administrative decision on expulsion.

(10) A appealed the administrative decisions. On 15 May 2013, UNE dismissed the appeal in two administrative decisions. As regards the daughter B, UNE writes the following in the expulsion case:

> **"UNE assumes that the child can return to Kenya together with her mother and continue a family life there. UNE has considered the information on the mother's health status, and other information in the appeal, among other things, that the appellant has no contact with her own family in her native country and would have problems finding employment. Based on this, UNE cannot ignore that it would be in the child's best interests to grow up with her mother in Norway. The fact that, materially speaking, the child could have a better life in Norway, has still not had decisive weight in the proportionality assessment. Based on the information in the case, there are no indications that the child's mother is not a good carer. It is also found that the appellant would receive HIV treatment in Kenya."**

(11) In response to the notice of claim pursuant to s8ection 5-2 of the Dispute Act, UNE considered setting aside the administrative decisions. In a letter dated 14 June 2013, UNE informed that the administrative decisions were upheld. UNE also found no reason to postpone implementation of the administrative decision on expulsion pending the judicial review.

(12) In a writ of 28 June 2013, A and B instituted legal proceedings against the Norwegian State, represented by the Immigration Appeals Board, requesting a court judgment that the administrative decisions on expulsion and rejection of the application for a resident permit for A be ruled null and void. They petitioned for an interlocutory injunction to prevent implementation of the administrative decision on expulsion. A judgment was also eventually requested on the claim that the administrative decisions were in violation of the European Convention on Human Rights (ECHR) Article 8 and / or ECHR Protocol 4, Article 3. In the reply, the Norwegian State argued that the legal proceedings instituted by B be dismissed, as in the view of the Norwegian State, B had no legal interest in reviewing the validity of the administrative decision that concerned her mother. The Norwegian State also contested that there were grounds for having a separate judgment for violation of ECHR. The Norwegian State further requested that the court find in its favour and requested that the petition for an interlocutory injunction should be rejected.

(13) On 1 November 2013, Oslo District Court delivered judgment and a ruling with the following conclusion:

> **"In the main case:**
>
> **1. B is granted leave to proceed.**
> **2. The court finds in favour of the Norwegian State represented by the Immigration Appeals Board.**
> **3. B's request for a separate declaratory judgment on violation of the European Convention on Human Rights is dismissed.**
>
> **In the injunction case:**
> **The petition is dismissed.**
>
> **In both cases:**
> **A and B are excused from the requirement to pay legal costs."**

(14) A and B appealed the judgment and ruling to Borgarting Court of Appeal, which on 19 June 2014 delivered a judgment and a ruling with the following conclusion:

> **"In the main case:**
>
> **1. The court finds in favour of the Norwegian State represented by the Immigration Appeals Board as regards the alleged violation of ECHR Article 8.**
>
> **2. The appeal is otherwise dismissed.**
>
> **In the injunction case:**
> **The appeal is dismissed.**
>
> **In both cases:**
> **No legal costs are awarded."**

(15) A and B have appealed the judgment and ruling to the Supreme Court. The appeal concerns the Court of Appeal's assessment of evidence and application of law. Following a request from the Supreme Court, the Norwegian State has informed that A will not be deported until a judgment has been delivered. Under this premise, the appellants have accepted that there is no need for the Supreme Court to decide on the petition for an interlocutory injunction, and that the question of compensation for legal costs in the injunction case is decided in connection with the main case.

(16) Landinfo and the Norwegian Embassy in Nairobi have submitted some documentation regarding the conditions in Kenya and declarations from two specialists in clinical child and adolescent psychology and clinical neuro-psychology respectively. The specialist declaration has been prepared on behalf of SEIF, which has been an accessory intervener for the Supreme Court, cf. section 15-7 (1) (b) of the Dispute Act. The facts of the case presented to the Supreme Court are essentially the same as presented to the lower courts.

(17) The appellants - A and B - have, with the support of SEIF, in brief argued:

(18) The Court of Appeal's judgment is incorrect. The administrative decision on expulsion is null and void. This will also have an effect on the rejection of the application for family reunification.

(19) The decisions have such a significant impact on B that she has a legal interest in the validity proceedings, cf. section 1-3 of the Dispute Act. She also has a legal interest in obtaining a declaratory judgment that the decisions violate ECHR Article 8 and / or ECHR Protocol 4, Article 3.

(20) As the decisions not only concern the mother, but also B directly, B should have been a party during the processing by UDI and UNE, cf. section 2 (1) (e) of the Public Administration Act. This is a procedural error resulting in invalidity on an independent basis, cf. section 41 of the Public Administration Act.

(21) The decision to expel the mother is incompatible with B's citizenship rights. At the time of the administrative decision, B was three years old and totally dependent on her mother, who is the child's sole carer. That the child will have to leave Norway is therefore a necessary consequence of the administrative decision to expel the mother. Throughout the whole 5-year expulsion period, B

will in fact be precluded from returning to Norway. Section 69 of the Immigration Act, section 106 (2) second sentence of the Norwegian Constitution and ECHR Protocol 4, Article 3 prohibit expulsion of own citizens. This prohibition not only applies to formal administrative decisions on expulsion. It also affects expulsion *de facto*, inter alia, in that a child must leave the country as a necessary consequence of the child's sole carer being expelled. This is also the case for EU citizenship, cf. the European Court of Justice's judgment of 10 October 2013 in case C-86/12, *Alokpa et al.*

(22) The administrative decision on expulsion is in any case disproportionate and it therefore violates B's right to a family and private life, the consideration of her best interests and her right to proper conditions in which to grow up, cf. section 102 of the Norwegian Constitution compared with ECHR Article 8 and section 104 of the Norwegian Constitution compared with the UN Convention on the Rights of the Child, Article 3 no. 1 and section 70 of the Immigrants Act: As a Norwegian citizen, B has a legitimate and inviolable connection to Norway. She is also dependent on, and has a legal right to keep her mother as her carer. Thes following is overriding; in the proportionality assessment, B's rights outweigh the need for immigration control, which in this case suggests sanctions against violations of the Immigration legislation.

(23) A and B, with support from SEIF, have submitted the following claim:

"In the main case:

1. **The Immigration Appeals Board's two administrative decisions of 15 May 2013 are null and void.**
2. **The Immigration Appeals Board's two decisions of 15 May 2013 violate ECHR Article 8 and ECHR Protocol no. 4 Article 3.**
3. **The appellants are awarded costs for all courts.**

In the injunction case:

1. **The appellants are awarded costs for all courts."**

(24) The respondent - the Norwegian State represented by the Immigration Appeals Board - has in brief argued the following:

(25) The Court of Appeal's judgment is correct. The administrative decision on expulsion and rejection of the application for family reunification are valid.

(26) There are no procedural errors in the decisions. The administrative decision on expulsion is based on an adequate report. It is satisfactorily justified. The expulsion and family reunification cases are of a personal nature. Therefore, B was not a party in the administrative decision on expulsion, cf. section 2 (1) (e) of the Public Administration Act. Basically, she could not then contest the administrative decision on expulsion through the courts, cf. Rt. 1995, page 139. Any procedural error associated with the administrative decision on expulsion has nevertheless not been of any significance, cf. section 41 of the Public Administration Act and Rt. 2012, page 2039, paragraph 57.

(27) B has no legal interest in obtaining a declaratory judgment for any violation of ECHR Article 8 and / or ECHR Protocol 4 Article 3. The question whether there is a violation, must be considered in connection with the validity

proceedings. The right to an effective remedy under ECHR Article 13 is then ensured. The request for judgment regarding violation of ECHR must therefore be dismissed pursuant to section 1-3 of the Dispute Act, cf. Rt. 2009, page 477.

(28) The administrative decision on expulsion concerns the mother and does not affect B's citizenship rights. As a Norwegian citizen, B is entitled to stay in Norway. She cannot be expelled, cf. section 69 of the Immigration Act and ECHR Protocol 4, Article 3. That B accompanies her mother to Kenya is an actual consequence of the administrative decision concerning the mother. However, it does not imply that in the legal sense B may be regarded as "expelled" pursuant to section 71 of the Immigration Act or as "expelled" in accordance with ECHR Protocol 4 Article 3. She is also not "refused entry to the realm", cf. section 106 (2) second sentence of the Norwegian Constitution.

(29) The right to residence for family members of EU citizens, as this is expressed through recent case law of the European Court of Justice, based on the Treaty on the Functioning of the European Union (TEUF), Articles 20 and 21, would not have prevented expulsion of the mother in this case, and in any case has no effect for EEA citizens, cf. Joint Declaration of the EEA Joint Committee's decision on incorporation of Council Directive 2004/38/EC. The rights under this Directive only apply where the EEA citizen has exercised his right to free movement in accordance with the EEA agreement, cf. the EFTA Court's advisory opinion of 27 June 2014 in E-26/13 *Gunnarsson.* EU citizenship rights are also not protected as such by ECHR, cf. The European Court of Human Rights' (ECtHR) Grand Chamber judgment in *Jeunesse v. the Netherlands* of 3 October 2014, paragraph 110.

(30) The administrative decision on expulsion is not disproportionate, cf. section 70 of the Immigration Act. Neither the mother nor B has any real connection to Norway. B has no contact with her father. The conditions in Kenya do not preclude expulsion of the mother or that B may accompany her. B is at an adaptable age. The expulsion is time-limited. That B is a Norwegian citizen and will experience different living conditions in Kenya compared to Norway, does not preclude expulsion of the mother. Violation of the Immigration Act is a significant social problem. Use of incorrect and misleading information as regards identity is particularly serious.

(31) The administrative decision on expulsion does not in any way represent an *intervention* in family or private life, as this must be construed in section 102 of the Norwegian Constitution and ECHR, Article 8 no. 1. The mother and B may continue their *family life* in Kenya. Neither the mother nor B has established a *private life* in Norway that is protected by the Norwegian Constitution or the Conventions on Human Rights.

(32) In any case, the administrative decision on expulsion is not a *violation* of the right to a private or family life pursuant to section 102 of the Norwegian Constitution and ECHR, Article 8. The decision has legal authority, has been justified by a legitimate aim and is proportionate. As neither the mother nor B is so-called "settled immigrants" in Norway, expulsion of the mother will, in accordance with established case law of ECtHR, only be disproportionate in "exceptional circumstances". Neither B's citizenship nor other circumstances in

the case are such "exceptional circumstances". B's best interests have been considered and properly weighed against the need to control immigration, which with decisive weight suggests expulsion of the mother, cf. section 104 of the Norwegian Constitution and ECHR, Article 3, no. 1.

(33) The Norwegian State represented by the Immigration Appeals Board has submitted the following claim:

> **"In the main case:**
>
> **1. The request for a declaratory judgment that the administrative decision on expulsion violates ECHR, Article 8 and ECHR Protocol 4, Article 3 is dismissed.**
> **2. The appeal is otherwise dismissed.**
> **3. The Norwegian State represented by the Immigration Appeals Board is awarded costs for all courts."**
>
> **In the injunction case:**
>
> **Principally:**
> **The appeal is dismissed.**
>
> **Alternatively:**
> **The case is lifted."**

(34) *I have concluded* that the appeal is successful.

(35) The case concerns *the validity* of UNE's two administrative decisions of 15 May 2013 to expel A and to deny her family reunification with her daughter B in Norway. It also includes *enforcement proceedings* requesting judgment that the decisions against A violate her daughter B's rights under ECHR Article 8 and / or Protocol 4 Article 3.

(36) Before I address the material issues the case raises, I would like to point out the following regarding B's *legal interest* in the validity and enforcement proceedings respectively, cf. Section 1-3 of the Dispute Act:

(37) The Norwegian State has not requested dismissal of the validity proceedings. However, the courts – at their own initiative – must consider whether there is a legal interest.

(38) In Rt. 1995 page 139, the Supreme Court Appeals Committee found that the expelled person's cohabitant alone could not appeal the judgment in the validity proceedings, which the couple had instituted jointly. The ruling gives the impression that an administrative decision on expulsion is "of such a personal nature" that "only the person, who is expelled, should be able to contest it". I find it difficult to equate B with the appellant cohabitant in the ruling from 1995, as in a legal and factual respect B is significantly more dependent on her mother than an adult cohabitant would normally be on his or her partner. Also, the ruling provides no answer to whether expulsion still would have been the result if the cohabitant had argued that the decision violated *her own* right to a family life with the expelled party. In my view, such proceedings cannot in any case be dismissed today on the grounds that the administrative decision on expulsion is of a "personal nature". Insofar as it is family life pursuant to section 102 of the

Norwegian Constitution and ECHR Article 8 that is at stake as a consequence of the expulsion, the point is precisely that the administrative decision does *not* only apply to the expelled party.

(39) B's connection to the contested administrative decision on expulsion is immediate and strong. She argues that the administrative decision has been made in violation of her *own* citizenship rights and her *own* right to a private and family life pursuant to the Norwegian Constitution and ECHR. In my view, dismissal of the validity proceedings will for B's part entail a denial of justice, which could hardly be reconciled with Norwegian procedural traditions. Also the right to a court hearing pursuant to section 95 of the Norwegian Constitution and ECHR Article 6 no. 1 and the right to an effective remedy pursuant to ECHR Article 13 weigh heavily in favour of granting leave for B to proceed with the validity proceedings.

(40) Based on this, I find it clear that B has a legal interest in the validity proceedings, cf. section 1-3 of the Dispute Act.

(41) The Norwegian State has requested dismissal of B's proceedings insofar as she is requesting a judgment that the administrative decisions are in violation of ECHR Article 8 and / or Protocol 4 Article 3. It has been argued that she would not have a legal interest in having this determined by the court, as the question of whether there is a violation or not, may be clarified by way of preliminary ruling in the validity proceedings, cf. Rt. 2009, page 477.

(42) I disagree with the Norwegian State. Rt. 2011 page 1666, paragraph 32 stresses as a clear right that a declaratory judgment may be requested for violation of ECHR - that this constitutes a "legal right" in the procedural sense. The same has been stated in the plenary judgment in Rt. 2012 page 2039, paragraphs 94-99. The question of violation of the Convention is also of obvious relevance to B, as a judgment in her favour implies that it would be unlawful towards her to implement the administrative decisions, cf. section 92 of the Norwegian Constitution. The enforcement proceedings cannot then be dismissed pursuant to section 1-3 of the Dispute Act. The fact that any violation of the Convention - under the circumstances - could also constitute a preliminary legal issue in the parallel validity proceedings, does not reduce the legal interest that she has in the enforcement proceedings. Previously, the right to obtain a judgment on preliminary legal issues was explicitly set forth in Ssction 58 no. 1 of the Civil Procedure Act of 1915. It now follows from the general provision on cumulation of claims in section 15-1 of the Dispute Act.

(43) I will now discuss the *question of validity*. In expulsion cases, the courts also have full jurisdiction when it comes to the discretionary elements, cf. Rt. 2005, page 229, paragraph 34, Rt. 2009, page 534, paragraph 46 and Rt. 2013, page 449, paragraph 103. However, the review must be conducted on the basis of the circumstances at the time of the decision, cf. the plenary judgment in Rt. 2012, page 1985.

(44) The immigration authorities' *processing* has been contested. It has been argued that B should have been a *party* when the case was dealt with by UDI and UNE, and that the error must result in invalidity.

(45) The Immigration Act has no special provisions on who is considered to be a party in an administrative decision on expulsion. The general rule in Section 2 (1) (e) of the Public Administration Act states that a "party" is the person "against whom the decision is aimed or who the case otherwise directly concerns". The administrative decision on expulsion is aimed at A. However, it also interferes with B's family life with her mother. It also challenges the care situation in a way that may have quite fundamental importance for B's childhood and future. She is therefore in such a situation as described in the wording of the law - the case concerns B directly. And, as far as I can understand, she is also affected in such a way that must have been in mind when the definition of party was formulated in the Public Administration Act. In the preparatory works to the *Immigration Act* doubt is expressed as regards whether other family members than the expelled party should have party rights. I refer to Proposition no. 75 (2006–2007) to the Norwegian Storting page 321, where reference is also made, among other things, to the following statement of 22 July 2004 from the Ministry of Justice's legal department:

> **"The question...appears doubtful. The wording of the definition of party in Section 2 (1) (e), seen in light of the purpose of the provisions...suggests that they should be regarded as parties. However, the fairly standard practice in cases of a personal nature, the Appeal Committee's ruling of 1995 and the practice the immigration authorities has employed thus far indicate the contrary."**

(46) The ruling referred to from 1995 is Rt. 1995, page 139, which I mentioned as regards B's legal interest in instituting the validity proceedings. As was evident from what I said then, the ruling, in my view, has limited interest to the issues in our case. And if it is believed, like I do, that B has the right to institute validity proceedings, it is natural that she also should have had party rights in connection with the administrative processing. I refer to Graver, "Alminnelig forvaltningsrett, 4th edition 2015, which on page 382 discusses the question of other family members' party status in expulsion and family reunification cases.

> **"The family is protected against being split up under the right to a family life in ECHR Article 8. This is a right which not only belongs to the person being expelled, but also to his or her family members. Each family member must have a right to individual protection of this right regardless of how the other family members choose to follow-up their right before the courts. If the remaining family members are not allowed to review the decision, this will deprive them of their right to test whether the decision constitutes a violation of their codified rights.**
>
> **The topic of assessment in an expulsion case will also include whether the decision is proportionate towards the family. Thus, the main considerations to be made in accordance with the law include the situation and interests of the family members . In my view, it would be correct to give the family members party rights already in the administration case. The same view may be used in cases concerning family reunification. Contrarily, it may be argued that the case may affect personal matters for the person being expelled, which he or she may not want disclosed to his or her family members. However, these considerations may be taken into account within the framework of the provisions restricting a party's access to certain information pursuant to section 19 of the Public Administration Act."**

(47) I agree with this. In my view, it was therefore a procedural error that B was not considered a party in the immigration authorities' processing.

(48) However, the error does not result in invalidity if there is no reason to assume that it may have had a decisive impact on the contents of the administrative decision, cf. section 41 of the Public Administration Act. In general, it is likely that this type of error could easily result in invalidity, as the consequence is usually that someone directly affected by the administrative decision, has not been heard, or that all aspects of the case have otherwise not been satisfactorily highlighted, due to errors relating to the parties involved. However, in this case, the immigration authorities have undoubtedly been aware of B's situation and there is nothing specific to suggest that the aspects of the case would have been better highlighted if B had been a party. Also, the mother and B do not have conflicting interests. As I believe that the decision is null and void for other reasons, I will not conclude on this matter.

(49) I will now discuss the *substantive issues* of the case, starting with the argument that the administrative decision on expulsion aimed at the mother *de facto* is also an expulsion of B in violation of her *citizenship rights.*

(50) Reference is made to section 69 of the Immigration Act, section 106 (2) second sentence of the Norwegian Constitution and ECHR Protocol 4 Article 3. Common to these provisions is that they prohibit the citizen itself from being expelled. The key element of expulsion is that any valid permit to reside in Norway will cease to apply, cf. section 71 of the Immigration Act. However, B retains all her citizenship rights, including the right to reside in Norway. I agree with the appellants that the expulsion of A creates a coercive situation which *actually*, and in its effect, means that B must leave Norway. However, there is no reference to, nor have I found evidence in the legal sources that the expulsion ban - which is absolute - includes such situations. As regards ECHR Protocol 4, Article 3, I refer to Lorenzen et al., the European Convention on Human Rights with comments (Articles 10-59) and the additional Protocols), 3rd edition 2011, page 1342.

(51) Case law of the European Court of Justice relating to the Treaty on the Functioning of the European Union (TEUF) Articles 20 and 21 on union citizenship is interesting and fairly far-reaching. I refer in particular to the European Court of Justice's judgment of 8 March 2011 in case C-34/09 *Zambrano*, paragraphs 36 - 45 and the judgment of 10 October 2013 in case C-86/12 *Alokpa* et al. paragraphs 20 -37. However, I agree with the Norwegian State that this case law of the European Court of Justice is not applicable to EEA citizens. I refer to the Joint Declaration by the Contracting Parties to the decision on incorporation of Council Directive 2004/38/EC, which among other things states:

> **"The term citizen of the European Union which was introduced by the Maastricht Treaty... [now TEUF Articles 20 and 21] has no parallel in the EEA Agreement. Incorporation of Directive 2004/38/EC in the EEA Agreement shall not affect the assessment of EEA relevance of future EU legislative acts or future case law from the European Court of Justice based on the term citizen of the European Union. The EEA Agreement does not provide a legal basis for the EEA citizens' political rights.**
>
> **The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the agreement, with the exception of rights granted through the Directive to third country nationals who are family members of an EEA**

national exercising his or her right to free movement under the EEA Agreement, as these rights are corollary to the right to free movement for EEA nationals..."

(52) This has been followed-up in the EFTA Court's advisory opinion of 27 June 2014 in E-26/13 *Gunnarsson*, paragraph 74.

(53) Based on this, my conclusion is that the actual coercive situation in which the administrative decision on expulsion against A puts B cannot in the legal sense be equated with a decision to expel B in violation of national or international prohibition of expulsion of own citizens.

(54) I will now discuss the question of whether the administrative decision on expulsion is null and void because it violates B's *human rights*.

(55) The appellants argue that the administrative decision on expulsion violates section 102 of the Norwegian Constitution compared with ECHR Article 8 and section 104 of the Norwegian Constitution compared with the Convention on the Rights of the Child, Article 3 no. 1 and section 70 of the Immigrants Act. Thus, it is necessary that I say something about these legal bases and the connection between them.

(56) Section 102 (1) first sentence of the Norwegian Constitution states that:

"Everyone is entitled to respect for his or her private and family life, his or her home and communication."

(57) The provision was incorporated by constitutional reform in May 2014 and is based, inter alia, on the UN Convention on Civil and Political Rights (CCPR), Article 17 and ECHR Article 8. There are major similarities with ECHR. I find that section 102 should be interpreted in light of the international law models, but still so that future practice by the international enforcement agencies does not have the same judicial precedent in a constitutional interpretation as in the interpretation of the parallel provisions of the convention: In our view it is the Supreme Court - not the international enforcement agencies - which has the responsibility to interpret, clarify and develop the Norwegian Constitution's human rights provisions.

(58) There is no precise or complete definition of the term "private life", cf. the plenary judgment in Rt. 2012page 2039, paragraph 70. However, in the existing case law of ECtHR, emphasis is placed on the person's physical and psychological *integrity*, all the various elements of each person's *identity* in the broadest sense and *personal autonomy*. According to ECtHR's fairly extensive case law, family life refers to more specific relations between people, such as in established relationships and through ties between parents and children. The boundary between the human relations which constitute a family life and those included in a private life is not well-defined.

(59) The right to "respect" for a private and family life primarily involves protection against unwarranted government intervention. To a certain extent, the requirement of respect also constitutes positive obligations for the public

authorities in the sense that measures must be taken to secure against intervention by other private persons, cf. Rt. 2013, page 588, paragraphs 41 - 49 with further references. The duty to protect is now also set out in section 92 of the Norwegian Constitution.

(60) Unlike CCPR Article 17 and ECHR Article 8, section 102 of the Norwegian Constitution contains no indication of whether it is at all possible to impose lawful restrictions on private and family life. However, the constitutional protection cannot be - and it is – not absolute. In line with the provisions in international law which served as a model for this part of section 102, it would be possible to intervene in the rights under sub-section 1, first sentence, if the measure has sufficient *legal authority*, pursues a *lawful purpose* and is *proportionate*, cf. Rt. 2014, page 1105, paragraph 28. The assessment of proportionality must take into account the balance between the protected individual interests and the legitimate social needs that justify the measure.

(61) Section 104 of the Norwegian Constitution reads as follows:

> **"Children are entitled to respect for their human dignity. They are entitled to be heard in issues regarding themselves, and their opinion should be given due weight in accordance with their age and development.**
>
> **In actions and decisions concerning children, the best interests of the child shall be a fundamental consideration.**
>
> **Children are entitled to protection of their personal integrity. The government authorities shall facilitate conditions enabling the child's development, including ensuring that the child receives the necessary financial and social security and standard of health. preferably within its own family."**

(62) This provision was also included in the Norwegian Constitution during the reform in 2014. In Recommendation 186 S (2013 - 2014) to the Norwegian Storting, page 29, the Standing Committee on Scrutiny and Constitutional Affairs explains the background:

> **"The Committee believes there is a weakness in the Norwegian Constitution, as it does not reflect the special protection children have under Norwegian and European law. All vulnerable groups cannot have special protection in a constitution. However, children are in an exceptional position. Not only are they vulnerable and have a special need for protection in order to live a free, safe and dignified life; they are also in a special position of dependence and in a very formative phase of the life they shall use to exercise the freedoms and rights of all. The special independence situation of childhood concerns us all...**
>
> **Despite Norway's status as a frontrunner for children's rights, it has not been willing to acknowledge individual right of appeal under the Convention on the Rights of the Child, among other things, on the grounds that the rights of the child are adequately protected here in Norway. This reasoning will appear inconsistent if Norway does not now protect the rights of the child in the Constitution."**

(63) Section 104 (2) states that the best interests of the child shall be a fundamental consideration, and this is the mainstay of the provision. The provision has its parallel in the Convention on the Rights of the Child, Article 3 no. 1, which reads as follows:

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

(64) In *General Comment No. 14* (2013) "on the right of the child to have his or her best interests taken as a primary consideration", the UN Committee on the Rights of the Child has explained the background and function of the provision and has made a consolidating review of a number of interpretation issues. In my view, the UN Committee on the Rights of the Child expresses herein a natural starting point for interpretation of Article 3 no. 1 - and thus also for the interpretation of section 104 (2) of the Norwegian Constitution. I refer to Doc. 16 (2011 - 2012) page 192, which states that it was decided to formulate section 104 (2) based on the Convention on the Rights of the Child Article 3 no. 1 in order to be able to draw on international interpretation practices. I also refer to what I said in connection with section 102 of the Norwegian Constitution regarding the Supreme Court's independent responsibility for interpretation of the Constitution.

(65) The UN Committee on the Rights of the Child points out in *General Comment No. 14* that Article 3 no. 1 grants a right to each child which is "directly applicable (self-executing) and can be invoked before a court", cf. paragraph 6. It is further emphasised that the provision also acts as a principle of interpretation and gives preference to "the interpretation which most effectively serves the child's best interest". Article 3 no. 1 is also a procedural provision in the sense that decisions concerning children must show that the child's best interests have been identified and how these have been weighed against other considerations. The UN Committee on the Rights of Children elaborates on the norm itself in paragraphs 36 - 40. It is evident that the child's interests are not the only and also not always the decisive factor, cf. the plenary judgment in Rt. 2012 page 1985 paragraphs 134 - 136. However, the Committee emphasises that the child's best interests have high priority and are not just one of several considerations in an overall assessment: The child's best interests shall form the basis, be highlighted and brought to the fore.

(66) There is a close connection between private and family life and the provision that the child's best interests shall be a fundamental consideration. Sections 102 and 104 of the Norwegian Constitution are complentary in this area so that the child's best interests are included as a weighty element in the proportionality assessment under section 102 of the Norwegian Constitution.

(67) ECHR contains no provision that corresponds to Section 104 of the Norwegian Constitution or Article 3 no. 1 of Convention on the Rights of the Child. However, it follows from ECtHR's case law in recent years that the child's best interests still play a key role in the proportionality assessment under ECHR, Article 8 no. 2 in cases concerning foreigners. I refer to ECtHR's judgment in *Nunez v. Norway* of 28 June 2011, paragraph 84 and *Kaplan v. Norway* of 24 July 2014, paragraph 88. The Grand Chamber judgment in *Jeunesse v. the Netherlands* of 3 October 2013 states the following in paragraph 109:

> **"On this particular point, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance (see**

> ***Neulinger and Shuruk v. Switzerland*, cited above, § 135, and *X v. Latvia*, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."**

(68) What I have discussed regarding sections 102 and 104 of the Norwegian Constitution and ECHR Article 8, cf. Article 3 no. 1 of the Convention on the Rights of the Child, also govern the proportionality assessment under section 70 of the Immigration Act.

(69) On this basis and background I will now discuss the administrative decision on expulsion against A.

(70) It is undisputable that the decision intervenes in a protected right for B: The administrative decision on expulsion creates a situation where B must either give up contact with her mother or for a long period let go of her connection with Norway, that she has and is entitled to have through her citizenship. The former is an intervention in B's right to respect for her family life with her mother; the latter is an intervention in B's right to respect for her private life.

(71) It is clear that the administrative decision on expulsion has legal authority. It is also quite clear that the considerations used to justify the expulsion - the need to sanction violations of the Immigration Act - are legitimate, cf. e.g. ECtHR's judgment in *Kaplan v. Norway* of 24 July 2014, paragraph 83. The key point in the case is whether expulsion of A is proportionate.

(72) It follows from what I have discussed regarding section 104 of the Norwegian Constitution and the Convention on the Rights of the Child Article 3 no. 1 that the Supreme Court must also begin its assessment with B and what is in her interests.

(73) B is best served by having her mother as her primary caregiver. This is supported not only by the general presumption that children do best when they can grow up with their parents. The documentation that has been submitted to the Supreme Court indicates that the mother and daughter have a strong bond and that A manages to take care of B in the best possible way, considering the circumstances. There is no alternative for B than her mother's care- I find that expulsion of the mother alone, combined with the Child Welfare Service taking over the care of B is out of the question.

(74) B is born in Norway. When the administrative decision on expulsion was made in 2013, B was around three years old. Today, she is soon five years old. There is a weakness in UDI and UNE's decision that B's actual situation has been poorly highlighted. However, there is nothing to indicate that up until the age of three B had formed particularly strong ties with other persons than her mother. There is, however, no reason to go into more detail on this. There are other elements which in my view deserve special attention in this case; elements that surprisingly enough there is very little trace of in the immigration authorities' administrative decision.

(75) In my view on the case, the fact that B is a Norwegian citizen is very important. I have already discussed that section 69 of the Immigration Act, section 106 (2) second sentence and ECHR Protocol 4, Article 3 do not preclude expulsion of A, even though this implies that B is actually being forced to leave Norway. B's Norwegian citizenship does not trump everything. However, her citizenship does have special significance in the proportionality assessment: The Convention on the Rights of the Child, Article 7 recognises all children's right to have a citizenship. And Article 9 gives all children the right to protect their identity, including their nationality. The provisions express the fundamental view that citizenship is also important for children.

(76) Norwegian citizenship is not just a formality. The Standing Committee on Local Government points out in Recommendation no. 86 (2004-2005) to the Norwegian Storting on the Citizenship Act, section 2.2 that "Norwegian citizenship has an important symbolic importance in that it marks an affinity to Norwegian society and its fundamental values". The Committee also states that "citizenship provides important rights and obligations which are important for the participation of citizens in the Norwegian society". In my view, citizenship constitutes a fundamental legal, social and psychological bond, which may be crucial to a person's identity and development throughout their life, from birth to death.

(77) B is a Norwegian citizen. Therefore she is entitled to residence and protection in Norway, to spend her childhood and youth here and to go to school here. Like other Norwegian children she is entitled to develop her own Norwegian identity - linguistically, culturally, socially and emotionally. As a Norwegian citizen, B is entitled to benefit from growing up and eventually working in the Norwegian society, with all that this entails of opportunities and access to a social security network, welfare and health services. The administrative decision on expulsion will actually cut B off from all this for at least five identity-forming years and in practice perhaps forever.

(78) In the overall assessment, I have also considered B's care situation if she must travel to Kenya together with her mother. According to what the immigration authorities have concluded, in general, the situation there for B and for her mother in particular does not preclude execution of the administrative decision on expulsion. However, the documentation presented to the Supreme Court, primarily from Landinfo, shows that a return to Kenya would without doubt pose significant challenges to B and her mother. It is uncertain whether A has any family network to support her in Kenya, she is HIV positive and without an education. She has poor prospects of obtaining work in order to be able to support B. As advanced child maintenance is only paid to children who live in Norway, B will actually be left without maintenance from her father. There is a strong possibility that mother and daughter will end up in Nairobi's slum areas, with the far-reach consequences this must be expected to have for B's safety, education and welfare. A realistic approach suggests that B will face a harsh, hazardous and in any case a highly uncertain future in Kenya.

(79) In my view, it would clearly be in B's best interests to remain in Norway and that her mother, who is her sole caregiver, cannot be expelled. There must be very good and compelling reasons not to allow this.

(80) As I mentioned initially, it has been decided to expel A because she has provided incorrect identity information, because she had "evaded execution of a decision by not leaving Norway within the departure deadline, and that she stayed unlawfully in Norway" for a period of around one year and two months. It is not disputed that the circumstances qualify for expulsion under section 66 (1) (a) of the Immigration Act. However, the more detailed circumstances, including the seriousness of the violation, have implications for the proportionality assessment, cf. Rt. 2011, page 948, paragraph 38. As far as I can understand, the violations are fairly typical and by nature have actual importance for the immigration administration's activities and control possibilities, cf. Rt. 2009, page 534, paragraph 51,Rt. 2010, page 1430, paragraph 80 and Rt. 2011, page 948, paragraph 48. However, the grounds for expulsion here concern violation of the Immigration Act - where the main rule under section 14-2 of the Immigration Regulations is a ban on entry for up to five years - and not other serious crime, which in comparison could give grounds for permanent expulsion.

(81) There is an obvious tension between the need for efficient and just immigration administration and the requirement under section 104 (2) of the Norwegian Constitution and ECHR Article 3 no. 1 that the best interests of the child must be a fundamental consideration. However, I have difficulty seeing that in this case, the grounds which clearly suggest that A receives some form of sanction for her violation of the law, have the gravity required to outweigh the individual burdens imposed on B if her mother is expelled to Kenya. In the overall assessment, it is of importance to me that the sanction will hit the perfectly innocent party - B - hardest.

(82) The administrative decision on expulsion is therefore null and void. As an effect of this, the decision to reject the application for family reunification is also null and void.

(83) It has been requested that the court finds that the administrative decision on expulsion and rejection of the application for family reunification are in violation of ECHR Article 8 and Protocol 4, Article 3. I refer to what I have previously discussed regarding B's legal interests in such a judgment being delivered. In the enforcement proceedings, it is the situation when the case has been submitted for judgment that is decisive, cf. the plenary judgment in Rt. 2012, page 2039, paragraph 65. et seq.

(84) With regards to whether, materially speaking, there is a violation of a convention in this case, I refer to what I discussed in connection with the validity proceedings. Thus, there are no grounds for stating that there has been a violation of ECHR Protocol 4, Article 3. However, the decisions violate B's rights under ECHR Article 8.

(85) The appeal has been successful and under the main provision of the Dispute Act, the appellants shall be awarded compensation for their legal costs in all courts. This also applies to legal costs associated with the petition for an interlocutory injunction, since the Norwegian State accepted before the Supreme Court - in line with the petition - that the administrative decision on expulsion should not be executed for the time being. The legal costs relating to the petition have been stated as being 10 per cent of the total claim. The

total claim is NOK 574,109, which includes VAT, I will use this as a basis for the decision, cf. section 20-5 (1) of the Dispute Act. In addition to this there are court fees for three courts totalling NOK 55,470.

(86) The interlocutory injunction is to be lifted.

(87) I vote for this

JUDGMENT AND RULING:

1. The Immigration Appeals Board's two administrative decisions of 15 May 2013 are null and void.

2. The Immigration Appeals Board's two decisions of 15 May 2013 are in violation of the European Convention on Human Rights, Article 8.

3. The Norwegian State represented by the Immigration Appeals Board is ordered to pay legal costs for the District Court, the Court of Appeal and the Supreme Court to A and B jointly totalling NOK 629,579 - six hundred and twenty-nine thousand, five hundred and seventy-nine Norwegian kroner - within 2-two-weeks of pronouncement of the judgment and ruling.

4. The interlocutory injunction is lifted.

(88) Justice **Normann** I agree with the first-voting justice in all material respects and with his conclusion.

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

(90) Justice **Bergsjø:** Likewise.

(91) Justice **Skoghøy:** Likewise.

(92) After passing of votes, the Supreme Court pronounced the following

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True transcript confirmed: