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"Public order, national security and the rights of the third-country nationals in immigration and citizenship cases"

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Answers to questionnaire: Norway

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Public order, national security and the rights of the third-country nationals in immigration and citizenship cases

Answers from Norway

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I. Introduction.

1.1. This seminar will focus on striking a balance between the rights of third-country nationals and the protection of national security and public order in immigration and citizenship cases. The most common categories of the administrative acts that are relevant to this topic are visa decisions, refusal of entry, entry bans, all types of decisions on granting a residence permit (permanent or temporary), return decisions, and decisions relating to the acquisition and loss of nationality.

1.2. The topic of this seminar does not cover the situation of refugees in cases where the procedure for international protection has not been finally completed, although the returning of unsuccessful asylum seekers is within the topic hereof. The situation of EU citizens and their family members is also not covered by this seminar, since they are not considered to be third-country nationals within the meaning of EU law. For these reasons when answering the questions please do not include information relevant to asylum seekers or EU nationals or their family members within the meaning of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

1.3. Neither EU law nor the jurisprudence of the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR) give us a clear definition of public order and national security (external and internal security of the member states). It should also be noted that not one single term but instead often a number of different terms are used in relation to national security and public order. That alone may lead to a lack of consistency of judicial practice in Member States and cause confusion in terminology. For example, in Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for the returning of illegally present third-country nationals (referred to as the Returns Directive) in relation to an entry ban the term “a threat to public policy, public

security or national security" is used, in Art. 11(3) thereof. In relation to refraining from granting a period for voluntary departure the term "a risk to public policy, public security or national security" is used, in Art. 7(4), and in relation to an entry ban which is more than five years in length the term "a serious threat to public policy, public security or national security" is used, in Art. 11(2). In Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents the term "a threat to public policy or public security" is used and excludes the acquiring and maintaining of long-term resident status in a Member State, in Recital 8, Art. 6(1), Art. 9(7), Art. 17(1) and Art. 22(1)(3), and "actual and sufficiently serious threat to public policy or public security" is found in Art. 12 (1). The term "a threat to public policy or public security or public health" is used by Directive 2003/86/EC of 22 September 2003 on the right to family reunification and it is permitted to withdraw a family member's residence permit or to refuse to renew the said permit (Recital 14, Art. 6 (2) of the Family Unification Directive). On the other hand, under Art. 8 (2) of the ECHR the right to family life may be denied, inter alia on the grounds of "national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". The Visa Code (Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas) allows the verification of entry conditions and risk assessments in the light of risks to the security of the Member States (Art. 21(1)) or whether a person constitutes a "threat to public policy, internal security or public health as defined in Art. 2(19) of the Schengen Borders Code or to the international relations of any of the Member States", Art. 21(3d) and Art. 32(1a vi). One of the entry conditions for third-country nationals under the Schengen Borders Code (Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (the Schengen Borders Code)) is to not be considered to be "a threat to public policy, internal security, public health or the international relations of any of the Member States" (Art. 6(1e)). In Decision No 1/80 of the EEC/Turkey Association Council of 19 September 1980 on the Development of the Association "grounds of public policy, public security or public health" were invoked in relation to employment and the free movement of workers of Turkish nationality (Art. 14(1)).

1.4. Along with national security and public order, the term "public health" is often used. Since the focus of the questionnaire is on public order and national security only, issues

related to the public health have not been included and there is no need to present them when answering the questions.

1.5. There are consequences of establishing risks to public order and national security from third-country nationals in both substantive and procedural immigration and citizenship laws in Member States. Many of those derive directly from EU law. It is important to examine not only whether there is a common understanding of these concepts but also their similarities and differences and how a judge in the administrative court can strike a balance between the rights of third-country nationals and the protection of national security and public order in immigration and citizenship cases.

II. Questions

A. General questions. National judicial and legal framework in the field of migration of third-country nationals and in citizenship cases.

1. What is the national legal framework in the field of immigration of third-country nationals in relation to national security and public order? Please provide in particular information on the relevant legislation, the organisation of the courts responsible for immigration cases (special tribunals, general administrative courts and others), the number of tiers of the court system and also at the administrative level, if there is a prior administrative procedure. Please give links to websites with the relevant national legislation, if available.

The legal framework

The primary source of regulation in this field is the Immigration Act of 2008. The act provides the basis for regulating and controlling entry and exit of foreign nationals and their stay in the realm, in accordance with Norwegian immigration policy and international obligations. Further, it facilitates lawful movement across national borders, and ensures legal protection for foreign nationals who are entering or leaving the realm, who are staying in the realm, or who are applying for a permit under the act. It further provides the basis for protecting foreign nationals who are entitled to protection under general international law or international agreements by which Norway is bound. The act is supplemented by the Immigration Regulation of 15 October 2009, in which detailed rules about the immigrants' entry and stay in Norway is set out.

Both the act and the regulation govern the immigration of third-country nationals in relation to fundamental national interests and public order. The act and the provision use the notion of "fundamental national interests" and not "national security" or the likes. The previous act used the latter. In the preparatory work for the 2008 act it was emphasised that "fundamental national interests" is a more adequate notion that more clearly reflects which interests the act governs.[1] It was particularly stressed that the new wording is more appropriate to reflect how modern terrorism works, where the intention is not always directed towards national security per se, but to create fear in the society. The content of the notion is further elaborated in the answer to question 6 below.

The Immigration Act chapter 14 provides certain special regulations and procedures for cases in which fundamental national interests are concerned. The chapter allows for the same type of coercive means and decisions as the act otherwise sets out, but on a supplementary ground (fundamental national interests or interests of foreign policy) and it provides certain special procedural rules for the government and the courts when these supplementary grounds are employed in a case. Chapter 14 cases is different from ordinary immigrant cases in that there is classified information that the government has access to, but wants it kept secret from the immigrant, and use this information in the decision of the legal questions in the case. The act is also supplemented by the Norwegian Security Act, under which security clearance for the person(s) involved in these cases is regulated.

The administrative bodies and the court system

The first instance administrative body is normally the Norwegian Directorate of Immigration (UDI). The UDI processes applications for protection (asylum), visitor's visas, family immigration, residence permits for work and study purposes, citizenship, permanent residence permits and travel documents. The UDI also make decisions on rejection and deportation.

The Immigration Appeals Board (UNE) considers appeals against the UDI's decisions pursuant to the Immigration Act, the Immigration Regulations and the Citizenship Act. The UNE is superior to the UDI as a body for legal interpretation. This means that UNE's practice forms the basis for the UDI’s practice. The UNE is an independent administrative body, meaning that it in ordinary cases cannot be instructed by e.g. the Ministry of Foreign Affairs.

[1] Ot.prp. no. 75 (2006-2007) page 385.

This ordinary administrative track in immigration cases can be adjusted in cases concerning fundamental national interests or foreign policy interests. The Ministry of Foreign Affairs may in such cases resolve that the ministry itself shall decide as first instance administrative body. This is normally the case if the party has made reasonable arguments that the case raises questions about compliance with the ECHR.[2] Further, only the police can employ coercive means (e.g. custody) against the immigrant. If the Norwegian Police Security Service or the Ministry of Foreign Affairs has made an assessment in a case, the conclusion of this assessment shall at the outset prevail in the UDI's decision.

The immigrant must exhaust administrative remedies in cases concerning fundamental national interests. Consequently, a suit may only be submitted after the highest administrative body in the case has made a resolution.

In Norway there are no special courts or tribunals responsible for immigration cases, although the UNE may in some respects be regarded as a special tribunal. This means that the legal review of the government's decision is carried out by the ordinary courts, i.e. the district/city court (first instance), the court of appeals (second instance) and the Supreme Court (third instance).

In March 2017 a government-appointed committee submitted a recommendation in which it was advised to replace the UNE with an administrative court.[3] The recommendation is now at the Ministry of Justice and Public Security and the Ministry of Children and Equality for assessment.

- UDI information page: https://www.udi.no/en/about-the-udi/about-the-udi-and-the-immigration-administration/who-does-what-in-the-immigration-administration/

- The Immigration Act, unofficial English translation: https://www.udiregelverk.no/no/rettskilder/sentrale/utlendingsloven-engelsk/

2. What is the national legal framework in the field of citizenship cases in relation to national security and public order? Please provide in particular information on the relevant legislation, the organization of the courts responsible for citizenship cases (special tribunals, general administrative courts and others), the number of tiers of the court system and also at

[2] Prop. 141 L (2012-2013) page 35.
[3] NOU 2017:8.

the administrative level, if there is a prior administrative procedure. Please give links to websites with the relevant national legislation, if available.

The Norwegian Citizenship Act of 2005 governs conferral and loss of Norwegian citizenship. The act is supplemented with the Citizenship Regulation of 2006. The administrative procedure and court procedure equal the ones described above. However, the act does not set out specific procedures for cases concerning fundamental national interests and foreign policy interests, with one exception: The Ministry of Foreign Affairs can instruct the underlying bodies in a specific case if the case concerns fundamental national interests.

3. Please give the number of immigration and citizenship cases brought before the courts in 2016 (1 January to 31 December 2016) involving third-country nationals (please exclude cases concerning EU nationals and refugees). Please provide separately information on the number of cases brought before the court of last resort (the Supreme Administrative Court) and before the lower courts. If possible, please provide information on the percentage of cases in which grounds related to national security and public order were decisive. Are cases in which issues related to national security and to public order have to be considered registered with the court separately and are they given priority when listed for hearing?

Unfortunately, we do not have any adequate official statistics in this field. We have been in contact with the UNE regarding this question, and we have been informed that 144 UNE cases were brought to the courts in 2016. 86 of these cases were asylum cases and three concerned both asylum and another case type (deportation or repeal of permits). Three of the cases concerned EU/EEA citizens. Consequently, 55 new cases were brought to the courts in 2016, including the three cases concerning both asylum and another case type.

Please note that of the suits that originally were registered as asylum cases, some cases may have changed their course to concern residence permit on the grounds of strong humanitarian consideration or particular connection to Norway. The UNE did not have the resources to manually control these cases.

As presented below, leave is required for the Supreme Court to assess the case on the merits after an oral hearing of the appeal. The Supreme Court passed three judgments in immigrant cases in 2016, of which one was an asylum case.[4]

4. Briefly describe the judicial procedure in immigration cases in your country. Please address in your answer, inter alia, the following questions:

a. Are there any differences in the judicial procedure between immigration cases and other administrative cases?

If the immigrant is not satisfied with the administrative decision, a suit must be initiated. The government will normally have an obligation to cover the legal expenses. There will thereafter be an oral hearing in the first instance court, and the same applies to the appellate court (although the appeal court under some circumstances may reject to assess the appeal on the merits).

Apart from the special regulations that may apply in cases involving fundamental national interests, there are no particular differences in the judicial procedure.

b. Do the elements of national security and public order make procedures in immigration cases involving the issue of national security and public order different from the procedures in immigration cases in which an issue related to national security and public order does not exist?

The Immigration Act provides that the normal procedural rules in the Civil Procedure Act at the outset apply. Chapter 14 of the act provides some exemptions/adjustments for cases concerning fundamental national interests, which in short terms are:

- A suit must, as a main rule, be sent to the courts within a month after the immigrant has been notified about the administrative decision. As mentioned, the immigrant must exhaust administrative remedies, i.e. appeals in the administrative system.
- According to the Civil Procedure Act evidence cannot be presented in the court proceedings about anything that is confidential for reasons of national security or

[4] HR-2016-2017-A, HR-2016-1252-A and HR-2016-1051-A.

relations with a foreign state. As a condition for submitting such evidence, the government may decide that the information may only be given to a special counsel appointed for the immigrant. The special counsel appointed for the foreign national shall be notified of the information and evidence that will be presented, and shall safeguard the interests of the foreign national in connection with the court's consideration of these. The court decides the means by which the special counsel is given access to the classified material. After the special counsel has been given access to the classified information mentioned, he or she may not discuss the case orally or in writing with the immigrant or his/her ordinary legal counsel. The immigrant and the ordinary counsel must leave the court room when the special counsel submits his/her arguments concerning the classified evidence.

- The court shall take into consideration the explanations and arguments from the party, his/her ordinary legal counsel and the special counsel. Only after these have been presented, the court can pass its judgment.

c. *What is the power of the judge of a first instance administrative court, in particular is he/she limited to control legality (conformity with law) of the challenged administrative decision or is the role of the judge broader and the judge has the power not only to quash an administrative decision but also to change it (judgement on the merits) and is it a judicial review ex nunc or ex tunc?*

The first instance court is not limited to control legality of the challenged administrative decision. At the outset the first instance court can also repeal the decision on the merits, meaning that the courts' review includes the application of the law and the facts of the case. However, the courts' judicial review is in certain respects limited to control legality and facts, and not the application of the law. This is the case where the application of a requirement, in full or in part, or the choice of means is the government's prerogative. For example, the courts can normally only assess whether the choice of means is proportionate.

The assessment of the courts' powers must be carried out through an interpretation of the provision in question. Consequently, the question of the courts' powers cannot be answered on a general basis. The courts are however authorized to conduct a full judicial review of compliance with international law. Please also note that because of the rule of law principle

the courts' powers are generally broader in immigrant cases than in ordinary administrative cases.

The courts cannot pass a judgment on the merits of the case. This means that the authorities' decision is either upheld or repealed, unless it is considered to be unnecessary formalism to not pass a judgment on the merits. This exception is employed only in very special cases.

In 2012 the Supreme Court passed two judgments concerning inter alia the question of whether the factual basis for the review should be the facts present at the time the challenged decision was made, or whether subsequent facts could be taken into account in the judicial review.[5] The Supreme Court held that subsequent facts could not be considered in the judicial review, also for the questions regarding violation of the ECHR and the UN Convention on the Rights of the Child.

The distinction of ex nunc and ex tunc has not been particularly discussed in jurisprudence with respect to the judicial review of administrative immigration decisions. The leading view has traditionally been that invalid orders and prohibitions are considered invalid ex tunc, and are therefore without effect already from the time of the decision was made. However, if a decision is considered invalid on the basis of subsequent facts (if possible), the decision cannot be considered without effect ex tunc. Please note that case law does not provide a clear answer to this question, and there are elements of uncertainty here.

d. What is the power of the court of the last resort? Please indicate which court that is (the Supreme Administrative Court, the Supreme Court or the Council of State or another court).

The Norwegian Supreme Court is the court of the last resort. The Supreme Court's powers equal the one described in the answer above.

e. Can a party in every immigration case apply for his/her appeal to be heard by the Supreme Administrative Court or is in some situations that right excluded or restricted (e.g. is leave required)?

[5] Rt-2012-1985 and Rt-2012-2039.

A party in every immigration case can appeal to the Supreme Court. However, leave is required for the Supreme Court to assess the case on its merits. Leave can only be granted if the appeal concerns issues with significance/interest beyond the case or if it is important for other reasons that the case is assessed by the Supreme Court.

5. Briefly describe judicial procedure in citizenship cases in your country. Please address in your answer, inter alia, the following questions:

a. *Are there any differences in the judicial procedure between citizenship cases and other administrative cases?*

The citizenship cases follow the same track as immigrant cases. The Citizenship Act does however not have the same procedures as the Immigrant Act has for cases concerning fundamental national interests. In the administrative procedure the Citizenship Act has a provision by which the Ministry of Foreign Affairs can instruct the underlying administrative bodies in specific cases.

b. *Do the elements of national security and public order make the procedure in citizenship cases involving the issue of national security and public order different from the procedure in citizenship and immigration cases in which an issue related to national security and public order does not exist?*

No, but please see answer 4 a and 5 a.

c. *What is the power of the judge of a first instance administrative court, in particular is he/she limited to control legality or is the role of the judge broader and then judge has the power not only to quash an administrative decision but also to change (reform) it (judgement on the merits) and is it a judicial review ex nunc or ex tunc?*

Please see answer to 4 c.

d. What is the power of a judge of the last resort court? Please indicate which court that is (the Supreme Administrative Court, the Supreme Court or the Council of State, or another court).

Please see answer to 4 d.

e. Can a party in every citizenship case apply for his/her appeal to be heard by the Supreme Administrative Court or is in some situations that right excluded or restricted (e.g. is leave required)?

Please see answer to 4 e.

B. Substantive issues. The notion of public order and national security.

6. Does the national law in your country define such terms such as "public order", "national security" or other terms that play a similar role in immigration and citizenship cases and aim to protect those values? Please quote definitions of such terms if possible. If those terms have been defined in case law only, please explain how they are understood in jurisprudence.

As previously mentioned, the Immigration Act of 2008 adjusted the notion to "fundamental national interests". At the same time the notion was amended in the Citizenship Act.

In the preparatory work for the Immigration Act it was stressed that the notion of "fundamental national interests" is broader than "national security", and must the interpreted dynamically in light of developments in the society and international developments.[6] It has also been assumed that the notion to a greater extent encompasses threats against private interests or persons than the notion of "national security".[7]

The term is not statutory defined, and it is not easy to define precisely. As mentioned the term is not to be interpreted statically, but in light of developments in the society. It is broader than the notion of "national security" and the likes. In Einarsen: Comments to the Immigration Act (2008) page 102 it is stressed that the core is fundamental national interests related to

[6] Ot.prp. no. 75 (2006-2007) page 385.
[7] Prop. 141 L (2012-2013) page 9.

territorial sovereignty and defence, but also governing key governmental institutions and vital business interests. Einarsen also adds that the term encompasses threats of more limited acts of terror, or support or assistance to such operations, can suffice – even though the action is not aimed towards national security as such, but rather to create fear in the society and/or attention to a matter.

The scope of the notion must be assessed on a case-specific assessment, and it is not simple to draw a clear line of what actions fall outside of the term.

The government has established the following list of *indicators* that a case may concern fundamental national interests:[8]

1. The UN Security Council has resolved sanctions against the immigrant or an organisation the immigrant is part of, or the EU has resolved restrictive measures against the immigrant or an organisation/entity the immigrant has links to. The same applies if the immigrant or an organisation/entity he/she has links to is on the EU's list of persons, organisations or entities involved in terrorist acts.
2. There is reason to assume that the immigrant has a non-peripheral link to a terrorist network that has carried out violent acts, or that the immigrant has a non-peripheral link to a group, organisation or party with connections to, or actively supports, terrorist networks or groups that have carried out violent extremist acts. In the assessment it should inter alia be taken into account the duration of the link and if the immigrant has been exposed to coercive recruiting.
3. There is reason to assume that the immigrant in other ways has a non-peripheral link to terror, for example by inspiring or motivating to extremist acts although no specific acts have been carried out.
4. There is reason to assume that the immigrant has a political and/or ideological conviction that indicates that he/she supports extremist and violent acts.
5. There is reason to assume that the immigrant can be linked to refugee espionage.
6. There is reason to assume that the immigrant works for/has worked for, has or has had links to or knowledge of security and/or intelligence services, or has knowledge of intelligence information.

[8] GI-2016-2.

7. There is reason to assume that the immigrant can pose a threat against key persons in the Norwegian government, government bodies, important infrastructure, transport and communication, emergency preparedness or foreign representation, or otherwise will endanger fundamental interest of society.
8. The immigrant belongs to a regime Norway does not recognize.
9. The immigrant is a distinguished person and/or has had a vital political/administrative position, and the outcome of the administrative case in Norway will cause reactions from the state of origin or other states' authorities.
10. The immigrant has or is assumed to have had a distinguished position in the military or police in a state without a democratic government.
11. There is reason to assume that the immigrant has participated in or contributed to crimes of particular danger to the society, organised crime, war crimes, crimes against humanity or genocide.
12. The immigrant has been on several travels abroad from a state in which travel permits are restrictively regulated.
13. The immigrant is or has been part of the personnel, or family member part of the same household as such personnel, at another state's diplomatic representation in Norway or another state, and applies for asylum or other permission to stay in Norway.
14. There is reason to assume that the immigrant has participated in arms dealing or has knowledge about the weapon industry, and that is criminal according to international law Norway is bound by.
15. The immigrant has worked in a company, academic institution or research institution that can be suspected for producing weapon of mass destruction and/or components of such weapons.
16. The immigrant applies for higher education or to do research within areas relevant for spread of mass destruction weapons and/or components of such weapons.
17. The case is linked to co-operation arrangements with international courts, or international bodies have conferred with Norwegian government about the case.

7. Has the meaning of the terms "public order" and "national security" evolved in case law in recent years? In particular, are both terms given wider comprehension in comparison to their scope in the past, and does a broader meaning result in them covering current situations

that were unlikely to have constituted a risk to public order and national security in the past? Is this evolution a result of the jurisprudence of the ECtHR or the CJEU?

Please see above regarding the amendment to the notion of "fundamental national interests". The term is by nature flexible and to be adjusted by time. The amendment was not a result of the jurisprudence of the ECHR or the CJEU.

As the Immigration Act of 2008 is relatively new, we only have one decision from the Supreme Court in cases that concern fundamental national interests.[9] The Supreme Court ruled that the procedure of appointment of a special counsel to review classified material for the immigrant satisfied the immigrant's right to an effective remedy under the ECHR Article 13. The judgment does not assess whether the term "fundamental national interests" was satisfied in the case, as this was not disputed.

8. Does risk to public order and national security constitute grounds in your national law for refusing to allow a third-country national:

a. to enter the territory of your state;

b. to stay for 90 days in any 180-day period (short stay);

c. to be granted resident permits (temporary or permanent);

d. to acquire nationality?

If the answer to one of the above sub-questions is "yes", please describe whether public order or national security grounds may be applied in every case or in some categories of cases only. In particular, are there any exceptions if the third-country national is married to a national or there are strong family life concerns (Art. 7 of the Charter of Fundamental Rights of the European Union, Art. 8 of the ECHR) or prohibition of torture and inhuman or degrading treatment or punishment is at stake (Art. 4 of the Charter, Art. 3 of the ECHR)?

According to chapter 14 of the Immigration Act, fundamental national interests can be legitimate grounds for rejecting an application for permissions (e.g. residence permits) or granting rights. Further, an application for citizenship may be rejected on the basis of fundamental national interests. In the preparatory work the legislative committee discussed

[9] HR-2016-1252-A.

whether this provision was unnecessary in light of the provisions in the Immigration Act and the possibility to repeal acquired citizenship, but the legislator found it appropriate to include such provision in the Citizenship Act.[10]

The provisions give the government a discretionary power to decide whether refusal as described in the question shall be given. The provisions do not have an explicit reference to the ECHR, but because of the Human Rights Act the restrictions of the ECHR will apply directly. Exceptions from the power to refuse applications for such permits or rights may therefore follow from the ECHR. The specific assessment will be carried out in accordance with the ECHR.

9. Does risk to public order and national security constitute grounds in your national law for decisions resulting in:

a. the removal of a third-country national from the territory of the country (a return decision);

b. the issuing of a return decision without providing an appropriate period for voluntary departure;

c. the withdrawal of residence permits (temporary and permanent);

d. the loss of nationality that had been acquired?

If the answer to one of the sub questions is "yes", please describe whether public order or national security grounds may be applied in every case or in some categories of cases only. In particular, address whether there are any exceptions if the third-country national is married to a national or there are strong family life concerns (Art. 7 of the Charter of Fundamental Rights of the European Union, Art. 8 of the ECHR) or prohibition of torture and inhuman or degrading treatment or punishment is at stake (Art. 4 of the Charter, Art. 3 of the ECHR).

The immigration authorities may in accordance with the Immigration Act resolve to deport the immigrant or retract a permit or other rights from him/her in the interest of fundamental national interests. Such decisions may however not be made if, considering the interests at stake and the immigrant's connection to Norway, it is a disproportionate mean against the immigrant or his/her closest family members. The best interests of the child are of

[10] Ot.prp. no. 41 (2004-2005) section 8.11.6.

fundamental importance in cases concerning children. The mentioned provisions of the ECHR will apply in the proportionality assessment, if relevant in the case in question.

In the preparatory works to the Immigration Act it is stated that the interests of the party or his/her family must apply with great strength for a deportation decision to be disproportionate when fundamental national interests are at stake.[11]

Today the Citizenship Act does not allow the government to repeal an acquired citizenship because of fundamental national interests per se. Grounds for repeal may follow from other provisions, but they encompass as a main rule only omissions or other wrongdoings in the administrative process that led to the acquisition of the citizenship. If the person is subsequently radicalized and thereby poses a threat to fundamental national interests, the citizenship cannot be repealed on the basis of these provisions. In December 2016 the Ministry of Justice and Public Security issued a proposal to amend the act. It is inter alia proposed that fundamental national interests per se can constitute grounds for loss of citizenship that has been acquired.[12] The proposal is now being assessed at the Ministry of Justice and Public Security in light of responses received in the consultation procedure that ended in February 2017. Certain aspects of the proposal have received criticism from consulted bodies and in the media.

For the sake of completeness: The Immigrant Act states that a foreigner born in Norway and has continuously lived in Norway since his/her birth cannot be deported.

10. Please give examples from your court's practice in often repeated situations that have fallen within the scope of the terms "public order" and "national security" in:

a. immigration cases;

b. citizenship cases.

As previously mentioned, the Supreme Court has not had cases in which the notion of fundamental national interests was disputed, after the notion was introduced in the legislation.

[11] Ot.prp. no. 75 (2006-2007) section 15.6.3.
[12] Consultation paper from the Ministry of Justice and Public Security of 20 December 2016.

11. Are the following criteria in your case law or the national law used to determine a threat to national security and public order:

a. personal conduct;

b. the fundamental interest of society;

c. genuine, present and sufficiently serious threat;

d. other?

Please specify whether the above are applicable in immigration or citizenship cases.

As a consequence of the new notion, at least letter b must be considered as a de facto requirement, although not explicitly being defined as a requirement. Further, it is difficult to see how personal conduct is not a de facto requirement in the assessment, the same applies to letter c. With regards to the latter the Supreme Court has held that when there is a risk of terrorist acts of some extent, even a limited but genuine risk of such actions will fall within the notion.[13]

12. Would you consider the following to be a violation of public order that would lead a third-country national being denied a residence permit or given return decision if the third-country national cannot rely on the protection of family or private life and is found guilty of:

a. shoplifting;

b. drink driving;

c. tax avoidance;

d. fare avoidance;

e. parking offences;

f. traffic offences;

g. smuggling small quantities of alcohol/cigarettes (duty avoidance);

h. hate speech;

i. contracting a marriage of convenience (a sham marriage).

Residence permits can be obtained on different grounds and the rules do not have common features of particular interest to this question. In this respect the framework regarding deportation provides a more relevant answer to the question.

[13] Rt-2007-1573.

The system of the Immigration Act strives to balance the interests of the individual on the one side, and the society on the other. This means that the individual's connection to Norway determines what constitute legitimate grounds for deportation. The first factor has three tiers: immigrants *without* residency permit, immigrants with *temporary* residency permit and immigrants with *permanent* residency permit.

Immigrants without residency permit can be deported if he/she has been convicted for a crime that can lead to imprisonment (it is not necessary that he/she actually has been sentenced to prison, it is sufficient that the type of crime in question can lead to imprisonment) and other specifically listed felonies, e.g. petty theft. Consequently, the offences described in letter a, b, c (if illegal avoidance), f and h can lead to deportation. The other offences do not per se constitute grounds for deportation, as this will depend on the graveness of the offence etc.

If the immigrant has a temporary residency permit, being sentenced for a crime that can lead to imprisonment of more than one year constitutes grounds for deportation. Further, the provision lists other specific felonies that also can lead to deportation. The offences described in letter c (if illegal avoidance) and h can lead to deportation of such immigrant.

For immigrants with a permanent residency permit the maximum sentence for the crime must be two years or more, alternatively the other specified felonies the relevant provision refers to. Consequently, the offences described in letter c and h can lead to deportation of such immigrant.

However, these are only minimum requirements for deportation. A foreign national may not be deported where, in light of the seriousness of the offence and the foreign national's connection to Norway, deportation would be a disproportionate measure against the foreign national concerned or the person's closest family members. In cases concerning children, the child's best interests shall be a fundamental consideration. Consequently, there are no clear-cut answers to question 12.

13. If a third-country national can rely on the protection of family/private life, could the situations described above (in question 12, points a–i) ever lead to the denial of a residence

permit or a decision on return? Could removal or denial of a residence permit be dependent on a proportionality test? Please differentiate between situations a–i if necessary.

Please see the answer to question 12. This would be relevant for the proportionality test.

14. How do you protect the best interests of a child with regard to national security and public order? Please illustrate with examples. Can a third-country national be removed from your country if he/she is the only 'home maker' guardian to a national of your country (for example, if the national of your country is a minor) and there are strong indications that the third-country national continuing to stay in your county is a threat to national security or public order?

As previously stated the best interests of a child must be particularly emphasized in cases involving children, but the government and the courts must find a balance between these and other interests the case concerns. Although the immigrant's stay in Norway poses a threat to fundamental national interests, the best interests of a child may cause a deportation decision to be unlawful. With respect to the specific question, it is difficult to provide a clear answer to that. It will inter alia depend on how the child's situation will be in the immigrant's country of origin and the seriousness of the threat to national interests. As previously stated, deportation will normally not be a disproportionate mean if the immigrant is a threat to fundamental national interests.

15. Would you consider terrorism, smuggling of people, child abuse, trading in weapons, crimes committed by repeat offenders or drug dealing to be offences with regard to public order or national security that may lead to:

a) loss of nationality that had been acquired;

b) the denial of a residence permit or issuance of a return decision?

Please see above answers.

16. If a third-country national has been excluded from protection on the grounds of Art. 1F of the 1951 Refugee Convention, is he/she automatically considered to be a [serious] threat to public order or national security and does he/she have to be removed from the country

without any additional examination of the actual and current risk? If a separate procedure is required in order to take a return decision, is it necessary to take into account the following criteria:

a. personal conduct;

b. the fundamental interest of society;

c. genuine, present and sufficiently serious threat;

d. other?

An immigrant who has committed acts as described in the alternatives in the exclusion clause will, with almost no exemptions, be considered as a threat to fundamental national interests. He/she is however not automatically considered to be such a threat, as this would depend on the case-specific application of the fundamental national interests notion. Removal of this person will follow the same procedure as described in answers above.

17. Can you give examples of cases in which family or private life is given priority over national security or public order? Please describe them briefly.

We are not familiar with case law of interest for this questionnaire in this respect.

18. Do you experience tensions between the automatic protection given by Art. 4 of the Charter of Fundamental Rights of the European Union (Art. 3 of the ECHR) and national security that calls for removal? Could you give examples of your national practice?

We can on a general level say that there may be tensions between these two interests when both of them apply with great strength. We have, however, not seen such tensions in the upper courts here in Norway. There may be several reasons for this. One may be that the Immigration Act sets out a clear requirement of proportionality for deportation, which we assume is normally triggered at a lower level than Article 3 of the ECHR.

C. Procedural issues. Fairness of the procedure.

19. If a decision reviewed by a judge is based on national security or public order grounds, does it always contain legal and factual reasons? On what conditions can an administrative authority refrain in full or in part from justifying such a decision?

Yes, decisions from the government and the courts must contain legal and factual reasons. However, according to the Civil Procedure Act evidence can be kept secret in the interests of national security or relations with a foreign state. These are reviewed by the special counsel. The parts of the decisions, both from the authorities and the courts, that refer to such evidence are also classified.

One example is the judgment of 14 January 2016 from Borgarting Court of Appeal.[14] The court presented the relevant facts concerning fundamental national interests, and thereafter simply noted that the court agreed with Oslo City Court that the graded evidence supported the immigrant's role in an extremist group. The appellate court's judgment was as a whole public, but the city court's judgment was partially kept secret and only provided to the special counsel.

Please note, however, that the government may opt to not submit such evidence. The procedure of a special counsel applies only when the government submits this evidence in the court proceedings.

If evidence is kept secret the courts have to assess whether the submitted evidence is sufficient for its review. The so-called Krekar case raised this issue.[15] Krekar had a residency permit and the case concerned the validity of the decision to deport him. The Supreme Court noted that the submitted evidence was sufficient to review the government's decision. However, with reference to inter alia the ECHR case of Al-Nashif v. Bulgaria (50963/99) the court stressed that it is not obvious that the Norwegian legal framework satisfies the ECHR Article 13 if important information is kept secret because of the interests of national interests.

The special procedural rules described above came as a result of inter alia this Supreme Court case.

[14] LB-2015-86502 and TOSLO-2014-136933.
[15] Rt-2007-1573.

20. If a decision is based on national security or public order grounds, do the party, his/her lawyer and a judge reviewing a decision have the same access to the legal and factual reasons of this decision provided by the administrative authority?

Please see above. The judge and the special counsel will have full access to the classified parts of the decision, but the party and his/her ordinary counsel will not have access.

21. Is evidence that substantiates the establishing of facts (grounds) that constitute a risk to national security or public order always open to:

a. a judge;

b. a party to the procedure;

c. a counsellor (lawyer) representing a party?

Please see answers above.

In the Supreme Court's judgment of 14 June 2016 the question was whether the special counsel procedure satisfies the requirements of effective remedy under the ECHR Article 13.[16] The Supreme Court held that the procedure does not violate Article 13. In the case it was argued that the deportation decision was in violation of the ECHR Article 8, and the Supreme Court noted that the procedural requirements under Article 13 is stricter if the question is whether the government's decision is in violation of Article 3. It is therefore not clear whether the special counsel procedure is lawful in cases concerning a possible violation of Article 3.

22. Is every judge allowed to have access to classified evidence or is it necessary to obtain a special certificate (security clearance) and undergo a vetting process? Is this procedure mandatory for all judges or only to those who are ruling on national security cases and have access to classified evidence?

Yes, the judges involved in such cases must undergo a vetting process and obtain a special security clearance in accordance with the Security Act. This is not mandatory for judges on a

[16] HR-2016-1252-A.

general basis, but the judge must have such clearance to rule in these cases. The special counsel must also have this security clearance.

23. If facts or evidence that constitute a risk to national security or public order are not open to a party to a procedure and his/her counsellor (lawyer) representing the party, are there any mechanisms in your law or courts' practice that ensure 'Equality of Arms' between the parties to the proceedings and make evidence that was not disclosed to the party and his/her lawyer available in another way with a view to adversarial argument (e.g. a summary of the evidence is presented to the party or a specially vetted lawyer is allowed to see the case file in order to defend the interests of the third-country national)? Please describe how this mechanism works in practice, when it was established and its legal grounds.

Please see answers above, especially regarding the role of the special counsel. The special counsel procedure was established inter alia to satisfy the principle of equality of arms. The rules entered into force 1 January 2014 and they are provided in the Immigration Act.

24. If evidence that substantiates the establishing of facts (grounds) that constitute a risk to national security or public order is not open to a party to a procedure or his/her counsellor (lawyer), is the judge allowed to verify the lawfulness of the denial of access to such evidence and does the judge have the competence to disclose such evidence to the party to the procedure? Please describe the grounds and mechanism of judicial control in relation to the denial of access to a case file due to its confidentially on grounds of its classified character (state secrecy or similar).

As mentioned, the Civil Procedure Act section 22-1 gives the government the option to not submit evidence that concerns national security or relations to a foreign state. The court is competent to review whether the evidence meets the requirements of section 22-1. However, this control must in ordinary cases be carried out without the possibility to review the relevant evidence. Consequently the judicial control of the government's secrecy is rather limited in this respect. If the special counsel procedure is employed the court can make its decision after reviewing the evidence.

25. Is evidence admitted by judges during court procedures in immigration and citizenship cases always available to the parties with a view to adversarial argument or are special protective measures applied to sensitive documents that do not allow the disclosing of such evidence to a party? Are there any special mechanisms applied to ensure 'equality of arms' between the parties to proceedings if a document is not disclosed to a party?

Please see answers above.

26. Are full judgements and their legal and factual reasons in immigration and citizenship cases always open to the parties and their counsellors? Are there any restrictions regarding the reasons for a judgement in relation a party or their counsellor if that judgement is based on national security or public order grounds?

Please see answers above. If the case does not concern fundamental national interests or the likes, the full judgments are open to the parties and their counsellors.

27. Are the same standards applied in relation to access to classified case files for nationals, EU citizens and their family members and third-country nationals? If there are differences in treatment of the third-country nationals in immigration and citizenship cases and other categories (nationals or EU nationals and their family members), please describe those differences.

Chapter 14 of the Immigration Act does not have any exceptions for EU/EEA citizens. Consequently the procedure, as described above, applies also for these. Nationals fall outside the scope of the Immigration Act and these procedures do not apply if a national is a party to an administrative case.

28. Are national security cases (immigration or citizenship) decided by a judge more quickly or given any priority when listed for hearing? Is every judge eligible to decide such cases or are there any special conditions provided by applicable law (e.g. security clearance)?

According to chapter 14 of the Immigration Act these cases shall be prioritized. The Citizenship Act does not have a corresponding provision, but we assume that such cases

nevertheless are prioritized. With respect to security clearance, please see answer to question 22.