Association des Conseils d'Etat et des Juridictions administratives suprêmes de l'Union européenne a.i.s.b.l.

Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a.

Conseil du Contentieux des Etrangers de Belgique– Raad van Vreemdelingenbetwistingen van België

Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union
With scientific support of the Council of Alien Litigations of Belgium

Asylum and immigration law: the national judge between national and european standards

NORWAY

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QUESTIONNAIRE

PRELIMINARY REMARK

Actions filed by foreign nationals should be understood as those actions concerning asylum-related issues (as per Article 78 of the Treaty on the Functioning of the European Union), and immigration-related issues (as per Article 79 of the Treaty on the Functioning of the European Union).

1. EVIDENCE LAW IN COMPETENT NATIONAL COURTS WITH REGARD TO ACTIONS FILED BY FOREIGN NATIONALS

A) RULES OF EVIDENCE

1. Are the rules of evidence in actions filed by foreign nationals laid down specifically in internal law?

Actions filed by foreign nationals are handled in accordance with the general Norwegian Civil Procedure Act. The general rules of evidence in the Civil Procedure Act apply. The parties shall ensure that the factual basis of the case is properly and completely explained and must present the evidence necessary to fulfil this duty. The submission and examination of evidence is free. However the evidence presented must have relevance and importance for the disputed questions of the specific case. The Immigration Act does not have any special rules of evidence.

1.1. Do national law or case law rule out certain types of evidence? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

No types of evidence are ruled out on a general basis. In the individual case evidence can be ruled out due to lack of relevance or if the scale and scope of the presentation of evidence is considered not proportionate to the importance of the dispute.

1.2. Do national law or case law allow certain presumptions (e.g. in asylum cases, in the event of past persecution or safe countries of origin)? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

The facts upon which the case shall be determined shall be established based on a free overall evaluation of the evidence presented in the individual case. There are however a few presumptions. For instance are the closest family members of a refugee without further submission of evidence presumed to have the same need for protection as the refugee himself. Furthermore, according to the Immigration Act in the event of past persecution there is a presumption for a well-founded fear of future persecution. Another example is the provision about collective protection. In a situation of mass outflow the King in Council may grant collective protection. Any foreigner who is included in the situation of mass outflow and who

comes to Norway will be granted protection temporarily based on group assessment. This is founded on a presumption that everyone included in the group has the same qualified need for protection.

In addition the Immigration Act on a few points lists some particularly relevant circumstances. These circumstances will carry a great deal of weight but are not considered conclusive evidence.

B) BURDEN OF PROOF

2. What is the role of the parties in the administration of evidence in actions filed by foreign nationals? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

As a general rule the plaintiff has the burden of proof. When action is taken for the courts by a foreigner, the disputed question is whether the rejection of the application is legal or not. The foreigner must substantiate his claim for protection or fulfilment of the refugee definition, and present evidence supporting his need for protection, showing that it is more likely that he has a need for protection than not. However when claiming risk of persecution it is enough to prove that the fear of persecution is well founded, thus persecution does not have to be the most probable scenario. This modification in the burden of proof is based on vital consequences of a possible wrong decision on this point.

There are a few exceptions from the general rule imposing the foreigner the burden of proof. For instance if an application for asylum is rejected the foreigner still has right to protection against persecution of a kind that may justify recognition as a refugee. If protection according to the non-refoulment clause is not granted, the Immigration authorities have the burden of proof. Thus the authorities must prove or substantiate that it is safe for the foreigner to return to his home-country.

The Immigration authorities also have the burden of proof if an application for family reunion is rejected on the ground that the marriage is without substance. The authorities must then present sufficient evidence supporting the allegation that the marriage has no substance.

3. Can trial judges play a role in the administration of evidence in actions filed by foreign nationals? If so, on what terms (e.g. do trial judges have the authority to examine evidence in detail or do they give a more marginal assessment)? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

The judge can try the facts of the case and in that respect make a full examination of the evidence presented by the parties. When the jurisdiction of the Immigration authorities is defined using vague or very discretionary criteria, the right to review is limited to controlling that the discretion exercised falls within the limits laid down by statute, that the administrative authorities have adhered to the relevant rules of procedure and that the discretion exercised is defendable.

C) WEIGHT OF EVIDENCE

4. How and on what terms do trial judges weight the various types of evidence submitted to them in asylum and immigration cases? Is any such weighting determined by national law

or by case law? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

On a few points the Immigration act lists circumstances with special relevance. These circumstances are not to be considered conclusive evidence. The judge must evaluate the evidence presented in the specific case and determine the weighting of the different pieces of evidence in that case.

5. What powers of review does the supreme administrative court have in assessing the evidential weighting of documents? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

The Supreme Court can try the facts and evidence of the case to the full extent.

2. COMPETENCE OF THE NATIONAL COURT TO ACT OF ITS OWN MOTION IN A EUROPEAN CONTEXT

1. Where the parties raise preliminary questions, can procedural restrictions be applied? For example, at what point in proceedings may the parties submit preliminary questions? Do those questions have to be submitted in a specific written procedural document or can they be submitted at any time, including at the hearing?

During the preparation of the case the parties may raise questions about the presentation of evidence, including the need for expert witnesses, and procedural issues concerning the preparation of the case or the main hearing. As a general rule the court must decide on these questions during the case preparation. Questions or objections to the court's management of the case or plan for further proceedings must be raised as soon as possible. During the preparation the court will not decide on material questions.

Evidence must be presented during the trial preparation. The evidence shall be presented as early as possible. Similarly the other party must present any objections against a piece of evidence as soon as possible. When submitting a piece of evidence, that party must state in some detail what the evidence purports to establish. The trial preparation is normally completed two weeks prior to the main hearing. The parties must then submit a written closing submission among other things listing the evidence that will be presented. The right to present new evidence after closing of the preparation and at the hearing is very limited.

If one party during the preparation refuses to present evidence in his possession upon request from the other, the judge must resolve the dispute prior to the main hearing. This decision may be appealed. Similarly the judge must resolve the dispute if one party's right to present a specific piece of evidence is challenged by the other, i.e due to lack of relevance or due to lack of specification of what the evidence purports to establish. The court may also during the preparation or at the hearing on it's own initiative exclude evidence that is not apt to appreciably improve the basis for the ruling, or the court finds necessary to have presented in a different manner. The scale and scope of the presentation of evidence must also be reasonably proportional to the importance of the dispute.

2. Has the national court already ruled on the issue of direct applicability in your country of Articles 18 and 47 of the Charter of Fundamental Rights of the European Union? If so, is the

national court which has jurisdiction to rule on disputes concerning actions filed by foreign nationals able or obliged to raise, of its own motion, arguments from these provisions?

The Charter of Fundamental Rights does not fall within the legal scope of the EEA-agreement. Subsequently the issue of direct applicability is not relevant under Norwegian law.

3. THE NATIONAL COURT AND EUROPEAN INSTRUMENTS

1. Do you regularly refer to European case law when handing down judgements? Have you ever referred to the case law of other Member States when handing down judgements?

Norwegian courts do not on a regular basis refer to European case law in their judgemenst. Within the scope of the EEA-agreement the Supreme Court refers to European case law regularly. Furthermore the Norwegian legislature has to some extent chosen to adapt legislation outside the scope of the EEA-agreement to EU regulations. Naturally European case law will be relevant and important for the interpretation of this legislation and will be referred to. Known case law from other Member states are some times referred to in Norwegian judgements. Case law from the Scandinavian Member States are referred to more often than case law from other Member States as the legislation in the Scandinavian countries are quite similar and as Scandinavian law are more known by and available to Norwegian judges and lawyers. In some cases the Supreme Court prior to the main hearing instruct the lawyers to prepare and give a presentation of European case law and relevant case law from Member states.

2. Can the national court autonomously interpret Article 1(A) to (F) of the Geneva Convention of 28 July 1951, specifically when abstracting information from Council Directive 2004/83/EC (the so-called Qualification Directive)? Has a conflict ever arisen between the two standards (e.g. in terms of their criteria of attachment or exclusionary clauses)? What solution(s) did the national court adopt, if any?

The national courts interpret article 1 (A) to (F) of the Geneva Convention autonomously. The Qualification Directive is not part of the EEA-agreement. Thus the directive is not part of Norwegian legislation and not applied by Norwegian courts.

3. Some European Directives contain provisions which do not have to be transposed, including Articles 5(3), 8(1) and (3), and 17(3) of Council Directive 2004/83/EC (the so-called Qualification Directive), Articles 26 and 27 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (the so-called Procedure Directive) and Articles 4(2) and (3), and 7(1) and (2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. Where these provisions have not been transposed, does the national court attach a level of importance to them anyway (soft law, minimal standards, etc.)?

The above-mentioned directives are not part of the EEA-agreement and have no importance or direct relevance under Norwegian law.
