An applicant's right to protection and the state's entitlement to protect its citizens against terrorism – a Norwegian perspective.

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To facilitate the discussion during this conference in Lisbon, this paper will focus on the procedural rules given in the Norwegian Immigration Act in cases where terrorism is an issue. The procedure is different than in many other countries as the Immigration Appeals Board is not part of the judiciary but part of the Civil Service.

1. Introduction

When the Immigration Appeals Board (UNE) was established and started its operation in 2001, this was after a thorough consideration of what would best protect the interest of the appellant.

UNE is an independent quasi-judicial Appeals Board that handles appeals of rejections by the Directorate of Immigration (UDI) pursuant to the Immigration Act. Administratively, UNE sorts under the Ministry of Justice and the Police (JD). Although the Ministry can instruct the Board through legislation, regulations, budget and general priorities, it cannot in general instruct the Board on interpreting the law, exercising discretion or deciding individual cases. The appeals UNE handles include; protection, family migration, residence permits.

UNE has a staff of over 350, of whom 26 are Board Leaders qualified as judges. In addition, approx. 300 lay persons have volunteered to serve as ad hoc appeals board members.
UNE has more than one method to reach its decisions. Decisions can be reached at appeals board hearings with the appellant present, at appeals board hearings without the appellant, by a board leader or by the legal secretariat. A board leader decides the processing method for each case. Decisions on process method can't be appealed.

A Grand Board was established on September 9th 2005. It reviews cases on issues of principle, cases with wide ranging economic and social consequences as well as cases where the board's practice varies. Three board leaders and four lay board members sit on the Grand Board. Decisions of the Grand Board are precedence-setting for other cases.

According to the Immigration Act, cases without material questions of doubt may be decided without an appeals board hearing, either by a board leader or by the legal secretariat. These may, for example, be cases governed by a regulation in which it is easily determined whether specific requirements of laws and regulations have been met. It is in cases presenting material questions of doubt that an appeals board hearing is convened.

Some appeals board hearings are held with the appellant present. However, appeals board hearings are also held without the appellant. If, for example, there is no doubt about the relevant facts of the case and no need for additional information from the appellant, the appeals board can hold a hearing and decide the case without the appellant. Alternatively, in

cases where relevant facts are in dispute or where the appellant can help provide necessary clarification, the appellant can be requested to appear at a board hearing.

Appeals board hearings are chaired by a board leader and attended by two lay board members. UNE's legal secretariat prepares cases to be handled by the appeals board. The board leader submits case documents to other board members prior to the hearing. Hearings take place in camera. Cases handled at appeals board hearings are decided by a majority vote.

2. Cases concerning terrorism.

Section 76 second and third paragraph read as follows:

> *The Ministry's general right of instruction shall not confer the right to instruct in relation to decisions in individual cases. Nor may the Ministry instruct the Immigration Appeals Board on law interpretation or exercise of discretion. The Ministry may instruct in relation to prioritization of cases.*
>
> *In order to safeguard fundamental national interests or foreign policy considerations, the Ministry may instruct regardless of the constraints of the second paragraph. The Ministry may in such instances instruct in relation to all decisions included in a case. The King in Council of State shall be the appeal instance in cases encompassed by the Ministry's instructions concerning law interpretation, exercise of discretion or decision of individual cases.*

As can be seen, the Board – in practice the Board Leaders – cannot be instructed in individual cases. But it follows from the third paragraph that in certain cases the Ministry can give instructions – and then in all decisions relating to that case.

The concept of "fundamental national interests" was introduced in the new Immigration Act of 2008. In the previous Act the term "the security of the realm" was used. In the travaux préparatoire of the new Act, the view was that the old term was outdated, especially in relation to terrorism. The aim for such acts may not so much be to threaten the security of the State but rather to create fear in the population or to inspire or motivate extremist acts.

The concept of "fundamental national interests" must be interpreted taking into account the development in society in general and changes in the international security situation and is of a dynamic character. The concept includes both Norwegian and foreign interests in Norway as well as Norwegian interests abroad. Also the interests of Norwegian alliance partners are included. The final interpretation of the concept will have to be based on a comprehensive evaluation and based on the facts in individual cases.

The introduction of the new concept extended the Ministry's power to instruct compared to the previous act.

3. The applicant's right to protection

The right of the applicant to receive protection is not affected by the Ministry's instruction. Instructions must be within the legal boundaries set by the Refugee Convention, the Immigration Act and its regulations. As the ECHR is part of Norwegian legislation the protection according to Article 3 must also be considered, as well as the UN Convention on

the Rights of the Child. The applicant's convention based right to protection can thus not be affected by instructions by the Ministry.

However, it may be of interest to note that in cases where the Ministry instructs UDI, the appeal goes not to UNE but to the King in Council of State, i.e. the Government. If the case has been sent to UNE, UNE must decide whether to send the case back to UDI or to decide the case in accordance with the instruction.

For UDI and UNE it is for the Ministry to decide what falls within fundamental national interests and foreign policy considerations. However, all decisions by the Civil Service and the Government can be brought before the ordinary courts for judicial review. The courts cannot be instructed and has no obligation to follow the view of the Ministry.

Only one case has been decided by the Norwegian Supreme Court and this was regarding expulsion to Iraq. It concerns a man born in the northern part of Iraq. He came to Norway in 1991 and was granted refugee status in 1992. He was granted permanent residence permit in 1998.

He had prior to his arrival been political active and continued to be so. He frequently returned to Iraq while living in Norway and became the leader of a group listed by the United Nations as a group cooperating with Al-Qaida, Ansar al-Islam.

The UDI decided in 2003 to expel him and the decision was upheld by UNE in 2005. The Ministry had instructed both UDI and UNE on the outcome of the decisions.

The applicant started court proceedings to have the decision overturned. He lost in both the city court and the court of appeal. The Supreme Court found that the courts can examine the evidence on which the decision is based. However, the Court stated that in expulsion cases where the facts of the case are complex, the courts should show restraint in overturning the civil service' finding on the facts as long as they appear sound.

The Court found that the courts must examine if the applicant, if he is not expelled, will pose a threat to the interests covered by the term "national security[1]". The courts will examine if expulsion is necessary, but can only overturn the decision in cases of abuse of power.

Certain evidence known to UDI and UNE had not been presented to the Court pursuant to Section 22-1 of the Dispute Act which reads:

> *Section 22-1 Prohibition against evidence of importance to national security or relations with a foreign State*
> (1) Evidence cannot be presented about anything that is confidential for reasons of national security or relations with a foreign State.

The Supreme Court only examined the case on the open evidence presented to it and found that sufficient to reach a conclusion. It did however comment that it was arguable whether the Norwegian system meets the condition set by the ECHR if information essential to consider the case was withheld from the courts pursuant to Section 22-1.

[1] The condition according to the previous Immigration Act was "when consideration for national security makes this necessary"

Based on comments made it would appear as if these procedures can be accepted if you have other mechanisms to safeguard the rights of the applicant, for example independent special bodies or special courts.

4. Concluding remarks

The balancing act judges will have to do is this kind of cases is a difficult one. They will have to balance the right of the individual and public demand for protection. I am looking forward to an interesting debate.