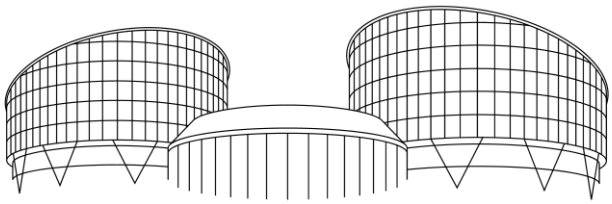

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ANTWI AND OTHERS v. NORWAY

(Application no. 26940/10)

JUDGMENT

STRASBOURG

14 February 2012

FINAL

09/07/2012

This judgment has become final under Article 44 § 2 (c) of the Convention. It may be subject to editorial revision.

In the case of Antwi and Others v. Norway**,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Nina Vajić, *President,*
Peer Lorenzen,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 24 January 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 26940/10) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), on 11 May 2010, by Mr Henry Antwi ("the first applicant"), a Ghanaian national who was born in 1975; by his wife, Mrs Vivian Awere Osei ("the second applicant"); a Norwegian citizen who was born in Ghana in 1979; and by their daughter, Ms Nadia Ryan Pinto ("the third applicant"), a Norwegian national who was born in September 2001.

2. The applicants were represented by Mr A. Humlen, a lawyer practising in Oslo. The Norwegian Government ("the Government") were represented by Mr M. Emberland, Attorney, Attorney-General's Office (Civil Matters), as their Agent, assisted by Ms A. Matheson Mestad, Attorney of the same office.

3. The applicants alleged that the Norwegian immigration authorities' decision to expel the father from Norway and to prohibit his re-entry for five years would, if implemented, give rise to a violation of his, his wife's and his daughter's right to respect for family life under Article 8 of the Convention.

4. On 19 May 2010 the President of the First Section decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to deport the first applicant until further notice. The President further decided to give priority to the application (Rule 41).

5. On 1 July 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The circumstances of the case

1. Factual background

6. The first applicant arrived in Germany in 1998, where he obtained a forged passport and a birth certificate stating a false identity indicating that he was a Portuguese national named Jose Joao Olas Pinto, born on 1 March 1969.

7. The second applicant is also of Ghanaian origin. She had arrived in Norway in 1997, at the age of seventeen, with a view to be reunited with her father and three siblings who still live in Norway. The first and second applicants met while she was travelling in Germany. The second applicant invited the first applicant to Norway and soon after they started cohabiting. They live in Oslo.

8. In 2000 the second applicant obtained Norwegian citizenship.

9. On 23 December 1999 the first applicant applied for a work- and residence permit as a citizen of the European Economic Area (hereinafter "the EEA", established in 1994 under an agreement bringing the three member states of the European Free Trade Association (EFTA) – Iceland, Liechtenstein and Norway – and the twenty-seven member states of the European Union (EU) together in a single internal market, without the EFTA members having to join the EU). On the basis of the forged Portuguese passport indicating a false identity, the Norwegian immigration authorities granted him a five-year residence- and work permit from 13 April 2000 to 13 April 2005 as an EEA national.

10. On 23 September 2001 the couple had a daughter (the third applicant).

11. In 2003 the first applicant applied for Norwegian citizenship. The application was refused because the duration of his residence in Norway had been insufficient.

12. On 11 February 2005 the couple married in Ghana. According to the applicants, it was in that connection that the second applicant had become

aware of the first applicant's true identity as he obtained a Ghanaian passport.

13. The first applicant also used his false identity when he applied for renewal of his residence permit in the spring of 2005.

14. On 15 July 2005 the first applicant was arrested in the Netherlands while travelling to Canada, as the Dutch authorities discovered that his passport was forged. Subsequently, the first applicant provided his true identity to the Norwegian authorities. After a few months he returned to Norway.

2. Proceedings before the immigration authorities

(a) The Directorate of Immigration

15. On 12 October 2005 the Directorate of Immigration warned the first applicant about the possibility that he might be expelled from Norway.

16. On 3 May 2006 the Directorate decided that he should be expelled from Norway under section 29(1)(a) of the Immigration Act 1988 (according to which an alien may be expelled if he or she has committed serious or repeated violations of one or more provisions of the Act). Reference was made to the fact that by having provided false information in connection with his application for work permit on 23 December 1999, he had violated section 44 (cf. section 47(1)(b) of the Act). He had submitted false information regarding his date of birth, identity and nationality. Whilst the first applicant had stated that his name was Jose Joao Olas Pinto, a citizen of Portugal, born on 1 March 1969, his true identity had been Henry Antwi, a citizen of Ghana, born on 9 May 1975. The Directorate found that his expulsion would not be a disproportionate measure *vis-à-vis* him for the purposes of section 29(2). He was prohibited from re-entry for a period of five years (section 29(4)).

17. The Directorate also decided that these measures should be entered into the Schengen Information System, with the consequence that the expulsion in principle would apply to the entire Schengen area. He was given until 24 July 2006 to leave Norway.

18. On the same date as the above decision, the Directorate rejected the first applicant's application for work-permit and family reunification with the second and third applicants on the ground of his expulsion.

(b) The Immigration Appeals Board

19. On 4 September 2007 the Immigration Appeals Board rejected the first applicant's appeal against the Directorate of Immigration's decision of 3 May 2006. Like the Directorate, it observed that the first applicant had given false information about his identity and in support of this had submitted a forged passport. He had further maintained his false identity in

his respective applications for Norwegian citizenship, for renewal of his work permit, and for family reunification. He had accordingly repeatedly committed aggravated violations of the immigration rules.

20. The Board found that the first applicant's expulsion would not constitute a disproportionate measure *vis-à-vis* him, nor *vis-à-vis* his closest family members. In addition to having obtained a work permit as an EEA citizen on the basis of false information about his identity with the support of a forged passport, the first applicant had failed to comply with the order to leave the country by 24 July 2006. Strong interests of general prevention militated in favour of expulsion.

21. With reference to Article 8 of the Convention, the Board found that the first applicant's personal links to Norway carried little weight. He had arrived in Norway at an adult age, had since returned to his home country and had also married the second applicant in Ghana, which suggested that he still had a strong attachment to his country of origin. In light of the gravity of the offences, his family links to his spouse and child could not be decisive in the global assessment. Since his relationship with the second applicant had been established during his residence on the basis of false identity, neither he nor she could entertain any legitimate expectation about being able to continue to live together in Norway if the matter was discovered. No weight could be placed on the fact that the second applicant claimed that she had been ignorant about the first applicant's actual identity. Reference was made to the fact that she had been aware that he originally had a Ghanaian background and that, in connection with their marriage in Ghana on 11 February 2005, he had obtained a Ghanaian passport.

22. The Board further noted that the third applicant had been conceived and born while the first applicant resided on the basis of a false identity. Links established under circumstances as described above thus carried less weight. The fact that the applicants were living together as a family and that the first applicant had significant contacts with the third applicant, could not be decisive for the assessment of the case as a whole. Reference was made to the fact that the second applicant was originally of the same nationality as the first applicant and could more easily accompany the first applicant to their country of origin. In view of her young age, the child had the closest attachment to her parents and for this reason could eventually follow them to their home country. Also, the duration of the prohibition on re-entry was limited to five years.

23. Referring to section 4 of the Immigration Act 1988 (pursuant to which the Act ought to be applied consistently with Norway's international legal obligations aimed at strengthening the foreigner's position) and to section 4 of the Human Rights Act, which incorporated the Convention into Norwegian domestic law, the Board found that the first applicant's expulsion would not be incompatible with Article 8 of the Convention or the United Nations Convention on the Rights of the Child. In this

connection the Board had regard to the Court's case-law, notably *Amrollahi v. Denmark*, no. 56811/00, § 35, 11 July 2002; *Boultif v. Switzerland*, no. 54273/00, § 48, ECHR 2001-IX; *Dalia v. France*, 19 February 1998, § 54, *Reports of Judgments and Decisions* 1998-I; *Jakupovic v. Austria*, no. 36757/97, § 31, 6 February 2003). The Board considered in detail the first applicant's arguments based on *Rodrigues da Silva and Hoogkamer v. the Netherlands* (no. 50435/99, ECHR 2006-I) and agreed with the Directorate that it was not directly applicable to the present case.

24. In sum, the Board was of the view that, having regard to the gravity of the first applicant's offences of the Immigration Act and to the circumstances of the case as a whole, there was a reasonable relationship of proportionality between the expulsion and its negative effects on his enjoyment of private and family life. His expulsion with a prohibition on re-entry for a period of five years would not be a disproportionate measure either *vis-à-vis* the first applicant or *vis-à-vis* his closest family members, for the purposes of section 29(2) of the Immigration Act, Article 8 of the Convention and the UN Convention on the Rights of the Child.

25. Throughout the above proceedings before the immigration authorities the first applicant was represented by a lawyer.

3. Judicial proceedings

(a) The City Court

26. The first applicant challenged the above decision before the Oslo City Court (*tingrett*), pending which it was decided in the autumn of 2007 to stay his expulsion.

27. On 28 March 2008 the Oslo City Court quashed the Immigration Appeals Board's decision of 4 September 2007 as being invalid. The City Court found it obvious that the conditions for expelling the first applicant set out in section 29(1)(a) had been fulfilled. The first applicant's offences of the immigration rules were aggravated and his expulsion was warranted by weighty considerations of general deterrence. According to the immigration authorities' practice, a prohibition on re-entry would normally be made permanent in such cases. The reason why the prohibition on re-entry had been limited to a period of five years in the present case was the fact that the first applicant had a six years' old daughter (the third applicant). The question thus arose whether the expulsion of the first applicant for a period of five years would be a disproportionate measure *vis-à-vis* his daughter despite the seriousness of his breaches of the Immigration Act.

28. In this regard the City Court observed, inter alia, that the third applicant appeared to be an ordinary Norwegian girl and that it was not certain that it would be unproblematic for her to move to Ghana, even though this was her parents' home country. One would have to take into

account possible problems for her in the event of a return to Norway. If the first applicant were to be expelled to Ghana for a period of five years, his daughter would most probably loose the close contact she had with him. To deprive the child of her relationship with her father would be a serious measure and could have disturbing effects on the child's development. This would be so even if she were to have the opportunity to visit him in his home country. Although considerations of general prevention militated in favour of expulsion, the measure would be disproportionate *vis-à-vis* the first applicant's daughter.

(b) The High Court

29. The State appealed to the Borgarting High Court (*lagmannsrett*). At the request of the State, the High Court decided on 14 November 2008 to suspend the proceedings in the first applicant's case pending the national outcome in a parallel case (*Nunez v. Norway*, no. 55597/09, 28 June 2011).

30. In a judgment of 19 January 2010, the High Court, by two votes to one, upheld the Immigration Appeals Board's decision of 4 September 2007.

31. The High Court observed that the first applicant's violation of the Immigration Act ought to be considered as serious. On four different occasions he had submitted false information about his identity to the immigration authorities and had supported this with a forged passport. First he had been issued with a permit - an EEA permit - despite his not being entitled to such a permit. On the second occasion, his application for citizenship had been refused on other grounds, namely the duration of his residence in Norway. On the third and fourth occasions, his application had been rejected because his expulsion had already been decided. False information about one's identity made it very difficult for the authorities to exercise an effective control of a foreigner's entry into and residence in Norway. To a large extent the system had to be based on confidence. General preventive measures suggested therefore that breaches of the immigration rules should entail adverse consequences for the person concerned.

32. As to the question whether, nonetheless, there was such an attachment to Norway as to make the expulsion disproportionate, the High Court observed inter alia as follows.

33. The first applicant had grown up in Ghana and had his family there. He had lived in Norway since the autumn of 1999. Since his attachment had been established on the basis of a residence permit that he had misled the authorities to grant him, he could not have had any legitimate expectation about being able to remain in Norway. The High Court found it clear that expulsion would not be a disproportionate measure *vis-à-vis* the first applicant.

34. As regards his wife, the second applicant, the High Court observed that she had originated from Ghana. She knew the culture and spoke the language of the country. Since the age of seventeen she had lived in Norway where she had her closest family, her father and three siblings. She was a Norwegian citizen, spoke Norwegian and was working in Norway. In 1999 she had started co-habiting with the first applicant in the belief that he held lawful residence in Norway as an EEA citizen. She thus had reason to believe that their marriage and his application for family reunification had not been necessary conditions for them to establish a reliable framework around their life together in Norway. She had become aware of her husband's true identity when they had married in February 2005. Only when the false passport had been revealed in the Netherlands in the summer of 2005 had she become aware that he was not a Portuguese national. Nonetheless, the High Court found that her interests seen on their own could not render the expulsion a disproportionate measure.

35. The High Court found that a decisive consideration in this case was the interests of the daughter, the third applicant. She was eight and a half years of age and was a Norwegian national. She was in her third school year, active in sport and well established in her local environment. She only spoke Norwegian and a few words of her mother's language – Twi – and English. Her parents spoke primarily Norwegian at home. It had been submitted that she needed close follow-up in relation to school and that it was the first applicant who assumed this contact, staying at home after having lost his work permit. It was also him who followed up her hobbies.

36. According to two medical statements dated 5 October 2007 and 18 September 2008, respectively, by the third applicant's general medical practitioners, since she had been a child she had been suffering from rashes that worsened with heat.

37. The High Court pointed out that regard for the best interests of the child was a fundamental consideration to be taken into account in the proportionality assessment under section 29 of the Immigration Act.

38. The High Court found it established that in the event of the first applicant's expulsion, either the family would be split, meaning that the second and third applicants would continue to live in Norway, or they would move with him to Ghana. This would clearly not be in the best interests of the daughter, who was born and had grown up in Norway and was very attached to her father. Naturally she also had strong bonds to her mother.

39. It ought to be expected that an expulsion would involve financial, emotional and social strain on established family life. This applied not least when family life was interrupted as a result of the expulsion. Strain of this kind was not in itself a sufficient indicator that expulsion would be a disproportionately severe sanction.

40. The High Court further pointed to the Supreme Court's judgment reported in *Norsk Retstidende* ("*Rt.*") 2009-534 (see *Nunez*, cited above, § 23), in which Norway's international obligations were also assessed, including the European Court's judgment in *Rodrigues da Silva and Hoogkamer*, cited above. In the High Court's view, the interests of a child who had no special needs for care and who had a remaining parent able to provide satisfactory care should not be a decisive consideration in assessing whether an expulsion measure should be implemented.

41. According to the High Court, the third applicant was a normal girl for her age – eight years and a half – and had no special care needs. It saw no reason to doubt that her mother would be able to provide her with satisfactory care on her own. Since the child's mother originated from the same country as the father, and had been on visits there with the daughter on three occasions, the situation was favourable for regular contact or, in the alternative, for the family's settling in Ghana. Consequently, the expulsion of her father with a prohibition on re-entry for a limited period would not be a disproportionate measure.

42. As to the duration of that period the High Court was divided.

43. The *majority* did not find five years inconsistent with current practice or disproportionate. It observed that the case involved serious violations of the Immigration Act. According to the Supreme Court's judgment in the *Nunez* case, an expulsion would only be disproportionate when it resulted in an extraordinary burden (see paragraph 63 of the Supreme Court's judgment quoted in *Nunez*, cited above, § 23).

44. As to the present case, the High Court reiterated its finding above that the child's mother would be able to provide the child with satisfactory care of her own. Since the child's mother originated from the same country as the father and had visited the country with the daughter on three occasions, there were favourable conditions for maintaining regular contacts or, in the alternative, for the whole family to settle in Ghana. Thus the family had a better basis for maintaining family life and contact than would have been the case if the parents had not had the same country of origin.

45. The parents had informed the court that the daughter could not stay in Ghana for extended periods since she suffered from a skin rash that was aggravated by heat. However, it was clear that she had been in Ghana several times, most recently in October 2009. In the majority's view, the information about the daughter's rashes had not been sufficiently documented and could not be relied upon.

46. The *minority* was of the view that the imposition of a five-year re-entry ban would be too severe and disproportionate a measure and that two-year ban would be appropriate, observing inter alia the following.

47. The gravity of the first applicant's offences under the Immigration Act had been comparable to those committed by the applicant in the *Nunez*

case, though less aggravated bearing in mind that he had not committed other offences in Norway and had not defied any prohibition on re-entry.

48. Since birth the daughter had been taken special care of by her father, who had followed her up in her recreational activities and through extensive contacts with her school. For a girl of eight years and a half of age, and for her mother, it would make a considerable difference were reunification of the family to take place in Norway after two to three years as compared to five to six years. Taking into account the normal processing time for a request for family reunification, the daughter would be nearly fifteen years before the family could resume cohabitation in Norway. The years in between would be important years.

49. Even though there was a possibility for the family to follow the first applicant to Ghana, this prospect was unrealistic. There was nothing to indicate that the family would easily find accommodation, work, etc. in Ghana.

50. The minority agreed that the evidence submitted in support of the affirmation that the daughter had a skin rash aggravated by heat was weak. Nonetheless, on the basis of the two statements form the daughter's two general practitioners, it ought to be assumed that she had "a recurrent skin rash. The diagnosis had been somewhat uncertain." As far as could be understood, one only had the word of the parents to the effect that the rash had been aggravated by heat; the general practitioners' statements on this point had apparently been based on information provided by the parents.

51. However, it was unnecessary to further consider this matter since in any event for the third applicant to be interrupted for at least five years' from her school, friends and hobbies in Norway in order to settle in a country where she neither knew the language nor the culture would be particularly unfortunate for her. Her knowledge of Norwegian would deteriorate and it would have social and educational consequences for her when returning to Norway at the age of fourteen or fifteen.

52. The minority in addition attached some weight to the second applicant's interests, notably the fact that she had entered into the relationship, had given birth to a child and had married the first applicant in the belief that it would be possible to continue family life in the country of which she was a national and where most of her remaining family lived. It further had regard to the fact that the first applicant had come to Norway because of his wife and that their cohabitation had been established almost immediately after his arrival in the country.

(c) The Supreme Court

53. On 28 April 2010 the Appeals Leave Committee of the Supreme Court (*Høyesteretts ankeutvalg*) unanimously refused the first applicant leave to appeal, finding that such leave was warranted neither by the general importance of the case nor by other considerations.

54. In the above-mentioned judicial proceedings, the first applicant was represented by a lawyer at each judicial level.

II. RELEVANT DOMESTIC LAW AND PRACTICE

55. Section 29 (1) (a) of the Immigration Act 1988 (Act of 24 June 1988 Nr 64, *Lov om utlendingers adgang til riket og deres opphold her – utlendingsloven* – applicable at the material time and later replaced by the Immigration Act 2008) read:

> "Any foreign national may be expelled
>
> a) when the foreign national has seriously or repeatedly contravened one or more provisions of the present Act or evades the execution of any decision which means that the person concerned shall leave the realm."

56. Even when the conditions for expulsion pursuant to section 29 of the Immigration Act were satisfied, expulsion could not take place if it would be a disproportionate measure against the foreign national or the closest members of his or her family. Section 29 § 2 of the Immigration Act 1988 provided:

> "Expulsion pursuant to the first paragraph, sub-paragraphs (a), (b), (c), (e) and (f) of this section, shall not be ordered if, having regard to the seriousness of the offence and the foreign national's links to the realm, this would be a disproportionately severe measure *vis-à-vis* the foreign national in question or the closest members of this person's family."

57. According to section 29 (4), an expulsion order would be accompanied by a prohibition on re-entry into Norway. However, the person expelled might, on application, be granted leave to enter Norway. Furthermore, according to well-established administrative practice, when considering an application for leave to enter under section 29 (4), the Directorate of Immigration was under an obligation to consider the proportionality of its decision on prohibition on re-entry. The provision read:

> "Expulsion is an obstacle to subsequent leave to enter the realm. Prohibition on entry may be made permanent or of limited duration, but as a general rule not for a period of less than two years. On application the person expelled may be granted leave to enter the realm, but as a rule not until two years have elapsed since the date of exit."

58. Section 41 (1) provided inter alia:

> "Any decision which means that any foreign national must leave the realm is implemented by ordering the foreign national to leave immediately or within a prescribed time limit. If the order is not complied with or it is highly probable that it will not lead to the foreign national's leaving the realm, the police may escort the foreign national out. ... Any decision which applies to implementation is not

considered to be an individual decision, cf. section 2 (1) (b), of the Public Administration Act."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

59. The applicants complained that the Norwegian immigration authorities' decision, upheld by the national courts, that the first applicant be expelled to Ghana with a prohibition on re-entry for five years would entail a breach of their rights under Article 8 of the Convention. It would disrupt the relationships between the first and the third applicants in a manner that would have long lasting damaging effects on the latter.

Article 8 reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests 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."

60. The Government disputed this contention.

A. Admissibility

61. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicants' arguments

62. Admittedly, the *first* applicant's breaches of the Immigration Act had related to the fact that he had initially presented a false Portuguese passport as a basis for his EEA permit in Norway and that he on three occasions had repeated the information to the Norwegian authorities in connection with his

applications for extensions of his residence permits and for citizenship. However, bearing in mind their similar nature, it would be difficult to see how one could consider these three violations as independent and separate offences.

63. Although one should not underestimate the seriousness of the first applicant's offence, once the matter had been discovered he had quickly contributed to the elucidation of his correct identity. At no time thereafter had he committed any criminal act or failed to comply with applicable rules and norms in Norway. At present, he posed no "threat" to Norwegian public interests.

64. Whilst the Norwegian authorities had decided not to deal with the matter as a criminal offence and press charges but rather as an administrative offence, there was no basis for considering the matter more severely than would have been the case had they opted for the former criminal-law approach.

65. The first applicant had lived in Norway since 1999 and had developed strong ties to Norway through work and social life by the time he lost his work permit in 2005, though his main interest in preserving his ties to Norway lay in the protection of his family life in the country.

66. His wife, the *second* applicant, was a Norwegian citizen. Although she initially was a Ghanaian citizen, the applicants' emphasised that she had been living in Norway since 1997 when she at the age of seventeen had settled there in order to be reunited with her father and siblings who lived in the country and who still lived there. She had held Norwegian citizenship since 2000.

67. The second applicant had only become aware of her husband's true identity in connection with their marriage in Ghana in February 2005. It was only later that year, after the first applicant had been stopped at the airport in the Netherlands in connection with the trip to Canada, that the second applicant had become aware that the first applicant had operated with false identity and citizenship. It ought to be emphasized that, by the time of their marriage in 2005, the couple had exercised "family life" for six years and had a daughter, born in 2001. The development of the second applicant's "family life" with the first applicant during this period could not be regarded as precarious.

68. In light of the above, the applicants argued that the second applicant subsequently was entitled to a degree of protection of her "family life" under Article 8 of the Convention. For six years she had entertained a legitimate expectation about being able to pursue her future relationship with her husband in Norway and had for such a length of time exercised actual "family life" with the child as part of the family. So far their effective family life had lasted for twelve years.

69. The *third* applicant, the first and second applicant's daughter, had been born and brought up in Norway and was presumably the one who had

the strongest interest in the protection offered by Article 8 of the Convention. Being a nine year old Norwegian national who had spent her entire childhood in Norway, she undoubtedly had a strong foundation in the country. She had little, if any, awareness of her parents' links to their country of origin. She had only visited Ghana twice, on each occasion for a short period, and had suffered allergic reactions on both occasions. She had experienced the reactions as very uncomfortable and had against this background stated that she would never go back to Ghana.

70. Throughout her childhood, both in kindergarten and at school, the third applicant had always been in a Norwegian environment. She had established strong cultural and social ties to Norwegian society, notably through her many sport activities. Moreover, her school had pointed out that these activities had helped reducing her restlessness and strengthening her focus on and learning capacity at school.

71. Apart from an occasional expression in the parents native Twi and English, the third applicant only spoke Norwegian, which was the family's everyday language.

72. Since he had lost his work permit in 2005, the first applicant had assumed the role as the third applicant's main caretaker within the family. The second applicant had been the family's main bread winner and had, as a result, been occupied in one job and a half in order be to be able to maintain the family's level of subsistence. This meant that the first applicant had the main role in following up the home work of the third applicant, who needed to be accompanied particularly closely, and in assuming the contacts between the family and school.

73. Bearing in mind the first applicant's important role in attending to the third applicant's care, education and sporting activities, the strong emotional bonds between them and the fact that the she was at a critical phase of her adolescence, the first applicant's expulsion with a prohibition of re-entry for five years would constitute a disproportionate measure *vis-à-vis* her, in particular, and also *vis-à-vis* the second applicant. It would have the effect of splitting the family for five years with the risk that it might sever the ties between the first applicant and his family.

74. For the second and third applicants to move with the first applicant to Ghana for five years would not be a realistic option, as it would entail a loss or significant weakening of the third applicant's educational, emotional, cultural and linguistic ties at an important age and severely prejudice her possibilities for pursuing life in Norway later.

(b) The Government's arguments

75. The Government maintained that Mr Antwi, the first applicant, had at no time been entitled to a residence permit under Norwegian law, in contrast to the applicant in the case of *Rodrigues da Silva and Hoogkamer*, cited above, which was clearly distinguishable. He had on several occasions

provided Norwegian immigration authorities with incorrect information concerning his identity and had moreover substantiated this identity with a false passport. He had had no right to the EEA residence permit that had been issued to him on the basis of an incorrect identification document. The other three occasions on which he had submitted false information had not resulted in incorrect decisions by the immigration authorities since they had relied on other grounds. But the fact that he had persisted in using false identification papers also in his direct contact with the Norwegian authorities fortified the Government's view that he had "a history of breaches of immigration law".

76. The Government further emphasised the particular gravity of the first applicant's offences of the immigration rules. As held by the High Court, the provision of incorrect information concerning identity made it very difficult for the authorities to exercise effective control of foreign national's entry and residence in Norway. The first applicant's forged passport indicating that he was an EEA citizen had enabled him to obtain a residence permit for five years, hence allowing him to establish himself in Norway for a long period of time on unlawful grounds. A lack of consequences for such gross or repeated contraventions of the law would, on the one hand, undermine respect for the legislation and, on the other hand, have an unjust effect on those who abide by the law.

77. The first applicant had been duly aware that his residence permit in Norway had been based on forged identification papers and that subsequently his residence in the country had been precarious. Hence, his family life had been developed in circumstances in which he could entertain no legitimate expectation about being granted a residence permit.

78. The Government further observed that the first applicant had arrived in Norway as an adult, having spent the first twenty-four years of his life in Ghana, and therefore had strong cultural, family and social ties to his home country. In contrast, his connection to Norway had been of a considerably weaker nature, resting merely on family bonds formed while he had been residing illegally in the country. Accordingly, regard for the first applicant's individual interests clearly could not render the decision to expel him unjustified for the purposes of Articles 8 of the Convention.

79. Since the work- and residence permits had been issued on the basis of false information provided by the first applicant, they could not be viewed as an argument in the applicants' favour. It was rather a factor which underpinned the gravity of his offences under the immigration law, hence the view that the expulsion order was justified for the purposes of Article 8.

80. In so far as the interests of the applicant's child were concerned, these had been thoroughly considered by the High Court in its judgment. Based on a concrete assessment of the evidence presented, the High Court found that the third applicant would not be subjected to any unusual strain as a result of the forced removal of the first applicant to his country of

origin. The High Court majority pointed to the Supreme Court's case law according to which an expulsion would only be regarded as disproportionately severe if it resulted in abnormal strain on the child. However, the second applicant – the mother – was well suited as a caretaker for the third applicant. The latter was a normal girl of eight years and a half of age with no special care needs and her mother would undoubtedly be able to provide her with satisfactory care on her own. Accordingly, the first applicant's expulsion with a prohibition on re-entry of limited duration would not constitute a disproportionately severe measure *vis-à-vis* the third applicant.

81. As regards the second applicant, the fact that she originated from Ghana was a relevant factor for the Court's assessment. Even though she had obtained a Norwegian citizenship and parts of her family resided in Norway, her links to Ghana ought to be considered strong: she was familiar with Ghanaian culture and spoke a Ghanaian language. The first and second applicants had married in Ghana in 2005, which choice of location clearly showed the links that they had to their common country of origin.

82. Hence, the Government considered that the applicants' "family life" would not be ruptured by the expulsion of the first applicant. Although the family probably would experience some difficulties and inconvenience if they were to settle in Ghana, they had failed to show that there existed insurmountable obstacles for enjoying family life in the couple's common country of origin.

83. In any event, nothing would prevent the second and third applicants from visiting the first applicant in Ghana. As observed by the High Court, they had already visited Ghana on several occasions. The conditions for keeping in touch in the event that the family choose not to settle in Ghana were in the Government's opinion particularly favourable.

84. In the High Court's view, the duration of the prohibition on re-entry – five years – had been consistent with the applicable administrative practice at the time and had not been disproportionately severe within the meaning of section 29(2) of the 1988 Immigration Act. At the expiry of this term the first applicant would no longer be barred from entering Norwegian territory. He would, upon application for visa, be able to visit the country and apply for a residence permit on an equal footing with others.

85. In light of the above, the facts of the case did not disclose any breach of the respondent State's positive obligations under paragraph 1 of Article 8 of the Convention.

86. In any event, should the Court consider the matter from the angle of the State's negative obligations not to interfere in a manner that failed to comply with the conditions set out in paragraph 2 of Article 8, the Government stressed that all those conditions had been fulfilled in the instant case. Referring to the considerations set out above, the Government maintained that the interference had been "necessary" for the legitimate aim

pursued. By having refused to comply with the lawful decisions taken by Norwegian immigration authorities, based on a family life established on unlawful grounds, the first and second applicants had confronted them with a *fait accompli* for which they ought to be held in the main responsible. The Norwegian immigration authorities and courts had in the present case struck a fair balance between the interests of the applicants and those relating to immigration control.

2. The Court's assessment

87. It is clear, and this was not disputed before the Court, that the relationship between the applicants constituted "family life" for the purposes of Article 8 of the Convention, which provision is therefore applicable to the instant case.

88. As to the issue of compliance, the Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of an alien to enter or to reside in a particular country (see, as a recent authority, *Nunez*, cited above, § 66).

89. In the present case, the first applicant had in 1998 obtained a forged passport and birth certificate stating a false identity, indicating that he was a Portuguese national named Jose Joao Olas Pinto and was born on 1 March 1969. He submitted that passport when he applied to the Norwegian authorities for a work- and residence permit in Norway as an EEA citizen, which was granted to him for five years from 13 April 2000 to 13 April 2005 on the basis of the false identity information contained in that document. Under the guise of this false identity and supporting this with the forged passport, the first applicant subsequently applied for renewal of the permit on two occasions and for Norwegian citizenship. Thus, the Court observes that, since he had not been entitled to any of the permits obtained, at no time had his residence in Norway been lawful (see *Nunez*, cited above, §§ 67 and 72, cf. *Rodrigues da Silva and Hoogkamer*, cited above, § 43). On the same approach as that adopted in the afore-mentioned *Nunez* judgment, the Court will have regard to the following principles stated therein:

> "68. ...[W]hile the essential object of [Article 8] is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Konstatinov v. the Netherlands*, no. 16351/03, § 46, 26 April 2007; *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 42, 1 December 2005; *Ahmut v. the Netherlands*,

28 November 1996, § 63, *Reports of Judgments and Decisions* 1996-VI; *Gül v. Switzerland*, 1 February 1996, § 63, *Reports of Judgments and Decisions* 1996-I; *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 41, Series A no. 172).

69. Since the applicable principles are similar, the Court does not find it necessary to determine whether in the present case the impugned decision, namely the order to expel the applicant with a two-year prohibition on re-entry, constitutes an interference with her exercise of the right to respect for her family life or is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation.

70. The Court further reiterates that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül*, cited above, § 38; and *Rodrigues da Silva and Hoogkamer*, cited above, § 39). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Rodrigues da Silva and Hoogkamer*, cited above, ibid.; *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999; *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious (see *Jerry Olajide Sarumi v. the United Kingdom* (dec.), no. 43279/98, 26 January 1999; *Andrey Sheabashov c. la Lettonie* (dec.), no. 50065/99, 22 May 1999). Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances (see *Abdulaziz, Cabales and Balkandali*, cited above, § 68; *Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others*, cited above; *Rodrigues da Silva and Hoogkamer*, cited above, ibid.)."

90. In applying the above principles to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the *first* applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see *Nunez*, cited above, § 71, and *Darren Omoregie and Others v. Norway*, no. 265/07, § 67, 31 July 2008; see also *Kaya v. the Netherlands* (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure

to comply with Article 8 of the Convention (see *Nunez* and *Darren Omoregie and Others*, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see *Nunez*, cited above, § 73).

91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country.

93. Like the first applicant, the *second* applicant had grown up in Ghana. There she had lived until the age of seventeen when she was reunited with her father and siblings in Norway. Although she had become a Norwegian citizen and had family ties and employment links to Norway and probably would experience some difficulties in resettling in Ghana, there does not seem to be any particular obstacle preventing her from accompanying the first applicant to their country of origin. The Court has also taken note of her claim that, although aware that the first applicant originally had a Ghanaian background and had obtained a Ghanaian passport in connection with their marriage in Ghana on 11 February 2005, she should only have become aware of his true identity in this context. However, the above-mentioned factors cannot in the Court's view outweigh the public interest in sanctioning the first applicant's aggravated offences against the immigration rules with the impugned measure.

94. As to the *third* applicant, the Court notes that she is a Norwegian national who since birth has spent her entire life in Norway, is fully integrated into Norwegian society and, according to the material submitted to the Court, speaks Norwegian with her parents at home. In comparison, her direct links to Ghana are very limited, having visited the country three times (see paragraph 44 above) and having little knowledge of the languages practiced there.

95. Furthermore, as a result of the first applicant no longer holding a work permit and staying full-time at home and of the second applicant's being particularly occupied by her work, the first applicant assumes an

important role in the third applicant's daily care and up-bringing. He is the parent who follows up her home-work and parental contacts with her school and who facilitates her participation in sport activities. She is also at an age, ten years, when this kind of support would be valuable and she is strongly attached to her father as she is to her mother.

96. It would most probably be difficult for her to adapt to life in Ghana, were she and her mother to accompany the father to Ghana, and to readapt to Norwegian life later.

97. Against this background, the Court shares the High Court's view that the implementation of the expulsion order would not be beneficial to her.

98. However, the Court sees no reason to call into doubt the High Court's findings to the effect that, both parents having been born and brought up in Ghana and having visited the country three times with their daughter, there were no insurmountable obstacles in the way of the applicants settling together in Ghana or, at the least, to maintaining regular contacts. As to the allegation that the third applicant's rashes had been aggravated by heat during her previous stays in Ghana, the High Court majority found that this had not been sufficiently documented and could not be relied upon. The minority agreed that the evidence submitted in support of this contention had been weak and observed that the information appeared to have originated from the first and the second applicants. In the proceedings before the Court, the applicants submitted no further evidence in support of this argument or placed emphasis on it.

99. As also observed by the High Court, it does not emerge that the third applicant had any special care needs or that her mother would be unable to provide satisfactory care on her own.

100. Moreover, the Court considers that there are certain fundamental differences between the present case and that of *Nunez* where it found that the impugned expulsion of an applicant mother would give rise to a violation of Article 8 of the Convention. In reaching this finding, the Court attached decisive weight to the exceptional circumstances pertaining to the applicant's children in that case, which were recapitulated in the following terms in its judgment (cited above, § 84):

> "Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings [to move the children to the father], the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention."

101. Unlike what had been the situation of the children of Mrs Nunez, the third applicant had not been made vulnerable by previous disruptions and distress in her care situation (compare *Nunez*, cited above, §§ 79 to 81).

102. Also, the duration of the immigration authorities' processing of the matter was not so long as to give reason to question whether the impugned measure fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (compare *Nunez*, cited above, § 82). On the contrary, in October 2005, only a few months after the discovery of the first applicant's fraud in July 2005, he was put on notice that he might be expelled from Norway. In May 2006 the Directorate ordered his expulsion and prohibition on re-entry and gave him until 24 July 2006 to leave the country.

103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, *Darren Omoregie* (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention.

II. RULE 39 OF THE RULES OF COURT

106. The Court recalls that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

107. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see paragraph 4 above) must continue in force until the present judgment becomes final or until the Court takes a further decision in this connection (see operative part).

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;

2. *Holds* by five votes to two that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention;

3. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to expel the first applicant until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 14 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Sicilianos, joined by Judge Lazarova Trajkovska, is annexed to this judgment.

N.A.V.
S.N.

DISSENTING OPINION OF JUDGE SICILIANOS, JOINED BY JUDGE LAZAROVA TRAJKOVSKA

1. We have been unable to join the majority in this case, especially in view of the *Nunez v. Norway* judgment (application no. 55597/09, 28 June 2011) and the necessity of a coherent interpretation and implementation of the principle of the best interests of the child.

The "best interests of the child" as a guiding principle

2. As it is well-known, such principle is embodied in Article 3 of the United Nations Convention on the Rights of the Child (see generally P. Alston (ed.), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994); L. LaFave, "Origins of the Evolution of the 'Best Interests of the Child' Standard", *34 South Dakota Law Review* (1989), pp. 459 ff.; S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999), pp. 85 ff.; P. Naskou-Perraki, K. Chrysogonos, X. Anthopoulos (ed.), *The International Convention on the Rights of the Child and the Domestic Legal Order* (2002), pp. 45 ff. (in Greek)). According to paragraph 1 of this provision: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities and legislative bodies, the best interests of the child shall be a primary consideration". The reference to "private social welfare institutions" suggests that the principle of the best interests of the child is relevant in relation to actions of private bodies. However, the emphasis of the above quoted provision is on public institutions, including courts of law and administrative authorities. To put it with a well-known commentator, "the principle of the best interests of the child is primarily concerned with acts of public officials" (S. Detrick, *op. cit.*, p. 90). As underlined by the Committee on the Rights of the Child: "The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children" (General Comment No. 5 (2003), "General Measures of Implementation of the Convention on the Rights of the Child", CRC/GC/2003/5).

3. The notion of "best interests" is broad enough to encompass different aspects of the well-being of a child. As observed by the UN High Commissioner for Refugees: "Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences" (UNHCR, *Guidelines on Determining the Best Interests of the*

Child, May 2008). Furthermore, the principle of the best interests of the child is of particular significance because it provides a general standard to be applied "in all actions concerning children". Such principle is relevant in respect to most if not all substantive provisions of the Convention on the Rights of the Child (R. Hodgkin, P. Newell, *Implementation Handbook for the Convention on the rights of the child*, UNICEF (1998), p. 40). It constitutes a general principle of interpretation of this Convention as a whole. It is true that Article 3, § 1 quoted above uses the expression "*a* primary consideration" instead of "*the* primary consideration". As it results from the *travaux préparatoires*, the aim of the Convention's drafters implicit in choosing the word "a" was to ensure a certain degree of flexibility, at least in extreme cases, to permit the interests of people other than the child to prevail (S. Detrick, *op. cit.*, p. 91). However, the formulation adopted seems to impose a burden of proof on those seeking to put the interests of the child aside to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist (P. Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights", in P. Alston (ed.), *op. cit.*, pp. 1-25, at 13).

4. The principle of the best interests of the child appears either explicitly or implicitly in a number of other international and European instruments (cf. for instance Principles 2 and 7 of the 1959 UN Declaration of the Rights of the Child; Articles 5 (b) and 16 (1) (d) of the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women; preamble, § 1 of the Hague Convention on the Civil Aspects of International Child Abduction of 25 November 1980; Articles 4 (1), 6, 9, 14 and 19 of the European Convention on the Adoption of Children (revised), 27 November 2008; Article 24 of the EU Charter on Fundamental Rights), as well as in national legislations (see for example P. Naskou-Perraki, K. Chrysogonos, X. Anthopoulos (ed.), *op. cit.*, pp. 48 ff.; cf. also the judgments by national courts cited in *Neulinger and Shuruk v. Switzerland*, no. 41615/07 (GC), §§ 61-64, 6 July 2010). It is also to be noted that in some such cases the relevant provisions go beyond the aforementioned formulation of the Convention on the Rights of the Child ("a primary consideration") by stipulating that "the best interests of the child *shall always be the paramount consideration*" (Article 14, § 1 of the European Convention on the Adoption of Children, italics added; cf. also Article 5 b) of the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women). Given its broad acceptance, it seems that the principle of the best interests of the child has become a general principle of (international) law.

5. This approach is corroborated by the repeated references to such principle in the case law of the Court, especially in relation to Article 8 of the Convention. To resume this important jurisprudence goes far beyond the object and purpose of the present opinion. Suffice it to recall in this respect the terms of the Grand Chamber, according to which: "The Court notes that

there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount" (*Neulinger and Shuruk v. Switzerland*, cited above, § 135). In this context, the Court has repeatedly underlined that: "The child's interest (...) dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties must only be severed in very exceptional circumstances and that everything must be done to preserve personal relations..." (*ibid.*, § 136; *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX). It is also important to note that, although the landmark case of *Neulinger and Shuruk* concerned the abduction of a child, the Grand Chamber took the view that guidance on this point may be found *mutatis mutandis* in the case-law of the Court on the expulsion of aliens (see also, for instance, *Emre v. Switzerland*, no. 42034/04, § 68, 22 May 2008), "according to which, in order to assess the proportionality of an expulsion measure concerning a child who has settled in the host country, it is necessary to take into account the child's best interests and well-being" (*Neulinger and Shuruk*, cited above, § 146. See also *Üner v. the Netherlands* [GC], no. 46410/99, § 57, ECHR 2006-XII). Finally, the Court has stressed that "the passage of time can have irremediable consequences for relations between the child and the parent with whom he or she does not live" (*Macready v. the Czech Republic*, nos 4824/06 and 15512/08, 22 April 2010; *Maumousseau and Washington v. France*, no. 39388/05, § 83, ECHR 2007-XIII).

Application of the principle in the present case

6. The application of the principle of the best interests of the child in the present case raises a number of questions. The Norwegian authorities themselves have been somehow divided over the issue. It is recalled that in its judgment of 28 March 2008, the Oslo City Court quashed the Immigration Appeals Board's decision to expel the first applicant, noting that to deprive the third applicant of her relationship with her father would be a serious measure and could have disturbing effects on the child's development. According to the City Court, such a measure would be disproportionate *vis-à-vis* the first applicant's daughter (*supra*, § 28 of the judgment). In the same vein, the minority of the High Court was of the view that the imposition of a five-year re-entry ban would be too severe and disproportionate a measure and that a two-year ban would have been preferable. The minority took especially into account the age of the third applicant and her close relationship with her father, noting that since birth the first applicant had taken special care of his daughter, following her up in her recreational activities and through extensive contacts with her school. In relation to the first applicant's offences under the Immigration Act, the minority of the High Court rightly observed that they had been comparable

to those committed by the applicant in the *Nunez* case, though less aggravated bearing in mind that he had not committed other offenses in Norway and had not defied any prohibition of re-entry (*supra*, §§ 46-48).

7. Furthermore, it is striking that the majority of the High Court explicitly acknowledged that the consequences of the first applicant's expulsion would "clearly not" be in the best interests of the daughter, who was born and had grown up in Norway and was very attached to her father (*supra*, § 38). However, the High Court concluded that the interests of the child should not be a decisive consideration in assessing whether an expulsion measure should be implemented and that the five-year ban was not a disproportionate measure (*supra*, §§ 40-41).

8. In view of the above elements, we have serious difficulties to follow the majority when stating that: "the Court is satisfied that sufficient weight has been attached to the best interests of the child in ordering the first applicant's expulsion" (*supra*, § 103). Admit that the impugned measure was "clearly not" in – i.e. against - the best interests of the third applicant, while at the same time affirming that such interests have been duly taken into account seems to pay lip service to a guiding human rights principle. All the more so that, taking into account the normal processing time for a request for family reunification, the daughter – who is today eleven years old – would be about eighteen years before the family could resume cohabitation in Norway. As rightly observed by the minority of the High Court, the years in between would be important years (*supra*, § 48). To put it otherwise, the expulsion order, combined with the five-year re-entry ban could entail a serious disruption of the third applicant's adolescence.

9. This result seems to us to be in contradiction to the Court's judgment in the *Nunez* case, cited above. Contrary to the opinion of the majority, the present case is very similar to *Nunez*. In this last case, the Court noted the "aggravated character" of the breaches under the Immigration Act, as well as other criminal offences by the applicant (*Nunez*, cited above, §§ 67, 72). For another comparable case under Article 8, involving serious breaches of the relevant immigration legislation, as well as other criminal offences (see *Konstatinov v. the Netherlands*, no. 16351/03, §§ 9-12, 49 ff., 26 April 2007). As observed by the minority of the High Court, the (administrative) offences of the first applicant in the present case were "less aggravated" than those of the applicant in the *Nunez* case. Furthermore, in the *Nunez* case, the Court took note of the rationale of the Norwegian legislation in authorizing the imposition of expulsion with a re-entry ban as an administrative sanction (*ibid.*, § 71). Such possibility would indeed constitute an important means of general deterrence against gross or repeated violations of the Immigration Act. Under those circumstances, the Court considered that "the public interest in favour of ordering the applicant's expulsion weighted heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention" (*ibid.*, § 73).

However, taking mainly into account the age of the applicant's children and their close bonds to their mother, the Court concluded that the expulsion order with a two-year re-entry ban – "a very long period for children of the ages in question" (nine and eight years old respectively) – would entail a violation of Article 8 of the Convention (*ibid.*, §§ 81-85).

10. Those considerations also apply in the present case. All the more so that in *Nunez* the re-entry ban was much shorter (two years instead of five). Furthermore, since May 2007 and until the adoption of the *Nunez* judgment in June 2011, i.e. for more than four years, the applicant did not have the daily care of her children and the relevant parental responsibilities, which had been granted exclusively to the father following the separation of the couple. In other words, the bonds of the applicant with her children in the Nunez case were in fact (and in law) much less close than those of the first applicant with his daughter in the present case. To put it otherwise: if there is indeed a difference between *Nunez* and the present case, this lies in the fact that the latter is even more striking than the former. Consequently, the solution in *Nunez* should have been applied in the present case *a fortiori*.

11. In conclusion, the decision to expel the first applicant from Norway with a five-year re-entry ban would entail, in our view, a violation of Article 8 of the Convention in respect of his daughter, the third applicant.