

*Supreme Court justice dr. juris Arnfinn Bårdsen,  
The Norwegian Supreme Court*

## **Deciding what to decide: The filtering mechanism in the Norwegian Supreme Court**

Icelandic Bar Association, Reykjavik, 16 February 2018

### **1. Introduction**

I intend to give an outline of the most important features of the filtering mechanism before the Norwegian Supreme Court, in particular as to the operative criteria for granting leave to appeal and the filtering procedure.

For further reading, I propose my article (in Norwegian) “Anketillatelse til Norges Høyesterett”, *Lov og Rett* 2014 page 529–549. For a general and updated presentation of the Supreme Court, its work and role within the Norwegian legal system, I refer to the Supreme Court’s Annual Report 2017, available at the Court’s web page at:

<https://www.domstol.no/hoyesterett>

The idea behind my presentation of the Norwegian system in an Icelandic setting is that the *similarities* between the well-established Norwegian filtering mechanism and the brand new Icelandic filtering mechanism before *Hæstiréttur Íslands*, can make the Norwegian experiences a source of inspiration to you, in this initial face of the new regime. In that respect, our meeting today represents a follow-up from the exchange between members of the Supreme Court of Iceland and the Supreme Court of Norway in Oslo in October 2017.

## 2. The Norwegian Supreme Court in brief

Norway has a judicial system with courts in three levels – 63 district courts in the first instance, six courts of appeal in the second instance and the Supreme Court as the apex court. As a rule, all cases must start in a district court, with appeal to one of the appeal courts, and then, eventually, to the Supreme Court. There is a possibility of “leapfrogging” directly from the district court to the Supreme Court. I will return to this.

According to the Norwegian Constitution (1814) Article 88, “the Supreme Court pronounces judgment in the final instance.” As a court of last resort, the Norwegian Supreme Court is functioning as *a Court of precedent*. Hence, the Court’s main responsibility is *not* to correct errors done by the courts of appeal. The principal role of the Court is – through its case law – to facilitate clarification and development of the law, within the framework of the Constitution, parliamentary statutes, and Norway’s obligations under international law.

For further reading, I refer to my article (in Norwegian) “De nordiske høyesterettene som prejudikatsdomstoler – et perspektiv fra Norges Høyesterett”, *Lov og Rett* 2016 page 259–282. See also “Høyesterett som prejudikatdomstol”, speech (in Norwegian) available at the Supreme Court’s web page at:

<https://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/Articles/artikler-og-foredrag-2017/hoyesterett-som-prejudikatdomstol/>

When deciding the merits in the appeals where leave to appeal to the Supreme Court have been granted, the Supreme Court will in nearly all cases hold an *oral hearing*. In fact, the Norwegian Supreme Court has one of the strongest oral traditions among *third level* instances in Europe, similar to that of the *UK Supreme Court*. In the Nordic countries, Norway is in this respect comparable to *Danmarks Højesteret* and *Hæstiréttur Íslands*.

A typical civil case will often take one to two days of oral hearings, while a typical criminal case will last from a couple of hours up to one day.

There are as many as 20 justices on the Supreme Court, including the president. The justices are appointed by the King in Council (the Government), and must retire at 70. Their background spans from having worked as lawyers and prosecutors, to judges from the lower courts, law professors, and civil servants. The current age span is from 46 to 69 years, seven of the justices being women.

The Court normally operates in two chambers composed of five justices in each chamber. The composition of each chamber is decided randomly, and will change every week. In particularly important cases, the Court may be sitting in a *grand chamber* of 11 justices, or even *en banc*. Usually this will only happen once or twice per year.

In principle, appeals in all types of cases may be brought before by the Supreme Court – civil disputes, including administrative cases, and criminal cases. The Supreme Court also deals with constitutional issues. This makes the Supreme Court the highest constitutional court, the highest administrative court, the highest civil dispute court, and the highest criminal court. There is no specialisation among the justices.

I must add that as for criminal cases, the Supreme Court cannot evaluate the evidence as to the question of the accused's guilt: Here the court of appeal has the final say. Historically, this is connected to the old jury system in Norway, established in the late 1800's. As from 1 January 2018, the jury system is history. However, the evaluation of evidence in criminal cases is still regarded as a matter for the courts of appeal, not for the Supreme Court.

Moreover, although the Supreme Court – apart from criminal cases – in principle may review the facts, the Court is rather reluctant in this respect. The reason is two-folded.

- *Firstly*: The procedural framework is unsuitable for a full review of the facts, in particular as the parties and the witnesses are not heard directly by the court.
- *Secondly*: Being a court of precedent, the Supreme Court's focus is on the law, not the evidence.

### 3. The filtering mechanism in a nutshell

Originally, Article 88 to the Constitution was understood to imply that the parties had the *right* to have their case decided by the Supreme Court.

However, the Norwegian Constitution is a living instrument: Through amendments to the text of Article 88 and the development of procedural law by the Court itself, it is today established that Article 88 does not prescribe for such an unqualified right of appeal to the Supreme Court. I refer in particular to the Court's grand chamber judgment in Rt-2009-1118 para 68–75, with further references. That ruling makes it clear that the Norwegian Constitution allows that appeals to the Supreme Court are filtered, insofar as at least the following to preconditions are met:

- *Firstly*: The primary purpose of the filtering mechanism must be to promote the Supreme Court's functioning as a court of precedent – and it must be designed and applied accordingly.
- *Secondly*: The actual filtering – the decision on what to decide – must be carried out by the Supreme Court itself, not by some outside body.

The second of these preconditions indicates that the existing filtering mechanism before the *Danish Supreme Court* would not have been constitutionally permissible in Norway: In Denmark leave to appeal is granted by a particular independent committee *outside* the Supreme Court – *Procesbevillingsnævnet* – headed by a justice at the Court.

Apart from being constitutionally necessary, it might be argued that the Norwegian design, just as the Icelandic, making the Supreme Court itself the final gatekeeper, adds a particular quality to the actual filtering process; thus also to the functioning of the Court as such.

The legislative basis for the filtering mechanism for criminal cases is dated 1995 (*toinstansreformen*). In civil cases, the roots are older. However, the current regime was in place as late as 2005 (*tvistelovreformen*).

The core feature of the filtering mechanism is that the Supreme Court itself decides which cases of those appealed, and which legal issues within those cases, that ultimately are to be decided on the merits by the Court.

This enables the court to *concentrate* the court's portfolio and – to a certain extent – to *design* the portfolio in a manner suitable to the Court's functioning. The Court's ability of deciding what to decide, and of deciding what not to decide, is considered a key element in the procedural framework for a full-fledged Court of precedent.

The Criminal Procedure Act (1995), section 323 first subsection, says:

“An appeal to the Supreme Court may not proceed without the consent of the Appeal Selection Committee of the Supreme Court. Such consent shall only be given when the appeal is concerned with issues whose significance extends beyond the current case, or it is for other reasons particularly important to have the case tried in the Supreme Court.”

The Civil Procedure Act (2005), section 30-4 first subsection, is practically identical:

“Judgments cannot be appealed without leave. Leave can only be granted if the appeal concerns issues whose significance extends beyond the scope of the current case or if it is particularly important for other reasons that the case is determined by the Supreme Court.”

There is no passage for an appeal to be decided on the merits by the Supreme Court other than through being granted *leave to appeal* by the Appeal Selection Committee of the Court. Moreover, there is reason to highlight that the legal criteria for granting leave to appeal are very closely connected to the Supreme Court's functioning as a court of precedent. I will shortly come back to this in more detail.

The Supreme Court's Appeal Selection Committee is part of the Supreme Court, not a separate body. Its work and competences are prescribed by law, primarily through the Act on Courts (1915), the Criminal Procedure Act (1981) and the Civil Procedure Act (2005). In addition, the Committee has its own *Rules of procedure*, established by the Supreme Court itself. The Rules consists of six sections, primarily connected with the principles governing the assignment of justices to the Committee and with the allocation of cases to the justices.

Every year each justice is allocated to the Committee for two or three periods, lasting four to six consecutive weeks. In section 4 of the Rules of procedure, it is stated that each judge should have his equal share of the work in the Committee, and that the combination of judges should alternate.

According to established practice, one could not serve in the Committee during the first six months after appointment as a justice on the Supreme Court: The work requires a minimum of experience within the Court and certain inside knowledge and "feel" of the working practices and philosophy of the Supreme Court. According to section 3 in the Rules of procedure, the Committee is led by the most senior judge assigned to the Committee, and of course the president when she has assigned herself to the Committee.

Each appeal is filtered by a panel of *three of the justices* in the Committee, not the Committee as such. I will get back to the details as to how those three justices work during the filtering stage of the case. But I will mention already now that the procedure is *written* – there are no oral hearings at the filtering stage.

The Supreme Court's Appeal Selection Committee is assisted by the *Legal Secretariat*, consisting of 23 particularly well-qualified legal clerks. Every appeal to the Supreme Court is first dealt with thoroughly by one of the clerks in the secretariat, who writes a report to the judges assigned to deal with the case in the Committee. The report will sum up the case and give an analysis of its legal issues, and a recommendation as to what the Committee should do with the case.

In the Court's annual report 2017 page 9, two of the clerks say this about their work:

“– When I receive an appeal against judgment, I must describe what the case concerns and account for the state of the law, Kristian Klem explains. – I put this in a report to give the justices in the Appeals Selection Committee an overview of the case. I primarily check the sources of law referred to by the lower courts, but I must ensure that my assessment of whether an appeal should be heard is based on all relevant sources. This means that I have to make my own searches and, if relevant, be particularly alert in terms of international law, he continues.

– When we write a report arguing why an appeal should or should not be heard by the Supreme Court, it is always done in accordance with the criteria under procedural law, Fredrik Lied Lilleby stresses. – The core question is whether the case raises issues of principle; that is, whether or not there is a need for the Supreme Court to give guidance that may be useful in similar future cases. This assessment is included in the report the Appeals Selection Committee receives.”

It is fair to say that the legal clerk's work is decisive for both the *quality* and the *speed* in the filtering procedure. They are indeed trusted with high responsibilities. However, I need to stress that their contribution is limited to securing the quality of the foundation for the decision. When it comes to the actual decision-making, this is solely a responsibility of the three justices assigned to the case.

#### 4. Filtering – the numbers

Annually, the Supreme Court receives approximately 2 400 appeals. One-third of them – 800 – are appeals against *judgments*: 400 in civil cases, and 400 in criminal cases. The remainder two-thirds are *interlocutory* appeals. My focus now is on the 800 annual appeals against judgments.

Statistics prove that the filtering process applied by the Norwegian Supreme Court is hard hitting. Here are the total numbers for both *civil and criminal* cases:

Year	Appeals	Leave granted	Leave in % of appeals	Judgement quashed
2010	872	132	16,0 %	-
2011	875	148	16,7 %	-
2012	909	143	16,5 %	6
2013	922	111	11,5 %	7
2014	896	117	12,7 %	13
2015	850	105	12,0 %	6
2016	829	102	11,8 %	19
2017	800	114	13,9 %	10

We can see that the numbers for 2017 are quite representative for the situation as it has been since 2010, although there are some tendencies that should be noted:

- *Firstly*: The total number of appeals, in both criminal and civil cases, has *decreased*, from a total of 872 in 2010 to a total of 800 in 2017.
- *Secondly*: The part of appeals that are granted leave has *decreased*, from 16 % in 2010 to 12 % in 2016 and 14 % in 2017.



- *Thirdly:* The total number of appeals decided by the Supreme Court after an oral hearing has *decreased* from 132 in 2010 to 114 in 2017.

It adds some perspective to this if one compares the total number of 114 cases dealt with the Supreme Court in 2017, with the total number of judgments rendered by the district courts and the courts of appeal in the same year. The district courts rendered approximately 24 000 judgments in 2017. The courts of appeal handed down approximately 2 000 judgements in 2017. Thus, less than 6 % of all judgments handed down by the courts of appeal are reviewed on the merits by the Supreme Court after an oral hearing.

The numbers *for civil* cases only, are:

<b>Year</b>	<b>Appeals</b>	<b>Leave granted</b>	<b>Leave in % of appeals</b>	<b>Judgement quashed</b>
<b>2010</b>	426	58	14,3 %	-
<b>2011</b>	431	73	17,4 %	-
<b>2012</b>	470	70	15,3 %	2
<b>2013</b>	472	58	11,9 %	1
<b>2014</b>	496	71	14,8 %	3
<b>2015</b>	469	57	11,8 %	2
<b>2016</b>	447	63	13,8 %	4
<b>2017</b>	393	64	16,3 %	4

The numbers *for criminal* cases only are:

<b>Year</b>	<b>Appeals</b>	<b>Leave granted</b>	<b>Leave in % of appeals</b>	<b>Judgment quashed</b>
<b>2010</b>	446	74	17,7 %	-
<b>2011</b>	444	75	16,1 %	-
<b>2012</b>	439	73	17,8 %	4
<b>2013</b>	450	53	11,0 %	6
<b>2014</b>	400	46	10,5 %	10
<b>2015</b>	381	48	12,2 %	4
<b>2016</b>	382	39	9,6 %	15
<b>2017</b>	407	50	11,7 %	6

One can see that while criminal cases has *decreased*, civil cases has *increased* in the period from 2010 to 2017. This development as to the composition of the cases is, at least partly, due to a strategic turn done by the Court: On the one hand, the Court has responded to a call from the legal community for more civil cases being decided by the Court. On the other hand, the Court has taken a step back regarding criminal appeals limited to the metering of punishment: This is to a greater degree left to the courts of appeal.

Looking at the composition of the cases where leave to appeal is granted, the criminal cases that are admitted are often concerned with procedural issues – quite often including issues related to the European Convention on Human Rights or other human rights provisions. Moreover, it is understood that the Court also must provide guidance as to how criminal law shall be interpreted and to define the levels and building blocks as to metering of punishment.

When it comes to civil cases, taxation law is on top with as many as 14 of the 114 cases in 2017. Next on the list are cases concerning economical compensation for wrongful acts or omissions, employment and labour law cases, cases on contracts and immigration cases.

##### **5. The main criterion – *significance beyond the case***

The main criterion for granting leave to appeal is whether the appeal raises issues of *importance beyond the present case*. This refers to the Supreme Court judgment's effects as *precedent*. When the law uses the term "issues", it refers to question of *law*. The Supreme Court's assessment of the *evidence* has no bearing beyond the current case.

In considering this criterion, the Committee must ask itself whether there is a sufficient demand for a (new) precedent on the relevant legal issue.

So, in order to say that a case raises questions that have significance outside the case itself, the Committee must be convinced that a ruling from the Court will have a substantial and practical value to *others* than the parties – the more, the better. Accordingly, the turning point is not the value for the parties in having the Court’s decision – including whether the court of appeal’s judgement is right or wrong. The Litmus test under this criterion is whether there is something to gain for the legal system and for the society as a whole.

The need for a clarifying ruling from the Supreme Court will typically emerge because the legal material leaves no definite answer as to what the law is – it is open to debate whether the applicable norm says A or B; professional trained lawyers can on justified grounds argue for both – or even more – positions. Such legal uncertainty may occur in many shapes and forms. I shall give some examples:

- It will typically be due to a *conflict between legal sources*, such as the wording of the law on the one hand and the preparatory work on the other – or perhaps inconsistency in the Supreme Court’s own case law.
- Or, there may be a *conflict between norms*, such as norms stemming from ordinary legislation on the one hand, and norms stemming from the Constitution or international treaties on the other.
- Or, there is the need for the Supreme Court to give additional guidance as the different *components of a vague or general norm*, or the *balancing* of competing rights or interests.
- Moreover, we have need for *unity* of the law: The existence of discrepancies as to the application of the law in lower courts or governmental and other administrative bodies, should be addressed and solved by a clarifying ruling from the Supreme Court.

- Then we have the *dynamics of law*: Both legal and factual changes – including the societal conditions, mind-set and values – might change the rationale or the justification of an established norm. If the tension this creates within the legal system, or between the legal system and the society, is not solved by the legislator, it might fall on the Supreme Court to adjust the law to the new environment.
- And then we have the *systemic* level: We need to see to it that the law as such is cultivated and refined as one coherent, comprehensible, and foreseeable system of norms. In that respect, the Supreme Court even has a responsibility to clarify and develop the supporting structures of our legal system, the general principles of the law and the overall patterns of judicial reasoning.

In order to obtain leave to appeal it is, however, not enough to convince the Appeal Selection Committee that the case involves a principled legal issue that ought to be solved. The Committee must also be convinced that this is *the right case*.

I often find that answering the following five questions is helpful in order to decide whether this is the right case:

- *Firstly*: Is it likely that the case – for legal or factual grounds – might be solved without the Court being called to take a position on the principled legal question after all?
- *Secondly*: Is the gravity of the case in the facts or in the concrete application of the law, rather than in the law as such?
- *Thirdly*: Are the facts of the case atypical or extreme, thereby reducing the Court's ability to render a judgment fitted for giving guidance for the mainstream cases?

- *Fourthly*: Are there reasons to await the outcome of some on-going development, or to let the issue mature, before it is put on the Court's table?
- *Fifthly*: Will the resources that the Court has to allocate to the case, on the expense of other cases, be proportionate to the probable clarification or development of the law that can reasonably be achieved through the Court's judgment?

## **6. The security valve – *particularly important for other reasons***

Leave to appeal may also be granted if it is particularly important for any other reason that the case is decided by the Supreme Court.

This alternative allows the Committee to grant leave to appeal even if the case does *not* raise questions of importance outside the scope of the current case. What one primarily has in mind are appeals in cases involving two components:

- *Firstly*: The case concerns *significant values* for private parties, personal or economical. This might for example connect to personal security, freedom or status, family relations, home, education or work.
- *Secondly*: There are substantial reasons to believe that the court of appeal's judgment is grossly mistaken as to the *law*, or there seems to be a fundamental *procedural error* that could have had a decisive influence on the outcome.

The threshold for granting leave to appeal under this heading is high in civil cases. In criminal cases though, leave to appeal will regularly be granted under this heading if the appellant seems to have a strong case as to his or her conviction are based on an erroneous application of criminal law or grave procedural errors, or if the sentencing is obviously too harsh.

## **7. Under both alternatives - *an overall assessment***

Theoretically, we are dealing with two separate criteria, one focusing on the effect that the Supreme Court's ruling might have as a precedent, the other focusing on eliminating manifestly injustice in the current case.

However, these two limbs must to some extent be seen in context, for example, so that a more moderate potentially effect as a precedent may be sufficient if the case has large impact for the appellant, and there is a real possibility that the appeal will turn out successfully.

In this overall assessment, the Committee will also consider alternative solutions to granting leave to appeal. There are two alternative avenues:

The first one is to *quash* the appeal court's judgment already at the filtering stage, see the Civil Procedure Act section 30-3 subsection 2 and the Criminal Procedure Act section 323 subsection 3. These provisions came into the law as late as in 2012. This option is of course particularly useful when the appeal clearly demonstrates a major procedural defect in the court of appeal. However, the Committee's competence to quash the lower court's judgement is not limited to procedural errors. The Committee may also set a judgement aside if it finds that the court of appeal has applied the law wrongly in that particular case, or there obviously is a manifest error as to the facts.

In order to set the judgment aside, the three justices in the Committee must agree. Moreover, there must not be any kind of doubt as to whether the judgment should be set aside.

Quashing the erroneous judgment from the lower court is particularly well suited in order to repair injustice in the current case – that is, as an alternative avenue for cases that do not raise any principled issue, but where it would be tantamount to a denial of justice to accept the judgment from the lower court.

If the Committee quashes the appeal court's judgment, this is done in the form of a judgment. So, the Committee will have to state reasons. Such a judgment will have the character of a *semi precedent*.

In 2016, the Committee quashed 19 judgments, 4 civil cases and 15 criminal cases. In 2017, a total of 10 appeal court judgments were quashed by the Committee, 4 civil cases and 6 criminal cases.

The second alternative is to deny leave to appeal and to state in the decision that the appeal had no prospect of success anyway, and to explain why. I will come back to the use of such *mini precedents*.

## **8. First-time convictions in the courts of appeal**

The law has a particular solution for cases where the appellant was *acquitted* in the district court and then *convicted* in the court of appeal. According to the Criminal Procedure Act section 323, the Committee may not deny leave to appeal in such cases unless it by an unanimous vote finds *it clear that the appeal has no prospect of success*. If denying leave to appeal in such cases, the Appeal Committee must, moreover, motivate its decision.

One might say that this rule – giving a right of appeal to the Supreme Court – runs counter to the idea that the Supreme Court is a court of precedent. However, the solution was thought necessary to cope with *the right of appeal* in criminal cases according to article 14 of the UN Covenant on Civil and political rights, as understood by the UN Human Rights Committee and the Supreme Court.

## **9. “Leapfrogging”**

With this expression, I refer to the situation where an appellant seeks to go directly from the district court to the

Supreme Court, thereby completely bypassing the court of appeal. “Direct appeal” is the keyword used in Norwegian procedural law on this phenomenon.

Direct appeal is possible both in *civil and criminal cases*, according to section 30-2 of the Civil Procedure Act and section 8 of the Criminal Procedure Act.

It is the Supreme Court’s Appeal Selection Committee that decides in the matter – at least two of the three justices in the Committee must agree.

It is understood that there must be strict limitations on allowing this extraordinary route. Those limitations must, for obvious reasons, extend far beyond the general criteria for granting leave to appeal in cases that have been decided by the courts of appeal – additional and weighty reason must be demonstrated.

According to the provisions on direct appeal, the Supreme Court’s Appeal Selection Committee may only allow “leapfrogging” if three conditions are met:

- *Firstly*: The case must give rise to *particularly* important issues of principle.
- *Secondly*: It must be important to *promptly* ascertain the view of the Supreme Court on those issues.
- *Thirdly*: Regard for the need for a *sound handling of the case* must not weigh against direct appeal.

These three cumulative criteria set a high threshold.

Therefore, it should come as no surprise that the Supreme Court allows for direct appeal very rarely. As far as I know, the last two times was in 2013 and 2011 (see Rt-2013-1308 and Rt-2011-1693). In both cases, the Supreme Court was invited to rule on the general interpretation of legislation with more or less immediate impact on many other cases already pending before the lower courts.



There is currently one application for direct appeal pending, in what is argued to be a principled environmental case on the constitutionality of search and exploitation of oil and gas resources on the Norwegian continental shelf.

## **10. The filtering procedure**

Section 5 paragraph 1 in the Committee's Rules of procedure states that cases should be distributed among the judges in the Committee on a random basis. The head of the Committee may, however decide otherwise due to compelling reasons, typically in order to achieve a fair and manageable workload for each justice in the Committee, in order to give urgent cases priority and in order to secure that all cases are dealt with within a reasonable time.

In urgent cases, the president of the Court might, according to section 5 subsection 2, appoint three justices not assigned to the Committee to decide that particular case.

At the filtering stage the three justices handles the cases in writing, and decides them only on the documents. The Civil Procedure Act section 30-9 subsection 3 allows for oral hearings before the Committee, if this is needed in order to ensure a proper conduct of the case. The Criminal Procedure Act section 387 provides for a similar option. In practice however, oral hearings are never held before the Committee at the filtering stage.

The case file will contain all the vital documents to the case, *inter alia*:

- The district court's judgment.
- The appeal to the court of appeal and the answer to the appeal.
- The court of appeal's judgment.

- The appeal to the Supreme Court and the answer to the appeal.
- Any subsequent briefs from the parties and interveners.
- The legal clerk's report to the Committee. The report is for the justice's eyes only – it is never exposed to the parties. If leave to appeal is granted, the report will be available to the panel of justices assigned to decide the appeal after an oral hearing, but not to the parties.

As to the appeal to the Supreme Court and the answer to the appeal, there is reason to stress that the parties are expected to explain why there are, or are not, reasons to grant leave to appeal to the Supreme Court.

This explanation must, moreover, be directly connected to the legal criteria for granting leave, as I have already described them to you. In particular, it is decisive to address expressively whether the case raises any general legal questions that needs to be clarified by the Supreme Court. The Committee may ask the lawyers to provide the Committee with further arguments or material connected to the question of granting leave. But regularly there is no such second round; the question of granting leave is decided without further exchange of briefs.

The case file is handed over to the first of the three judges (*førstevoterende*) who are assigned to the case, in order for him or her to evaluate the appeal and propose to the other two justices (*andre- og tredjevoterende*) what to do with the case.

Each justice has his or her own approach. Normally, I start with reading the first part of the legal clerk's report, as to what the case is all about. Then, I read the court of appeal's judgment, before I read the appeal and the answer to the appeal.

Depending on the particularities of the case, I sometimes also read the district court's judgment, and the appeal to the court of appeal and the answer to that appeal. Then, I turn to the second part of the legal clerk's report, as to his or her analysis of whether the criteria for granting leave to appeal are met in the case.

The justice handling the case first will normally write a memo addressed to the other two justices, explaining his or her view on whether leave should be granted to the appeal, completely or in part. In many cases this memo is rather short – it might even be limited to one sentence, such as “I see no reason to grant leave”, or “I agree with the legal clerk”. In other cases, the memo is more extensive. Memos on more than one page are, however, rather rare.

Just as the legal clerk's report, the justice's memos are not exposed to the parties. And if leave to appeal is granted, the justice's memos will be available to the panel of justices assigned to decide the appeal after an oral hearing, but not to the parties.

The file, now including the first justice's memo, is then circulated to justice number two and then justice number three, for their evaluation. They too write a short memo, explaining their position. For my part, I prefer not to read the other justices memos before I have made up at least a provisional view on whether leave should be granted or not.

If all three justices agree without further ado, the case will be decided at this stage. However, a case might circulate several times. Moreover, in some cases the three justices even meet to discuss the case. This is, for example, done if there are different opinions among the justices as to whether, or to what extent, leave should be granted. Usually the legal clerk attends those meetings as well.

The work in the Committee is varied, but also demanding – a high number of cases from all fields of the law are passing by in the course of a week.

You have to remember that, apart for being the gatekeeper to the Court, the Committee also handles approximately 1 600 interlocutory appeals each year as well. The pace is high – often a justice working in the Committee will handle 40 to 50 cases per week. The lawyers should keep this in mind when drafting the appeal, and the answer to the appeal, to the Supreme Court.

## 11. The decision

A decision *not* to grant leave to appeal must be *unanimous*. Hence, in order to obtain leave to appeal, it suffices that one of the three justices in the Committee approves. This system gives a certain guarantee against a one-sided referral practice. And it reduces the risk that the Court accidentally denies leave where leave should have been granted. The veto is also a useful reminder that justices cannot just “go with the flow”.

In many cases, the decision will either be that leave is granted for the appeal as such, or that leave is not granted for the appeal as such. However, the Committee might constraint the admission to *parts* of the appeal, so that the case before the Supreme Court is limited to certain claims or to certain aspects of the appeal court’s judgment. This allows the Committee to tailor the case, framing it according to what will provide the most efficient base for a precedent. Typically, the leave may be limited to certain legal questions arising out of the judgment from the court of appeal.

To the extent leave to appeal is not granted, the appellate party usually has to pay the opponent’s costs connected to the appeal to the Supreme Court. This is in accordance with the general rule in Norwegian procedural law; the losing party has to reimburse the winning party’s costs.

According to the law, if leave to appeal is not granted, there is no need for the Committee to state any *reasons* for its decision. In most cases, the Committee do not give reasons.

However, the law allows the Committee to motivate its decision not to grant leave to appeal. To a certain degree, the Committee do motivate the decision not to grant leave to appeal, in cases where it is obvious that the appeal has no chance of success whatsoever. By doing so, the Supreme Court contributes to at least some clarification, without needing to grant leave.

Motivated decisions not to grant leave are often referred to as “mini-precedents”. Such “mini-precedents” may be very short, limited to one sentence where the Court simply states that the appeal has no prospect of success. In other cases the decision may take the form of something very close to a full-fledged reasoned judgment. One might find one example – translated into English – at the Supreme Courts web page at:

<https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/sak-2017-778-eng.pdf>

There are no ordinary *remedies* against a decision from the Committee not granting leave. And, as a general rule, the Committee itself cannot change the decision.

However, there is one exception: In criminal cases, the Committee might – according to section 323 second subsection – in exceptional situations change a decision not granting leave to appeal from the convicted. In order to convince the Committee to change, the appellant must demonstrate that the Committee’s initial decision is based on erroneous facts on a crucial point, or is flawed by substantial procedural errors. If the request for a changed decision is made later than three months after the initial decision, the request will be declared inadmissible.

If leave to appeal is *granted*, the Committee’s decision will simply state this – no additional motivation is given. So, the decision is a true “one-liner”:

“Leave to appeal is granted.”

If the grant is limited, the limitation will, of course, be stated:

“Leave to appeal is granted as to the question of whether the court of appeal has applied section 2-1 of the Act of Compensation wrongly. For the remainder of the appeal, leave is not granted.”

To the extent leave is granted, this permission may not at a later stage be withdrawn or limited. There are no remedies against a decision granting leave to appeal.

Costs are not awarded as far as leave is granted – those costs will be absorbed by the decision on costs in the ruling of the Court on the merits.

On an average, from the Supreme Court receives the appeal until a positive or negative decision is taken as to granting leave to appeal, there will pass approximately *one month* in civil cases and a couple of additional weeks in criminal cases.

## 12. Some advice

I will end my presentation with some short advice to the lawyer considering to appeal a case to the Supreme Court:

- Be *realistic*: Most appeals are not granted leave. Is your case special?
- Be *selective*: Appeal only on those points that have a realistic chance of being admitted to the Court.
- *Explain* to the Court why the appeal, *according to the criteria for giving leave to appeal*, should be admitted.
- *Concentrate* on the good arguments – keep it tight. The best appeals are short.