SUPREME COURT OF NORWAY

J U D G M E N T

given on 22 March 2024 by the Supreme Court sitting as grand chamber composed of

Chief Justice Toril Marie Øie
Justice Hilde Indreberg
Justice Kristin Normann
Justice Henrik Bull
Justice Per Erik Bergsjø
Justice Arne Ringnes
Justice Wenche Elizabeth Arntzen
Justice Espen Bergh
Justice Erik Thyness
Justice Knut Erik Sæther
Justice Thom Arne Hellerslia

HR-2024-551-S, (case no. 23-154353SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 24 August 2023

The State represented by the Ministry of Justice and Public Security	(The Office of the Attorney General represented by Henriette Lund Busch)
v.	
A B C	(Counsel Maria Hessen Jacobsen)

(1) Justice **Arntzen:**

Issues and background

(2) The case heard by a grand chamber of the Supreme Court concerns the question whether routine body searches of three inmates in Bergen Prison were contrary to Article 3 or Article 8 of the European Convention on Human Rights (ECHR) and the provisions in Articles 93 and 102 of the Constitution regarding the same rights.

(3) A, B and C – hereafter also referred to as the three inmates – have all been detained in Bergen Prison while in custody on remand or while serving prison sentences of six to nine years. There they were, particularly from May 2018 to the end August 2020, subjected to a large number of body searches, including being asked to dress naked and perform deep knee-bends. Body searches are also referred to as strip-searches.

(4) Bergen Prison is a high-security prison – a closed prison. As set out in section 11 subsections 1 and 4 of the Execution of Sentences Act, all convicted persons are generally to be committed directly to a high-security prison. A prison with a lower security level – an open prison – should be considered if the sentence is up to two years, and in special cases, even for stricter sentences. This implies that the inmates in a closed prison may have been convicted of very different types of offences.

(5) In Bergen Prison, routine body searches were conducted before and after visits in the visiting area, and before and after departures from the prison – both ordinary leave and absence escorted by staff or police – as well as before committals and releases.

(6) A, B and C brought an action against the State represented by the Ministry of Justice and Public Security, requesting a declaratory judgment that the body searches to which they had been subjected violated their rights under Article 3 of the ECHR and Article 93 of the Constitution. The provisions prohibit, among other things, degrading treatment. The claimants also requested compensation for non-economic loss in accordance with Article 13 of the ECHR. The requests for a declaratory judgment were later expanded to include violation of Article 8 of the ECHR and Article 102 of the Constitution on respect for private life, in the event that the claims under Article 3 of the ECHR and Article 93 of the Constitution should not succeed.

(7) On 3 November 2022, Oslo District Court ruled as follows:

> "1. The Court finds in favour of the State represented by the Ministry of Justice and Public Security in the claim for compensation for non-economic loss.
>
> 2. The routine body searches of A in Bergen Prison during the period 5 November 2018 to 25 August 2020 violated her rights under Article 3 of the ECHR and Article 93 of the Constitution.
>
> 3. The State represented by the Ministry of Justice and Public Security is ordered to compensate A's costs of NOK 1,301,314, with the addition of a court fee, within two weeks of the service of the judgment.

4. The routine body searches of B in Bergen Prison during the periods 20 June 2018 to 31 August 2020 and 14 December 2018 to 31 August 2020 violated his rights under Article 3 of the ECHR and Article 93 of the Constitution.

5. The State represented by the Ministry of Justice and Public Security is ordered to compensate B's costs of NOK 609,750, with the addition of a court fee, within two weeks of the service of the judgment.

6. The routine body searches of C in Bergen Prison during the period 3 February 2016 to 8 April 2020 violated his rights under Article 3 of the ECHR and Article 93 of the Constitution.

7. The State represented by the Ministry of Justice and Public Security is ordered to compensate C's costs of NOK 633,195, with the addition of a court fee, within two weeks of the service of the judgment."

(8) The District Court found that the routine body searches of the claimants during the relevant periods violated their rights under Article 3 of the ECHR and Article 93 of the Constitution. It also found that Article 13 of the ECHR does not provide a basis for awarding compensation for non-economic loss.

(9) The State appealed against the judgment. On 24 August 2023, Borgarting Court of Appeal ruled as follows:

"1. The State represented by the Ministry of Justice and Public Security is ordered to pay NOK 100,000 to A in compensation for non-economic loss within two weeks of the service of the judgment.

2. The State represented by the Ministry of Justice and Public Security is ordered to pay NOK 75,000 to B in compensation for non-economic loss within two weeks of the service of the judgment.

3. The State represented by the Ministry of Justice and Public Security is ordered to pay NOK 100,000 to C in compensation for non-economic loss within two weeks of the service of the judgment.

4. The State represented by the Ministry of Justice and Public Security is ordered to pay compensation for costs in the Court of Appeal to A of NOK 1,187,764 with the addition of a court fee within two weeks of the service of the judgment.

5. The State represented by the Ministry of Justice and Public Security is ordered to pay compensation for costs in the Court of Appeal to B of NOK 176,838 with the addition of a court fee within two weeks of the service of the judgment.

6. The State represented by the Ministry of Justice and Public Security is ordered to pay compensation for costs in the Court of Appeal to C of NOK 194,966 with the addition of a court fee within two weeks of the service of the judgment.

7. In all other respects, the appeal is dismissed."

(10) The Court of Appeal, too, found that the three inmates' rights under Article 3 of the ECHR and Article 93 of the Constitution had been violated, and the State's appeal against the District Court's declaratory judgment was dismissed. In contrast to the District Court, the

Court of Appeal found that Article 13 of the ECHR provides a basis for awarding compensation for non-economic loss.

(11) The State represented by the Ministry of Justice and Public Security has appealed against the Court of Appeal's judgment to the Supreme Court. The appeal challenges the application of the law and the findings of fact. The State mainly contends that Article 3 of the ECHR and Article 93 of the Constitution have not been violated, and that there is no basis for a declaratory judgment or for awarding compensation for non-economic loss. In any case, Article 13 of the ECHR provides no basis for compensation. In the appeal, it is also contended that C's possible right to compensation for non-economic loss is partially time-barred.

(12) On 7 November 2023, the Supreme Court's Appeals Selection Committee granted leave to appeal concerning "the issues regarding Article 3 and Article 13 of the ECHR and the possibility to request a declaratory judgment along with a judgment for effective remedy for human rights violations". In other respects, leave to appeal was refused.

(13) On 21 November 2023, the Chief Justice made this decision:

> "The issue of violation of Article 3 of the ECHR will be heard separately and decided by a grand chamber of the Supreme Court under section 5 subsection 4 first sentence, see section 6 subsection 2, of the Courts of Justice Act. The hearing of the other issues is suspended until after a grand chamber judgment has been handed down."

(14) During the case preparation, it has been clarified that the decisions by the Appeals Selection Committee and the Chief Justice also concern Article 93 of the Constitution and the alternative contention of a violation of Article 8 of the ECHR and Article 102 of the Constitution.

(15) In accordance with the Supreme Court's rules of procedure for grand chamber hearings, adopted by the Supreme Court on 12 December 2007 in accordance with section 8 see section 7 subsection 2 of the Courts of Justice Act, a grand chamber consists, in addition to the Chief Justice, of ten justices elected by drawing of lots.

(16) The Organisation of Prisoners and the Norwegian Human Rights Institution (NIM) have submitted statements to highlight public interests, see section 15-8 of the Dispute Act. The submission from NIM is limited to the courts' power and duty to award compensation for non-economic loss under Article 13 of the ECHR, which is not an issue in this part of the case.

(17) Within these limits, the case is mainly similar to that in the previous instances.

The parties' contentions

(18) The appellant – *the State represented by the Ministry of Justice and Public Security* – contends:

(19) The body searches to which the three inmates have been subjected constitute neither violation of Article 3 of the ECHR and Article 93 of the Constitution nor of Article 8 of the ECHR and Article 102 of the Constitution.

(20) The European Court of Human Rights (ECtHR) applies a threshold principle under which only ill-treatment attaining "a minimum level of severity" will fall within the scope of Article 3 of the ECHR. The suffering and humiliation that deprivation of liberty inevitably involves are not in themselves a violation of this provision. Whether the threshold has been crossed depends on an overall assessment of all circumstances of the case – including the purpose, necessity and the actual execution of the body search.

(21) The body searches in Bergen Prison took place in connection with inmates' contact with the outside world. The purpose was to prevent and detect smuggling in and out of drugs and other illicit items. This control measure is a crucial contribution to security and order during the execution of sentences, which in turn is necessary for the rehabilitation of inmates and their gradual reintegration into society.

(22) There is a persistent and increasing drug problem in Norwegian prisons. Illegal drugs are partly smuggled in over the prison walls, partly in clothes and on the body, and partly in body cavities. The risk of smuggling out typically involves unregulated letters or messages. It is not possible to limit control measures to individual inmates, as anyone initially trusted may be pressured into smuggling in and out.

(23) During the period in question, it was not possible to maintain this aspect of security in a more lenient manner. Metal detectors only detect metal objects and therefore have limited applicability, while body scanners were introduced in 2020. Other closed prisons also had similar routines for body searches.

(24) The ECtHR acknowledges that body searches may be necessary for "prison security", which includes security for both inmates and staff, or to "prevent disorder or criminal acts".

(25) As stated in the ECtHR judgment of 12 June 2007, *Frérot v. France*, routine body searches after inmates' contact with the outside world are not in violation of Article 3. Admittedly, there are stricter requirements for inspections of the anus through the "bend over and cough" procedure, but the body searches in the case at hand are of a different nature. The procedure involving deep knee-bends entails a more limited exposure of the anus and is therefore less intrusive. The purpose is to examine if anything is concealed in the crotch area or between the buttocks.

(26) There are no individual circumstances related to the execution of the body searches of the three inmates that entail that they have been subjected to humiliating treatment contrary to Article 3. There is also no violation of Article 8 of the ECHR or Article 102 of the Constitution.

(27) The State represented by the Ministry of Justice and Public Security asks the Supreme Court to rule as follows:

> "The Court finds in favour of the State represented by the Ministry of Justice and Public Security."

(28) The respondents – *A, B* and *C* – contend:

(29) The routine body searches to which the three inmates were subjected in Bergen Prison before September 2020 constituted degrading treatment contrary Article 3 of the ECHR and Article 93 of the Constitution.

(30) The set-up and implementation of the routines built on an insufficient assessment of the security needs against the dignity of the inmates. There is no documented high risk of serious crime within the prison walls, and the drug problem was mostly limited to the sale and use of cannabis and prescription medicine.

(31) All body searches took place with deep knee-bends while completely naked. They were conducted on a large scale in a manner too intrusive, contrary to the regulations on stepwise undressing. The requirement for keeping records was also not met.

(32) Bergen Prison did not practice the possibility to make exceptions. Vulnerabilities in A and C were thus not considered. Except on certain random occasions, no distinctions were made between situations with different risks of smuggling in and out. These factors intensified the humiliation by creating a sense of arbitrariness. The routines were among the strictest in the country and exceeded the burdens that inevitably come with being imprisoned.

(33) The ECtHR requires that body searches are conducted only when necessitated by convincing security needs, and the requirement becomes stricter the more intrusive the searches are. It follows from the *Frérot* case that strip-searches with the obligation to "bend over and cough" can only be accepted when strictly necessary in the light of special circumstances and where there are "strong and specific reasons". The same must apply to the body searches in our case. The purpose of the deep knee-bends was in fact to facilitate a visual inspection of the crotch area. B and C were sometimes asked to cough without a basis in the regulations. A was ordered to change tampons in front of the guards, which in itself was deeply humiliating. It is clear that no individual security assessments were carried out in connection with the body searches. Under any circumstance, the routine body searches before visits and departure were not based on security needs. These routines were introduced due to a misreading of a letter from the Norwegian Directorate of Correctional Service.

(34) Article 8 of the ECHR and Article 102 of the Constitution have in any case been violated. The body searches in question were both unnecessary and disproportionate in terms of their content and frequency.

(35) A, B and C ask the Supreme Court to rule as follows:

> "1. The further proceedings in the Supreme Court will be based on the finding that the respondents were subjected to treatment that violated their rights under Article 3 of the ECHR and Article 93 of the Constitution.
>
> In the alternative:
>
> 2. The further proceedings in the Supreme Court will be based on the finding that the respondents were subjected to treatment that violated their rights under Article 8 of the ECHR and Article 102 of the Constitution.
>
> In both cases:
>
> 3. The issue of costs is suspended pending a final ruling in the case."

My opinion

The regulations on body searches

(36) The legal basis for body searches is section 28 of the Execution of Sentences Act, which reads:

> *Section 28. Inspection of inmates, rooms and possessions*
> The Norwegian Correctional Services may inspect inmates, their rooms and possessions in order to prevent disorder or criminal acts. The inspection may be conducted by means of technological equipment or dogs, search or body search.

(37) A search of a person is an inspection without undressing, while a body search is an inspection of a person who is partially or completely naked. The provision must be delimited against section 29, which permits, among other things, physical inspections to detect intoxicants etc. concealed in the inmate's body.

(38) The need for control measures directed at the inmate must be seen in the light of the purpose of the execution of the sentence as expressed in sections 2 and 3. The sentence is to prevent the commission of new criminal acts, while ensuring satisfactory conditions for the inmate. The execution of the sentence should both satisfy the need for security and assist a convicted person to adjust to society. In the Norwegian correctional system, leaves of absence and private visits are considered important measures to achieve successful rehabilitation. At the same time, such unsupervised contact with the outside world poses a security risk that necessitates appropriate control measures.

(39) The control measures in section 28 are further regulated in section 3-25 of Regulations of 22 February 2002 no. 183 on the execution of sentences, where subsections 1 and 5 read:

> "To prevent or document disorder or criminal acts, searches may be conducted of the inmates' person, room and possessions.
> ...
> A search may be conducted upon committal, at any time during the execution of the sentence and before and after departure. Upon committal, inspections of the inmate's person or possessions can only be omitted if security reasons do not clearly indicate the opposite."

(40) In other words, the inmate's person should be inspected each time he or she arrives at or leaves the prison. Furthermore, such inspections may be conducted at any time. No specific guidelines are given for inspections before or after visits. The Regulations also do not specify in which cases the inspection may be conducted in the form of a body search.

Preparatory works – legislative history and various considerations

(41) As set out in the Prison Law Committee's report, Norwegian Official Report 1988: 37 page 214–215, the 1958 Prison Act contained no direct legal basis for searches of inmates. However, according to prison regulations issued under section 56 of the Act, the inmates in closed prisons should in principle to be body searched upon departure and arrival, and upon suspicion of possession of illicit items. Otherwise, they could be body searched "at regular intervals". The routines varied from prison to prison, but body searches were generally not

conducted as often as prescribed. For example, the Committee was not aware of inmates being body searched when *departing from* the prison in connection with temporary absence. Regarding the arguments for and against body searches, the following is stated on page 215:

> "The Committee emphasises that body searches and other searches of persons is a far-reaching control measure. Implementation thereof can be perceived as intrusive by the individual being searched, and the prison officers may find it uncomfortable to carry out such a search. These are compelling arguments against extensive use of body searches in prisons. However, significant weight must also be given to the special security needs in a prison. Searching of inmates is one of several measures in the security check, as it may prevent the inmates from bringing illicit items into the prison."

(42) The Committee's basis was that one had not succeeded in stopping the smuggling of drugs through body searches, partly due to inmates hiding drugs in body cavities. At the same time, the Committee believed it would be "very easy" to smuggle drugs into prisons without there being a legal basis for conducting body searches. The Committee's recommendation was that body searches "be conducted as routine checks, random checks, and based on concrete suspicion," see page 216.

(43) In the consultation letter on the new Execution of Sentences Act, the Ministry proposed to continue "current provisions and practices" with regard to body searches, see Proposition to the Odelsting no. 5 (2000–2001) page 79. As for the different ways of searching the inmate's person, it is stated that the power to carry out searches and body searches is "positively mentioned as equal options in the legal text … to avoid signalling that one method should be used over another". The Ministry also stated that "it must be left to each prison to exercise discretion based on practical local conditions." I trust that this refers to both the conditions of the inmates and the building facilities etc.

(44) The Standing Committee on Justice noted in Recommendation to the Odelsting no. 60 (2000–2001) page 22 that the various inspection methods should be equal, but emphasised "that the measures perceived as least intrusive for the inmate must be used first, where this is deemed sufficient to carry out a satisfactory examination". As concerns combating drugs in prisons, the Committee also referred to its remarks in Budget Recommendation to the Storting no. 4 (1998–1999), presenting the Government's action plan against drugs in prisons.

(45) In the Budget Recommendation, the Committee mentions the difficult balance between "sealing off" prisons to have little or no contact with the outside world on the one hand, and values related to resocialisation and rehabilitation on the other. Then, the following is stated on pages 19–20:

> "The *Committee* endorses the sub-plan's description of the drug problem and its scope. It is also the *Committee's* opinion that the drug abuse in prisons has a significantly adverse effect on the environment and reduces the overall safety for inmates and staff. Activity and rehabilitation measures will not have the intended effect, and the contact between inmates and staff becomes more difficult. Moreover, drug abuse leads to pressure on fellow inmates to bring drugs into the facility after leave, and often results in inmates incurring debts while serving their sentence. However, not only fellow inmates are used for smuggling of drugs; even staff, visitors and others are subjected to pressure. Threats and the risk of retaliation from persons in the drug environment will increase if the drug abuse is allowed to develop."

(46) The security challenges described are a central part of the reasoning for the legal bases for body searches and the routine use thereof in many Norwegian prisons. It is clear that body searches are also intended to have a deterrent effect in the sense that they are to prevent attempts at smuggling of drugs, among other things.

(47) The Justice Committee then stated that the applicable rules largely permitted control measures, and that it was primarily a question of "exploiting the existing opportunities". The Committee also asked the Ministry to propose supplementary legal provisions to "ensure effective measures to combat drugs in prisons". The new provisions in the Execution of Sentences Act allowing inspection of inmates and visitors with dogs are examples of this.

(48) This outline demonstrates that the legislature has been aware of the dilemmas related to the use of strip-searches. As indicated in Report to the Storting no. 37 (2007–2008) *Effective punishment – less crime – safer society,* the concepts of humanity, legal security and equal treatment are central values in the correctional system. Both a drug-free prison environment and the inmates' feeling of dignity and self-respect are important prerequisites for successful rehabilitation.

The guidelines of the Norwegian Correctional Service and the routines for body searches in Bergen Prison

(49) According to section 9-1 subsection 2 of the Execution of Sentences Regulations, the Norwegian Directorate of Correctional Service may issue further guidelines to the law. In 2002, the Directorate provided guidelines to section 28 of the Execution of Sentences Act and section 3-25 of the Regulations, revised on 27 October 2008 (KSF-2008-9001).

(50) The guidelines set out that inspections of the inmate's person should generally be conducted upon arrival and before and after departures, and that they can be carried out at any time during the sentence. The inspections may take place on a routine basis and as random checks without individual justification.

(51) In addition to the instruction to carry out the inspection as considerately as possible, point 28.3 provides the following guidelines for the execution of body searches:

> "This includes undressing and inspection of the naked body and of hair. Body searches should be conducted by staff of the same sex as the inmate. If the search must be conducted by a person of the opposite sex, another staff member should be present during the search. As assistance during the search of inmates, one may use, for example, mirrors to facilitate the inspection. Inmates should have the opportunity to choose whether the inspection should be carried out with a mirror or only by a search. Inspection of body cavities is regulated by section 29 subsection 3 of the Execution of Sentences Act with regulations."

(52) Inspections of the inmate's person must be recorded in a separate protocol that is controlled by superiors. They are also to be "carried out in a manner that is as little embarrassing and degrading as possible for the inmates". The inspection must not be more extensive than necessary.

(53) In these guidelines, the Norwegian Directorate of Correctional Service indicated neither when a body search should be conducted nor that such a search should involve deep knee-bends.

(54) As already mentioned, it is a precondition in the preparatory works that the further implementation of the various control measures is left to the individual prison. The central regulations gave the prisons considerable leeway with regard to the use of body searches.

(55) Before May 2018, *Bergen Prison* conducted routine body searches in connection with all entries into the prison and after visits. It was not customary to impose body searches before departures or visits, nor after visits from advocates.

(56) In mid-May 2018, the Norwegian Directorate of Correctional Service asked all prison regions to tighten the body search procedures *after* the inmates had stayed in the visitation area. The Directorate referred to the broad experience with visitation rooms being used for temporary storage of illicit and unauthorised items that can be carried further into the prison. The request applied regardless of whether the visitor in question was a trusted person, typically an advocate.

(57) Bergen Prison then developed new routines that also included body searches of the inmates *before* stays in the visitation area and before prison departures. In the search routines dated 25 May 2018, it is stated:

> "• Inmates can be body searched based on concrete suspicion, routinely or as random checks.
>
> • Inmates must always be searched in the following cases, unless such a search is more extensive than necessary. Exceptions can only be made after an individual assessment: Before visits in the visitation area. Upon departures from the prison. (Escorted leave, leave and release). When returning after departures from the prison. After stays in the visitation area, upon terminated work for inmates who work in the visitation area. After all types of visits in the visitation area (also visits from advocate, police, glass partition)."

(58) In other words, the inmate was in principle to be body searched both before and after all contact with the outside world, and after work in the visitation area. The routines did not distinguish between the security risk in the individual situations, typically based on who was visiting and whether the visit took place behind a glass partition.

(59) About the very execution of the body searches, it is set out:

> "• All clothes must be taken off; including underwear, watch, headband and similar.
>
> • The search must not be more intrusive than necessary. Inmates who so wish should be given the opportunity to first take off their clothes on the upper body, before undressing the lower body. This is to avoid that they are completely naked.
>
> • The entire body must be checked, including hair, armpits, under feet, and under breasts. Inmates are to do deep knee-bends, at a slow pace.
>
> • Take your time, so that all steps are carried out in a good and safe manner
>
> • Be polite, but firm."

(60) Bergen Prison did not practice stepwise undressing before February 2020, as it should have according to the second point. Consequently, the inmates were completely naked during the body searches.

(61) Central to our case is that the inmates on a routine basis – regardless of the security risk – were body searched each time they arrived at or left the prison or a visiting room in the prison, and that they, as a step in this routine, had to do deep knee-bends slowly while completely naked.

(62) In 2019, criticism was levied against the routine body searches from several quarters. Advocate Maria Hessen Jacobsen raised concerns about the scope of body searches and the basis for conducting them even *before* visits. Furthermore, the Bar Association had principled objections to body searches in connection with visits from advocates and to the lack of recording. The Parliamentary Ombudsman's preventive unit, see section 3 a of the then Parliamentary Ombudsman Act, also criticised the control of the inmates in various prisons, including the implementation of routine body searches with complete undressing.

(63) In February 2020, the Norwegian Directorate of Correctional Service requested the prison regions to follow up on the documentation of body searches and stepwise undressing.

(64) Bergen Prison adopted new routines on 10 March 2020: Body searches *before* departures and visits were replaced by body scanning unless there was concrete suspicion against the inmate. However, the main rule on routine body searches after departures and all stays in the visitation area was continued. This also applied after visits from advocates and police, after visits with a glass partition, and after work in the visitation area. Body searches had to be executed with stepwise undressing, and they had to be recorded. The following was stated regarding the very execution:

> "The entire body must be checked, including hair, armpits, under feet, and under breasts. Inmates must do deep knee-bend, at a slow pace. Note: Deep knee-bends are used to more easily detect attempts to conceal objects in body cavities or between buttocks."

(65) I mention that body scanners, which had previously been under development and testing, could only be put into regular use from 2020.

(66) According to information provided, it took some time for the new routines to be implemented.

(67) On 10 July 2020, Gulating Court of Appeal handed down a judgment (LG-2019-161767) in a criminal case involving an aggravated drug offence, also involving the issue of body searches. The Court of Appeal found that routine body searches during detention in Bergen Prison from October 2018 to February 2020 constituted a violation of Article 3 of the ECHR. The violation particularly concerned searches before visits and upon prison departures, and compensation was granted in the form of a deduction in the sentence. The judgment was not appealed against.

(68) After a new inquiry from the Parliamentary Ombudsman to the Norwegian Directorate of Correctional Service, extensive changes were made to the guidelines for body searches. On 26 August 2020, the Norwegian Correctional Service Region West ordered all prisons in the region to practice the following routines:

> "1) Necessity assessment prior to body search – on the assessment of necessity, see below on sources of law.
>
> 2) Assessment of whether alternative measures can be used instead of body searches (for instance a body scanner, dogs, anything else?)
>
> 3) If a body search is necessary, see point 1 – there is an order of a stepwise execution of the search.
>
> 4) Documentation in *Kompis* of:
> - why the body search is necessary, see point 1
> - which alternative measures are assessed, and why this is not sufficient, see point 2
> - the execution, see point 3"

(69) These measures are specified and elaborated in the latest central guidelines of the Norwegian Directorate of Correctional Service of 21 September 2020. The Directorate refers both to Gulating Court of Appeal's judgment and the United Nations Standard Minimum Rules for the Treatment of Prisoners – the so-called Mandela Rules – revised on 22 May 2015, particularly rule 52 no. 1, which states:

> "Intrusive searches, including strip and body cavity searches, should be undertaken only if absolutely necessary. Prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches. Intrusive searches shall be conducted in private and by trained staff of the same sex as the prisoner."

(70) The Directorate points out that while these rules are not intended to be legally binding, they are "an expression of consensus on minimum standards for the treatment of prisoners worldwide."

(71) The main rule now is that the personal control of the inmates must take place by using body scanners or other less intrusive measures. Body searches should only be conducted after "a concrete and/or individual" necessity assessment. They must be recorded and executed with stepwise undressing, which means that the inmate is allowed to have upper body clothing back before garments are removed from the lower body.

(72) The latest guidelines from the Norwegian Correctional Service are *preliminary* and stated to apply until potential changes and specifications are made in the light of the Supreme Court's clarification of the application of the ECHR.

(73) The question in the following is whether the routine body searches with deep knee-bends performed on the three inmates before the last changes to the guidelines, were in violation of Article 3 or Article 8 of the ECHR and the corresponding provisions of the Constitution.

Article 3 of the ECHR and Article 93 subsection 2 of the Constitution

Starting points

(74) Article 3 of the ECHR reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

(75) The provision applies as Norwegian law, see section 2 of the Human Rights Act, and may limit the provisions in the Execution of Sentences Act, see section 3. Relevant to our case is the prohibition of degrading treatment. The prohibition of degrading treatment also follows from Article 93 subsection 2 of the Constitution.

(76) In three criminal cases, the Supreme Court has found that routine body searches imposed on inmates in custody on remand, including at Bergen Prison, violated Article 3 of the ECHR and Article 93 subsection 2 of the Constitution, and compensated this by reducing the sentences. In the two first cases – HR-2020-2136-A and HR-2020-2137-A – the parties agreed that there had been a violation.

(77) So far, I confine myself to referring to the presentation of the legal starting points in the third case – HR-2021-1155-A. Paragraph 42 reproduces the fundamental principles as they are summarised in HR-2017-1127-U paragraph 12:

> "In its case law, the Court of Human Rights emphasises that in order for the prohibition in Article 3 to apply, a 'minimum level of severity'/'un minimum the(y) gravité' is required, see for instance the Grand Chamber judgment 26 October 2000 in Kudla v. Poland paragraph 91. Whether the threshold of severity has been reached depends on an overall assessment, taking into account, inter alia, the nature of the treatment and its context, its duration, the physical and mental effects on the person subjected to it, and, in some cases, also the sex, age and state of health of the person, see the Grand Chamber judgment 15 December 2016 in Khlaifia and Others v. Italy, paragraphs 159-160. The purpose of the treatment is a central factor; strong indications of a violation would include circumstances where the intention was to humiliate or debase. Even for legitimately justified measures, however, Article 3 establishes a threshold, insofar as the nature, intensity or duration of these measures exceed what is necessary or in other ways cause disproportionate suffering, see the Grand Chamber judgment 28 September 2015 in Bouyid v. Belgium paragraphs 86-88."

(78) In other words, a violation of Article 3 of the ECHR requires a minimum level of severity. The provision does not protect the inmates from the inevitable burdens of legitimate treatment or punishment, see the 2021 judgment paragraph 44. Although the prohibition of, among other things, degrading treatment is *absolute,* the threshold assessment is *relative* in the sense that an overall assessment of all circumstances in the case must be made.

ECtHR case law on body searches

(79) The ECtHR rulings on body searches, often referred to as "strip-searches", may be divided into different categories:

(80) In some cases, the Court has found a violation in connection with individual searches conducted in a *particularly degrading* manner, see for example judgment 24 July 2001 *Valašinas v. Lithuania* and judgment 15 November 2001 *Iwańczuk v. Poland*. On the other hand, there are cases involving few searches, but without such special additional burdens, that have not met the threshold for violation of Article 3, see judgment 31 July 2014 *Jaeger v. Estonia* and judgment 1 June 2017 *Dejnek v. Poland*.

(81) In a number of cases, the ECtHR has found that *the sum of* various security measures has amounted to a violation. Many of these involve inmates under a particularly strict security regime who also have been subjected to daily or weekly body searches, see for example judgment 4 February 2003 *Van der Ven v. the Netherlands* and judgment 17 April 2012 *Piechowicz v. Poland*. There are also instances where the ECtHR has accepted a large number of body searches, either justified by specific risk assessments or concrete suspicion, see the ECtHR inadmissibility decisions 29 May 2018 *Hansen v. Norway* and 13 October 2022 *Nowak v. Poland*.

(82) The rulings illustrate the diversity in ECtHR case law on body searches. A consequence of violations of Article 3 being found based on an overall assessment, is that it can be difficult to draw a principled distinction between acceptable and unacceptable body searches. That being said, I cannot see that the ECtHR has explicitly disapproved of body searches upon initial remand or upon return to prison where the inmate has not been subject to regular supervision or other security measures, see also HR-2021-1155-A paragraph 56.

(83) The ECtHR judgment of 12 June 2007 *Frérot v. France* concerns routine body searches, particularly after visits. As such, the case is comparable to ours, and I will therefore examine it more closely.

(84) Frérot had been sentenced to double life imprisonment for intentional homicide, armed robbery, hostage-taking and terrorism. He was registered as a "high-risk prisoner" and detained in various prisons between 1987 and 2007. In September 1994, he was transferred to Fresnes Prison, described by the ECtHR as a "higher-security prison".

(85) According to the French prison regulations, inmates were to undergo full body searches, including required to undress completely, before and after unsupervised leave, after unsupervised visits in visiting rooms, and before and after placement in a punishment cell or in solitary confinement. In addition, prison staff had the possibility to carry out searches of high-risk inmates whenever deemed necessary. Inmates could also be subjected to rub-down searches with their clothes on, including before visits.

(86) A full body search was initially intended to be conducted completely undressed with legs spread to inspect the crotch area. In special cases, a more intrusive search could be carried out, as described by the ECtHR in paragraph 40:

> "In the specific case of searches for prohibited objects or substances, the prisoner may be required to bend over and cough (with the buttocks facing the officer carrying out the search, clearly to allow a visual inspection of the anus) … ."

(87) During this procedure, the inmate was required to bend over to let the officer see the anus. The purpose of coughing must have been to create a pressure, so that anything concealed would either fall out or become visible. As I will come back to, Frérot was body searched with the "bend over and cough" procedure each time he left the visiting room during a two-year period from September 1994 to September 1996.

(88) In paragraphs 35–37, the ECtHR outlines the general legal principles under Article 3 of the ECHR. At the end of paragraph 37, it states that "the measures taken in connection with the detention must be necessary to attain the legitimate aim pursued". Control measures during detention must therefore be necessary for the purpose.

(89) The Court then proceeds to the topic of body searches – "strip-searches". It is stated in paragraph 38 that such searches may be necessary to ensure prison security – including the prisoner's own safety – or to prevent disorder or crime. However, the searches must be conducted in an appropriate manner so that that they are not perceived as more burdensome and humiliating than necessary. The outline concludes with the following general guidance:

> "It is also self-evident that the greater the invasion of the privacy of a prisoner being strip-searched (particularly where the procedure involves having to undress in front of others, and even more so where the prisoner has to adopt embarrassing positions), the greater the caution required."

(90) The more intrusive the body searches are, the greater *caution* is required. This rule of caution must apply to both the justification for the searches and the manner in which they are conducted.

(91) The ECtHR then discusses the French rules on body searches with and without the "bend over and cough" procedure. Measures aimed at safeguarding human dignity are part of this, including that body searches were to be conducted by officers of the same sex, without physical contact, and in private rooms.

(92) Next, the Court expresses in paragraph 41 an understanding that the applicant perceived the body searches as humiliating, particularly on the occasions he was ordered to undergo "oral or anal inspections". I understand the Court to refer to *visual* inspections of the anus. The ECtHR states on a general basis that such body searches, viewed in isolation, is not incompatible with Article 3 of the ECHR unless "there are special circumstances relating to the situation of the person undergoing them". In continuation of this, the Court states:

> "The Court would add that this applies even where the prisoner is obliged to bend over and cough in order to permit a visual inspection of the anus 'in the specific case of a search for prohibited objects or substances', provided that such a measure is permitted only where absolutely necessary in the light of the special circumstances and where there are strong and specific reasons to suspect that the prisoner might be hiding such an object or substance in that part of his body.
>
> Accordingly, the Court is not persuaded by the applicant's argument that the procedure applied is inhuman or degrading in general terms."

(93) Here, the ECtHR also accepts the most intrusive procedure, "bend over and cough", which, according to the French prison regulations, could only be used "in the specific case of a search for prohibited objects or substances". The precondition seems to be that the procedure is reserved for situations where it is absolutely necessary in the light of the specific circumstances, and where there are strong and specific reasons to suspect that the inmate is hiding illicit objects or substances in the relevant part of the body.

(94) In the subsequent paragraphs, the ECtHR discusses the frequency of the various forms of searches, both rub-down searches with the clothes on and full body searches while naked. After a detailed account in paragraph 44 of the situation-specific searches prescribed by the French regulations, the Court's basis is that *Frérot* was subjected to "full body searches" frequently, partly due to his classification as a high-risk prisoner.

(95) In paragraph 45, the ECtHR states that it was "clearly necessary in order to maintain security or prevent crime" to carry out "full body searches" after Frérot had interacted with the outside world or other inmates, and before he was placed in a punishment cell. Here, the Court is addressing the various *situations,* and not *the manner* in which the body searches were executed.

(96) The specific "bend over and cough" procedure is addressed separately in paragraph 46, where the ECtHR remarks that it was "struck by the fact that the application of the most intrusive procedures in terms of physical intimacy varied from one place of detention to another in the applicant's case". Frérot had not been subjected to visual inspections of the anus in the various prisons in which he had previously been held. Additionally, and "most importantly", the Court highlights that the applicant during his two years in Fresnes Prison was subjected to a full body search and ordered to "bend over and cough" after every visit, and after a court hearing with supervision in 1995. Moreover, he had been sent to "the punishment block" on several occasions for not obeying such orders.

(97) These circumstances are particularly emphasised by the ECtHR in its concluding overall assessment in paragraph 47. Here, it is also noted that body searches with "bend over and cough" were systematically conducted in the relevant prison, and therefore independently of whether there was a strong and specific suspicion that the inmate had "prohibited objects or substances" concealed in the anus. In the assessment of the application of Article 3, the following is stated:

> "The performance of anal inspections in such conditions cannot be said to have been duly based on 'convincing security needs' (see *Van der Ven*, cited above, section 62) or on the need to prevent disorder or crime. The Court therefore finds it understandable that the prisoners concerned, such as the applicant, might feel that they are the victims of arbitrary measures on that account. It can accept that this feeling might be aggravated by the fact that the rules on prisoner searches in general, and full body searches in particular, are mainly set out in an instruction issued by the Prison Service itself – the circular of 14 March 1986 – and, moreover, allow each prison governor a large measure of discretion.
>
> In the Court's view, the combination of that feeling of arbitrariness, the feelings of inferiority and anxiety often associated with it, and the feeling of a serious affront to dignity indisputably prompted by the obligation to undress in front of another person and submit to a visual inspection of the anus, in addition to the other intrusively intimate measures entailed by full strip-searches, results in a degree of humiliation exceeding the – unavoidable and hence tolerable – level that strip-searches of prisoners inevitably involve. Moreover, the humiliation felt by the applicant was aggravated by the fact that on a number of occasions his refusal to comply with such measures led to his being placed in a punishment cell."

(98) It appears to have been central to the ECtHR that the routine body searches involving inspection of the anus were not "duly based on convincing security needs" or on the need to combat disorder or crime. The absence of such security needs may in turn have given the applicant a sense that the measure was arbitrary. These circumstances, combined with the humiliation naturally associated with such intrusive body searches, led to the violation of the prohibition of degrading treatment in Article 3 of the ECHR.

(99) It can be questioned whether it follows from *Frérot* that there must always be a specific suspicion against the relevant inmate for body searches with visual anal inspection to be justified, see the statement about strong and specific suspicions in paragraph 47 and also the previously quoted formulation in paragraph 41.

(100) In my view, the judgment cannot be understood in that way. I have noted the Court's reference in paragraph 47 to paragraph 62 of the *Van der Ven* judgment, where the Court concluded that subjecting Van der Ven to weekly anal inspections could not be said to have been duly based on "convincing security needs". The basis for this conclusion was that "this weekly strip-search was conducted as a matter of routine and was not based on any concrete security need or the applicant's behaviour", see paragraph 58. In other words, the measure was based *neither* on a specific security need *nor* on the behaviour of the inmate.

(101) The same understanding of "convincing security needs" has later been adopted for the assessment of body searches with *deep knee-bends* in several cases against Poland.

(102) In the *Piechowicz* case, the applicant had been subjected to body searches with deep knee-bends every time he went in and out of his cell. Such searches were characterised as "exceptionally embarrassing", and the ECtHR expresses in paragraph 175 of the judgment "grave misgivings" related to the fact that

> "[t]he strip-search, involving an anal inspection, was conducted as a matter of routine and was not linked to any specific security needs, nor to any specific suspicion concerning the applicants conduct".

(103) As long as the body searches were linked neither to specific security needs nor specific suspicions against the inmate, they were not based on "concrete convincing security needs", see paragraph 176. This approach to body searches with deep knee-bends has been followed in subsequent rulings, including judgment of 12 January 2016 *Karykowski v. Poland* paragraph 30 and 36 and judgment of 21 March 2017 *Michał Korgul v. Poland* paragraph 42.

(104) Also, I cannot see that the ECtHR in other rulings on Article 3 of the ECHR lays down a general requirement that body searches with visual inspection or exposure of the anus may only be conducted based on an individual suspicion.

(105) Against this background, my basis is that body searches with deep knee-bends can be imposed in situations and on individuals representing a specific risk of smuggling, provided that the security needs are sufficiently convincing. An individual suspicion that something is concealed is thus not a requirement.

(106) Furthermore, the ECtHR has pointed out in several judgments that routine body searches may be experienced as *arbitrary*, see also *Frérot* paragraph 47.

(107) In judgment of 22 October 2022, *Roth v. Germany,* the sense of arbitrariness seems to have been central. The applicant in that case had been subjected to eleven body searches with inspection of the anus, see paragraph 70. The repeated searches were random and conducted in situations where he was expecting or had been visited by public officials behind a glass partition. The following is set out in paragraph 72:

> "… owing to the absence of a legitimate purpose for these repeated and generalised searches, the feeling of arbitrariness and the feelings of inferiority and anxiety often

> associated with them, as well as the feeling of a serious affront to dignity indisputably prompted by the obligation to undress in front of another person and submit to inspection of the anus, resulted in a degree of humiliation exceeding the – unavoidable and hence tolerable – level that strip-searches of prisoners inevitably involve (…)."

(108) The ruling illustrates that routine body searches with anal inspection that are not duly based on legitimate security needs, may be experienced as arbitrary, which is likely to intensify the humiliation inflicted by such intrusive examinations.

(109) Finally, consideration must be given to any special circumstances relating to the inmate, see *Frérot* paragraph 41. In *Julin v. Estonia* of 29 May 2012, in paragraph 189, the ECtHR notes that while all detainees are in a vulnerable situation, the applicant did not appear to have been in a "particularly helpless situation" when subjected to body searches.

Summary

(110) For our case, the ECtHR case law on body searches can be summarised as follows:

(111) Body searches, with or without visual inspection of the anus, may be necessary for security reasons or for preventing disorder or crime. The more intrusive they are, the greater caution the prison authorities must exercise in their use.

(112) Body searches must be conducted in a considerate manner so that they are not experienced as more burdensome and humiliating than necessary.

(113) *Particularly intrusive* body searches involving visual inspection or exposure of the anus must be duly based on convincing security needs. In cases involving *deep knee-bends* body searches, this has been specified to mean there must be either concrete security needs or concrete suspicion related to the inmate.

(114) When assessing whether the threshold for Article 3 of the ECHR has been crossed, all circumstances of the case must be considered. The number of body searches is part of the overall assessment, but is not decisive on its own.

(115) Based on ECtHR case law, rigid and undifferentiated routines for particularly intrusive body searches are not compatible with Article 3 of the ECHR.

(116) Even so, the specific security needs may still, to some extent, also be based on situations that typically involve a high risk of smuggling, such as upon initial committal and after leaves of absence. The security needs may also be based on concrete circumstances, such as credible information on smuggling in and out. In many cases, however, a concrete assessment of the security risk associated with the individual inmate is required. When establishing guidelines for body searches, the security needs must be balanced against the welfare of the inmates.

(117) I therefore agree with the statement in HR-2021-1155-A paragraph 55:

> "The fact that ECtHR case law aims at routine executions of strip-searches cannot imply that a concrete assessment is required in each case, and for each individual inmate. Crucial in this regard must be that both the wording of the rules and routines and the way

> they are practiced build on an assessment of the present risk, balanced against the dignity of the inmates."

The individual assessment

Bergen Prison's routines for body searches with deep knee-bends

(118) According to ECtHR case law, intrusive body searches, such as those with deep knee-bends, must be duly based on convincing security needs.

(119) In Bergen Prison, the main rule in the relevant period was that the inmate had to undergo a body search with deep knee-bends in all situations that might entail a risk of smuggling in or out, such as before and after all visits, after work in the visitation area and before and after all departures from the prison. The routines did not differentiate between situations with varying degrees of risk. Consequently, body searches were conducted based on entirely *general* risk considerations.

(120) The routines also did not prescribe less intrusive measures − for example searches without undressing, inspections by use of a dog or body searches without deep knee-bends – where this would be sufficient. The requirement that all body searches had to involve deep knee-bends was particularly intrusive, also because the searches in the relevant period were carried out without stepwise undressing.

(121) Despite significant variations in what the inmates were convicted of and in other personal circumstances, the routines also did not contain individual security assessments. They did allow for exemptions "after an individual assessment in each case". In practice, however, there appears to have been no formalised system for exemptions, not even for inmates with particular vulnerabilities. Some officers chose not to carry out prescribed body searches in certain cases, but these exemptions rather appeared as random occurrences.

(122) There is no evidence that a systematic balancing between the security needs and the consideration for the inmates was conducted when establishing the routines at a local level. Since no records of the searches were kept, as the central guidelines prescribed, it could also not be verified that such balancing was carried out in the application of the routines.

(123) Overall, the routines for body searches with deep knee-bends were rigid and undifferentiated. They were thus not duly based on convincing security needs. The routine body searches could therefore be perceived as unnecessary and were consequently suited to give the inmates a sense of arbitrariness, which in turn could contribute to increasing the feeling of humiliation and inferiority. The routines further led to a situation with potentially a large number of intrusive body searches per inmate.

(124) Bergen Prison is one of the country's largest, with around 200 places on a higher-security level. I do not doubt that in such a prison it can be necessary to conduct body searches, including with deep knee-bends. However, this requires that the guidelines are based on differentiated assessments of security needs balanced against considerations as to the dignity of the inmates.

(125) My conclusion is consequently that the routines for body searches in the period in question were not compatible with Article 3 of the ECHR.

The body searches of A, B and C

(126) *A* was by Gulating Court of Appeal's judgment of 29 June 2018 sentenced to six years of imprisonment for arson, among other things. According to information provided, she was subjected to 306 body searches from November 2018 to August 2020. These searches took place before and after visits – many from her minor children accompanied by emergency or foster parents, before and after escorted absence and in connection with cleaning work in another department.

(127) *B* was by Gulating Court of Appeal's judgment of 9 September 2020 sentenced to seven years of imprisonment for importing drugs. According to information provided, he was subjected to 114 body searches during the summer of 2018 and from December 2018 to August 2020. Some of these took place in the cell while he was in custody with mail and visitation bans. In addition, he was body searched before and after visits and escorted absence.

(128) *C* was by Bergen District Court's judgment of 30 August 2017 sentenced to nine years of imprisonment for sexual offenses. From February 2016 to April 2020, he was subjected to 293 body searches, both while in custody on remand and while serving the sentence. The searches took place after visits, and during the period of the new routines from May 2018, also before visits. He was also body searched after escorted absence and often even before escorted absence.

(129) We are thus dealing with a high number of body searches where the three inmates, in accordance with the routine, had to undress and slowly do deep knee-bend. No illicit items or drugs were found during any of the body searches.

(130) All the three inmates have testified about burdensome additional elements during the execution of the body searches, while also expressing that the officers, with a few exceptions, acted considerately and correctly.

(131) The State argues that security considerations made it necessary to body search the three inmates in all situations described in the routines, including before visits and before and after departures supervised by prison staff or police. It has also been pointed out that several positive drug tests were taken from both A and B.

(132) Although the risk of smuggling in and out could not be ruled out in any of the relevant situations, the specific security risk should have been assessed against the dignity of the inmates. As long as such assessments are not recorded, I find it difficult to see that the body searches were duly based on convincing security needs. There is no evidence that the body searches of A and B were prompted or influenced by the positive drug tests. On the contrary, it appears that the body searches of all the three inmates were based on general risk considerations set out in the routines.

(133) Overall, the routine body searches, both in number and content, were suitable to create a persistent feeling of humiliation and inferiority beyond what serving a prison sentence is normally associated with. Consequently, the three inmates were subjected to degrading treatment in violation of Article 3 of the ECHR.

(134) It has not been contended that the assessment under Article 93 subsection 2 of the Constitution must be any different in the case at hand. I agree. The rights under this constitutional provision are consequently also violated.

(135) Against this background, it is unnecessary to discuss Article 8 of the ECHR and Article 102 of the Constitution, which relate to the alternative contention.

Conclusion

(136) My conclusion is thus that A, B and C have been subjected to violations of Article 3 of the ECHR and Article 93 subsection 2 of the Constitution.

(137) The grand chamber hearing is limited to specific legal issues in the case, see section 5 subsection 4 first sentence of the Courts of Justice Act. The conclusion of the judgment will be worded in accordance with this.

(138) The issue of costs will be decided pending a final ruling in the case.

(139) I vote for this

J U D G M E N T :

The further hearing of the case in the Supreme Court is to be based on the finding that that A, B and C were subjected to treatment that violated their rights under Article 3 of the European Convention on Human Rights and Article 93 subsection 2 of the Constitution.

(140) Justice **Indreberg:** I agree with Justice Arntzen in all material respects and with her conclusion.

(141) Justice **Normann:** Likewise.

(142) Justice **Bull:** Likewise.

(143) Justice **Bergsjø:** Likewise.

(144) Justice **Ringnes:** Likewise.

(145) Justice **Bergh:** Likewise.

(146) Justice **Thyness:** Likewise.

(147) Justice **Sæther:** Likewise.

(148) Justice **Hellerslia:** Likewise.

(149) Chief Justice **Øie:** Likewise.

Following the voting, the Supreme Court gave this

J U D G M E N T :

The further hearing of the case in the Supreme Court is to be based on the finding that that A, B and C were subjected to treatment that violated their rights under Article 3 of the European Convention on Human Rights and Article 93 subsection 2 of the Constitution.