**SUPREME COURT OF NORWAY**

On 19 December 2008, the Supreme Court delivered the following interlocutory judgement in

**HR-2000-02175-S, (case no. 2008/1360), criminal appeal against interlocutory decision**

A (counsels Monica Gjerde Sperre – for examination)

v.

The Public Prosecution (senior prosecuting counsel Lasse Qvigstad)

J U D G E M E N T :

(1) **Justice Tønder**: This issue in this case is whether a court decision to deny an appeal against conviction pursuant to section 321 subsection 2, first sentence of the Criminal Procedure Act, where no reason for the denial was given except for a reference to the statutory condition that an appeal may be disallowed if the court finds it "obvious that the appeal will not succeed", was in breach of article 14 paragraph 5 of the International Covenant on Civil and Political Rights.

(2) On 30 May 2008, A was convicted by the Nordmøre District Court of two counts of economic breach of trust of approximately NOK 196 500, one count of gross social security fraud which caused a loss of NOK 230 324 to the Norwegian Labour and Welfare Administration, one count of gross embezzlement of NOK 135 000, one count of withholding property amounting to at least NOK 400 000 which should have been applied to cover claims of creditors of a bankrupt estate, three breaches of the Accounting Act, one breach of the Bookkeeping Act, one breach of the Value Added Tax Act, one count of illegally preferring creditors in the amount of NOK 98 000, two breaches of the Tax Assessment Act, two breaches of the Maintenance Allowance Recovery Act, and two breaches of the bankruptcy legislation. During the main trial, which lasted five days, 30 witnesses gave testimony including one party-appointed expert witness. A court-appointed expert auditor also gave evidence and extensive documentary evidence was submitted to the court.

(3) The judgement reads as follows:

**1. A, d.o.b. 14 February 1958, is acquitted of section VII a) and the final item of section XII.**

**2. A, d.o.b. 14 February 1958 is convicted of breach of**

- **the Penal Code section 275 subsections 1 and 2, cf. section 276**

- **the Penal Code section 270 subsection 1 no. 1, cf. subsection 2, cf. section 271**
- **the Penal Code section 255 cf. section 256**
- **the Penal Code section 281 subsection 3 cf subsections 1 and 2 (prior to 1 October 2004)**
- **the Penal Code section 282**
- **the Accounting Act of 17 July 1998 no. 56 section 8-5 subsection 1, first sentencing alternative, cf. section 1-2 subsection 1 no. 1, cf. section 10-2, cf. the Accounting Act of 13 May 1977 no. 35 section 5, cf. section 6 cf. section 8, cf. section 9**
- **the Bookkeeping Act section 15 subsection 1, first sentencing alternative, cf. section 2, cf. section 7**
- **the Value Added Tax Act section 72 no. 2 subsection 2 cf. no. 3**
- **the Tax assessment Act section 12-1 no. 1 d, cf. section 4-2 no. 1 a, cf. section 4-4 no. 1**
- **the Maintenance Allowance Recovery Act of 9 December 1955 no. 5 section 12 subsection 1 (until 1 January 2006) and the Maintenance Allowance Recovery Act of 29 April 2005 section 33 subsection 1 (from 1 January 2006)**
- **the Maintenance Allowance Recovery Act of 9 December 1955 no. 5 section 7 subsection 4, cf. subsection 2 (until 1 January 2006) and the Maintenance Allowance Recovery Act of 29 April 205 section 33 subsection 3 (from 1 January 2006), and**
- **the Bankruptcy Act section 143 a, cf. section 143**

**together with the Penal Code section 62 subsection 1 and is sentenced to 1 – one – year and 4 – four - months' imprisonment. 8 - eight – months of the prison sentence shall be suspended pursuant to the provisions of sections 52 to 54 of the Penal Code subject to a probation period of 2 – two – years.**

3. **A, d.o.b. 14 February 1958, is ordered to pay compensation to the Norwegian Labour and Welfare Administration in the amount of 230 324 – two hundred and thirty thousand three hundred and twenty-four - Norwegian kroner within 2 –two – weeks of the date of service of this judgement.**

4. **A, d.o.b. 14 February 1958 shall, for a period of 5 – five – years forfeit the right to carry on any activity as a self-employed person, to be managing director or hold other senior office in a company or to sit on the board of directors of any company, see the Penal Code section 29 subsection 1 b.**

5. **The claim for confiscation of gain obtained by criminal acts is dismissed.**

6. **No award of costs."**

(4) Mr A lodged an appeal against the judgement of the District Court to the Frostating Court of Appeal. The appeal concerned the assessment of evidence and the application of law in relation to the conviction, sentencing, forfeiture of rights and compensation. The main issue in the appeal concerns the District Court's assessment of the evidence. Among other things, Mr A argued that he did not hold the necessary position in several of the companies that was required by the law in order to be held liable for the criminal acts. In addition to the witness testimony that was submitted to the District Court, he invoked two new witnesses. On 1 August 2008, the Frostating Court of Appeal pronounced the following decision:

**"Leave to appeal is denied."**

(5) No reason is given for the decision other than that the Court of Appeal has unanimously found it obvious that the appeal will not succeed. The Court referred to section 321 subsection 2 first sentence of the Criminal Procedure Act.

(6) On 14 August 2008, Mr A lodged an appeal against the decision with the Supreme Court and alleged that it must be quashed. The appeal concerns the procedure applied by the Court of Appeal, see section 321 subsection 6 of the Criminal Procedure Act, and it is argued that the decision should have contained a reason.

(7) On 17 July 2008, the United Nations Human Rights Committee delivered its ruling in the so-called "Restaurant Owner Case", see Communication no. 1542/2007. The Human Rights Committee is an 18-member body charged with monitoring the implementation of the International Covenant on Civil and Political Rights dated 16 December 1966, which entered into force on 23 March 1976. Monitoring is carried out through the submission of reports by State parties, the consideration of inter-state complaints and the examination of individual complaints. If the Committee considers an individual complaint, it delivers its findings in "views". These are referred to below as the rulings of the Committee.

(8) The ruling in the Restaurant Owner Case concerned a complaint from a person who was convicted by the District Court of several offences of an economic nature perpetrated in his capacity as owner of a restaurant. The Court of Appeal denied his application for leave to appeal against the decision of the District Court without giving any reason other than that the Court of Appeal had found it obvious that the appeal would not succeed. His interlocutory appeal to the Appeal Committee of the Supreme Court was dismissed pursuant to section 321 subsection 6 of the Criminal Procedure Act. In its ruling, the Human Rights Committee concluded that the failure to provide a reason as to why the court found that it was clear that the appeal would not succeed represented a violation of the right to have one's conviction reviewed as required by article 14 paragraph 5 of the International Covenant on Civil and Political Rights. This provision entitles a person who is convicted of a crime to have his conviction and sentence reviewed by a higher tribunal according to law.

(9) The Appeal Committee of the Supreme Court decided that the scope of the ruling in the Restaurant Owner Case should be determined by referring a selection of representative appeals against denials of leave to appeal by the Court of Appeal to the Supreme Court, where they should be heard in oral proceedings, see the

Criminal Procedure Act section 387. Mr A's appeal was selected together with case no. 2008/1265 B v. The Public Prosecution and case no. 2008/1398 C v. The Public Prosecution.

(10) On 19 September 2008, the Chief Justice of the Supreme Court decided that all three appeals should be determined together by the Grand Chamber of the Supreme Court, see the Courts of Justice Act section 5 subsection 4, cf. section 6 subsection 1 second sentence. The composition of the Grand Chamber was determined by the drawing of lots in accordance with the procedural rules for the Grand Chamber of the Supreme Court laid down by the Supreme Court on 12 December 2007 pursuant to section 8 of the Courts of Justice Act. By interlocutory order dated 31 October 2008, Justice Coward, Justice Øie and Justice Indreberg were required to vacate their seats in the appeal proceedings on the grounds of partiality.

(11) In the course of the appeal proceedings, issues that are common to all three cases were dealt with by defence counsel together and the legal issues have been shared out between them. Similarly, counsel for the prosecution has delivered a common presentation. I therefore first give a joint account of the parties' submissions in the three cases, and thereafter an account of the submissions that are particular to A's case. Separate interlocutory judgements will be delivered today in case no 2008/1360 B v. The Public Prosecution and case no. 2008/1398 C v. The Public Prosecution.

(12) The principal submissions made by defence counsel for *A, B and C* are as follows:

(13) According to the jurisprudence of the Human Rights Committee, the right of appeal in article 14 paragraph 5 of the International Covenant on Civil and Political Rights requires that the appeal must be subject to a "full review" – which means that the judgement must be thoroughly and substantially reviewed. In order for a higher court to be able to review whether the appellate court has in fact given the judgement the thorough review that the Covenant requires, the denial of leave to appeal must be reasoned. This is the essence of the ruling in the Restaurant Owner Case. There has therefore been a violation of the Covenant, which means that the Court of Appeal's decision must be quashed, because, by virtue of section 3 of the Human Rights Act, the Human Rights Committee's interpretation of article 14 paragraph 5 of the International Covenant on Civil and Political Rights has priority over the provisions of the Criminal Procedure Act.

(14) The prosecution's submission that the ruling in the Restaurant Owner Case was the result of the particular circumstances of the case and that the ruling therefore has only limited application, is wrong. The obligation to give reasons is a general obligation – in order to comply with the Covenant, a reason must be given for each and every denial of leave to appeal.

(15) It should be noted that many of the arguments put forward by the prosecution in support of a narrow application of the ruling are the same as those submitted by the State when the Restaurant Owner Case was heard by the Human Rights Committee in support of its case that a reasoned decision is not required. This applies to the

arguments on procedural efficiency and the implications for the Norwegian jury system.

(16) The Bryhn case, Communication No 789/1997, was also a key argument in the State's case, as it is now in the prosecution's case. However, the Bryhn case concerned other issues in the Court of Appeal's procedure and not the question of a reasoned decision and is therefore irrelevant to the question to be determined by the Supreme Court in the present case.

(17) The fact that the ruling in the Restaurant Owner Case is brief does not mean that it has limited application either. The case was subject to a thorough and contradictorial procedure. It cannot be said to be the result of a flawed or biased procedure.

(18) The ruling is in line with similar rulings in a number of complaints that the Human Rights Committee has heard. The screening of appeals has thus been allowed provided that the decision to deny leave to appeal is based on a "full review" of the case, see also the Human Rights Committee's General Comment No 32 of 2007 page 11-12.

(19) The requirement to provide reasons has been laid down in a number of individual complaints brought against Jamaica. The jurisprudence shows that the rationale behind the requirement of a reason is twofold: it shall to satisfy the requirement of a thorough and substantial review – the efficiency of the review – and it shall also facilitate control of whether the requirement of a "full review" is satisfied. Both of these considerations are relevant for Norway.

(20) The Supreme Court's ability to control the procedure of the Court of Appeal is also important in relation to Article 88 of the Norwegian Constitution, which provides that the Supreme Court judges in the final instance. Since the Supreme Court has power to review the procedure of the Court of Appeal, the Supreme Court must be enabled through the reasoning of the Court of Appeal to undertake such a review without having to revert to simple guesswork.

(21) As a separate ground for appeal, defence counsel has submitted that the Court of Appeal's review of the assessment of evidence in relation to the conviction without the submission of direct evidence may in certain circumstances constitute a violation of the requirements in article 6(1) of the European Convention on Human Rights. Even though the European Court of Human Rights has in its jurisprudence accepted written appeal proceedings in certain cases, this does not necessarily apply to appeals against the assessment of evidence. Defence counsel referred to case no 10563/83 Ekbatani v. Sweden.

(22) As regard the appeal from *A* in particular, the main submissions are as follows:

(23) There are clear similarities between A's case and the circumstances in the Restaurant Owner Case, both as regards the law and the facts and as regards the complexity of the case. Both cases concern economic crimes and, to some extent, the same provisions of the Penal Code, although A was convicted of more offences than the complainant in the Restaurant Owner Case. In addition, A's appeal also

concerns the assessment of evidence in relation to the conviction. When the Human Rights Committee concluded that there was an obligation to give a reason for the decision to deny leave to appeal in the Restaurant Owner Case, this must apply even more in A's case, even if the Supreme Court should find that there is no general obligation for the appellate court to give reasons in cases concerning leave to appeal.

(24) In any event, the circumstances of A's case are so extraordinary that the decision to deny leave to appeal should have been reasoned even pursuant to the existing jurisprudence of the Supreme Court.

(25) A made the following prayer for relief:

> **"The decision of the Frostating Court of Appeal dated 1 August 2008 shall be quashed."**

(26) The *Public Prosecution's* joint principal submissions in all three cases are as follows:

(27) The ruling in the Restaurant Owner Case is based on a concrete assessment of the particular facts of the case, see the Human Rights Committee's reference to "the circumstances of the case". Defence counsels' submission that there is a general obligation to give reasons in cases concerning leave to appeal is therefore wrong.

(28) The proceedings of the District Court were seriously flawed in the Restaurant Owner Case. Counsel for the prosecution referred in particular to the fact that the District Court had relied on evidence that had not been subject to a contradictorial procedure. This was such an extraordinary circumstance that the Court of Appeal should have given a reason for denying leave to appeal pursuant to established Norwegian jurisprudence. There is a considerable body of jurisprudence from the Appeals Selection Committee and the Appeals Committee of the Supreme Court that the decision to deny leave to appeal shall be reasoned in cases where there are such extraordinary circumstances. An analysis of this jurisprudence shows that where it is proven that there was a serious procedural error on the part of the police or the District Court, the denial of leave to appeal shall be reasoned. The same applies if the judgement gives rise to complex questions of law. Since the ruling in the Restaurant Owner Case was based on precisely such circumstances, it would be wrong to assume that it establishes precedent that has a wider scope than that which already exists pursuant to internal Norwegian law.

(29) An extension of the obligation to give reasons to all cases concerning leave to appeal would have considerable implications for the administration of the criminal legal system in Norway and would be an impediment to the procedural system. It is important to be aware of the relationship between the rules. Intervention in one step of the procedural chain – in this case the leave to appeal procedure – can easily upset the balance in the system that Norway has chosen to establish. The provision of a substantive reason for why it is obvious that an appeal will not succeed will often be time-consuming. The courts will require more resources if the Courts of Appeal are required to give higher priority to providing reasons for

their decisions in leave cases. If not, this will have to be done to the detriment of other important tasks, or the time taken to deal with cases will increase.

(30) A general obligation to give reasons will direct attention to the procedural side of rulings in criminal cases. This may lead to more appeals against denials of leave to appeal, which will also increase the workload of the Supreme Court.

(31) It is questionable whether the improvement in the rule of law that is gained is reasonably proportionate to the implications that an obligation to provide a reason will have on our criminal legal procedure. After all, we are talking about rulings where the conclusion is found to be obvious by a unanimous Court of Appeal.

(32) It is also questionable what meaning a reason for the ruling that concludes the case will have for the convicted person. A reason for the result will already have been given by the District Court. There is little reason to assume that a new reason will to a greater degree persuade the convicted person to resign himself to the ruling when he disagrees with it in the first place.

(33) The Public Prosecution does not disagree that, ideally, all rulings should be reasoned. However, this ideal must be weighed against the interests of costs and efficiency. The legislator weighed these interests against each other when the two-instance reform was introduced. There is no doubt that procedural economics was crucial when it was decided that rulings on leave to appeal should be determined by "decisions" [translators note: "avgjørelser", as opposed to interlocutory orders ("kjennelser") or judgements ("dom")]. At the same time, the legislator provided for a "safety valve" in the form of a power for the Supreme Court to review the procedure of the Court of Appeal – a control function that the Supreme Court has employed when the circumstances warrant it.

(34) It would be wrong to assume that the Human Rights Committee espouses an understanding of the Covenant which so fundamentally interferes in the Norwegian system. If that were so, it would be reasonable to expect a far more thorough treatment of the case than the three sentences that the Committee used to justify its ruling. Further, the legal systems will vary considerably from country to country in this matter. This is also reflected in article 14 paragraph 5 of the International Covenant on Civil and Political Rights, which provides that the review shall be "according to law".

(35) It would be wrong to make an allowance in the form of a safety margin in order to ensure that Norway is not found to be in violation of its obligations pursuant to the Covenant. Where there is doubt about an interpretation, the Norwegian courts must weigh the different interests and values against each other and in so doing must be entitled to rely on value priorities that are intrinsic to Norwegian legislation and sense of justice, see the judgement of the Supreme Court in Rt 2005 page 833 paragraphs 45-46. This is also an argument in favour of limiting the scope of the ruling in the Restaurant Owner Case.

(36) In this regard, it is relevant that the general principles of the system of leave to appeal were accepted by the European Commission of Human Rights in the case of E.M. v. Norway. The leave system was also accepted by the Human Rights

Committee in the case of Bryhn v. Norway, although the issue of a reason for the ruling was not raised in that case.

(37) As regard the appeal from *A* in particular, the Public Prosecution's main submissions are as follows:

(38) Unlike in the Restaurant Owner Case, there are no errors in the District Court's procedure in the case against A. The obligation to provide a reason for the denial of leave to appeal can therefore not be transposed to A's case. Nor does the complexity of the case justify imposing on the Court of Appeal an obligation to give a reason. The ground for the appeal is that the District Court did not believe A. Whether it is obvious that such an appeal will not succeed depends on a concrete assessment which the Court of Appeal can undertake based on the judgement of the District Court and the case documents. Further, the circumstances of the case are not so extraordinary that the denial of leave to appeal should on those grounds have been reasoned.

(39) The Public Prosecution has made the following prayer for relief:

**"The appeal shall be dismissed."**

(40) *I have concluded* that the appeal shall be allowed.

(41) *The problem*

(42) A was convicted by the District Court of a number of offences and sentenced to one year and five months' imprisonment, of which eight months were suspended. He appealed to the Court of Appeal for a review of the conviction for those offences to which he had not admitted, and against the sentence. The Court of Appeal decided to deny leave to appeal pursuant to section 321 subsection 2, first sentence of the Criminal Procedure Act. The decision states that the court found it "obvious that the appeal will not succeed". This is a citation of the statutory condition for denial of leave to appeal and a standard formulation which – with occasional linguistic variations – is used by the Court of Appeal in most such cases. The decision does not state why the Court of Appeal arrived at this conclusion. The reality of the matter is therefore that the decision was made without a reason.

(43) Pursuant to section 321 subsection 6 of the Criminal Procedure Act, the Appeal Committee of the Supreme Court has power to review the procedure of the Court of Appeal. The question is whether the Court of Appeal should have given a reason for its decision. The main issue in this assessment will be whether such an obligation to give a reason follows from article 14 paragraph 5 of the International Covenant on Civil and Political Rights as a consequence of the ruling of the Human Rights Committee in the Restaurant Owner Case.

(44) *The system of leave to appeal in the two-instance procedure*

(45) The so-called two-instance procedure was introduced into the criminal legal system by an amendment to the Criminal Procedure Act of 11 June 1993 no. 80,

which entered into force on 1 August 1995. The procedure implies that all criminal cases start in the District Court and that the judgement of the District Court can be appealed to the Court of Appeal. Except in the most serious cases, the right to a full review by the Court of Appeal depends on a pre-assessment by the Court of Appeal. This assessment is referred to as leave.

(46) The leave procedure is regulated in section 321 of the Criminal Procedure Act, which reads as follows:

> **"An appeal to the Court of Appeal concerning matters for which the prosecuting authority has not proposed and there has not been imposed any sanction other than a fine, confiscation or loss of the right to drive a motor vehicle, etc. may not be pursued without the court's consent. Such consent shall only be given when there are special reasons for doing so. Consent is not, however, necessary if the person charged is a business enterprise, cf. chapter 3 a of the Penal Code.**
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> **An appeal to the Court of Appeal may otherwise be disallowed if the court finds it obvious that the appeal will not succeed. An appeal by the prosecuting authority that is not in favour of the person charged may also be disallowed if the court finds that the appeal concerns questions of minor importance, or that there is otherwise no reason for the appeal to be heard.**
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> **An appeal concerning a felony punishable pursuant to statute by imprisonment for a term exceeding six years may only be disallowed in the cases referred to in the second sentence of the second paragraph. An increase of the maximum penalty because of repetition or concurrence of felonies, or the application of section 232 of the Penal Code shall not be taken into account.**
>
> **A decision to refuse consent or to disallow an appeal must be unanimous. A refusal may be reversed in favour of the person charges if there are special reasons for doing so.**
>
> **Decisions pursuant to this section shall be made by a decision and may be limited to part of the case.**
>
> **An interlocutory appeal concerning any refusal pursuant to this section or any rejection of an application for the reversal of such a refusal may be brought on the basis of procedural error. Otherwise decisions pursuant to this section may not be challenged by an interlocutory appeal or serve as a ground of an appeal proper. "**

(47) The provision divides appeal cases into three groups according to the degree of seriousness, see subsections 1, 2 and 3. In the most serious cases, i.e. offences which pursuant to statute are punishable by imprisonment for a term exceeding six years, the convicted person has an unconditional right to a review by the Court of Appeal, see subsection 3. At the other end of the scale are appeals in cases, except

where the person charges is a business enterprise, where the prosecution did not propose and the convicted person was not sentenced to more than a fine, confiscation or loss of the right to drive a motor vehicle etc. There is no right of appeal in these case, but appeal to the Court of Appeal is subject to the leave of the Court of Appeal, see subsection 1. In all other cases there is in principle a right to an ordinary review by the Court of Appeal with oral proceedings at a court hearing where the appellant and witnesses, experts, etc. attend and testify and other evidence and arguments are submitted. If leave to appeal is denied in these cases, the Court of Appeal must find it obvious that the appeal will not succeed, see subsection 1 first sentence.

(48) A's appeal falls under subsection 2 first sentence. In number, appeals of this kind certainly comprise the largest of the three groups.

(49) The decision to deny leave to appeal is made by three judges of the Court of Appeal and must be unanimous, see subsection 4. The procedure is in writing, see section 324 subsection 1. The conclusion is given in the form of a "decision", see subsection 321. As a consequence, and in accordance with the systematics of the Criminal Procedure Act, no reason has to be given, see section 53.

(50) The introduction of the two-instance procedure was an important reform. Two main concerns were highlighted in the preparatory works to the amendment Act: One was a desire to improve the rule of law for convicted persons by increasing the right to a trial in two instances. The other was an aim to withdraw, as far as possible, Norway's reservation to the two instance procedure made in connection with ratification of the International Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child in 1972, see Proposition to the Odelsting no. 78 (1992-93) pages 5-6.

(51) Although the leave procedure does not take place in an ordinary court hearing with oral proceedings where evidence is submitted directly to the court, there is a clear assumption in the Act that the procedure shall involve a proper review of the District Court's judgement in light of the arguments submitted in the appeal. This means that if the procedure does not enable the Court of Appeal to undertake a proper review of the appeal, for instance because the case is complex or because of the evidential circumstances of the case, leave to appeal shall be granted. The Act requires the Court of Appeal to undertake an independent assessment of each ground in the appeal. Leave to appeal shall be granted for those grounds where it is not obvious that the appeal will not succeed.

(52) As mentioned above, the two-instance procedure was supposed to increase the number of cases to be reviewed by the Court of Appeal. On this issue, the Two Instance Committee stated, in NOU 1992:28 at page 52:

> **"Tables 1 and 3 in section 2.3 above illustrate the rate of refusals under the current system. As mentioned in the comments to table 1, leave to appeal has been denied in about 70 % of *appeals* in recent years. About half of the remaining 30 % have been referred to the Supreme Court for review, while the other half have been determined by the Appeals Selection Committee of the Supreme Court which has either quashed the**

**judgement or delivered a new judgement. As regards *petitions for a retrial*, Table 3 shows that in the five year period between 1987 and 1991 the Appeal Selections Committee of the Supreme Court gave its consent to a retrial in 313 out of 3000 cases; the consent rate was thus just over 10 %.**
**…**
**The Two Instance Committee expects that a larger proportion of appeals, both full appeals and limited appeals, will be referred to the Court of Appeal for review in the appeal procedure that the Committee now proposes."**

(53) Statistics from the courts' case management system LOVISA show that leave to appeal was granted in about 25 % of appeals that were subject to the leave procedure between 2004 and 2007. The percentage of referrals can appear to be low. There is also a certain degree of variation between the different Courts of Appeal.

(54) The Committee deliberately chose that the grant or denial of leave to appeal should be made by way of decision, which does not require a substantive reason. NOU 1992:28 at page 53 states as follows:

**"However, a rule that a reason must be given in the large number of cases in question here would require considerable resources. Certainly, the judges must make their own internal comments when preparing the decision, but substantially more time would be needed to formulate a reason for publication. It is difficult to give a brief and at the same time meaningful explanation for why the judges agree with the district or city court and find it obvious that the appeal will not succeed. One possibility could of course be for the court to restrict itself to a standardised reason, but such a reason would not serve any purpose."**

(55) As mentioned earlier, the Supreme Court's power of review of the Court of Appeal's decision is limited to the Court of Appeal's procedure, see section 321 subsection 6. The Two Instance Committee assumed that such review would have a relatively limited scope. In NOU 1992:28 at page 54, the Committee referred in particular to bias and lack of contradiction as typical procedural errors, and emphasised that the rule was hardly likely to increase the workload of the Appeals Selection Committee of the Supreme Court to any considerable degree. Since the denial of leave to appeal would be made by way of decision, broad control of the reason was not a real issue.

(56) Notwithstanding, the Appeals Selection Committee, now the Appeals Committee, has occasionally required substantive reasons for the decision to deny leave to appeal. This has happened in various situations where the Committee has found reason to question the denial of leave to appeal due to the particular circumstances of the District Court's judgement. However, the Committee has emphasised that this obligation to give reasons only arises where there are "extraordinary circumstances" or similar, which suggests that the obligation has a limited scope.

(57) *The right to appeal in article 14 paragraph 5 of the International Covenant on Civil and Political Rights and in article 2 of the Seventh Protocol to the European Convention on Human Rights*.

(58) The provision on the right to appeal in article 14 paragraph 5 of the International Covenant on Civil and Political Rights reads as follows:

> **"Everyone convicted of a crime shall have the right to his conviction and sentence being reviews by a higher tribunal according to law."**

(59) The provision entitles a convicted person to have both the conviction and the sentence reviewed. This applies to the assessment of evidence, the application of law and the procedure.

(60) The European Convention on Human Rights does not oblige State parties to establish an appeal system. However, the right to appeal is laid down in Article 2 of Protocol No. 7, which Norway has ratified. The first part of the provision reads as follows:

> **"1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."**

(61) The second part of the provision contains some exceptions, among other things for minor offences.

(62) The scope of Article 2 of Protocol No. 7 is slightly narrower than the scope of article 14 no. 5 of the International Covenant. Article 2 of Protocol No. 7 entitles a convicted person to a review of either the conviction or the sentence, whereas article 14 no. 5 of the International Covenant entitles the convicted person to a review of both. In an opinion prepared for the Two Instance Committee by Mr Erik Møse, who was then a lawyer in private practice, this is explained as follows:

> **"The background was a desire to leave it to the discretion of the individual State party to determine the scope of the right to review by a superior tribunal, since it became apparent during the preparation of the protocol that the appeal systems of the Member States of the Council of Europe varied considerably. Several of these States had also entered a reservation against article 14 paragraph 5 of the International Covenant on Civil and Political Rights, and it was considered desirable to avoid the same in connection with the Additional Protocol."**

(63) There is no doubt that in so far as national law grants a right of appeal, Article 6 of the European Convention on Human Rights applies to the proceedings in the appellate court.

(64) *Does the screening procedure comply with article 14 no. 5 of the International Covenant on Civil and Political Rights and Article 2 of Protocol No. 7 to the European Convention on Human Rights?*

(65) The system of leave to appeal is common in many countries, particularly in the Nordic countries and in countries with common law legal systems. It appears that reasons are generally given for decisions on leave to appeal in common law countries – at least in the United Kingdom, Ireland and Australia. Among the Nordic countries, Norway differs from Sweden, Finland and Denmark in that the leave procedure is far more widespread here.

(66) The Human Rights Committee has on several occasions held that a system of leave to appeal does constitute a review within the meaning of the Covenant, see e.g. Communication No. 984/2001 Juma v. Australia at para 7.5. With regard to the conditions that must be satisfied in order for the procedure to comply with article 14 no. 5, the Committee stated in Communication No. 662/1995 Lumley v. Jamaica at para 7.3:

> **"While on the basis of article 14 paragraph 5, every convicted person has the right to his conviction and sentence being reviewed by a higher tribunal according to law, a system not allowing for automatic right to appeal may still be in conformity with article 14, paragraph 5, as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case."**

(67) This was developed further in the Committee's General Comment No. 32 of 2007 on Article 14. At page 11-12, the Committee states:

> **"However, article 14, paragraph 5 does not require a full retrial of a "hearing", as long as the tribunal carrying out the review can look at the factual dimensions of the case. Thus, for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the Covenant is not violated."**

(68) In my opinion, the leave procedure in section 321 of the Criminal Procedure Act satisfies the requirements in these two quotations. I refer to my explanation earlier that the leave procedure presupposes a proper review by the appellate court. In Communication No. 789/1997 Bryhn v. Norway, the written procedure for dealing with applications for leave to appeal was deemed to be in compliance with article 14 no. 5. However, the question whether the Covenant requires reasons to be given was not raised in that case.

(69) It is also clear that Article 2 of Protocol No. 7 recognises that a screening body can determine whether leave to appeal shall be granted or not. In case no. 20087/92 E.M. v. Norway, the Human Rights Commission examined the Norwegian system of leave to appeal as it was prior to the two-instance procedure. The Commission assessed the procedure in light of Article 2 of Protocol No. 7 and Article 6(1) of the Convention and dismissed the complaint on the grounds that there was no violation. The complainant had made a particular point of the fact that the Appeals

Selection Committee of the Supreme Court had provided no reason for denying leave for a retrial before the Court of Appeal. The Commission stated:

> **"As regards the applicant's reference to the fact that no reasons were given by the Appeals Selection Committee for its refusal to grant leave to appeal the Commission accepts that under specific circumstances the absence of reasons in a decision might raise an issue as to the fairness of the procedure which is guaranteed by Article 6 para. 1 (Art. 6-1) of the Convention. It considers, however, that if the domestic law, as in the present case, subjects the acceptance of the appeal to a decision by the competent court whether it considers that the appeal raises a legal issue of fundamental importance and whether it has any chances of success, it may be sufficient for this court simply to reject or accept this petition (cf. No. 8769/79, Dec. 16.7.81, D.R. 25 p. 240)."**

(70) On this basis, I find that the question whether the lack of a reason for denying leave to appeal is in violation of a treaty obligation must first and foremost be assessed as a question of whether there is a violation of article 14 no. 5 of the International Covenant on Civil and Political Rights.

(71) The Appeals Selection Committee of the Supreme Court has on several occasions entertained questions concerning compliance of the Norwegian system of leave to appeal with international conventions. The Appeals Selection Committee has on the whole been content to refer to the fact that the question was discussed and found to be in order when the two-instance procedure was passed by parliament. The issue has not been discussed in depth.

(72) The issue was dealt with in the preparatory works to the two-instance reform in connection with the question whether the implementation of the reform would enable Norway to withdraw its reservation to article 14 no. 5 of the International Convention. The Two Instance Committee concluded that the system of leave complied with Article 2 of Protocol No. 7 to the European Convention on Human Right but was unsure whether it complied with the UN Conventions because of the views voiced in the report prepared by Mr Møse, to which I referred earlier, and therefore recommended that the reservation be maintained, see Norwegian Official Reports 1992: 28 at page 124-125. In the Proposition to the Odelsting, the government expressed the view that the system of leave was in accordance with Norway's treaty obligations and that the reservation could be withdrawn, and the Standing Committee on Justice agreed, see Proposition to the Odelsting no. 78 (1992-93) at page 66-67 and Recommendation to the Odelsting no. 137 (1992-93) at page 14.

(73) *What influence does the Human Rights Committee's interpretation of the International Covenant have on Norwegian legislation?*

(74) A rule that imposes an obligation to give a reason for decisions in cases concerning leave to appeal would be incompatible with the rule in the Criminal Procedure Act that rulings that are made in the form of a "decision" do not require reasons. The essential issue, therefore, is which rule shall have priority.

(75) Today, the International Covenant on Civil and Political Rights has the force of Norwegian law, see section 2 no.3 of the Human Rights Act. Pursuant to section 3, the provisions of the Covenant shall take precedence over any other legislative provisions that conflict with them, including provisions of the Criminal Procedure Act. What influence the Human Rights Committee's interpretation has on Norwegian legislation is therefore a question of what authority such an interpretation shall have as a source of law in our interpretation of the Covenant.

(76) The rules of interpretation for how the precedence provision in section 3 of the Human Rights Act shall be applied have been drawn up by the Supreme Court in a number of judgements concerning the relationship between Norwegian legislation and the European Convention on Human Rights, most recently the judgement recorded in Rt 2005 page 833 at paragraphs 45-47. The views expressed there are equally valid to the relationship between Norwegian law and the International Covenant on Civil and Political Rights. However, it cannot be automatically assumed that the rulings of the Human Rights Committee have the same authority as the judgements of the European Court of Human Rights. I therefore find it necessary to explore this question in more detail.

(77) The question is discussed in the preparatory works to the Human Rights Act. The Human Rights Commission commented specifically on the relevance of the rulings or views expressed by monitoring bodies for the State under review. The Commission recalled that the rulings of the Human Rights Committee, as opposed to the decisions of the enforcement institutions of the European Convention on Human Rights, are not legally binding on Member States, and then went on to say (see Norwegian Official Reports 1993: 18 at page 88):

> **"Although there is a principle difference, the practical difference is not necessarily so great. For instance, in practice States observe the views of the UN Committee expressed in complaints cases and, at the same time, the only sanction for enforcing the legal obligations in the European Convention on Human Rights is exclusion of the relevant State from the Council of Europe."**

(78) At page 89, the Human Rights Commission concluded:

> **"As we have shown, it is not possible to lay down a generally applicable principle on the obligation in international law to observe the interpretations of convention organs of the convention in question. However, there is no doubt that the decisions or views of such organs will normally be sources of law of considerable weight in the interpretation of the conventions, also when the interpretation is being done by national authorities."**

(79) The Ministry of Justice also discussed the extent to which a distinction should be drawn between the rulings of the UN Human Rights Committee and the decisions of the enforcement institutions of the European Convention on Human Rights. The Proposition to the Odelsting no. 3 (1998-99) at page 69-70 states:

**"In cases of doubt as to whether a provision of Norwegian law should be set aside, a court should give a certain amount of weight to the fact that the UN Human Rights Committee does not pass legally binding decisions (that is why the conclusions of the Committee in complaints cases are called "views"). Otherwise, Norway has so little experience with complaints before the UN Human Rights Committee that it is too early to say whether there may be other reasons for giving greater weight to decisions of the enforcement institutions of the Council of Europe than the views of the UN Human Rights Committee. As a starting point, however, this seems unlikely. Both the European Court of Human Rights and the UN Human Rights Committee are comprised of highly qualified and independent persons. Experience shows that the views of the UN Human Rights Committee are highly respected."**

(80) Finally, I refer to the comments of the Standing Committee on Justice in Recommendation to the Odelsting no. 51 (1998-99) at page 6:

**"The Standing Committee emphasises that incorporation [of the Covenant] will result in a new legal situation based on the fundamental aim of strengthening individual legal rights. One of the purposes of incorporation must therefore be said to be to influence legal development in Norway towards increased attention and an open relationship to the practice of the Strasbourg court and other international enforcement institutions. …**
**The Standing Committee emphasises the fundamental aim that Norwegian jurisprudence shall, to the greatest possible degree, comply with international interpretation that is current practice at any given time."**

(81) Based on the preparatory works to the Human Rights Act that I have now gone through, I find it clear that the UN Human Rights Committee's interpretation of the International Covenant must be accorded considerable weight as a source of law. This is underscored by the fact that since 1 January 2004 the rulings of the UN Human Rights Committee in individual complaints can entitle a convicted person to have his case reopened on the same terms as decisions of international courts, see the Criminal Procedure Act section 391 subsection 1 no. 2.

(82) *The UN Human Rights Committee's consideration of the Restaurant Owner case*.

(83) The restaurant owner was convicted in the District Court of two counts of VAT fraud of altogether more then NOK 1.1 million, one count of failure to file a VAT return, six breaches of the Accounting Act and one count of social security fraud of altogether NOK 236 000. The offences were perpetrated in connection with his restaurant business and mainly concerned the running of two restaurants, of which the District Court found him to be the manager. At the trial, the submission of evidence was both complicated and lengthy, among other things as regards the calculation of the alleged turnover of the restaurants. The trial lasted more than four weeks and 41 witnesses gave testimony.

(84) The appeal was lengthy and concerned procedural issues, the application of law and sentencing. The appeal against procedure mainly concerned the reasons for the

judgement. The appellant alleged that the reasons gave cause to doubt whether the requirement of proof applied by the court was correct and whether it had understood how the estimated turnover on which the indictment for VAT fraud was based had been calculated. The appellant also alleged that the court had attached weight to evidence which the appellant had not had the opportunity to challenge. The appellant attacked the court's assessment of evidence as regards the amount on which VAT had been evaded and the amount of the social security fraud. The appeal also covered the order in the District Court's judgement to pay compensation and legal costs.

(85) Apart from an account of the grounds of appeal, the decision of the Court of Appeal denying leave to appeal only contained a sentence stating that the Court of Appeal has found it obvious that the appeal would not succeed. Interlocutory appeal to the Appeals Selection Committee of the Supreme Court was dismissed pursuant to section 321 subsection 6 of the Criminal Procedure Act.

(86) The complaint to the UN Human Rights Committee mainly concerned the lack of a reason for the Court of Appeal's decision, viewed in light of the error and defects that were invoked in the appeal.

(87) In its ruling of 17 July 2008, Communication No. 1542/2007 at paragraph 8, the Human Rights Committee found that there had been a violation of article 14, paragraph 5 of the Covenant. The basis for the Committee's conclusion is to be found in paragraph 7.2, where the Committee states:

> **"The Committee recalls its jurisprudence, according to which, while States parties are free to set the modalities of appeal, under article 14, paragraph 5, they are under an obligation to review substantially the conviction and sentence. [10] In the present case, the judgment of the Court of Appeal does not provide any substantive reason at all as to why the court determined that it was clear that the appeal would not succeed, which puts into question the existence of a substantial review of the author's conviction and sentence. The Committee considers that, in the circumstances of the case, the lack of a duly reasoned judgment, even if in brief form, providing a justification for the court's decision that the appeal would be unsuccessful, impairs the effective exercise of the right to have one's conviction reviewed as required by article 14, paragraph 5, of the Covenant."**

(88) It is clear that the Committee found that there had been a breach of the Covenant because the decision of the Court of Appeal did not contain a reason.

(89) I understand the reasoning of the Committee such that it took as its starting point the obligation of member States to ensure a substantial review of the appeal ("review substantially"). This means that the appellant is entitled to a full review of all aspects of the appeal, both evidential aspects and legal aspects. I refer to the passages sited above from the case of Lumley v. Jamaica and General Comment No. 32 of 2007. The finding that article 14, paragraph 5 of the Covenant requires a full review is in accordance with a number of rulings of the Committee. In a footnote, the Committee itself refers to Communication No. 355/1989 Reid v.

Jamaica paragraph 14.3, where the same expression is used. In other cases, the Committee states that there must be a "full review", which I understand to mean the same as "review substantially", see e.g. Communication No. 802/1998 Rogerson v. Australia paragraph 7.5 and the case of Lumley v. Jamaica which I have mentioned already.

(90) In the following paragraphs, the Committee emphasises two consequences of the fact that the Court of Appeal's decision does not contain a reason. The first is that it "impairs the effective exercise of the right to have one's conviction reviewed", see the third sentence. I understand this to mean that the requirement of a reason is a necessary safeguard for ensuring a substantial review. By requiring the court to explain why the appeal will not succeed, one ensures that the decision is reached following a thorough and sound assessment.

(91) The second consequence is that the lack of a reason makes it impossible to control whether there has been a substantial review of the appeal, see the second sentence, which states that the lack of a reason "puts into question the existence of a substantial review of the author's conviction and sentence". Firstly, this is relevant for the appellant - the reason for the denial shall enable the appellant to control that the issues raised in the appeal have been properly assessed. In addition, it is relevant for the superior review body, where such exists. True enough, article 14, paragraph 5 of the Covenant does not require more than one appeal instance. However, if the law provides that the decisions of the appellate instance can be appealed to a superior body, the decisions of the appellate body must be reasoned in such a manner that enables them to be controlled. I recall that considerations of this nature lie behind the requirement to provide reasons in several rulings of the Human Rights Committee. I mention by way of example Communication No. 230/1987 Henry v. Jamaica at paragraph 8.4, Communication No. 709/1996 Bailey v. Jamaic at paragraphs 7.4, and paragraph 14.4 of the case referred to by the Committee, Reid v. Jamaica. As explained earlier, in Norway this control is limited to the procedure of the Court of Appeal. However, I do not consider that this diminishes the importance that the Committee has attached to the provision of a reason which, among other things, shall show whether the Court of Appeal has satisfied our obligations pursuant to the Covenant.

(92) *What is the scope of the Human Rights Committee's ruling in the Restaurant Owner Case?*

(93) The prosecution has submitted that the ruling in the Restaurant Owner Case must be read in light of the specific objections that were raised against the judgement of the District Court. Counsel for the prosecution argued that the complaint pointed to circumstances in the District Court's judgment that were clearly reprehensible - in particular the fact that the District Court had relied on evidence that had not been presented to the parties. The prosecution therefore argued that according to the existing jurisprudence of the Appeals Selection Committee and the Appeals Committee of the Supreme Court, a reason should have been given for the decision to deny leave to appeal. There are therefore no grounds for giving the obligation to provide reasons a wider scope than the scope that already follows from current jurisprudence. In support of this view, the prosecution also recalls that the third

sentence of the passage that I have just quoted refers to "the circumstances of the case".

(94) I disagree that the scope of the ruling is limited in this way. First of all, the reasons given by the Human Rights Committee are not linked up to the actual objections that were raised against the District Court's judgment, but are of a general nature. I read the reference to "the circumstances of the case" as a standard formulation that indicates that the case is an individual complaint. In this connection, it is noteworthy that in paragraph 10, the Committee – again in a standard formulation - gave the Norwegian government a time limit to provide information about the measures that will be taken to ensure all individuals the rights to which they are entitled according to its ruling in the case, see further article 2 no. 2 of the Covenant. In my opinion, this is an invitation to look more closely at the system of granting leave without providing a reason. I also refer to paragraph 9, where the Committee states that Norway is under an obligation to take measures to prevent similar violations in the future. This is also directed at the system itself.

(95) The prosecution has also argued that a general obligation to give reasons would considerably increase the workload of the courts, which would affect both the efficiency and the priorities of the criminal legal system, and it is unlikely that the Human Rights Committee has intended to interfere in the Norwegian procedural system in this way. I do not agree with the prosecution's arguments here either.

(96) As already mentioned, I read the ruling such that the two main considerations behind the obligation to provide reasons emphasised by the Human Rights Committee - the effective exercise of the right to have one's conviction reviewed and controllability – are founded in the requirement in the Covenant of a substantial review. This means, in my view, that the obligation to provide a reason cannot be limited to cases where there are "extraordinary circumstances", which is the position according to current Norwegian practice and what the prosecution has argued for. Nor can the obligation be limited depending on special features of the case, e.g. the complexity of the case or similar, or the grounds for appeal that are submitted. The requirement of a *substantial review* applies to all cases that are subject to the leave procedure and the main considerations behind the obligation to provide reasons to which the Human Rights Committee referred in the Restaurant Owner Case must therefore be satisfied in all cases. On this basis, I find that the ruling of the Human Rights Committee must be understood such that there is a general obligation to give reasons in cases concerning leave to appeal – a reason which shall both *ensure* and *show* that all relevant matters in the appeal have been considered.

(97) A general obligation to provide reasons for denying leave to appeal is also in line with the practice of the Human Rights Committee. I have not found a clear parallel to our case, but I do find a certain amount of guidance in the fact that the Committee referred to the case of Reid v. Jamaica paragraph 14.3, to which I have referred earlier. After having pointed out that State parties are under an obligation in appeal cases to "review substantially" the conviction and the sentence, the Committee continued

**"In the instant case, the Committee considers that the conditions of the dismissal of Mr. Reid's application for leave to appeal, without reasons given and in the absence of a written judgment, constitute a violation of the right guaranteed by article 14, paragraph 5, of the Covenant."**

(98) It is also noteworthy that in cases where the Committee has found that there has not been a violation of the Covenant, it appears either directly or indirectly that a reason was provided. As examples, I refer to Communication No. 1156/2003 Juma v. Australia at paragraph 7.5 and Communication No. 1156/2003 Pérez Escolar v. Spain at paragraph 9.3. By way of illustration, I quote from the second of these rulings:

**"It is clear from the judgement that the Supreme Court looked at the author's allegations in great detail and considered the evidence submitted in the trial and referred to by the author in his appeal, and found that there was sufficient incriminating evidence to rule out errors in weighing the evidence and set aside the presumption of innocence in the author's case."**

(99) *Can a general obligation to provide reasons for denying leave to appeal be given the force of law in Norway?*

(100) As previously concluded, the Human Rights Committee's interpretation of the Covenant will be accorded considerable weight as a source of law when determining the content of the Covenant.

(101) The prosecution has referred to paragraph 45 of the case reported in Rt 2005 page 833, where the Supreme Court stated that when weighing different interests or values against each other, Norwegian courts may, in cases of doubt "rely on value priorities that underlie Norwegian legislation and sense of justice." In my view, the fact that the legislator chose to have rulings on leave to appeal determined by way of a "decision", which does not have to contain a reason, cannot outweigh such a clear ruling of the Human Rights Committee as we have in the present case. Moreover, the requirement of a reason is in itself fully in line with generally accepted procedural ideals in Norway.

(102) My conclusion, therefore, is that article 14 no. 5 of the Covenant requires that a reason must be given for all denials of leave to appeal and that this rule must have force of law in Norway, see the Human Rights Act section 3.

(103) *What conditions must the reason fulfil?*

(104) In general, the reason must contain what is necessary to show that there has been a substantial review. It will normally be sufficient to give a summary reason - that is to say in a brief and concise form, with reference to the matters that are alleged in the appeal. A summary reason will be in line with the simplified form of decision that the Norwegian criminal procedure system has established for rulings on leave to appeal, and which the Human Rights Committee has accepted. It will also be in line with the views expressed in the Restaurant Owner Case, see the expression

"even if in brief form" in the third sentence and the additional individual opinion of Committee member Mr. Ivan Shearer.

(105) The reason must show that the Court of Appeal has understood the errors in the District Court's ruling over which the appellant has appealed and why the appeal obviously cannot succeed. This means that it is not sufficient, as is the current practice, to list the grounds for appeal and then state the statutory conditions for denying leave to appeal. In this connection, it should be borne in mind that the reason shall enable the Appeal Committee of the Supreme Court to control the Court of Appeal's procedure, including whether it has complied with the requirement in the Covenant of a *substantial review.* I refer to my comments to the second sentence of the quote from the ruling in the Restaurant Owner Case concerning the relevance of the ruling for controllability.

(106) The extent of the reason will necessarily vary considerably depending on the nature of the individual case – from reasons of one or two sentences to more detailed assessments of the law or the facts.

(107) At the one extreme, I think for instance that it will possible to give a very short reason for why an appeal obviously will not succeed in the case of an appeal against sentence where the facts are clear and the main issue is where in the context of established sentencing practice the case should be placed – particularly bearing in mind the threshold in section 344 of the Criminal Procedure Act for when the appellate court can alter the sentence imposed. The same will probably apply where the appeal concerns a simple question on the interpretation of the law, whether of a substantive or procedural nature, and the Court of Appeal finds that the reason given by the District Court is adequate. In these cases, it must be in order for the Court of Appeal to agree with the District Court's interpretation, possibly with brief additional comments. Many appeals against procedure will also concern simple issues, but the circumstances may vary considerably.

(108) At the other end of the scale there are large complex cases where the appeal covers several and quite different kinds of matters. The greatest challenge is probably posed by cases where the resolution of the appeal would require a broad assessment of all of the circumstances. In these cases, it may be difficult to give a reason "in brief form". The reason will at least have to contain the main items that have formed the broad assessment, for instance by emphasising the matters to which the Court of Appeal has particularly given weight. In these cases, it may also be appropriate for the Court of Appeal to expressly state that it has considered the soundness of determining the appeal without appeal proceedings.

(109) As previously discussed, the Human Rights Committee has accepted that also appeals against evidence can be determined through a leave procedure. This must also apply – at least in principle – when the result of the case depends on the assessment of testimony from witnesses and the accused. If the appeal relates to this kind of evidence, it is important that the Court of Appeal emphasises the grounds on which it bases its decision. The same applies to the evidential assessment of witnesses invoked in the appeal who were not presented to the District Court.

(110) For some appeals it will be impossible through the leave procedure to give a reason that shows that the appeal has been subject to a substantial review. This will apply to cases where the statutory requirement of a substantial review cannot be complied with without carrying out an ordinary appeal procedure with oral proceedings. In these cases, leave to appeal will have to be granted for the issues in question. As explained in my examination of the system of leave to appeal in the Criminal Procedure Act, this situation may arise as a consequence of both the complexity of the case and the actual evidential situation.

(111) In choosing the form of ruling to be used in cases of leave to appeal, the Two Instance Committee placed particular emphasis on the additional workload that an obligation to provide reasons would create. I do not disagree that it could in many cases be burdensome to give a substantive reason. However, it is important not to exaggerate here. The current working method in decisions on leave to appeal is to prepare internal comments in each individual case – a leave memorandum, which is circulated among the judges. Each judge must articulate his or her reasons for why the appeal obviously will not succeed. Although the language may perhaps differ in the published reason, the current working method already requires the main elements to be formulated.

(112) I do not rule out that a general obligation to provide reasons for decisions on leave to appeal will lead to more appeals being referred to the Court of Appeal for ordinary appeal proceedings than is the case today. However, I do not find this development problematic. It is both a consequence of Norway's obligations under the Covenant and, moreover, it will mean that the statutory requirement of a substantive review and the presumption of the legislator that cases shall be given fair treatment, are fulfilled in a more satisfactory manner.

(113) *Does the general obligation to provide reasons also apply to cases covered by section 321 subsection 1 of the Criminal Procedure Act?*

(114) Although it is not directly relevant to the current case or case no. 2008/1265 and case no. 2008/1398, I consider it appropriate also to discuss whether a general obligation to provide reasons will apply to appeals that fall within the scope of section 321 subsection 1 of the Criminal Procedure Act. As explained in my general discussion of the Norwegian system of leave to appeal, this applies to appeals concerning matters in regard to which the prosecuting authority proposed and there has not been imposed any sanction other than a fine, confiscation of the proceeds of crime or loss of the right to drive a motor vehicle etc. In these cases, there is no general right of appeal. The appellant must have the consent of the Court of Appeal for the appeal to proceed.

(115) Such a general exception from the right of appeal is unproblematic in relation to Article 2 of Protocol No. 7 to the European Convention on Human Rights. This follows from paragraph 2 of article 2, which contains an express right to make exceptions for offences of a minor character, as prescribed by law. The Two Instance Committee found that "it is also reasonable to assume that the proposal will satisfy the UN Conventions. The Human Rights Committee's ruling of 24 March 1982, cited by Møse in paragraph IV item 5.2, appears to assume that a review is not necessary in the least serious cases", see Norwegian Official reports

1992: 28 page 125. The case referred to is Communication No. 64/1979 Salgar de Montejo v. Colombia.

(116) I am also of the opinion that article 14 no. 2 of the Covenant does not require a right of appeal for the cases covered by section 321 subsection 1 of the Criminal Procedure Act. For that reason, there will be no obligation to provide reasons either. I do not rule out that special cases can arise where it would be appropriate to give a reason for a decision to disallow an appeal to proceed, for instance where the fine or the amount of money that has been confiscated is very high.

(117) *The implication of a general obligation to provide reasons in cases of leave to appeal for the case of A.*

(118) In my discussion of the scope of the Human Rights Committee's ruling in the Restaurant Owner Case, I have concluded that a reason must be given for all denials of leave to appeal pursuant to section 321 subsection 2 first sentence of the Criminal Procedure Act, although the extent of the reason that is required may vary considerably. Since no reason was given for the Court of Appeal's decision of 1 August 2008, the decision suffers from a procedural error and, as a consequence, it must be quashed pursuant to section 385 subsection 3, cf. section 343 subsection 1 of the Criminal Procedure Act.

(119) I vote for the following

INTERLOCUTORY JUDGEMENT

The decision of the Court of Appeal shall be quashed.

(120) Justice **Gjølstad**: I agree on the whole and with the result of the first voting Justice.

(121) Justice **Lund**: Likewise.

(122) Justice **Tjomsland**: Likewise.

(123) Justice **Stang Lund**: Likewise.

(124) Justice **Flock**: Likewise.

(125) Justice **Matningsdal**: Likewise.

(126) Justice **Utgård**: Likewise.

(127) Justice **Endresen**: Likewise.

(128) Justice **Bårdsen**: Likewise.

(129) Chief Justice **Schei**: Likewise.

(130) After the passing of votes, the Supreme Court delivered the following

INTERLOCUTORY JUDGEMENT

The decision of the Court of Appeal shall be quashed.