SUPREME COURT OF NORWAY

On 25th October 2006, the Supreme Court delivered the following judgement in

HR-2006-01817-A, (case no. 2006/486), civil appeal against judgement

A	(counsel Mr Anders Brosveet)
v.	
The Norwegian State, represented by the Ministry of Justice	(The Attorney General, represented by Mr Goud Helge Homme Fjellheim – for examination)

J U D G E M E N T :

(1) **Mr Justice Oftedal Broch**: The case concerns judicial review of an administrative decision to place a prison inmate in an especially high security section of the prison. The key issues relate to judicial review of administrative decisions in cases where a substantial part of the basis for the decision has been kept secret from the detainee pursuant to section 7 (c) and (d) of the Execution of Sentences Act and from the court in connection with judicial review of the legality of the decision pursuant to section 204 no.2 of the Civil Procedure Act.

(2) A was arrested and detained on suspicion of drug offenses on 11th February 2004. On 2nd May 2005, he was convicted by the Court of Appeal (LB-2005-5953) for a number of offences, including storing 19.9 kg of heroin and selling drugs for 3 million kroner and sentenced to 17 years imprisonment.

(3) While on remand and later when serving the sentence, A has been detained in the especially high security section of the Ringerike Prison, originally pursuant to a decision of the Southern Region of the Correctional Services dated 11th August 2004. The reason was the "he is believed to represent a special risk of escape, a risk of external attempts to assist his escape, a risk of hostage-taking or a risk of specially serious new criminality". The cited reason recites word-for-word the statutory conditions for committal to and detention in a department with an especially high security level, see the Execution of Sentences Regulation dated 22nd February 2002 no. 183 section 6-2. A appealed against the decision to the Central Correctional

Services (Kriminalomsorgens sentrale forvaltning) but the appeal was rejected. A has also complained that he has not been given access to the documents in the case. This complaint did not succeed either. Subsequently, the decision to commit A to a department of the prison with an especially high security level has been renewed every six months. The last such committal order was made on 8th February 2006. The reason for the renewed committal order is as follows:

> **«In the judgment of the Borgarting Court of Appeal of 2nd May 2005, the Court found that A had stored a considerable quantity of heroin and that he had sold drugs for approximately 3 million kroner. The judgment also states that he has played an organizational role in storing the heroin and that he has been active in organizing the sales business. He was also the leader of the other persons who were convicted together with him.**
>
> **The judgment, and the fact that A was arrested in Sweden, shows that there is a risk that he may attempt to escape. However, these facts alone are not sufficient to justify detaining him in a department with an especially high security level.**
>
> **The information which gives reason to believe that there is a realistic and viable escape plan, and that is essentially the basis for this and the previous decision on committal to a department with an especially high security level, are exempt from disclosure, see the Execution of Sentences Act section 7 (c). For this reason, it is not possible to give grounds for the decision, see section 7 (d). »**

(4) The committal decision was reversed by a decision of the Central Correctional Services dated 9th March 2006 on the grounds that no new information in the case had been received since the first decision was made in August 2004.

(5) On 9th March 2005, A instituted civil proceedings before the Oslo District Court against the Norwegian state, represented by the Ministry of Justice, claiming that the committal decisions were invalid. The Oslo District Court pronounced judgment on 8th July 2005 with the following conclusion:

> **« 1. The state, represented by the Ministry of Justice is acquitted.**
>
> **2. No order for costs.**

(6) A appealed against the judgment to the Borgarting Court of Appeal which pronounced judgment with the following conclusion on 9th January 2006 (LB-2005-148509):

> **« 1. The judgment of the District Court is affirmed.**

2. For costs before the Court of Appeal, A shall pay to the state, represented by the Ministry of Justice, 22 000 – twenty two thousand – kroner within 2 – two – weeks from the dated of service of this judgment, together with default interest calculated in accordance with the Interest on Late Payments Act section 3 subsection 1 first sentence from the due date until payment is made.»

(7) A has appealed the Court of Appeal's judgment to the Supreme Court. The case is essentially the same as before the lower courts. The Director of the Ringerike Prison has submitted a written statement in the proceedings before the Supreme Court.

(8) I mention that the state previously claimed that the case should be dismissed because A had no legal interest in a decision after he was returned to the ordinary prison department. However, the state has since dropped this claim for dismissal and has conceded that A has a legal interest in a decision. I agree with this.

(9) In brief, the appellant A has argued as follows:

(10) Primarily, the appellant argues that when the states makes decisions that require statutory authority, the state must prove the existence of facts that justify the decision. The importance of placing the evidential burden on the state increases the more invasive the decision is.

(11) The decision to commit to a high security department is especially invasive and has resulted in a very long period of isolation for A. Under pretext of the provisions in the Execution of Sentences Act section 7 (c) and (d), the prison authorities have refused to disclose the facts upon which the decision is based. In the civil proceedings concerning the validity of the decision, the state has invoked section 204 no. 2 of the Civil Procedure Act in order to uphold its refusal to disclose the facts. A has no possibility of refuting facts of which he is unaware. On this basis, he submits that the state must either produce evidence of the facts on which the committal allegedly is based, or the court must determine the matter on the basis of the evidence which is disclosed, in which case the state must lose.

(12) An approach in which the state's pretension is applied without evidence would effectively preclude the power of judicial review in all cases where the state invokes a duty of confidentiality. This would be a violation of the power of judicial review of administrative action, a principle which has constitutional status.

(13) The assertion that a decision that involves almost total isolation and that applies for up to six months at a time can be taken without judicial review harmonizes poorly with the very strict limits for isolation of remand prisoners that are laid down in the Criminal Procedure Act section 186 a.

(14) Strong policy considerations dictate that administrative decisions to commit prisoners to high security departments shall be subject to judicial review. The risk of errors in the information that can form the basis of the decision is considerable. The source of errors can for example be incorrect information from fellow prisoners given as part of an act of revenge or to further their own advantages, or poorly substantiated reports from over-zealous intelligence agents or a desire to use the committal decision as an easier alternative to the Criminal Procedure Act section 186 a in order to keep prisoners in isolation.

(15) On this basis, the appellant has not seen it necessary to ask the court to review the state's decision not to produce evidence, see the Civil Procedure Act section 204 no. 2, subsection 2. It is the state, not the private party, who is required to either prove the existence of necessary facts or to forfeit the isolation.

(16) In the alternative, the appellant argues that the discretionary power in the Civil Procedure Act section 204 no. 2 subsection 2 – to order the state to adduce evidence following an "assessment of the need for confidentiality against the need to clarify the case" – is far too vague and discretionary to justify a limitation on the power of judicial review as alleged by the state. Moreover, any restriction on the power of judicial review requires an explicit and clear legal authority, which does not exist in this case.

(17) A has entered the following plea:

> **« 1. The decision of the Southern Region of the Correctional Services dated 8th February 2006 to commit A to a department with an especially high security level is invalid.**
>
> **2. No order for costs at any instance. »**

(18) In brief, the respondent, the Norwegian state represented by the Ministry of Justice, has argued as follows:

(19) The main question raised by the case is the implication for judicial review that some of the available information is classified and cannot be produced to the court.

(20) Regard for the safety of the community is a paramount objective in the determination of sentencing conditions in a criminal conviction. This task is assigned to the Correctional Services pursuant to the Execution of Sentences Act section 2. This includes the decision whether to commit to a department with an especially high security level.

(21) The high security department of the Ringerike Prison is the only one of its kind in the country. The department has five single cells. Due to this very limited capacity, the threshold for a decision to commit is extremely high. During the four years since the department was established, only seven persons have been committed there. According to the practice of the Correctional Services, a decision to commit requires that it has information that gives reason to believe that there exists a realistic and viable escape plan. Normally, this means an escape plan involving firearms. Officials in Norwegian prisons are unarmed. Committal to a department with an especially high security level may be the only opportunity for the Correctional Services to prevent escapes as a result of armed attacks against the prison. The sources of information about escape plans, which may be other prisoners, must be protected. Their lives may be endangered if the source becomes known. It can also be dangerous if outsiders gain knowledge of what the prison authorities at any given time know or do not know about any escape plans.

(22) Provisions on confidentiality and exceptions to the right of access of a party to information are therefore obviously necessary. Similarly, a prohibition in legal proceedings against evidence about the basis for committal to a high security department may also be essential. The consequence of the prohibition against evidence advocated by the appellant - that the state must either produce evidence or lose the case - would undermine the whole purpose of a high security department. The state's stance is strongly supported by public policy.

(23) The prisoner is not without rights. The committal decision may be reviewed by the Correctional Services centrally. The appellate body has full access to all information in the case. The very limited use of the high security department minimizes the risk of abuse. Moreover, the courts can require the Correctional Services to produce evidence

about the factual basis for the decision pursuant to the Civil Procedure Act section 204 no. 2.

(24) Principles of constitutional law do not prevent the Civil Procedure Act section 204 no. 2 being practiced in accordance with its wording. There is no doubt that the legislator has power to limit the courts' power of judicial review. This is a limited area of public administration, and there is therefore no absolute limitation on the power of the legislature to regulate the right of judicial review.

(25) The Norwegian state has entered the following plea:

> **« 1. The judgment of the Court of Appeal shall be affirmed.**
>
> **2. The state represented by the Ministry of Justice shall be awarded costs for the proceedings before the Supreme Court, together with interest pursuant to the Interest on Late Payments Act from the due date until payment is made. »**

(26) *My opinion on the case is as follows*:

(27) I will first say a few words about the legal basis for prison departments with an especially high security level. Such departments were first discussed in Report to the Storting (St.meld.) no.27 (1997-1998) on The Correctional Services at pages 35-36. the Report states:

> **«Parts of the criminal community both at home and abroad are becoming tougher and tougher. Situations can then arise which require that cells with an especially high level of security cells can be made available for remand and convicted prisoners at short notice. The Correctional Services must as far as possible ensure that prisoners do not abscond or otherwise evade punishment. While prisoners are on remand, it is important to avoid evidence being destroyed. Other countries have experienced freedom raids and terrorist attacks against prisons, and the Correctional Services must be prepared that these could happen in Norway too. It is particularly important to be prepared for the security challenges posed by prisoners who are involved in organised criminal groups, for instance prisoners who have contacts in violent, militant underground communities, extremist political or religious organisations or other hierarchical groups. »**

(28) Following this, the necessary authority to establish high security departments was granted in the Execution of Sentences Act of 18th May 2001 no. 21 section 10 subsection 2, cf. section 11 subsection 2. More detailed provisions on such

departments are laid down in the appurtenant Regulations to the Execution of Sentences Act of 22nd February 2002 no. 183 and in Guidelines to the Act laid down by the Central Correctional Services, revised on 31st May 2006. The conditions for committal to a department with an especially high security level are to be found in section 6-2 subsection 1 of the Regulations:

> **« § 6-2. Conditions for committal to a department with an especially high security level**
>
> **Convicted persons and persons remanded in custody may be committed to a department with a specially high security level if it may be assumed that their detention involves a special risk of escape, a risk of external attempts to assist their escape, a risk of hostage-taking or a risk of specially serious new criminality. »**

(29) When a decision to commit to a high security department is made, the right of access to information is in certain cases suspended. In these cases, there is an exception to the duty to give reasons for the decision in section 24 of the Public Administration Act, see the Execution of Sentences Act section 7 (c) and (d)

> **«§ 7. Rules of procedure**
>
> **The Public Administration Act applies subject to the following exceptions:**
>
> **…**
>
> **c) A party is not entitled to inspect a document that contains information which it is deemed inadvisable in the interests of another person for the party to obtain knowledge of. Nor is the party entitled to become acquainted with information in a document if inspection thereof is inadvisable for security reasons, or in the interests of the investigation of criminal offences.**
>
> **d) An exception may be made from the duty to give grounds for an administrative decision pursuant to section 24 of the Public Administration Act if such grounds will disclose information that is exempt from the right to inspect pursuant to paragraph c. »**

(30) Pursuant to section 7 (h) of the Act, officials in the Correctional Services are under a duty of secrecy concerning security conditions in the prisons. In the present case, A has been denied access to the information which resulted in his committal to a high security department, and the only grounds that have been given is a reference to the conditions in the Act and the Regulation. In his written statement to the Supreme

Court, Mr Sigbjørn Hagen, director of the Ringerike Prison, has commented on the reason for withholding such information from the prisoner:

> **« A decision to commit a prisoner to a high security department is founded on extraordinary safety issues. Normally, it will be based on information on planned escape actions involving firearms. These actions will be related to persons who themselves or through their network affiliations are likely to cause serious fear.**
>
> **Full transparency about what information has formed the basis for the committal decision would be problematic from a security point of view ... »**

(31) This is explained in more detail in the statement:

(32) The lives of third parties can be exposed to considerable danger. It would destroy the confidence that is necessary in order to obtain underground information from informants. The police will sometimes only release information on condition of full confidentiality because disclosure of information may ruin the investigation of crimes. Giving the prisoner full access to information about what the prison authorities know also reveals a lot about what they don't know.

(33) Escape attempts can involve taking hostages, assistance from networks inside and outside the prison, smuggling of firearms, weapons or explosives and armed liberation attempts in connection with remand hearings or transport. All of these - if they are attempted - will put security officials in considerable danger. Escape actions could also have fatal consequences for innocent fellow prisoners and the public at large.

(34) It follows from the prison director's statement that the need to keep information confidential may appear to be absolute.

(35) This background is important when I now proceed to discuss the main question in our case: What is the consequence of the fact that the state pursuant to the Civil Procedure Act section 204 nr. 2 does not disclose the confidential information so that neither the respondent nor the court is given information about the facts upon which the committal decision is founded?

(36) From a civil procedural point of view, it is tempting to say that the public administration has the evidential burden of proving the existence of facts that justify the administrative decision. Normally, the courts cannot simply accept a statement

from the state that the necessary facts exist. As a general rule, the courts have full competence to review whether the facts relied on by the public administration are correct. Reliance by the court on an undocumented allegation from the state would therefore represent a fundamental break with the ordinary rules of procedure.

(37) However, such reasoning is too simplistic in the present case. If the instigation of civil proceeding would force the Correctional Services to either disclose the confidential information or to drop the case, as the appellant argues, the system of high security departments would collapse. There is an obvious need to withhold certain security information without at the same time the court having to disregard the factual conclusions that the Correctional Services have drawn from the information. The question is how to balance these conflicting considerations against each other.

(38) Section 204 no. 1 and 2 of the Civil Procedure Act provide as follows

> **« 1. The court cannot receive witness testimony about anything that is confidential for reasons of national security or relations with a foreign State without the consent of the King.**
>
> **2. Without the consent of the Ministry, the court cannot receive testimony which the witness is not allowed to give without breaching a statutory duty of confidentiality which is imposed on him as a consequence of his service or work for the state or a municipality. The same applies to witnesses who are under a duty of confidentiality as a consequence of service or work for family protection services, a postal operator, a supplier or installer of telecommunication networks or services, or the state airport company. The same also applies to witnesses who are under a statutory duty of confidentiality as a consequence or service or work for a technical regulatory body. Consent may only be refused if disclosure may be damaging to the state or public interests or be unreasonable to the person who is entitled to confidentiality.**
>
> **After giving due consideration to the duty of confidentiality and the need for clarification of the case, the court may by interlocutory order decide that testimony shall be given even though consent is refused, or that testimony shall not be received even though the Ministry has consented. The Ministry shall have the opportunity to present its views before the court makes its decision. The Ministry's views shall not be communicated to the parties. »**

(39) I add that the rule in no. 2 subsection 2 last sentence has been abolished and is not to be found in section 22-3 subsection 3 of the new Disputes Act, which provides that the Ministry's views shall be communicated to the parties.

(40) As regards section 204 nr. 1 concerning the prohibition against testimony about matters that are confidential for reasons of national security, the implications for the courts' assessment of evidence that this provision is invoked is dealt with in the case reported in Rt-1987-612. The case concerned telephone tapping conducted by the Police Intelligence Service. The Supreme Court held that the court must adjudicate on the basis of the evidence actually submitted by the state, see page 618:

> **«As regards subsequent judicial review, the position as mentioned is that the court does not have access to the information which could form the basis for an independent judicial review, see Civil Procedure Act section 204 no. 1. Under these circumstances, it is not possible to undertake a proper review of the legality of the alleged telephone tapping. As a consequence, although there is no statutory provision that expressly exempts or restricts the power of the courts to exercise judicial review over the intelligence service's operations, there is very little of the power of judicial review left. I add however that the fact that the state in the interests of national security has the right to withhold information that forms the basis of any decision on telephone tapping cannot mean that the claimant must succeed in his claim that the decision to tap or the conduct of the tapping is illegal unless the state proves the opposite. »**

(41) In this decision, the Supreme Court emphasized that the Parliament had established other guarantees of due process for citizens who are subject to the activities of the intelligence services. The provision in section 204 no. 1 on the right to withhold evidence in the interests of national security is absolute: if the King in Council does not consent to the information being disclosed, that decision is final. In comparison, section 204 no. 2, which is applicable in the present case, opens for judicial review if the Ministry refuses to submit evidence. Pursuant to section 204 no. 2, the court has power in an individual case to overrule the state's decision to refuse to submit evidence and as a consequence of which the power of judicial review is seriously diminished.

(42) Accordingly, I find it clear that the general consequence when the state invokes an obligation of confidentiality in section 204 no. 2 cannot be that the interference shall be deemed to be illegal unless the state proves the opposite; see the citation from the

judgement above. The wording of the two provisions of section 204 is identical, except that no. 2 opens for judicial review of the refusal. Instead of the alternative guarantees of due process that the Supreme Court emphasized in relation to section 204 no. 1, section 204 no. 2 provides that the final decision as to whether the state shall be imposed a duty to testify rests with the court.

(43) Strong policy considerations support this conclusion. As I have already noted, a finding that the state must choose between presenting evidence of the committal decision or losing the case would defeat the object of the system of high-risk departments.

(44) This understanding of the relationship between section 204 no. 1 and no. 2 also appears to be reflected in legal theory, see Schei Tvistemålsloven (The Civil Procedure Act) 2nd edition at page 685:

> **«The prohibition against testimony in section 204 no 1 implies that some particularly sensitive administrative decisions will be subject to only very limited judicial review, see Rt-1987-612, Rt-1979-1696 and RG-1981-785. The prohibition against testimony in section 204 no 2 can also limit the ability of the courts to review administrative action, but in this case the court has power pursuant to section 204 no 2 subsection 2 to decide that testimony shall be given even though the Ministry has refused to grant consent to testimony being given despite the obligation of confidentiality. »**

(45) I find that in the present case section 204 no.2 of the Civil Procedure Act must be viewed together with the provision on exemptions from the party's right of access and the obligation to give reasons in section 7 (c), (d) and (h) of the Execution of Sentences Act. In view of the coherence between these provisions and considerations of public policy, the courts must rely on the findings of the Correctional Services even when the underlying information is withheld in connection with the judicial review. If a situation arises where there is a strong tension between considerations of due process and respect for confidentiality, the court must consider whether to require the court to disclose the information.

(46) The appellant has chosen not to invoke the right in section 204 no. 2 subsection 2 to petition the court to review the Ministry's refusal to grant consent. We therefore do not have the opportunity to discuss the circumstances where this might arise. I add however that I do not agree with the appellant that the consequence of the conclusion

that I have reached is to effectively preclude judicial review in all cases where the state invokes a duty of confidentiality. A key issue in the present case is that there is no right of access to information and no obligation to give reasons for the decision. There are very few situations like this.

(47) The appeal has failed and the state has made a claim for costs. Given the principle nature of the case and that the appeal concerns a radical intervention within the prison service, I find that costs should not be imposed for any instance.

(48) I vote for the following

JUDGEMENT:

1. The judgement of the Court of Appeal, item 1 is affirmed.

2. Costs shall not be imposed for any instance.

(49) Mrs Justice **Øie**: I agree on the whole and with the result of the first voting Justice.

(50) Acting Justice **Sverdrup**: Likewise.

(51) Mr Justice **Endresen**: Likewise.

(52) Mr Justice **Lund**: Likewise.

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

JUDGEMENT:

1. The judgement of the Court of Appeal, item 1 is affirmed.

2. Costs shall not be imposed for any instance.