SUPREME COURT OF NORWAY

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

HR-2000-02177-S, (case no. 2008/1398), criminal appeal against interlocutory decision

A (counsel John Christian Elden)
(counsel Anders Christian Stray Ryssdal)

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 3 June 2008, Mr A was convicted by the Oslo District Court pursuant to section 202 subsection 1(b) of the Penal Code of having let out premises for the purposes of prostitution. The judgement reads as follows:

> **1. A, d.o.b. 19.12.1957, is convicted of breach of section 202 subsection 1(b) of the Penal Code and is sentenced to 90 – ninety – days' imprisonment. The sentence shall be reduced by 3 – three – days for custody on remand.**
> **2. Proceeds of crime in the amount of 57 750 – fiftyseventhousandseven hundredandfifty - Norwegian kroner shall be confiscated from A.**
> 3. **A shall pay legal costs in the amount of 6000 – sixthousand – Norwegian kroner**.

(3) A lodged an appeal against the conviction to the Borgarting Court of Appeal. The appeal concerned the assessment of evidence in relation to the conviction, sentencing and confiscation. The appeal invoked in particular two new witnesses who would be able to confirm that it was unthinkable that he with full knowledge and intent had let out the apartment for the purposes of prostitution.

(4) On 4 August 2008, the Borgarting 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, and a reference to section 321 subsection 2 first sentence of the Criminal Procedure Act.

(6) On 13 August 2008, 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 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 also dismissed, see 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.

(8) 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 Plavoukas' appeal was selected together with case no. 2008/1360 Anders Konrad Sandvik v. The Public Prosecution and case no. 2008/1265 Karl Nilsen v. The Public Prosecution.

(9) 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.

(10) In the course of the appeal proceedings, issues that are common to all three cases have been 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. Interlocutory judgements are being delivered today in case no. 2008/1360 Anders Konrad Sandvik v. The Public Prosecution and case no. 2008/1265 Karl Nilsen v. The Public Prosecution. HR-2008-02175-S, case no. 2008/1360 contains an account of the parties' submissions that are common for all three cases, and I refer to this.

(11) *A's* principal submissions are as follows:

(12) On account of the ruling of the Human Rights Committee in the Restaurant Owner Case, it must be clear that the Court of Appeal is under a general obligation to give reasons for denying leave to appeal. No such reasons were given in the present case and the decision of the Court of Appeal must therefore be quashed.

(13) Even in the absence of a general obligation to give reasons, the circumstances of the present case are of such a nature that a reasoned decision was called for. The appellant recalled that the appeal to the Court of Appeal mainly concerned the assessment of evidence, and new witness evidence was invoked. Furthermore, the District Court's reasoning for its findings on the evidence shows that there was an error in procedure. When, despite this, the Court of Appeal has found it obvious that the appeal will not succeed, this must be explained in more detail. The appellant also alleged that when new witnesses are invoked before the Court of Appeal, one can at least expect that the witnesses will be interviewed by the police or that the Court of Appeal will take the initiative to hear them before the appeal case is decided. The appellant referred among other things to Article 6(3)(d) of the European Convention on Human Rights.

(14) The circumstances of the case are so special that a reason should have been given even pursuant to prevailing jurisprudence.

(15) A made the following prayer for relief:

"The decision of the Court of Appeal shall be quashed."

(16) The Public Prosecution's principal submissions are as follows:

(17) On the Public Prosecution's understanding of the Restaurant Owner Case, there is no general obligation on the Court of Appeal to give reasons for its denial of leave to appeal. Nor are there any actual errors in the District Court's procedure that make A's case comparable with the Restaurant Owner Case.

(18) The fact that A invoked new witnesses is not sufficient to give rise to an obligation to give reasons, even though A alleged that this would lead to an acquittal for those matters on which the witnesses would testify. An allegation is not enough.

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

"The appeal shall be dismissed."

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

(21) I refer to the discussion on the scope of the ruling of the Human Rights Committee in the Restaurant Owner Case contained in my judgement in HR-2008-02175-S, case no 2008/1360 Anders Konrad Sandvik v. The Public Prosecution. In that 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 4 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.

(22) I vote for the following

INTERLOCUTORY JUDGEMENT

The decision of the Court of Appeal shall be quashed.

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

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

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

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

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

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

(29) Justice **Utgård**: Likewise.

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

(31) Justice **Bårdsen**: Likewise.

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

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

INTERLOCUTORY JUDGEMENT

The decision of the Court of Appeal shall be quashed.