THE NORWEGIAN SUPREME COURT

On 29 March 2012, the Supreme Court gave judgment in

HR-2012-669-S (case no. 2011/1820), civil case, appeal against judgment

A	(Counsel Sigurd J. Klomsæt) (Counsel Anders Ryssdal)
v.	
The State represented by the Norwegian Criminal Cases Review Commission	(Attorney General Sven Ole Fagernæs)

V O T I N G

(1) Justice **Falkanger:** The case concerns the courts' competence to review a decision made by the Norwegian Criminal Cases Review Commission (the Review Commission) not to reopen a criminal case.

(2) B and C were on 19 May 2000 found murdered in X in Y. They were ten and eight years old respectively.

(3) On 16 February 2001, A was together with D indicted for, amongst other things, rape and premeditated murder of the two girls.

(4) By Kristiansand City Court's judgment of 1 June 2001 A was found guilty of these crimes. The sentence was set at 21 years of imprisonment. In addition, the prosecuting authority was authorized to use preventive supervision for 10 years. I will not go into detail regarding the hearing of the case against D.

(5) A appealed to the Court of Appeal against the question of guilt, the sentencing and the decision regarding preventive detention. By Agder Court of Appeal's judgment of 13 February 2002, he was again found guilty of rape and premeditated murder of the girls. The sentence was set at preventive detention for 21 years with a minimum term of ten years.

(6) A appealed to the Supreme Court. The appeal was aimed at the Court of Appeal's procedure and application of the law related to the question of guilt. The Appeals

Selection Committee of the Supreme Court decided on 24 April 2002 that the appeal would not go forward.

(7) On 5 September 2008, A filed a request to reopen the criminal case. On 17 June 2010, the Review Commission decided to deny the request. The following day, A requested a setting aside of the decision, in the alternative he filed a new request for a reopening. In a letter of 25 June 2010, the Commission stated that there was no basis for a renewed hearing of the case. On 27 August 2010, A filed yet another request for a reopening of the criminal case, but the Commission decided on 24 September 2010 that also this request would be denied.

(8) On 30 December 2010, A filed a writ to the Oslo District Court requesting that the Review Commission's decision be found invalid. He argued primarily that the courts have full competence to review the Commission's decisions and that the conditions for a reopening contained in inter alia section 391 no. 3 and section 392 subsection 2 of the Criminal Procedure Act were satisfied. In the alternative, he argued that the decisions contained specifically stated errors.

(9) The State retorted submitting, among other things, that the court's review must be limited to the Commission's general interpretation of the law and procedure.

(10) In a preliminary hearing on 12 April 2011, the District Court decided to split the main hearing according to section 16-1 of the Dispute Act so that it was initially limited to the issue of the courts' right of review. If the court should conclude that the right of review was limited in the way submitted by the state, the validity of the decisions must be decided on this basis.

(11) On 1 September 2011, Oslo District Court delivered judgment with the following conclusion:

> **"1. The court finds in favour of the State represented by the Review Commission.**
>
> **2. Within 2 – two – weeks A shall pay by way of costs to the State represented by the Review Commission an amount of NOK 238,000. - – Norwegian kroner two hundred and thirtyeight thousand 00/100."**

(12) As regards the Commission's assessment of evidence, the District Court took for its basis that it was only authorized to review whether there were "misunderstandings of the basic material presented to the Commission, but not any interpretations that the Commission may have made of this material". The District Court also found that it was authorized to review the application of the law and procedure. The review of procedure was also to include the issue whether the Commission had studied and assessed the case to the extent necessary and whether its rationale for the decision "emerges as a sound evaluation", but the District Court stated that on these points a certain caution must be shown with a view to distinguishing between this and the assessment of evidence. The District Court furthermore found that it was authorized to review the question whether there was any abuse of authority.

(13) A appealed against the District Court's judgment and applied for permission to bring the appeal directly before the Supreme Court, cf. section 30-2 of the Dispute Act.

(14) On 15 December 2011, the Appeals Committee of the Supreme Court made a decision with the following conclusion:

> **"Leave to direct appeal to the Supreme Court is granted as regards the submission that the courts have full competence to review the Commission's decisions. Otherwise, leave to a direct appeal is refused.**
>
> **As regards the issue where leave to bring it directly before the Supreme Court is granted, the proceedings before the Supreme Court are limited to the issue of the competence which the court has under the law to review the Review Commission's decisions."**

(15) On the same day, the Chief Justice of the Supreme Court decided that the matter was to be heard by the Supreme Court in Grand Chamber, cf. section 5 subsection 4 first and second sentences, cf. section 6 subsection 2 first sentence of the Courts of Justice Act.

(16) The composition of the Grand Chamber is decided by the drawing of lots, cf. the rules of procedure for the Supreme Court in Grand Chamber, laid down 12 December 2007 pursuant to section 8 of the Courts of Justice Act. Justice Kallerud was excluded from the drawing of lots by reason of prejudice, while Justices Matningsdal, Webster and Øie were excluded because there were due reasons for recusal. Justice Noer was originally meant to participate, but was excused due to illness. According to the drawing of lots, Justice Utgård took her place.

(17) The preliminary judge has consented to A having two counsel, cf. section 3-1 subsection 2 of the Disputes Act.

(18) The appellant – *A* – has essentially argued:

(19) The Review Commission was in error when finding that the conditions set out in section 391 no. 3 and section 392 subsection 2 of the Criminal Procedure Act were not satisfied, and the courts are competent to review all aspects of the Commission's decision.

(20) It would be contrary to constitutional custom if the courts do not have full review competence. The Commission is an administrative body and there is a long tradition of the courts reviewing the administration's interpretation of the law, the assessment of evidence, the concrete application of the law and procedure. Curtailments of the right of review require special indications. There are no such indications as regards the Commission's decisions. On the contrary, there is a special reason why the courts should carry out a full-scale review of these decisions. The decisions are rule-bound and have clear similarities to adjudication activities. The courts should therefore have the final word. Reference is made to the fact that the Commission is not subject to parliamentary control.

(21) Section 88 of the Constitution contains one page for the distribution of the collective authority of the State, and a restriction on the court's right of review of the Commission's decisions would not be in harmony with the rule as it is interpreted in recent case law.

(22) A limited review will also be contrary to the European Convention on Human Rights (ECHR) article 6 no. 1. Admittedly, the Commission's decisions do not *per se* fall under the scope of the article, but given that the legislator has deliberately opened the door to these decisions being challengeable under civil law, such actions concern "civil rights and

obligations". The courts must therefore have full right of review, cf. the effective remedy requirement in article 13.

(23) It accordingly follows from the lex superior principle and section 3 of the Human Rights Act that an act which provided for a limited right of review for the courts must have been set aside.

(24) However, since the act – interpreted in the light of other sources of law – recommends full right of review, no need for such setting aside will arise. The purpose of the establishment of the Commission was to strengthen the convicted person's guarantee of due process of law. This was supposed to be by ensuring that the decisions relating to a reopening were made by an independent body with an independent responsibility to investigate. There are no indications that the legislator's purpose was to limit the convicted person's right to a judicial review of the issue whether the substantive conditions for a reopening were satisfied. On the contrary, the preparatory works allow for a review being conducted according to the general rules applicable to a review of administrative decisions. In addition to procedure, this must include interpretation of the law, assessment of evidence and the concrete application of the law.

(25) The Supreme Court has in several cases stated that the courts' right of review extends very far when due process of law considerations come into play, as in this case.

(26) The courts are well suited to make the evaluations recommended in section 391 no. 3 and section 392 subsection 2 of the Criminal Procedure Act – also the more discretionary parts. Such a right of review therefore promotes the objective of obtaining as many correct substantive judgments as possible.

(27) The State's fear that the courts will be swamped with actions if the door is opened to a full right of review is unfounded. It must be assumed that the Commission will essentially make correct decisions that will be respected. Furthermore, only a few convicted persons will have the financial resources to file an action. Nor is the State right when alleging that a civil procedure is unsuited when it comes to conducting a full review of the Commission's decisions. The issue before the court will exclusively be whether the conditions for a reopening are satisfied; there will be no question of a full review of the criminal case.

(28) A limitation to the courts' right of review will be difficult to put into practice and the limits will continuously be challenged. Moreover, such a system will not be in harmony with the rules relating to the reopening of civil actions.

(29) If the rules must be understood to mean that the courts' review of the Commission's decisions is limited, it would be contrary to the retroactivity prohibition in section 97 of the Constitution to apply the limitations to A. According to the system in effect at the time of the crime and sentencing – and for a good while thereafter – all aspects of a failed request to reopen a case could be submitted to a higher court. The new rules came into force on 1 January 2004. If A had received the necessary legal assistance before that date, he would thus have been ensured a full review. Even if rules of procedure may in principle be amended without infringing section 97, this cannot apply in a case such as the one at hand, where it is clearly unreasonable and unfair to preclude A from invoking this element of the former review system.

(30) A has submitted this prayer for relief:

> **"1. The District Court's judgment is to be set aside.**
>
> **2. The ppellant is to be awarded costs before the District Court."**

(31) The respondent – *the State represented by the Norwegian Criminal Cases Review Commission* – has essentially argued:

(32) It is not disputed that the Commission's decisions can be challenged by a civil validity action. However, a full-scale court review is out of the question.

(33) The Commission was established because many did not believe that requests to reopen a case were given an objective and unbiased hearing by the courts. This must have consequences for the right of review.

(34) The overall impression of the preparatory works of the amendment to the law that introduced the Commission is that the Ministry wanted significant limitations to the review. The reason why the Ministry did not propose to abolish the review entirely was constitutional considerations.

(35) The Ministry claimed that it should not be possible to challenge the Commission's decisions by criminal procedure remedies, and there is accordingly no reason to believe that the Ministry was instead of the opinion that a full review could take place on a civil law track.

(36) The background to the establishment of the Commission was a desire to strengthen the convicted person's guarantee of due process of law by lifting the reopening issue out of the courts, and it would be in violation of this fundamental idea if the cases were to be directed back to the courts through a full-scale review in civil actions.

(37) Such a system would have entailed a huge and unintended burden on the judiciary system, in that the full-scale review would have to be conducted according to the rule in the Disputes Act related to oral proceedings and the adduction of primary evidence. The civil procedure track is moreover not suited for a full-scale review of these cases, not least because the prosecuting authority – which is familiar with the case and has an investigation machinery to rely on – will have no role in such a process. It would also be a paradox if the District Court – composed of one judge – were to be authorized to review the Commission and the criminal courts' decisions.

(38) The establishment of the Review Commission was especially inspired by the English system. Decisions by the English Commission can be challenged by civil actions, but the courts' right of review is very limited.

(39) The courts' review of the Commission's decisions should be limited in such a way that the legal process does not turn into a rematch about the assessment of evidence. This entails that not only the assessment of evidence itself, but also the concrete application of the law should be excluded. The courts must, however, be authorized to review the interpretation of the law and the question of abuse of authority. Furthermore, the courts should be authorized to review whether the Commission has examined the case in line with fundamental rules and principles of procedure. Obvious misunderstandings of a factual nature can be reviewed from this angle. However, the courts should not be

authorized to review alleged errors of procedure, which *de facto* entail a rematch concerning the assessment of evidence. This applies especially to the question whether the Commission has complied with its duty to investigate.

(40) A right of review which is limited in this way is not contrary to section 88 of the Constitution or any other constitutional rules. Presumably the courts' right of review could, unimpeded by the Constitution, have been excluded entirely.

(41) Nor is it in violation of section 97 of the Constitution to apply such limited right of review in relation to A. He did not at the time of crime or sentencing acquire a constitutional right to have a request to reopen his case heard according to the rules in force at the time. Rules of procedure can be amended regardless of section 97. Under any circumstances, the amendment has not been to the disadvantage of A.

(42) Since the reopening of criminal cases falls outside article 6 no. 1 of the ECHR, the provision has not been infringed. That the denial of the request for a reopening is now reviewed under civil law does not change this fact.

(43) The State represented by the Norwegian Criminal Cases Review Commission has submitted this prayer for relief:

> **"1. The appeal is to be dismissed in so far as leave to a direct hearing by the Supreme Court has been granted.**
>
> **2. The other parts of the appeal are to be heard further before Borgarting Court of Appeal."**

(44) *I have reached the conclusion* that the appeal must be dismissed.

(45) Final and enforceable criminal sentences may be reopened pursuant to the rules contained in chapter 27 of the Criminal Procedure Act. Before the Review Commission was established, a request to reopen a case had to be sent to the prosecuting instance that had issued the indictment in the matter. The request was to be decided by an interlocutory order by the court which had originally decided the criminal case, but not by the same judges. If it was decided to reopen the case, the criminal case was to be conducted again before the same court – but also in that event with other judges. The interlocutory order that decided the request for a reopening could be appealed to a higher court, which would review all aspects of the matter.

(46) This system was eventually criticized, in that many felt that neither the prosecuting authority nor the courts had the distance to the cases necessary to make decisions on an objective basis.

(47) After several alternatives had been looked into, it was by an amendment of the law of 15 June 2001 no. 63 decided that requests for reopenings were to be decided by a special review commission, cf. section 394 et sec of the Criminal Procedure Act. The amendment came into force on 1 January 2004.

(48) The Commission consists of five members with different backgrounds and skills. In principle, the requests are examined in writing, but it may be decided to conduct oral proceedings. It is the Commission's duty to guide the petitioner, and it shall on its own

initiative ensure that the matter is as extensively elucidated as possible before deciding whether the request will be granted.

(49) If the Commission finds that there are grounds for a reopening, the criminal case shall be heard by a court at the same level as the court that delivered the original criminal sentence. The Commission does thus not make a decision regarding the proposed sentence.

(50) The Commission is an administrative body and it makes administrative decisions. However, its duty is to review whether final and enforceable criminal sentences shall be reopened for a new hearing, and it cannot be instructed regarding its exercise of authority. The Commission thus has clear similarities to a specialized court.

(51) If a request for a reopening is not granted by the Commission, the convicted person may at a later stage file a new request. However, the Commission's decisions of requests for reopenings cannot be challenged by criminal procedure remedies, cf. section 395, subsection 3 of the Criminal Procedure Act. As emphasized in the decision by the Grand Chamber in Rt.[1] 2010, page 1170, paragraph 36, it is, however, clear that a convicted person whose request for a reopening has been denied may bring a validity action to the courts for a review of the Commission's decision.

(52) The question is whether there are limits to the competence of the courts to review such actions.

(53) We do not have any rules of law that directly regulate the extent of the courts' competence to review cases. The background history and preparatory works of the amendment to the law of 15 June 2001 no. 63 do, however, give significant indications and I will therefore go into these relatively thoroughly.

(54) On 15 March 1999, the Ministry of Justice sent out a consultation paper requesting views concerning the establishment of a special court of complaints – a specialist court – for the hearing of requests for reopenings. The issue of review was discussed there and hesitations were expressed about opening the door to criminal procedure remedies being used against the decisions made by the court of complaints. It was stated inter alia:

> "**An essential purpose of establishing a special court of complaints to hear requests for a review is to ensure a certain distance between the deciding instance and the ordinary courts. The reasons behind the proposals are a wish to reestablish the public's confidence in the courts' ability to act impartially and unbound by collegial influences in these cases. It might therefore seem self-contradictory if one of the ordinary courts were to be competent to review the court of complaints' decisions and thus decide the question of a review in the last instance. On the contrary, it seems to be a logical consequence of transferring the hearing of these cases to an independent court of complaints that there shall not be any possibility of introducing its decisions once again into the ordinary court system.**"

(55) On 14 July 2000, the Ministry sent out a new consultation document, where it was suggested that a separate commission should hear requests for reopenings, the way the system was in England. The English system, and on certain points also the Scottish, was in the Ministry's view "a natural starting point for the structuring of a corresponding Norwegian commission". Also in this consultation paper, the possibilities of reviewing

[1] Publication containing Supreme Court judgments

the decisions are discussed. The Ministry submitted that one possibility was that a civil action could be filed against the Commission requesting that the decision be held invalid, but found that this was not a very practical system; it was more natural to let the Court of Appeal review the Commission's decisions "wholly or in part in line with the rules relating to appeal contained in the Criminal Procedure Act". As regards what aspects of the commission's decisions could be reviewed according to such a system, it was stated:

> **"The Ministry assumes that the Court of Appeal should at any rate be authorized to review whether the Commission has committed any *procedural errors* which lead to the decision being or being found invalid, and whether the Commission's *application of the law* is correct. It is not equally obvious that the Court of Appeal should be authorized to review the Commission's *assessment of the evidence related to the question of guilt.* It is this very aspect of the matter which the Commission with its composition and method of operation will have especially good qualifications for clarifying and assessing. Also considerations of resources and the wish to create a distance to the prosecuting authority in review cases could suggest that the Commission's assessment of evidence should not be subject to a review."**

(56) Further into the consultation paper the following is stated:

> **"If the accused feels that central aspects have been overlooked or misunderstood, there is nothing to prevent the filing of a new request with the Commission. Even if the Commission's proximity to the evidentiary material in the case may make it desirable to have a renewed and more withdrawn assessment of the evidence, the Ministry is inclined toward the Court of Appeal merely being authorized to review the procedure and application of the law."**

(57) In the consultation paper, the Ministry submitted a concrete proposal for a new section 398 of the Criminal Procedure Act, according to which the right to appeal was limited to "the procedure at the Commission or the Commission's interpretation of statutory regulations" – thus a narrower review than what was assumed in the cited discussions.

(58) Like the consultation paper, the majority of the consultation comments reflected a negative attitude to authorizing the use of criminal procedure remedies against the Commission's decisions. The Director General of Public Prosecution thus felt that the decisions should "be final". The rationale was as follows:

> **"Decisive for the Director General of Public Prosecution's position is first and foremost that every case must have an end and that opening the door to a review of the Commission's decisions will hardly entail any real increased guarantee of due process of law. The cases where it is relevant to consider a reopening will after the two-instance reform normally have been heard by both the lower court and the Court of Appeal. Many of them will also have been tried by the Supreme Court or the Appeals Committee of the Supreme Court. A further review by the Commission, in addition to the right to file a new request with the Commission, must be sufficient."**

(59) Also the Norwegian Bar Association was critical to allowing criminal procedure remedies to be used against the Commission's decisions. The Association's opinion includes the following statement:

> **"As regards the question of the right to review the Commission's decisions, cf. pp. 63-67 of the consultation paper, the Standing Committee on Law is of the opinion that the best reasons indicate that there is no possibility of such review, at any rate in those cases where the Commission has allowed a reopening. An essential purpose of a commission system is to create independence and distance to the courts, and it will therefore be inconsistent if the final decision were to fall under the province of a court. However, the**

> **same reflections are not to the same extent relevant if it is only the question of a procedural error and the application of the law that may be subject to a review."**

(60) In Proposition to the Odelsting no. 70 (2000–2001) related to Act on Amendments to the Criminal Procedure Act etc. (reopening), the Ministry advocated the establishing of a commission. As regards the right to review the Commission's decisions, the Ministry referred to the fact that the majority of the consultative bodies felt that the decisions should be final. The Ministry subsequently discussed whether constitutional rules prevented a preclusion of the courts' review of the Commission's decisions:

> **"Regardless of whether the Commission's decisions are looked upon as an administrative activity or a judicial activity, these are decisions of major importance to those concerned. This suggests that each individual should have the opportunity to have the Commission's decisions reviewed by the courts. It is also natural to feel that the convicted person has a legal right to a reopening in certain specific cases. This will make it easier to raise questions as to whether the Commission has acted *unlawfully*."**

(61) The Ministry drew the following conclusions from this:

> **"A completely precluded right to a review by the courts may therefore be constitutionally precarious. In the more detailed discussion as to what is possible, the principle of the courts' right to review the administration's decisions may give a certain guidance. However, it must be taken into consideration that such administrative decisions often encroach upon the legal sphere of the individual. The Commission's decisions are in a somewhat different position.**
> **…**
> **In the Ministry's opinion, it is uncertain whether it would be in conformity with constitutional rules to completely preclude the right of review before the ordinary courts as regards decisions to allow or deny reopenings."**

(62) The discussion in the proposition shows so far that the Ministry wanted to preclude, or at any rate limit, the right of review, but that it did not want to challenge possible constitutional limits.

(63) In its conclusions, the Ministry stated that it largely agreed with the consultative bodies advocating that the Commission's decisions should be final. The Ministry referred in particular to the opinions submitted by the Director General of Public Prosecution and the Norwegian Bar Association, and presented the following rationale:

> **"Paving the way to a review by the courts in the form of an appeals system, as outlined in the consultation paper, is hardly the best solution. The regard for due process of law must be weighed against the regard for the offended party and a sensible use of the resources of the courts, and it must in this connection carry weight that the case has already been heard by the courts and by the Commission. If the way is paved to a review by the courts in the form of an appeal within the framework of criminal procedure, all experience suggests that this right will be exercised in a great many cases. This would not only be time- and resource-demanding, but also counter the object of the commission system, which is, amongst other things, to lift the reopening issue out of the court system. The value of establishing a commission would in that event easily be reduced to the advantage the courts may have of the Commission's investigation of the case. Separate rules related to a criminal procedure "right to appeal" – with or without limitations – may furthermore emerge as a system which is legally complex and somewhat difficult to understand."**

(64) The Ministry is here arguing against a review on a criminal procedure track and the further discussion – which allows for a civil procedure track – must be read against this background. It is stated there:

> **"The Ministry has, in the light of the conflicting considerations that come into play in the matter, concluded that the same rules should apply to the courts' review of the Commission's decisions as to the courts' review of other types of administrative decisions. This will make it possible to file a civil action against the Commission claiming that the Commission's decision is invalid and the Commission will be subject to the Ombudsmann's review."**

(65) The appellant's understanding of this statement it that it instructs that the courts' civil review of the Commission's decisions must be as comprehensive as their review of ordinary administrative decisions. I agree that the text – if read in isolation – can be understood this way. When read in context with the discussion above, I find, however, that the only way to read the statement is that the Ministry – after having rejected the criminal procedure track – points out that the Commission's decisions can only be challenged by a civil action. The Ministry does not say anything about which aspects of the decisions the courts shall be authorized to review, but merely that the consequence of the criminal procedure track being discarded is that the decisions can only be reviewed under civil law.

(66) Given that there are such strong arguments against a full-scale review on a criminal procedure track, it is incidentally highly unlikely that the Ministry would subsequently have given directions for a full-scale review by a civil action. The arguments raised against a full-scale review on the criminal procedure track are even more valid in relation to a full-scale civil procedure review. While a criminal procedure appeal is normally heard in writing, oral proceedings with adduction of primary evidence are conducted when hearing civil actions – with the burden this may entail for the courts, the aggrieved party and the other parties involved.

(67) On page 64 of the Proposition, it is pointed out that civil actions are cost-consuming and that experience from England suggests that only few will take advantage of this opportunity. The appellant has submitted that the Ministry's meaning has been that from an overall point of view, a review under civil law would not entail any dramatic increase of the burden on the courts and that this reduces the doubts as to a full-scale review. I read this differently. The statement must be read in the context that the Ministry immediately above emphasized the need for the Commission's hearing providing a guarantee of due process of law. The point of highlighting the costs of litigation was to point out that the possibility of a civil action did not reduce this need. I furthermore find it difficult to believe that the Ministry would have wanted a system with a full-scale review of the Commission's decisions which would only be available to the socially resourceful.

(68) As the regards the issue of review, the Standing Committee on Justice supported the Ministry, cf. Rec. O. no. 114 (2000–2001) Recommendation from the Standing Committee on Justice regarding Act on amendments to the Criminal Procedure Act etc. (reopening) page 13. The Committee states there that it has noted the consultative bodies' scepticism when it comes to an "ordinary right of review" – in other words, according to the criminal procedure system. The Recommendation goes on to state the following:

> **"The Committee therefore supports the Ministry's evaluations that the same rules shall apply to the courts' review of the Commission's decisions as to the courts' review of other types of administrative decisions."**

(69) The word "therefore" shows that all the Committee states is that it here supports the choice of a civil procedure track rather than a criminal procedure track. The statement does not give any indications that the courts should subject the Commission's decisions to a full-scale review.

(70) To sum up, the preparatory works do not provide any precise directions as to what aspects of the Commission's decisions can be reviewed by an action. The starting point for the reform was, however, especially the need for distance between the courts and the body that was to decide the reopening requests. The legislator was therefore negative to a full-scale review of the Commission's decisions by a criminal procedure appeal. In my opinion, this attitude must have validity also in relation to the civil procedure track.

(71) I would in this connection point out that according to the English system – on which the Norwegian system was patterned – the courts' right of review is very limited.

(72) The appellant has in his argumentation pointed out that the courts have full competence to review decisions of requests for a reopening of civil actions and that this competence should not be less in criminal procedure. As there are significant differences between the two procedural systems, I cannot subscribe to this point of view. I particularly point out that the parties to civil actions normally have conflicting interests, and that for these cases no special commission has been established to examine reopening requests. I therefore fail to see that such an isolated element in civil procedure can automatically have a transfer value to criminal procedure, nor are there any indications that the legislator has had any such intention.

(73) After this, I shall address more concretely what the courts are authorized to review. I will then stick to the provisions which A invokes as grounds for a reopening, namely section 391 no. 3 and section 392 subsection 2 of the Criminal Procedure Act. For other reopening grounds, the review competence may be different, cf. Rt. 2010 page 1170, which concerned a reopening under section 392 subsection 1. However, I will not go into this in any further detail.

(74) That the courts can review the Commission's general interpretation of section 391 no. 3 and section 392 subsection 2, must in my opinion be obvious. If the courts are to be authorized to review the decisions, a general interpretation of the law must be at the core of this review.

(75) On the other hand, the courts must be precluded from reviewing the Commission's assessment of evidence. The considerations on which the establishment of a separate commission was based are particularly relevant for the assessment of evidence. The criticism of factors according to the former system was first and foremost aimed at this aspect. Through the possibility and obligation which the Commission has to investigate the cases on its own, it is particularly well equipped to handle the assessment of evidence. In my view, it would be unfortunate and contrary to the idea behind the establishment of the Commission if the courts were to be made into an arena for a rematch concerning the evidence. As pointed out on page 64 of the Proposition, such a system might easily have reduced the Commission's role to an investigating entity for the courts.

(76) In my view, the concrete application of the law can also not be reviewed. The relevant provisions in the Criminal Procedure Act partly recommend very discretionary evaluations. Under section 391 no. 3 it is thus decisive whether a new circumstance or a new piece of evidence "seems likely" to lead to an acquittal and under section 392 subsection 2, the question is whether "special circumstances" make it doubtful whether the judgment is correct. In order to decide whether these criteria are satisfied, the Commission must have a thorough look into the evidence adduced in the criminal case. I find it difficult to see how the courts should be able to review the Commission's concrete application of the law without doing the same. A review of this application of the law will therefore *de facto* easily open the door to a rematch concerning the assessment of evidence – which I, as already mentioned, believe is contrary to the legislator's assumptions.

(77) The Courts must, however, review whether the Commission has complied with fundamental rules of procedure, for example that the impartiality and adversarial proceedings requirements are satisfied – which is also assumed by the Appeals Selection Committee of the Supreme Court in Rt. 2008 page 1571. However, unless it is a question of serious and obvious mistakes, other aspects of the Commission's procedure must fall outside the right of review. I mention in particular the Commission's duty to investigate. The duty to investigate is crucial in the Commission's work to clarify facts, and it would be in breach of the fundamental idea behind the establishment of the Commission if the courts were authorized to review the Commission's evaluations as to which investigations are necessary. As pointed out on page 104 of the Proposition, the provision regarding the duty to investigate reflects a legal standard which presupposes a detailed weighing of the various interests against each other on a case to case basis. The courts will have problems seeing whether this standard is complied with without moving into the assessment of evidence.

(78) As will have appeared, the limits I believe apply to the courts' review are narrower than those on which the District Court relied.

(79) I will then look at the question whether the limits I have drawn up are contrary to our Constitution.

(80) The appellant has submitted that it follows from section 88 of the Constitution that the courts shall be authorized to review the Commission's assessment of evidence and application of the law. The provision reads as follows:

> **"The Supreme Court pronounces judgment in the final instance. Nevertheless, limitations on the right to bring a case before the Supreme Court may be prescribed by law."**

(81) As pointed out by the first-voting justice in Rt. 2009 page 1118 paragraph 63, section 88 entails on the one hand that the Supreme Court's decisions cannot be appealed against and on the other hand a point of departure to the effect that it shall be possible to appeal lower courts' decisions on the merits of a case to the Supreme Court. In addition, it has probably also been an object of the provision to say something about the distribution of functions between the three estates, cf. Castberg, "*Statsforfatningsrett I*" [Constitutional law] (3rd edition, 1964) page 332. Or, as the third-voting justice expressed it in Rt. 2009, page 1118, paragraph 118: to determine the purview of the judiciary. However, I find it clear that it does not prohibit a curtailment of the courts' right of review when – as in this case – there are reasonable grounds and it is done within a demarcated area.

(82) Nor can I see that there are other constitutional rules or principles that prevent a limitation to the review in this respect. In Skoghøy, "*Tvisteløsning*" [Dispute Resolution] (2010), page 19, it is stated:

> **"As long as the citizens have a right to bring administrative decisions before the courts for a review, and the courts have a certain minimum of review competence, it will not be in violation of the Constitution … to leave it to administrative bodies to establish rights or obligations for the citizens – whether this is done on the basis of rules or discretion."**

(83) I subscribe to this statement. The limits which I believe apply to the review are therefore not unconstitutional.

(84) I will then look at the question whether the limitation to the right of review infringes article 6 no. 1 of the ECHR. The first sentence of the provision reads as follows:

> "**In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.**"

(85) It follows from established practice of the European Court of Human Rights (ECHR) that requests for reopenings of criminal cases do not come under the term "criminal charge", cf. the ECHR's judgment of 27 October 2009 (Stepanyan v. Armenia) where it says in section 30:

> **"The Court points out that Article 6 of the Convention applies to proceedings where a person is charged with a criminal offence until that charge is finally determined. It further reiterates that Article 6 does not apply to proceedings concerning a failed request to reopen a case."**

(86) However, the appellant has argued that once the Commission's decision is allowed to go forward for a civil hearing before a court, the case concerns "civil rights and obligations". I do not agree with this. Case law from the ECHR admittedly shows that there has been a development from the original starting point that "civil rights and obligations" only comprised strictly private law disputes; also a number of disputes where the public authorities are a litigant party, and which do not come under private law in the traditional sense, are now considered to fall within this formulation, cf. Lorenzen *et al*, the European Convention on Human Rights (3rd edition, 2011) page 527 *et seq*. However, the prerequisite is that the dispute is of direct significance for private law rights. Actions related to failed requests to reopen a case clearly fall outside.

(87) I have in this light reached the conclusion that the limits to the right of review that I have drawn up are neither in violation of the Constitution nor the ECHR.

(88) It then remains to make a decision regarding A's submission that it would be in violation of section 97 of the Constitution to apply the review limitations to his case. He has cited that the rules in force at the time of the crime and the time of the sentence – and for a good while thereafter – gave convicted persons the right to challenge all aspects of failed requests to reopen a case and that it would be unreasonable for anything different to apply to him now.

(89) I find it obvious that this argument cannot be upheld. As the clear main rule section 97 of the Constitution does not prevent new rules of procedure from being applicable to older

cases, even if this would entail that the position for the person concerned becomes less favourable, cf. Andenæs and Fliflet, "*Statsforfatningen i Norge"* [The Norwegian Constitution] (10th edition, 2006), page 451, and Rt. 2010, page 1008, section 17. It is possible that certain reservations need to be made to this if the procedural amendments take place while a case is pending before the courts, but this is not the case here. The sentence against A became final and enforceable on 24 April 2002, and the requests to reopen the case did not entail that the same case was in the meantime still pending before the courts.

(90) I have in this light concluded that the appeal must be quashed to the extent that leave to direct appeal proceedings before the Supreme Court has been granted. As set out in the Appeals Selection Committee's decision of 15 December 2011, the remainder of the appeal must be heard further by the Borgarting Court of Appeal.

(91) The State has not asked for costs before the Supreme Court.

(92) I vote in favour of the following

J U D G M E N T :

The appeal is dismissed to the extent that leave to a direct appeal to the Supreme Court has been granted.

(93) Justice **Gjølstad:** I concur in all essentials and as regards the conclusion with the first-voting judge.

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

(95) Justice **Skoghøy:** Likewise.

(96) Justice **Utgård:** Likewise.

(97) Justice **Tønder:** Likewise.

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

(99) Justice **Indreberg:** Likewise.

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

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

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

(103) After the voting the Supreme Court delivered the following

J U D G M E N T :

The appeal is dismissed to the extent that leave to a direct appeal to the Supreme Court has been granted.

True transcript certified: