SUPREME COURT OF NORWAY

On 08 June 2017, the Appeals Selection Committee of the Supreme Court, comprising Justices Matningsdal, Indreberg and Bårdsen in

HR-2017-1127-U, (sak nr. 2017/778), civil case, appeal against judgment:

Anders Behring Breivik (Advocate Øystein Storrvik)

v.

State of Norway, represented by the Ministry of Justice and Public Security (Attorney General, represented by Attorney General Fredrik Sejersted)

delivered the following

ORDER:

(1) Anders Behring Breivik is currently serving a sentence of preventive detention pursuant to Section 39 c, no. 1, of the Penal Code of 1902, handed down by Oslo District Court on 24 August 2012. A time frame of 21 years was imposed, with a minimum duration of 10 years. The judgment concerns acts of terrorism, committed on 22 July 2011, carried out by means of a car bomb at *Regjeringskvartalet*, the executive government quarter in Oslo city centre, and an attack using semi-automatic weapons against participants at a political youth camp at Utøya in the Municipality of Hole. In total, Breivik killed 77 people and wounded 42. Many survivors and next of kin suffered major psychological trauma. The material damage was considerable. His motive was to avenge national socialists of the past and start a "fascist, ethno-nationalist revolution in Europe". Breivik refers to himself as, inter alia, "a party secretary of the Nordic State" and a "spokesperson for Norwegian national socialists, fascists and other ethno-nationalists". He considers himself to be "Norway's only political prisoner".

(2) Breivik filed legal action against the State of Norway, claiming that the conditions of his confinement had been, and still were, in violation of the prohibition of inhuman or degrading treatment, as established by Article 3 of the European Convention on Human Rights (ECHR), as well as of his right, pursuant to Article 8, to private life and correspondence. In Oslo District Court's judgment of 20 April 2016, the State of Norway was found to have violated Article 3, but not Article 8. The State of Norway appealed this judgment to Borgarting Court of Appeal, which, in its judgment of 01 March 2017, found in favour of the State of Norway on all accounts.

(3) Breivik appealed the court of appeal's judgment to the Supreme Court. The appeal is lodged on grounds of the court of appeal's assessment of evidence and application of the law.

(4) Leave to appeal to the Supreme Court must be granted by the Appeals Selection Committee of the Supreme Court, cf. Section 30-4, Subsection 1, of the Dispute Act. Such leave is only granted when the appeal concerns "issues whose significance extends beyond the scope of the current case, or when other compelling reasons indicate that the case should be reviewed by the Supreme Court".

(5) *As concerns the appeal against the assessment of evidence*, the Appeals Selection Committee of the Supreme Court notes:

(6) The evidence presented in district court and in the court of appeal was extensive, including inspections on site. The appeal to the Supreme Court has not substantiated any claims of significant new evidence, nor any changes or developments that may affect the court's assessment. Upon assessing the appeal, the Appeals Selection Committee finds that, in the interest of clarification of the case, there is no need for the Supreme Court to review the evidence again; such review by the Supreme Court would, in any case, be based on the presentation of secondary evidence. Furthermore, no other compelling reasons exist to serve as grounds on which to grant leave to appeal against the assessment of evidence to the Supreme Court. Leave is therefore refused for this part of the appeal, cf. Section 40-4, Subsection 1, of the Dispute Act. This includes the claim that Breivik has a mental vulnerability. The Appeals Selection Committee refers to the court of appeal's judgment (page 53), which concludes that Breivik has no such vulnerability.

(7) *As concerns the appeal against the court of appeal's application of the law in connection with Breivik's claim that the conditions of his confinement are in violation of Article 3 of the ECHR*, the Appeals Selection Committee of the Supreme Court notes:

(8) In his appeal to the Supreme Court, Breivik claims that the court of appeal misconstrued and misapplied Article 3 of the ECHR in concluding that the conditions of his confinement do not constitute inhuman or degrading treatment. In particular, he emphasizes the stress of continuous solitary confinement, in light of the stringent security measures otherwise imposed.

(9) Article 3 of the ECHR establishes:

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

(10) Article 3 of the ECHR, and its international law implications, has the force of Norwegian law, cf. Sections 2 and 3 of the Human Rights Act of 1999. The same prohibition is established by Article 93, second paragraph, of the Constitution, which stipulates that no one shall be subjected to "torture or other inhuman or degrading treatment or punishment". The provisions "inhuman or degrading treatment" are central to this case.

(11) Article 3 expresses fundamental principles in any democratic society and respect for human dignity, both part of the essence of the ECHR as a whole, cf. the Grand Chamber judgment of 28 September 2015 in *Bouyid v. Belgium*, paragraphs 81 and 90, and the Grand Chamber judgment of 15 December 2016 in *Khlaifia and others v. Italy*, paragraph 158. This provision prohibits—in absolute terms—torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's previous or current behaviour, cf., inter alia, the judgment of 14 October 2010 in *A.B. v. Russia*, paragraph 99. This also applies

under extraordinary conditions, including in connection with acts of terrorism, cf. the Grand Chamber judgment of 08 July 2004 in *Ilaşcu and others v. Moldova and Russia,* paragraph 424, the Grand Chamber judgment of 12 May 2005 in *Öcalan v. Turkey,* paragraph 179, and, most recently, the judgment of 01 June 2017 in *Mindadze and Nemsitsveridze v. Georgia,* paragraph 103. Article 3 makes no provisions for exceptions. Nor can any measures derogating from Article 3 be taken in times of emergency, as established by Article 15 of the ECHR.

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

(13) The suffering and humiliation that necessarily follow from being deprived of one's liberty do not in themselves constitute a violation of Article 3, cf. the Grand Chamber judgment of 08 July 2004 in *Ilaşcu and others v. Moldova and Russia,* paragraph 428. States are required, however, to ensure that every prisoner is detained in conditions that are compatible with respect for his human dignity, that the manner and method of the execution of the measure of deprivation of liberty do not subject subject him or her to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that his or her health and well-being are adequately secured, cf. the judgment of 27 November 2012 in *Apcov v. Moldova and Russia,* paragraph 40. In respect of a person who is deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct could, in principle, constitute a violation of Article 3, cf. the Grand Chamber judgment of 28 September 2015 in *Bouyid v. Belgium,* paragraph 88.

(14) The ECtHR has developed a considerable body of precedents concerning solitary confinement of prisoners. In so doing, the European Court of Human Rights has largely established general criteria for when such isolation would infringe on the rights established by Article 3 of the ECHR. The central principles of this case law could, as concluded by the Appeals Selection Committee of the Supreme Court, be summarized in the following four tenets:

(15) *Firstly:* The ECtHR has emphasized that the harmful potential of *complete* isolation, i.e. complete sensory deprivation, coupled with total social isolation, is so great that such isolation cannot be justified under any circumstances, cf. the judgment of 04 February 2003 in *Van der Ven v. Netherlands,* paragraph 51, and the Grand Chamber judgment of 12 May 2005 in *Öcalam v. Turkey,* paragraph 191. *Relative* isolation—in the form of absence of contact with other prisoners, which in a European context is a relatively common security measure—does not, according to said judgments, in itself constitute a violation of Article 3, cf, also the Grand Chamber judgment of 04 July 2006 in *Ramirez Sanchez v. France,* paragraph 123.

(16) *Secondly:* Article 3 does, however, establish limits even for relative isolation, cf. the judgment of 17 April 2012 in *Piechowicz v. Poland*, paragraphs 164–165, the judgment of 10 April 2012 in *Babar Ahmad and others v. United Kingdom,* paragraph 205 et seq., and the judgment of 27 November 2012 in *Chervenkov v. Bulgaria*, paragraphs 63–65. In *Babar Ahmad,* paragraph 207, the ECtHR points out that solitary confinement is one of the most invasive measures available in a prison, and that "all forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities". The judgment also points out that "the damaging effect of solitary confinement can be immediate and increases the longer the measure lasts and the more indeterminate it is". In paragraph 209 of the same judgment, the ECtHR states that solitary confinement should be avoided if possible, but that the issue of whether the solitary confinement is in violation of Article 3 "depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned". No maximum duration has been defined in ECtHR case law. However, solitary confinement "cannot be imposed on a prisoner indefinitely", cf. the Grand Chamber judgment of 04 July 2006 in *Ramirez Sanchez v. France,* paragraphs 136 and 145, the judgment of 10 April 2012 in *Babar Ahmad and others v. United Kingdom,* paragraph 210, and the judgment of 17 April 2012 in *Piechowicz v. Poland,* paragraph 164.

(17) *Thirdly:* Decisions concerning solitary confinement must be accompanied by procedural safeguards preventing arbitrary use of force and guaranteeing the prisoner's welfare and the proportionality of the measure, cf. the judgment of 10 April 2012 in *Babar Ahmad and others v. United Kingdom,* paragraph 212. In this paragraph, the ECtHR also lays out the specific procedural mechanisms that must be in place:

> **"First, solitary confinement measures should be ordered only exceptionally and after every precaution has been taken, as specified in paragraph 53.1 of the European Prison Rules. Second, the decision imposing solitary confinement must be based on genuine grounds both *ab initio* as well as when its duration is extended. Third, the authorities' decisions should make it possible to establish that they have carried out an assessment of the situation that takes into account the prisoner's circumstances, situation and behaviour and must provide substantive reasons in their support. The statement of reasons should be increasingly detailed and compelling as time goes by. Fourth, a system of regular monitoring of the prisoner's physical and mental condition should also be put in place in order to ensure that the solitary confinement measures remain appropriate in the circumstances … Lastly, it is essential that a prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement …"**

(18) *Fourthly:* The use of solitary confinement must be seen in light of the conditions of confinement in general, including the physical environment and other facilities. Other measures fit to cause suffering, such as the use of handcuffs or body searches, would necessarily have to be included in the overall assessment. On the other hand, one must also take into account whether the risk of harm or excessive suffering has been sought prevented, e.g. through other forms of physical, social or mental stimulation for the prisoner.

(19) Breivik served most of his initial sentence at Ila Detention and Security Prison, and as of 09 September 2013 he has been held at Telemark Prison in Skien. Since 08 August 2011 he has been held in a department with "an especially high security level" pursuant to Section 11, second paragraph, of the Execution of Sentences Act, cf. Section 10, second paragraph, of the same, and Chapter 6 of the Execution of Sentences Regulation. The law requires that "special security reasons make it necessary" for a prisoner to be held in such a department. Further details are provided by Section 6-2, first paragraph, of the Execution of Sentences Regulation, which states that prisoners whose 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 especially

serious new criminality" may be committed to a department with "an especially high security level". The grounds for such committal is subject to review every six months. Pursuant to Section 17 of the Execution of Sentences Act, prisoners committed to a department with "an especially high security level" shall be allowed the company of other prisoners in the same department. However, such company may be wholly or partially restricted in the interests of peace, order or security, or if it is in the interests of the prisoners themselves or other prisoners. In any event, the law establishes that any restrictions in contact with other prisoners must not constitute a disproportionate intervention. Insofar as only one prisoner is committed to a department with "an especially high security level", any decision to commit said prisoner to such a department would, in practice, entail that the person is cut off from contact with other prisoners.

(20) Breivik has, under and pursuant to the Execution of Sentences Act and the Execution of Sentences Regulations, been cut off from contact and community with other prisoners throughout his entire period of confinement. When he is transported through communal areas, the other prisoners are locked in their respective cells, to prevent unrest and to protect Breivik. His day-to-day human interaction is provided by prison personnel. Breivik has been offered extensive services from the prison's pastor, physician, psychiatrist and psychiatric nurse. Since November 2011, he has also been allowed approved and monitored visitors from the outside, provided that all communication take place through a glass wall. However, only his lawyers and a researcher, in addition to his mother—who died in March of 2013—have visited him. Since being transferred to Telemark Prison, Breivik has also been in regular contact with a prison visitor for up to 1.5 hours every week. He has always been allowed monitored phone calls of up to 20 minutes per week, and to send and receive monitored letters.

(21) The isolation of Breivik from other prisoners has now lasted close to six years. This is an extraordinarily long time. The solitary confinement has not been found to have harmed his physical or psychological health. However, the risk of severe and irreversible psychological trauma associated with such prolonged isolation from regular, meaningful human interaction is generally quite high. It therefore takes a lot to justify such solitary confinement with reference to Article 3 of the ECHR.

(22) The intention behind committing Breivik to a department with "an especially high security level" in isolation from other prisoners is central to any assessment of how these conditions relate to Article 3 of the ECHR.

(23) Committing Breivik to solitary confinement is considered necessary on grounds that Breivik is dangerous. In its judgment of 24 August 2012, sentencing Breivik to preventive detention, the district court concluded that there was a high risk of him committing serious violent offences in the future, even after serving out a regular period of imprisonment of 21 years. As detailed in the court of appeal's judgment, a number of risk assessments have been carried out on Breivik throughout his detention, and they all come to similar conclusions. Based on the extensive evidence presented, the court of appeal concluded that prison authorities were justified in concluding that Breivik represented, and continues to represent, a considerable security risk for his environment and society in general, even during his detention. Isolating him from other prisoners was done to prevent violence within the prison, reduce the risk of escape, prevent networking for the purpose of instigating new attacks and prevent Breivik from inspiring others to commit the kind of extreme violence he himself committed.

(24) Keeping him from interacting with other prisoners was also motivated by the assumption that the acts of terrorism for which Breivik was convicted—and the message he continues to

attempt to communicate in various contexts—entail a considerable risk of serious attacks on his person. Prison authorities have a duty to protect Breivik from such attacks, cf. Article 2 of the ECHR.

(25) In the early phases of his detention, especially, the security measures implemented were stringent, including frequent night-time inspections and the use of handcuffs and body searches. Over time, these measures have been eased, in line with, inter alia, recommendations from a visitor report, dated November 2015, by the Parliamentary Ombudsman's National Prevention Mechanism against torture and inhuman treatment in facilities where people are deprived of their liberty. Handcuffs have not been used inside the department since September 2015, and, according to the court of appeal's judgment, no body searches have been carried out since year's end 2015/early 2016. Night-time inspections have, over time, been limited to inspecting the areas outside the cell door.

(26) Generally speaking, there is no doubt that the conditions of Breivik's confinement cause him great hardship, and they are also potentially harmful. But they also, overall, cause no distress or hardship exceeding the unavoidable level of suffering inherent in the long period of detention Breivik is serving and in the fact that he, on several levels has represented, and continues to represent, an unusually high risk of very serious events. The court of appeal concluded that alternative, less invasive, measures have so far not been able to achieve a satisfactory level of security. This conclusion necessarily carries considerable weight in any assessment under Article 3 of the ECHR.

(27) It has been established that all measures implemented in connection with Breivik's conditions of confinement have been authorized by or implemented pursuant to law, and they have been based on what the ECtHR in *Babar Ahmad* refers to as "genuine grounds both *ab initio* as well as when its duration is extended". The issue of whether solitary confinement is necessary has been reviewed regularly. Health personnel have continuously monitored Breivik's health closely. Decisions to commit him to a department with "an especially high security level", which in reality has entailed solitary confinement, have been justified. These decisions have also been reviewed through administrative appeals procedures. As part of this action, Breivik has also been given the opportunity for judicial review of his case in several courts. The procedural safeguards emphasized by the ECtHR have therefore been satisfactorily implemented.

(28) The physical environment of Breivik's detention is, under the circumstances, very good. He has access to three continuous cells, with daylight and access to a TV, a shower, a toilet, a refrigerator, a computer, exercise equipment, a stereo system and a video game console. He has the option of going outside in the yard for one hour each day, and access to a newspaper every morning. During his detention, Breivik has been able to receive instruction, study and complete examinations at university level with good results. Increasingly, steps have been taken to facilitate for a more extensive and social interaction between Breivik and various categories of prison personnel. Breivik has a regular prison visitor, whom he is free to talk with every week. These moderating elements are central in assessing the conditions of his confinement in light of Article 3 of the ECHR, in that they make it easier for Breivik to cope with the stringent detention regime and the lack of ordinary human interaction. These measures contribute to giving his days a certain structure and meaning, and they facilitate for physical and mental stimulation. They also largely serve as a psychological substitute for the lack of social interaction with other prisoners.

(29) In its judgment, the court of appeal criticized the Norwegian Correctional Service: One should, to a greater extent, have considered the possibility of at least some degree of

interaction with other prisoners, and the decisions should have included a more detailed justification. Furthermore, the use of random body searches at Ila was, in the court of appeal's assessment, unnecessarily high. Also, one should, to a greater extent, have considered using bars instead of glass walls for visitation purposes.

(30) These criticisms are relevant for an assessment into whether the conditions of confinement have been, and continue to be, inhuman or degrading, cf. Article 3 of the ECHR. However, the material elements of Breivik's detention regime—including the degree of isolation—are based on verifiable professional assessments, and they are implemented for the purpose of safeguarding critical security concerns as well as Breivik's health and dignity. The Appeals Selection Committee recognizes that prison authorities, in Breivik's case, face a considerable challenge in maintaining an optimal balance in this respect.

(31) Upon an overall and comprehensive assessment, the court of appeal concluded that the threshold for infringement of rights established by Article 3 had not been exceeded. The Appeals Selection Committee of the Supreme Court sees no basis on which to draw a different conclusion. At this point, Breivik's appeal has no chances of succeeding in a hearing before the Supreme Court.

(32) *As concerns the remaining parts of the appeal* the Appeals Selection Committee of the Supreme Court has taken into account Breivik's claim that the use of handcuffs and body searches constitutes independent violations of Article 3. In this context, the Appeals Selection Committee finds it sufficient to refer to article 2.9 (pp. 45–47) of the court of appeal's judgment, with which the Committee concurs. As regards body searches and the right to respect for private life pursuant to Article 8, the Appeals Selection Committee also refers to the ECtHR's judgment of 01 June 2017 in *Dejnek v. Poland*, paragraphs 59–60.

(33) Furthermore, Breivik claimed that monitoring his correspondence and visits violates his right to respect for his private life and his correspondence pursuant to Article 8 of the ECHR. The court of appeal gave a comprehensive assessment on this issue as well, and concluded that the measures have statutory authority, pursue legitimate ends and are proportionate—and thus also justifiable under Article 8, cf. article 3.3 of the judgment (pp. 49–52). The Appeals Selection Committee sees no basis on which to draw a different conclusion.

(34) These other parts of Breivik's appeal also have, in the Appeals Selection Committee's view, no chances of succeeding in a hearing before the Supreme Court.

(35) In that no part of the appeal against the court of appeal's application of the law has any chance of succeeding, or raises any questions concerning the construction of Article 3 or 8 of the ECHR that has not already been settled by ECtHR case law, the Appeals Selection Committee unanimously finds that sufficient grounds to grant leave for the appeal to be heard by the Supreme Court do not exist, cf. Section 30-4, Subsection 1, of the Dispute Act.

(36) Based on the above, leave to appeal is refused.

(37) Given the circumstances, no costs of action are awarded in connection with the hearing in the Appeals Selection Committee of the Supreme Court.

CONCLUSION:

1. Leave to appeal is refused.

2. No costs of action are awarded.

Hilde Indreberg	Magnus Matningsdal	Arnfinn Bårdsen
(sign.)	(sign.)	(sign.)

True transcript certified: