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Ninety-third session
7 to 25 July 2008

VIEWS

Communication No. 1542/2007

Submitted by:	Mr. Abdeel Keerem Hassan Aboushanif (represented by counsel, Anders Ryssdal)
Alleged victim:	The author
State Party:	Norway
Date of communication:	20 November 2006 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 January 2007 (not issued in document form)
Date of adoption of Views:	17 July 2008

* Made public by decision of the Human Rights Committee.

Subject matter: Decision to deny leave to appeal not reasoned

Procedural issue: Substantiation of claim

Substantive issues: Right to review of conviction and sentence by higher tribunal

Article of the Covenant: 14, paragraph 5

Article of the Optional Protocol: 2

On 17 July 2008 the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1542/2007.

[ANNEX]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-third session

concerning

Communication No. 1542/2007[*]

Submitted by:	Mr. Abdeel Keerem Hassan Aboushanif (represented by counsel, Anders Ryssdal)
Alleged victim:	The author
State Party:	Norway
Date of communication:	20 November 2006 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 2008,

Having concluded its consideration of communication No. 1542/2007, submitted to the Human Rights Committee by Mr. Abdeel Keerem Hassan Aboushanif under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Two individual opinions signed by Committee members Mr. Ivan Shearer and Ms. Ruth Wedgwood are appended to the present decision.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 20 November 2006, is Mr. Abdeel Keerem Hassan Aboushanif. The author, who was born in 1946, came to Norway from Egypt in 1970. He has been serving a 20-month prison sentence since 23 November 2006. He claims to be a victim of a violation by Norway of article 14, paragraph 5, of the International Covenant on Civil and Political Rights. The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for Norway on 23 March 1976. The author is represented by counsel, Mr. Anders Ryssdal.

The facts as presented by the author

2.1 The author owns a number of restaurants in Norway. On 11 January 2006, he was convicted by the Sarpsborg District Court of fraud and several breaches of the Norwegian Act on Value Added Tax and the Norwegian Accounting Act.[1] He was sentenced to 20 months imprisonment and to pay damages to the Østfold revenue and social security offices. On 3 February 2006, he lodged an appeal on grounds of procedurals errors, including on the ground that the District Court based its decision on documents which were not presented to the parties.

2.2 On 1 June 2006, the Borgarting Court of Appeal denied leave to appeal. The author claims that no reason was given for the denial; the Court simply stated that it was clear that the appeal would not succeed. The author appealed against this decision to the Appeal Committee of the Supreme Court (*Kjæremåsutvalget*). The appeal was dismissed on 19 July 2006.

2.3 The author indicates that under the Norwegian Criminal Procedure Act[2], leave to appeal can only be denied when the Court of Appeal considers that an appeal will not succeed. Moreover, the decision of denial does not need to be substantiated. It can be challenged before the Appeal Committee of the Supreme Court, but only on grounds of procedural errors. According to the Supreme Court's jurisprudence, these provisions do not violate the requirements of the right to a fair trial. However, it has recognized that, in certain circumstances, the Court of Appeal may have to provide reasons for the denial of leave to appeal.

The complaint

3. The author claims that Norway violated his rights under article 14, paragraph 5, of the Covenant to have his criminal conviction and sentence reviewed by a higher tribunal according to law because the Court of Appeal did not provide any argument for the denial of leave to appeal against his conviction and sentence. Therefore, it cannot be ascertained that there has

[1] He was convicted for breaches of the Norwegian Penal Code (*straffeloven*) section 270 (1), paragraph 2; section 271; the Norwegian Act on Valued Added Tax (*merverdiagiftloven*) section 72, paragraph 1, nos. 1 and 3; and paragraph 2, nos. 2 and 3; the Norwegian Accounting Act (*regnskapsloven*) section 8-5, paragraph 1.1; section 1-2, chapter 2, section 10-2; and the Norwegian Accounting Law of 1977, chapter 2, sections 5, 6, 8 and 11, in connection with the Norwegian Penal Code, section 62(1).

[2] Section 321, second paragraph of the Norwegian Criminal Procedure Act reads. "An appeal to the Court of Appeal may otherwise be disallowed if the court finds it obvious that the appeal will not succeed (…)".

been a substantive examination of his appeal. He claims that, due to the nature and the complexity of his case, reasoned arguments for the preliminary dismissal of his appeal were required in order to ascertain that his appeal had been adequately reviewed in accordance with the requirements of article 14, paragraph 5, of the Covenant.

State party's observations on the admissibility and the merits of the communication

4.1 On 24 September 2007, the State party made its submission on the admissibility of the communication and on 23 November 2007, it made its submission on the merits. The State party maintains that the communication lacks sufficient substantiation and is therefore inadmissible under article 2 of the Optional Protocol. Alternatively, the State party argues that the leave to appeal proceeding complies with article 14, paragraph 5, of the Covenant.

4.2 The leave to appeal system was introduced in Norway in 1993 for felonies punishable by law with imprisonment for a term not exceeding six years. The requirements to disallow an appeal are strict: The Appeals Court, sitting with three professional judges, may only refuse an appeal if it unanimously determines that the appeal would not succeed. In making such determination, all three judges review the substance of the case. The decision of the Court of Appeal is made without oral hearings. However, the parties may express their views in writing and they may introduce new evidence.

4.3 The State party submits that the leave to appeal system constitutes a review within the meaning of article 14, paragraph 5, of the Covenant. Consequently, the Court of Appeals decision –albeit summarily reasoned- does not amount to a breach of the author's right to have his sentence reviewed. It states that the question whether the current system satisfies the requirements of article 14, paragraph 5, of the Covenant, was thoroughly assessed during the drafting of the bill amending the Criminal Procedure Act in 1993, including by an independent human rights expert, the Ministry of Justice and the National Assembly. The State party maintains that the leave to appeal system in Norway ensures a thorough review of the substance of all cases while taking procedural economy into consideration.

4.4 The State party refers to the Committee's Views in the case of *Bryhn v. Norway,*[3] where the Committee decided that the leave for appeal system did not breach article 14, paragraph 5, of the Covenant. In accordance with this decision, article 14, paragraph 5, does not require written decisions to be reasoned beyond the summary reasons given in this case, and that the totality of the review process must be scrutinized. The State party adds that if all decisions in appeal proceedings have to be reasoned, this would jeopardize the role of the jury.

4.5 The State party maintains that there is no reason to assume that the author did not have his case reviewed in substance, as all his arguments were thoroughly commented on and refuted by the Prosecuting Authority before the Court of Appeal decided not to grant the leave to appeal. Furthermore, the wording of the Court of Appeal's decision indicates that the Court has considered the appeal in detail. Lastly, the fact that the Supreme Court's Appeal Committee - which also had all documents available- upheld the decision of the Court of Appeal, even though the author pointed to the lack of reasoning in that decision, confirms that no errors have occurred

[3] Communication No. 789/1997, *Bryhn v. Norway*, Views of 29 October 1999.

and that the Borgarting Court of Appeal thoroughly and objectively reviewed each appeal ground.

4.6 On the merits, the State party argues that article 14, paragraph 5, of the Covenant does not require the Court of Appeal to provide detailed reasons for its decision in order to ascertain that a substantive review has taken place. It adds that this provision aims at securing the effective exercise of the right to appeal. As a reasoned, written judgment of the trial courts forms the basis for most appeals, the right to a review would naturally be hampered without it.[4] Reasoned decisions from the appellate courts may be necessary when there is a further avenue of appeal, to form the basis for such an appeal.[5] In the present case, however, the decision of the Court of Appeal was final, as the author has no further avenue of appeal concerning the sufficiency of the evidence or the application of the law. The interlocutory appeal to the Supreme Court was limited by law to procedural errors made by the Court of Appeal. Thus, even if the Court of Appeal had provided detailed comments on the issues that formed the basis for the author's appeal, i.e. the facts (calculation of mark-up rates), the law (correct standard of proof) or alleged procedural errors of the District Court (the evidentiary basis for the conviction), those grounds would fall outside the scope of the review by the Supreme Court. Hence, the appellate court's reasoning could not have formed the basis for a further appeal and was thus unnecessary to secure an effective exercise of the right to appeal within the meaning of article 14, paragraph 5, of the Covenant.

4.7 The State party submits that the Borgarting Court of Appeal was the most appropriate body to determine whether or not there were sufficient grounds for granting leave to appeal in this case. The State party makes reference to a statement by the Chief Judge of the Borgarting Court of Appeal where he confirms that the appellate judges will always consider the decision of the District Court, the reason provided for the appeal and all investigation documents, including police reports and statements from witnesses. Furthermore, the Chief Judge controlled the judges' notes and confirmed that the case was handled procedurally correctly.

4.8 The State party invokes decisions by both the former European Commission of Human Rights and the European Court of Human Rights, which accepted that the leave to appeal procedure conforms with the European Convention on Human Rights and its Protocol 7. It also compared the Norwegian system with the Swedish system, where decisions not to grant leave for appeal are, in practice, never reasoned.

Author's comments on the State party's observations

5.1 On 16 May 2007, the author submitted comments on the State party's response. He states that the proceedings before the Sarpsborg District Court were long and complex, and that it is impossible for any appellate tribunal to establish without doubt that the appeal could not succeed, simply by reading the judgement and the appeal. He maintains that the trial court consistently adopted the prosecution's view, even if a number of issues required assessment and

[4] The State party refers to General Comment No. 32, *Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32 of 23 August 2007.
[5] The State party refers to Communication No. 709/1996, *Bailey v. Jamaica*, Views of 21 July 1999.

discretion by the court. Furthermore, the author states that the trial court based its decision on evidence that had not been presented to the court and that the sentence imposed was extremely harsh.

5.2 The author submits that the court did not apply the correct standard of proof in its judgement: it used the civil law "balance of probabilities" threshold, rather than the criminal law "beyond reasonable doubt" standard. Moreover, the court adopted the County Tax Office statements without conducting its own independent evaluation of the facts. In addition, no expert judges were elected to sit on such a difficult and complex financial case. The Court of Appeal could not conclude, simply by reading the judgment and the appeal and without reviewing the parties' evidence, that the appeal would certainly fail on all counts.

5.3 The author argues that there was a breach of the rules on evidence at the trial court, as it contains factual errors, which discredit the lower court proceedings generally and calls for a hearing *de novo*. As to the punishment imposed, the author believes that his sentence was much more severe that the ones rendered in similar cases, which entitles him to a new examination of his case in appeal.

5.4 The author states that, in cases where the lower court judgment reveals deficiencies as regards due process, the Norwegian Supreme Court has required that appeal rejections be reasoned. The fact that the Supreme Court did not detect the errors in the case of the author demonstrated that the Norwegian system failed. He refers to a number of Norwegian judicial decisions, where the Supreme Court has stated that the appellate court should provide justification for rejecting an appeal.[6] As regards the jurisprudence of the Committee,[7] the author disagrees with the interpretation of the *Bailey* case[8] made by the State party and submits that in that case, unlike his, the author was indeed provided with a reasoned decision. With respect to the *Bryhn* case[9], the author argues that this decision is irrelevant, as it is outdated and as the issue of the need for a reasoned decision was not discussed by the Committee.

5.5 The author submits that procedural economy cannot constitute a valid argument to limit the right to appellate review. As regards the State party's contention that a decision in his favour would jeopardize the role of the jury, the author contends that jury decisions are reasoned and that they maintain important legal safeguards.

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[6] Cases HR-1998-00227 – Rt-1998-710 (207-98); HR-2001-01409 – Rt-2001-1635 (295-2001); HR-2002-01401 – Rt-2002-1733 (382-2002); HR-2006-01949-U – Rt-2006-1445; and HR-2007-00880-U – Rt-2007-789.

[7] The author refers, *inter alia*, to Communication No. 355/1989, *Reid v. Jamaica*, Views adopted on 8 July 1994; Communication No. 662/1995, *Lumley v. Jamaica*, Views adopted on 31 March 1999; and Communication No. 230/1987, *Henry v. Jamaica*, Views adopted on 1 November 1991.

[8] *Bailey v. Jamaica*, op. cit.

[9] *Bryhn v. Norway*, op. cit.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement, and that it is uncontested that domestic remedies have been exhausted.

6.3 The Committee notes the State party's argument that the communication should be considered inadmissible under article 2 of the Optional Protocol due to lack of sufficient substantiation. The Committee considers that the author's allegations have been sufficiently substantiated, for purposes of admissibility. It therefore decides that the communication is admissible in as far as it appears to raise issues under article 14, paragraph 5, of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the author's claim that his rights under article 14, paragraph 5, to have his conviction and sentence reviewed by a higher tribunal was violated, because the decision of the Court of Appeal did not disclose the reasons for disallowing his appeal against the District Court. The Committee also notes that the decision to reject the appeal was unanimous and subscribed to by three professional judges, and that the decision was later appealed and subjected to the scrutiny of the Supreme Court, albeit only on procedural grounds. The Committee recalls its jurisprudence, according to which, while States parties are free to set the modalities of appeal, under article 14, paragraph 5, they are under an obligation to review substantially the conviction and sentence.[10] In the present case, the judgment of the Court of Appeal does not provide any substantive reason at all as to why the court determined that it was clear that the appeal would not succeed, which puts into question the existence of a substantial review of the author's conviction and sentence. The Committee considers that, in the circumstances of the case, the lack of a duly reasoned judgment, even if in brief form, providing a justification for the court's decision that the appeal would be unsuccessful, impairs the effective exercise of the right to have one's conviction reviewed as required by article 14, paragraph 5, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

[10] *Reid v. Jamaica*, op. cit., para. 14.3.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the review of his appeal before the Court of Appeals and compensation. The State party is also under an obligation to take measures to prevent similar violations in the future.

10. By becoming a party to the Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and, pursuant to article 2 of the Covenant, the State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. In this respect, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

APPENDIX

Individual opinion of Committee member Mr. Ivan Shearer (concurring)

I agree with my colleagues in the result of this communication, but I wish to state my understanding of the meaning of the words "even if in brief form" contained in paragraph 7.2 of the Views of the Committee. In my opinion article 14 (5) of the Covenant does not require courts of appeal, and especially final courts of appeal, to state reasons at length when considering applications for leave to appeal against conviction or sentence, either orally or on the papers. Indeed such a requirement would impose an intolerable burden on the higher courts of populous states. On the other hand, something more is required than a formulaic response to the effect that the appeal has no prospect of success. However briefly stated, the Court should indicate to the appellant the main reasons why the Court cannot entertain the appeal. I draw to the State party's attention a useful reflection by a serving judge of a final court of appeal on the general problem, not limited to criminal cases, raised by the present communication: M.D. Kirby, "Maximising Special Leave Performance in the High Court of Australia" in 30 University of New South Wales Law Journal 731-752 (2007). Examples of brief reasons typically given by the High Court of Australia in particular cases rejecting applications for special leave to appeal are to be found on the web site http://www.austlii.edu.au/au/cases/cth/HCASL.

[*signed*] Mr. Ivan Shearer

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion of Committee member Ms. Ruth Wedgwood (dissenting)

The author of this communication is a trained economist and experienced restaurant owner, who had previously developed and sold various restaurant establishments.

In July 2005 he was charged with significant financial offenses in relation to two of his restaurants. In January 2006, after a five-week trial before a three-judge court composed of professional judges, the author was found guilty of evading Norway's Value Added Tax by filing incorrect tax returns that underreported actual sales, as well as by failing to file required VAT returns. In addition, he was convicted of failing to maintain the required documentation of accounting information. And finally, he was convicted of fraudulent receipt of sickness and rehabilitation benefits during a period when he was in fact working. He was acquitted on a charge of receiving the proceeds of a criminal act. The court imposed a sentence of twenty months in jail.

Norway accompanied its ratification of the International Covenant on Civil and Political Rights, in 1972, with a general reservation in regard to Article 14(5) of the Covenant, concerning the right to appeal criminal convictions. However, in 1995, the State Party amended its judicial code to provide for the possibility of review of criminal convictions in all ordinary cases, through a "leave to appeal" system. With this change, Norway preserved its Article 14(5) reservation for two situations only: the trial of public officials in courts of "impeachment", and the entry of a conviction by an appellate court following an initial judgment of acquittal below.

Under the Covenant, the case of Mr. Aboushanif is one that falls on the margin. The Norwegian trial court wrote a 28 page single-spaced opinion explaining the basis for the conviction and the sentence, including rarified details of the methodology used in the calculation of actual restaurant receipts. The three-judge panel of the Court of Appeals received briefs from both sides, and then denied the application for leave to appeal, concluding in three operative paragraphs that it was "clear that the appeal will not succeed." This was a unanimous decision, and had a single judge disagreed, the case would have gone forward for a full review. The Court of Appeal noted that the issues it had considered addressed matters of "the procedure, the application of law and the assessment of the sentence", as well as the calculation of the amount of VAT evaded and the extent of the National Insurance fraud.

The Committee now concludes that this abbreviated opinion constitutes a violation of Article 14(5) of the Covenant.

It is plain that the exercise of writing an opinion is a useful discipline for every conscientious judge. It helps to guarantee fairness and the appearance of fairness to the parties. An esteemed common law judge in the American system, Judge Henry J. Friendly, famously remarked that there are times when "the opinion will not write." Indeed, it is the task of setting pen to paper that may frame the problems of a case most cogently for a reviewing judge.

Nonetheless, this good practice must be squared against the language and intention of the Covenant. Article 14(5) states that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Article 14(5) does not speak, as such, of the procedural requirements of an appeal, though these may be

grounded on general principles of law. But it is notable that shortly after Norway's "leave to appeal" system was instituted, the Human Rights Committee concluded that Article 14(5) was satisfied, even where no oral hearing was provided to the parties. See Bryhn v. Norway, No. 789/1997, 29 October 1999.

So, too, in July 2007, the Committee issued the final text of General Comment 32, on the scope of Article 14. This summary of Committee jurisprudence states that "The right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement *of the trial court*, and at least in the court of first appeal *where domestic law provides for several instances of appeal* …" See General Comment 31, at section 7. This may reflect the view that a written opinion is necessary in part to permit another court to review the proceedings below. But it does not, as such, require more than one level of review.

We do not have at hand any survey of how many states parties have a "leave to appeal" system. And certainly, there are state systems that use abbreviated opinions in disposing of appeals on the merits, restricting full opinions to the cases that present novel issues of law or have significant public import. The view may be taken that the parties are familiar with the facts as found below, and that the case is therefore not worthy of extended exegesis.

In the system of the State Party in this case, the scope of review provided at the level of the third instance court, in the Norwegian Supreme Court, is seemingly confined to procedural errors that occur in the Court of Appeals, rather than in the trial court. Hence, there may not be the additional level of appeal that would, under the contemplation of General Comment 32, require the publication of a "duly reasoned" and "written" exegesis by the appellate court.

In any event, the Committee should exercise some caution in this area. Caseloads can be crushing in a great many legal systems. The liberality of the Norwegian system, in permitting a party to seek leave to appeal on any point of law or fact, would be discouraged by a requirement of elaborate opinions. And the State Party has noted that the role of the jury system in the adjudication of some appeals in the Norwegian system may effectively preclude the use of written opinions. This Committee, too, has pressed many states parties on the importance of the speedy disposition of appeals, as much as speedy trials. And certainly, it would not have added much if the Court of Appeals in this case had said, "For the reasons adduced by the Trial Court, we affirm." Thus, though it is hardly a surprise, it will often be difficult to strike the right balance between the various demands of fairness in a criminal justice system.

[*signed*] Ms. Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
