

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF HANSEN v. NORWAY

(Application no. 15319/09)

JUDGMENT

STRASBOURG

2 October 2014

FINAL

02/01/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Hansen v. Norway,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 9 September 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 15319/09) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Norwegian national, Mr Hroar Anton Hansen ("the applicant"), on 19 March 2009.

2. The applicant was represented by Mr A.C. Ryssdal, a lawyer practising in Oslo. The Norwegian Government ("the Government") were represented by their Agent, Mr M. Emberland, Attorney, Attorney General's Office (Civil Affairs).

3. The applicant complained that the reasons stated by the Borgarting High Court in refusing to admit his appeal had been inadequate and thus entailed breach of Article 6 § 1 of the Convention.

4. On 31 August 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant lives at Nesoddtangen, Norway.

6. In 1989 Mrs B., who was then the applicant's wife, bought a property named *Ekheim* from him for 6,400,000 Norwegian kroner (NOK), currently corresponding to approximately 760,000 euros (EUR). The couple drew up marital agreements ("*ektepakt*") in 1990 and 1995.

7. On 3 November 1995 Mrs B. and the applicant concluded an agreement stipulating that they each owned 50% of the *Ekheim* estate, regardless of what was stated or might follow from formal entitlements (hereinafter referred to as the joint ownership agreement).

8. Subsequently, after their divorce, the applicant lodged an action against Mrs B. with Fredrikstad City Court (*tingrett)*, seeking a ruling to the effect that the marital agreements were invalid and that the joint ownership agreement was valid. By a judgment of 4 April 2001, the City Court found against the applicant and in favour of the respondent, concluding that the marital agreements were valid and that the joint ownership agreement was invalid. The applicant did not appeal against this judgment, which gained legal force.

9. In 2005 Mrs B. sold the *Ekheim* estate to *Ekheim Invest AS*, a limited liability company, for NOK 15,000,000 (approximately EUR 1,1780,000).

10. On 28 June 2007 the applicant instituted civil proceedings before the City Court against *Ekheim Invest* claiming that he had title to 50% of the *Ekheim* estate and seeking, firstly, an order that the latter convey 50% of the property to him and, secondly, that he held a pre-emption right with respect to the remaining 50%.

11. According to the summary of the applicant's submissions made by the City Court in its judgment referred to below, the applicant argued in the main as follows:

(a) The question was how to interpret the former spouses' joint ownership agreement of 3 November 1995. In the case that had previously been decided by the City Court on 4 April 2001, the subject-matter of the dispute had been whether the marital agreements from 1990 and 1995 were valid. The subject-matter in the present case was different. Two spouses having completely separate property had the opportunity to conclude a mutual agreement involving an obligation of performance for each party. According to legal doctrine, such a contract was not dependent on any condition as to form.

(b) The contract had been a reality in the present case. *Ekheim Invest* had purchased the half of the *Ekheim* estate that had been in Mrs B.'s ownership, not the half owned by the applicant, because Mrs B. had had no right to sell the other half. Consequently, *Ekheim Invest* ought to transfer by deed of conveyance half of the *Ekheim* estate back to the applicant.

(c) The applicant further submitted that in its 2001 judgment the City Court had not reviewed the validity of the joint ownership agreement. In any event, the legal force of that judgment extended only to the relationship between Mrs B. and the applicant, not between *Ekheim Invest* and the applicant. The applicant referred to legal doctrine, according to which a judgment as a main rule only had legal force in the relationship between the parties to the proceedings. Moreover, the parties' arguments ought to be taken as a starting point in the assessment of whether any new factual circumstances had arisen.

(d) The applicant's argument was that in the period since 2001 the estate had increased so greatly in value that the City Court now had to assess the ownership issue independently of the conclusion reached in the 2001 judgment. At that time the mortgages on the property had clearly exceeded its value and it had therefore been unproblematic to hold that, in light of an on-going bankruptcy at the time, the applicant would not have been in a better position in the absence of the marriage settlement agreements. It would be unreasonable if Mrs B. or her successors should be able to profit from the tremendous increase in the property's value.

12. By a judgment of 21 January 2008, the City Court found in favour of the respondent *Ekheim Invest*, on the ground that the applicant did not have title to the property in question as the respondent company had derived its rights from Mrs B. and the City Court had ruled in her favour in its 2001 judgment. It rejected the applicant's argument based on legal doctrine that the 2001 judgment only had legal force between the parties by referring to another passage in the legal manual in question from which it appeared that the point only applied to disputes between a private party and public authorities. The action brought by the applicant had no public-law aspects and the City Court did not consider that the legal doctrine referred to had any bearing on the present case.

13. The applicant appealed against the City Court's judgment of 21 January 2008 to the Borgarting High Court (*lagmannsrett*). He argued in particular that the City Court had confused his pleadings and references to legal doctrine made at the oral hearing and had shortened the overall duration of the hearing from the three days initially scheduled to five hours. One hour into the hearing the City Court had truncated the hearing of the applicant's witnesses, including the presentation of documentary evidence regarding the disputed agreements. The City Court's hearing record had also been marred by formal mistakes.

14. On 4 April 2008 the High Court warned the applicant that it envisaged refusing admission of his appeal and gave him until 21 April 2008 to comment. After an extension of this time-limit to 5 May 2008 the applicant on the latter date requested that his appeal be admitted for examination or, in the alternative, that the High Court quash the City Court's judgment and refer the case back to the City Court for fresh examination. On 5 and 11 June 2008 he filed additional submissions.

15. In a unanimous decision (*beslutning*) of 12 June 2008 the High Court concluded that it refused to admit the appeal ("*Anken nektes fremmet*"), giving the following reasons:

> "The High Court finds it clear that the appeal will not succeed, and that its admission should therefore be refused pursuant to Article 29-13(2) of the Code of Civil Procedure."

16. The applicant appealed against the High Court's decision to the Supreme Court, arguing notably that the refusal of admission of the appeal lacked reasons.

17. On 19 September 2008 the Appeals Leave Committee of the Supreme Court (*Høyesteretts ankeutvalg*), pointing out that its jurisdiction was confined to reviewing the High Court procedure (Article 29-13 (5) of the Code of Civil Procedure), unanimously found it clear that the appeal would not succeed and therefore rejected the appeal under Article 30-9 (2).

II. RELEVANT DOMESTIC LAW AND PRACTICE AND INTERNATIONAL COMPARATIVE LAW

A. Provisions regarding the filtering of civil appeals to the High Court

18. The 2005 Code of Civil Procedure (*Tvisteloven*) entered into force on 1 January 2008 and replaced the 1915 Code of Civil Procedure (*tvistemålsloven*).

19. Under Article 29-12 of the 2005 Code of Civil Procedure, the High Court could at the preparatory stage (a) dismiss (*avvise*) an appeal on the ground that is suffered from errors that ought to lead to dismissal; (b) discontinue the proceedings in whole or in part on the ground of lack of jurisdiction or that the matter is already *res judicata*; (c) quash the appealed decision on grounds of errors that ought unconditionally to be given effect.

20. The conditions for the High Court granting leave to appeal and for refusing the admission of an appeal ("*Krav til samtykke. Nektelse*") were set out in Article 29-13.

21. Under paragraph 1 of this provision an appeal against a City Court judgment could not be admitted without the leave to appeal being granted by the High Court if the value of the subject-matter was less than NOK 125,000 (approximately EUR 15,000). The provision, which further set out certain criteria for a grant of leave to appeal, did not come into play in the instant case, where the appeal related to pecuniary interests (approximately EUR 1,780,000) exceeding by far that minimum threshold.

22. The ground on which the High Court had refused admission of the appeal in the present case was based on a filtering provision introduced by the 2005 Code concerning civil appeals to the High Court. Paragraph 2 of Article 29-13 read:

> "The admission of an appeal against a judgment may be refused if the High Court finds it clear that the appeal will not succeed. A refusal may be limited to certain claims or appeal grounds."

23. Unless an appeal had been decided under Articles 29-12 or 29-13, the proceedings were to continue, according to Article 29-14. The

preparation of the proceedings was to concentrate on matters that should be reviewed according to the appeal and were disputed.

24. Article 19-6 set out the requirements regarding the contents of judgments and decisions of the national courts. Paragraph 4 of this article provided that judgments (*dommer*) and certain procedural decisions (*kjennelser*) should include a presentation of the case, a statement of the parties' arguments and claims and the court's reasoning. The type of decision (*beslutning*) at issue in the present case was not mentioned.

B. Preparatory works

25. From the preparatory works to the 2005 Code of Civil Procedure it can be seen that the aim of introducing a merits filtering mechanism before the High Court, in addition to the already existing leave to appeal requirements for disputes concerning pecuniary interests below the minimum level described above, was to promote the interests of procedural economy. The committee submitting draft statutory provisions recognised that there was a need to stop clearly unmeritorious appeals to the High Court in order to avoid additional considerable costs being incurred by the parties and by the judiciary (*Rett på sak Lov om tvisteløsning – (tvisteloven)*, *Norges Offentlige Utredninger* ("*NOU*" Official Norwegian Report) 2001:32, at pp. 775-779)).

26. In supporting the proposal, the Ministry of Justice observed that, whilst the right to appellate review of a decision on the merits was an important safeguard, an unlimited and extensive right in this respect could be counterproductive to the rule of law (*Ot.prp. nr. 51* (2004-2005), p. 296).

27. It was also noted that the Supreme Court had for decades made use of a similar provision for refusing the admission of appeals under former Article 373 (3) no. 1 of the 1912 Code of Civil Procedure (see *NOU* 2001:32, p. 779). This was in the context of a leave-to-appeal procedure.

28. The substantive effect of a refusal of admission of an appeal was that the judgment appealed against gained legal force; the force of *res judicata* depended on the judgment, not the refusal of admission of the appeal (*NOU* 2001:32, p. 401).

29. The High Court's role in appeal proceedings in a civil case was not to examine the case afresh but to review the first-instance court's decision that formed the subject of the appeal (*NOU* 2001:32, p. 781). After carrying out an examination of the merits of the case, normally on the basis of the case file as it stood, the High Court could refuse admission of the appeal provided that it found it "clear" that the appeal had no prospects of success. "Clear" implied a high degree of certainty that the outcome would remain unaltered after an ordinary appeal hearing (ibid., p. 778). It was not a condition for refusing admission of the appeal that the High Court agreed

with the City Court's reasoning or was of the view that its reasoning would stand after the High Court's review of the case. It was sufficient that the High Court found it clear that the outcome would be upheld, possibly on a different reasoning than that given by the City Court (*Ot.prp. nr. 51* (2004-2005), p. 475). It was moreover a condition in Article 29-13 (5) that the three judges taking part in the decision to refuse admission of the appeal unanimously found that the appeal would not succeed (ibid., p. 476).

C. Views of the UN Human Rights Committee of 17 July 2008 regarding Communication No. 1542/2007

30. A provision corresponding to Article 29-13 (2) of the Code of Civil Procedure may be found in Article 321 (2) of the Code of Criminal Procedure (*Straffeprossessloven*), according to which the High Court may refuse the admission of an appeal in a criminal case if it finds it clear that the appeal will not succeed.

31. On 17 July 2008, the United Nations Human Rights Committee communicated its "Views" on a communication (no. 1542/2007) lodged by Mr Abdel Kereem Hassan Aboushanif under the Protocol to the 1966 International Covenant on Civil and Political Rights concerning the lack of reasoning in a decision by a Norwegian High Court refusing the admission of an appeal in criminal proceedings. It stated:

> "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. ... In the present case, the judgment of the [High] Court ... 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."

D. Ensuing developments in the Supreme Court's case-law as well as legislative change

32. Following the Human Rights Committee's "Views" in Mr Aboushanif's case, the Norwegian Supreme Court, sitting in a Grand Chamber of eleven judges, delivered three decisions on 9 December 2008 (*Norsk Retstidende* – "*Rt.*" – 2008 at pp. 1764, 1783 and 1786) in *criminal* proceedings. It concluded that from Article 14 § 5 of the Covenant it followed that every High Court decision refusing admission of an appeal under Article 321 § 2 of the Code of Criminal Procedure ought to be reasoned. It further held that this requirement ought to be considered part of Norwegian national law (section 3 of the Norwegian Human Rights Act).

33. The Supreme Court emphasised two main considerations for why High Court decisions refusing admission of an appeal ought to contain reasons. Firstly, it stressed that reasons must be provided in order to ensure the efficiency of the High Court's review. Omitting to provide reasons "impair[ed] the effective exercise of the right to have one's conviction reviewed". The requirement of reasons was a necessary safeguard for ensuring a substantial review. By requiring the court to explain why the appeal would not succeed, one could ensure that the decision was reached on the basis of a thorough and sound assessment.

34. Secondly, the lack of reasons made it impossible to verify whether there had been a substantial review of the appeal. The Supreme Court held that this was relevant for the appellant – the reason for the refusal should enable the appellant to verify that the issues raised in the appeal had been properly assessed. In addition, it was relevant for the superior review body, where such existed. Where the law provided that the decision of the appellate instance could be appealed against to a superior body, the decision of the appellate body ought to be reasoned in such a manner as to enable review of the decision.

35. As to the extent to which reasoning was required, the Supreme Court observed that as a starting point, the reasoning should include what was needed to show that a substantial review had taken place. Usually, such reasoning could be done summarily, in a brief and succinct form, and be linked to the submissions in the appeal. The reasoning should show that the alleged errors in the first-instance court's decision had been understood and why the appeal clearly would not succeed. This meant that it would be insufficient, as had been done previously, to state the grounds for appeal and paraphrase the statutory requirement for refusing admission of an appeal. In this connection the reasoning should be formulated with a view to enabling the Supreme Court to review the High Court procedure, including whether a substantial review had been carried out as required by Article 14 (5) of the Covenant. The extent of the reasoning required would vary considerably, depending on the nature of the particular case, ranging from a couple of sentences to more extensive reasoning of a legal or factual character.

36. On 18 September 2009, the Supreme Court, sitting in a Grand Chamber formation in *civil* proceedings (*Rt.* 2009 p. 1118), by nine votes to two, quashed a High Court decision refusing admission of an appeal on the basis of Article 29-13 (2) of the Code of Civil Procedure. The Supreme Court was divided, with respect to the reasons for quashing the High Court's decision.

37. A majority of seven members considered the subject matter in relation to Article 88 of the Constitution, according which the Supreme Court was to adjudicate in final instance and limitations thereon ought to be prescribed by law. The majority observed that this provision left the legislator great latitude in organising the national system of judicial remedies as it deemed appropriate. Whilst a system giving the High Court

the final say on questions of law would be at odds with this provision, one that limited the right to appeal against the assessment of evidence would not. However, a filtering system for appeals would not as such be incompatible with Article 88. Nor did it follow that the High Court's refusal to admit an appeal ought to be reasoned or that the Supreme Court ought to have competence to review the City Court and or the High Court's application of the law. There were also other mechanisms that could ensure the Supreme Court the necessary control.

38. The majority noted that, according to Article 29-13 (5) of the Code, a decision of the High Court to refuse the admission of an appeal could be appealed to the Supreme Court in so far as the High Court procedure was concerned. The Supreme Court's competence to review the High Court procedure encompassed questions of whether a breach had occurred of expressly stated rules of procedure. The Supreme Court was empowered to fully examine the application of the law and the assessment of the evidence in relation to questions of procedure and, if necessary, determine whether an error of procedure had materialised (see *NOU* 2001:32 p. 777, *Rt*. 2008 p. 1317; *Rt*. 2009 p. 222 and *Rt*. 2009 p. 411). The Supreme Court could also review whether the High Court procedure, seen as a whole, including its exercise of discretionary powers in this respect, had been justifiable ("*forsvarlig*"), cf. Article 1-1 (1), setting out the Code's general purpose to guarantee a fair hearing, and Article 6 § 1 of the Convention. This also covered whether in the light of the points of law raised in the case was justifiable for the High Court to refuse admission of the appeal (*Rt*. 2002 p. 1032). The Supreme Court could in addition review whether the state of the evidence before the High Court suggested that the subject matter could be adequately dealt with on the basis of the written case-file in a simplified procedure. The majority further emphasised that, in assessing whether in view of the points of law raised in the case was justifiable for the High Court to refuse admission of the appeal, regard could be had to whether the case raised issues of constitutional law or questions regarding Norway's international legal obligations or whether the High Court should have admitted the appeal in the interest of legal unity, clarification or development of the law, with a possibility for lodging an ordinary appeal to the Supreme Court. This ought to be sufficient to satisfy Article 88 of the Constitution.

39. Since the Supreme Court in any event could base its review of the High Court procedure on the same material as had been before the latter, no constitutional obligation to give reasons for a High Court refusal to admit an appeal could be justified by the interests of the Supreme Court procedure.

40. The majority's conclusion relied on systemic considerations and what they considered as clear presumptions on the part of the legislator. Bearing in mind the connection to Article 321 (2) of the Code of Criminal Procedure and the developments that had taken place with regard to the issue of reasoning for refusals of admission of an appeal in criminal cases, it

followed that a general requirement for stating reasons also applied to refusals of admission of an appeal under Article 29-13 (2) of the Code of Civil Procedure. The relevant High Court should therefore have given reasons for its impugned decision in that case.

41. In the light of the foregoing, the Supreme Court's majority found it unnecessary to consider the alternative plea that the decision had to be quashed in view of the requirements of Article 6 of the Convention and Article 14 of the Covenant that national decisions be reasoned.

42. Two concurring judges emphasised that the procedure for refusing admission of an appeal entitled a full review of the first-instance decision on the merits and that the High Court's omission to give reasons for its decision to refuse admission of an appeal entailed a violation of Article 6 § 1 of the Convention. The decision therefore had to be quashed.

43. Two dissenting members disagreed with the majority view that the obligation to state reasons for a refusal of admission of an appeal in criminal cases also extended to civil cases. Nor did they find that a requirement to this effect could be deduced from Article 6 § 1 of the Convention.

44. As a result of the above-mentioned developments, there is currently a general obligation for Norwegian high courts to state reasons (see paragraph 35 above) for a decision refusing admission of an appeal under Article 29-13 (2) of the Code of Civil Procedure.

45. On 11 June 2010 the Ministry of Justice proposed to Parliament (*Prop. 141L* (2009-2010)) certain amendments to the Code of Criminal Procedure and the Code of Civil Procedure, including a provision requiring High Courts to state reasons for decisions refusing admission of an appeal. Without stating any view on compliance with Article 6 § 1 of the Convention, the Ministry pointed out that the Supreme Court ruling of 18 September 2009 reflected applicable law and that the relevant provisions in the respective codes should be amended accordingly and in a similar manner. For High Courts the financial and administrative consequences of the proposed changes should be manageable.

46. With effect from 10 December 2010, Article 29-13 (5) was amended to include a requirement that a refusal of admission of an appeal under Article 29-13 (2) had to be reasoned ("*begrunnet*").

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

47. The applicant complained that in its decision of 12 June 2008 the High Court had dismissed his appeal against the City Court's judgment of 21 January 2008 without providing adequate reasons, in breach of the fair

hearing guarantee in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

48. The Government contested that argument.

A. Admissibility

1. The Government's submissions

49. The Government disputed the applicability of Article 6 § 1 of the Convention to the impugned decision taken by the High Court to refuse to admit the applicant's appeal for examination on the merits. Although the dispute was one that concerned his "civil rights", the decision in question could not be said to constitute a "determination" of that right within the meaning of Article 6 § 1. In this connection, relying on *Athanassoglou and Others v. Switzerland* [GC] (no. 27644/95, § 43, ECHR 2000-IV), the Government emphasised that "[t]he outcome of the proceedings must be directly decisive for the right in question" and that "mere tenuous connections or remote consequences [were] not sufficient to bring Article 6 § 1 into play". Moreover, in *Gorou v. Greece (no. 2)* [GC] (no. 12686/03, § 29, 20 March 2009) the Grand Chamber had held that "in assessing whether there [was] a dispute over a civil right, one must look beyond the appearances and the language used and concentrate on the realities of the situation ... according to the circumstances of each case".

50. The Government submitted that in the instant case the 2001 judgment of the City Court was final and also settled the dispute between the parties to the 2008 proceedings. The decision concerning the appeal to the High Court in 2008, however, determined a different question, namely whether or not the applicant's case should be examined again. The High Court's decision – having regard to "the realities of the situation" in the circumstances of the applicant's case – had only tenuous connections or remote consequences to the "civil right" in question. It differed, for example, from a decision that either confirmed or quashed a previous judgment.

51. Thus, with reference to the particular circumstances of the case, the Government invited the Court to hold that Article 6 § 1 did not apply to the case at hand and to declare the application inadmissible as being incompatible *ratione materiae* with the provisions of the Convention, in accordance with Article 35 §§ 3(a) and 4.

2. The applicant's submissions

52. The applicant, disagreeing with the Government, maintained that from the Court's case-law it followed that the scope of applicability of

Article 6 § 1 of the Convention ought not to be interpreted restrictively. Not only the City Court but also the High Court expressly determined the private property rights of the applicant and their decisions were "directly decisive" for the existence, scope or modalities of the rights and obligations concerned.

53. The Government's suggestion that the 2001 proceedings provided a final determination of the applicant's property rights and that the 2008 proceedings simply regarded the question of whether the case should be examined again was incorrect. Whilst it was true that the 2008 proceedings concerned some elements that had also been assessed during the 2001 proceedings, in the 2008 case the applicant also presented several arguments that had not been examined in the 2001 case, notably circumstances occurred after the 2001 judgment (see paragraph 11 (d) above). The 2008 proceedings clearly consisted of more than a simple review of the 2001 judgment, as was confirmed by the fact that in 2008 the City Court held a hearing and delivered a judgment in a procedure for decision on the merits, instead of dismissing the case as having been previously decided.

54. Thus, both formally and substantively, the 2008 proceedings involved a "determination" of the applicant's private property rights. Article 6 § 1 was accordingly applicable to the proceedings at issue.

3. Assessment by the Court

55. The Court, having regard to the applicant's submissions to the City Court in the proceedings leading to its judgment of 2008 and its own case-law, is satisfied that they concerned a dispute over a civil right, namely his claim against the respondent company of a right of ownership to a part of the property in question, that could be said, at least on arguable grounds, to be recognised under domestic law (see, for instance, *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 40, ECHR 2007-II; and *K.T. v. Norway*, no. 26664/03, § 82, 25 September 2008). The dispute was genuine and serious; it related not only to the actual existence of a right but also to its scope and the manner of its exercise (ibid.). The Court further observes that the City Court rejected the applicant's claim on the ground that the company had derived his rights from the applicant's former wife and that the City Court had previously ruled in her favour in its 2001 judgment. The City Court's 2008 judgment must be considered to have determined the dispute since, following the High Court's refusal to admit the appeal, the result of these proceedings seen as a whole was directly decisive for the right in question (ibid.). Article 6 § 1 was accordingly applicable to those proceedings. In reaching this conclusion, the Court is aware that, as noted in *Valchev and Others v. Bulgaria* (dec.) nos. 47450/11, 26659/12 and 53966/12, 21 January 2014), there have been cases in which such proceedings were found not to involve a "determination" of the applicant's "civil rights" and the provision was therefore considered

inapplicable (ibid., § 72). However, the prevailing approach seems to be that Article 6 § 1 is applicable also to leave-to-appeal proceedings (ibid., §§ 69-71; *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 54, Series A no. 115; and *Martinie v. France* [GC], no. 58675/00, §§ 11 and 53-55, ECHR 2006-VI), and that the manner of its application depends on the special features of the proceedings involved, account being taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein (*Monnell and Morris*, cited above, § 56).

56. The Court is therefore unable to agree with the Government that the applicant's complaint is incompatible *ratione materiae* with the provisions of the Convention. Nor does the Court find that the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or that it is inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

57. The applicant maintained that, due to the lack of reasoning in the High Court's decision of 12 June 2008 dismissing his appeal, it was not apparent that his appeal had been reviewed in a manner complying with the Article 6 § 1 requirements.

58. Like in *Hirvisaari v. Finland* (no. 49684/99, §§ 31-32, 27 September 2001), his appeal to the High Court had to a large extent concerned the inadequacy of the first-instance court's reasoning, in particular the City Court's confusion regarding the applicant's arguments on points of law and its refusal to hear certain witnesses.

59. Whilst an appellate court could, in principle, endorse the reasons of the lower court's decision (*Meltex Ltd and Movsesyan v. Armenia*, no. 32283/04, § 88, 17 June 2008), the High Court had not done so in the applicant's case. Paraphrasing the provision in question, it had merely stated that it found it "clear" that the appeal would not succeed. This was not the same as endorsing a decision explicitly. Indeed, provided it upheld the first-instance court's conclusion, the High Court could dismiss an appeal without giving reasons, even if it disagreed with the latter's reasoning and the first-instance court procedure suffered from deficiencies.

60. Even when an appellate court simply endorsed the reasons of the lower court's decision, Article 6 § 1 required that the appellate court "did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by the lower court" (*Helle v. Finland*, 19 December 1997, § 60, *Reports of Judgments and Decisions* 1997-VIII). In the applicant's case, the possibility of verifying whether the High Court had done so was non-existent (in

contrast to *Meltex Ltd and Movsesyan*, cited above, § 88, where this transpired from the relevant national judgments).

61. The High Court should at least have provided "very limited reasoning". The Strasbourg Court had accepted that this could satisfy the Article 6 requirement "where a Supreme Court refused to accept a case on the basis that the legal grounds for such a case had not been made out" (*Marini v. Albania*, no. 3738/02, § 106, ECHR 2007-XIV(extracts)).

62. The extent of the requirement to give reasons depended not on the form but rather on the substance of the decision. The condition for rejecting an appeal under Article 29-13 (2) of the Code of Civil Procedure (i.e. that the High Court "[found] it clear that the appeal [would] not succeed"), reflected that such a decision effectively determined the subject matter of the case and explained why the reasons ought to be thorough in order to be deemed adequate for the purposes of Article 6 § 1.

63. In the present case, a number of factors spoke in favour of requiring the High Court to state adequate reasons and for rejecting the Government's invitation to the Court to rely on its previous rulings in which it had accepted that appellate courts give limited or even no reasoning when rejecting an appeal:

(i) The case-law in question was very specific and had been limited to dealing with decisions taken by national supreme- or constitutional courts or similar tribunals of last and final jurisdiction, with inherent features suggesting a more lenient duty to state reasons (see for instance, *X v. Germany*, (dec.) no. 8769/79, 16 July 1981; *Müller-Eberstein v. Germany* (dec.), no. 29753/96, 27 November 1996; *Immeubles Groupe Kosser v. France* (dec.), no. 38748/97, 9 March 1999; *Bufferne v. France* (dec.), no. 54367/00, ECHR 2002-III (extracts)); *Burg and Others v. France* (dec.), no. 34763/02, ECHR 2003-II; *Sale v. France*, no. 39765/04, 21 March 2006); *Nerva and Others v. the United Kingdom* (dec.), no. 42295/98, 11 July 2000; *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, ECHR 2001-VI; and *E.M. v. Norway* (dec.), no. 20087/92, 26 October 1995).

(ii) That case-law had generally concerned situations where the merits of the case had been thoroughly assessed in two lower instances and where a reduced requirement for stating reasons in the last and final instance refusing the appeal had been justified. However, the merits of the present case had not been thoroughly assessed even once. Although the City Court had accepted to hear the case on the merits (thus accepting that the 2001 proceedings were not legally binding on the 2008 proceedings), it had considerably restricted the scope of the hearing by not allowing the applicant to examine any witnesses or present any other evidence, thereby generally preventing him from putting forth his arguments. Despite his having pointed to these errors in his appeal (see paragraph 11 above), the High Court had failed to hear oral argument and to take any steps to rectify them. All it did before rejecting the appeal was to obtain one set of written

pleadings from the applicant (who was not represented by counsel at the domestic level). Thus, a strict requirement ought clearly to apply to the High Court's reasoning.

(iii) Whereas the above case-law commonly related to provisions offering a court of last and final jurisdiction the possibility of granting leave to appeal, the present case concerned a situation where the legislator had opted for a provision offering the applicant a right to appeal to the High Court (Article 29-13 (2) of the Code of Civil Procedure). This was presumably on the ground that the former type of appeal scheme (which was the rule of appeal to the Supreme Court, see Article 30-4 (1) of the Code) would offer insufficient legal protection where the case had only been reviewed once, at first instance.

(iv) While the said case-law had generally concerned appeals limited to questions of law, as was common for appeals to a court of last and final jurisdiction, an appeal to the High Court, as was the situation here, could concern questions of fact, law and procedure (Article 29-3 (1) of the Code). Since the High Court failed to state any reasons for its decision it was impossible to understand why it had found it "clear that the appeal will not succeed" (Article 29-13 (2) of the Code).

(v) The aforementioned case-law commonly concerned situations where the decision in question could not itself form the subject of a further appeal and the need for reasoning was accordingly more limited. In contrast, in the case at hand, the High Court's decision was one that could be appealed to the Supreme Court under Article 30-1(1) of the Code but, because it stated no reasons, it would be impossible for the appellate court to review it. Since Norwegian law provided that a High Court decision could be appealed, the decision ought to be reasoned in such a manner as to enable the Appeals Leave Committee of the Supreme Court to carry out a review of the High Court procedure. In this context, the applicant prayed in aid the *Hadjianastassiou v. Greece* judgment (16 December 1992, § 33, Series A no. 252).

64. The latter point had also been stressed by the Supreme Court when modifying its practice in criminal procedure to the effect that a dismissal of an appeal must state the reasons as a consequence of the requirement in Article 14 (5) of the Covenant (see paragraph 35 above). In addition, the applicant argued, the lack of reasons in the High Court's decision had prevented public scrutiny of the administration of justice.

2. The Government's submissions

65. The Government maintained that, as a point of departure, it ought to be emphasised that the impugned decision of the High Court had in fact contained reasons, namely by stating that is was "clear" to High Court that the appeal "had no prospect of success". This was sufficient under the Court's case-law (see *Gorou*, cited above, § 41).

66. The Government contested the applicant's unsubstantiated view that the High Court's decision did not demonstrate that his appeal had been subjected to such review as was required by Norwegian law and the Court's Article 6 § 1 case-law. When the three judges comprising the High Court had unanimously stated that they found it clear that the appeal had no prospect of success, it ought to be assumed that their decision had in fact been based on a careful review of the City Court's judgment, the applicant's appeal and three written pleadings. The applicant's allegations to the contrary suggested that they had neglected their professional duties.

67. It was true, as the applicant pointed out, that it would have been possible for the High Court to refuse to admit the appeal even if it did not fully agree with the lower court's reasoning provided that it agreed with the conclusion. However, this was a merely hypothetical scenario as the present case was clear-cut and could not have been decided in any other way.

68. The case-law which the applicant prayed in aid had in fact little bearing on the concrete assessment which the Court was called on to make in this case. The Government found no compelling reasons for distinguishing filtering based on a refusal of admission of an appeal (paragraph 2 of Article 29-13 of the Code of Civil Procedure) from the type based on leave-to-appeal procedure (paragraph 1 of the said provision). Even though they represented two different systems of appeal they both served the same filtering purpose and might produce the same results depending on the circumstances. Were the requirement to provide reasons in the procedure at issue here to be stricter than was the case with regard to leave-to-appeal proceedings, it would have the unfortunate consequence of encouraging States to offer the latter kind which was less furnished with Article 6 guarantees.

69. The Government were thus of the opinion that the reasoning provided by the High Court in the case under consideration satisfied the "fair hearing" requirement in Article 6 § 1 of the Convention.

70. In this connection, account ought to be taken of "the entirety of the proceedings" (see, amongst other authorities, *Sutter v. Switzerland*, 22 February 1984, § 28, Series A no. 74; and *Monnell and Morris*, cited above, § 56), notably the reasons contained in the City Court's judgment, from which it transpired that the applicant's legal arguments had no prospects of success whatsoever. Regard must also be had the procedural safeguards that applied when a first instance judgment was appealed. In particular, before delivering its decision the High Court had warned the

applicant that it envisaged refusing to admit his appeal and had in accordance with Article 20-13(4) of the Code of Civil Procedure given him an opportunity to comment, of which he availed himself. Thus the procedure conducted by the High Court before taking its decision fully complied with the right to an adversarial process guaranteed by the right to a "fair hearing" in Article 6 § 1 (see *Vermeulen v. Belgium*, 20 February 1996, § 33, *Reports of Judgments and Decisions* 1996-I).

3. The Court's assessment

(a) General principles

71. The Court reiterates that while the Convention does not compel the Contracting States to set up courts of appeal or of cassation and does not guarantee a right to appeal as such in civil cases, a State which does so is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (*Delcourt v. Belgium*, 17 January 1970, p. 14, Series A no. 11). As to the requirement to state reasons, which is at issue in the case under consideration, in *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I, it held as follows:

> "26. ... [A]ccording to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see the Ruiz Torija v. Spain and Hiro Balani v. Spain judgments of 9 December 1994, Series A nos. 303-A and 303-B, p. 12, § 29, and pp. 29-30, § 27; and the Higgins and Others v. France judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 60, § 42). Although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (see the Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, p. 20, § 61). Thus, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision (see, *mutatis mutandis*, the Helle v. Finland judgment of 19 December 1997, *Reports* 1997-VIII, p. 2930, §§ 59-60)."

72. The Court has also stated that a lower court (or authority) in turn must give such reasons as to enable the parties to make effective use of any existing right of appeal (see *Hadjianastassiou*, cited above, § 33; *Hirvisaari*, cited above, § 30; and *Sanchez Cardenas v. Norway*, no. 12148/03, § 49, 4 October 2007). The Court's task is to consider whether the method adopted in this respect has led in a given case to results which are compatible with the Convention (see *Hadjianastassiou*, ibid.).

73. Furthermore, the manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see *Ekbatani v. Sweden*, 26 May 1988, § 27, Series A no. 134; and *Monnell*

and Morris, cited above, § 56). In order to determine whether the requirements of fairness in Article 6 were met in the present case, it is necessary to consider matters such as the nature of the filtering procedure and its significance in the context of the civil proceedings as a whole, the scope of the powers of the High Court, and the manner in which the applicant's interests were actually presented and protected before the High Court (*Monnell and Morris*, cited above, ibid.*)*.

74. In this context it should be borne in mind that, with regard to the decision of an appellate court on whether to grant leave to appeal, the Court has held that Article 6 § 1 cannot be interpreted as requiring that the rejection of such leave be subject itself to a requirement to give detailed reasons (see *Sawoniuk*, cited above).

(b) Application of the above principles to the present case

75. Turning to the particular circumstances of the present case, the Court first notes the applicant's argument that, in view of the shortcomings in the City Court's procedure and reasoning, the High Court should have given more detailed reasons for its refusal of admission in the instant case. In his appeal to the High Court, he had complained of the City Court's decision to shorten the overall duration of the hearing from the three days initially scheduled to five hours, including the hearing of the applicant's witnesses and the presentation of documentary evidence, and of the City Court's assessment of the legal issues to be determined.

76. However, the Court observes that the City Court had held an adversarial hearing at which both parties were heard and evidence was presented, the applicant having opted to plead his own case and his opponent being represented by a lawyer. While it is not the Court's task to express any view on whether the City Court's interpretation of Norwegian law was correct or to substitute its own assessment for that of the City Court with regard to any factual issues brought before it (see *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B; *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 31, Series A no. 274; and *Botten v. Norway*, 19 February 1996, § 48, *Reports* 1996-I), it finds nothing to indicate that the City Court transgressed the normal discretion enjoyed by national courts in assessing the admissibility and relevance of evidence in cases before them and making findings of facts (see, for example, *Eskelinen and Others v. Finland*, no. 43803/98, § 31, 8 August 2006; *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 44, 5 July 2007; and *Bergsson and Others v. Iceland* (dec.), no. 46461/06, 23 September 2008). Nor does it appear that the City Court's own reasoning was inadequate for the purposes of Article 6 § 1 of the Convention (compare *Hirvisaari*, cited above, §§ 31-33). There is no appearance of any failure on the part of the City Court to observe the Article 6 fairness

requirements in the applicant's case (see *Sawoniuk*, cited above; and *Nerva and Others*, cited above).

77. The question nonetheless remains whether the High Court, notwithstanding the above findings, could be said to have failed to give sufficient reasons for its refusal of 12 June 2008 to admit the applicant's appeal for examination. The reasons stated by the High Court in the present case consisted of a paraphrasing of the contents of Article 29-13 (2), first sentence, according to which such admission could be refused if the High Court "found it clear that the appeal would not succeed".

78. By way of general observation, the Court notes that the impugned decision had been taken within the framework of a filtering procedure introduced by the 2005 Code of Civil Procedure in the interests of procedural economy. It was recognised that in order to avoid that the parties and the judiciary incur considerable additional costs there was a need to stop clearly unmeritorious appeals to the High Court. Whilst the right to appellate review of a decision on the merits was deemed an important safeguard, an unlimited and extensive right in this respect could be counterproductive to the rule of law (see paragraphs 18, 25 and 26 above).

79. The High Court's role in appeal proceedings in a civil case was not to examine the case afresh but to review the first-instance court's decision that formed the subject of the appeal. After carrying out an examination of the merits of the case, normally on the basis of the case file, the High Court could refuse admission of an appeal provided that it found it "clear" that the appeal had no prospects of success. This requirement implied a high degree of certainty that the outcome would remain unaltered after an ordinary appeal hearing. It was not a condition for refusing admission of an appeal that the High Court agreed with the City Court's reasoning or was of the view that its reasoning would stand after the High Court's review of the case. It was sufficient that the High Court found it clear that the outcome would be maintained, possibly on the basis of a different reasoning than that given by the City Court. It was moreover a condition that the three judges taking part in the decision to refuse admission of an appeal unanimously found that the appeal would not succeed (see paragraph 29 above). A decision to refuse admission of an appeal was taken at the preparatory stage of the proceedings (Article 29-14) and, once final, had the effect that the lower court's judgment gained legal force (see paragraph 28 above).

80. In this connection, the Court reiterates that "as regards the preliminary procedure for the examination and admission of appeals on points of law by an organ operating within the Court of Cassation, it has ... acknowledged that an appellate court is not required to give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success, without further explanation" (see, for instance, *Gorou*, cited above, § 41; and *Wnuk v. Poland* (dec.), no. 38308/05, 1 September 2009, cited above, both with further references). This principle, which it has thus affirmed in such

general terms, the Court has also applied with respect to the dismissal of an appeal made on factual grounds (see *Wnuk* and *E.M.*, both cited above).

81. Moreover, in substance, the High Court's specific role at this stage of the national proceedings when *refusing admission of an appeal* can hardly be distinguished from that assumed by a national appellate court when *refusing leave to appeal* on the ground of no reasonable prospects of success. In a number of previous cases the Court has had to examine each type of situations and, without drawing any such distinction, has found that reasoning such as here did not give rise to a breach of the Article 6 fair hearing guarantee (as examples of the first type, see for instance, *Immeubles Groupe Kosser; Burg and Others*; and *Sale*, all cited above; as examples of the second situation, see *Sawoniuk*, *Nerva and Others*; and *E.M.*, all cited above). Nor has it differentiated between filtering decisions taken as here at second instance and such decision taken at third instance (see other cases above). Indeed, the nature of the issue to be determined, namely the existence or not of reasonable prospects of success, is in substance the same.

82. However, the Court observes that the High Court's jurisdiction was not limited to questions of law and procedure but extended also to questions of fact. In the case under consideration, the applicant appealed to the High Court against the City Court's examination of his pleas on points of law and its sudden decision to drastically shorten the hearing from three days to five hours thereby substantially reducing his opportunity to adduce witness- and documentary evidence regarding certain issues of fact (see paragraph 13 above). The Court is not convinced in the concrete circumstances that the High Court's reasoning in its decision of 12 June 2008 did address the essence of the issue to be decided by it (compare, *mutatis mutandis*, *Helle,* cited above, § 60) in a manner that adequately reflected its role at the relevant procedural stage as an appellate court entrusted with full jurisdiction and that it did so with due regard to the applicant's interests (see *Monnell and Morris*, cited above, § 56).

83. Furthermore, it should be noted that when refusing to admit the applicant's appeal, the High Court did not act as the final instance in so far as its procedure could form the subject of an appeal to the Appeals Leave Committee of the Supreme Court. Whilst the latter's jurisdiction did not extend to the merits of the applicant's appeal to the High Court or of the latter's refusal to admit his appeal (compare *Hadjianastassiou*, cited above, § 33; and *Hirvisaari,* cited above, §§ 31-32), its review did encompass the High Court's application of the law and assessment of the evidence in as much as it related to points of procedure. It could also review whether in the light of the High Court procedure, seen as a whole, it was justifiable from a fair hearing point of view, notably the guarantees in Article 6 § 1 of the Convention, for the High Court to refuse admission of the appeal. This review included whether the subject matter could be adequately dealt with on the basis of the written case-file in a simplified procedure (see paragraph

38 above). Against this background, the Court cannot but welcome the developments in national judicial practice (see paragraph 44 and also paragraph 35 above) and the legislative changes (see paragraphs 45 to 46 above) in this area after the impugned proceedings. Thus, while the said review would be based on the same case-material as before the High Court (see paragraph 39 above), the Court is not persuaded that the reasons stated by the High Court for refusing to admit his appeal made it possible for the applicant to exercise effectively his right to appeal (see *Hadjianastassiou*, cited above, § 33; *Hirvisaari,* cited above, § 30) against the High Court's procedure to the Supreme Court, for the purposes of Article 6 § 1 of the Convention.

84. There has accordingly been a violation of this provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

86. The applicant (1) invited the Court to hold that he was entitled to appropriate remedies under Article 13 of the Convention, referring to *Kudła v. Poland* [GC], no. 30210/96, ECHR 2000-XI). He (2) further asked the Court to award him an appropriate amount of compensation for the non-pecuniary damage inflicted on him by the wrongful treatment he had suffered in the proceedings before the High Court. The fact that the High Court would not take his appeal seriously and had deprived him of basic Article 6 guarantees had caused him considerable distress.

87. The Government disputed item (1) above, stressing that, in the event that the Court were to find a violation of the Convention, it only had competence to award the applicant just satisfaction under Article 41. As to item (2), they requested the Court to reject it as being unsubstantiated. In any event, they were of the view that the finding of a violation would constitute adequate just satisfaction in the present case.

88. As to item (1), the Court notes from the outset that the applicant did not complain of a violation of Article 13 of the Convention. While referring to the above-cited *Kudla* judgment, he invoked this provision in asking the Court to hold that he was "entitled to appropriate remedies", but without elaborating specifically on the grounds for his request. His claim can be understood to imply an invitation to the Court to indicate to the respondent State what measures, beyond the payment of compensation under Article 41

of the Convention, should be adopted by it to implement the present judgment under Article 46. However, bearing in mind its case-law in this area (see, as a recent authority, *Del Rio Prada v. Spain* ([GC], no. 42750/09, §§ 137-138 ECHR 2013, with further references), the Court does not find in the concrete circumstances of the present case that the violation found by it is of such a character as to warrant indicating to the respondent State any individual or general measures for its domestic legal order to put an end to the violation and to redress the effects thereof.

89. As regards item (2), an award under Article 41 can only be based on the fact that the applicant did not have the benefit of all the guarantees of Article 6 § 1. The Court cannot speculate as to the outcome of any judicial review had the violation of this provision not materialised in the instant case but is prepared to accept that the applicant must have suffered some anguish and distress therefrom. Bearing in mind the domestic judicial and legislative changes related to the subject-matter in question (see paragraphs 44 and 46 above), the Court considers that the present finding of a violation constitutes adequate just satisfaction in this respect.

B. Costs and expenses

90. The applicant also claimed 164,387 Norwegian kroner (NOK) (corresponding to approximately EUR 21,500 on 26 March 2012) for his lawyers work (105 hours, including 47.50 hours at NOK 1,264 per hour and 46.75 hours at NOK 2,050 per hour) in the Strasbourg proceedings, incurred by him on a *pro bono* basis.

91. The Government requested the Court to carefully examine the claim in the light of the Court's case-law, according to which only costs that are necessarily incurred and are reasonable as to quantum should be reimbursed.

92. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the specification of costs submitted and the above criteria, the Court considers it reasonable to award the sum of EUR 12,500 for the proceedings before the Court, plus any tax that may be chargeable to the applicant on this amount.

C. Default interest

93. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*, unanimously,
   (a) that the finding of a violation constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
   (b) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 12,500 (twelve thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 2 October 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro-Lefèvre
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Møse is annexed to this judgment.

I.B.L.
S.N.

DISSENTING OPINION OF JUDGE MØSE

I. Introduction

1. The main issue in this case is to what extent a court of appeal – acting as the second instance – is required under Article 6 § 1 of the Convention to give reasons in filtering proceedings, and in particular whether it may limit itself to a general formulation to the effect that the case has no prospect of success. In the view of the majority, such brief reasoning was not acceptable (see paragraphs 82-83 of the judgment). I am not convinced that this is correct.

2. It is common ground that as a consequence of subsequent judicial and legislative developments in Norway (see paragraphs 32 to 46) the situation in the *Hansen* case will no longer occur. But the exact requirements of the Convention involve questions of principle which may arise in future cases.

3. First, a few words about the case as it evolved at the national level. In 2001 Fredrikstad City Court gave judgment in the real-estate dispute between the applicant and his former wife. It found against the applicant, who did not appeal (see paragraph 8). In 2007 he instituted proceedings against the company which had bought the property. In its judgment of 21 January 2008, the City Court again found against the applicant, attaching particular weight to its 2001 judgment (see paragraphs 10 to 12). Its decision to declare evidence inadmissible and to shorten the proceedings was also based on the premise that the dispute about ownership had been decided in 2001.

4. In his appeal to Borgarting High Court the applicant challenged the City Court's approach primarily by raising various points of law, including alleged procedural errors. After warning the applicant that his appeal could be refused, extending the deadline for his comments and receiving two sets of submissions from him, the High Court by a unanimous decision of 12 June 2008 found it clear that the appeal would not succeed (see paragraphs 13 to 15). On 19 September 2008 the Appeals Leave Committee of the Supreme Court unanimously found it clear that the applicant's appeal would not succeed and rejected it (see paragraphs 16-17).

II. The Court's case-law

5. I agree with the description in the judgment (see paragraphs 71 to 74) of the general principles elaborated in the Court's case-law and share the view that an appeal system based on *refusing admission of an appeal* can hardly be distinguished from a model based on *refusing leave to appeal* on the ground of no reasonable prospect of success (see paragraph 81 of the judgment).

6. In my view the Court has until now applied these general principles in a cautious way. Firstly, there has been uncertainty in the case-law of the

Convention organs as to whether Article 6 is applicable at all to leave-to-appeal proceedings and similar filtering processes. As noted in *Valchev and Others v. Bulgaria* (dec.) nos. 47450/11, 26659/12 and 53966/12, § 72, 21 January 2014, there have been cases in which such proceedings were found not to involve a "determination" of the applicant's "civil rights". In *Valchev* the Court decided to leave the issue open as the applicants' complaint was in any event inadmissible (ibid. § 73). For my part, I share the view expressed in the present judgment (see paragraph 55) that the prevailing approach seems to be that Article 6 § 1 is applicable also to filtering proceedings. However, the above-mentioned discrepancy in the case-law on the applicability of Article 6 to filtering proceedings, and the fact that the Court as recently as in early 2014 decided to describe the two trends without finding it necessary to rule on the matter, illustrate the Court's prudence in this field.

7. Secondly, the cases referred to in paragraphs 60, 63 (i), 70, 73-74 and 81 of the judgment clearly show that the Court has been reluctant to require national appellate courts to give detailed reasons when exercising their filtering role. In most of these cases the applicants' complaints of insufficient reasoning were declared inadmissible as manifestly ill-founded. In the very few judgments on the merits concerning the reasons in filtering proceedings, the Court did not find a violation of Article 6 § 1. The *Hansen* judgment is the first time it does so.

8. It may be argued that the previous cases focussed on filtering before national supreme courts, constitutional courts or courts of cassation. However, that is not entirely correct. As stated in the judgment (see paragraph 80), the Court has in some cases accepted filtering decisions with very brief reasoning at second and third instance, and on the basis of legal and factual grounds. Indeed, paragraph 80 reiterates that "an appellate court is not required to give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success, without further explanation" and then refers to three cases.

9. The first case is *Gorou v. Greece (no. 2)* [GC] (no. 12686/03, 20 March 2009), where the prosecutor had not given reasons for rejecting a civil party's request that he appeal an acquittal to the Court of Cassation on points of law. Based on the individual circumstances of the case (see §§ 37-42), the Court found no violation of Article 6 § 1. That case was of course different from the *Hansen* case in several ways, but I note that the Court of Cassation was the second instance.

10. Paragraph 80 also mentions *Wnuk v. Poland* (dec.), no. 38308/05, 1 September 2009, which involved the Supreme Court as the third instance. That appeal included assessment of the evidence and the application of incorrect criteria by the lower courts in respect of the value of the appellant's claim. The Supreme Court refused to entertain the cassation

appeal, relying on a provision concerning manifestly ill-founded appeals and appeals in cases where no serious legal issues arose. The decision, which was taken by a single judge sitting in camera, referred to the criteria listed in the provision, stated that none of the circumstances was present, and found it justified to refuse to entertain the cassation appeal.

The Court declared *Wnuk*'s complaint inadmissible. It stated that when a Supreme Court refuses to accept a case on the basis that the legal grounds for such a case are not made out, very limited reasoning may satisfy the requirements of Article 6. It also repeated the formulation in *Gorou* and some other cases that there is no need for appellate courts to give detailed reasoning as regards points of law (see para. 10 above), and – again referring to case-law – did not rule out the possibility that, in the circumstances of a particular case, a Supreme Court may be required to give more adequate reasons.

Wnuk differs from *Hansen* in at least two ways: the screening in *Wnuk* took place in the Supreme Court as the third instance, and the case had already been examined on the merits by two judicial instances (the Regional Court and the Court of Appeal) which had full jurisdiction as to the facts and the law. But it is worth noting that the appeal to the Supreme Court included assessment of the evidence, that its competence included both facts and law, and that the Court, as always, based its conclusion on the individual circumstances of the case.

11. The third case mentioned in paragraph 80 of the present judgment is *E.M. v. Norway* (no. 20087/92, Commission decision of 26 October 1995, Decisions and Reports (DR) no. 83-A). The applicant had been convicted of fraud in the City Court. Under the previous system of review in criminal cases he applied to the Appeals Leave Committee of the Supreme Court for a new trial in the High Court or, in the alternative, for leave to appeal to the Supreme Court. In support of the request for a new trial in the High Court, he maintained his innocence and contested the City Court's evaluation of the evidence. In the alternative request for leave to appeal to the Supreme Court he submitted that there had been certain procedural errors, in that the City Court's reasoning was incomplete, the law had been wrongfully applied, and the sentence was disproportionate. The Appeals Leave Committee rejected both requests.

Before the European Commission of Human Rights E.M. argued that Article 2 of Protocol No. 7 to the Convention and Article 6 § 1 of the Convention had been violated. His application was declared inadmissible as manifestly ill-founded. The Commission did not find it necessary to decide whether the Appeals Leave Committee's decision amounted to a "determination" of the criminal charge against the applicant (see para. 6 above).

With respect to *E.M.*'s complaint that no reason was given by the Appeals Leave Committee for its refusal to grant leave to appeal, the

Commission considered that if the domestic law, as in that case, subjects the acceptance of the appeal to a decision by the competent court as to whether it considers that the appeal raises a legal issue of fundamental importance and whether it has any chances of success, it may be sufficient for that court simply to reject or accept such a petition.

The *E.M.* case is relevant in our context. The Commission did accept that the Appeals Leave Committee of the Supreme Court – acting as a second instance in leave-to-appeal-proceedings – had rejected by a unanimous decision an appeal which included assessment of evidence (bearing on the innocence of the accused) using standard reasoning ("unanimously finds it clear that the appeal will not succeed" which was equivalent to the formulation in the present case, see paragraph 15 of the judgment).

Admittedly, the *E.M.* case dates from 1995 and was decided by the former Commission. But subsequent case-law developing the principles in this field has not set aside or expressed reservations about the reasoning in *E.M.* As regards the fact that the *E.M.* case was a criminal one, it is my view that if a standard rejection formula is acceptable in respect of an appeal which includes the factual basis of the guilt or innocence of an accused, it is difficult to see why such brief reasoning should not be allowed in a civil case, perhaps of a trivial character. According to our case-law, the Contracting States have greater latitude when dealing with civil cases, concerning civil rights and obligations, than when dealing with criminal cases (see *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 19, Series A no. 274).

12. Based on this recapitulation (paras. 5 to 11 above), I cannot see that a filtering decision by a second instance based on no prospect of success is, as such, a violation of Article 6 § 1 if matters of evidence are involved. In my opinion, it does not follow from the case-law that there is any clear distinction between factual and legal issues or between second and third instance. Consequently, the finding of a violation in the present case amounts to a development in the Court's case-law. In my view, *Hansen* is not the right case for such a step to be taken (III), and I doubt whether the time is ripe to do so (IV).

III. The Hansen *Case*

13. The majority observes that the High Court's jurisdiction was not limited to questions of law and procedure but extended also to questions of facts, and places emphasis on the City Court's decision to shorten the hearing and substantially reduce the applicant's opportunity to adduce witness- and documentary evidence (see paragraph 82).

14. In my opinion, it should be noted, firstly, that when the applicant instituted proceedings in 2007, he was in fact rearguing a final judgment in a case he had lost in 2001 – that is, six years earlier. Without expressing any view on the City Court's interpretation and application of national law, it

seems to follow from the reading of the City Court's 2008 judgment that his submissions had no solid basis: the main issue in the case – the ownership of the estate – had been decided in 2001; the manner in which the applicant described the crucial issue in the 2001 proceedings was incorrect; and his reference to legal doctrine was irrelevant and based on a misunderstanding.

15. Furthermore, in its decision on the admissibility of evidence the City Court noted that all the witnesses whom the applicant wished to call, with one exception, had been heard in 2001. It further stated that the only new witness, an art historian, could not shed light on the issues of property rights. Under these circumstances I certainly agree with the judgment (see paragraph 76) that the City Court did not transgress the normal discretion enjoyed by national courts in assessing the admissibility and relevance of evidence. In view of the fact that the applicant had received the City Court's inadmissibility decision and judgment, both of which explained the legal situation and that his evidence challenging the 2001 judgment was irrelevant, I do not agree that the High Court needed to elaborate its reasons in order for him to exercise his right to appeal efficiently. The extent to which reasons should be given varies according to the nature of the decision and must be determined in the light of the circumstances of the case (see paragraph 71 of the judgment).

16. It is true, as stated by the majority (see paragraph 82), that the High Court's general jurisdiction was not limited to law and procedure but also extended to questions of facts. However, in the present case this is of little significance. The applicant's appeal mainly raised questions of law, and his complaint about the shortening of the hearing was linked to the inadmissibility decision, which in turn depended on what was legally relevant in the case. In my view, it is difficult to discern elements in the applicant's appeal which would require that the High Court provide detailed reasons when refusing admission of the appeal on the ground that it was clear that it would not succeed.

17. The majority refers to *Helle v. Finland*, 19 December 1997, § 60, *Reports of Judgments and Decisions* 1997-VIII), where the Court stated that the notion of a fair procedure requires that a national court which has given sparse reasons for its decision does in fact "address the essential issues" which were submitted to its jurisdiction and does "not merely endorse without further ado the findings reached by the lower court". I am in total agreement with this statement of principle. At the same time, it should be borne in mind that *Helle* did not concern a filtering process but ordinary appeal proceedings before the Supreme Administrative Court which – without an oral hearing – simply appended the reasons of the first-instance court without commenting on them. As correctly stated in the present judgment (see paragraphs 73 and 74) the manner of application of Article 6 depends on the special features of the proceedings in the domestic legal order and of the role of the appellate court therein, and the provision does

not require that the rejection of leave to appeal be subject itself to a requirement to give detailed reasons. Finally, it should be recalled that the Court found no violation in *Helle*, even though the Supreme Administrative Court could review both facts and law.

18. Paragraph 83 of the judgment also addresses the fact that the High Court did not act as the final instance, in so far as its procedure could form the subject of an appeal to the Appeals Leave Committee of the Supreme Court. The majority is not persuaded that the reasons given by the High Court for refusing to admit his appeal enabled the applicant to exercise effectively his right to appeal. I respectfully disagree. The effect of the High Court's refusal to admit the appeal was that the City Court's judgment, with the latter's reasoning, gained legal force (see paragraphs 28 and 79 of the present judgment). The contested issues in the domestic proceedings were straightforward and the applicant mainly insisted on arguments which had already been discussed and rejected at previous instances (and in 2001). The Appeals Leave Committee, which had available the same case-material as the High Court, was empowered to fully examine the application of the law and the assessment of the evidence in relation to questions of procedure; and to review whether the procedure, seen as a whole, had been justifiable and in conformity with, *inter alia*, Article 6 § 1, which is incorporated into Norwegian law and has precedence in the event of conflict (see paragraph 32 of the judgment).

19. It is difficult to avoid the impression that the applicant's appeal was clearly unmeritorious, and I cannot see that any injustice was done when it was stopped at the filtering stage (see paragraph 25 of the judgment). Mechanisms serving as a deterrent against such appeals pursue a legitimate aim, which has been accepted by the Court (see, for instance, *Monnell and Morris v. the United Kingdom*, 2 March 1987, §§ 59, 63 and 67, Series A no. 115). Taking into consideration that the applicant was afforded a fair hearing in the City Court; that he was warned that his appeal could be refused and nonetheless presented further submissions; the nature of his appeal submissions to the High Court and the latter's role in the proceedings at issue, and the nature of its decision refusing admission of the appeal, I do not find, in the concrete circumstances of the present case, that the High Court's use of the "no-prospect-of-success" formula was incompatible with Article 6 § 1 of the Convention.

IV. Final Remarks

20. The finding of a violation in the *Hansen* case may seem trivial. At the domestic level the matter was solved by the Norwegian Supreme Court, which relied on domestic systemic considerations without finding it necessary to enter into the requirements of Article 6 of the Convention (see paragraphs 40 to 43 of the judgment).

21. In my view this judgment may have more general repercussions which require careful consideration. It is clear (see paragraph 71) that the Convention does not compel the Contracting States to set up courts of appeal or of cassation, and it does not guarantee a right to appeal as such in civil cases, but persons are to enjoy the fundamental guarantees of Article 6 before such appellate courts. The Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6.

22. It seems to me that the approach adopted at the national level differs considerably between the Contracting States. Specific reasoning may be required in some systems and more stereotyped reasoning may be permissible in others. I am not aware that there is any consensus about the extent to which reasons ought to be given when an appellate court refuses leave to appeal or performs other kinds of filtering. More generally, it is established case-law that the manner of regulation of the right to access to a court, including access to a court of appeal, is a matter in respect of which the Contracting States enjoy a certain margin of appreciation (see *Berger v. France*, no. 48221/99, § 30, ECHR 2002-X (extracts), with further references).

23. The emphasis of the majority in this case on whether the filtering mechanism was competent to review factual issues may well – if applied generally – come as a surprise to States which have perceived the Court's case-law differently. One should not underestimate the need for foreseeability in connection with the organisation of national judicial systems. Furthermore, the specific requirement to give reasons at the appeal levels may also be linked to the allocation of resources and prioritisation of the most important substantive stages of the judicial process, the aim being to ensure that proceedings are conducted fairly and are concluded within a reasonable time.