

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

FIRST SECTION

DECISION

Application no. 1195/10
Ismet SHALA
against Norway

The European Court of Human Rights (First Section), sitting on 10 July 2012 as a Chamber composed of:

Nina Vajić, *President,*
Peer Lorenzen,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and Søren Nielsen, *Section Registrar,*

Having regard to the above application lodged on 23 December 2009,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Ismet Shala, is a Norwegian citizen, who was born in 1965. He is currently serving a prison sentence at Ullersmo Prison. Before the Court he was represented by Mr Ø. Storrvik, a lawyer practising in Oslo.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Indictment

3. On 4 September 2008, the applicant and co-accused Mr Y. were indicted for having violated:

> "**I. Article 162 (1), cf. (3), first sentence, cf. (5), cf. Article 60A, of the Penal Code**
>
> as part of the activities of an organised criminal group, of having unlawfully imported or stored drugs, and the violation concerns a very considerable quantum, or for having aided and abetted this.
>
> **The ground is the following offence or aiding and abetting in this**:
>
> **(a) Concerning both accused**
>
> During the period from March 2007 until June 2007, as a participant in a group which organised illegal drugs trade, they agreed in advance to the importation of approximately forty-eight kilograms of amphetamines from the Netherlands into Norway. The drugs were probably imported on Thursday, 7 June by two persons unknown to the police with the use of a mobile home. [The applicant] and [Y.] met the couriers on the same date at 16h00 in the vicinity of the Oslo Fjord Tunnel and received the drugs which they thereafter transported to Oslo.
>
> **(b) Concerning both accused**
>
> On Thursday, 7 June 2007, in the afternoon, as participants in such a group as described in item (I)(a) above, and after having received the above-mentioned shipment of amphetamines of approximately forty-eight kilograms, they transported the drugs from a location in the vicinity of the Oslo Fjord Tunnel via Hurum to Oslo in a VW Passat, with the registration number [NN 00000]. In Oslo they placed forty-three kilograms of the shipment of amphetamines in an apartment in [X] street no. [Z], while the remainder was left in the car.
>
> **II. Article 162 (1), cf. (3), cf. Article 60A, cf. Article 49, of the Penal Code**
>
> as part of the activities of an organised criminal group, of having unlawfully sold drugs, and the violation concerns a very considerable quantum.
>
> **Grounds:**
>
> **Concerning both accused**
>
> On Thursday, 7 June 2007, as a participant in a group organising illegal drugs trade, he attempted to sell approximately five kilograms of amphetamines, but failed in this as the police apprehended him and confiscated the amphetamines."

4. The applicant was in addition charged with having stored and/or obtained approximately two kilograms of amphetamines which Mr A had handed over to Mr B (referred to as item III in the indictment).

2. Conviction and sentence by the City Court

5. On 21 October 2008 the Oslo City Court convicted the applicant of (I) having (a) imported and (b) stored fifty kilograms of amphetamines and (II) for having attempted to sell five kilograms of this shipment, both (I) and (II) having been committed as part of the activities of an organised criminal group in violation of Article 60A. He was also convicted of having stored and sold two kilograms of another shipment of amphetamines (III). The City Court sentenced him to twelve years' imprisonment. At the trial hearing, the applicant had confessed to the offences described under items (I)(a) and (b), except that he did not admit that they had been committed as part of organised crime in violation of Article 60A.

6. In its reasoning for the applicant's conviction in respect of items (I) (a) and (b) and (II) of the charges, the City Court referred to evidence originating from secret tapping of telephone communications between the applicant and several named individuals from the Kosovo Albanian milieu and between the applicant and Mr Y., with indications of the time and contents of the communications, and also the applicant's and Mr Y.'s statements. The City Court noted that the applicant and Mr Y. had gone to Amsterdam to meet some persons of Turkish origin who could deliver the drugs. None of them had informed of who was to receive the shipment of drugs in Oslo but the applicant had maintained that he thought this would be some persons of Turkish origin and that he would be paid as a courier.

7. As regards the interpretation of the relevant provision in Article 60A, the City Court observed that a group could be regarded as an organised criminal group if it consisted of three or more persons who had as a main purpose the commission of a criminal offence punishable by a minimum of three years' imprisonment, and where an important part of the reprehensible activity consisted of committing such offences. According to the preparatory work, it was not sufficient for applying Article 60A that several persons had together carried out well-planned individual operations unless these occurred within the framework of an organised criminal group. In the assessment emphasis was to be placed on whether the group had a certain structure, had international branches, a distribution of roles had been agreed on and the group had existed over time. If Article 60A applied, the maximum sentence for serious drugs offences increased from fifteen to twenty years.

8. The City Court noted that the applicant had previously been convicted of serious drugs offences. It found no reason to doubt that for a shipment of amphetamines of such a magnitude several persons other than those who were known had been involved both as suppliers and receivers. The approach followed in the plans made during the winter of 2007, the importation of the shipment in June 2007 and the contacts with the criminal milieus abroad had a relatively professional character. The communication control had also shown that the applicant had close contacts with the

criminal Kosovo Albanian milieu in Oslo at the time when the drugs were imported. Therefore, there was a strong presumption that this criminal activity necessarily ought to be carried out in organised forms. A number of persons had been involved in the importation and the planned resale of the amphetamines, even though only a smaller number of persons could be viewed as belonging to an organised group. The City Court had no doubt that the applicant belonged to an organised criminal group consisting of three persons or more, whose main purpose was the importation and sale of drugs. Furthermore, the court found it proved beyond any reasonable doubt that the applicant had played a central role in the criminal group in question, which also had the necessary organisation and structure. The applicant had been aware of the factors of the activity that made Article 60A applicable and thus fulfilled the subjective conditions for applying this provision. He was therefore convicted of having violated Article 60A in relation to items (I) (a) and (b) and (II).

9. The applicant's co-defendant, Mr Y., was convicted in respect of the same offences, except that, on the prosecution's request, he was acquitted of the charge that the offences had been committed as part of organised crime (Article 60A of the Penal Code), no evidence having been adduced to this effect.

3. Appeal to the High Court

10. The applicant appealed to the Borgarting High Court against the City Court's assessment of the evidence regarding the finding of guilt in respect item (II) and his conviction under Article 60A in relation to items (I)(a) and (b), as well against his sentence. His co-defendant Mr Y. appealed against his sentence.

11. The High Court, sitting with three professional judges and a jury of ten lay members, held an oral hearing between 3 and 6 February 2009. The applicant, represented by a lawyer, was heard, as were the public prosecutor and eight witnesses, including Mr Y. who had withdrawn his appeal at the opening of the hearing.

12. According to the trial record, after the High Court had heard the evidence on the question of guilt, the prosecution presented a draft of the questions ("*spørsmålsskrift*") to be put to the jury. Counsel for the defence was given an opportunity to comment. The questions were then finalised and distributed to the jury (Article 363 of the Code of Criminal Procedure).

13. Thereafter, the High Court heard the oral pleadings of the prosecution and the defence regarding the question of guilt and their respective replies. The applicant was given an opportunity to make a statement.

14. The presiding judge of the High Court went through the evidence in the case, read out the questions to the jury and explained the questions and the applicable legal rules (Article 368 of the Code).

15. The jury then retired to deliberate *in camera*, with the following questions:

> **"Question 1 – supplementary question:**
>
> (More than six votes are required in order to reply to this question in the affirmative.)
>
> Was the importation of a very considerable quantum of drugs on 7 June 2007, of which [the applicant] was found guilty by the Oslo City Court's judgment of 21 October 2008, carried out as part of the activities of an organised criminal group?
>
> **Question 2 – supplementary question:**
>
> (More than six votes are required in order to reply to this question in the affirmative.)
>
> Was the storage of a very considerable quantum of drugs on 7 June 2007, of which [the applicant] was found guilty by the Oslo City Court's judgment of 21 October 2008, carried out as part of the activities of an organised criminal group?
>
> **Question 3 – primary question:**
>
> (More than six votes are required in order to reply to this question in the affirmative.)
>
> Is [the applicant] guilty of having unlawfully tried to sell drugs?
>
> Factual basis
>
> On Thursday 7 June 2007 he attempted to hand over and/or sell amphetamine.
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> **Question 4 – supplementary question:**
>
> (This question should be answered provided that question 3 has been answered in the affirmative. More than six votes are required in order to reply to this question in the affirmative.)
>
> Did the offence mentioned in question 3 concern a very considerable quantum?
>
> **Question 5 – supplementary question:**
>
> (This question should be answered provided that question 3 has been answered in the affirmative. More than six votes are required in order to reply to this question in the affirmative.)
>
> Was the offence mentioned in question 3 carried out as part of the activities of an organised criminal group?"

16. The jury answered all the questions in the affirmative. The High Court's professional judges accepted the jury's verdict as a basis for the

further examination of the case (Article 40(1) of the Code of Criminal Procedure).

17. Subsequently, the jury foreperson and three further jury members, whose names were drawn by lots, joined the professional judges to examine the question of sentencing. Sitting in this composition, the High Court heard oral argument on sentencing before it retired to deliberate and vote *in camera*.

18. In its judgment of 6 February 2009, by which the applicant was sentenced to twelve years' imprisonment, the High Court stated:

> "**The circumstances of the case**
>
> After the jury's verdict and what has emerged in the hearing on appeal, the High Court finds the following facts established:
>
> [The applicant], who has previously been convicted twice of serious drug offences, respectively in 1997 and 2006, had during the spring of 2007 connections with an organised criminal group based in Amsterdam. According to the jury's verdict he was guilty of the importation and storage of approximately forty-eight kilograms of amphetamines, as finally determined by the City Court, as well as of the attempted sale of five kilograms of this shipment, as part of the criminal activities of this group. The group consists of Albanians and Turks.
>
> The importation was planned in the spring of 2007. [The applicant] and [Mr Y.] were then directly in contact with the criminal organisation in Amsterdam and the order of the shipment of approximately forty-eight kilograms was made at a meeting there. It was then decided on the type of drugs, the price and the quantum. In the period thereafter the importation, the reception and distribution of the drugs were further planned. Amongst other things, a new mobile phone was acquired right before the importation, there were extensive telephone communications between the group and [the applicant] and a number of other persons in the drugs milieu in the Oslo area were called.
>
> The shipment of around forty-eight kilograms [of amphetamines], which had a strength of between 33% and 47%, was imported into Norway on 6 or 7 June 2007 by two Turkish nationals travelling in a mobile home. It was handed over to [the applicant] and [Mr Y.] in the afternoon of 7 June 2007. The delivery took place on a parking lot located west to the Drøbak tunnel.
>
> [The applicant] and [Mr Y.] then transported the drugs to Oslo, where it was placed in the apartment of [the applicant's] former spouse in [X] street no. [Z].
>
> After a short while [the applicant] and [Mr Y.] left the apartment. They brought a bag containing approximately five kilograms of amphetamines and they drove to Grønland [an area of Oslo]. The police, who for a long time had been monitoring the two of them and had tapped their telephone communications, and therefore knew that the shipment was on its way, had performed undercover monitoring of them most of the day on which the drugs were received. They intervened when [the applicant] and [Mr Y.] arrived at Grønland, arrested them and confiscated the bag containing drugs placed in the car and soon thereafter also approximately the remainder forty-five kilograms of the shipment in the apartment in [X] street no. [Z].

With reference to the jury's verdict on the question of guilt regarding the attempted sale of the drugs that [the applicant] and [Mr Y.] had brought to Grønland, and having regard to what has otherwise emerged during the hearing on appeal, the High Court finds it established that [the applicant] was the recipient on behalf of the criminal group's importation of the drugs shipment at issue. His task was accordingly to receive, store, portion and distribute the drugs to buyers in the drugs milieu. In addition he was to receive the payments and to ensure that this be sent to the group in Amsterdam. On the other hand there is no evidentiary basis for determining whether he had any other and greater role, whether he was an active member of the criminal group from which he had received the drugs.

In the assessment of the evidence regarding [the applicant's] role, in addition to what follows from the jury's verdict, particular weight has been placed on a number of telephone communications engaged by [the applicant] to several well-known persons in the drugs milieu shortly before the importation took place, the contents of these conversations and of conversations that [the applicant] had with the group in the Netherlands. Reference is also made to the witness statements by Police Superintendent [E] on how drugs trade such as that at issue in the present case normally is prepared and carried out.

As regards the remainder of the circumstances of the case, reference is made to the City Court's judgment.

In addition to the dealing with the shipment of approximately forty-eight kilograms it has been finally determined by the City Court that [the applicant] is guilty of the storage of further two kilograms of amphetamines. Also with regard to this aspect of the case reference is made to the City Court's judgment.

Sentencing

The present case concerns the dealing with approximately fifty kilograms of amphetamines of normal strength. As regards the approximately forty-eight kilograms, the case concerns importation, storage and attempted sale of approximately five kilograms. As regards the shipment of two kilograms the case concerns storage with a view to delivery.

This is a very serious case where considerable weight ought to be attached to the interests of general crime prevention. This is both due to the scope of the case and to the fact that [the applicant's] dealings with the shipment of approximately forty-eight kilograms occurred as a part of the activities of an organised criminal group.

> In view of the role that the High Court has found it proven that [the applicant] played, Article 60A suggest that the sentence be somewhat stricter than that for a corresponding offence without any links to an organised criminal organisation. [The applicant] has played a central role as a recipient and distributor of the drugs and is therefore, from this point of view, a man behind in relation to the drugs trade in Norway, but cannot be linked any more closely to the organisation he has traded with.
>
> ..."

4. Appeal to the Supreme Court

19. The applicant appealed to the Supreme Court, challenging the High Court procedure, notably the lack of reasoning for his conviction under Article 60A of the Penal Code. He submitted that the High Court's judgment contained no reasoning, only a reference to the jury's affirmative answers to the questions. Nor had the High Court in its reasoning on sentencing explained adequately why he had been convicted under the said provision. Whilst the European Court in its Chamber judgment in *Taxquet v. Belgium* (no. 926/05, 13 January 2009) had emphasised the importance of the manner in which the questions to the jury had been formulated, the questions regarding Article 60A in relation to the applicant had been formulated vaguely and broadly and could not offset the lack of reasoning. Also the City Court's judgment had been vague and general on this point. In the alternative, the applicant appealed against the sentence imposed by the High Court.

20. By a decision of 3 April 2009 the Appeals Leave Committee of the Supreme Court refused the applicant leave to appeal against his sentence and adjourned its examination of his appeal against the procedure, pending the Supreme Court's final judgment in two parallel cases (nos. 2009/202 and 2009/397). After judgment in those cases (see paragraph 21 below), the Appeals Leave Committee of the Supreme Court, by a decision of 30 June 2009, unanimously found that there was insufficient ground for granting leave to appeal with respect to the part of the appeal that had been adjourned.

5. The Supreme Court's leading judgment of 12 June 2009

21. In the Supreme Court's leading judgment of 12 June 2009 in the case no. 2009/397 referred to above, the first voting judge, Mrs Justice Indreberg, with whom the other sixteen justices sitting in plenary formation agreed in the main, gave the following reasons for holding that the Norwegian jury system complied with the requirement to give adequate reasons implied by the fair hearing guarantee in Article 6 of the Convention:

> "(32) *The requirement of a reasoned decision pursuant to the human rights conventions*

(33) Neither the European Convention nor the International Covenant on Civil and Political Rights state explicitly that a conviction shall be reasoned. However, from settled case-law of the [respective] convention organs it follows that the right to a fair trial – guaranteed by Article 6 § 1 of the Convention and Article 14 § 1 of the Covenant, and the right to review of a conviction – provided for by Article 2 of Protocol No. 7 to the Convention and Article 14 § 5 of the Covenant, presuppose that criminal judgments shall adequately state the reasons on which they are based.

(34) According to the convention organs' case-law, the reasons given should fulfil several purposes. Firstly, they should serve as a safeguard against arbitrariness; see *Taxquet v. Belgium*, no. 926/05, § 43, 13 January 2009. Secondly, the reasons should show the parties that they have been heard and enable public scrutiny of the administration of justice; see *Salov v. Ukraine*, no. 65518/01, § 89, ECHR 2005-VIII (extracts). The reasons should also give the parties a basis on which to decide whether to appeal; see *Hadjianastassiou v. Greece*, 16 December 1992, § 33, Series A no. 252) and give the appellate court a basis on which to review the judgment; see e.g. paragraph 49 of the Human Rights Committee's General Comment 32 of 2007. It shall also ensure that the appellate court can undertake a substantive review; see paragraph 48 of the same General Comment. ...

(35) In sum, one can say that the purpose of the requirement of an adequately reasoned judgment is to ensure that the assessment is genuine and conscientious, to ensure verifiability, and to ensure an effective right of appeal.

...

(60) *Did the High Court's procedure comply with Article 6 § 1 of the Convention?*

(61) According to the case-law of the European Court of Human Rights, the lack of reasons for a jury verdict ought to be compensated by other mechanisms which adequately safeguard the same purposes. What is required in this respect would to a certain degree depend on the specific circumstances of each individual case.

(62) The High Court's examination in the criminal proceedings against Mr X followed the rules of the Code of Criminal Procedure. I therefore find it appropriate to consider whether there were such compensating mechanisms in Norwegian criminal procedure in general and in Mr X's case in particular. The issue is whether the Norwegian jury system adequately ensures the purposes of the requirement to give reasons. As mentioned earlier, there are three main purposes: to ensure a genuine and conscientious assessment of the case, verifiability and an effective right of appeal.

(63) A thorough procedure in accordance with the provisions of the Code of Criminal Procedure is designed to ensure that the court's review of the case is conscientious and genuine.

(64) The High Court sits with a jury ... when an appeal is brought against the assessment of the evidence regarding the question of guilt in cases which concern a felony punishable according to statute with more than six years' imprisonment; see Article 352 [of the Code]. The case is therefore to be examined entirely anew; see Article 331. Evidence is submitted directly to the jury, and after each individual witness has been heard and after all documentary evidence has been read out, the accused is given an opportunity to make a statement; see Article 303. After the

production of evidence has been completed, the prosecutor and the defence counsel address the court twice each, and the accused is given an opportunity to make a closing statement; see Article 304. Thereafter the jury is to determine the question of guilt by answering yes or no to specifically formulated questions, which are submitted to it in writing. The questions are formulated by the presiding judge on the basis of a draft prepared by the prosecutor and to which defence counsel is given an opportunity to comment; see Article 363. In Article 364(2) it is emphasised that each question 'must relate to only one accused, as far as possible to only one criminal matter and to only one penal provision'. A question shall not only describe the particular characteristics of the criminal act, but also describe in brief how the criminal act was committed, with details of time and place; see Article 366. This is illustrated by the questions that were asked in Mr X's case, which are set out above. It can be seen that the specific account of what Mr X allegedly had done distinguishes them from the questions that were put to the jury concerning Mr Taxquet's guilt.

(65) Before the jurors retire to deliberate *in camera*, the presiding judge shall ... in a 'summing up' explain the questions and the legal principles on which the jury ought to base its decision and shall go through the evidence in the case; see Article 368(2). The explanation of the applicable legal principles is binding on the jury, whereas the summing up of the evidence is for guidance only. Before the jury retires, the parties may require that 'specially indicated parts of the explanation of the legal principles' be entered in the court record; see Article 368(4). This was not asked for in Mr X's case. Defence counsel has informed us that he asked the presiding judge to explain precisely what is required to establish guilt, and that this was done.

(66) If the jury returns a not-guilty verdict, the High Court shall as a general rule base its ruling on the jury's verdict. The panel of professional judges may only set aside a not-guilty verdict if it finds that the defendant 'without doubt' is guilty; see Article 376A. In contrast, a guilty verdict is not binding on the panel of professional judges. Article 376B provides that if the panel of professional judges finds that the matter described in the questions to the jury is not criminal or that criminal liability is time-barred, it shall acquit the defendant. And the panel of professional judges shall also set aside the jury's guilty verdict if it finds that 'insufficient evidence of his guilt has been produced'; see Article 376C. It is true that Article 376 uses the word 'may' and not 'shall', and the preparatory works to Article 376C state that 'the court [i.e. the panel of professional judges] is not obliged to set aside a guilty verdict in all cases where it would have come to a different conclusion', since it is the jury which has the 'principal responsibility' for the assessment of evidence; see *Ot.prp. no. 35 (1978-79)* page 221. However, fundamental principles of the rule of law dictate that the court, i.e. the panel of professional judges, shall set aside a jury's guilty verdict if there is reasonable doubt about the defendant's guilt.

(67) For the sake of completeness, I mention that if the jury's verdict is set aside, the case shall be tried anew by other judges and that at the retrial the High Court shall sit as a composite court with three professional judges and four lay judges; see Article 376A and 376C, cf. Article 332.

(68) It is thus apparent that several mechanisms exist that are designed to ensure that the jury reaches its verdict following a conscientious assessment of the evidence on the basis of a correct understanding of the law. The questions that are put to the jury are specific and individual and are explained to them by the presiding judge of the court. Also the legal principles by which they are bound are explained to them and the evidence is summed up. The professional judges' review of a guilty

verdict is also a safeguard. In the light of the European Court's case-law, I cannot see that there is any support for suggesting that a genuine and conscientious assessment is not sufficiently ensured, nor that it was not ensured in Mr X's case.

(69) The next question is how the Code of Criminal Procedure ensures that the defendant and the general public can *scrutinise the assessment that has been carried out*.

(70) Article 40(1) of the Code of Criminal Procedure provides that a judgment of the High Court that is based on a jury verdict shall, 'as regards the question of guilt, simply consist of a reference to the said verdict'. As already mentioned, the European Court has given particular weight in its case-law to whether the questions that are put to the jury in a particular case are formulated so concretely that they provide information about what the jury has found to be proven. As I have already shown, the questions that are put to the jury in Norway shall provide information about the facts that the jury has found to be proven; see Article 365 and 366.

(71) A primary question shall begin with the words: 'Is the accused guilty?'; see Article 366. The jury is not asked whether the individual conditions for criminal liability are satisfied. Thus, in the event of an acquittal, one is not informed of whether the jury was of the view that the defendant did not commit the offence or whether there was a ground for exempting him from criminal liability or whether the subjective conditions for criminal liability were not satisfied. However, acquittals are not at issue here. And a guilty verdict means that the jury has found that all of the conditions for convicting the defendant are satisfied. A different matter is that, in a guilty verdict, some questions may remain unanswered, for example regarding the scope of the criminal act or the degree of guilt found in the assessment of the accused's culpability. These are questions that will be dealt with in sentencing.

(72) Pursuant to Article 376E [of the Code], the sentence is determined by three professional judges and four jurors – the jury foreperson and three other jurors chosen by lots. From Articles 39(1) no. 2 and 40(2) it follows that reasons shall be given for the sentence. According to long-standing practice the professional judges and four appointed jurors were to jointly describe, as a basis for passing sentence, the act for which the defendant has been convicted. The description of the criminal act must, among other things, state what is found to be proven as regards subjective guilt and, if the questions to the jury were formulated as alternatives using the words 'and/or', the description of the criminal act must state which of the alternatives is found to be proven. It may also be necessary to give details about the scope of the criminal act; see e.g. the case reported in *Norsk Retstidende* – "*Rt*." 2007 page 961.

(73) Thus, the reasons that are given for the sentence contain detailed information about what the four jurors and three professional judges have found to be proven. Normally – if there is no reason to assume otherwise – the said reasons must also be deemed to represent the jury's view.

...

(75) The evidence on which the conviction is based will often be apparent from the context, but this is not always the case. Where a case has been tried by a composite court, Article 40(5) provides that the reasons in the judgment shall not only describe the matters which the court has found to be proven, but also state 'the main points in the court's assessment of the evidence'. ...

(76) This provision does not apply directly in jury cases, but the view in legal theory is that it should apply by analogy to the High Court's assessment of the evidence in connection with sentencing; ... . I agree with this view. However, in the same way as in cases that are tried by a composite court, the circumstance that an inadequate account has been given of the assessment of evidence will rarely constitute a ground for setting aside a judgment; see *Ot.prp. no. 78 (1992-93)* at page 78. A judgment will only be set aside on the grounds that the account of the assessment of evidence was inadequate if the deficiency hinders the hearing of the appeal or if it is deemed to have affected the substance of the judgment; see Article 343(2) no. 8 and Article 343 (1).

(77) Referring to paragraph 30 of the European Court's judgment in *Göktepe v. Belgium* (no. 50372/99, 2 June 2005), defence counsel have alleged that a violation of the Convention in relation to the question of guilt cannot be repaired during sentencing. In *Göktepe*, the violation of the Convention consisted in a failure to put separate questions to the jury for each of the defendants, and the Court rejected the respondent State's argument that this was repaired by the possibility to differentiate between the defendants in sentencing. This is a different situation from the one where separate questions for each defendant have been put to the jury, and where the matters which the court has found to be proven within the scope of [those] questions ... are specified in the grounds for the sentence. Paragraph 48 of the Court's [Chamber] judgment in the *Taxquet* case, where it points out that Mr Taxquet was not given so much as a summary of why the Assize Court found him guilty, also indicates that a summary in the reasons for sentencing must be relevant when determining whether the requirement of fair trial has been satisfied.

(78) On this basis, I am of the view that the Norwegian Code of Criminal Procedure adequately preserves the interests of both the defendant and the public at large in having access to the premises for a conviction – *the interests in verifiability*, and that those interests were adequately protected in Mr X's case.

(79) I turn now to the question whether and to what extent the Code of Criminal Procedure ensures an *effective right of appeal* of the High Court's judgment.

(80) Pursuant to Article 306(1) and (2), a criminal conviction by the High Court can be appealed to the Supreme Court on the grounds of an error in the application of law regarding the question of guilt, an error in the sentencing and an error of procedure. However, Article 306(3) provides that if a case has been tried by jury, an appeal against the application of law concerning question of guilt can only be lodged to a defendant's detriment if there is an error in the presiding judge's summing up of the legal principles that are applicable in the case and the summing up has been recorded. There is no such limitation on the right to lodge an appeal to a defendant's benefit. In a long series of cases, the Supreme Court has held that on an appeal to a defendant's benefit, it has power to review the jury's application of law, both on the basis of the presiding judge's recorded summing up and on the basis of what the jury, in the light of the available information, probably founded its decision on; see the case recorded in *Rt.* 2007 page 961 paragraph 29 with references to former case-law. This means that when the Supreme Court hears an appeal against the High Court's application of the law, it can base its decision on the description of the criminal act given by the professional judges and the four jurors as the reason for the sentence, in addition to the questions that were put to the jury and any information available on the contents of the summing up; see the case reported in *Rt.* 2007 page 961 at paragraph

35. As I have previously pointed out, this must – in the absence of information to the contrary – also be deemed to represent the jury's view.

(81) Whether the above provides the Supreme Court with a sufficient basis for reviewing the application of law will depend on the circumstances of each individual case. In most cases, the questions put to the jury and the description of the criminal act in the judgment will provide a sufficient basis for reviewing the High Court's application of the law. In some cases, however, this may be insufficient. If it is not clear that the criminal act as described falls within the scope of the legal provision in question, it may ... be wise to make an audio recording or a written record of the summing up even though neither of the parties has requested this. If this is not done, the High Court's judgment should, out of regard for the Supreme Court's review, contain an account of its application of the law.

(82) In Mr X's case, the salient question is whether the requirement of intent is satisfied. The judgment contains a description of the relevant requirement of intent, *dolus eventualis*, and therefore enables the Supreme Court to review whether the law has been applied correctly. Mr X has not otherwise appealed against the application of the law.

(83) In sum, it cannot be deduced from the Convention institutions' case-law that a conviction based on an affirmative answer from the jury without any further reasons is incompatible with violation of Article 6 § 1 of the Convention. What is decisive is whether the purpose behind the requirement to give reasons is sufficiently satisfied in some other way. The Norwegian jury system contains mechanisms to satisfy these purposes, and cases that are dealt with in accordance with the provisions of the Code of Criminal Procedure will normally meet the requirements of a fair trial. In some cases, however, in order to ensure that the Supreme Court's review the application of the law be effective, it may be necessary in the circumstances for the High Court to make an audio recording or a written record of the summing up and/or describe its understanding of the law in the reasons that are given for the sentence."

B. Relevant domestic law and practice

22. The following provisions of the Code of Criminal Procedure pertaining to jury trials are of relevance:

Article 39

"A judgment shall contain:

1) a short account of the subject-matter of the case with the claims that have been made,

2 the reasons for the decision,

3) the conclusion of the judgment.

Transcripts of the judgment shall also contain information about the court, the judges, the time and place of the delivery of judgment, the parties and their representatives.

The presiding judge of the court shall write the judgment unless the court decides otherwise.

The judgment shall be signed by the judges who have taken part in the adjudication."

Article 40

"In the case of judgments of the High Court, when the judgment is based on the verdict of a jury, the grounds of the judgment shall, as regards the question of guilt, simply consist of a reference to the said verdict.

In other cases, when the person charged is convicted, the grounds of the judgment concerning the issue of guilt shall specifically and fully state the facts of the case that the court has found to be proven as a basis for the judgment and shall refer to the penal provision pursuant to which the person charged has been convicted. When the person charged is convicted, the grounds of the judgment shall also state the reasons to which the court has attached importance in determining the penalty and other sanctions. ... Information about previous convictions or waivers of prosecution shall only be included in so far as they affect the judgment."

Article 306

"Appeals against judgments of the District Court or the High Court may be brought by the parties to the appellate court indicated in Articles 6 to 8.

An appeal to the Supreme Court cannot be made on the ground of an error in the assessment of evidence in relation to the question of guilt.

As regards a judgment of the High Court in a case that is tried with a jury, no appeal to the detriment of the person charged may be brought against the application of law with regard to the question of guilt unless the ground of appeal is that the presiding judge's recorded explanation of the legal applicable principles was erroneous."

Article 363

"After the production of evidence relating to the question of guilt has been completed, the prosecutor shall submit a draft of the questions to be put to the jury. Defence counsel shall be given an opportunity to comment on the said draft. When required, a short adjournment shall be granted in order to study the draft.

The presiding judge shall formulate the questions and submit them to the parties. If any of them raises any objection to the questions, the court shall decide the matter."

Article 364

"The object of the questions is the matter to which the indictment relates.

A question must relate to only one accused, as far as possible to only one criminal matter and to only one penal provision.

When the court finds it appropriate or a party so requires, a question shall be put as to whether there are circumstances that may bring the matter under another penal provision than the one to which the indictment relates.

If an affirmative answer to a question will exclude other questions, the question that will lead to the least favourable result for the accused shall be put first. ”

Article 365

“All questions shall be so framed that the jury can answer yes or no to any of them.

For each question it shall be stated how many votes are required for an answer in disfavour of the accused. If a question is to be answered only in the event that a preceding question is answered in a specific manner, this shall also be stated in the written list of questions.”

Article 366

“A primary question shall, unless it relates to a matter that is not concerned with criminal guilt, begin with the words: ‘Is the accused guilty?’ The question shall include the legal characteristics of the criminal act and a short, but as accurate as possible, description of the matter to which the indictment relates, with details of time and place.”

Article 367

“If the jury is to decide whether there are such special circumstances as would pursuant to statute bring the matter under a more severe or milder penal provision, an additional question concerning this issue may be put. This question shall only be answered if an affirmative answer is given to the question to which the additional question is connected.”

Article 368

“When the questions have been defined, the presiding judge shall read them aloud. Each member of the jury shall receive a transcript of the questions.

The presiding judge shall sum up the evidence in the case and explain the questions and the legal principles to be applied.

The parties may request further explanation on specific points. They may also submit proposals concerning amendments to the questions.

The parties may require that specially indicated parts of the explanation of the legal principles shall be entered in the court record. Any such demand must be submitted before the jury has retired to deliberate; see Article 369.”

23. Under Articles 376, 376A, 376B and 376C of the Code of Criminal Procedure, the professional judges shall pronounce judgment in accordance with the jury’s verdict, unless they decide differently on the conditions set

out in these provisions. The professional judges may set aside a jury verdict concluding with the indicted person being found not guilty, if they find that he is undoubtedly guilty (Article 376A) and may also set aside a "guilty" verdict, if they find that insufficient evidence has been produced (Article 376C). In both situations the case is tried anew by other judges in a composite court.

C. Council of Europe Instruments

24. On 12 November 2008, the Consultative Council of European Judges (CCJE) adopted Opinion No. 11 (2008) on the Quality of Judicial Decisions. Paragraph 3 states that "[c]lear reasoning and analysis are basic requirements in judicial decisions and an important aspect of the right to fair trial". It follows from paragraph 9 that the term "judicial decision" in the Opinion means "a determination which decides a particular case or issue and is given by an independent and impartial tribunal", and that this concept includes "decisions given by professional or non-professional judges or by courts combining the two (*échevinage*)". According to paragraph 34, judicial decisions "must in principle be reasoned". A footnote explains that exceptions may include, among others, decisions involving the management of the case, minor procedural issues or essentially non-contentious issues, decisions by an appeal court affirming a first instance decision after hearing similar arguments on the same grounds, jury decisions and some decisions concerning leave to appeal. Paragraph 41, which concerns the scope of the obligation to give reasons, provides that in the case of a jury, "the judge's charge to the jury must clearly explain the facts and issues that the jury must decide."

COMPLAINT

25. The applicant complained under Article 6 § 1 of the Convention that he had not been afforded a fair hearing in that the national courts had failed to give adequate reasons for his conviction.

THE LAW

26. The applicant complained in particular that the High Court had provided inadequate reasons for its decision to convict him under Article 60A of the Penal Code and that the Appeals Leave Committee of the Supreme Court had refused him leave to appeal against the High Court's

judgment. There had thus been a violation of Article 6 § 1 of the Convention, which, in so far as relevant reads:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

27. Relying on the Court's Chamber judgment in *Taxquet v. Belgium* (no. 926/05, 13 January 2009), the applicant submitted that whilst he, in contrast to Mr Y., had been convicted for having committed the drugs offences as part of the activities of a criminal group, the High Court's judgment did not specify the persons with whom he was found to have formed such a group. It was unclear whether it was found that he had formed a group with the Turkish milieu, which had stood for the importation, or with the Kosovo-Albanian milieu in Oslo, in which he had acquaintances. It could have been a combination of the two but this had not been specified. However, the High Court's judgment did not contain any reasoning, only a reference to the jury's affirmative answer to the questions. Nor did its reasoning on sentencing provide any further answer to why he had been convicted under Article 60A.

28. The applicant further argued that, since only a general question had been addressed to the jury on whether the applicant belonged to a criminal group, the question offered no guidance or reasoning that could offset the lack of reasoning in the judgment. Also the City Court's judgment was vague and general and provided no answers to the above issues.

29. The Court notes from the outset that the Supreme Court's plenary judgment of 12 June 2009 (see paragraph 21 above) post-dates the Court's Chamber judgment in *Taxquet v. Belgium* (no. 926/05, 13 January 2009) and pre-dates its Grand Chamber judgment of 16 November 2010 (*Taxquet v. Belgium* ([GC], no. 926/05, ECHR 2010) in the same case. In the latter judgment, after having carried out a detailed analysis of the Convention case-law, the Grand Chamber enunciated the following general principles:

> "90. It follows from the case-law cited above that the Convention does not require jurors to give reasons for their decision and that Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict. Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness. As the Court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the Convention (see, among many other authorities, *mutatis mutandis*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 116, ECHR 2005-X). In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society (see *Suominen v. Finland*, no. 37801/97, § 37, 1 July 2003, and *Tatishvili v. Russia*, no. 1509/02, § 58, ECHR 2007-III).
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> 91. In proceedings conducted before professional judges, the accused's understanding of his conviction stems primarily from the reasons given in judicial decisions. In such cases, the national courts must indicate with sufficient clarity the

> grounds on which they base their decisions (see *Hadjianastassiou v. Greece*, no. 12945/87, 16 December 1992, § 33, Series A no. 252). Reasoned decisions also serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case (see *Ruiz Torija*, cited above, § 29). While courts are not obliged to give a detailed answer to every argument raised (see *Van de Hurk v. the Netherlands*, 19 April 1994, § 61, Series A no. 288), it must be clear from the decision that the essential issues of the case have been addressed (see *Boldea v. Romania*, no. 19997/02, § 30, ECHR 2007-II).
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> 92. In the case of assize courts sitting with a lay jury, any special procedural features must be accommodated, seeing that the jurors are usually not required – or not permitted – to give reasons for their personal convictions (see paragraphs 85-89 above). In these circumstances likewise, Article 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction (see paragraph 90 above). Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced (see paragraphs 43 et seq. above), and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers (see *Papon*, cited above). Lastly, regard must be had to any avenues of appeal open to the accused."

30. In its examination, the Court will first have regard to the general features of the Norwegian jury system. A prerequisite for the jury to pass a verdict that the defendant is guilty of a charge is that more than six of the (normally) ten jurors answer "yes" to the question addressed to it by the High Court's presiding judge in relation to the charge. No further specification is to be given of the number of votes (Article 372 of the Code of Criminal Procedure), nor should the jury state reasons for its verdict: Pursuant to Article 40, "when the High Court's judgment is based on the jury's verdict, the grounds of the judgment concerning the issue of guilt shall simply consist of a reference to the said verdict." However, as can be seen from the principles summarised in the *Taxquet* judgment (see paragraph 26 above), this state of affairs does not of itself give rise to an issue of failure of compliance with Article 6 of the Convention. The question is rather whether the rules governing the operation of the jury system under Norwegian law and the manner in which they were applied in the instant case offered sufficient safeguards to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction.

31. In this regard, the Court sees no cause for calling into doubt the Supreme Court's conclusion that a series of safeguards were in place to ensure that the jury reached its verdict following a conscientious assessment of the evidence on the basis of a correct understanding of the law (see paragraph 68 of its leading judgment quoted at paragraph 21 above).

32. In the first place, the Court notes that important safeguards existed under national law in respect of the jury's participation in the examination of a case before the High Court. Like the professional judges, the jurors were to hear all the evidence and arguments presented on behalf of the prosecution and the defence. Thereafter, the jury was to decide on the question of guilt by answering "yes" or "no" to questions specifically formulated by the High Court's presiding judge on the basis of a draft prepared by the prosecution and in light of comments by the defence. Articles 363, 364 and 366 set out requirements concerning the degree of precision with which the questions ought to be formulated, with regard to the accused, the criminal matter and the relevant penal provision, the description of the particular characteristics of the criminal act and the manner in which the act was committed with reference to time and place (see paragraph 64 of the Supreme Court's judgment at paragraph 21 above).

33. Before the jury withdrew to deliberate *in camera*, the High Court's presiding judge, in the presence of the prosecution and the defence, explained in a "summing up" to the jury the questions and the applicable legal principles and provided guidance on the evidence, with a possibility for the parties to require that parts concerning points of law be entered on the court records (see paragraph 65 of the Supreme Court's judgment at paragraph 21 above). The jury's verdict was further subject to validation by the professional judges (the modalities of which are described in paragraph 66 of the Supreme Court's at paragraph 21 above).

34. The Court further notes that the procedure included a number of devices aimed at enabling the accused to understand the reasons for his or her conviction. The questions put to the jury should provide information about the facts that the jury had found to be proven. A guilty verdict meant that the jury had found that all the conditions for convicting the accused to be satisfied. Although some questions might remain unanswered, regarding such matters as the scope of the act and the degree of guilt, these would be dealt with in the sentencing (see paragraphs 70 and 71 of the Supreme Court's judgment at paragraph 21 above).

35. Moreover, whilst reasons were not given for the jury's verdict or, for that matter, the professional judges' decision to endorse the verdict – in other words the decision on conviction, reasoning was a requirement for the High Court's decision on sentencing (Articles 39 and 40 of the Code of Criminal Procedure). In this context, there was a long-standing practice (see paragraphs 72 and 73 of the Supreme Court's judgment at paragraph 21 above) whereby the professional judges and the four jury members (the fore-person and three jurors drawn by lot) jointly describe the offence of which the defendant had been convicted as a basis for passing sentence. This was to state what had been found established regarding subjective guilt; in the event of alternative questions having been put to the jury, which one of the alternatives was found established and, where necessary, give

details of the scope of the criminal act. Normally, unless there was reason to assume otherwise, the grounds so stated would be representative of the jury's views.

36. Finally, the Court observes that it was open to lodge, to the defendant's benefit, an appeal with the Supreme Court against the High Court's application of the law regarding the question of guilt, its decision on sentencing and its procedure. The Supreme Court had power to review the jury's application of the law on the basis of the presiding judge's recorded summing up to the jury and of the description of the offence given as the reasons for the sentence by the professional judges and the four jurors (see paragraph 80 of the Supreme Court's judgment at paragraph 21 above).

37. Against this background the Court is satisfied that that, for the purposes of the fair hearing guarantee under Article 6 § 1 of the Convention, there were sufficient safeguards in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his or her conviction.

38. As to the further issue concerning the manner of application of these safeguards to the instant case, the Court is unable to agree with the applicant's contention that inadequate reasons had been given by the High Court for his conviction under Article 60A of the Penal Code for having committed the various drugs offences as part of the activities of an organised criminal group and that this shortcoming had not been offset by the questions put to the jury. It is not apparent that the applicant or his counsel during the High Court proceedings expressed any objections or made any suggestions to the manner in which the questions to the jury were formulated, although given an opportunity to do so.

39. Be that as it may, the Court is in any event satisfied that the information contained in the questions to the jury, which were geared towards the applicant individually, and in the reasons given by the professional judges and the four jurors as their basis for sentencing was sufficient to enable the applicant to understand his conviction on the Article 60A charges (see paragraphs 15 and 18 above; compare *Taxquet* [G.C.], cited above, §§ 96-98). His suggestion that he ought to have been in a position to understand the High Court's findings regarding the national and/or ethnic profiles of the groups in question and that inadequate reasoning had been given in this respect appears unfounded.

40. Also, the Court cannot see that the application of Article 60A of the Penal Code to the applicant's case should have given rise to any issue of law regarding the question of guilt or of sentencing that had not been adequately addressed in the High Court's judgment and could not, therefore, be raised in the applicant's appeal to the Supreme Court. Indeed, the applicant did not argue the contrary.

41. Therefore, having regard to the safeguards of the Norwegian jury system and the manner in which these were applied to the instant case, the

Court finds nothing to indicate that there was any risk of arbitrariness or that the applicant was not able to understand the reasons for his conviction under Article 60A of the Penal Code. Accordingly, the omission of the jury to state reasoning for its verdict did not render the trial unfair for the purposes of Article 6 § 1 of the Convention (see similarly *Judge v. the United Kingdom* (dec.) 35863/10, 8 February 2011).

42. The application is therefore manifestly ill-founded and must be declared inadmissible under Article 35 §§ 1 and 4 of the Convention

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren Nielsen Registrar	Nina Vajić President