Translation from Norwegian

OSLO DISTRICT COURT

JUDGEMENT

Pronounced:	20 April 2016 in Oslo District Court
Case no.:	15-107496TVI-OTIR/02
Judge:	District Court Judge Helen Andenæs Sekulic
At issue:	Petition for declaratory judgement for violation of Articles 3 and 8 of ECHR

Anders Behring Breivik	Attorney Øystein Storrvik Second chair: Attorney Mona Danielsen
v.	
Ministry of Justice and Public Security	Attorney Marius Kjelstrup Emberland Second chair: Attorney Adele Matheson Mestad

JUDGEMENT

The case relates to a petition for declaratory judgement for violation of Articles 3 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") during remand in custody and subsequent serving of the sentence imposed.

Presentation of the case

The Plaintiff, Anders Behring Breivik, was arrested by the police on 22 July 2011 after having committed acts of terrorism in Oslo city centre and at Utøya in Hole municipality. He killed 8 people and wounded a number of others, several of them seriously, when he detonated a bomb in the Government Building Complex in Oslo. The explosion also caused extensive damage to property. On that same day, he killed 69 people on Utøya island, where most of the victims were attending the summer camp organised by Arbeidernes Ungdomsfylking <*Workers' Youth League – hereinafter 'AUF' - Translator*>. Most of the victims were killed by bullets from a semi-automatic rifle and a semi-automatic pistol, wielded by the Plaintiff. Another 33 young people were wounded, and a large number of people had to endure mental pain and suffering.

In a judgement rendered by Oslo District Court on 24 August 2012, Breivik was convicted of violation of the (Norwegian) General Civil Penal Code - Section 147 a, first subsection, a) and b), cf. General Civil Penal Code – Section 148 first subsection, first penal alternative and Section 233, first and second subsections, and Section 233, first and second subsections, cf. Section 49, and General Civil Penal Code - Section 147 a, first subsection, b), cf. Section 233 first and second subsections, and Section 233 first and second subsections, cf. Section 49, and sentenced to preventive custody pursuant to the General Civil Penal Code – Section 39 c (1) for a period of 21 years, with a minimum period of 10 years.

Plaintiff spent the first few days following his arrest in police custody, and was transferred to Ila Detention and Security Prison <*hereinafter 'Ila' – Translator*> on 27 July 2011. A special maximum security wing (hereinafter "SHS") was established at Ila. The Norwegian Correctional Service (regional level) came to its first decision on 8 August 2011 to the effect that the Plaintiff was to be confined to SHS pursuant to the rules laid down in the (Norwegian) Execution of Sentences Act – Section 11, cf. Section 10, second subsection, and the Regulations to the Execution of Sentences Act, Chapter 6. Since that time, he has been confined to SHS. These decisions are made for periods of six months, and the most recent decision is dated 4 March 2016. Since September 2012, Plaintiff has appealed the decisions

concerning continued imprisonment in SHS to the Directorate of the Norwegian Correctional Service, but this has not been successful.

On 23 July 2012, Plaintiff was transferred to Telemark Prison, Skien Unit, where he stayed for approximately two months. On 28 September 2012, he was moved back to Ila, where he remained until 9 September 2013. From 9 September 2013 to the present, he has served his sentence in Telemark Prison, Skien Unit (hereinafter "Telemark Prison").

Telemark Prison cannot be considered a high-security prison. The Norwegian Correctional Service has maintained that, despite this, Telemark Prison has been considered to be a more appropriate prison unit for the Plaintiff, in part because it can offer him more space and a better range of activities, so as to avoid isolation damage over time.

A memo has been submitted from Ila, dated 29 February 2016, as well as a memo from Telemark Prison dated 1 March 2016, where a more thorough account is given of details related to the Plaintiff's confinement.

As regards his time at ***Ila Detention and Security Prison***, Breivik had access to three cells: a cell to live in, a cell to work in and a cell for exercise. Each of the cells was 8 square metres in size. He was always handcuffed and, usually, examined using a metal detector whenever he moved between these cells. A door was installed between the living area cell and the work cell on 15 April 2013, so that Breivik could move freely between these cells during daytime. He also had access to a shower and exercise yard on a daily basis, if he wished.

The cells had windows equipped with protective film to prevent visual access. The living area cell was equipped with a toilet and sink, a desk and chair, a cork board, bed and TV with built-in DVD player.

The work/study cell contained a desk with chair, a toilet and sink, a "Stressless" recliner (from May 2013), cork board, bookshelf, TV, PlayStation 1 (from May 2013) and PlayStation 2 (from August 2013). He had access to a PC during the remand period. He was given an electric typewriter in November 2012.

The exercise cell contained a toilet and sink, treadmill, exercise mat, a multi-purpose weight training machine (from November 2011) and a spinning bike (from December 2012).

Prior to the criminal trial and during the three-week judicial observation, the South Block auditorium (approximately 60 square metres) was used for Plaintiffs' conversations with legal

experts. Other conversations with experts, defence counsel, health professionals, chaplain, etc. were conducted in the approx. 10 square metre lounge with a glass wall in Wing G.

The Court has been informed that Breivik had daily contact with prison personnel in connection with moves/transfers, etc., and had conversations with the wing manager almost daily. This contact with the wing manager could vary from short messages to conversations that lasted approximately half an hour.

Breivik had weekly talks with the prison chaplain, with a duration of approximately one hour.

In the beginning, he had conversations with health personnel every day. The health service gradually reduced the frequency of these talks to five days a week, and then to three days a week, divided among physician, psychiatrist and psychiatric nurse.

He had the opportunity to make private telephone calls for 20 minutes per week. It has been stated that he had 23 telephone conversations lasting 20 minutes, and one telephone call lasting 40 minutes to his mother, during the period from 4 October 2012 to 21 March 2013. Breivik's mother died on 22 March 2013. It has also been stated that he has had 18 telephone conversations of 10 minutes' duration to a female acquaintance, and 8 telephone conversations of 20 minutes' duration to another female acquaintance. All of these phone calls were monitored.

Breivik was visited regularly by his attorneys during his confinement at Ila. He received 5 visits from his mother. Her final visit, which took place a few weeks before his mother's death, was carried out without a glass wall.

As regards correspondence, it has been stated that during the period from 8 August 2012 to 26 September 2013, Breivik sent out 78 letters without changes from the mandatory inspection. 48 letters were refused and not sent, while 56 were partially censored before they could be sent. A total of 619 letters were received for Breivik during the same period. Delivery was denied for 14 of these letters to Breivik, and one letter was partially censored before it was delivered to him. The prison's letter log does not cover the period before the final and enforceable judgement was rendered in August 2012. Therefore, the number of letters actually received and sent is probably somewhat higher.

Cameras were placed in the study cell and the exercise cell, in the exercise yard, in the lounge and the auditorium. There was no camera surveillance of the living area cell.

Ila has stated that Breivik was strip-searched 117 times in 2011, 199 times in 2012 and 76 times in 2013. It is not contested that the prison figures do not include body-searches of Breivik conducted by the police. Therefore, the total number of body-searches during the period is substantially higher. Breivik himself has estimated a total of 880 body-searches.

Furthermore, it has been stated that the prison has recorded use of handcuffs 768 times in 2011, 1007 times in 2012 and 441 times in 2013.

During his time at Ila, the Plaintiff received lessons from a part-time teacher from Rud school related to the private candidate examinations in history and Norwegian for the 2012/2013 school year. These lessons amounted to a total of 50 hours.

In ***Telemark Prison,*** Breivik has access to three cells – a living area cell, a work/study cell and an exercise cell – each of which is approximately 10.5 square metres, according to the prison memo. After a period of time, a security gate was installed between the cells Breivik has access to and the rest of the wing, so that he can move freely between his cells during the period from 07:30 hours (09:00 on weekends) to 19:30 hours. This area was reduced for a period of time in the autumn of 2015 (from September to December), when another inmate was placed in one of the cells the Plaintiff used. This entailed that the Plaintiff had to be locked inside his work/study cell during daytime, and could not move freely as before.

All of the cells have windows which allow daylight into the cell, and are equipped with protective film.

The living area cell contains a toilet, sink and shower, desk with chair, TV with built-in DVD player and X-box, cork board, cupboard with integrated refrigerator, and a bed.

The work/study cell has a toilet, sink and shower, desk with chair, cork board, bookshelf, TV and PlayStation. He has access to electronic writing tools, in addition to an ordinary typewriter.

The exercise cell has a toilet, sink and shower, treadmill, elliptical machine, exercise mat and multi-purpose workout machine.

He has the opportunity to use an exercise yard for fresh air every day. Since December 2015, he has also used the prison's main exercise yard approximately once every two weeks, accompanied by 3 officers.

It has been stated that prison officers check on Breivik once an hour during daytime, and that there may be conversations through the security gate in connection with these checks, lasting from five to 30 minutes. He has weekly, one-hour conversations with a chaplain, and is visited by a volunteer prison visitor once every two weeks, for about 1.5 hours. Breivik also receives regular visits from his attorneys.

Breivik has the opportunity to speak with health professionals one to two times per week, and as needed. He has a standing offer to speak with a psychiatrist, but has declined since March 2014.

All visits and all conversations with health professionals, chaplains, etc. take place in a visiting room with a glass wall.

Furthermore, 99 telephone calls have been logged, each of 20 minutes duration, between the Plaintiff and a female acquaintance during the period from 19 September 2013 – 27 August 2015. The Plaintiff has chosen to terminate this contact. All telephone calls have been monitored.

During his confinement in Telemark Prison from September 2013, Breivik wanted to send out 1313 letters. Of these, 875 were allowed, while 438 were refused. He has received 923 letters, 820 of which were delivered to him, while 103 letters were refused.

Surveillance cameras are placed in the study cell, exercise cell, lounge and common rooms. His living area cell is not kept under camera surveillance.

The body-searches have been significantly reduced after the Plaintiff came to Telemark Prison. It has been stated that a total of 5 body-searches have been performed on him. In addition, 75 inspections have been made of the Plaintiff (inspections of his clothing) in 2014, 35 inspections in 2015 and two inspections as of 10 February 2016.

It has also been stated that handcuffs were used on the Plaintiff 150 times in 2014, 80 times in 2015 and three times as of 23 February 2016 (in connection with visits to the main exercise yard).

He completed a preparatory university programme (Norwegian: ex.fac) privately in the spring of 2015, and took the exam. He applied for and was accepted to the bachelor programme in political science in the summer of 2015. He completed the Political theory and Public policy and administration units, and took the exam in December 2015. In January 2016, he started

private studies for examen philosophicum (another preparatory examination), and his application to take the examination in prison in May 2016 has been granted.

After the restraint on correspondence and visits was lifted on 14 November 2011, the Plaintiff has, in principle, been able to receive visits, with the exception of visits that could presumably be taken advantage of for the planning of criminal acts, evasion of punishment or actions that could disturb the general peace, order or security. With the exception of his mother, and one visit by a researcher who testified as a witness during the criminal proceedings, Breivik has not had any private visits.

The Plaintiff has not had any form of companionship with other inmates, neither at Ila Detention and Security Prison nor in Telemark Prison. When the Plaintiff is to be moved, the regular routine is that all other inmates are on lock-down in their own cells. Breivik has therefore not physically observed other inmates during his prison confinement.

Basis for Plaintiff's claim:

Articles 3 and 8 of ECHR have been violated, both during the period when Breivik was remanded in custody, and subsequently in the period during which he has been serving his sentence.

As regards Article 3 of ECHR, it is asserted that the extensive isolation the Plaintiff has been subjected to since his arrest and up to the present, constitutes *"inhuman treatment"* in the sense of the Convention.

The concept of isolation is not an absolute. The reality is that the Plaintiff spends 22-23 hours per day alone in a cell. This is an entirely closed world, with very little human contact. The external facilities surrounding the Plaintiff are of little significance; being cut off from other human beings is the important issue here.

He has been totally cut off from any contact with fellow inmates, and has only had limited contact with prison guards and professionals. With the exception of visits by his mother when he was confined at Ila, the Plaintiff has only been visited by people in their professional capacity. All visits – including attorneys' visits – are conducted through a glass wall. The glass wall creates an extreme sense of detachment, and results in peculiar communication. This must be regarded as a very excessive security measure.

Sufficient compensating measures to counteract isolation damage have not been implemented. The measures proposed in the risk assessment by witness Rosenquist have not been followed up, and the reason for this has not been substantiated. There have been few attempts to ease the security regime over time, even though Breivik has exhibited exemplary behaviour during his imprisonment.

It is also asserted that Breivik has suffered isolation damage for which he has not received adequate medical treatment. He has made painstaking reports describing typical isolation afflictions. These are of such a nature that they are difficult to ascertain other than by a description from the afflicted person – examples include persistent headache and feelings of powerlessness. There is a greater danger that the Plaintiff is covering up afflictions rather than over-reporting them.

Convention practice shows that the prisoner's mental vulnerability is an important element in the assessment. It is pointed out that Breivik has a mental vulnerability which means that the authorities must exercise extra caution when subjecting him to isolation. He does not want to be followed up by a psychiatrist because he wants to be perceived as strong and healthy. The authorities must deal with him as he actually is.

Moreover, Breivik has not had an independent appeal body that could evaluate his prison conditions overall. Instead, he has been relegated to appealing the individual decisions to the Correctional Service Directorate, which Breivik has previously asserted is legally incompetent as the Directorate was directly affected by the terrorist attack. He has not been able to appeal the terms of his imprisonment as a whole, only the individual decisions. Also, he has so far had his application for free legal aid rejected, and the question of who will cover the expenses of providing him with legal assistance has still not been resolved. The protection of due process is an integral part of the assessment of whether or not the Convention has been breached.

His prison regime deviates in such a manifest way from the treatment given to all other prisoners in Norwegian prisons, regardless of what heinous acts they have been convicted of, that this must be deemed to be an additional punishment.

A comprehensive assessment must be made, in which all aspects are taken into consideration. The standard of proof is that it must be beyond a reasonable doubt.

Alternatively, it is argued that the frequent strip-searches and being woken up in the night which the Plaintiff was subjected to at Ila, constitutes a distinct violation in the form of *"degrading treatment"* according to ECHR, Article 3.

Breivik himself has noted the number of strip-searches during the period at Ila at 880, a figure the Court will accept. This number seems unnecessarily high, taking into account the other stringent security measures also in place. Female guards were present during the searches on several occasions, and Breivik found that to be an extra burden. For a long period of time, he was also woken up every half hour during the night to prove that he was still alive.

As regards ECHR Article 8, the letter screening has been carried out so stringently that the Plaintiff has, in practice, been cut off from communicating and forming relationships with others by means of letters. The previous assertion to the effect that the letter screening was carried out in violation of Section 30 of the Execution of Sentences Act, was withdrawn during the main hearing.

The Plaintiff further asserts that practice as regards his opportunity to make/receive telephone calls and to receive visitors from outside has been very strict. He has thus been deprived of the opportunity to establish personal relations.

Viewed in context with his strict prison conditions in general, these are disproportionate interferences, and not *"necessary in a democratic society"*, as Article 8, No.2 of ECHR stipulates as a criterion.

Plaintiff's statement of claim:

Primarily:

1. There has been violation of ECHR, Art. 3 throughout the entire period from 22 July 2011 up to the present.

Alternatively:

2. There has been violation of ECHR, Art. 3 during the period from 22 July 2011 to 9 September 2013.

Primarily:

3. There has been violation of ECHR, Art. 8 throughout the entire period from 22 July 2011 up to the present.

In both cases:

4. Anders Behring Breivik shall be awarded legal costs.

Basis for Defendant's claim:

There is no breach of ECHR, Article 3 or Article 8. The measures that have been implemented vis-à-vis Plaintiff, both individually and collectively, fall well within the framework of what is allowed under ECHR as it is interpreted by the European Court of Human Rights.

Breivik is a very dangerous man. There is a high risk that he will once again resort to serious acts of violence, and reference is made to expert assessments and the judgement in the criminal proceedings. He is markedly methodical, rational and covert, he exhibits no remorse and persists in his mission. In order to protect society from Breivik, it is absolutely necessary that he serve his sentence in a special maximum security (SHS) facility. This is also necessary in order to protect Breivik from attacks by others.

Serving in an SHS facility entails special restrictions for the inmate which reflect the unique security and risk aspects that exist in such a wing. Serving in an SHS facility does not, in itself, constitute a violation of human rights.

The European Court of Human Rights' interpretation of the expressions *"degrading"* and *"inhuman"* treatment in ECHR Article 3, shows that there is a very high bar for ascertaining such infringement. There must be a concrete assessment of the cumulative effect of the prison conditions over time. Relevant elements in such an assessment include duration, physical and mental impact on the inmate, physical prison conditions such as light, air, space, etc., gender, age, state of health, personal qualities, improvement over time, compensating measures and the authorities' intentions.

"Isolation" does not carry a specific legal meaning, and is not a term that, in itself, determines whether or not there has been a violation of ECHR. The degree of isolation is just one element in the overall evaluation.

From the outset, the institutions have been determined to ensure that the Plaintiff is treated in a humane and dignified manner, while at the same time safeguarding considerations for the safety of the Plaintiff himself, staff in the institutions and society at large. The Plaintiff has neither been socially isolated, nor isolated from sensory impressions. A number of initiatives

have been enacted to compensate for the measures the Plaintiff must endure as a consequence of the restrictions.

The Plaintiff often spends time with staff in the institutions, and receives regular visits from a volunteer prison visitor and a chaplain. He has extensive correspondence with the outside world, as well as telephone contact. Provisions have been made so that he can study, and he has access to e.g. writing tools, various media and television.

The Plaintiff has refused a number of proposals for activities and social contact. He has, of his own volition, terminated contact with his family. He has also, for example, rejected offers of a volunteer prison visitor from the Red Cross.

The control and supervision measures, such as use of body-searches and handcuffs, have been well-founded and necessary, and they have also been gradually relaxed in line with ongoing risk assessments. The Norwegian Correctional Services' assessments in this connection are founded on broad-based knowledge.

He has ongoing medical follow-up, and there are no facts to support the assertion that he has developed ailments as a consequence of the prison conditions.

The physical prison conditions are good. He has the use of three cells, and can move freely between them during daytime. He has the opportunity to go outdoors on a daily basis, and a life training initiative has started, in which he prepares his own food and does his own laundry.

The Plaintiff has had the opportunity – and has made use of said opportunity to a great extent – to appeal the decisions to a superior administrative body. He has also had the opportunity to have a judiciary review of the decisions.

He has also not been subjected to violation of ECHR, Article 8.

Lawful imprisonment entails certain inherent restrictions in the exercise of family and private life which do not necessarily constitute any infringement on the protection provided under Article 8 (1). Occasional refusals of visits in the prison cannot be regarded as interference in the sense implied in the Convention. Breivik is not subject to any prohibition against visits. As regards other restrictions under the SHS regime, such as control of telephone conversations, letter screening and use of a glass wall in connection with visits, it is not

disputed that this is interference in private life and correspondence pursuant to the first subsection. However, the interference is permitted pursuant to Article 8 (2).

The legal requirement under ECHR, Article 8 (2) has been met. The letter screening that has been carried out takes its legal authority from Section 30 of the Execution of Sentences Act, which ordains that postal items to inmates in high-security wings shall be examined. The legal authority for control of visits and telephone calls is found in the Execution of Sentences Act, Sections 31 and 32. The legal authority for use of a glass wall is Chapter 6 of the Regulations to the Execution of Sentences Act.

He is not subject to any ban regarding letters, but has, on the contrary, sent and received a substantial number of letters. The letter screening does not entail interference in existing relationships, but does entail certain limitations in his opportunity to establish new relations and networks with individuals who have contacted him, or with whom he himself has wished to establish contact. The interventions that have been undertaken, are warranted by the fact that the content of the letters is such that they must be stopped pursuant to Section 30(4) of the Execution of Sentences Act. Most denial decisions are linked to letters to and from three categories of like-minded individuals and supporters: mass sending of letters to supporters/like-minded individuals, letters to extreme right-wing individuals with criminal records and letters to supporters who will assist him in establishing web-based platforms for his message. Other letters that have been denied, have been designed to make control impossible; for example through the use of tiny print and crossing out.

He is not subject to a general prohibition against visits. Applications from three persons have been turned down with reference to the applicant's background. Other than this, it is the Plaintiff himself who has refused to receive visits, or has placed restrictions on the opportunity for visits by stipulating a number of conditions for such visits.

He is also able to make phone calls. He himself has terminated telephone contact with a female acquaintance because he felt that the contact was meaningless.

Control of his correspondence and other communication with others are interventions that are permitted under ECHR, Article 8 No. 2 as *"necessary in a democratic society"*, in order to prevent disorder and crime. The State's interest in protecting citizens from terrorism and organised crime weighs heavy. The State must be afforded a broad margin of discretion in the assessment of which measures are best suited to secure effective crime fighting and prevention of extremism.

The interference is limited as, in reality, the Plaintiff himself is responsible for the limited contact he has with the outside world – through his actions, his break with family and friends, and the attitude that meaningful contact can only take place with like-minded people. Alternatives have always been available to him.

Defendant's statement of claim:

1. Judgement is rendered in favour of the State, represented by the Ministry of Justice and Public Security.

2. The State, represented by the Ministry of Justice and Public Security, shall be awarded legal costs.

The Court's assessment

1. Introduction

The Court shall determine whether Breivik is or has been subjected to violations of the Convention during his imprisonment.

The Human Rights Act makes ECHR Norwegian law. Pursuant to Section 3 of the Human Rights Act, the provisions of the Convention shall *"in the event of conflict, take precedence ahead of provisions in other legislation".*

Established Supreme Court case law dictates that Norwegian courts shall interpret ECHR in the same way as the European Court of Human Rights. This emerges e.g. from Supreme Court Report Rt. 2005.833 (paragraph 45), which states:

> *"... when applying the rules in ECHR, Norwegian courts of justice shall undertake an independent interpretation of the Convention, including use of the same method as the European Court of Human Rights. Norwegian courts must thus act in accordance with the text of the Convention, general consideration of objectives and the decisions of the European Court of Human Rights. It is nevertheless primarily the European Court of Human Rights that shall develop the Convention. And if there is doubt concerning interpretation, Norwegian courts must, when balancing various interests or values, be*

allowed to involve value priorities that form the basis for Norwegian legislation and general sense of justice."

The European Court of Human Rights' precedent will therefore be an important source in the evaluation of whether the Convention has been violated.

In the following, the Court will first make some observations regarding Breivik's confinement in SHS. Thereafter, we will address the issue of whether there have been violations of ECHR, Article 3; and furthermore, whether there have been violations of ECHR, Article 8.

The area of application between the provisions is not clearly defined; depending on the circumstances, the same infringement can be assessed in relation to both articles. As a point of departure, the most intense infringements are covered by Article 3, thus exhausting Article 8.

If there is no conflict with the Convention pursuant to Article 3, the same circumstances can also be assessed in relation to Article 8. Reference is made in this context to William A. Schabas: The European Convention on Human Rights (2015) pg. 171:

"The assessment of the minimum level is 'relative' and depends on the circumstances, bearing in mind such factors as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and state of health of the victim. In circumstances where treatment does not reach the level required for application of article 3, it may nevertheless engage issues relating to article 8 of the Convention."

2. Living in an SHS facility

Breivik has been placed in SHS facilities during his entire period of incarceration; both in the remand period and subsequently during the serving of his sentence. This period amounts to four years and nine months, as of the date of this judgement.

SHS is a prison regime that is only utilised in special cases which necessitate particularly stringent security measures. Decisions to impose such a regime are made for periods of six months at a time. There is no express limit for how long a prisoner can be kept in SHS conditions. It is indeed true that no other prisoner in post-World War II Norway has ever spent such a long time in SHS as Breivik.

It emerges from Section 11, second subsection of the Execution of Sentences Act that, where *"special security reasons so dictate, the convicted person can be incarcerated in a facility with a maximum security level, pursuant to Section 10, second subsection".*

The conditions for incarceration in an SHS facility emerge from Section 6-2 of the Regulations to the Execution of Sentences Act. The first subsection of the provision reads as follows:

> *"Wings with a particularly high level of security are for the potential incarceration of convicted persons and persons remanded in custody who are presumed to represent significant risk of escape, risk of outside assistance in escape, risk of hostage situations or imminent danger of new and serious criminal acts."*

The Court agrees that the criteria for placing Breivik in an SHS facility have been met. He is convicted of extremely serious crimes with devastating and wide-ranging effects. Reference is made to the fact that all of the court-appointed experts in the criminal proceedings concluded that there was a high risk of serious acts of violence in the future, and furthermore to Oslo District Court's assessment in connection with the stipulation of preventive custody. The Court would also refer to his statements in the compendium that was distributed to a number of email addresses on the same day the acts of terror were committed ("the manifesto") where, among other things, he describes how he will escape from prison by employing violence. The Court also believes that there is a need to protect Breivik from potential attacks by other inmates. Reference is made e.g. to an episode in Telemark Prison where another prisoner managed to make his way to the outer door of Breivik's wing, and shouted his intention to kill him.

The Court understands the Plaintiff such that his placement in an SHS wing is not, in itself, disputed in the case before the District Court. Breivik appears to agree that he cannot serve his sentence in an ordinary prison wing. The Court's understanding is that it is the content and conditions of his imprisonment in the SHS facility which the Plaintiff believes are in violation of the Convention.

3. ECHR Article 3

3.1 The provision in general and important aspects of the assessment

ECHR Article 3 has the following wording:

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

A corresponding provision is included in Section 93, second subsection of the Norwegian Constitution.

ECHR Article 3 lays down an absolute ban against torture, inhumane and degrading treatment. The provision is without reservation, in contrast to most of the other ECHR rights, which allow for interference, exceptions and limitations. The alternatives relating to inhuman or degrading treatment are invoked in this case.

The prohibition against inhuman and degrading treatment represents a fundamental value in a democratic society. It applies regardless – also in relation to the treatment of terrorists and murderers.

At the same time, it also clearly emerges from European Court of Human Rights' precedent that imprisonment in itself does not entail violation of the Convention. Punishment is a necessary evil which society deliberately imposes upon the individual, and incarceration may well be experienced as suffering. Moreover, imprisonment in institutions with particularly high security will not, in itself, entail violation of the Convention. Reference is made in this context to van der Ven vs. the Netherlands from 2003 (paragraph 50):

"While measures depriving a person of his liberty often involve an element of suffering or humiliation, it cannot be said that detention in a high-security prison facility, be it on remand or following a criminal conviction, in itself raises an issue under Article 3 of the Convention."

In order for a sentence or treatment associated with a sentence to be regarded as inhuman or degrading, the suffering or humiliation must exceed the inevitable suffering or humiliation that will follow in the wake of a lawful detention. One must exceed a certain threshold of severity.

The threshold is expressed as follows in Sanchez vs. France (paragraph 117):

"Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim..."

Furthermore, paragraph 119 of the judgement states:

> *"...Nevertheless, Article 3 requires the State to ensure that prisoners are detained in conditions that are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured (...). The Court would add that the measures taken must also be necessary to attain the legitimate aim pursued.*
>
> *Further, when assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant (...)"*

An overall evaluation must accordingly be made, where all aspects of the case are taken into consideration. Important elements of the assessment can include the duration of the measures, whether they have caused harmful physical or mental effects for the prisoner, and the prisoner's age, gender and general health. Furthermore, the European Court of Human Rights has emphasised that the measures that are implemented must be necessary to achieve a legitimate purpose, and the overall effect of the measures must be considered.

Whether or not the prisoner has been isolated, and the degree of isolation, are elements in the assessment. Other elements can include whether the restrictions in question have been relaxed over time. Gradual improvements might indicate that there is no violation, cf. Enea vs. Italy from 2009, paragraph 66. The scope of compensating measures will also be key.

Furthermore, the tangible prison conditions are of significance. If the conditions are poor, for example as regards space, ventilation, light, opportunity to get fresh air, etc., this might indicate that the Convention has been violated. Reference is made, for example, to Mironovas et al. vs. Lithuania from 2015, paragraph 122-123.

The authorities' intentions behind the measures may also be a relevant aspect. If the purpose is to humiliate or break down the prisoner, this could easily represent a violation. However, the absence of such a motive on the part of the authorities does not automatically mean that the measure is allowed under Article 3. Reference is made to Ahmad et al. vs. the United Kingdom from 2012, paragraph 201.

A genuine opportunity to lodge complaints, including the possibility of having the complaint reviewed by a court of justice, is also of significance.

Other elements are whether the measures are proportionate to the risk the prisoner represents, and the absence of remorse on the part of the prisoner for the criminal acts committed.

As regards the standard of proof, the European Court of Human Rights stated the following in Sanchez vs. France:

> *"In assessing the evidence on which to base the decision whether there has been a violation of Article 3, the Court adopts the standard of "proof beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant interferences or of similar unrebutted presumptions of fact".*

This means that the European Court of Human Rights adopted a standard of proof expressed as 'bevis utover rimelig tvil' in Norwegian.

3.2 *General aspects regarding isolation and European Court of Human Rights' precedent*

Plaintiff's main reasoning for asserting violation of ECHR, Article 3, is the argument that he has now been isolated for four years and nine months.

Isolation is not a concept that has an established legal content which, in itself, determines whether or not ECHR, Article 3, has been violated. Furthermore, there is no internationally recognised definition of isolation.

A definition has been attempted in the so-called Istanbul Statement, framed in connection with an expert symposium (where the statement represented the participants' private opinion) on 9. December 2007. The definition subsequently adopted by the UN Special Rapporteur on torture, reads as follows:

> *"The Istanbul Statement on the Use and Effects of Solitary Confinement defines solitary confinement as the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. In many jurisdictions, prisoners held in solitary confinement are allowed out of their cells for one hour of solitary exercise a day. Meaningful contact with other people is typically reduced to a minimum. The reduction of stimuli is not only quantitative but also qualitative. The available stimuli and occasional social contacts are seldom freely chosen, generally monotonous, and often not empathetic."*

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) uses the term isolation regarding exclusion from companionship with other prisoners. This emerges from CPT Standards (2015) pg. 29:

> *"The CPT understands the term "solitary confinement" as meaning whenever a prisoner is ordered to be held separately from other prisoners, for example, as a result of court*

decision, as a disciplinary sanction imposed within the prison system, as a preventative administrative measure or for the protection of the prisoner concerned."

The term *"exclusion from company"* is used in the Execution of Sentences Act and the Regulations to the Execution of Sentences Act.

The European Court of Human Rights distinguishes between *"complete sensory isolation"*, *"total social isolation"* and *"relative social isolation"*, cf. Sanchez vs. France, paragraph 136. The Court believes that Breivik is subject to the latter prison regime, in which he is isolated from other prisoners. When the Court uses the term isolation in the following, reference is being made to a relative social isolation.

High-security regimes where prisoners serve in isolation from other inmates is a topic that is attracting increasing international attention. In his report on isolation, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has particularly pointed to the thoroughly documented negative effects that isolation can have on the health of the individual.

CPT has also focused on the major harmful effects that isolation can have, and has advocated minimising the use of isolation. The following is quoted from CPT Standards (2015) pg. 29:

"The CPT has always paid particular attention to prisoners undergoing solitary confinement, because it can have an extremely damaging effect on the mental, somatic and social health of those concerned.

This damaging effect can be immediate and increases the longer the measure lasts and the more indeterminate it is."

Furthermore, CPT states on pg. 37:

"The CPT considers that solitary confinement should only be imposed in exceptional circumstances, as a last resort and for the shortest possible time"

In several decisions, the European Court of Human Rights has endorsed the concern regarding the harmful effects of isolation.

In Ahmed et al. vs. the United Kingdom, the European Court of Human Rights pointed out that isolation is one of the most serious measures a prison can implement. It was also stated that isolation from other prisoners does not, in itself, entail inhuman or degrading treatment, but that this depends on *"the particular conditions, the stringency of the measure, its duration,*

the objective pursued and its effect on the person concerned" (paragraph 209). The European Court of Human Rights also confirmed that a prisoner cannot be isolated from others "*indefinitely*".

In Onoufriou vs. Cyprus from 2010, the European Court of Human Rights stated:

> *"First, solitary confinement measures should be ordered only exceptionally and after every precaution has been taken, as specified in paragraph 53.1 of the European Prison Rules. Second, the decision imposing solitary confinement must be based on genuine grounds both ab initio as well as when its duration is extended. Third, the authorities' decisions should make it possible to establish that they have carried out an assessment of the situation that takes into account the prisoner's circumstances, situation and behavior and must provide substantive reasons in their support. The statement of reasons should be increasingly detailed and compelling as time goes by." "*

The European Court of Human Rights therefore stipulates relatively clear requirements for the authorities. Isolation is reserved for extraordinary cases, and then only after all other precautions (*"every precaution"*) have been taken. The necessity of isolation demands an appropriate justification, and the requirements for this justification increase as time passes.

The European Court of Human Rights has accepted relatively long periods of isolation in several judgements, without ascertaining violation of Article 3.

In Kashavelov vs. Bulgaria from 2011, the prisoner had been kept in solitary confinement for 13 years. In the beginning, he was isolated from other inmates, but was allowed to exercise with other prisoners in the yard, but without permission to communicate with them. In later years, however, he had the opportunity to communicate with other inmates in his wing, and to participate in activities with them. The prison authorities reported that the prisoner was extremely distrustful, impertinent and hostile, both in relation to prison staff and other inmates.

Also in Sanchez vs. France (which related to the so-called "Jackal"), no violation of Article 3 was ascertained. He had been held for a total of more than eight years in solitary confinement, without contact with other inmates. However, he did have unusually frequent visits from one or more of his 58 attorneys, more than 1500 visits in total. He was subsequently married to one of these attorneys in a Muslim ceremony. The visits were carried out in a special visiting room, without a glass wall between the prisoner and the attorney. The European Court of Human Rights expressed concern over *"the particularly lengthy period"* in which he sat in

isolation. When judgement was pronounced, he had been transferred to a normal prison regime, and the Court stated that this situation should not be changed for the future.

In Öcalan vs. Turkey (No. 1) from 2005, the prisoner's isolation for more than six years as the only inmate in a prison on a prison island was not considered to have reached the threshold for violation. He had daily contact with prison staff and was checked by a physician twice per day. He also received regular visits from his attorney and family.

Öcalan subsequently filed another suit, and in Öcalan vs. Turkey (No. 2) from 2014, no violation was ascertained for four and a half years in solitary confinement on a prison island. However, it emerges from the judgement that the prisoner had contact with other inmates for one hour per week during that period, and this contact was expanded to three hours per week after one year. He also had an opportunity to take part in up to five group activities per week. Moreover, he received visits from his family, without use of a glass wall. The previous ten-year isolation on the prison island prior to the relief in the prison regime was, on the other hand, considered to be a violation of Article 3.

Sanchez is linked to a large number of terrorist acts in the 1970s and 1980s. When he was apprehended, he was one of the world's most feared and wanted terrorists. Öcalan founded the militant Kurdish PKK organisation and was its leader when he was arrested. Both of these prisoners are associated with an extraordinary risk of escape attempts with outside assistance.

There is no corresponding concern regarding outside plots linked to Breivik. He committed the criminal acts alone, without assistance from others. There was exhaustive investigation to determine whether others were involved in the events, particularly due to Breivik's references to the Knights Templar organisation. The investigation did not uncover any circumstances to indicate that such an organisation existed.

Breivik does, indeed, have some followers, but it cannot be assumed that they are in possession of resources that would allow them to carry out this type of campaign.

In Rodhe vs. Denmark from 2005, isolation in solitary confinement for eleven months was not ascertained to be a violation. The prisoner was isolated from other inmates, but had contact with staff, health personnel, social workers, and received visits from family and friends once a week. The prisoner developed a psychosis as a consequence of the intervention. With regard to the length of the isolation period, the Court stated that *"a period of such length may give rise to concern because of the risk of harmful effects upon mental health, as stated on several occasions by the CPT"*.

The physical prison conditions and the scope of the contact with professional players can be compared with the circumstances in this present case. In the Rodhe case, the prisoner also had a substantial amount of visits from family and friends. The visits were monitored, but a glass wall was not used. In Breivik's case, he has only had a few visits from his mother, where only the last visit prior to her death was carried out without a glass wall.

A violation of Article 3 was established in Iorgov vs. Bulgaria from 2004. The prisoner was isolated in solitary confinement for three years and six months, and was alone in his cell for 23 hours a day. For one hour each day, he was allowed to exercise in the prison yard with other inmates in the maximum security wing, during which time the inmates were allowed to communicate with each other. The European Court of Human Rights believed that no adequate reason had been given for why he was isolated, and furthermore was of the opinion that the medical follow-up of him was unnecessarily delayed.

In Khider vs. France from 2009, the prisoner had been isolated for more than five years, with only brief interruptions. The reasons given for the isolation was the escape risk following the prisoner's attempted armed escape by helicopter, aggressive behaviour vis-à-vis prison staff and links to people outside the prison. A national court had ascertained that the escape risk was no longer valid after three years, and the decisions regarding extended isolation were made against physician's recommendations. There were frequent body searches. The European Court of Human Rights determined that the overall circumstances entailed violation of Article 3.

None of the above-mentioned cases deal with circumstances that are fully comparable with the matter at hand. Nor has the Court has found any other European Court of Human Rights' precedent that is directly relevant. In the following, the Court will apply the principles emphasised in the European Court of Human Rights' precedent.

3.3. The concrete assessment

3.3.1 Breivik's actual situation

Breivik is serving his sentence in a "prison within a prison". During daytime, he can move freely between three cells, which are located behind a security gate separating his area from the common area in the maximum security wing. No other persons, neither inmates nor staff, stay in this common area. With the exception of the prison officers' inspection rounds once an

hour, Breivik sees no other people during the course of his day on the wing. He has the opportunity to exercise alone each day in a separate prison yard.

The Court considers Breivik's physical/tangible prison conditions to be good. He has the use of relatively well-equipped cells with direct daylight, and has access e.g. to TV, books and several newspapers. This is not the crux of the problem; the issue is whether the degree of isolation is acceptable.

As described in detail in the presentation of the case, Breivik's human contact is limited to conversations with staff, chaplain, health personnel, a volunteer prison visitor and attorneys. He is able to use the telephone and to receive visitors, but has made little use of this opportunity. Who he can have contact with is subject to control. During the course of his imprisonment, he has not even physically seen any other inmates, as all other prisoners are subject to lock-down if he is led through common areas. This must be regarded as a closed world, and the reality is that Breivik is alone in the cell section inside the security gate for 22-23 hours per day.

The Parliamentary Ombudsman's unit for prevention of torture and inhuman treatment during detention visited Telemark Prison in June 2015. The prevention unit's report from the visit includes a review of the Plaintiff's prison conditions in the SHS wing, including his contact with other people. The following statement was made in this connection:

> *"Nevertheless, overall, this gave the impression of very restricted social contact compared with inmates in group wards. It is also pointed out that the prisoner has already spent several years at this level of security, and the law does not contain any time limitations for how long a person may be held in a maximum security ward, as long as the criteria for detaining the person under such measures are considered to be fulfilled."*

The prevention unit recommended, inter alia, that his contact time with staff should be expanded, and that he be given outdoor exercise options in addition to the concrete prison yard. The prison has followed these recommendations.

3.3.2 The question of whether isolation is strictly necessary and the real opportunity to appeal

A key question is whether the relative isolation of Breivik is strictly necessary and a last resort for the prison authorities.

Serving a sentence in an SHS wing does not, in itself, mean that one must be excluded from the company of others in the wing. It emerges from Section 6-3, second subsection of the Regulations to the Execution of Sentences Act that the local level determines whether more inmates in the SHS wing shall have company with each other. Pursuant to the third subsection of the provision, potential exclusion from such company is not limited in time, provided that the exclusion is not regarded as disproportionate.

Norway does not have many inmates in SHS facilities. We have been informed that there have been six inmates in SHS wings over the last ten years. In addition to the institutions where Breivik has been detained, only Ringerike Prison has such a wing. The Court does not know whether there are other inmates in the SHS wing in Ringerike Prison. There have been other inmates in Breivik's wing from time to time, but they have not spent time together. There are no other inmates in his wing at this time.

The Court cannot see that the circumstances that warrant Breivik's placement in an SHS wing also constitute sufficient grounds for him not having the company of potential other inmates in the same wing. The wing is subject to very strict security measures and routines, and is staffed by highly qualified employees. It is therefore difficult for the Court to see why the prison cannot carry out companionship among the inmates, under prudent supervision by prison guards. The Court cannot see that a sufficient reason has been given for this.

The Norwegian Correctional Service must ensure that prisoners who serve their sentences in SHS wings are not subjected to a greater burden than necessary. In a situation such as this one, where an inmate has served his sentence in solitary confinement for several years, efforts must be made to bring others into the same wing, precisely to facilitate such companionship. According to the Court's understanding, the possibility of future companionship between Breivik and other inmates is a topic that has been raised in meetings at the Norwegian Correctional Service, but no concrete initiatives have been taken to have other inmates placed in Breivik's wing in order to establish such a companionship.

If there are multiple inmates in the same wing and no companionship is practiced among them, it must be assessed and explained why such companionship should not be practiced. The reasons given must also be stronger as time passes. The Court cannot see how the Norwegian Correctional Service can avoid this whole issue by placing Breivik in an SHS wing by himself, if there are other inmates in maximum security wards in other Norwegian prisons.

The existing decisions only cite the justification for placing him in an SHS wing. The question of whether it might have been possible to place him together with other maximum security inmates, and whether or not there are, in fact, any such candidates, is extremely relevant, in the opinion of the Court. These are factors that must be discussed by the Norwegian Correctional Service. If there are no such other relevant inmates, this factor must then be pointed out – as a key reason for why Breivik is isolated. No sufficient description has been given of any assessments that may have been made by the Norwegian Correctional Service in this context, neither through the decisions that have been made nor to the Court.

The Court is therefore not convinced that Breivik's situation, in which he is serving his sentence in isolation from all others, represents a "last resort" for the Norwegian Correctional Service.

Furthermore, the Court has noted that the Norwegian Correctional Service so far also does not appear to have any concrete plans for Breivik's future prison conditions. While the Court's task in this case is restricted to an evaluation of the circumstances up to when judgement was pronounced, the lack of such a definite plan for the future also highlights the prevailing circumstances, in that the Court questions whether the isolation issue has been properly taken into account.

As the isolation of Breivik has been a direct consequence of his placement in SHS, and the necessity of isolating Breivik from other maximum security inmates has not been subject to a separate discussion in the decisions, it has also been difficult for Breivik to obtain a review of the justification for the actual isolation. Breivik has submitted an appeal to a higher administrative authority regarding the degree of isolation, but the Correctional Service Directorate was originally of the opinion that the evaluation of the prison conditions is implicit in the assessment of whether he shall be placed in an SHS wing.

A letter from the Parliamentary Ombudsman to the Correctional Service Directorate dated 12 June 2014, pointed out that the evaluation of the actual isolation should have been expressly communicated to Breivik. The following emerges from the Parliamentary Ombudsman's letter:

> *"It cannot be considered sufficient that an evaluation of the prison conditions "is implicit in the assessment" of whether a basis still existed for detention in a maximum security wing. It is my opinion it is unfortunate that the assertions regarding the prison conditions were not explicitly assessed by KSF <Prison and Probation Central Administration>."*

In the subsequent decisions regarding confinement in the SHS wing, the Norwegian Correctional Service has briefly stated that inmates in SHS shall not have the company of inmates from other wings. On the other hand, the Service has not touched on the question of whether opportunities exist for companionship with other maximum security inmates.

3.3.3 Scope of compensating measures

The question is furthermore whether enough compensating measures have been implemented to counteract the harmful effects of isolation. It is clear that there has been some easing of the prison regime over time, i.e. he is no longer subjected to strip-searches, and the use of handcuffs has been significantly reduced. He is also allowed to use the main prison yard approximately every second week, and he also has increased planned time spent with the staff. This is positive.

However, there is still a glass wall between him and all visitors; i.e. during his conversations with health personnel, the chaplain, volunteer visitor and attorneys. The visits are also visually monitored by staff through a glass wall, with the exception of visits by health personnel.

The Regulations to the Execution of Sentences Act, Section 6-10, first and second subsections, read as follows:

> *Visits shall be carried out by using glass wall and listening in, or with a prison officer in the room. Local level may permit relaxations of these control measures after prior consent from the regional level. Relaxations cannot be permitted if the visitor resists the mandatory control measures.*
> *An officially appointed defence counsel or a representative of a public authority, including a diplomatic or consular representative, shall be allowed to communicate freely with prisoners, without any listening in or staff presence in the visiting room. A glass wall shall be used, and the visit may in addition be carried out under supervision.*

The provision is formulated in such a manner that it might seem there is no room for exemptions from the mandatory glass wall in connection with visits by defence counsel (attorney). It is the Court's opinion that this is a rigid and rather unnatural interpretation of the provision. The Court cannot see the reason why an attorney's visit should be evaluated differently on this point than all other visits. The local level, pursuant to consent from the

regional level according to the prevailing circumstances, must also have the opportunity to grant dispensation for an attorney's visit.

The Court believes that communication via microphone through a glass wall results in a sense of detachment. For a person who is already serving his sentence in isolation from all others, such communication could easily reinforce feelings of detachment and loneliness. In such a situation, the importance of being able to carry out conversations with another human being in a normal manner (without a glass wall), must not be under-estimated.

Attorney Storrvik has stated that he has repeatedly made applications to carry out visits with Breivik without a glass wall, but that this has not been granted. The prison authorities cite security reasons linked to technical prison assessments, particularly the risk of hostage-taking, as the reason for the glass wall.

Psychiatrist Randi Rosenquist has performed a risk assessment of Breivik for Ila Detention and Security Prison, and has also been engaged by Telemark Prison for the purpose of making an updated risk assessment.

In her original assessment from 16 January 2013, she pointed out that it is *"important to always keep in mind that Breivik could take hostages, harm staff or commit other violent acts, including against himself, if he finds that this could be useful for him".*

At the same, she stated that if professionals are recruited to converse with Breivik, *"one must, in time, consider whether this can take place without handcuffs and glass wall, but obviously with staff members outside.".*

She also stated that she expects *"that his attorneys are not in any immediate danger from Breivik, but that here too, there may be fatigue and acting-out. Such conversations must be continuously assessed by the head of the wing, together with the attorney".*

Rosenquist stated the following in the report dated 25 November 2014:

> *"I note that Breivik now has a volunteer prison visitor and that this is working out well. I do not think the glass wall is necessary, one could start off without the glass wall but with handcuffs, and then see how things develop. I assume that these visits are closely monitored in any event, and I do not in any way think that Breivik will harm his volunteer prison visitor."*

In a report dated 18 December 2015 she wrote:

> *"I feel the last year has shown that Breivik conducts himself in a controlled and ideological manner. I believe that the risk of violent reactions in the institution are now further reduced somewhat in relation to earlier assessments, as there is now an even longer period wherein his behaviour has been fairly exemplary."*

The following is stated under the heading *"Planned violence"*:

> *"2015*
> *Breivik has not changed to any significant degree. He remains very interested in media coverage, but continues to do this in a manner which is, and which he himself describes as, non-violent. He has now, over a period of 4½ years, exhibited stable function and has, after all, tolerated a great deal of frustration. I do not find any factors now that would indicate that there will be a new, planned violent act on his part. I believe that one can assume that he now prefers non-violent behaviour. I am also now somewhat in doubt as to whether he would actually be able to carry out planned, dramatic acts of violence where he would have to get dirty (literally and figuratively) and use his hands. One should not forget, however, that he has nothing to lose through new, serious demonstrations of violence, as long as he believes that he will never get out of prison anyway."*

The report concludes:

> *"Unless there are significant changes in relation to Breivik's ideological standpoint, the risk assessment will remain unchanged over time."*

She maintained her conclusions in her testimony to the Court.

Rosenquist, who has access to all available relevant information regarding Breivik and his history, and has extensive experience in conducting risk assessments of prisoners convicted of violent acts, has recommended for several years that Breivik be allowed to meet with selected visitors without the glass wall. Nevertheless, the regime has not been relaxed at all on this point. The Court is somewhat surprised regarding this. When the Norwegian Correctional Service at the same time has continued the strict regime wherein he is isolated from other inmates, the minimum compensating measure should be to allow him to meet with his attorney and possibly the volunteer prison visitor in the most normal manner possible, without the glass wall. It must surely be possible to monitor the visits in some other way in order to

guard against undesirable incidents. It is also illustrative that the prison authorities, during the exceptionally well-guarded main hearing in the prison gymnasium, found it necessary to build a temporary lounge with a glass wall so that Breivik could confer with his attorney on an ongoing basis.

A letter from Breivik dated 29 September 2013 addressed to Bærum Police Station was submitted in Court, linked to Breivik's police complaint relating to Ila Detention and Security Prison. In the letter, Breivik describes how he could attack and neutralise one or more prison guards if he wanted to. He also describes how he could make 10-15 lethal weapons using the materials currently found in his cell, if he had a desire to do so.

The Court cannot see that the letter itself can be ascribed any great significance in the assessment of which restrictions Breivik shall be subject to. The essential factor must be his actual behaviour in the prison. The Court has been informed, through various reports and witness testimony, that Breivik has behaved well throughout his incarceration. He is described as calm, polite and accommodating. In other words, there are no aspects of his behaviour during imprisonment which, in themselves, indicate that the stringent restrictions must be maintained.

The scope of visits from other people can most definitely constitute a factor which counteracts the negative effects of isolation. Breivik receives a limited number of visits by professionals, but does not receive visits from any other people. The reason for these circumstances is, in part, that Breivik allegedly does not want contact with anyone other than like-minded individuals – which is denied to him. In part, the reason is that there are no requests from family, friends or acquaintances who want to see him. In the opinion of the Court, the fact that the lack of visits is partly due to factors that Breivik can control, can only be granted limited weight when evaluating whether adequate compensating measures have been implemented. Breivik is an unusual person, and the Norwegian Correctional Service must deal with him as he is.

3.3.4 Effects of the isolation and the Plaintiff's health

Breivik does not appear to have suffered demonstrable harm from the prison conditions. Reference is made to the statement from the prison physician at Telemark Prison. He pointed out that everyone is very aware of factors that could indicate a change in Breivik's condition, and that there is considerable focus on his health. The witness testified that the health service has not observed signs of physical or mental harm.

There are examples where prison staff have noticed aspects of Breivik that have warranted closer examination. The report from Director Bjarkeid at Ila Detention and Security Prison dated 10 December 2012 states:

> *"Conclusion*
> *We are beginning to see signs of changes in behaviour that could be due to isolation problems. It is the observation of the unit that, after his return from Skien Prison, Anders Behring Breivik is more questioning and cantankerous as regards the measures and routines that are carried out at Ila. He asserts that he has served his sentence impeccably ever since he was arrested on 22 July 2011 and up to the present. He believes that this should be rewarded by staff and the Norwegian Correctional Service generally trusting him more. The everyday prison life which this person in remand may have envisioned prior to his arrest and conviction, has probably not been entirely as he had pictured. ..."*

The monthly report from Telemark Prison of 5 September 2014 includes the following:

> *"Staff have found that he sometimes does not remember dates and times. The days are often all the same. Another example is that he does not remember that the same person was there the previous day, and had a conversation, whereupon the following day he uses the argument that the guard introduced, and makes it out to be his own knowledge."*

The following is a quote from the monthly report from Telemark Prison dated 10 August 2015:

> *"There have been indications that the Prisoner may have incurred isolation damage, and the reason for the concern is that the Prisoner gets mixed up/forgets more than before. The health service has been contacted in this regard, and will make it a focus area."*

When two other inmates were placed in his wing in September 2015, with whom he was not allowed to meet or communicate, it meant that Breivik's space was curtailed for a period of time, so that he could no longer move freely between his cells. The 8 October 2015 monthly report from the prison describes his reaction when he was informed about this:

> *"The inmate reacted immediately, and there were substantial changes in his non-verbal communication. He was obviously shocked and stated to the undersigned that this can't*

> *happen, and that he would immediately start a hunger strike. He also reacted with despair, tears and went immediately into his living area cell and remained there for approx. 20 minutes before we could get him to speak to us again. Seemingly in better shape (with a "mask"), but it was clearly apparent that he was struggling tremendously."*

In the days that followed, the staff observed *"clear signs of cognitive impairment (forgot things/information), he appeared to be confused"*. It is further described that his condition normalised after a few days.

Breivik himself has reported, for example, protracted headaches, which he characterises as *"isolation headaches"*, dizziness and pressure in his head. The fact that he may take a headache tablet is not of particular interest for the Court. It is not the treatment of the headache that is the key issue here – attention must be directed to the cause of the headache. It also emerges from his journals that he describes dispiritedness and resignation, that he does not sleep well and has difficulty concentrating on studies. He reported this particularly from the autumn of 2014 and after. There are also a number of examples where he has said to health personnel that he is feeling well and *"has never been happier"*. This was particularly in the period at Ila Detention and Security Prison.

The Court believes that there is a greater danger that Breivik will under-report his health problems than that he will lie about symptoms. He wants to be healthy, and wants to appear as a leadership figure. This is expressed stated in the journal from 17 November 2014:

> *"...States that he is troubled almost daily by dizziness and "pressure in the head". Has read himself that these can be side effects of the isolation. Says he finds it difficult to admit that he experiences these problems, as he regards them as a sign of weakness. States that he has "anxiety" as regards being open to the health service concerning potential health ailments, as he fears leaks to the media."*

Breivik no longer wants to meet with psychiatrists.

Breivik's mental health was a central topic during the criminal proceedings. Two of the court-appointed experts concluded that he was psychotic at the time of the crime, and thus criminally incompetent, and two concluded that he was competent. As we know, the Court determined that Breivik was competent to stand trial.

Being criminally competent is not synonymous with being healthy. It does not mean that Breivik's mental health condition can be regarded as being unproblematic. There is little doubt that Breivik is not mentally healthy – in the sense of not having a diagnosis. The two court-appointed experts who concluded that he was competent to stand trial, also confirmed that Breivik has several psychiatric diagnoses (narcissistic personality disorder and dissocial personality disorder). Witness Rosenquist believes that Breivik meets the diagnosis criteria for dramatizing personality disorder and several of the diagnosis criteria for dissocial personality disorder.

Attorney Storrvik maintained that Breivik must be evaluated as a person with a mental vulnerability. The Court agrees. Due consideration must be taken of this during the imprisonment, and there is every reason to exercise caution in subjecting him to extended isolation, even though he seemingly handles this well. The assessment does not appear to pay sufficient attention to this. The Court cannot see that this problem has been discussed in the decisions that have been made.

3.3.5 Isolation - conclusion

The Norwegian Correctional Service thus faces substantial challenges in the handling of Breivik and his prison conditions. Enormous resources and considerable work have been devoted to the case. There is no reason whatsoever to question the authorities' motives behind the restrictions; there is nothing to indicate that irrelevant external considerations have been included in the evaluations. However, it is the opinion of the Court that the security aspects have predominated in the stipulation of Breivik's prison regime.

Breivik is a dangerous person, who will most likely spend the rest of his life in prison. There are good reasons for preventing him from establishing contact with like-minded individuals so as to prevent him from inspiring others, cf. Item 4 of the judgement. However, inside the prison's maximum security wing, the Court cannot see any basis for concluding that he represents an equally extreme risk. In the opinion of the Court, there is no correspondence between the risk assessments performed of him, his good behaviour in prison since he was arrested, and the strict regime he is still subjected to.

After a comprehensive assessment of the facts of the case, the Court has determined that the prison regime entails an inhuman treatment of Breivik; the threshold of severity has been exceeded. As emerges from the discussion above, the most important elements in this context are the long duration of the isolation, deficient reasoning in the assessment of whether the isolation is strictly necessary, and limited opportunity for administrative appeal. Furthermore,

adequate compensating measures have not been implemented, nor can the Court see that his mental health has been sufficiently considered when stipulating the prison conditions.

3.3.6 Scope of inspections at Ila Detention and Security Prison

The Court will also comment on the scope of the inspections that Breivik was subjected to during his time at Ila Detention and Security Prison.

In connection with every transfer, including moves to the neighbouring cell inside the security gate, the regular routine was that Breivik had to stretch out his hands through the door hatch, handcuffs were put on him and he followed along when the door was opened, while he still had his hands out through the hatch. He was then usually checked with a metal detector. Three prison officers were always present during these moves, to ensure that Breivik was kept under good control at all times.

Another regular routine was that Breivik was strip-searched whenever he was moved into and out of prison, for example when he was to be interrogated, in remand hearings and in the main criminal proceedings. This entailed that he had to remove all of his clothing and bend his knees. His clothing was then searched. This took place inside a cell, with three prison officers present. The Court has been informed that the same routine applied when he was to move in and out of the police station or the courthouse. The Police carried out this inspection. This means that he was strip-searched at least four times during these days. He was also strip-searched in the prison every time he had been outside in the exercise yard. Surprise routine inspections were also carried out on a regular basis.

The Court appreciates that these types of examinations may be necessary in many cases. This is particularly true in those cases where the inmate has been outside the prison, to make certain that no objects are smuggled in that could be used as weapons. The routine was particularly stringent in the first phase after the arrest, which is natural.

However, the Court questions the necessity of performing strip-searches after each visit to the exercise yard. The exercise yard was under camera surveillance, in addition to the fact that a prison officer was in a position to watch Breivik while he was there alone. It is true that the same exercise yard was also used by other inmates, but the real possibility of Breivik managing to bring anything with him from the exercise yard without this being observed by the staff, must be considered to be very slight. The Court has the impression that the inspections were carried out because this was the ordinary routine in the prison. When a person sits in isolation and is otherwise subject to strict security restrictions, it is particularly

unfortunate to link strip-searches to activities that are recommended as a means of preventing isolation damage. Breivik explained in Court that he on many occasions declined outdoor exercise in order to avoid the strip-searches.

Furthermore, the Court is of the opinion that surprise strip-searches also should have been avoided, although this is a general procedure in the prison. Viewed in context with the other stringent restrictions he was subject to, these measures cannot be deemed to have been necessary based on a security perspective.

In van der Ven vs. the Netherlands from 2003, weekly routine strip-searches of an inmate were considered to be a violation of ECHR Article 3. The inspection included an external anal inspection *"which required him to adopt embarrassing positions"*. The European Court of Human Rights pointed out that these were routine inspections that were not based on a concrete security need or the inmate's behaviour. The inmate had symptoms of depression. He was subjected to a regime where he could not have contact with more than three inmates at a time, he had to receive visits using a glass wall, with the exception of visits from his family, and had to wear handcuffs when transported out of the prison, and in some cases, also inside the prison.

The following was stated in the judgement:

> *"In the present case, the Court is struck by the fact that the applicant was subjected to the weekly strip-search in addition to all the other strict security measures within the EBI".*

Breivik was subject to a stricter regime than what is described in the van der Ven case. The State has pointed out that a similar anal inspection as described in the judgement was not performed on Breivik. For its part, the Court cannot see that there is any crucial difference between the cases in this context. An external examination was also at issue in the van der Ven judgement. When Breivik was examined, he was forced to bend his knees. The purpose was the same, to check that he was not hiding objects anally or between his legs. In any event, this must be regarded as an embarrassing position to have to adopt. There can be no doubt that such inspections can be humiliating for the person subjected to them. The Court also notes that female prison officers were present during the examination on a few occasions, which Breivik explained that he found to be an additional burden. As far as the Court is aware, male officers are not present in connection with strip-searches of female inmates.

The strip-searches that were performed in connection with outdoor exercise and surprise routine inspections must be viewed in context with all of the other strict security restrictions Breivik was subjected to simultaneously. Reference is made to other strip-searches of him when he was kept in other locations outside the prison, the isolation from other inmates, extensive use of handcuffs and metal detectors and restrictions in visits and communication. Furthermore, he was subject to nightly inspections through the cell door every half hour, at least for the first year, in which he was forced to give some sign that he was still alive, or have the flashlight turned on him. It is the opinion of the Court that the extra burden entailed by the strip-searches must be regarded as a degrading treatment in the sense of the Convention.

3.3.7 Overall conclusion

The Court sees no reason to look further at the time periods as regards violation of Article 3. The Court will confine itself to confirming that it has been proven beyond a reasonable doubt that ECHR, Article 3, has been violated vis-à-vis Breivik during his imprisonment.

4. ECHR, Article 8

4.1 Introduction

ECHR, Article 8, has the following wording:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

In other words, interference in the right to respect for private and family life and correspondence is not in violation of the Convention if the interference conforms with the law, safeguards lawful considerations and is necessary in a democratic society.

The actual execution of the sentence will, in itself, entail restrictions in the right to respect for private life; however, the scope of the interference must be assessed on an individual basis.

The inmate must be assured a minimum standard of private life, and the interference must not extend further than necessary, cf. Odelsting Proposition No. 5 (2000-2001) pg. 16.

4.2 Letter screening

Breivik has stated that the letter screening is a very burdensome interference for him, in that it impedes his opportunity to communicate with like-minded individuals.

The State has not disputed that the letter screening constitutes an interference in the sense of Article 8. The question is whether the interference is permitted under Article 8, No. 2.

It emerges from Section 30, second subsection of the Execution of Sentences Act that the Norwegian Correctional Service *"shall"* check postal items to and from inmates in SHS wings. The fourth subsection of the provision states that personnel can refuse to deliver or send a postal item *"if the said item contains information concerning the planning or committing of a criminal act, evasion of execution of the sentence or acts that will disturb peace, order or security".*

It is further stated in the preparatory works to the act (Proposition to the Odelsting No. 5 (2000-2001) pg. 161) that delivery of postal items can be refused in cases where the item *"could disturb peace, order and security".* Reference is also made to the circular letter from the Norwegian Correctional Services' central administration on 8 August 2012, where it is assumed that the legislator's intention here has been *"to address those cases where there is a reasonable suspicion of disruption of peace, order and security".* The Court agrees.

It is clear that Breivik is not subject to a general ban on sending and receiving mail. He has sent and received a high number of letters during the period he has been imprisoned. As explained in more detail in the presentation of the case, the prisons have noted that he has sent and received a total of nearly 3 000 letters. The number is probably somewhat higher, as his correspondence during certain periods has not been logged.

The letters that have been stopped in the letter screening, largely relate to letters to and from three categories of like-minded individuals and supporters. Category 1, which is the largest, are mass dispatches of letters to like-minded individuals. Category 2 is letters to/from right wing extremist convicted criminals. Category 3 are letters to supporters who will assist him in establishing web-based platforms for his message.

In addition, some dispatches have been refused because the letters have been designed in such a way that it makes letter screening difficult or impossible, for example, letters with many things crossed out, tiny print or incomprehensible language.

Categories of letters that are generally allowed for sending and receiving, include media letters and letters to various agencies and organisations. Furthermore, letters to/from other private individuals outside Categories 1-3 have mostly been accepted.

Breivik is convicted of politically-motivated terrorism, and this forms the actual context for the letter screening. He has exhibited an ability to plan and carry out extreme criminal acts.

It must further be assumed that Breivik has a kind of hero-status in certain extreme right-wing circles. Reference is made to the submitted article by Turner-Graham - *"Breivik is my hero": the Dystopian World of Extreme Right Youth on the Internet* – which describes the phenomenon. The Court also refers to the submitted letter to Breivik from Russian "colleagues" with *"faith in the future of White Europe"* in the factual compendium on pg. 97, which states a desire to cooperate with Breivik on establishing and developing an anti-Muslim network in Russia, allegedly in understanding with the terror-convicted Russian neo-Nazi Nikola Korolev.

The State has a strong interest in controlling Breivik's correspondence with like-minded individuals and preventing the development of a network, so that he cannot contribute to extreme right-wing radicalisation. Radicalisation can be described as a process wherein persons or groups gradually accept and begin to use violence as a political instrument, while terrorism is the most extreme consequence of radicalisation. The Internet is an increasingly important arena for radicalisation ("web extremism"). The Court also assumes that social media can have an important function in recruiting and radicalising right-wing extremists, and reference is made to the report entitled *"Forebygging av radikalisering og voldelig ekstremisme på internet"* <*Prevention of radicalisation and violent extremism on the Internet –Trans.*> published by the Norwegian Police University College in 2013 (ed. Inger Marie Sunde).

It can be confirmed that Breivik's remarks are rapidly spread on the Internet. For example, reference is made to the submitted print-out from the SPAS website, where a letter that Breivik has sent from prison to a Russian "brother" is published.

Viewed in light of the objective of the Execution of Sentences Act, Section 2, which includes that the punishment shall be executed in such a manner as to counteract new criminal acts,

and in a way that is satisfactory for the society, the Court believes that the Norwegian Correctional Services' letter screening practice is in keeping with the law.

If Breivik were to be allowed to establish and nurture a network of other right-wing extremists, this could pose a danger for society. He would then have the opportunity to inspire others and to spread his message on web-based platforms. While Breivik himself now claims that he rejects violence, it is precisely the gruesome acts of violence that he has committed that are crucial for his appeal to certain right-wing extremists. These are probably not people with any significant resources, but they could still have the ability to carry out actions. In the Court's view, there is a genuine risk that other individuals could allow themselves to be incited to commit acts of violence through communicating with Breivik, without such persons taking note of his new, allegedly non-violent approach to his cause.

Therefore, it is the opinion of the Court that communication between Breivik and like-minded individuals "*could disturb peace, order and security.*" The interference is thus in accordance with the law.

The interference is also justified by a legal consideration, which is to protect the citizens and prevent disorder and crime.

The question is then whether the interference is *"necessary in a democratic society".*

In the European Court of Human Rights case Silver vs. the United Kingdom, the criteria are e.g. described as follows in paragraph 97 c:

> *"the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, inter alia, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" [....]"*

The Council of Europe human rights handbook (2012) pg. 45 states:

> *"As proportionality is an ingredient of the necessity requirement and of the margin of appreciation, any interference with Article 8 rights will have to be weighed on this ground: in principle it will not be considered disproportionate if it is restricted in its application and effect, and is duly attended by safeguards in national law so that the individual is not subject to arbitrary treatment."*

Important issues are thus whether the interference is restricted, and whether there are sound legal safeguards associated with the interference.

The interference is restricted; as mentioned, only postal items related to specific categories of senders/recipients are stopped. The dispatches that are stopped only account for about 15% of Breivik's total correspondence. Each letter is assessed individually, and there is an opportunity to request an administrative law review of all decisions.

The letters that have been stopped are largely pure mass sendings to persons with whom Breivik has no known prior connection. Refusing to send this type of letter is a lesser interference measure than if there had been talk of stopping letters to his family, friends or acquaintances.

The European Court of Human Rights has allowed stringent restrictions for an inmate's contact with the outside world when the consideration has been to protect the society against terrorism. Reference is made to the case Erdem vs. Germany, where the European Court of Human Rights determined that it did not constitute a disproportionate interference that the inmate's correspondence with his own attorney was checked.

In this connection, the Court stated (paragraph 69):

> *"Having regard to the threat posed by terrorism in all its forms (see Bader, Meins, Meinhof, Grundman vs. Germany, no. 6166/73, Commission decision of 30 May 1975, Decisions and Reports 2), the safeguards attached to the monitoring of correspondence in the instant case and the margin of appreciation afforded to the State, the Court holds that the interference in issue was not disproportionate to the legitimate aims pursued."*

This means that when the purpose of the interference is to combat or prevent terrorism, the State must be afforded a wide margin of discretion, even in relation to interference in the inmate's close or specially protected relationships.

These types of relationships are not at issue in the matter at hand. Breivik's interests in establishing a contact network must give way to the State's interest in preventing possible right-wing extremist radicalisation. Therefore, the Court cannot ascertain any breach of ECHR, Article 8.

4.3 Control of visits

The legal authority for controlling prison visits is found in Section 31 of the Execution of Sentences Act. The point of departure is that prison inmates shall be able to receive visits; however, pursuant to the third subsection, the Norwegian Correctional Service can refuse visits if *"there is reason to assume that the visit will be misused for planning or committing a criminal act, evasion of execution of the sentence or acts that may disturb peace, order and security"*.

It can be confirmed that Breivik is not subject to a general prohibition on visits. The Norwegian Correctional Service has only refused Breivik visits from three persons. These are persons who, due to their background, were considered by the Norwegian Correctional Service to pose a security risk, and they were therefore not accepted. The Court's understanding is that all three persons have links to right-wing extremist communities, and that Breivik was not previously acquainted with any of them.

The purpose of refusing this type of visit is to prevent crime and disorder. As regards the question of whether the interference is necessary in a democratic society, the Court refers to similar comments relating to the letter screening.

The interference vis-à-vis is Breivik is, in practice, limited. Like other inmates in Norwegian prisons, he has the opportunity to receive visits. Breivik himself has not wanted visits from, for example, his father. In other cases, he is said to have set various terms and conditions for receiving visits, which the visitors could not, or did not want to, fulfil. The fact that Breivik is not allowed to receive visits from persons with extreme right-wing connections is not regarded as a violation of the Convention, in the opinion of the Court.

4.4 Telephone calls

The legal authority as regards telephone control and refusal of telephone calls is found in Section 32 of the Execution of Sentences Act. The rules correspond to those that regulate visits in prison.

During his imprisonment, Breivik has had the opportunity to use the telephone for 20 minutes per week.
The scope of his telephone contacts is described in more detail under the presentation of the case.

He has been refused conversations with persons who the Norwegian Correctional Service believes pose a security risk. A notice was submitted by Ila Detention and Security Prison dated 25 February 2013 regarding denial of telephone contact with a specific person. The Court finds it somewhat unclear whether others have been refused telephone contact.

The purpose of the interference and the question of whether it is necessary in a democratic society, are comparable in this connection.

The interference is limited, as it is first and foremost Breivik's own attitude that determines the situation. For example, Breivik chose to cut off weekly telephone contact with a woman, as he felt that the contact was meaningless.

The fact that Breivik is not allowed to have telephone contact with persons with extreme right-wing connections cannot be regarded as a breach of the Convention.

As regards the question of the use of a glass wall during visits, this is addressed as part of the Article 3 assessment.

The Court can accordingly not see that the above-mentioned interventions, neither individually nor collectively, entail a breach of ECHR, Article 8.

5. Legal costs

In order for a case to be deemed to have been won, the Court must find in favour of one party *"in the whole or in the main"*, cf. Section 20-2 (2) of the Dispute Act. The point of departure for this assessment must be the parties' claims in the summons and response, which are compared with the judgement. In cases where the opponent only wins on a minor point, the case can be considered to have been won by the other party. Breivik has succeeded in his assertion of violation of ECHR Article 3, but not in his assertion of violation of ECHR, Article 8. The latter cannot be regarded as a less important point, and Breivik has therefore not won the case.

On the other hand, the Court has found that Breivik has succeeded *"to a significant degree"*, cf. Section 20-3 of the Dispute Act. Furthermore, the Court is of the opinion that weighty grounds indicate that he shall have all of his legal costs covered by the opposite party. Reference is made to the nature and the severity of the case. The case has substantial importance for his well-being, and the relative strengths of the parties indicate that the State should bear his legal costs.

Attorney Storrvik has submitted a statement of costs where it emerges that a total of 250 hours have been spent on the case, at an hourly rate of NOK 995. With the inclusion of value added tax and travel expenses in the amount of NOK 20 000, the total claim amounts to NOK 330,937.50. The opposite party has made no objections to the claim. The Court considers the costs to be necessary and reasonable, cf. Section 20-5 of the Dispute Act.

The State is hereby ordered to reimburse Breivik's legal costs in the amount of NOK 330,937.50.

Judgement has not been pronounced within the statutory deadline, due to the fact that the case has been labour-intensive.

CONCLUSION OF JUDGEMENT

1. ECHR Article 3 has been violated in relation to Anders Behring Breivik during his imprisonment in Ila Detention and Security Prison and in Telemark Prison, Skien Unit.

2. The State, represented by the Ministry of Justice and Public Security, is acquitted of the assertion of violation of ECHR Article 8.

3. The State, represented by the Ministry of Justice and Public Security, is ordered to reimburse Anders Behring Breivik's legal costs in the amount of NOK 330,937.50 – threehundredandthirtythousandninehundredandthirtyseven – kroner and fifty øre within 2 – two – weeks from service of the judgement.

The Court adjourned

Helen Andenæs Sekulic

Guidelines on the right to appeal in civil actions are enclosed.