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Luxembourg September 21 2010

Att	: Secretary General
Re	: Norway: Systematic violations of the ECHR and the Treaty of London
Case #	:
Your reference	:
Our reference	:
Posting by	: Fax and mail
Your fax #	: + 33 3 88 41 27 81
Numbers of pages	: 5
Attachment	: 1
Copy	: Commissioner for Human Rights (33 3 90 21 50 53); Committee of Ministers (cm@coe.int).

Mr. Jagland,

I am representing Arild and Terje Lundquist, Norway, in legal matters. In this regard please find enclosed a Power of Attorney confirming my mandate.

Two lawsuits filed by Lundquist are at present considered by, respectively, justice Anne Ellen Fossum and justice Mary-Ann Hedlund, both with the Borgarting Court of Appeals, Oslo, Norway.

Fossum has been acting as a judge since 1999 while Hedlund has been acting as a judge since 1990. On August 16 2010 it was revealed that neither Fossum nor Hedlund has signed their oath / declaration according to the Norwegian Procedural Act §60, nor have they signed their oath in accordance with the Norwegian Constitution §21.

In his formative study "Judicial Ethics in Australia" (1988), Justice James Burrows Thomas has described the judge and the impact of his/her actions in this manner:

> "*We form a particular group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before us. Citizens cannot be sure that they or their fortunes will not some day depend upon our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it, that there be standards of*

conduct, both in and out of court, which are designed to maintain confidence in those expectations."

The judiciary in general and the judge in particular have – out of necessity – been provided with immense power. It is therefore of great importance that this power is used not only wisely but also in accordance with the given provisions. And if this power is misused in any way there must – of obvious reasons – exist an efficient system immediately locating and eliminating the problem.

According to Recommendation No. R (94) 12, its preamble, the Committee of Ministers[1] has noted the essential role judges have in ensuring the protection of Human Rights. Furthermore the committee has declared its desire to promote the independence of judges, this in order to strengthen the Rule of Law. The committee was said to be aware of the need to reinforce the position and powers of judges this in order to achieve an efficient and fair legal system. It was also conscious of the desirability of ensuring the proper exercise of judicial responsibilities which the committee found are a collection of judicial duties and powers aimed at protecting the interests of all persons. On this basis the Committee of Ministers recommended that governments of the member states were to adopt or reinforce all measures necessary to promote the role of individual judges and the judiciary as a whole and strengthen their independence and efficiency, by implementing, in particular, the following principle:

Principel I - General principles on the independence of judges

"*All necessary measures should be taken to respect, protect and promote the independence of judges.*" cf. No. 1.

"*The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.*" cf. No. 2 b.

By this the Committee of Ministers recognizes and emphasizes the importance of an independent judiciary, as well as the protection of this independency. This is also expressed in the "Explanatory Memorandum", "Commentary on the principles" No. 12 of the Recommendation No. R (94) which reads:

"*Support for the independence of the judges is expressed in the first principle which calls for all necessary measures to be taken to respect, protect and promote the independence of judges.*"

And in No. 13:

"*The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles (cf. paragraph 2 a. of this principle). This requirement implies that the independence of judges must be guaranteed in one way or another under domestic law.*"

A person, who has been appointed as a judge and is ready to start his duty, might feel convinced or even knows by himself that he/she is as independent as it can get. As an

[1] Council of Europe

assurance, towards the society and the users of the court, that the independency by this has been identified, secured and protected, this is though obviously insufficient. Most legal societies thus require an oath or a declaration from judges, before they take their seats. Professor Jacob Katz Cogan has in his Essay: "Competition and Control in International Adjudication" described the motivation for this oath / declaration:[2]

> "*Foremost, international judges are limited by the professional norms associated with their office, primarily independence and impartiality. Though such norms exist as a necessary consequence of a judge's election, "for [a new] international judge to conduct himself in an impartial and independent way," writes Judge Theodor Meron, "may require adaptation and discipline." As part of this process, the statutes of most international courts require that judges, before they take their seats, make a solemn declaration that is designed to impart notions of impartiality and conscientiousness to the persons taking the oath—in other words to appeal to their "internal compass." To bolster their effect, oaths are administered publicly. This is intended to suggest to the judge that he or she is publicly accountable in the event of a failure to abide by judicial norms of conduct. It is also intended to satisfy the audience that the judge will act in accordance with the norms expected of him or her. Professional norms thus act upon judges in two ways: as a reminder of agreed judicial standards and as a reminder of the possible consequences resulting from the failure to abide by those standards.*"

The oath / declaration holds two indispensable parts of what finally (when signed or orally submitted) should constitute what you could call a judge per se; 1) the anticipated independency and impartiality, and 2) the appointed person's voluntarily acceptance of the constraints tied to the title. In other words; if an appointed judge for some reason or other refuses to declare his/her independency and impartiality, he/she is not a judge and is obviously not allowed to take seat as a judge.

In his Commentaries on the Norwegian Administration of Courts Act (2000), Justice Anders Bøhn, Norway, states that it is a mandatory requirement to submit a written oath /declaration to the National Court Administration (NCA) before the judge is allowed to take seat. Bøhn then continues with a remarkable and astonishing statement:

> "*There is reason to believe that oath / declaration pursuant to the Procedural Act §60 have not been submitted in several cases.*"[3]

Consequently an unknown number of persons ("judges") in Norwegian courts have not declared their independency and impartiality, and are by definition not considered as judges.

In January 2008 I started investigating the matter. My preliminary findings give reasons to believe that the number of "judges" in Norway which has not signed an oath / declaration is significantly higher than what Bøhn vaguely indicates in his book. The problem though is that none of the relevant authorities in Norway seems to take this vast problem[4] seriously. The

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[2] Although professor Cogan's Essay is dealing with legitimacy, accountability, and good governance of international organizations, and in particular control and independence of international courts, his review of the motives of the required oath / declaration applies to national judiciaries and judges as well.

[3] Page 161.

[4] Any decision which has been passed by a person who has not signed his/her oath / declaration is considered null and void. As for Norway the number of decisions regarded as null and void is exceeding what is intelligible.

NCA, which is supposed to receive and file all oaths / declarations, has in this regard been unwilling to provide me with requested written oaths / declarations or any other information concerning this issue.

Through articles on the Internet and other means I have been advising users of Norwegian Courts to request for the oath / declaration whenever approaching a judge. This has lead to tremendous feedback, giving me access to documents that confirms that 1) a significant percentage of the "judges" has not signed any oath / declaration, 2) some have signed a *home-made*[5] oath, and 3) that there is no system safeguarding the procedure from the point of appointment to the point where the judge actually take the seat as a judge. This systematic malfunction in the Norwegian judiciary is most likely the main reason why so many individuals in Norway have been able to take seat as judges without being asked to declare their independency and impartiality.

This problem has now materialised in the two above mentioned lawsuits in Borgarting Court of Appeals. As a consequence of the fact that the said two persons have refused to declare their independency and impartiality and thus are not considered as judges, we have petitioned the President of the Court in question, as well as the NCA to remove these two persons, and distribute the two cases to judges who have signed their oath / declaration *before* they took seat.[6] The acting President of the Court has refused to answer upon our petition and the two "judges" in question continue to administer the appeals as if nothing had happened. The NCA, the Minister of Justice and the Parliamentary Standing Committee on Justice remain silent.

As you should understand by now, Norway is – by this systematic and wilful failure – violating a number of the Council's treaties and protocols, among these are the Treaty of London itself, cf. Article 3. As the violations are serious, consistent and well considered,[7] Article 8 applies, and Norway should thus be suspended from its rights of representation, which is the reason why this letter is dispatched to the Committee of Ministers as well.

I take it for granted that all relevant entities within the Council of Europe reacts adequately on the information provided in this letter, and I do trust that you will do whatever is in your powers to stop Norway from further violations as stated in this letter. Finally I would highly appreciate your soonest reply.

Yours faithfully,

Luxembourg September 21 2010

Herman J Berge

In this regard it is also worth noting that a person who wilfully gives oneself out to be a judge is violating the Norwegian Criminal Act chapter 11 and 12.

[5] I.e. using their own words, hence suspending the exact mandatory words as described in the Royal Decree of May 13 1927.

[6] It goes without saying that a person which hasn't declared his/her independency can not carry out judicial activity and can thus not administer a court case.

[7] Note that this issue has been well known within the judiciary for several decades. As noted Mr. Bøhn is a justice and he has been investigating this issue during the 1990'. Instead of addressing the relevant authorities in Norway, he left the problem within the binding of his book, together with a woolly statement that if what he had found was correct, the consequences could be dramatically. I have for several years addressed the problem to relevant authorities, including NCA, the Minister of Justice as well as the Parliamentary Standing Committee on Justice, with silence as the standard response from them all.