



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

FIRST SECTION

CASE OF KASTE AND MATHISEN v. NORWAY

(Applications nos. 18885/04 and 21166/04)

JUDGMENT

STRASBOURG

9 November 2006

FINAL

09/02/2007

In the case of Kaste and Mathisen v. Norway,

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

Christos Rozakis, *President*,

Loukis Loucaides,

Françoise Tulkens,

Nina Vajić,

Anatoly Kovler,

Dean Spielmann,

Sverre Erik Jebens, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 19 October 2006,

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

PROCEDURE

1. The case originated in two applications (nos. 18885/04 and 21166/04) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Norwegian nationals, Mr Bård Kaste and Mr Per Stian Tveten Mathisen (“the applicants”), on 23 May and 1 June 2004 respectively.

2. The applicants were represented by Mr Ø. Storrvik and Mr T. Staff, both lawyers practising in Oslo. The Norwegian Government (“the Government”) were represented by their Agent, Mrs F. Platou Amble, of the Attorney-General’s Office (Civil Affairs).

3. On 1 December 2005 the Court decided to communicate the applications. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the applications at the same time as their admissibility. On 19 October 2006 the Court decided to join the applications.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The first applicant, Mr Bård Kaste, and the second applicant, Mr Per Stian Tveten Mathisen, were born in 1970 and 1973 respectively and both live in Oslo.

A. Conviction and sentencing of the applicants and co-accused “D” at first instance

5. On 21 March 2002 the Oslo City Court convicted the first applicant of illegal possession of a firearm and, with two other co-accused, namely the second applicant and “C”, of possessing 48.41 kg of amphetamines and attempting to import those drugs by ferry from Kiel (Germany) to Norway on 9 January 1999. The first applicant was given a prison sentence of fourteen years, the second applicant twelve years and C six years.

6. The summary of facts contained in the City Court’s judgment took note of statements made to the Norwegian police by a fourth person, “T.A.”, concerning transportation of the drugs from Rotterdam to Kiel by “Percy” (the second applicant’s nickname) and another person. Before driving his car onto the ferry in Kiel, T.A. was stopped by German customs officials, who found a total of 48.41 kg of amphetamines in a rucksack and a bag in the car boot. Immediately after T.A.’s arrest, Norwegian police officers travelled to Kiel to take part in his questioning. T.A. was tried and convicted in Germany in June 1999.

7. In its reasoning in the first applicant’s conviction, the City Court based its decision on circumstantial evidence, notably on his and his cohabitant’s use of a mobile telephone, and its finding that there could be no doubt that the telephone in question, which used two specific pre-paid card numbers, had functioned as a means of communication in the operation and had played a central role in the case.

8. On 9 October 2002 the City Court, in separate proceedings, convicted a fifth person, “D” (who had absconded to the United States of America but later returned), in relation to the same offences and sentenced him to eleven years’ imprisonment.

B. Appeal proceedings before the High Court

9. The first applicant, the second applicant, C and D subsequently appealed to the Borgarting High Court, which decided to join the proceedings. Whereas D appealed only against the sentence, the other appellants appealed against other aspects, including the procedure, the assessment of evidence and the application of the law with regard to the question of guilt.

10. In the appeal proceedings before the High Court, the prosecutor requested that D be heard first, before the other defendants, because the giving of testimonies in this order would be the most appropriate in the interests of elucidating the case and ensuring effective administration of justice. The applicants’ respective defence lawyers protested against the order requested by the prosecutor. The High Court considered that, since D was to give evidence on matters of relevance to his sentence, normal

practice should be followed, which was to hear first those defendants who had appealed against the lower court's judgment as a whole. After C, the first applicant and the second applicant had given oral evidence, it transpired that D did not wish to give oral evidence. As to the procedure thereafter, the court record states:

"The prosecution asked, with reference to Article 290 of the Code of Criminal Procedure, for permission to read out the depositions that the accused [D] had made to the police on 22 May, 24 May and 21 June 2002.

[D]'s defence counsel, Mr Oscar Ihlebæk, had no objections to this. Mr Marius Dietrichson, defence counsel for [C], wanted the depositions to be read out. Mr Trygve Staff, defence counsel for [the first applicant], did not wish to express any particular opinion on the right to read them out. Mr Øystein Storrvik, defence counsel for [the second applicant], opposed the reading-out of the police depositions. He argued that such a reading would be in conflict with the requirements of a fair trial laid down in the European Convention on Human Rights, and would also be in conflict with the minimum rights contained in Article 6 § 3 (d) of the Convention, namely the right of the accused to examine witnesses against him, inasmuch as he maintained that testimony from [D] at this stage of the case would have the nature of witness testimony.

The Court thereafter ruled as follows:

Decision

The High Court finds that the reading-out of [D]'s police depositions is permissible under Article 290. Reference is made to the *Bjerke-Keiserud* commentary [on the Code of Criminal Procedure], volume II, page 1012, from which the following citation is taken:

'In the High Court an appeal against the assessment of the evidence may be joined to a limited appeal ... During the appeal hearing, all the accused will normally be present. The reading-out of their previous depositions must be done in accordance with the rules of Article 290, not Article 296, even if the deposition to be read concerns a co-accused, that is, someone other than the person giving the deposition himself. The procedure is different when a former co-accused has had his case finally and enforceably adjudicated and is appearing as a witness in the case.'

The High Court finds accordingly and cannot otherwise see that the reading-out of [D]'s depositions will be in conflict with ... Article 6 §§ 1 and § 3 (d) ... of the Convention. [D] has the status of an accused, and the High Court finds that this must be decisive even if he has lodged a limited appeal in the case."

11. The second applicant's counsel then asked the High Court to adjourn the proceedings in so far as the second applicant was concerned until a legally enforceable judgment existed with respect to D, so that D could be summoned as a witness with an obligation to testify. The High Court rejected the request for adjournment.

12. The prosecutor then read out D's statement, following which the second applicant's counsel asked to put a question to D. He referred to the

fact that in one of his statements to the police D had stated that his deposition contained so many errors that he saw no point in going through it any further. In this connection, the court record states:

“The President of the Court noted that [D] had invoked his right to remain silent, and that it would not therefore be permitted to question him directly, but that the President would ask [D] whether he wanted to testify, wholly or in part.

[D] replied that he still wished to remain silent, including in response to the questions put by Mr Storrvik.”

13. On 23 May 2003 the High Court, noting that the jury had answered in the negative with regard to C’s criminal guilt and in the affirmative with regard to that of the other defendants, acquitted C and convicted the other defendants. It sentenced the second applicant and D to nine years’ imprisonment and the first applicant to eleven years’ imprisonment. The High Court’s judgment contained no summary of the assessment of the facts in relation to the jury’s verdict, only a description of the facts in so far as relevant for sentencing, which was decided by the judges.

C. Appeal to the Supreme Court

14. Both applicants appealed against the High Court proceedings to the Supreme Court (the first applicant had also sought to appeal against the sentence but was refused leave to do so), which on 22 January 2004 rejected their appeal, finding no incompatibility with the requirements of Article 6 §§ 1 and 3 (d) of the Convention.

15. In his reasoning, approved in the main by the other four justices sitting in the case, the first voting judge, Mr Justice Tjomsland, observed, *inter alia*, that one difficulty for the Supreme Court in reviewing the appeal was that the High Court, contrary to the European Court’s case-law, had proceeded from the assumption that, as a co-accused, D had not been a “witness” for the purposes of Article 6 § 3 (d) of the Convention. The High Court had therefore failed to carry out an assessment of the evidence according to the relevant criteria, notably the importance of D’s depositions in relation to other evidence in the case, although this would have been difficult to do at such an early stage of the proceedings.

16. The Supreme Court noted that extensive evidence had been adduced before the High Court. The hearing had lasted for eighteen days during which no less than forty witnesses had been heard. Documentary evidence and statements related to the use of a number of mobile telephones connected to the case had been of central importance. It was difficult to say whether the statements by D, the only accused who had confessed to the offences, were an element of minor importance compared with the evidence seen as a whole. In his statements, D had implicated the second applicant

and, probably indirectly, also the first applicant. However, his statements had not given any clear negative picture of the latter.

17. It would be inconsistent with the purposes of proceedings involving full examination at two judicial levels if the evaluation of evidence carried out by the City Court were to carry significant weight in the assessment of the evidence before the High Court. In this regard the Supreme Court pointed to the fact that C had been acquitted by the High Court and that the High Court judges had based their findings regarding certain points, in particular with respect to the transportation of the drugs from the Netherlands to Kiel, on facts different from those relied upon by the City Court.

18. The Supreme Court continued:

“The prosecutor has pointed out that in her directions to the jury the President of the High Court had stated that, in her opinion, there was no question of ‘entirely dominant or crucial evidence against any of the accused’. I find it difficult to place particular weight on this factor. In addition, she had also said in her direction to the jury that in her view the depositions would be ‘only one of several elements in a consideration of whether the accused are guilty’ ... As I see the case, I do not find it defensible to draw any particular conclusion as regards the police depositions’ significance in the overall evidentiary picture presented to the High Court. In view of the state of the evidence at hand, it may indeed appear probable that D’s confession was a more important element with respect to the other defendants’ convictions than was his deposition about their role. But the doubt that here obtains means that, despite the other important evidence in the case, I must regard it as ‘a real possibility’ that the reading-out of D’s police depositions had ‘decisive significance for the overall assessment of the evidence’ (see *Norsk Retstidende Rt.* 2001-29).

In those instances where there is a real possibility that the police statements would have a decisive influence on the assessment of the evidence, the reading-out of these would as a rule have to be refused unless the accused has had an opportunity to put questions to the witness (see *Rt.* 1999-757).”

19. The Supreme Court observed that in this case none of the defendants had had an opportunity to put questions to D either during the trial before the City Court or at any time prior to the High Court proceedings. At the High Court hearing D had availed himself of his right to silence. After his depositions had been read out, the President of the High Court had, on a request by counsel for the second applicant, asked D again whether he wished to give oral evidence in full or in part. Thus the arrangement was that counsel for the other defendants should have an opportunity to put questions to D, but his unwillingness to give evidence had made a real examination impossible. Under Norwegian case-law, the requirements of Article 6 §§ 1 and 3 (d) of the Convention would be met if the accused or his counsel were given a formal opportunity to put questions, even if the witness refused to reply, provided that the proceedings considered as a whole were fair. In this connection reference was made to *Harri Peltonen v. Finland* (dec.), no. 30409/96, 11 May 1999; *Lucà v. Italy*, no. 33354/96,

§§ 40-45, ECHR 2001-II; and *Craxi v. Italy (no. 1)*, no. 34896/97, § 86, 5 December 2002.

20. The Supreme Court was satisfied that Article 6 §§ 1 and 3 (d) had been complied with as the defence had had an opportunity to put questions to D during the trial, even though the latter had opted to refuse to answer those questions. When the cases had been joined, there had been no reason to believe that D would not reply to questions at the trial. A complicating factor had been the divergence of views among the defendants during the trial as to whether the reading-out of D's depositions should be permitted. To separate the proceedings regarding D and to postpone the trial concerning the other defendants until the case regarding D had been finalised (and he could be required to answer questions as an ordinary witness) would have entailed unreasonable consequences, both from the point of view of elucidating the case and of ensuring effective administration of justice, and would have enabled the defendants to obstruct and protract the trial unduly.

II. RELEVANT DOMESTIC LAW

21. The relevant provisions on the reading-out at a trial hearing of depositions made to the police may be found in Articles 290 and 296 of the Code of Criminal Procedure, which deal respectively with depositions made by an accused and by a witness.

Article 290

“Any reproduction in the court record or a police report of any statement that the person indicted has previously made in the case may only be read out if his statements are contradictory or relate to points on which he refuses to speak or declares that he does not remember, or if he does not attend the hearing. The same applies to any written statement that he has previously made in relation to the case.”

Article 296

“Witnesses who can give evidence that is deemed to be of significance in the case should be examined orally during the main hearing unless special circumstances prevent this.

At such examination any reproduction in the court record or a police report of any statement that the witness has previously made in the case may only be read out if the witness's statements are contradictory or relate to points on which he refuses to speak or declares that he does not remember. The same applies to any written statement that the witness has previously made in relation to the case.”

22. The above provisions are subject to limitations, which are not contained in the Code of Criminal Procedure but follow from interpretations by the Norwegian Supreme Court (see, in particular, a decision of 19 December 2003, *Rt.* 2003-1808) in the light of the Convention case-law, which may be summarised as follows.

(a) As a general rule, witnesses must be examined “at a public hearing in the presence of the accused”.

(b) Exceptions may be made in special circumstances if, taken as a whole, the proceedings are “proper and fair”.

(c) The reading-out of depositions may take place if the accused or his defence is given an “adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage of the proceedings”. Particular care should be exercised if a conviction is secured “solely or to a decisive extent” on the deposition.

(d) It is not a condition that the witness answer the questions asked by the accused or his defence. A deposition may, as a rule, be read out in court even if the witness invokes his right to remain silent, or indeed chooses not to speak for other reasons.

23. For items (c) and (d) above, the Supreme Court referred to *Asch v. Austria*, 26 April 1991, §§ 27-28, Series A no. 203; *Lucà*, cited above, § 40; and *Craxi*, cited above, §§ 85-86; and, for item (d), it also referred to *Harri Peltonen*, cited above.

COMPLAINT

24. The applicants complained that the proceedings before the High Court had violated their rights under Article 6 §§ 1 and 3 (d) of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

25. The applicants alleged a violation of Article 6 §§ 1 and 3 (d) of the Convention, which read:

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

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...”

26. The Government contested that argument.

A. Admissibility

27. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

28. The applicants stressed that, while an examination of D as a witness would have been particularly important to their defence, their respective convictions by the High Court had been based to a decisive degree on D's depositions to the police which were read out at the High Court hearing. Neither of the applicants, nor their counsel, had been permitted to put questions to D in order to challenge the reliability and credibility of his depositions, as D had availed himself of his right to remain silent. The request to have the proceedings postponed in order to have D summoned subsequently as a witness with an obligation to testify had been rejected without good reason.

29. The first applicant, whose counsel had not expressed any firm view on the reading-out of D's depositions, emphasised that this could in no way be taken to mean that he had waived his rights under Article 6 §§ 1 and 3 (d) of the Convention in relation to the evidence from co-accused D before the High Court. The High Court record had incorrectly recorded the order of comments made by the applicants' respective counsel. In fact, counsel for the second applicant had actually spoken before counsel for the first applicant, by prior mutual agreement. Thus, since a protest had already

been voiced by the former, there was no need for the latter to repeat it. The fact that counsel for the first applicant did not make the same requests as counsel for the second applicant, only to receive the same answers from the High Court, could not be regarded as an unequivocal waiver, or even a tacit one, by the first applicant. The Court should be extremely cautious in allowing waivers of human rights in criminal proceedings to be anything but explicit.

30. In addition, the first applicant stressed that the fact that the relevant criterion was an “adequate and proper opportunity” in itself ran counter to the assumption that an opportunity as such sufficed to meet the requirements. The right to an adversarial procedure could not merely be a formal one but had also to be effective, in practice as well as in law. By merely securing D’s presence, the authorities could not be said to have made every reasonable effort and to have taken every reasonable step to ensure that the witness in question could be examined.

31. The second applicant, whose lawyer had expressly objected to the reading-out of D’s depositions, pointed out that this was a key piece of evidence for the High Court, pertaining as it did not only to the objective description of the course of events but also to *mens rea*. The High Court found established a different course of events than did the City Court, which corresponded specifically to D’s depositions. His evidence had been crucial because it had contained specific accusations against the second applicant, describing how he had handled the consignment of drugs in Kiel and his actual knowledge of the sort of drugs involved.

32. The second applicant further submitted that, had the High Court applied the Convention law correctly and treated D in accordance with the rules on the hearing of witnesses, the second applicant would have been given an opportunity to ask questions and, for each question, D would have been able to refuse to answer. This would have enabled counsel for the applicants to clarify important aspects of the case to the jury and also to give D an opportunity to consider whether he wished to answer specific questions. However, the second applicant’s lawyer had been completely barred from asking any questions whatsoever before D’s depositions were read out. There was a significant difference between being barred from questioning and being able to ask questions of a person who, for each question, could have relied on the right to remain silent.

33. The motive for asking D questions was that, in one of his statements to the police, D had said that his deposition contained so many errors that he saw no point in going through it any further. For the defence it would have been vital to be able to ask D what he thought was wrong with the record of his questioning, but the President of the High Court did not allow counsel to put this specific and vital question to D. In fact, not once during the proceedings had the second applicant had an opportunity to ask D any

questions. The High Court ought to have permitted the questions and should have left it to D to invoke his right to silence if he wished.

(b) The Government

34. The Government disputed the above contentions and requested the Court to find that there had been no violation of Article 6 §§ 1 and 3 (d) of the Convention in the present case.

35. In the Government's opinion, the central issue in the present case was to what extent a co-accused's fundamental right to remain silent – established by the Court in its own case-law – could interfere with another co-accused's right under Article 6 § 3 (d) to examine or have examined witnesses against him.

36. Moreover, referring to the Court's case-law (notably *Mild and Virtanen v. Finland*, nos. 39481/98 and 40227/98, §§ 46-47, 26 July 2005, and *Mayali v. France*, no. 69116/01, 14 June 2005), the Government argued that the judicial authorities would have fulfilled their obligations under Article 6 of the Convention provided that they had made "every reasonable effort" to secure the presence of the co-accused, or provided that the co-accused had actually made an appearance but nevertheless refused to answer any questions.

37. In the present case, the judicial authorities did in fact secure co-accused D's presence at the High Court trial and did indeed arrange for adversarial proceedings. However, they could not, and should not, have influenced his choice as to whether to answer the questions asked. To do so would have impinged on his right to remain silent.

38. The Government further maintained that, provided that the proceedings as a whole were fair, the requirements of Article 6 § 3 (d) would be met if the accused or his or her counsel had at some point been given an opportunity to examine the co-accused. Thus, what was material for the adversarial principle under the Court's case-law was whether the accused had had the opportunity to examine the witness, not necessarily the results of such an examination. This implied that a formal approach had to be adopted in applying the adversarial principle, where the decisive element was how the proceedings had been arranged by the judicial authorities.

39. Policy considerations clearly supported this view. Were it to be held otherwise, the co-accused could be put in a position where he or she would be able to block the prosecution by not answering questions from the defence (see *Asch*, cited above) and also to hinder compliance with the reasonable time requirement contained in Article 6 § 1 of the Convention.

40. Thus, in the assessment of whether an accused had had a fair trial, the behaviour of a co-accused ought not to be decisive. A right for the defence to ask questions of a witness would rarely correspond to an equivalent obligation or willingness on the part of the witness to testify. Accordingly, so long as the judicial authorities gave the defence an

opportunity to examine the witness, the conditions for adversarial proceedings were present, and thus the requirement under Article 6 §§ 1 and 3 (d) of the Convention would be satisfied. It was in fact the responsibility of the State, not the witness, to secure the fulfilment of the guarantees in Article 6.

41. Furthermore, regard was to be had to the necessity of witness protection. If the position taken by a witness in relation to whether to appear, or whether to answer questions asked, were to influence the assessment as to whether the obligations under Article 6 §§ 1 and 3 (d) were satisfied, a considerable amount of pressure could be exerted on him or her.

42. The Government also pointed out that, in cases involving several co-accused, joint proceedings were normally the best approach in order to secure a fair hearing and consistency in their treatment.

43. Finally, as long as the obligations under Article 6 §§ 1 and 3 (d) had been met and the defence had been given an adequate and proper opportunity to cross-examine the witness, then allowing the reading-out of statements, taken together with all other evidence in the case, was the course most likely to result in secure judicial rulings.

44. Accordingly, in the Government's opinion, as a matter of principle and provided that the proceedings in issue as a whole were fair, the requirements of Article 6 §§ 1 and 3 (d) of the Convention would be satisfied if an accused were able to put questions to a co-accused, even if the latter refused to answer them by relying on his or her right to remain silent.

45. Even though the Supreme Court had used a different, and perhaps slightly more restrictive criterion ("[I] ... must regard it as 'a real possibility' that the reading-out of D's police depositions had 'decisive significance for the overall assessment of the evidence'") than might the Strasbourg Court, the Government would not dispute that the co-accused D's depositions to the police had been relied on to a decisive extent by the High Court in convicting the applicants. However, this point was not crucial since, in compliance with Article 6 §§ 1 and 3 (d) of the Convention, the co-accused had been given an adequate and proper opportunity to challenge D's statements.

46. Finally, as regards the first applicant, the Government disputed his submission that, in the light of the second applicant's objection, it was not necessary for him to object to the reading-out of the depositions. The Government emphasised that co-accused C and each of the applicants took a completely different stance. If the first applicant was opposed to the reading-out, he should have expressed this view, or in the alternative he could have referred to the submissions of the second applicant's defence counsel. This failure to form an opinion and express a view on the issue could be taken as a tacit waiver. According to the Court's case-law, a waiver may be inferred from the circumstances. At any rate, this omission

ought to be taken into account in assessing whether the proceedings as a whole were “fair” under Article 6 § 1 of the Convention.

2. *The Court’s assessment*

47. The Court will determine the present case in the light of the principles enunciated in its case-law (see, in particular, *Lucà*, cited above, §§ 37-43). In this connection, it observes that the Government, and also the second applicant, placed some emphasis on the considerations behind the principle that the authorities are under an obligation to make “every reasonable effort” to secure the appearance of a witness. The Court considers that the appearance of a witness is a prerequisite for the defence’s opportunities to confront the witness. However, there must also be a proper and adequate opportunity to question the witness (*ibid.*, § 39).

48. Turning to the particular circumstances of the case, the Court notes from the outset that only counsel for the second applicant objected to the prosecution’s request to read out D’s depositions to the police and requested adjournment of the case. Counsel for the first applicant stated that he did not wish to express a firm view on whether reading the statements out should be permitted (see paragraph 10 above). After the High Court decided to grant the prosecutor’s request, counsel for the first applicant did not join the request by counsel for the second applicant for adjournment of the proceedings (see paragraph 11 above). The Court considers that, if the first applicant’s counsel was of the view that it was important for his case that D’s depositions should not be read out, one could, in principle, have expected him to have pointed this out.

49. However, the Court has taken note of the first applicant’s explanation as to the order of interventions, to which the Government did not object, namely that counsel for the second applicant spoke first. Having regard to the High Court’s treatment of the second applicant’s objections and requests (see paragraphs 10 and 12 above), it appears that it would have been futile for the first applicant to make the same objections and requests. In these circumstances, the Court does not find it established that the first applicant had waived unequivocally, either expressly or tacitly, his Article 6 § 3 (d) rights.

50. The Court further observes that, as soon as D had declared his wish to remain silent, the prosecutor requested, and the High Court granted, authorisation to read out his depositions to the police (see paragraph 10 above). In this respect the present case is similar to those in *Lucà* (cited above, §§ 13-15) and *Craxi* (cited above, § 30), where the reading-out was to be done if the co-accused chose to remain silent. At no point during the proceedings prior to the reading-out of D’s statements by the prosecutor were the applicants given an opportunity to challenge and question D through cross-examination. Rather than allowing the applicants’ respective counsel to put questions to D and plead their defence in the light of D’s

replies or refusals to reply, the High Court gave the floor to the prosecution so that it could read out D's depositions. Thus, D's opting to exercise his right of silence had the effect of dispensing him altogether from answering any question that the applicants might have wished to address to him.

51. This appears also to have been the situation after D's statements had been read out, when counsel for the second applicant made a reasoned request to put a question to D. The President of the High Court responded that, since D had invoked his right of silence, it would not be permitted to question him directly. It is true that the President nevertheless asked D if he wished to give oral evidence in full or in part, and that D replied that he still did not wish to give oral evidence even in relation to the specific question put to him by the second applicant's counsel (see paragraph 12 above). However, even at this stage, with the President of the High Court acting as an intermediary filter between the second applicant – the defendant – and D – the witness – it cannot be said that the second applicant was given a real opportunity to confront D (contrast *Harri Peltonen*, cited above).

52. Furthermore, the Court is not convinced that, had the applicants been afforded an opportunity to question D directly, this could not have been reconciled with D's right not to answer those questions that might have incriminated him.

53. The High Court's interpretation of the law seems to have had implications for its conduct of the proceedings in relation to the matter complained of under Article 6 §§ 1 and 3 (d) of the Convention. The Court cannot but note that the High Court considered that, as a co-accused, D had not been a "witness" for the purposes of these provisions (see paragraph 10 above). According to the Supreme Court, the High Court appeared to have proceeded from the assumption that the Convention limitations on the reading-out of depositions to the police did not apply to such statements made by a co-accused (see paragraph 16 above). In the Court's view, this interpretation by the High Court is hardly consistent with the autonomous meaning of the term "witness" in the Court's case-law, according to which the fact that the depositions were made by a co-accused rather than by a witness is of no relevance (see *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B). It should be reiterated that where a deposition may serve to a material degree as the basis for a conviction then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (see *Lucà*, cited above, § 41).

54. The Court finds no reason to adopt a different approach in this case. Having regard to the findings of the Supreme Court, it must be presumed that D's depositions had a decisive influence on the outcome of the case (see paragraphs 19 and 45 above).

55. Against this background, the Court is not satisfied that the applicants were given an adequate and proper opportunity to contest the statements on which their conviction was based.

56. The applicants were therefore denied a fair trial. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. Article 41 of the Convention provides:

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

A. Damage

58. The first applicant, but not the second, claimed compensation for damage. This included:

(a) 570,557 Norwegian kroner ((NOK), approximately 72,000 euros (EUR)) in respect of pecuniary damage on account of his loss of salary (NOK 25,000 per month for a period of twenty-one months, plus 0.75% interest per month) as a result of his unjustified detention;

(b) non-pecuniary damage on account of the suffering and distress caused by the violation, in an amount to be assessed by the Court, not to exceed NOK 240,000 (approximately EUR 30,000), corresponding to the flat daily rate of NOK 400 applied in Norway and 652 days spent in detention before the submission of the claim.

59. The Government were of the opinion that the question was not ready for examination. Referring to the fact that the applicant was subsequently convicted of other serious crimes, it was not evident that there was a causal link between any violation and the damage claimed by the first applicant. In any event, this matter would be better dealt with by the national authorities after judgment by the Court.

60. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It cannot speculate on what the outcome of the proceedings would have been had they complied with Article 6 §§ 1 and 3 (d). Consequently, it dismisses the applicant's claims under this head (see *Lucà*, cited above, § 48, and *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 155, ECHR 2000-VII).

61. Moreover, with regard to his claim for non-pecuniary damage, the Court, having regard to the case as a whole and to the possibilities for the applicant to seek the reopening of the proceedings under national law (see

Bocos-Cuesta v. the Netherlands, no. 54789/00, § 82, 10 November 2005), considers that the finding of a violation constitutes in itself sufficient just satisfaction.

B. Costs and expenses

62. The first applicant also claimed NOK 61,090 (EUR 7,720) for the costs and expenses incurred before the Court. This included NOK 9,940 for his first lawyer, Mr Elden, and NOK 48,300 (sixty hours at an hourly rate of NOK 805) for his second lawyer, Mr Staff, who replaced the former in December 2005, and NOK 2,850 for translation costs (the latter amount is not inclusive of value added tax – VAT).

63. The second applicant sought the reimbursement of a total amount of NOK 44,312 (EUR 5,600), which comprised NOK 35,000 for his lawyer's work with the case before the Court and NOK 9,312 for translation costs.

64. The Government did not object to the applicants' respective claims.

65. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the applicants EUR 7,800 and EUR 5,600 respectively for the proceedings before the Court, both amounts being inclusive of VAT.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the applications admissible;
2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 of the Convention with respect to both applicants;
3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the first applicant;

4. *Holds*

(a) that the respondent State is to pay the first and second applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,800 (seven thousand eight hundred euros) and EUR 5,600 (five thousand six hundred euros) respectively in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 9 November 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President