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

FIRST SECTION

CASE OF EKEBERG AND OTHERS v. NORWAY

(Applications nos. 11106/04, 11108/04, 11116/04, 11311/04 and 13276/04)

JUDGMENT

STRASBOURG

31 July 2007

FINAL

31/10/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ekeberg and Others v. Norway,

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 10 July 2007,

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

PROCEDURE

1. The case originated in five applications (nos. 11106/04, 11108/04, 11116/04, 11311/04 and 13276/04) 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 five Norwegian nationals, (1) Mr Roger Ekeberg (born in 1960), (2) Mr Hans Mikkelsen (born in 1968), (3) Mr Morten Hoelstad (born in 1967), (4) Mr Roger Elvsveen (born in 1963) and (5) Mr Torkjel Alsaker (born in 1960) ("the applicants"), on various dates between 19 and 24 March 2004.

2. The applicants were represented by Mr S. Næss, a lawyer practising in Lillestrøm. The Norwegian Government ("the Government") were represented by their Agent, Mr E. Haaskjold.

3. The applicants complained under Article 6 § 1 of the Convention that, due to its composition, they did not have a fair and impartial hearing before the Borgarting High Court, whose judgment of 24 March 2003 was upheld by the Supreme Court on 25 September 2003.

4. The Chamber decided to join the proceedings in the applications (Rule 42 § 1).

5. By a decision of 11 July 2006, the Court declared the applications admissible.

6. The Government, but not the applicants, filed further written observations (Rule 59 § 1).

THE FACTS

THE CIRCUMSTANCES OF THE CASE

7. All the applicants, but the fifth, were members of a motor cycle club named “*Screwdrivers*”, which was based in Hamar and was, at the time of the events giving rise to the proceedings described below, the “Hang-Around Club” of the Hells Angels. On 8 November 1997 it became a Prospect Club of the latter and, as from 8 May 1999, a “Chapter”. The fifth applicant was a member of Hells Angels in Oslo.

A. Criminal conviction by the City Court

8. On 18 March 2002 the applicants, along with two other defendants, B. and M., were indicted (count I) under Article 148 (1) (second alternative) of the Penal Code for having instigated fire or explosion capable of causing loss of human life and extensive material damage and resulting in death, or for aiding and abetting in this. On Wednesday, 4 June 1997 at around 11.45 pm in Drammen, they had, after having planned the operation, blown up parts of the club house in 25, Konnerud Street, of another motor cycle club, named *Bandidos*. A Volkswagen Transporter had been placed in the latter's courtyard, loaded with explosives that were detonated. The force of the explosion had been such that metal and rubber parts of the vehicle had hit and killed the driver of a passing car. The building in question had in part subsided and a massive fire had broken out, putting at risk the lives of three persons inside the building. The building had burned down to the ground and a neighbouring property had been severely damaged, several vehicles had been totally or largely destroyed. The total damage had amounted to at least NOK 2,000,000. Moreover, the applicants were indicted (count II) under Article 161(1) and (2) for the acquisition, confection or storage of explosives, or for aiding or abetting thereto, with the knowledge that the explosives had been intended to be used for the commission of the offence described under count I above, during the period before 4 June 1997. Furthermore, the applicants were indicted (count III) under Articles 291 and 292 for aggravated offences of serious material damage in respect of 25, Konnerud Street and a number of properties adjacent to or in the vicinity thereof, amounting to NOK 285,386,387 (approximately EUR 40 million).

9. By a judgment of 10 June 2002, the Drammen City Court (*tingrett*) acquitted the first, second and third applicants of counts I and II but convicted them of count III and sentenced each of them to 3 years' imprisonment. The fourth applicant was acquitted of count II but convicted of counts I and III and sentenced to 8 years' imprisonment. For each of them

the time spent in pre-trial detention was to be deducted. The fifth applicant was acquitted of all the charges.

10. The two co-defendants, B. and M., were convicted of all the charges and were sentenced respectively to 10 and 5 years' imprisonment.

B. Decisions on provisional detention pending final judgment

11. On 1 July 2002 the Borgarting High Court (*lagmannsrett*), sitting with three judges, including Judge G., rejected an appeal by the fourth applicant against a decision of 10 June 2002 by the City Court to prolong his provisional detention. The decision included the following reasons:

> "The City Court has ordered detention of [the fourth applicant] on the ground of danger of evasion, see Article 171 (1) no. 1 of the Code of Criminal Procedure, and the defence counsel's first supporting letter concerned imprisonment on this ground. The High Court found it correct to assess whether there were grounds for imprisonment on the basis of law enforcement considerations pursuant to Article 172, and notified the defence counsel and prosecutor of this by telephone. The defence counsel's second supporting letter concerns this issue.
>
> According to the City Court's convicting judgment, the basic condition for remanding the prisoner in custody pursuant to Article 171 (1) [...] on ground of reasonable suspicion has been fulfilled. The High Court does not find it necessary to consider whether the danger of evasion ought to lead to imprisonment, but points out that if [the fourth applicant] does not attend court for the hearing of the appeal, his conviction will remain in force. This, and his personal circumstances as described by the defence counsel, are factors which indicate that the danger of evasion is not sufficiently great.
>
> The defence counsel has stated that the basic condition for imprisonment pursuant to Article 172 [...], namely the existence of factors which particularly strengthen the suspicion, has not been met and has alleged that the conviction is based on the statement of a co-defendant which is contradicted by other statements and evidence. The High Court bases its judgment, as in the Borgarting High Court's ruling of 28 June 2001 in the *Orderud* case (appeal case 01-02109) on the fact that when there is a convicting judgment, the qualified requirement of suspicion stated in Article 172 has usually been fulfilled. It is true that in that case this was not contested by the defence counsel, nor during the subsequent hearing by the Appeals Leave Committee of the Supreme Court (see *Norsk Retstidende* ("Rt") 2001, page 940), but this is a matter the courts must consider of their own motion. In the High Court's opinion, there are no grounds for taking a different view in this case either. The basic condition stated in Article 172 is regarded as having been met.
>
> As regards the discretionary decision regarding whether imprisonment under Article 172 should take place, the High Court refers to the extensive discussions in the case mentioned above. The present case was widely covered by the media just after the explosion, regularly during the subsequent period, and later in connection with the arrest and the City Court proceedings. It appears from the judgment that this was a planned crime, within the meaning of section 148 of the Penal Code, organised by several persons where a passer-by lost her life. The explosion took place in a town and could easily have led to the loss of more lives. Damage amounting to great sums was

caused. The City Court based its ruling on the fact that the matter arose out of rivalry between two Motor Cyclist milieus. The High Court adds, as a factor when assessing the case pursuant to Article 172, that this rivalry in Nordic countries has led to a number of violent confrontations, including several deaths. This case is undoubtedly likely to cause such a reaction among the general public as Article 172 is intended to counteract and must be said to lie in the core area for the application of this provision. On the basis of an overall assessment, the High Court has found that the law enforcement considerations which form the basis of Article 172 are so prominent here that the accused should remain in prison also after judgment. The accused's personal and family circumstances pointed out by the defence counsel cannot be given sufficient weight in the opposite direction, and continued imprisonment cannot be said to be a disproportionate measure under Article 170A.

The decisions by the Appeals Leave Committee of the Supreme Court to which the defence counsel has referred – reported in Rt 1994, page 88, Rt 1998, page 470, Rt 1999, page 2102, and Rt 2000, page 1136 - cannot lead to any different result. The High Court has also considered decisions included in Rt 2000, page 371, page 1664 and page 1905.

Unless it is of importance for the decision regarding whether or not the accused is to be released, especially in relation to the consideration of proportionality, where the accused is placed during the remand period is outside the High Court's control. The regime he is now subject to is found to be of no importance to the High Court's assessment."

C. Appeal against the City Court's judgment to the High Court

12. The first, second and third applicants appealed to the High Court against the City Court's assessment of facts concerning the question of guilt and the application of the law with respect to count III. The fourth applicant appealed against the assessment of facts concerning the question of guilt, the application of the law and sentencing with regard to counts I and III. The prosecution appealed against the acquittals of the first, second and third applicants on count II and that of the fifth applicant's acquittal on counts I and III.

M did not appeal whereas B only pursued an appeal against the sentence which the High Court dismissed by a separate decision of 5 February 2003.

13. As for the appeal brought by the applicants, the High Court held an oral hearing between 24 February and 21 March 2003. The High Court was sitting with a jury of 11 members (reduced to 10 on the fifth day as one of the jury members was disqualified, see below) and with 3 professional judges, one of whom was Judge G. In the questions put to the jury the offences were described in the way set out in the indictment. The jury answered all the questions in the affirmative, except for one regarding count II with respect to the fourth applicant. The professional judges decided to pass judgment on the basis of the jury's verdict (Article 376B, first section,

of the Code or Criminal Procedure) and, by a judgment of 24 March 2003, convicted all five applicants on counts I and III.

14. Thereafter, the High Court, composed of the three professional judges, the jury chairperson and three other jurors drawn by lots among the jury (Article 376E of the Code or Criminal Procedure), unanimously sentenced the first, second and third applicants to 6 years' imprisonment and the fourth and fifth applicants to 12 and 16 years, respectively. For each applicant, the number of days spent in provisional detention was to be deducted from the sentence.

Finally, the three professional judges awarded NOK 120,000 in compensation for non-pecuniary damage to the husband of the woman killed by the explosion.

The issue of compensation for pecuniary damage was postponed.

15. The applicants all appealed to the Supreme Court against the High Court procedure and the sentences. As regards the former appeal ground they all argued that they had not been afforded an impartial hearing before the High Court.

16. Firstly, they argued that Judge G. had taken part in the High Court decision of 1 July 2002 rejecting an appeal against a prolongation by the City Court of the fourth applicant's provisional detention. Unlike the City Court, which had applied the ordinary grounds for such detention in Article 171 of the Code of Criminal Procedure, the High Court had applied a special ground contained in Article 172, which authorised such detention, even if the ordinary grounds under Article 171 were not fulfilled, namely where it concerned an offence punishable by imprisonment for 10 years or more and provided that there was a confession or (as found here) other circumstances which strengthen particularly the suspicion (*som i særlig grad styrker mistanken*) against the defendant. The decision of 1 July 2002, it was argued, had also had implications for the other defendants.

17. Secondly, they submitted that on the fifth day of the trial hearing, after having taken part for four full hearing days, a member of the jury had stated that on 10 July 1997 she had made a witness statement to the police that related to the case. Her name had not been included on the list of witnesses. The High Court had then discharged the jury member in question and had continued the trial, despite a request by the defence to postpone it and to have the case tried by a differently composed court.

18. However, on 25 September 2003 the Supreme Court unanimously rejected both appeal grounds, on procedure and sentencing, subject to certain adjustments to the number of days to be deducted on account of provisional detention. The first voting judge, Mr Justice Støle, gave *inter alia* the following reasons:

> “(13) I will first deal with the allegation that High Court judge, Judge G., was disqualified. ...

(14) From the outset, I find reason to point out that our rules of procedure for criminal cases in a High Court that sits with a jury are based on a distribution of functions. The decision regarding the question of guilt is the jury's alone, while the court proceedings are determined by the High Court's three professional judges. These decide on the issue of sentencing together with the jury's foreman and three members of the jury. In cases that are heard and ruled on in the first and second instance by a court sitting with professional judges and lay judges, the lay judges and professional judges have the same authority regarding all issues, which are decided on jointly.

(15) Following the landmark judgment by the European Court of Human Rights on 24 May 1989 in the case *Hauschildt v. Denmark* (application no. 10486/83) regarding disqualification by reason of prejudice due to participation in decisions regarding remand in custody, there is extensive Supreme Court case law on this. In criminal cases which at first and second instance are heard and decided on by a court sitting with professional and lay judges, a professional judge who has previously taken part in a remand case in which imprisonment has been ordered under Article 172 of the Code of Criminal Procedure is regarded as being disqualified and shall therefore not take part in any subsequent main hearing to determine, *inter alia*, the question of the guilt of the same accused in the same body of cases. In Rt-1996-261, the Supreme Court has stated that the same applies to the presiding judge in a High Court case involving a jury. The first voting judge stated, on page 265, the following regarding the relationship to section 108 of the Administration of Courts Act:

'As regards the relationship with section 108 of the Administration of Courts Act, I would point out: Article 172 of the Code of Criminal Procedure stipulates that there must be a very strong probability that the accused is guilty, see the wording of the section according to which, in the serious crimes covered, there must be 'a confession or other circumstances that strengthen the suspicion to a particularly high degree'. This is clearly a stronger suspicion than the one which is sufficient pursuant to Article 171 of the Code of Criminal Procedure, which stipulates 'reasonable grounds' for suspicion.'

(16) ...

(17) In the above-mentioned judgment, the question of imprisonment was decided during the investigation and without a conviction by any court. In Rt-1996-925, the presiding judge of the High Court was, with dissenting votes, also regarded as being disqualified in a situation where the order to remand the accused in custody pursuant to Article 172 of the Code of Criminal Procedure had been made after there was a conviction by a first instance court.

(18) In our case too, the relevant remand order had been made after a conviction by the court of first instance. But here the objection on the grounds of disqualification is not aimed at the presiding judge of the High Court, but at one of the other two professional judges who took part. It appears from what I have previously quoted from the first voting judge's vote in Rt-1996-261, that the emphasis was placed on the fact that the presiding judge in a jury case had a key function, with particular emphasis on his/her instructions to the jury, in which the evidence in the case was regularly reviewed. The question now is whether the other professional judges in a High Court that is convened with a jury are to be regarded as disqualified under section 108 of the Administration of Courts Act due to the fact that they have previously been involved in applying Article 172 of the Code of Criminal Procedure as a basis for imprisoning one or more of the accused in the same criminal case.

(19) I find that there are insufficient grounds for regarding the other professional judges as being disqualified in such a situation, and refer to what I have already stated about the distribution of functions in criminal cases that are heard by a jury. It is for the presiding judge to give instructions to the jury, see Article 368 (2) of the Code of Criminal Procedure, and this is his responsibility alone. It is true that all the professional judges take part in the subsequent assessment of whether the jury's decision is to form the basis of the judgment, or in exceptional cases be set aside, see Articles 376A, 376B and 376C of the Code of Criminal Procedure. However, such a setting aside of decisions does not determine the question of guilt and is also so exceptional that, in my opinion, it cannot be given any significance worth mentioning in this context.

(20) ...

(21) My conclusion is thus that Judge G. of the High Court was not disqualified.

(22) I will now deal with the allegation that the jury members were disqualified. The factual basis for this allegation is as follows:

(23) W. went to the police at an early stage of the investigations, due to a newspaper article on 9 July 1997 which described, *inter alia*, the car that was used in the explosion. She believed she had seen such a car on two occasions at the Statoil petrol station on the E-18 near Lier toll station, on Saturday 30 May and on Wednesday 4 June 1997, when the explosion took place. She gave a statement regarding this to one of the detectives on Thursday 10 July 1997. When questioned by the police, she described three people she had seen both near the car and inside the shop, and stated she believed she had seen that one of them was carrying a black petrol can. She also stated what she believed she remembered of the car's licence number.

(24) When the High Court's presiding judge discussed the impartiality rules with the jury members on the first day in court, on 24 February 2003, W. did not give any account of her previous statement to the police. She had not heard any more from the police and was not on the list of witnesses. The jury was constituted with 11 members, according to Article 355 (2) of the Code of Criminal Procedure.

(25) After the hearing had been adjourned on 27 February 2003, juror W. contacted a policeman she knew and asked if she could sit on the jury even though she had been questioned by the police on one occasion. This question was then put to the public prosecutor, and the matter was made known to the High Court when it convened on 28 February 2003. Her statement to the police, which was given on 10 July 1997, was read out and the parties were given the opportunity to make a statement. The High Court thereafter ordered that W. was to withdraw from the jury, and stated:

'It has become known that jury member W. gave a statement to the police on 10 June [presumably July] 1997. She has not been called as a witness in the case, and her impartiality must be assessed under section 108 of the Courts Act. According to this provision, no one can be a jury member if there are special circumstances that may weaken confidence in the impartiality of the person concerned. All the defence counsel have petitioned for her to withdraw and have also stated that the entire jury is disqualified.

The High Court finds that such special circumstances exist in this case. It bases its decision on the fact that the jury member reported to the police as a witness and told

the police about her observations in close connection to the day of the explosion. Her observations are of such a nature that it can be questioned whether she is impartial in this case.

However, the High Court does not find that the jury member may, by having possibly stated her observations to the other members of the jury, have influenced the other jury members so that they are disqualified. It must be assumed that the jury members will be able to disregard any information she may have told the jury, as they are assumed to be able to disregard other information on the case that has arisen outside the court room, for example in the media.'

(26) After this, W. withdrew from the jury and the hearing continued with the remaining 10 jury members.

(27) I agree with the High Court that W. was prejudiced. The question is then whether the other 10 members of the jury became prejudiced as a result of W. serving on the jury for the four first days of the hearing.

(28) ...

(29) ...

(30) ...

(31) ...

(32) What is decisive for our case is therefore whether the aforementioned matter can be regarded as a procedural error that may be considered pursuant to the provision stated in Article 343 (1) of the Code of Criminal Procedure. The question here is whether W.'s presence as a member of the jury during the first four days of the hearing may have influenced the jury's verdict.

(33) The defence counsel have alleged to the Supreme Court that the High Court has, in its reasons for regarding the other jury members as being impartial, incorrectly treated any information from W. on the same footing as information on the case that arose outside the court room, for example in the media. I agree that, when considering the impartiality issue, one cannot always treat these matters as being equal. The jury members will regularly be told by the presiding judge that, when deciding on the question of guilt, they must only place emphasis on what is stated as evidence in court, and that they must not discuss the case with third parties. There is no corresponding barrier to the jury members discussing the case among themselves – even continuously during the court hearing – and it is realistic to expect that this actually happens to a certain extent.

(34) ...

(35) When I nonetheless have decided that the jury members cannot be regarded as having been disqualified to serve as a result of jury member W.'s disqualification, I have placed decisive emphasis on the following: the statements that the foreperson of the jury and W. have given to the police for use in the Supreme Court do not provide any basis for assuming that she had given the other members of the jury factual information regarding her private knowledge of the case or in any other way

influenced the others before she withdrew on 28 February 2003. I refer to the fact that W. was at no time called as a witness in the case, by either the prosecuting authority or the defendants. The prosecutor has stated to the Supreme Court that the observations she had told to the police on 10 July 1997 – including about parts of the vehicle in question's licence number – were clarified early on as being of no importance to the further investigation.

(36) The jury foreperson has explained that the situation that arose after W. had withdrawn was discussed by the jury members and that they agreed that her participation during the first few days had not had any effect on the jury's verdict.

(37) Accordingly, I cannot see that W.'s presence as a member of the jury during the introductory presentation of evidence in the first days of the hearing can be regarded as a procedural error to which Article 343 (1) of the Code of Criminal Procedure applies."

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. Rules on the impartiality of judges and jurors are set out in sections 106 to 108 of the Administration of Courts Act (*domstolloven* - Law of 13 August 1915 no. 5). In the present case, the national courts relied in particular on section 108, which reads:

Section 108

"Nor may a person sit as a judge or juror if there are other particular circumstances which are liable to weaken the confidence in his impartiality. This applies in particular if a party requests that he withdraws on this ground."

20. The conditions for provisional detention were set out in Articles 171 and 172 of the Code of Criminal Procedure, the relevant parts of which provided:

Article 171

"Any person who on reasonable ground is suspected of one or more acts which according to statute is or are punishable with more than 6 months' imprisonment, may be arrested if:

1) there is reason to fear that he will evade prosecution or the execution of a sentence or other precautionary measures,

2) there is an immediate risk that he will spoil the evidence in the case, e.g. by removing clues or influencing witnesses or accomplices,

3) it is deemed to be necessary in order to prevent him from re-committing a criminal act punishable by ore than 6 months' imprisonment,

4) he himself has requested it for reasons that are found to be satisfactory.

..."

Article 172

“When a person is suspected of

(a) a crime punishable by imprisonment for 10 years or more, or of an attempt to commit such a crime, or

(b) a criminal offence under Articles 228 (2), second alternative, see Article 232, Article 229 second alternative, see Article 232, or Article 229 third alternative, s/he may be arrested even if the conditions in Article 171 are not fulfilled, provided that s/he has made a confession or there are other circumstances which to a particularly high degree strengthen the suspicion. In the assessment emphasis shall be placed particularly on whether it would provoke the public's perceptions of justice or create insecurity if the suspect is at large. Any increase of the maximum penalty because of any repetition or concurrence of offences shall not be taken into account.”

21. The relationship between Article 172 of the Code of Criminal Procedure and section 108 of the Administration of Court Act was dealt with by the Norwegian Supreme Court in a landmark judgment reported in *Rt* 1996-261, several passages of which were quoted in the Supreme Court's judgment in the present case (see paragraph 18 above, paragraph (15) of the Supreme Court's judgment). In another part of the 1996 judgment, the Supreme Court took note of a Circular (G-140/89) issued by the Ministry of Justice informing the national courts about the *Haushcildt* judgment. It quoted *inter alia* the following statement, with respect to the High Court proceedings conducted without a jury:

“A decision on detention on remand is normally taken by the district-or city court ... However, if the High Court has examined the question of detention on remand under Article 172, the same judge may not take part in the decision on the question of guilt under the main hearing.”

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

Article 355

“... Before the hearing begins, the president of the court shall ascertain whether any of the jurors or their deputies are disqualified, cf. section 115 of the Courts of Justice Act.”

Article 359

“The President of the court shall inform the members of the jury of the course of the court proceedings and of the jury's tasks and responsibility. He shall especially impress on the members of the jury that until the verdict of the jury has finally been pronounced, they must not have any discussion or contact with any person other than the court as regards the case, and that they must not without the permission of the President of the court leave the conference room after they have retired to answer the questions put to them.”

Article 360

“The President of the court shall then ask the members of the jury: 'Do you affirm that you will pay close attention to the whole proceedings in the court and answer the questions that will be submitted to you as truthfully and justly as you can according to the law and the evidence in the case?' The members of the jury standing and each in turn shall answer: 'I do so affirm.' ...”

Article 363

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

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

Article 368

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

The President of the court shall sum up the evidence in the case and explain the questions and the legal principles applicable.

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

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

Article 369

“The jury shall then retire to a secluded room to consider its verdict. The jury shall take with it the written list of questions signed by the President of the court.

When retiring to consider its verdict the jury may take with it pictures, drawings, maps, and other objects that have been produced during the main hearing. The jury may also take with it written exhibits and other written evidence that has been produced when the court finds this appropriate. As a general rule, the jury should not be permitted to take with it statements previously made by the person indicted, witnesses or experts.”

Article 370

"The foreperson of the jury shall be in charge of the jury's consideration of its verdict.

If the jury finds that it needs further clarification of the questions, of the legal principles applicable, or of the procedure to be followed, or if it finds that the questions should be amended or that new questions be put, it shall return to the courtroom so that the President of the court may do what is required. The jury may summon the President of the court in order to receive guidance concerning the questions referred to in the first sentence.

If it is to be decided whether the questions are to be amended or new questions put, the parties shall be given the opportunity to express their views."

Article 371

"When it has finished considering its verdict, the jury shall under the leadership of its foreperson vote on the individual questions in the order in which they are put. ..."

Article 373

"After the voting the members of the jury shall return to their places in the courtroom. The foreperson shall rise and say: 'The jury has on its honour and in good conscience given the following answers to the questions that have been put.' He shall then read aloud the answers that have been given to each of the questions.

The foreperson shall deliver the written list of questions and the signed answers to the court."

23. Under Articles 376, 376A, 376B and 376C of the Code of Criminal Procedure, the professional judges shall pronounce judgment in accordance with the jury's verdict, unless they decide differently on the conditions set out in these provisions. The professional judges may set aside a jury verdict concluding with the indicted person being found not guilty, if they find that he is undoubtedly guilty (Article 376A) and may also set aside a "guilty" verdict, if they find that insufficient evidence has been produced (Article 376C). In both situations the case is tried anew by other judges in a composite court. Article 376C reads:

Article 376C

"If the jury's verdict is that the person indicted is guilty, but the court finds that insufficient evidence of his guilt has been produced, the court may decide that the case shall be retried before other judges. The provisions of Article 376A, first paragraph, final sentence, and second and third paragraphs, shall apply correspondingly."

THE LAW

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

24. The applicants complained under Article 6 § 1 of the Convention that they did not have an impartial hearing before the High Court, whose judgment of 24 March 2003 was upheld by the Supreme Court on 25 September 2003. In so far as is relevant, this provision reads:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal..."

A. Submissions of the parties

1. The applicants

25. The applicants complained that Judge G. had lacked the requisite impartiality on account of her participation as a judge in the trial after having taken part in the decision of 1 July 2002 to prolong the fourth applicant's detention under Article 172 of the Code of the Criminal Procedure. The first, second, third and fifth applicants argued that, even though it only concerned the fourth applicant directly, the decision of 1 July 2002 contained some general statements about the motor cyclist milieu to which all the defendants belonged and that it had been implicit that the High Court judge considered the conditions for applying Article 172 were fulfilled in respect of these applicants too.

The applicants stressed that Judge G. had been part of the collegium of professional judges right from the opening of the trial until judgment. It could be assumed that throughout the trial she was able to confer with the other judges and to influence the presiding judge's directions to the jury.

26. Moreover, the shortcoming pertaining to Judge G.'s participation had been compounded by the fact that, after the first four days of the High Court hearing, one of the 11 member jury, juror W., was disqualified from taking part in the further consideration of the case as she had given a witness statement to the police in relation to the case. This was after the defendants had given oral evidence. After she had been discharged, the High Court proceeded with the case nonetheless, contrary to the defence's request to postpone the hearing and to have the case heard by a differently composed court. At the opening of the trial the jurors had been informed by the presiding judge of the importance of conferring among themselves during the trial without making this known to others. It was therefore impossible to ascertain what influence juror W. might have had on the other jurors. In this

connection, emphasis should be placed on the applicants' own perception that the proceedings had been unfair.

27. In any event, the applicants argued that the above shortcomings considered together gave rise to legitimate doubts about the impartiality of the High Court.

2. The Government

28. The Government disputed the applicants' submission that they were not afforded a fair hearing by an impartial tribunal in the appeal proceedings before the High Court. They submitted that it was beyond doubt that no element of subjective bias had existed on the part of Judge G. or juror W. or any other members of the High Court. Nor had the applicants any objective reason for fearing lack of impartiality**.**

29. In so far as the role of Judge G. was concerned, the Government stressed that an issue of objective impartiality arose only in relation to the fourth applicant on account of her previous involvement in the decision of 1 July 2002 regarding his provisional detention. In that respect the Government argued that the general remarks about the motor cyclist milieu, to which all the applicants belonged at the time, were not set out in connection with the suspicion of guilt, but in the assessment of whether it would be provocative to public opinion to release the fourth applicant and whether prolonged detention was disproportionate.

However, in applying Article 172 the High Court, sitting with Judge G., had not performed any independent assessment of the evidence pertaining to the existence of a qualified suspicion but had solely based itself on the conviction by the City Court. Therefore Judge G.'s involvement in the said decision could not disqualify her from later taking part as a judge in the trial. In any event, the decision of 1 July 2002 had only concerned the fourth applicant, not the remaining applicants and could not have had any bearing on her impartiality vis-à-vis them.

At the High Court trial, Judge G. had not presided and had had no opportunity to exert any influence either on the President's directions to the jury, made under a requirement of objectivity and neutrality, or on the jury itself. Judge G. had not taken part in the determination of guilt, a matter left to the jury. Additional safeguards were afforded by the parties' presence during the President's summing up to the jury and their possibilities to make objections should they find the summing up misleading.

Furthermore, the fourth applicant or his counsel had at no time objected to Judge G.'s participation in the High Court trial, even though the parties were asked by the presiding judge if there was any objection to the composition of the Court. This was all the more important since the fourth applicant was represented by the same counsel as in the case concerning prolonged provisional detention.

30. As to juror W., the Government argued that there was no reason to believe that she indeed did give the jury any information concerning her witness-observations nor that, should she had done so (contrary to what was established as a fact) this would have made any influence on the jury's decision. Moreover, before the professional judges decided to dismiss juror W., all the applicants, the juror in question and the chairperson of the jury were heard. The High Court had therefore dealt with the situation of dismissal of the juror in an immediate, proper and thorough manner.

B. Assessment by the Court

31. The Court considers that it is essentially the requirement of "impartiality" that is in issue in the present case (see *Langborger v. Sweden*, judgment of 22 June 1989, Series A no. 155, p. 16, § 32). The existence of impartiality for the purposes of Article 6 § 1 of the Convention must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is by ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII). It should be reiterated that the principles established in the Court's case-law apply to jurors as they do to professional judges and lay judges (see *Holm v. Sweden*, judgment of 25 November 1993, Series A no. 279-A, p. 14, § 30; and *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 792, § 29).

32. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary. The applicants have adduced no evidence to suggest that either Judge G. or juror W. was personally biased (see *Pullar*, cited above, § 43).

33. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the party concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (ibid., § 44).

(i) Judge G.'s participation

34. A first issue is whether the High Court's impartiality was open to doubt on account of Judge G.'s participation, as one of the three professional

judges sitting in the proceedings, due to her prior involvement in a decision of 1 July 2002 to reject an appeal by the fourth applicant against a decision of 10 June 2002 by the City Court to prolong his detention. In this connection it should be reiterated that, according to the Court's case-law, the mere fact that a judge has also made pre-trial decisions in the case cannot be taken as in itself justifying fears as to his or her impartiality (see the *Hauschildt v. Denmark* judgment of 24 May 1989, Series A no. 154, p. 22, § 50). Only special circumstances may warrant a different conclusion (ibid.). In this regard, the extent and nature of the pre-trial measures taken by the judge are of importance (see *Fey v. Austria*, judgment of 24 February 1993, Series A no. 255-A, p. 12, § 30). In this case, which was heard by an appellate court sitting with a jury, also the judge's role in the disputed proceedings must be taken into account.

35. By way of preliminary observation, the Court notes that the Norwegian Supreme Court's assessment of whether Judge G. ought to have been disqualified from taking part in the trial in the High Court had particular regard to the above cited *Hauschildt* judgment where the Court found a violation of the requirement of impartiality under Article 6 of the Convention (see also *Castillo Algar v. Spain*, ECHR 1998-VIII, §§ 46-51; *Perote Pellon c. Espagne* no. 45238/99, 25.07.02) on the following reasoning:

> "51. ... In the instant case, the Court cannot but attach particular importance to the fact that in nine of the decisions continuing Mr Hauschildt's detention on remand, Judge Larsen relied specifically on section 762(2) of the Act (see paragraph 20 above). Similarly, when deciding, before the opening of the trial on appeal, to prolong the applicant's detention on remand, the judges who eventually took part in deciding the case on appeal relied specifically on the same provision on a number of occasions (see paragraphs 26-27 above).
>
> 52. The application of section 762(2) of the Act requires, *inter alia*, that the judge be satisfied that there is a "particularly confirmed suspicion" that the accused has committed the crime(s) with which he is charged. This wording has been officially explained as meaning that the judge has to be convinced that there is 'a very high degree of clarity' as to the question of guilt (see paragraphs 34-35 above). Thus the difference between the issue the judge has to settle when applying this section and the issue he will have to settle when giving judgment at the trial becomes tenuous.
>
> The Court is therefore of the view that in the circumstances of the case the impartiality of the said tribunals was capable of appearing to be open to doubt and that the applicant's fears in this respect can be considered objectively justified.
>
> 53. The Court thus concludes that there has been a violation of Article 6 § 1 of the Convention."

36. The case now under consideration concerns the application in a decision of 1 July 2002 of a provision in Article 172 of the Norwegian Code of Criminal Procedure which is comparable to the Danish section 767(2). Judge G. was one of the three judges of the High Court who had taken part

in that decision and who later sat as a professional judge in the trial before the High Court.

37. The Court finds that the specific circumstances of the present case in several important respects were similar to those that led it to find a violation in the above-mentioned *Hauschildt* case.

38. This is the case with regard to the fourth applicant, whose appeal against the City Court's decision to prolong his detention on remand after convicting him (cf. *Hauschildt*, cited above, §§ 25 and 51), had been rejected on 1 July 2002 by the High Court, sitting with judge G., on the basis of Article 172 of the Code of Criminal procedure, requiring that there was a particularly confirmed suspicion that he had committed the offence of which he was charged. According to relevant national case-law, a conviction at first instance was normally a sufficient reason for considering that this condition had been fulfilled, but the issue was nevertheless one that the High Court had to assess for itself. Thus, it must be assumed that the High Court carried out an assessment of its own as to whether there was a qualified suspicion with respect to the fourth applicant.

39. On the other hand, in its decision of 1 July 2002, the High Court did not make any assessment regarding the condition of qualified suspicion with respect to the remaining applicants. The latter referred to certain statements in the decision about the motor cyclist milieus to which they belonged but these statements related to a different issue, namely whether the fourth applicant's release would cause public outcry, another condition in Article 172.

40. In the light of the above, the Court finds that the fourth applicant had a legitimate reason to suspect that Judge G. might have had preconceived ideas as to his innocence or guilt before the opening of the High Court trial. The remaining applicants, for their part, had no reasons to entertain any such beliefs.

41. As to Judge' G.'s subsequent participation in the trial, the Court notes that, unlike in the *Hauschildt* case, the present case was heard by a High Court sitting with a jury. It was not Judge G., but the presiding judge of the High Court, who at the close of the oral hearing instructed the jury before it held its deliberations and gave its verdict on the questions of guilt. The professional judges did not deliberate until after the verdict. There is nothing to indicate that Judge G. had any influence on the jury's votes on the questions put to it regarding the fourth applicant's guilt.

42. However, if, as here, the jury's verdict is that the indicted person is guilty, but the professional judges find that there is insufficient evidence for finding the person guilty, the latter may decide that the case shall be tried anew by other judges (Article 376C). In this respect the professional judges, including Judge G., had a role to play in the fourth applicant's conviction. Without their endorsement of the jury's verdict, he could not have been convicted by the High Court in the proceedings concerned. Even though, in

practice, the professional judges would only exceptionally use their powers to set the jury's verdict aside, their role in the decision on conviction cannot be ignored. The Court finds that the difference between the issue that Judge G. had to settle when applying Article 172 of the Code of Criminal Procedure and the one she had to assess when endorsing the jury's verdict became tenuous.

43. In addition, along with the other two professional judges and four of the jurors, Judge G. took part in sentencing.

44. Against this background, the Court finds that the fourth applicant had legitimate grounds for fearing that, by virtue of Judge G.'s participation in the trial against him, the High Court lacked the requisite impartiality vis-à-vis him. The fact that neither the fourth applicant nor his counsel at any time objected to Judge G.'s participation in the High Court trial should not, in the circumstances of the case, reduce the protection that follows from the requirement of objective impartiality of judges. On the other hand, any fears that the remaining applicants had in this respect cannot be considered objectively justified.

(ii) Juror W.'s participation

45. As to the second issue, relating to W.'s participation as a juror in the appeal trial, the Court notes that the trial was opened on 24 February 2003 and that on 21 March 2003 the jury deliberated and gave its verdict. After the first four days of the trial, on 28 February 2003, the High Court was informed of her witness statement to the police of 10 July 1997. After this was read out in court and counsel for the defence made their comments, the High Court's President ordered her to withdraw from further participation in the case. Thus, her presence on the jury bench was limited to, and terminated after, a relatively early phase of the trial.

46. Moreover, the prosecution had not deemed her statement of 10 July 1997 to be of any importance to the case and neither side had called her as a witness in the case (see, *mutatis mutandis*, *Pullar*, cited above, § 39). The Supreme Court considered that the explanations given by the High Court President and W. to the police for the purposes of its own review of the impartiality issue did not give any reason to assume that she had imparted information to other jurors about her prior knowledge of the case or had in any way influenced the jury before she was discharged on 28 February 2003. According to the jury foreperson, the situation that had arisen after W. had withdrawn had been discussed by the jury members internally who had agreed that her participation during the first few days had not had any effect on the jury's verdict.

47. Thus it cannot be said that juror W. was involved either directly or indirectly in determining the criminal charges against the applicants when three weeks later the jury deliberated and gave its verdict (cf. *Pullar*, cited above, § 36). In this regard the applicants' complaint seems markedly

weaker than those made by applicants in several previous cases where the disputed jury member, unlike here, had taken part in the determination of the merits of the national case (see *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 794, § 37; *Gregory v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 309, § 46; and *Sander v. the United Kingdom*, no. 34129/96, § 26, ECHR 2000-V), in some of which the Court had found no violation of the requirement of objective impartiality under Article 6 § 1 of the Convention (see *Pullar*, cited above, pp. 794-795, §§ 36-41; and *Gregory*, cited above, pp. 309-310, §§ 46-50).

48. It should further be noted that the jury's impartiality was ensured by a number of safeguards (see *Pullar*, cited above, § 40). The rules in the Administration of Court Act governing the impartiality of judges also applied to jurors (see *Holm v. Sweden*, judgment of 25 November 1993, Series A no. 279-A, p. 15, § 31). Not only had the presiding judge at the opening of the trial discussed with the jury the impartiality requirement applicable to jurors. Also, the jury had been reminded of the importance of this requirement when the High Court promptly ordered juror W. to withdraw from the case on the ground of disqualification (see *Gregory*, cited above, § 49; cf. *Remli v. France*, judgment of 23 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 574, § 47). While neither side in the trial had relied on W.'s statement to the police of 10 July 1997, the presiding judge would regularly remind the jury to rely only on statements presented in court and not to discuss the case with third parties (see paragraph 33 of the Supreme Court's judgment quoted at paragraph 18 above). In these circumstances, it would appear to have been superfluous for the presiding judge to point out in his directions to the jury that it should not be influenced by any affirmations that juror W. might have made to other members of the jury regarding her statement to the police before being discharged three weeks earlier (cf. *Gregory*, cited above, §§ 47-48).

49. In light of the above, the Court finds that the nature, timing and short duration of juror W.'s involvement in the proceedings concerned were not capable of causing the applicants to have legitimate doubts as to the impartiality of the jury. The High Court was therefore not obliged to discharge the jury and order a rehearing before a differently composed jury for the purposes of the requirement of impartial tribunal in Article 6 § 1 of the Convention (cf. *Sander v. the United Kingdom*, no. 34129/96, § 34, ECHR 2000-V).

(iii) General conclusion

50. Accordingly, the Court finds that there has been a violation of Article 6 § 1 of the Convention with respect to the fourth applicant but not to the remaining applicants, on account of Judge G.'s participation in the High Court trial.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. 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."

52. The fourth applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention on account of Judge G.'s participation in respect of the fourth applicant but not in respect of the remaining applicants;

2. *Holds* by four votes to three that there has been no violation of Article 6 § 1 of the Convention on account juror W's participation.

3. *Holds* unanimously that there is no call to award the fourth applicant any sum for just satisfaction.

Done in English, and notified in writing on 31 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Christos ROZAKIS
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Spielmann joined by Mr Loucaides and Mr Kovler is annexed to this judgment.

PARTLY DISSENTING OPINION OF JUDGE SPIELMANN JOINED BY JUDGES LOUCAIDES AND KOVLER

1. I cannot agree with the finding of the majority that there has been no violation of Article 6 § 1 of the Convention on account of juror W's participation (point 2 of the operative part).

2. The trial opened on 24 February 2003 and on 21 March 2003 the jury deliberated and returned its verdict. After the first four days of the trial, on 28 February 2003, the High Court was informed of the juror's witness statement to the police of 10 July 1997. After this had been read out in court and counsel for the defence had made their comments, the High Court's President ordered her to withdraw from further participation in the case.

3. I strongly believe that the applicants, from their perspective, had legitimate reasons to suspect that it could not be ruled out that, before the High Court's President discharged her from the jury, W. had communicated with the other members of the jury on the subject of her statement to the police of 10 July 1997. May I add that it transpires from the reasons given by the first voting judge of the Supreme Court (Judgment of 25 September 2003, §§ 23 et seq., reproduced in paragraph 18 of the judgment) that the witness statement of W. to the police was not a neutral witness statement but related to precise factual circumstances.

4. While the jurors were reminded of their duty not to discuss or have contact with outsiders about the case, no such safeguards applied to discussions amongst jurors. In fact, quite the contrary, it is undisputed that at the beginning of the trial the presiding judge informed the jury about the importance of conferring among themselves during the trial without making this known to others.

5. Certainly, I am mindful of the fact that the jury's impartiality was ensured by a number of safeguards (see *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 795, § 40). The rules in the Administration of Court Act governing the impartiality of judges also applied to jurors. Not only had the presiding judge at the opening of the trial discussed with the jury the impartiality requirement applicable to jurors, but the jury had also been reminded of the importance of this requirement when the High Court ordered juror W. to withdraw from the case on the ground of disqualification. While neither side in the trial had relied on W.'s statement to the police of 10 July 1997, the presiding judge would regularly remind the jury to rely only on statements presented in court and not to discuss the case with third parties (see

paragraph 33 of the Supreme Court's judgment quoted at paragraph 18 of the judgment). However, these safeguards did not in my view remove the risk that juror W. might have influenced the other members of the jury. Indeed, I am not convinced that it sufficed for the jury to have been lawfully constituted when it decided on the question of guilt, since the proceedings leading to that decision had been contaminated owing to the presence of juror W. during the initial phase of the criminal trial.

6. In the circumstances, the risk appeared to be a real one and I am satisfied that it was legitimate for the applicants to entertain fears that the jury lacked the requisite impartiality for the purposes of Article 6 § 1 of the Convention. Accordingly, I find that the High Court's refusal to accede to the applicants' request, on account of juror W's participation, to discharge the jury and to order a rehearing before a differently composed jury, also gave rise to a violation of Article 6 of the Convention in respect of all the applicants.