CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 45837/99
by Helen and Wilfred-Marvin KLEUVER
against Norway

The European Court of Human Rights (Third Section), sitting on 30 April 2002 as a Chamber composed of

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mr K. TRAJA, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application introduced on 9 December 1998 and registered on 2 February 1999,

Having deliberated, decides as follows:

THE FACTS

The first applicant is a Dutch national, born in 1964 and living in The Hague, the Netherlands. The second applicant is her son born on 11 November 1990. The applicants are represented before the Court by Mr Knut Rognlien, a lawyer practising in Oslo.

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

The first applicant's father died when she was at the age of 11. Thereafter her mother remarried. According to her doctor the first applicant was treated several times by a psychiatrist as she was very depressive, especially in the years 1987, 1988 and 1989. As part of the treatment she was from time to time provided with medication. The first applicant had a sister and a stepbrother. The latter, who died in 1989, was according to the first applicant shot dead by the police while in police custody in Belgium. Following her brother's death the first applicant became further psychologically imbalanced and went on sick leave for two weeks. Her mother attempted suicide (by taking pills) and had alcohol problems.

At the time of the events described below the first applicant had no previous criminal record and had been in gainful employment as a secretary since the age of 18. She had a partner with whom she did not cohabit.

On 27 February 1990, the first applicant explains that she bought on a street in The Hague a Citroen 2CV from a person who she knew just as "John". She had the car registered and drove towards Scandinavia in the evening of the same day. The week beforehand, she had deliberately tried to become pregnant and when she left she was aware that she had succeeded in this. She was pregnant with the second applicant.

On 1 March 1990, the Norwegian Police stopped her having been notified by the Danish customs authorities that she had given them peculiar information concerning her travel destination, etc. The first applicant was arrested after the police had found 4.951 Kg of amphetamine in the Citroen 2CV that she had driven from the Netherlands to Norway. The drug had a particularly high degree of purity; some 63-71 weight per cent, with a street value assessed at NOK 5,000,000. The first applicant stated to the police that she had neither knowledge of Norway nor any acquaintances in the country, she was in possession of a limited amount of money upon arrest and had no credit card, to her employer in the Netherlands she had said that she had to go on a holiday with her mother who had been to hospital after taking an overdose.

On 3 March 1990 she was remanded in custody at Bredtvedt National Prison. On 31 May 1990 she was transferred to Drammen District Prison, as

she had made an attempt to flee, assisted by two persons visiting her from the Netherlands who had left a filing tool under the prison fence. On 4 July 1990 she was transferred back to Bredtvedt Prison.

After a hearing on 10 and 11 September 1990, the Eidsivating High Court *(lagmannsrett*) jury answered the charges in the negative, whereupon the judges sitting in the case unanimously set aside the first applicant's acquittal by the jury as obviously erroneous and ordered a retrial.

In order to facilitate the applicant's particular situation and to co-ordinate future measures vis-à-vis the mother and child, several discussions were held between representatives from the child care authorities, the relevant hospital, the prosecution, the police and her lawyer, who throughout the first applicant's stay in Norway, until she unilaterally decided to send the second applicant to his grandmother in the Netherlands, were in close co-operation with one another. To this end also a meeting was held at Bredtvedt Prison between all the persons concerned, including the first applicant and her lawyer. She was able to communicate fluently in English. After the first applicant's attempted flight, security became an issue and different options were considered.

Between 14 August and 8 November 1990, the first applicant went eight times to Aker Hospital in Oslo for prenatal checks, including ultra sound examinations. Most times she was accompanied by uniformed police officers and was obliged to wear handcuffs during her transportation and while in the waiting room with other patients. She felt humiliated vis-à-vis other patients because of the presence of uniformed police and the use of handcuffs. The handcuffs were removed before the actual medical examinations and, with one exception, before she entered the examination room. Some times the first applicant was accompanied by plain-clothed police officers from the anti-drugs squad who did not apply handcuffs, as they felt they had sufficient knowledge of her and her case to keep her under constant surveillance without applying handcuffs. The first applicant found it unacceptable that she could not always be accompanied by the latter police officers. On one occasion, when the applicant had an ultra sound examination, two male police officers followed her into the examination room, as it was on the ground floor with windows whereby one could leave the building. One of the officers then assisted as an interpreter at the request of the midwife who did not master English. He *inter alia* explained to the first applicant what could be seen on the screen during the examination. The examination was limited to a plain ultra sound examination. Only at a later time did the first applicant complain about the police officers' presence in the room during the ultra sound examination.

On 11 November 1990 the first applicant gave birth to the second applicant at Ullevål Hospital in Oslo, one of the best-equipped hospitals in the country. During her hospitalisation, which lasted some nine days, she was guarded by two police officers. At that time there had already been one

incident in Norway where a female detainee had fled in connection with giving birth at a hospital. There were other incidents were a detainee had fled when taken to hospital for medical reasons. On one such occasion, at the least, the detainee had been armed.

Shortly before the first applicant gave birth, the two uniformed police officers followed her at a close distance as she and the female deputy director of the prison, serving as her support person, walked up and down the corridor. While the first applicant gave birth, the two officers sat outside the delivery room. The door to the room was closed and a folding screen was positioned between the first applicant's bed and the door. At the first applicant's request, the deputy director attended the birth as her support person. The latter was a psychologist specialised in social psychology who had spent much time talking to and assisting the first applicant during her detention. In retrospect it had been observed that, on the whole, the efforts made by the prison staff in order to accommodate the first applicant's wishes and needs had almost been at the expense of those made vis-à-vis other prisoners. The first applicant's mother came to visit and assist her daughter the day after the second applicant was born.

On 19 November 1990 the first applicant was released from the hospital and transferred back to the prison. It was not deemed suitable that the son stay with his mother in Bredtvedt prison, which did not have the necessary facilities. This institution was considered unsuitable for keeping small children, in view of *inter alia* its architectural disposition, the outdoor areas, the sanitary conditions and the composition of the prison population. The latter comprised all categories of detainees, including mentally unstable persons held in security detention. A number of detainees were struggling with poor mental health, infectious diseases, consumption of intoxicating substances as well as deviant behaviour.

The second applicant was instead placed in the Aline Child Care Centre offering high quality services for the mother and the newborn. The Centre was situated in Oslo at a relatively close distance to the Bredtvedt prison. Arrangements were put in place to enable the baby to be fed with his mother's milk. Until 17 December 1990 the first applicant was transported 5 times a week to visit the boy at the Centre for 1 1/2 hour each time. On a few occasions, she was accompanied by police officers. Some times, as was the case during the prenatal checks, the officers wore uniform and applied handcuffs on the first applicant until she received her son. On other occasions her guardians were plain cloth police officers from the anti-drug squad who did not apply handcuffs on her. Thereafter, for a month, the boy was brought to the prison for 2 ½ hours a day on weekdays and 4 ½ hours a day on weekends.

From 22 to 25 January 1991, the second applicant was hospitalised at Ullevål Hospital because of a lung virus. Its paediatric ward was located on the ground floor. The first applicant was able to visit him once for a

duration of 20 minutes, on which occasion she was wearing so-called transport cuffs – that was a chain attached to a foot and the opposite arm. Under these conditions she was permitted to be alone with the baby in a separate room while being observed by the police only through a screen. However, she could hold her baby, but was allegedly unable to nurse him and put him back in bed. Afterwards the mother received her son in the prison every day.

On her return to the prison after the above-mentioned visits, the applicant was regularly body searched, although some prison guards omitted to do this. The searches were carried out in accordance with standard practice. In a separate room she had to undress completely before a female prison officer, who, without any physical contact with her, inspected her hair, ears, mouth, arm pits and the crotch and made her squat and swing to and fro to ensure that she would not bring any unauthorised items into the prison.

After 17 December 1990, such searches were occasionally also carried out after the boy had visited his mother in prison. The Aline Child Care Centre had on 28 December 1990 received information suggesting that the son showed signs of nervousness, and it was thought that it might be due to drug abuse by his mother

Because she had refused 3 times to allow a body search, the first applicant was placed in an isolation cell only equipped with a mattress, for a duration of a couple of hours and once for some 24 hours. She made a complaint in writing. As of 3 January 1991 she was no longer searched after her son's visits as she accepted to give urine samples enabling the prison administration to verify possible drug abuse. The tests proved negative.

On 5 February 1991, after a retrial, the High Court convicted the applicant and sentenced her to 6 years' imprisonment, from which the 342 days already spent in custody were to be deducted. This was deemed to be a relatively lenient sentence for such a serious drug offence, the reasons being her pregnancy, the birth in detention on remand and the fact that it would be an extra burden for her to serve a long prison sentence in a foreign country, with language difficulties and the absence of close relatives.

On 10 February 1991, at the initiative of the first applicant, the second applicant left Norway with his maternal grandmother, who then assumed the care for the second applicant in the Netherlands. This was before her conviction and sentence had gained legal force and before the Norwegian authorities had taken a stance on where the first applicant should serve her sentence. The prosecution, for its part, had in a letter of 7 February 1991 to the prison authorities expressed the view that, since she was a Dutch national without any links to Norway, the service of the sentence should not be postponed; otherwise she would have to remain in detention on remand. Although there was no general agreement about the serving of sentences between the Netherlands and Norway, the prosecution was not opposed to the first applicant serving the sentence in her home country.

The first applicant was allowed to call (free of charge) her mother and son for 20 minutes a week, in accordance with the applicable rules. On 25 May 1991 she sought to have the time extended. Her request was rejected by the Prison Director on 4 June 1991, which decision was upheld by the Prison Board on 14 October 1991, as there were no extraordinary circumstances to warrant an extension of the time offered. As of 30 October 1991, she was granted an extra call per week at her own expense.

As of 21 February 1992, the first applicant was transferred to a wing with a more lenient regime, on a contractual basis of good behaviour. Thereafter, there was no time restriction on her use of the telephone.

On 5 June 1992 the first applicant requested a pardon from the Ministry of Justice, which request was rejected. It was observed that the condition of her health and the interests of the mother and child in being reunited could not outweigh the interest of avoiding giving an undesirable signal with respect to the use of pregnant women as drug couriers. Her subsequent appeal against this refusal was successful, having regard to her depressive and psychotic mental state and concerns about the child's future care and development. The first applicant was released on 17 July 1992 and returned to the Netherlands where she reunited with her son. In the meantime, she had several times been visited in the prison by her son and mother who had come from the Netherlands.

Prior to being pardoned, the first applicant had already brought proceedings against the State seeking a declaration (*fastsettelsessøksmål*) of a violation of Articles 3 and 8 of the Convention, as well as compensation. Her claim was rejected by the Oslo City Court (*byrett*) in February 1993 and dismissed by the Eidsivating High Court in September 1993, which decision was upheld by the Appeals Selection Committee of the Supreme Court in October 1994. She then sought compensation under a different procedure, requesting an executory judgment (*fullbyrdelsessøksmål*). By judgment of 17 January 1997, the High Court upheld the City Court's above-mentioned judgment, as did the Supreme Court in a judgment on 2 July 1998.

Before the Supreme Court, the first applicant unsuccessfully challenged the participation of one of its judges, Mr Justice Pedersen. The judge in question, who normally served as President of Eidsivating High Court, had as a temporary (*konstituert*) judge occupied a seat in the Supreme Court from 1 May to 6 July 1998, vacated by a judge who had retired, and had replaced another judge on sabbatical leave from 17 August to 31 December 1998. On each occasion, the Supreme Court had first inquired of him whether he might be willing to take on the assignment and, after he had given an affirmative answer, the King, sitting in Government Cabinet, had taken the decision to appoint him as a replacement judge for the period in question. At the material time Mr Pedersen had not applied for any vacant seat in the Supreme Court.

COMPLAINTS

The applicant mother and child both complained under Article 8 of the Convention that their separation while he was a baby unjustifiably interfered with their right to respect for family life. Under this provision, the first applicant further complained about the imposition of various measures of constraint and control, body searches and restrictions on telephone conversations gave rise to an unjustified interference with her right to respect for private and family life and, as regards the latter, also correspondence. These interferences considered separately, or in aggregate, amounted to a violation of Article 8.

In addition, with respect to the same facts as those complained of above in relation to handcuffing in the waiting room and body searches, the first applicant also alleged a violation of Article 3 of the Convention.

Finally, the first applicant alleged a violation of Article 6 of the Convention on account of the participation in the Supreme Court of a temporary judge "appointed" by the Ministry of Justice, her adversary in the case.

THE LAW

1. Article 8 of the Convention provides:

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

The Court accepts the applicants' submission that the various matters complained of by them can be viewed as interference with their right to respect for private and family life and correspondence protected by paragraph 1 of Article 8. As regards the further question whether the conditions for such interference in paragraph 2 were fulfilled, the Court notes that the applicants do not dispute that the measures were in accordance with the law and pursued a legitimate aim, namely the prevention of disorder or crime. The Court sees no reason to hold otherwise, whilst considering that other legitimate aims enumerated in paragraph 2 of Article 8 may also be relevant. The only issue is whether the national authorities failed to respect or the applicants' Article 8 rights or interfered with their enjoyment of these rights in a manner that was not "necessary".

The Court will first consider the separation of the mother and child, then each of the other measures complained of and, finally, the aggregate of the measures.

(a) Concerning the separation of the first applicant and her son

The applicant mother and son complained that their separation, while she was held in detention, constituted an unjustified interference with their right to respect for family life and thus violated Article 8 of the Convention. They stressed the importance for both sides of preserving the bond between a mother and the newborn baby, and the necessity for constant residential contact to perpetuate that bond. While a baby's primary need was to stay close to the mother and breast feed, the baby would be unconscious of being in prison and would not need much space. Separation from the mother meant that the baby would bond with another carer and would experience yet another separation once the mother was released. Although it was considered necessary for the prevention of disorder or crime to keep the mother in Bredtvedt prison, it was not necessary for the pursuance of these aims to remove the baby from the mother. If and in so far as the prison conditions were inadequate for the baby, the prison authorities ought to have taken appropriate measures to improve them. Any failure on their part to do so could not excuse the fact that the applicant and her son were unable to stay together. Such facilities existed in detention centres, both for detention on remand and imprisnonment, in several European countries, notably in the United Kingdom, Finland, Iceland and Denmark, in some instances even in closed centres though mostly in open ones.

The Court observes from the outset that the applicants do not seem to argue that the first applicant's detention as such violated Article 8 of the Convention. Their complaint under this provision concerns rather the fact that the relevant authorities had failed to enable the mother to have the baby with her during the 3-month period from his birth on 11 November 1990 until 10 February 1991, during which she was detained almost exclusively on remand. On the latter date, a few days after her conviction, she sent the boy with his grandmother to the Netherlands, having unilaterally decided to do so. In the view of the Court, this cannot necessarily be considered an interference in the exercise of their right to respect for family life. However, although the special object of Article 8 is to protect the individual against arbitrary interferences by the public authorities with his or her exercise of the rights protected, there may in addition be positive obligations inherent in an effective "respect" for family life. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole

(see, for instance, the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 19, para. 49).

According to information supplied by the applicants, in a number of Contracting States there exist detention centres offering facilities for a mother and a newborn baby to stay together. The Court notes, however, that this concerned mainly open institutions; it does not permit the conclusion that in the vast majority, or the majority, of the Contracting States, there are such facilities in closed detention centres of the kind at issue in the present case. It is thus difficult to discern a common European standard in this area. Bearing in mind the particular circumstances of the case, the Court does not find it necessary to pronounce any general view on to what extent the Contracting States may be obliged under Article 8 of the Convention to take measures to this effect but will confine its examination to the concrete facts of the case.

The Court notes that the Bredtvedt prison was deemed unsuitable for keeping small children, in view of *inter alia* its architectural disposition, the sanitary conditions there and the composition of the prison population. The Court sees no reason to question the assessment made by the national authorities that the first applicant's wishes to have her son with her in the prison could not have been accommodated unless substantial alterations were made to the prison conditions, for the protection of the child's best interests.

However, in the view of the Court, the first applicant could not legitimately claim that the competent national authorities ought to have taken any special measures in order to secure her interests in having the child with her in prison. In this connection, the Court cannot but note that she was fully aware of the fact that she was pregnant when she embarked upon the criminal activity that led to her detention. Her detention in a closed prison with particular security arrangements had been made necessary by her own conduct, namely the seriousness of the drugs offences of which she was suspected, and later convicted, her actual attempt to flee as well as the obvious risk of her absconding as demonstrated by her attempt of flight. Understandably, this state of affairs would have implications for her son.

The Court further accepts the national authorities' view that, in the absence of important alterations being made to the prison conditions, the mother's as well as the child's interests were adequately protected by the manner in which they were treated by the authorities. During the first month, they were able to meet in the childcare centre 5 times a week and, thereafter, in the prison every day. Throughout the 3 months, the entire period in question, the baby was kept at an institution offering high quality services, and arrangements were made so that he could be fed with his mother's milk. Particular steps were taken to ensure that the mother's views and interests were heard. It was her decision, not the authorities', that the baby join his maternal grandmother in the Netherlands as from February

1991. Thereafter, they visited the first applicant several times in the prison. Apart from the fact that her sentence to 6 years' imprisonment by the High Court was relatively lenient, in July 1992, already 1½ years after her conviction, the first applicant was pardoned and released so that she could return to the Netherlands and be reunited with her son.

Against this background, the Court does not find that the separation of the applicants as such amounted to a lack of respect for their family life within the meaning of Article 8 of the Convention.

(b) Concerning the other restrictions disputed by the first applicant

Under Article 8 of the Convention, the applicant mother further alleged that each of the following events gave rise to an unjustified interference with her right to respect for private life: (1) the use of handcuffs on her while she was in the waiting room in the clinic for the prenatal checks and (2) when she visited the Aline Child Care Centre; (3) the use of transport cuffs when she visited her son at the Ullevål Hospital; (4) the presence of uniformed police officers during one of her ultra sound examinations and (5) in connection with the delivery of the baby; (6) the body searches carried out on her after her visits outside and the reception of visitors inside the prison. In addition, (7) the first applicant submitted that the telephone restrictions imposed on her unjustifiably interfered with her Article 8 right to respect for family life and correspondence.

The Court will deal with each of the above matters in turn.

As to the use of means of restraint mentioned under items (1) to (3) above, the Court notes that these were motivated solely by the danger of flight that the first applicant represented during visits at different locations outside the prison, there being nothing to indicate that they were aimed at debasing or humiliating her. On each occasion the responsible police officer accompanying her assessed the need for using such means, in the light of the conditions obtaining at the relevant place and the officer's own knowledge of the first applicant. The fact that some officers on certain visits did not deem it necessary to apply handcuffs does not undermine the assessment made on the spot by other officers that there were good reasons for believing that she might use the visits outside prison as an opportunity for absconding. As already mentioned above, particular security measures had been made necessary by the applicant's own conduct. In the view of the Court, they did not exceed what could reasonably be considered necessary in the circumstances.

Similar considerations apply with respect to the matter raised under item (4). The ultra-sound examination in question had taken place in a room at the hospital's ground floor, from which it might have been possible to escape. While the examination was not of an intimate character, one of the two police officers present who knew the applicant well assisted with

interpretation during her conversations with the midwife, as the latter did not have sufficient mastery of the English language. It was not signalled until after the event that the police officers' presence was unwelcome. The Court finds nothing to suggest that, on this occasion, the first applicant's private life was unjustifiably interfered with in violation of Article 8 of the Convention.

Nor does the Court consider that the police's presence outside the delivery room during birth (item 5) amounted to an interference transgressing the limits of this provision.

Bearing in mind the factual background of the applicant's detention - importation of nearly 5 kg of amphetamines into Norway -, the Court sees no reason to doubt the necessity of making body searches of the first applicant in the context of her visits outside or reception of visitors inside the prison (item 6). These measures were part of an ongoing effort by the prison authorities to avoid that narcotic substances be brought into the prison. The reason why the first applicant, in a few instances, had been searched even after visits by her baby in the prison was that the Aline Child Care Centre had detected in him a certain nervousness which, it was thought, could be attributed to drugs abuse by her. The measures ceased on 3 January 1991 as she accepted giving urine samples enabling the prison authorities to verify possible drug abuse. The body searches did not exceed their purpose and had been carried out by female prison guards without any physical contact between them and the applicant. In the view of the Court, the first applicant's complaint about the searches is entirely unfounded.

So is her complaint about restrictions on telephone calls (item 7). She was allowed to call her mother and son free of charge for 20 minutes per week; as from October 1991, before her son had reached the age of 1 year, she was allowed one further call at her own expense. No time restrictions applied beyond February 1992, when the first applicant was placed in a wing with a more lenient regime. Thus, she was not only able to communicate with her family regularly but also to increase the frequency of her telecommunication contacts. The limitations in question clearly did not exceed what follows from ordinary and reasonable requirements of imprisonment (see, *mutatis mutandis*, the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, § 74).

Therefore, the Court finds nothing to suggest that any of the above instances of interference complained of by the first applicant gave rise to a violation of her Article 8 rights.

(c) All the measure considered on the whole

Even if seen on an aggregate, the Court does not consider that the matters complained of entailed any breach of Article 8 of the Convention. Again, the Court finds it significant that, whilst aware that she had recently become

pregnant, the first applicant chose to transport a large quantity of a highly dangerous drug from her home country afar to a foreign country, with a distinct likelihood that she would be made to serve a long prison sentence there, were she to be convicted of this serious crime. The seriousness of the crime was compounded by her attempt to flee and the obvious danger that she would again try to abscond, requiring the authorities to take special security steps. In the circumstances, she could not legitimately expect to be able to keep the baby with her in prison. The other disputed measures were mostly direct consequences of this fact and of the authorities' efforts to provide the mother and son with the best medical facilities and the latter with suitable care, available outside the prison only. The resulting inconvenience which the first applicant experienced in connection with her pregnancy, birth and the period thereafter clearly did not transgress what the authorities were entitled to consider "necessary" for the purposes of Article 8 of the Convention.

(d) Conclusion

In the light of the above considerations, the Court finds that this part of the application discloses no appearance of a violation of Article 8 of the Convention. It follows that this part must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. With respect to two of the matters complained of under Article 8 above, the first applicant further alleged a violation of Article 3 of the Convention, which provides:

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

Under this provision she complained about the use of handcuffs on her while she was in the waiting room in the clinic for prenatal checks and the body searches carried out on her in connection with her visits outside and the reception of visitors inside the prison (items 1 and 6 under sub-section (b) above), which had adversely affected her mental state.

The Court reiterates that the measures in question had been imposed in the context of the first applicant's lawful detention, not in order to humiliate and debase her, but on the grounds of a reasonable fear on the part of the responsible authorities that otherwise she might escape. They did not entail use of force, or public exposure, exceeding what could reasonably be considered necessary in the circumstances. Nor is the Court persuaded that the treatment in issue adversely affected the first applicant's mental state (see Raninen v. Finland, 16.12.1997, ECHR 1997-VIII, No. 60, pp 2821-2822, §§55-59). In its view, the treatment clearly did not attain the minimum level of severity required by Article 3 of the Convention. This

part of the application discloses no appearance of a violation of this provision. It follows that this part must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

3. The first applicant moreover alleged a breach of Article 6 § 1 of the Convention on account of the participation in the Supreme Court of Mr Pedersen as a temporary (*konstituert*) judge "appointed" by the Ministry of Justice, her adversary in the case. In so far as is relevant, this provision reads:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ..."

The first applicant argued that, while the decision to appoint Mr Pedersen had been taken by the King sitting in Government Cabinet (*Kongen i statsråd*), the Ministry of Justice had approved his candidature. In reality, it was this authority that would decide on whether he should be re-appointed as a replacement judge or, in the event of a seat being vacated, as a permanent judge. It could not be excluded that a replacement judge would bear this in mind when adjudicating a case to which the Ministry was a party. In addition, the first applicant invoked the shortness of the terms of appointment.

The Court recalls that, in order to establish whether a body can be considered "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence (see, *inter alia*, the Campbell and Fell v. the United Kingdom judgment of 28 June 1984, Series A no. 80, pp. 39-40, para. 78).

The existence of impartiality for the purposes of Article 6 § 1 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 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 [21.12.00]).

As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (*ibidem*, § 43).

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 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 (*ibidem*, § 44).

In this case there is no evidence calling into doubt Mr Justice Pedersen's subjective impartiality, which moreover is undisputed. The Court considers that the only issue before it concerns the judge's objective impartiality and independence, which matters appear difficult to dissociate from one another. It relates to the fact that in 1998 he replaced two of the Supreme Court's permanent members for two relatively brief periods of definite duration.

However, the Court notes that on each occasion the Supreme Court had approached the judge to enquire about his availability and that he had been appointed by decision of the King sitting in Government Cabinet. It does not appear that the Ministry of Justice played any significant role in this respect. Nor had Mr Justice Pedersen applied to become a permanent member of the Supreme Court. The possibility that he might do so at a later stage does not suffice to consider that there existed special links between him and the Ministry in the proceedings under consideration.

The judge in question normally served as a permanent member of the High Court, with all the guarantees of independence and impartiality befitting members of the judiciary generally. Each one of his assignments with the Supreme Court had been of a fixed duration with the specific purpose of replacing members of that court. In the light of this, the Court does not find that the relatively short duration of each term of temporary replacement could reasonably call into doubt the judge's independence and impartiality.

Against this background, the Court does not consider that the first applicant's fears with regard to this judge's independence and impartiality were objectively justified. It finds that this part of the application discloses no appearance of a violation of 6 § 1 of the Convention. It follows that this part must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Georg RESS
President