

The Influence of the European Convention for the Protection of Human Rights and Fundamental Freedoms on Norwegian Criminal Procedure

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1 Introduction

Norway was the second country to ratify the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹ Norway delivered its ratification on 15 January 1952 and the Convention entered into force for Norway on 3 September 1953. The subsequent Protocols to the Convention have also, on the whole, been ratified by Norway shortly after they have been opened for ratification.

As a general rule, Norwegian law was not considered to pose a problem for acceptance of the international obligations in the Convention and Protocols prior to ratification. For a long time, this was also the case in practice and it wasn't until about 1990 that the safeguards established by the Convention became an issue in Norwegian criminal law. The first main issue that arose was whether there was a right to read out in court a statement given by a witness under police interrogation in circumstances where the witness either failed to attend or refused to give testimony at the trial. This became a pertinent issue when the judgment of the European Court of Human Rights of 24 November 1986 in *Unterpertinger v. Austria* became known.² Later on, new areas have been added and, today, the Convention is invoked regularly.

The main consequence of the Convention has been that legal practice has been adjusted to comply with the obligations established by the Convention as it has been interpreted by the European Court. The Convention has led to only a few legislative amendments.³ However, during the preparation of new legislation that can raise the question of compliance with the Convention, a detailed analysis is normally made of whether the proposed provisions comply with Norway's international obligations. For reasons of space, I will – with one exception – concentrate on the modifications of law that have taken place through case law.

2 Norwegian Legislation and Case Law Concerning the Relationship to the Convention

Norway applies a dualistic system. By Amendment Act of 13 April 1962 no. 1, a provision on sectormonism was introduced into the former Criminal Procedure Act section 5, which reads as follows:

1 Often abbreviated ECHR.

2 Application no. 9120/80.

3 One example of a statutory amendment is the repeal of section 183 of the Criminal Procedure Act of 22 May 1981 no. 25. Section 183 enabled the prosecution to hold a person charged with *inter alia* treason on remand in custody for one week before bringing him before a judge. This rule would have violated Article 5 (3) of the Convention, and it was repealed by Act of 3 December 1999 no. 82.

“The provisions of this Act shall apply subject to such limitations as are recognised in international law or which derive from any agreement made with a foreign State.”

A similar provision is contained in the General Civil Penal Code⁴ section 14, and has been there ever since the Code was passed in 1902.

Section 5 of the former Criminal Procedure Act was originally introduced in order to give foreign ships the protection to which they are entitled in international law. However, the travaux préparatoires to the statutory amendment stated that, at the same time, “[t]he proposed provisions will give a general legal authority in international law for immunity in criminal cases”.⁵ The relationship to ECHR was not mentioned at all.

With a small linguistic difference, the provision was adopted in the current Criminal Procedure Act 1981 (“CPA”) section 4.

As mentioned above, ECHR did not become an important topic in the Norwegian courts until about 1990. The first time the Supreme Court commented on the priority between the provisions of the ECHR and Norwegian statutory and case law was in 1994. In Rt.⁶ 1994 page 610, the Supreme Court held as follows on this topic (at pages 616-617):

“On this issue, I will first of all comment that I agree that the Norwegian courts must apply criminal procedural law so that the court proceedings comply with our treaty obligations, and that Norwegian law may be set aside if it is incompatible with the ECHR, see the Criminal Procedure Act section 4. If, however, a Norwegian court is to depart from national legal procedure, this can only be done if the incongruent provision that is derived from international sources is *sufficiently clear and unambiguous*. In my opinion, this is especially the case if the question arises of changing the state of law on a point that is founded on *clear and established principles of Norwegian legislation or case law*. When deciding whether the judgment of an international court shall have this consequence in national law, it is also important whether it is based on factual and legal circumstances that are comparable with the particular circumstances of the case that is to be determined by the Norwegian court.” (Emphasis added.)

This decision established “the principle of clearness”, which implied that “clear and established principles of Norwegian legislation and case law” should not be set aside unless the international rule was “sufficiently clear and unambiguous”.

In Rt. 1999 page 961, one of the justices of the Supreme Court voted to reject the principle of clearness. He argued that the courts are expected “to undertake an independent interpretation of the human right conventions that are included in the incorporation”⁷ (pages 970-971). The majority of the Supreme Court did not agree, but amplified and modified the principle (pages 972-973).

4 Act 22 May 1902 no. 10.

5 See Ot.prp. no. 23 (1961-62) page 1.

6 Norsk Retstidende, i.e. the journal in which the judgments and decisions of the Supreme Court and the Appeals Selection Committee of the Supreme Court are published.

7 See Act of 21 May 1999 no. 30.

However, in a unanimous plenary judgment the following year - Rt. 2000 page 996 - the principle of clearness was abolished. The Supreme Court held (at page 1007-1008):

“The question whether there is a conflict between a convention rule that has been incorporated into Norwegian law and other Norwegian law, with the consequence that the convention rule must take priority, cannot be resolved by a general rule but must depend on a more detailed interpretation of the legal rules in question. Harmonisation through *interpretation* can resolve an apparent conflict.

It follows from the precedence rule in section 3 of the Human Rights Act that if the result of interpretation of a provision of the ECHR appears to be reasonably clear, the Norwegian courts are obliged to apply the convention rule notwithstanding that the application of the rule would set aside established principles of Norwegian legislation or legal practice.

In many cases, however, there can be justifiable doubt as to how the ECHR is to be interpreted. This may be due to the fact that many of the provisions of the ECHR are vague and interpretation of the Convention requires a balancing of different interests or values on the basis of a common European interpretation of the law or practice. The doubt can also be due to the fact that the aim of the European Court of Human Rights is not only to clarify the content of the Convention but that it has also, in many cases, interpreted the provisions of the convention dynamically and as law-maker. ...

Although the Norwegian courts apply *the same principles of interpretation* as the European Court of Human Rights when applying the ECHR, the task of developing the Convention lies first and foremost with the European Court. The Norwegian courts must respect the wording and the objectives of the Convention and the decisions of the Convention organs. If there is any doubt about the scope of the decisions of the European Court, it will be relevant whether the decisions are *based on factual and legal circumstances that are comparable with the particular circumstances of the case that is to be determined by the Norwegian court*. Where different interests or values are to be weighed against each other, the Norwegian Courts must be entitled – within the scope of the method applied by the European Court – to apply traditional Norwegian value priorities. This applies, in particular, *if the Norwegian legislator has considered the relationship to the ECHR and has concluded that there is no conflict*.

The Norwegian courts do not have the same overview as the European Court of the legislation, interpretations of law and legal practice in other European countries. However, by balancing different interests or values based on the value priorities upon which Norwegian legislation and interpretations of law are based, the Norwegian courts interact with the European Court and contribute to influencing its practice. If the Norwegian courts were equally as *dynamic* as the European Court in their interpretation of the Convention, the Norwegian courts would risk going further than required by the Convention in individual cases. This could be unnecessary restraint on the Norwegian legislator, and could be detrimental to the balance between the legislative and judicial powers upon which the structure of state in Norway is built.

For this reason, it is my view that, *where there is doubt* as to how the ECHR is to be interpreted, the Norwegian courts *should not apply a too dynamic interpretation of the Convention*. As a general rule, the Norwegian courts *cannot build in a safety margin to protect Norway against being found to be in breach of the Convention either*. The Norwegian courts must try to ascertain how the provisions of the Convention are to be understood based on the practice of the

Convention organs and perceptions of values and traditions in Norwegian society.” (Emphasis added.)

This judgment has been followed in subsequent case law.⁸

The Human Rights Act of 21 May 1999 no. 30 also confirms that Norwegian legislation and case law are subordinate to Norway’s obligations pursuant to the ECHR and five of its protocols - Protocol of 20 March 1952, Protocol no. 4 of 16 September 1963 securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Protocol no. 6 of 28 April 1983 concerning the abolition of the death penalty, Protocol no. 7 of 22 November 1984 and Protocol no. 13 of 3 May 2002 concerning the abolition of the death penalty in all circumstances. Section 3 of the Human Rights Act provides that the provisions of the ECHR and the abovementioned protocols “shall take precedence over any other legislative provisions that conflict with them”.

In the following, we shall take a closer look at the various situations where Norway’s obligations pursuant to the ECHR have led to changes in Norwegian case law. A very practical rule – the right not to be tried or punished twice in Protocol 7 Article 4 – will not be discussed for the simple reason that my colleague, Mr Justice Skoghøy, has written a separate article on this topic. In the final section, section 11, I will present an important law reform concerning the freedom of a charged person to choose his own defence counsel, where the relationship to the ECHR had a central place in the legislator’s considerations during the preparation of the statutory amendment.

3 Documentation in Court of Statements Given to the Police

Before we became aware of the judgment in the *Unterpertinger* case, the right to document in court a statement given to the police during interrogation was judged on the basis of the interest of the witness. The decisive issue was whether the witness had been informed, before the statement was given, that he or she had no obligation to give a statement. The police is obliged to give this information. This right not to give testimony applies to the indicted person’s wife, registered partner, cohabitant and close relatives of these persons, and is laid down in CPA section 235 first paragraph cf. section 122 first and second paragraphs. Statements given to the police by these persons could not be documented in court if they had not been informed that they had no obligation to give a statement. Nor could the police officer who had received the statement testify about what had been stated to him. On the other hand, if the witness had been provided with the necessary information, his or her statement to the police could be documented in court and the police officer to whom the statement was

⁸ See inter alia the plenary judgment in Rt. 2002 page 557 (p. 565).

made could testify about what had been stated to him.⁹ This rule, which is not a consequence of the ECHR, remains the rule in case law today.¹⁰

CPA section 235 second paragraph provides that the police have a discretion to decide whether persons who are not compelled to give a statement to the police on the grounds that this may expose the witness, or anyone to whom the witness has a relationship mentioned in CPA section 122 first or second paragraph, to a penalty or loss of civil esteem, see CPA section 123, shall be informed of their rights. Thus, failure by the police to inform these witnesses of their rights is not a procedural error. Consequently, the Supreme Court has held that statements from such a witness can be documented in court even though he has not been informed of his rights.¹¹

In the period after we became aware that ECHR Article 6 (1), together with the principles inherent in Article 6 (3) d, grants an accused person a certain right to object to a witness statement being documented in court if he or his defence counsel has at no stage had the opportunity to cross-examine the witness, the Supreme Court has on several occasions discussed the limitations that follow from this provision.

For a long time, the Supreme Court required that a conviction could not be based “primarily” on the statement of a witness who *did not appear* at the trial.¹² However, the judgment in Rt. 2001 page 29 was understood to curtail the power to document the statement. In setting aside the judgment of the Court of Appeal, the Supreme Court held (at page 33):

“Against this background, there is a *real possibility* that the documentation of D’s statement to the police has been given decisive weight in the total assessment of the evidence, and that it thus presented itself as an *important and perhaps necessary piece of evidence*.” (Emphasis added.)

This formulation was reiterated in the judgment recorded in Rt. 2004 page 897, where the general principle was described in the following way (at paragraph 9):

“When deciding whether it was correct to allow the statement to be documented, the decisive issue is whether there is a real possibility that the documentation can have been given *decisive weight in the total assessment of the evidence*, and that the statement thus seemed to be *an important and perhaps essential piece of evidence ...*” (Emphasis added.)

9 See Rt. 1954 page 573, Rt. 1984 page 1105, Rt. 1987 page 1318 and Rt. 1988 page 663 read together.

10 See inter alia Rt. 1997 page 1778.

11 See Rt. 1978 page 859.

12 See Rt. 1990 page 312, Rt. 1991 page 333, Rt. 1991 page 410, Rt. 1991 page 1096 and Rt. 1992 page 28. Additional examples are recorded in Rt. 1990 page 990 and Rt. 1992 page 35, where the convictions were set aside, while the result was the opposite in Rt. 1995 page 752 and Rt. 1995 page 773.

The judgment of the Court of Appeal was set aside because the Supreme Court “could not rule out” the possibility that this was the case. This criterion was reiterated in Rt. 2004 page 950. However, on the basis of a concrete assessment of the facts, the judgment of the Court of Appeal was not set aside in this case.

The assessment whether the statement “could have been given decisive weight in the total assessment of the evidence” represented a shift in focus for the Supreme Court. Whereas the original criterion focussed on how important the statement was compared with the other evidence, the new criterion focussed on whether the conviction would have been possible if the statement had not been documented. The criterion meant that the right to document a witness statement could vary from case to case, because a judgment could be set aside although the witness statement, compared with other evidence, was not particularly important. For this reason, the prosecution took a risk if it asked to document a witness statement in court because the judgment could be set aside if the Supreme Court “could not rule out” that the statement had been given “decisive weight”. I add that, in both judgments, counsel for the prosecution was appropriately cautioned against making a request to document the statement.

These judgments limited the right to document a statement in court compared to the position both in Supreme Court case law from the 1990s and in the case law of the European Court. In *Lucà v. Italy*,¹³ judgment of the European Court of 27 February 2001 at paragraph 40, the Court held that a conviction cannot “solely or to a decisive degree” be based on a documented statement. The same formulation can be found in *Craxi v. Italy*¹⁴, judgment of 5 December 2002 at paragraph 57, and in several subsequent judgments. These judgments reiterate several earlier judgments of the European Court that, in reality, applied the same criterion although the Court used slightly different words. The unanimous plenary decision in Rt. 2000 page 996 should have required the Supreme Court to consider whether this change in direction was necessary in light of the rights of the accused pursuant to ECHR Article 6. As the abovementioned judgments of the European Court show, this was not the case. Thus, section 3 of the Human Rights Act did not give the Supreme Court the requisite competence to change its case law.

In Rt. 2004 page 1789, the Supreme Court returned to its original criterion and to the case law of the European Court. The Supreme Court referred firstly to the criterion laid down in the *Lucà*-judgment and, based on a concrete assessment, found that the convictions in question were not “solely or to a decisive degree” based on the witness statements that had been documented in court. This criterion is subsequently reaffirmed in Rt. 2004 page 1974 and Rt. 2006 page 120. In other words, the case law of the Supreme Court is now consistent with the case law of the European Court.

Also in circumstances where a witness refuses to testify but *is present* in court when his statement to the police is documented, the Supreme Court has in several cases held that the condition for documenting the statement is that a

13 Application no. 33354/96.

14 Application no. 34896/97.

conviction cannot be based primarily on the statement.¹⁵ However, in certain cases the Supreme Court appears to have disregarded this criterion. This particularly appears to be the case where a witness has refused to testify in court and his former statement to the police has therefore been documented, and the presiding judge has given defence counsel the opportunity to ask questions but the offer has been declined. In these cases, the Supreme Court has found that it is sufficient that defence counsel has had the opportunity to ask questions.¹⁶

Following the European Court's admissibility decision in *Peltonen v. Finland*¹⁷ of 11 May 1999, where the complaint was found to be manifestly ill-founded, the Supreme Court concluded that it was sufficient to ensure the accused's right pursuant to Article 6 (3) d that defence counsel had been given the opportunity to ask questions to the witness, see Rt. 2003 page 1808. This was sufficient even if the witness did not answer. If defence counsel had been given the opportunity to ask questions, the only issue was whether the accused had been given a "fair trial", see Article 6 (1). This opinion is reaffirmed in Rt. 2004 page 1974.

On several occasions, the European Court has emphasized that the term witness shall be given an autonomous interpretation. As regards ordinary witnesses, the first judgment where this was stated seems to be *Delta v. France*,¹⁸ judgment of 19 December 1990 at paragraph 34. As a natural corollary to this, the European Court concluded in both *Lucà v. Italy* and *Craxi v. Italy* that a statement from a co-accused also constitutes a statement to which the guarantees provided by Article 6 (1) and (3) d apply. The case law of the Supreme Court is in accordance with this interpretation.¹⁹

4 Child Witnesses

Most countries are reluctant to require child witnesses to give testimony in court at the trial, and statements are usually obtained from them beforehand and documented at the trial.

In Norway, statutory authority for this procedure was introduced as early as 1926. From the accused's point of view, however, the statutory provisions were unsatisfactory because they did not entitle the accused or defence counsel to be present when the statement was given. Today, the examination of children outside the trial is regulated in CPA section 239 subsection 1 and 2, which reads as follows:

"In the case of an examination of a witness who is under 14 years of age or a witness who is mentally retarded or similarly handicapped in cases of sexual

¹⁵ See Rt. 1990 page 1221, Rt. 1997 page 1778 and Rt. 1999 page 757.

¹⁶ See Rt. 1992 page 1500 and Rt. 1995 page 289.

¹⁷ Application no. 30409/96.

¹⁸ Application no. 11444/85.

¹⁹ See Rt. 2004 page 97 and Rt. 2004 page 1974.

felonies or misdemeanours, the judge shall take the statement separately from a sitting of the court when he finds this desirable in the interests of the witness or for other reasons. The judge shall in such cases as a general rule summon a well-qualified person to assist with the examination or to carry out the examination subject to the judge's control. When it is possible and due consideration for the witness or the purpose of the statement does not otherwise indicate, the examination shall be recorded on a video cassette and if necessary on a separate tape-recorder. On the same conditions the defence counsel of the person charged shall as a general rule be given an opportunity to attend the examination.

The same procedure may also be used in cases concerning other criminal matters when the interests of the child so indicate.”

In practice, examination of child witnesses is watched over by a judge, while the conversation and direct examination of the child is undertaken by a police officer, a psychologist or another person who is presumed to be specially qualified for the task.

In the 1990s, when we became aware of the protection afforded to the person charged by ECHR Article 6 (1) and (3) d, the relationship between the provisions of the CPA and the ECHR was raised in Rt. 1990 page 319. The accused, who was sentenced to eight months imprisonment, had not been present or been represented by defence counsel under the examination of the child. Following a concrete assessment of the circumstances, where the Supreme Court considered in particular the problems raised by examination of children in cases involving sexual offences, the procedure was held not to violate the ECHR.

The question was raised again in Rt. 1994 page 748.²⁰ In this case, defence counsel requested a new examination of the child because he had not attended the first examination, but the request was refused. The child's statement was documented at the trial, but the Supreme Court set aside the conviction on the grounds that the child's statement constituted the primary evidence in the case.

In the same year, CPA section 239 was amended by Act of 1 July 1994 no. 50, which added the proviso that “[o]n the same conditions the defence counsel of the person charged shall as a general rule be given an opportunity to attend the examination”. Defence counsel is not allowed to question the child directly but must follow the examination from an adjoining room. Questions from the defence must be given to the judge who, in turn, passes them on to the person carrying out the examination. The Supreme Court has held that this procedure does not violate the ECHR.²¹

In Rt. 1999 page 586, the Supreme Court again considered whether the use of a witness statement in circumstances where the person charged has not been represented by defence counsel at the examination of the witness violates ECHR Article 6. The Supreme Court held that “if the statement is to be used as evidence at the trial – and when the statement is an important piece of evidence in the case – the rule must be that the person charged shall have had the opportunity to examine the witness through his defence counsel, if necessary at a new examination”. Since statements from child witnesses in practice always are

²⁰ The question was also a topic in Rt. 1991 page 421, but I will not comment this case.

²¹ See Rt. 1994 page 748 (p. 750) and Rt. 1995 page 1248 (p. 1251).

important, it can be concluded that the Supreme Court will not accept the use of witness statements that are taken by a judge at a separate sitting of the court if the person charged has not had the opportunity to submit questions to the witness through his defence counsel. However, if defence counsel has not been present at the first examination, the statement can be documented if defence counsel has been present at a second examination.²²

In my opinion, Norwegian case law today is clearly in accordance with the case law of the European Court. I limit myself to referring to the principal judgment of 2 July 2002 in *S.N. v. Sweden*,²³ where, in my view, Swedish law gave the European Court more reason to question whether there was a violation of the Convention than current Norwegian case law. Further, the fact that the person charged has no right to be present under the examination of a witness does not violate Article 6 or the case law of the European Court, since Article 6 (3) d gives the person charged a right to “examine or *have examined* witnesses against him”.²⁴

5 Impartiality

The European Court’s judgment in *Hauschildt v. Denmark*²⁵ of 24 May 1989 has also had consequences for Norwegian case law. Norwegian law, like Danish law, provides that in serious criminal cases a person can be arrested and remanded in custody if the suspicion against him is strengthened, see CPA section 172. The condition is that the person charged has “made a confession or there are other circumstances that strengthen the suspicion to a marked degree”. When the Hauschildt judgment was delivered, the Ministry of Justice published a circular²⁶ in which it concluded that a judge who has remanded a person in custody pursuant to CPA section 172 will be disqualified on the grounds that this can cast doubt on the judge’s impartiality to sit as judge at the subsequent trial.

Norwegian judges acted in accordance with the Ministry’s conclusion. In Rt. 1996 page 261, the Supreme Court considered the question whether it was sufficient to cast legitimate doubt on the judge’s impartiality that the trial judge has applied this provision just once. In the case in question, the presiding judge at a jury trial had taken part at one pre-trial hearing to prolong the detention on remand. The Supreme Court stated that the Hauschildt-judgment did not necessarily mean that a judge is incompetent on the grounds of impartiality after having applied this provision just once. However, the Court recalled “the importance of clarity in the composition of the court and that it is important, in order to inspire confidence in the courts, to avoid the possibility that the impartiality of judges who pass judgments in criminal cases can be called into

22 See Rt. 2003 page 1146.

23 Application no. 34209/96.

24 In Danish law the same is assumed in *retsplejeloven* § 745 e.

25 Application no. 10486/83.

26 Circular G-140/89.

question”. For this reason, the Supreme Court held that it was sufficient to affect the impartiality of the judge that he had used the provision just once. The rule had to be the same for the presiding judge in a jury trial (at page 266):

“I find that the same must apply to a presiding judge in a jury trial, and I refer to his central role in the trial and especially his summing up²⁷ where he also summarises the evidence that has been submitted in the case – even though he normally makes it clear that his summing up is not binding on the jury.”

In Rt. 1996 page 925 (dissent 3-2), the Supreme Court reached the same conclusion in a case where the order for detention in custody pursuant to CPA section 172 was made after the conviction in the lower instance.

In a later case, Rt. 2003 page 1269, the Supreme Court considered whether the same rule applies to the two other professional judges who take part in a jury trial together with the presiding judge. One of the professional judges, who was not the presiding judge, had attended at one pre-trial hearing to prolong the detention in custody pursuant to CPA section 172. The Supreme Court held that the impartiality of the judge could not legitimately be deemed to be impaired.²⁸ The first voting justice held (at paragraph 19):

“The presiding judge, and the presiding judge alone, is responsible for the summing up, see the Criminal Procedure Act section 368 subsection 2. It is true that all of the professional judges take part in the subsequent decision as to whether the judgment shall be based on the jury’s verdict or, exceptionally whether the jury’s verdict shall be set aside pursuant to the Criminal Procedure Act section 376 a, b and c. However, a decision to set aside the jury’s verdict does not settle the issue of guilt and, moreover, is so uncommon that it cannot, in my opinion, be attributed particular importance in this connection.”

The Supreme Court has made one more exception to the rule: If the person charged has made an unreserved confession and the case proceeds to be dealt with as a confession case pursuant to CPA section 248, the fact that a judge has made an order for detention in custody pursuant to section 172 does not impair his impartiality at the subsequent trial, see Rt. 1992 page 538.

On the other hand, the fact that a judge has made an order for detention in custody pursuant to CPA section 171, where it is sufficient with “just cause” for suspicion, will not, as a general rule, be deemed to impair the impartiality of the judge in question. The same applies to a pre-trial order for the temporary confiscation of a driving licence pursuant to the Road Traffic Act²⁹ section 33 no. 3. However, there are some exceptions to this general rule:

If a person is remanded in custody pursuant to CPA section 171 subsection 1 no. 3 on the grounds that custody is “deemed to be necessary in order to prevent

27 The CPA section 368 subsection 2.

28 See also Rt. 2004 page 477, which concerns a professional judge who had presided over an interlocutory appeal concerning control of communication based on section 216a of the CPA.

29 Act of 18 June 1965 no. 4.

him from again committing a criminal act punishable by imprisonment for a term exceeding 6 months”, the impartiality of the judges who have taken part in the remand order(s) will be deemed to have been impaired so that they cannot sit at any subsequent hearing where the prosecution contends that the accused shall be transferred to compulsory mental health care, compulsory care or preventive detention.³⁰ The reason for this is that the requirement of danger of new criminality in CPA section 171 is practically the same as the corresponding requirement in the Penal Code sections 39, 39 a and 39 c.

The Supreme Court has also held that the grounds upon which an earlier decision to detain a person in custody or to temporarily confiscate his driving licence is based can, in certain circumstances, legitimately be deemed to impair the impartiality of the judge. In Rt. 1994 page 1281, the judge had stated at an earlier hearing that it was not possible “to trust the statement of the person charged”. The Supreme Court (dissent 4-1) held that this was sufficient to cast legitimate doubt on the judge’s impartiality.³¹ In Rt. 1997 page 479,³² however, the Supreme Court came to the opposite conclusion based on a concrete evaluation of the circumstances of the case.

The principles that apply to judges who take part in the determination of guilt apply correspondingly to judges who take part in decisions on leave to appeal pursuant to CPA section 321.³³

In Rt. 2004 page 477, the Supreme Court considered whether doubt could reasonably be cast on the impartiality of a judge who had taken part in several pre-trial communication control orders pursuant to CPA section 216a. The Supreme Court recalled that a judge who participates in repeated communication control orders may have acquired knowledge of documents that are unknown for the defence counsel, and held that this circumstance would often be sufficient to cast legitimate doubt on the judge’s impartiality.

The Supreme Court has also considered whether opinions expressed by a judge in an earlier judgment about an accomplice can be deemed to impair the judge’s impartiality in subsequent proceedings concerning another accomplice. In Rt. 1994 page 663, the Appeals Selection Committee of the Supreme Court answered this question in the affirmative and emphasised that the court in the first judgment had, “to a large degree, also laid the foundation for B’s conviction even though only A was on trial”. In Rt. 2004 page 477, on the other hand, the Supreme Court came to the opposite conclusion. The Supreme Court took its starting point in the European Court’s judgments in *Ferrantelli and Santangelo v. Italy*³⁴ of 7 August 1996 and *Rojas Morales v. Italy*³⁵ of 16 November 2000.

30 See Rt. 1990 page 379, Rt. 1990 page 823, Rt. 1994 page 968, Rt. 2000 page 1282 and Rt. 2002 page 587.

31 See also the orders of the Appeals Selection Committee of the Supreme Court in Rt. 1997 page 89 (dissent 2-1) and Rt. 2003 page 957.

32 See also Rt. 2000 page 1940.

33 See Rt. 1996 page 610, Rt. 1996 page 833, Rt. 1997 page 497, Rt. 1997 page 947, Rt. 1999 page 2083, Rt. 2000 page 1282, Rt. 2000 page 1940, Rt. 2003 page 957 and Rt. 2004 page 154.

34 Application no. 19874/92.

The Supreme Court found that the remark made by the judge in the instant case was “very unlike” the remarks made by the judges in the judgments of the European Court, where there was found to be a violation. The remark appeared as a “neutral rendition of the findings of fact, in part by reference to A’s own testimony”, and nothing was said that could be understood to imply that the judge had reached a conclusion on the accomplice’s guilt.

As mentioned in section 4 above, CPA section 239 provides that child witnesses can be examined outside the trial by a judge or subject to the judge’s control. The most important area of application of this provision is in cases concerning sexual abuse of children where the child’s testimony is often vital. In addition, child witnesses are not normally present at the trial. The strategy of defence counsel in these cases is often to find weaknesses in the examination of the child. For this reason, among others, a pertinent question is whether reasonable doubt can be cast on the impartiality of the trial judge if he has undertaken or overseen the examination of the child prior to the trial. In Rt. 1997 page 1288, the Appeals Selection Committee of the Supreme Court concluded that the impartiality of the judge shall be deemed to be impaired irrespective of whether he has made any remark regarding the child’s credibility. The decision in Rt. 1997 page 1288 is affirmed in Rt. 1999 page 1823.

6 Detention in Custody on the Grounds of Strengthened Suspicion – the Criminal Procedure Act section 172

As mentioned in section 5 above, CPA section 172 empowers the court to remand a person in custody if he has “made a confession or there are other circumstances that strengthen the suspicion to a marked degree”. As a general rule, the charge must concern an offence punishable by imprisonment for a term of 10 years or more, or attempt to commit such an offence. In this case, no special reason for detention in custody is necessary.

The question arises whether the provision exceeds the right to deprive a person of his liberty established by ECHR Article 5 (1) c, which accepts deprivation of a person’s liberty “for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”. The question is whether the remand in custody of a person based only on the seriousness of the case is a violation of the Convention.

In Rt. 1987 page 1285, the Appeals Selection Committee of the Supreme Court concluded that remand in custody pursuant to CPA section 172 does not violate Article 5 (1) c of the Convention. In Rt. 2001 page 940, however, the Court considered the relationship between section 172 and Norway’s international obligations in broader terms. Three convicted persons were remanded in custody after they had been sentenced to 21 years imprisonment for aiding and abetting the premeditated murder of three people. Since the order for

35 Application no. 39676/98.

detention in custody had been made after the conviction, Article 5 (1) a applied even though the judgment was appealed. The Appeals Selection Committee of the Supreme Court referred to four judgments of the European Court, all involving proceedings against France,³⁶ where the European Court in all four cases concluded that France had committed a violation of the Convention. In these cases, the persons charged had been detained in custody before the judgment in the first instance. The European Court had required that detention in custody without any special reason must be “necessary to preserve public order”. The Appeals Selection Committee of the Supreme Court found that the reason why the European Court had found a violation was that the French courts had confined themselves to establishing that the formal conditions for detention in custody without any special reason were fulfilled, and that the courts in the instant cases had not evaluated the actual need for custody in more detail. On this basis, the Appeals Selection Committee concluded that detention in custody without any special reason does not in itself violate the ECHR. However, the court must “make a concrete assessment of whether there is sufficient reason to detain the person charged in custody”. This condition was clearly fulfilled in the case in question.

In the 1990s, the Norwegian courts applied CPA section 172 quite often and there are examples where the provision was used in relatively minor drug cases.³⁷ This is because drug offences involving even quite small quantities of drugs are punishable by imprisonment for a term of 10 years in Norway.³⁸ Even before the decision in Rt. 2001 page 940, the Appeals Selection Committee of the Supreme Court had started to require more detailed grounds from the Court of Appeal for its decision to apply CPA section 172 but, following this decision, the requirement has become very strict. One of the main reasons for this change in course is the Supreme Court’s regard for ECHR Article 5. As a consequence, the Appeals Selection Committee of the Supreme Court has set aside several orders of the Court of Appeal where a person has been remanded in custody charged with drug-related offences.³⁹ The practice in rape cases and in cases concerning violence, homicide etc. has also become more restrictive.⁴⁰

The legislator has taken the consequence of this change in course. By an amendment in Act of 4 July 2003 no. 78, a qualification was added to CPA section 172 which provides that “[i]n its assessment [the court] shall consider in

36 See the judgments in *Letellier v. France* of 26 June 1991 (application no. 12369/86), *Kemmache v. France* of 22 October 1991 (application no. 12325/86 and 14992/89), *Tomasi v. France* of 27 August 1992 (application no. 12850/87) and *I.A. v. France* of 26 August 1998 (application no. 27812/95).

37 See e.g. Rt. 1999 page 544, which concerns storage of 40 grams of heroin.

38 For dealings with heroin, the limit was about ten grams for a long time; the limit today is about 15 grams.

39 See Rt. 2002 page 85, Rt. 2002 page 315, Rt. 2003 page 974 (dissent 2-1) and Rt. 2004 page 354. In Rt. 2004 page 1216 and Rt. 2005 page 1167, however, the grounds were found to be sufficient.

40 See Rt. 2002 page 842, Rt. 2003 page 1486, Rt. 2004 page 640 and Rt. 2006 page 149. In Rt. 2002 page 252, Rt. 2004 page 20, Rt. 2004 page 106 and Rt. 2005 page 1003, the Court of Appeal’s orders were upheld.

particular whether it would offend the general sense of justice or create insecurity if the suspect is at large”.

7 The Requirement of Detail of the Indictment

CPA section 252 subsection 1 no. 4 provides that the indictment shall contain “a short but as accurate as possible description of the matter to which the indictment relates, with details of the time and place”. The requirement of identification of the offence in the indictment must also respect the requirement in ECHR Article 6 (3) a, which provides that everyone charged with a criminal offence shall “be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”.

The relationship to ECHR Article 6 (3) a arose for the first time in Rt. 1995 page 1491. In this case, the offence was described in the indictment as follows:

- “a) In 1994, before 29 October, in X, at the ...club at no. 14... street in X, he continuously stored heroin and altogether a large quantity including approximately 6 grams which, by 28 October, he had hidden at no. 14 ... street in X.
- b) In 1994, before 29 October, from the ... club at no. 14 ... street in X, he sold heroin on several occasions and altogether in a large quantity and/or to a large number of persons and/or regularly to drug addicts.”

The Supreme Court found that the description of the offence in the indictment was sufficient. The Supreme Court recalled that in this case it would have been “practically impossible to describe each individual incident of storage and sale”. Furthermore, “[t]he indictment, together with the detailed list of evidence, was a sufficient individualisation of the offence”.

The Supreme Court came to the same conclusion in Rt. 1998 page 1416, where the indictment for aiding and abetting between 60 and 70 thefts only described the area where the thefts had been committed without specifying any aggrieved person. The Supreme Court recalled that the case law of the European Court shows that the requirement of individualisation depends on the individual circumstances of the case in question. In the instant case, the indictment was primarily based on the accused’s own statement to the police and, because he had not been present when the thefts were committed, he was unable to provide a detailed description.

In Rt. 2001 page 38, however, the Supreme Court came to the opposite conclusion (dissent 3-2). In this case, the offence was described in the indictment as follows:

“In the period from 27 April 1997 until Wednesday 18 February 1998, in the South-Eastern part of Norway, he on several occasions sold drugs, presumably heroin, cocaine, amphetamine and/or marijuana, for a total sum of approximately NOK 700.000,- or a part of this sum.”

The majority of the Supreme Court referred in particular to the fact that, in contrast to earlier judgments on this issue, the list of evidence in this case was brief, and held that it was difficult to “get around such an approach in the evaluation of all of the circumstances of the case which the appellate court is required to carry out when determining whether the offence is sufficiently individualised to satisfy the legal safeguards upon which section 252 subsection 1 no. 4 is built”.

8 Access to Documents During the Investigation Stage – the Criminal Procedure Act section 242

As a general rule, a suspect is entitled to have access to the documents in his case, see CPA section 242. The condition is, however, that access can happen “without detriment or risk to the purpose of the investigation or to a third person”. This exception to the general rule is applied relatively often in serious criminal cases, not least in serious drug cases and in cases where the person charged refuses to give a statement to the police.

In practice, the question has been raised how long the case documents can be withheld on these grounds – not least if the person charged is in custody. This issue was considered in Rt. 2003 page 877. Here, the person charged had been remanded in custody for almost one year, during which time he had been denied access to a series of documents. He had been willing to give only a short statement to the police. On the power to withhold documents in general, the Appeals Selection Committee of the Supreme Court stated (at paragraph 28):

“The Appeals Selection Committee of the Supreme Court finds that the power to deny access to documents, whether wholly or in part, pursuant to the Criminal Procedure Act section 242 must be balanced against and limited by the charged person’s procedural rights. This follows from both fundamental procedural rights in traditional Norwegian law and ECHR Articles 5 and 6, which protect the charged/indicted person’s rights.”

Since the Court of Appeal had not sufficiently considered this question, its order to deny access to the documents was set aside.

With a view to the retrial of the application for access, the Appeals Selection Committee recorded that the hearing of an application to remand a person in custody is a contradictory process and that the parties shall have equality of arms. The Committee also referred to the European Court’s judgment in *Garcia Alva v. Germany*⁴¹ of 13 February 2001. In this connection, the Committee stressed that the right to information in accordance with Article 6 (3) b can also, “according to circumstances”, arise before the indictment is brought against the person charged. When considering whether there are appropriate circumstances, the following factors would be particularly important (at paragraph 32):

41 Application no. 23541/94.

“In the determination of the charged person’s right to access to documents, the detriment or risk to the purpose of the investigation must be balanced against the charged person’s need for access to the documents, ... While there will often be grounds to deny access to documents at the early stages of an investigation, an application for access to documents will become more justifiable with time. In the instant case, the charged person has been remanded in custody for a long time and an indictment is not yet brought. However, the application for access to documents can also in the circumstances be satisfied if they are made available to defence counsel, ... It appears that defence counsel in the instant case has refused to accept access to the documents on a condition of secrecy towards his client. The relevance of this fact must be considered in the determination.”

The decision in Rt. 2003 page 1125 also concerned the question of access to documents in a drug case where the person charged had refused to give a statement to the police. Also here, defence counsel argued that the refusal to give a statement was not a relevant consideration in the determination of the application for access to documents. The application for access to the documents was submitted at an early stage in the investigation. The Appeals Selection Committee of the Supreme Court found that the refusal to give a statement was a relevant argument.

In the *Garcia Alva* case referred to above, the ECHR presumes (at paragraph 42) that the right to access to documents at the investigation stage can be adequately satisfied if the documents are made available to defence counsel on condition of secrecy towards the client. The citation from Rt. 2003 page 877 above shows that the conclusion in Norwegian case law is the same. It has been held that defence counsel’s refusal to accept access to the documents on this condition does not prevent the prosecution from using the documents in an application to detain the suspect in custody, see Rt. 2005 page 1110.⁴²

9 The Presumption of Innocence – ECHR Article 6 (2)

The presumption of innocence in ECHR Article 6 (2) has given rise to questions in two particular areas of Norwegian criminal procedure.⁴³

The first concerns the situation where the accused is acquitted due to lack of evidence. The question that has been raised is whether the court, in the same case, can make an award of compensation to the victim for pecuniary and non-pecuniary loss or whether this violates the Convention. The Supreme Court has found in a number of cases that the presumption of innocence is not an obstacle because the standard of proof for a claim for compensation is lower than the standard of proof for criminal guilt.⁴⁴ Two of these cases were brought before

42 See also Rt. 1997 page 1841.

43 See also Rt. 1995 page 1191, where the consequence of the presumption of innocence is discussed in relation to the content of the prosecutor’s explanation of the substance of the indictment at the trial.

44 See Rt. 1992 page 400, Rt. 1996 page 864, Rt. 1997 page 1643, Rt. 1998 page 445 and Rt. 1999 page 1363.

the European Court and decided on 11 February 2003. In one of the cases,⁴⁵ the European Court concluded that there had been a violation of Article 6 (2). In the other case,⁴⁶ the Court concluded that there had been no violation.

In Rt. 2003 page 1671, the Supreme Court interpreted the judgments of the European Court and concluded that the presumption of innocence is not an obstacle for making an award of compensation to the victim for pecuniary and non-pecuniary loss in the acquittal case. The condition, however, is that “the reasoning given for the award of compensation does not cast doubt upon the correctness of the acquittal” (paragraph 32). In this regard “it is important that the courts, in cases where compensation is granted after an acquittal, emphasise the difference between a criminal and a compensation case, because this [that the standard of proof for a civil award of compensation for pecuniary and non-pecuniary loss is lower than the standard of proof for a criminal conviction] will help to mark the distance from the criminal case” (paragraph 35). In this case, the Supreme Court concluded that the reasoning given by the Court of Appeal in its judgment could cast doubt on whether the acquittal was correct. In a subsequent case, Rt. 2004 page 321, the Supreme Court came to the opposite conclusion on the basis of a concrete assessment.

The second area where the presumption of innocence in ECHR Article 6 (2) has arisen is in cases where the accused is acquitted or the prosecution against him is discontinued. In these circumstances, the accused can claim compensation for pecuniary and non-pecuniary loss he has suffered through the prosecution. Previously, the condition for such a claim was that “it is shown to be probable that he did not commit the act that formed the basis for the charge”, see CPA sections 444 and 446. This provision gave the accused the burden of proof of his innocence, but it was sufficient that his innocence was proven on a balance of probabilities.⁴⁷ In two judgments that were also delivered on 11 February 2003, the European Court concluded that the Norwegian courts’ application of this provision was a violation of ECHR Article 6 (2).⁴⁸ These judgments were immediately followed up in Norwegian practice, see Rt. 2003 page 251. In addition, the Norwegian statutory provision was amended by Act of 10 January 2003 no. 3, which entered into force on 1 January 2004. The rule now is that the accused is entitled to compensation without having to prove that it is probable that he is innocent unless the exceptions in section 446 apply.

10 Fines for Contempt of Court

The Courts of Justice Act⁴⁹ gives the courts a limited power to impose fines on the parties, their legal representatives and witnesses for contempt of court on

45 Judgment in *Y v. Norway* (application no. 56568/00), also recorded in Rt. 1999 page 1363.

46 *Ringvold v. Norway* (application no. 34964/97).

47 See inter alia Rt. 1994 page 721 (p. 725).

48 See the judgments in *O. v. Norway* (application no. 29327/95) and *Hammern v. Norway* (application no. 30287/96).

49 Act of 13 August 1915 no. 5.

account of their conduct during the proceedings. The most important provision is to be found in section 205 of the Courts of Justice Act, which empowers the court to fine a witness who fails to appear without lawful excuse, or fails to notify the court in due time that he will not appear, or leaves the court premises without permission. Section 213 provides that the court, in such cases, can fine the witness for contempt of court of its own motion, but the witness shall “as far as possible” have an opportunity to present his opinion. Fines for contempt of court are practical first and foremost where the witness fails to appear in court. In these cases, however, it is difficult to give the witness an opportunity to present his opinion before the fine is imposed. Although the witness summons contains information about the possibility of fining the witness if he fails to appear in court etc, the issue remains whether there is a violation of the witness’ right to a “fair trial” pursuant to ECHR Article 6 (1) if he is fined without being given the opportunity to present his opinion beforehand.

This issue was considered in Rt. 2003 page 804, where the Supreme Court held that the proceedings leading to a fine for contempt of court must be deemed to be a “criminal charge” so that Article 6 (1) applies. However, the Supreme Court found that although a sanction falls within the scope of this provision, the case law of the European Court, inter alia the judgment in *Öztürk v. Germany*⁵⁰ of 21 February 1984, shows that there is no general condition that the legal safeguards in Article 6 “are secured immediately and simultaneously, provided that the subsequent process secures the witness who has failed to appear a legal process that satisfies the necessary conditions” (paragraph 46). The Supreme Court concluded that the Norwegian provisions satisfied this condition. In particular, the Supreme Court recalled that the Courts of Justice Act section 215 empowers the court to reverse the decision if a petition for reversal is filed within two weeks and the court then finds that the fine was unjustified. The order in which the fine is imposed ought therefore to contain information to the witness on the possibility of reversal and his right to appeal against the decision.⁵¹

11 Freedom of Choice of Defence Counsel

ECHR Article 6 (3) c gives a person who is charged with a criminal offence the right to defend himself in person or through legal assistance “of his own choosing”. In Norwegian law, the freedom of choice of defence counsel is regulated in CPA section 102. Previously, this provision required the court to respect the charged person’s choice of defence counsel “unless this would lead to the case being considerably delayed or other circumstances make it inadvisable”. This provision often caused problems in listing criminal cases for trial because of the availability of the defence counsel chosen by the accused. Listing cases where several co-accused were to be tried together could be

50 Application no. 8544/79.

51 See also Rt. 2003 page 816 and Rt. 2003 page 1064 for other cases on fines for contempt of court and the relationship to the ECHR.

particularly difficult and potentially problematic with regard to the accused's right in Article 6 (1) to have the charge against him tried within a "reasonable time".

In order to improve the chance of bringing criminal cases to trial within a reasonable time after they have been filed with the court, the CPA was amended by Act of 28 June 2002 no. 55. CPA section 275 subsection 2 now reads as follow:

"The trial shall be held as soon as possible. Unless prevented by special circumstances, the trial shall start within six weeks after the case has been filed with the District Court and, where appropriate, within eight weeks after the appeal has been lodged with the Court of Appeal or referred to appeal, if the accused

- a) was below 18 years of age when the offence was committed, or
- b) is detained in custody when the case is set down for trial."

At the same time, CPA section 102 was amended. The relevant part of this provision now reads as follows:

"If the accused has requested a particular defence counsel, he or she shall be appointed. However, the court may appoint a different defence counsel if appointment of the defence counsel requested by the accused would lead to delay of any significance for the case, including exceeding the time-limit for holding the trial in section 275 subsection 2 second sentence."

The requirement of "considerable" delay was removed and special conditions were added for cases where the accused is detained in custody and for young offenders. In connection with the amendment, the legislator considered whether case practice on the provision could violate ECHR Article 6 (3) c, but concluded that it would not. The legislator referred in particular to the fact that the principal objective of the amendment was to secure the accused the right to choose an independent defence counsel. This principal objective would be satisfied if the accused was given the opportunity to choose between several qualified defence counsels.⁵²

Following this amendment, practice has become noticeably stricter in cases where the accused has chosen a defence counsel who is very busy and cannot attend a trial within an acceptable timeframe. The Appeals Selection Committee of the Supreme Court has on these grounds dismissed several interlocutory appeals in cases where the court has not accepted the accused's choice of defence counsel.⁵³ However, since mid 2004 the trend has moved slightly in favour of the accused.⁵⁴

52 See the discussion in Ot.prp. no. 66 (2001–2002) pages 67–74 and 132–133.

53 See Rt. 2003 page 420, Rt. 2003 page 1041, Rt. 2003 page 1499, Rt. 2003 page 1627, Rt. 2003 page 1869, Rt. 2004 page 950 (Supreme Court, dissent 4-1), Rt. 2004 page 1038, Rt. 2004 page 1200, Rt. 2005 page 74, Rt. 2005 page 355 and Rt. 2005 page 1212. See also Rt. 2003 page 1291 concerning appointment of counsel for the victim.

54 See Rt. 2004 page 1161, Rt. 2004 page 1175 and Rt. 2005 page 1010.