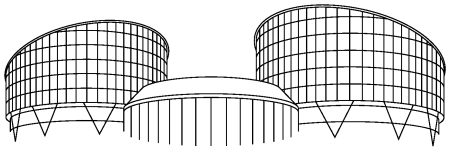

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KRISTIANSEN v. NORWAY

(Application no. 1176/10)

JUDGMENT

STRASBOURG

17 December 2015

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Kristiansen v. Norway,

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

Angelika Nußberger, *President,*
Khanlar Hajiyev,
Erik Møse,
André Potocki,
Yonko Grozev,
Síofra O'Leary,
Carlo Ranzoni, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 24 November 2015,

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

PROCEDURE

1. The case originated in an application (no. 1176/10) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Norwegian national, Mr Jørgen Kristiansen ("the applicant"), on 23 December 2009.

2. The applicant was represented by Mr K.M. Berg, a lawyer practising in Oslo. The Norwegian Government ("the Government") were represented by Mr M. Emberland of the Attorney General's Office (Civil Matters) as their agent, assisted by Mr H. Kolderup, Attorney.

3. The applicant alleged that in criminal proceedings leading to his conviction he had not been afforded a fair hearing by an impartial tribunal as required by Article 6 § 1 of the Convention.

4. On 17 July 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1984 and lives in Borgenhaugen.

A. Applicant's conviction

1. The City Court

6. On 18 September 2008 the Sarpsborg City Court (*tingrett*) convicted the applicant *inter alia* on a charge of attempted rape committed against Ms A during the night of 9 March 2008 in a car parked near a petrol station. At the time Ms A and the applicant had been seventeen and twenty-three years old, respectively. Together they had left a party at Mr C's home in order to buy mineral water at the petrol station. The applicant had borrowed the car from Mr D, Ms A's boyfriend. They had both attended a party at Mr C's home one week before but they did not know each other. The applicant and Ms A had been sitting in the car talking and listening to music for a while before they had decided to return to the party. As the car's battery was flat it would not start. The applicant had called a friend, Mr B, who worked as a taxi driver and who collected him and Ms A and brought them back to Mr C's home. The City Court did not find credible the applicant's explanation that he and Ms A had kissed and to a little extent touched one another voluntarily and that he had not forcibly attempted to rape her.

2. The High Court

7. By a judgment of 5 February 2009, the Borgarting High Court (*lagmannsrett*), hearing the applicant's appeal with a jury, convicted him on the attempted rape charge and sentenced him to one year's imprisonment on account of this (and a number of other offences of which he had been charged in the same proceedings). It ordered him to pay 60,000 Norwegian *kroner* (NOK) (approximately 7,500 euros at that time) in compensation to Ms A for non-pecuniary damage.

8. In its reasoning the High Court described in detail how the applicant, after he had called Mr B (who could not come straight away), had attempted to obtain sexual contact with Ms A by force. It stated that in the beginning, when the applicant had tried to kiss and touch her, Ms A had told him that she was not interested because she was the girlfriend of Mr D and slapped the applicant. The applicant had not stopped, but had moved himself over to her seat and held her arms behind the neck support. Ms A tried to defend herself and after a while the situation involved into a fight between them, in which she had been physically inferior and had to come to terms with the situation. The applicant had had such control over Ms A that he was also able to call Mr B again and the fact that Mr B was on his way had not hindered the applicant from continuing, until the moment when the lights from Mr B's car appeared.

9. The High Court also noted that Mr B had testified that he had not noticed anything conspicuous about Ms A; she had been cheerful and

friendly and her clothes had not been in disorder. However, this did not suggest, in the High Court's view, that she had not been exposed to sexual abuse causing a great burden on her. She had managed to pull herself together when Mr B had arrived. Her reaction had been expressed vis-à-vis others only when she and the applicant had returned to Mr C's home, where Ms A cried and was in great despair. Her boyfriend, Mr D, had understood that something was very wrong. After opening herself gradually to him, she had explained what had happened.

B. Motion for disqualification of juror

10. During a pause in the oral proceedings before the High Court, after both Ms A and the applicant had been heard, one of the jurors –"J" – had informed the presiding judge of the High Court about her previous contacts with Ms A. When the hearing resumed after the break, the presiding judge informed the public prosecutor, counsel for the defence and Ms A's assistant advocate (*bistandsadvokat*) about the matter. Counsel for the defence requested that J be disqualified from taking part in the further proceedings on grounds of lack of impartiality. Ms A's assistant advocate (*bistandsadvokat for offeret*) supported counsel's motion. The public prosecutor expressed understanding for the motion without taking a stance.

11. The applicant's contestation of J's impartiality was made with reference to section 108 of the Administration of Courts Act (*domstolloven* – see paragraph 23 below) and Article 6 § 1 of the Convention. According to the relevant court record, counsel for the defence had stated:

> "Counsel stated that he had been informed by the High Court's presiding judge and the other members of the court, that [J] [who was a member of the jury] had informed the presiding judge that she was the foster mother of a child who had been a pupil in the same school class as the victim, and that she had had contacts with the victim in connection with birthday celebrations at her home. [J] thought that she could recall knowing that the victim had participated in class outings which [J] had attended as a parent. The presiding judge had further informed counsel that [J] did not have any further personal knowledge of the victim, but she had a personal view [*bilde*] of her as a calm girl. Last time there had been any contact between the victim and [J] dated far back in time."

12. The High Court withdrew to deliberate on the issue and decided that J ought not to withdraw. It pointed out that a member might be disqualified if the person in question had particular reasons for identifying himself or herself with the victim or if there were any other circumstances to the effect that he or she had a prejudging attitude because of prior knowledge of the victim. However, that was not the situation in the present case. The High Court observed that "the jury member had formed a picture [*bilde*] of the victim from many years ago where she at the time had experienced her as a quiet and calm person". However, it could not see that this was capable of influencing J's attitude to the sustainability of the victim's explanation and

J's assessment of the question of guilt in the case. In particular the contact had been sporadic many years ago and the High Court did not find that such a contact was capable of influencing, in one way or another, the assessment in the criminal case. The High Court had special regard to the fact that the parties to the case had requested that J recuse herself, but it found the absence of partiality so clear in this case that this could not be decisive.

13. Consequently, juror J took part in the entire trial before the High Court, including the jury's deliberations and vote on the questions put to it by the presiding judge on the charge of attempted rape. After the jury had answered the questions in the affirmative and the professional judges had confirmed the jury's verdict, she took part, together with the other two jurors selected by drawing of lots, in the deliberations with the professional judges on the question of sentencing and award of compensation of non-pecuniary damage to the victim Ms A.

C. Procedural appeal to the Supreme Court

14. The applicant appealed against the High Court's procedure to the Supreme Court (*Høyesterett*), arguing that J's participation had been incompatible with section 108 of the Administration of Courts Act and Article 6 § 1 of the Convention.

15. By a judgment of 26 June 2009 the Supreme Court, by three votes to two, rejected the applicant's appeal.

16. The *majority* did not consider that J's knowledge of the victim from her attendance at birthday parties and class outings with the victim in itself indicated an identification with the victim or weakened in any other way the confidence in J's impartiality. It had involved sporadic contacts, not a personal knowledge, and the contacts dated several years back in time. Neither had counsel for the defence alleged before the Supreme Court that this was a sufficient ground for disqualification.

17. Nor could the mere fact that the juror in question had formed a picture of the victim disqualify her. When it was deemed acceptable that a juror may have some prior knowledge of a victim, it ought also to be accepted that the juror has formed a picture of the latter. Therefore, the question was whether the fact that the juror had stated this to the presiding judge and the matter had thereafter been repeated by the defence counsel in open court would bring the matter into a different light.

18. In the majority's view, a statement that one had a picture of a young woman one had previously met when she was younger, as a quiet and calm girl, could hardly be perceived as an expression of an assessment of the person's credibility or give the impression of identification with, or particular sympathies for, her. This was a neutral value judgment; an observation about the child's inconspicuous conduct. It could possibly be maintained that one could draw the conclusion that a calm girl would hardly

make a fuss without any justifications for doing so, which suggested that Ms A's crying and despair after she returned after the drive was a sign that she had actually been exposed to an attempted rape. However, there was no basis for such a conclusion and there was in any event no reason for attaching weight to such a possibility. J's information about Ms A had emerged after she had given evidence to the High Court for one hour. At that point, the jury, including J, had a good opportunity to form an independent and updated picture of the victim as a person. That defence counsel and the assistant advocate had requested that J withdraw could not be decisive. Accordingly, there were no particular circumstances capable of calling into doubt J's impartiality for the purposes of section 108 of the Administration of Courts Act, as interpreted in the light of Article 6 of the Convention.

19. The *minority* considered that the assessment of the impartiality issue ought to take as a starting point that the case concerned a serious and stigmatising accusation against the defendant. There was a lot at stake for the victim, as she could easily perceive a verdict acquitting the defendant to mean that the jury believed that she had made an unfounded and serious accusation against the defendant. The minority shared the majority's view (see paragraph 16 above) that previous contacts between the victim and J could not, of their own, disqualify the latter. What was decisive was whether J's statement made after she had heard the evidence given by the accused and the witness describing the latter as a "quiet and calm person" would lead to a different conclusion. In this regard, the minority took as a starting point that the credibility of the victim was the decisive evidence in this case. An additional factor of lesser importance was how the surrounding persons had perceived the victim's behaviour after the alleged rape attempt.

20. The timing of J's statement was of considerable importance. For the persons present in court it could seem conspicuous that the juror, after having heard both the accused and the victim's evidence, had not confined herself to informing about her previous contacts with A but had found it correct to add that she had experienced the victim as a "quiet and calm person". The timing of J's affirmation could easily have given the impression that J expressed a positive assessment of the victim.

21. Whilst a literal interpretation of "quiet and calm person" was not directly related to the credibility assessment, the affirmation was positively loaded and, when expressed just after the victim had given evidence, could at least easily have been perceived as if, according to J, one had to do with a person who would not make a fuss and thus would not make a false accusation about an attempt of rape. That J had expressed a view on how she had perceived her "at the time", was of secondary importance. This was a nuance that could easily be overlooked by a person overhearing her statement and which, having regard to the timing, could hardly be perceived as a reservation with regard to A's current character.

22. An important, albeit not decisive, consideration under section 108 of the Administration of Courts Act was also the fact that both counsel for the defence and the assistant advocate had demanded that J recuse herself. Under Article 6 § 1 of the Convention, "the standpoint of the accused [was] important but not decisive"; in this case the "fear" of lack of impartiality by the applicant had been "objectively justified" (see *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, *Reports of Judgments and Decisions* 1996-III).

II. RELEVANT DOMESTIC LAW

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

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

24. For further information on the general safeguards of the impartiality of jurors under the Code of Criminal proceedings, see *Ekeberg and Others v. Norway* (nos. 11106/04, 11108/04, 11116/04, 11311/04 and 13276/04, § 22, 31 July 2007).

THE LAW

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

25. The applicant complained under Article 6 § 1 of the Convention that due to J's participation at the High Court trial, and the Supreme Court's subsequent rejection of his appeal, he had not been afforded a fair hearing by an impartial tribunal. In so far as is relevant, this provision reads:

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

26. The Government contested that argument.

A. Admissibility

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

B. Merits

1. Submissions of the parties

(a) The applicant

28. In the applicant's view, the fact that juror J was the foster mother of a child who had been a pupil in the same school class as the victim, that the victim had attended birthdays in J's home, and that the victim had participated in class outings which J had attended as a parent showed that there had been contacts between J and the victim over years and that these had been related to positive events. The last contact between the two had dated a few years back in time. The nature and degree of the contacts as well as the contents and timing of J's statement on the matter gave legitimate reasons to doubt her impartiality. In this regard, the applicant mainly agreed with the Supreme Court minority. The question was not what the jury member had actually meant by the actual statement, but how it could reasonably be perceived by the defendant and other people present. As the minority emphasised, the timing of the statement was of considerable importance. It was not until after the victim and the accused had given their oral testimonies that J had taken the step to inform the presiding judge of her previous knowledge of the victim. She stated that she had formed a picture of Ms A from that time where she had experienced her as a "quiet and calm person".

29. The applicant agreed with the Supreme Court's minority regarding the perception of the view stated by J on the victim (see paragraph 20 above).

30. The applicant added that if his version of events were true (that the contact of sexual character had been voluntarily), it would mean that the victim had been unfaithful to her boyfriend. The timing of J's comment ("quiet and calm person") could easily be understood by those present as suggesting that the victim was someone who would not be unfaithful and that the applicant's version thus could not be true.

31. It was particularly important that not only counsel for the defence but also the assistant advocate representing the victim both feared that J lacked impartiality and that the assistant advocate supported counsel's motion for J's disqualification. It was equally important that the public prosecutor expressed understanding for the motion. Although she did not take a stance, the High Court noted her support for the motion. The fact that the professional parties – representing fundamentally opposing interests in the legal procedure – held a common view regarding J's lack of impartiality was clearly indicative of how J's opinion on the key witness was perceived by people present.

32. As pointed out by the Supreme Court minority, it was of substantial importance that the victim's credibility was the decisive evidence in the

case, as the victim and the applicant had been alone in a car when the attempted rape was supposed to have taken place. If she were found to be credible, the applicant would be found guilty. The fact that the victim's credibility was decisive, the information about J's previous contacts with the victim and her positively loaded statement given at a critical point, were factors that created a legitimate fear of lack of impartiality, from an objective observer's point of view.

33. Regard should also be had, as done by both factions of the Supreme Court, to the seriousness and the stigmatising character of the charge against the applicant. Furthermore, as held by the minority, a lot was at stake for the victim who could easily perceive an acquitting verdict as suggesting that she had made an unfounded and serious accusation against the defendant. Since J's child had been a class mate of the victim and the victim had been only seventeen years of age at the time, it was legitimate to fear that J would find it difficult to vote for acquittal, knowing the potential negative consequences this would have for the victim.

34. Also, as noted by the Supreme Court's minority, no reasons were given by the jury for its verdict on the question of guilt and the number of votes was not specified.

35. In the circumstances, the only safeguard which could have been offered by the High Court was to discharge J.

(b) The Government

36. The Government pointed out that, in assessing the key issue pertaining to J's prior knowledge and the statement she made to the High Court on the basis of that knowledge, both factions of the Supreme Court had found that J's prior knowledge of the witness did not in itself contribute to undermining her objective impartiality. Moreover, due regard ought to be had to the nature, not merely to the existence, of the acquaintance.

37. The Supreme Court had reiterated the High Court's ruling stating that "[t]he jury member had an impression of the victim many years ago and that she at the time found her to be a quiet and calm person". The Government emphasised that J had had no close personal acquaintance with the witness. J's foster daughter's acquaintance seemed hardly out of the ordinary for individuals being pupils in the same class. J had had no further knowledge of the witness than any other parent having a pupil in the same class as one's offspring. J's recollection of the girl had stemmed from several years back. The degree of familiarity, which was among the general principles in *Pullar v. the United Kingdom* (10 June 1996, § 38, *Reports of Judgments and Decisions* 1996-III) and which the Court had consistently relied on in subsequent cases, had by all means been lesser than that which had been in issue in that case.

38. The further question, whether the statement by J of her recollection of the witness could justify a different conclusion, should be answered in the negative for the following reasons.

39. Emphasis should be placed on the contents rather than on the degree of recollection, since any person would have a personal recollection of individuals with whom he or she had been acquainted, however remotely. As suggested by the Supreme Court's majority, J's statement could under no circumstance be construed as anything more than an affirmation that she recollected that the witness was an inconspicuous girl at the time of their acquaintance. The statement could not be perceived as an opinion about her credibility, which also the minority seemed to have accepted even if describing it as "positively charged". This was essentially a semantic issue. Whereas it may be common ground that negative connotations were absent, the presence of positive connotations, if any, was very limited and in no way manifest.

40. It was not known whether J had made the statement unsolicited or in response to a question in the conversation between her and the presiding judge before the latter called the representatives. In the latter event, there could be no cause for attributing such weight to the timing as done by the minority.

41. No distinction could be made between the impartiality of J on the one hand and that of the tribunal as such on the other hand. J had given her statement at a time when any subjective recollection from several years back in time would have been supplemented by her observations of the witness in court and by which time the other jurors would have formed their own impressions of the witness.

42. The Government invited the Court to have regard to alternative safeguards in lieu of discharging a juror for alleviating any doubts that one might have had in regard to impartiality. An illustration could be found in *Gregory v. the United Kingdom* (25 February 1997, § 48, *Reports of Judgments and Decisions* 1997-I), where the Court found no violation of the impartiality requirement in relation to a markedly graver statement in the course of the jury's deliberations, thus with a far greater potential impact on the outcome, and where the judge had summoned the jury and had reminded the jurors of their obligations without dismissing anyone. In contrast, J's statement had had very limited connotations, if any, and had been made at a different time. The *Gregory* judgment supported the proposition that the decision not to discharge J was in any event compliant with Article 6 § 1.

43. Whilst the Court does not seem to have taken the gravity of a charge into account in its application of the Article 6 impartiality requirement in its case-law (see, for instance, *Szypusz v. the United Kingdom*, no. 8400/07, §§ 82-90, 21 September 2010), not only the minority but also the majority of the Supreme Court had done so by applying a strict impartiality norm and the majority concluded that it had been observed.

44. The Government further pointed to the existence of a series of general procedural safeguards – which had been a relevant factor in *Pullar* (cited above, § 40), *Gregory* (cited above, § 44) and *Szypusz* (cited above, § 84) under Norwegian law, notably the strict requirements of subjective and objective impartiality in sections 106 to 108 of the Administration of Courts Act), the duty of the presiding judge to ensure that the juror candidates fulfil the requisites of impartiality (i.e. the practice of introducing the persons involved, including witnesses, to ensure that any recollection of previous acquaintances be discussed, sections 115 and 355) and to inform the jurors about their obligations to respect secrecy and their role in assessing the facts of the case (sections 359 and 360) (for further details see paragraphs 23 and 24 above). The High Court records indeed showed that the presiding judge had informed and consulted the jurors to ensure compliance with these provisions. Also, the presiding judge had discretionary powers to address procedural matters in the course of the proceedings, but a redirection to the jury, comparable to that made in *Gregory* (cited above, § 48), was not necessary in the present case.

45. Moreover, under Article 376A of the Code of Criminal Procedure it was possible for the professional judges to overturn a guilty verdict by the jury to the extent that insufficient evidence of guilt had been provided, for instance when the jury had based its verdict in whole or in part on irrelevant factual basis, such as prejudice or recollection.

46. Finally, the Government reiterated that, in accordance with the procedure laid down in section 118 of the Administration of Courts Act, the High Court had set out its view on the impartiality issue in a reasoned decision pronounced during the proceedings, offering transparency and a basis for lodging a procedural appeal with the Supreme Court. The applicant had availed himself of this possibility, but without success.

2. Assessment by the Court

(a) General principles

47. It is essentially the requirement of "impartiality" that is in issue in the present case (see *Langborger v. Sweden*, judgment of 22 June 1989, Series A no. 155, p. 16, § 32; and *Ekeberg and Others*, cited above, § 31). In determining this issue, the Court will have regard to the principles in its well established case-law, which apply to jurors as they do to professional judges and lay judges (see *Ekeberg and Others*, ibidem; *Holm v. Sweden*, judgment of 25 November 1993, Series A no. 279-A, p. 14, § 30, and *Pullar*, cited above, § 29). The existence of impartiality for the purposes of Article 6 § 1 of the Convention must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is by ascertaining whether the judge offered guarantees sufficient to exclude any

legitimate doubt in this respect (see *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII; and *Morice v. France* [GC], no. 29369/10, § 73, 23 April 2015).

48. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Ekeberg and Others*, cited above, § 32; and *Morice*, cited above, § 74).

49. Under the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Ekeberg and Others*, cited above, § 33; and *Morice*, cited above, § 76).

50. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings (*Micallef v. Malta* [GC], no. 17056/06, § 97, ECHR 2009). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar*, cited above, § 38; and *Morice*, cited above, § 77).

51. In this connection even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports* 1998-VIII; *Micallef*, cited above, § 98; and *Morice*, cited above, § 78).

(b) Application of those principles

52. Turning to the particular circumstances of the present case, the Court observes that J had had prior knowledge of Ms A and had uttered that she "had formed a picture [*bilde*] of the victim from many years ago where she at the time had experienced her as a quiet and calm person" (see paragraph 12 above). The minority of the Supreme Court agreed with the majority's view that previous contacts between the victim and J could not, on their own, disqualify the latter (see paragraphs 16 and 19 above). On this point the majority did not consider that J's knowledge of the victim from her attendance at birthday parties and class outings with the victim of itself indicated an identification with the victim or weakened in any other way the confidence in J's impartiality. It had involved sporadic contacts, not a personal knowledge, and the contacts had dated several years back in time. Neither had counsel for the defence alleged before the Supreme Court that this was a sufficient ground for disqualification (see paragraph 16 above). The Court sees no reason to hold otherwise.

53. More problematic is the fact that J depicted Ms A as being "a quiet and calm person". This was not, as it appears from her own words, merely a superficial impression but was "a picture" that she had "formed" on the basis of her "experience" of Ms A "at the time" (see paragraph 12 above). It has not been suggested that J's statement could be understood to mean that that "picture" had changed into something negative after having heard oral evidence from the applicant and Ms A. On the contrary, it is common ground between the parties that J's characterisation of A conveyed nothing negative, although the views differ as to its contents and significance for the assessment of the question of impartiality.

54. In this regard the Court notes the view of the Supreme Court's majority that J's statement could hardly be perceived as an expression of an assessment of the person's credibility or give the impression of identification with, or particular sympathies, for her. In the majority's view, this was a neutral value judgment, an observation about the child's inconspicuous conduct. It could possibly be maintained that one could draw the conclusion that a calm girl would hardly make a fuss without any justifications for doing so, which suggested that A's crying and despair after she returned after the drive was a sign that she had actually been exposed to an attempted rape. However, still according to the majority, there was no basis for such a conclusion and there was in any event no reason for attaching weight to such a possibility (see paragraph 18 above).

55. The minority considered that, although a literal interpretation of "quiet and calm person" was not directly related to the credibility assessment, the affirmation was positively loaded and, when expressed just after the victim had given evidence, could at least easily have been perceived as if, according to J, one had to do with a person who would not make a fuss and thus would not make a false accusation about an attempt of rape. That J had expressed a view on how she had perceived her "at the time", was of secondary importance. This was a nuance that could easily be overlooked by a person overhearing her statement and which, having regard to the timing, could hardly be perceived as a reservation with regard to A's current character (see paragraph 21 above).

56. The Court does not find it necessary to determine the exact meaning to be given to J's statement, which was somewhat vague and imprecise, but it agrees with the minority that the timing should be taken into account.

57. What matters in particular is that (unlike in *Pullar*, cited above, § 15) she uttered a value judgment (see *Gregory*, cited above, § 9, "jury showing racial overtones") reflecting a preconceived view on Ms A personal character. Although the contents of her statement and its significance for the question of impartiality were open to different assessments, it clearly was not negative (as in *Remli v. France*, 23 April 1996, § 11 (jury member: "I'm a racist", *Reports of Judgments and Decisions* 1996-II; *Gregory*, ibidem; and *Sander v. the United Kingdom*, no. 34129/96, § 26 (racist remarks and

jokes), ECHR 2000-V). It could reasonably be understood as having some sort of positive connotations in regard to Ms A, susceptible of having a bearing on J's evaluation and/or influencing that of other members of the jury to the defendant's disadvantage. This possibility was reinforced by the fact that J had expressed her value judgment at a time when it could be perceived as a comment or reaction to the oral evidence given by Ms A, on the one hand, and by the applicant, on the other hand. It is further significant that whether the High Court would rely on his version or on her version of the impugned event was decisive for the question of guilt.

58. In these circumstances, the Court considers that the applicant had a legitimate reason to fear that J might have had preconceived ideas capable of having a bearing on his innocence or guilt.

59. It is moreover relevant that not only did counsel for the defence request that J be disqualified on grounds of lack of impartiality, but also A's assistant advocate supported the motion and the public prosecutor expressed understanding for the motion, albeit without taking a stance (see paragraph 10 above). In the Court's view, whilst none of these objections and comments was by itself decisive, when considered together they did provide a strong indication of the importance of appearances in the present case.

60. However, despite the contents and timing of J's affirmation and her prior knowledge of Ms A and the objections or other comments to J's participation by the legal representatives on all sides, the High Court decided not to discharge her (compare *Ekeberg and Others*, cited above, §§ 45-49; and *Procedo Capital Corporation v. Norway*, no. 3338/05, §§ 64-72, 24 September 2009). As a result she continued to sit in the case without the matter being reverted to again, first as a member of the jury. There is no information, and it has not been argued, that the presiding judge sought to redirect the jury, for instance by impressing on the jurors to rely on evidence presented in court alone and that they must not allow any other factor to influence their decision (compare *Ekeberg and Others*, cited above, § 48; and *Gregory*, cited above, §§ 47-49). Thereafter, following the jury's affirmative answer to the rape charge (and other charges), J took part in the formation, composed of professional judges and jurors (drawn by lots), which determined the question of sentencing.

61. Having regard to the cumulative effect of the factors mentioned above – the content of the statement, its timing, the decisions not to discharge J or to redirect the jurors – there were justifiable grounds on which to doubt the High Court's impartiality, which shortcoming could not have been alleviated by any of the general safeguards pointed to by the Government.

Accordingly, the Court finds that there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. Article 41 of the Convention provides:

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

A. Damage

63. The applicant claimed 4,000 euros (EUR) in respect of non-pecuniary damage.

64. The Government maintained that in the absence of any documentary evidence, the applicant had failed to substantiate his claim.

65. It is not for the Court to speculate on whether the High Court would have reached a different conclusion had it been composed in a different manner. However, the Court sees no reason to doubt that the applicant felt distressed by the matter giving rise to a breach of Article 6 § 1 the Convention. Deciding on an equitable basis, it awards him the amount claimed.

B. Costs and expenses

66. The applicant also claimed 30,457.80 Norwegian *kroner* (NOK) (inclusive of value added tax – "V.A.T.") for the costs and expenses incurred for the work of his lawyer (25.25 hours at NOK 965 per hour, which rate is exclusive of V.A.T.) before the Court.

67. The Government pointed out that the claim had only been supported by a transcript of the law firm's internal billing system, but no invoices to show had it had actually been incurred.

68. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents, including vouchers, in its possession and the above criteria, the Court sees no reason to doubt that the claimed costs have actually been incurred. In the circumstances it finds reasonable to award the sum of EUR 2,500 for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 December 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdick
Registrar

Angelika Nußberger
President