

THE NORWEGIAN CRIMINAL CASES REVIEW COMMISSION

Annual Report 2009

The Norwegian Criminal Cases Review Commission is an independent body which is responsible for deciding whether convicted persons should have their cases retried in a different court.

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Annual Report 2009

The Norwegian Criminal Cases Review Commission (the Commission) is an independent body which is to determine whether convicted persons are to have their cases retried in a different court. The Commission's activities are regulated by chapter 27 of the Norwegian Criminal Procedure Act.

The composition of the Norwegian Criminal Cases Review Commission

The Commission consists of five permanent members and three alternate members. The chairperson, vice chairperson and one of the members must have law degrees. The King in Council appoints the chairperson for a period of seven years and the members for a period of three years.

During 2009, the terms of office of the following expired: Ann-Kristin Olsen, vice chairperson, Svein Magnussen, a member, and Øystein Mæland and Erling O. Lyngtveit, alternate members. The chairperson since the Commission was established, Janne Kristiansen, left to take up another position as from 10 November 2009.

District Court Judge Helen Sæter was appointed acting chairperson of the Commission as from 10 November 2009 until a new chairperson is appointed, although until 31 May 2010 at the latest. At the same time Gunnar K. Hagen, a lawyer, was appointed acting vice chairperson for the same period. During the absence of Department Director Ingrid Bergslid Salvesen, Assistant Professor Ellen K. Nyhus, one of the alternate members, was appointed as a member from 16 December 2009 until 28 February 2010. Court of Appeal Judge Vidar Stensland was appointed as an alternate member from 16 December 2009 until a new chairperson is appointed, although until 31 May 2010 at the latest.

The Commission was composed of the following as at 31 December 2009:

Acting Chairperson: Helen Sæter, Halden District Court judge

Acting Vice Chairperson: Gunnar K. Hagen, lawyer, Lillehammer

Members:

Bjørn Rishovd Rund, director of mental health at Asker and Bærum Hospital HF

Birger Arthur Stedal, Gulating Court of Appeal judge

Ingrid Bergslid Salvesen, head of the education department at the University of Tromsø (temporary absence since the end of 2009)

Ellen K. Nyhus, assistant professor at the University of Agder
(in Ingrid Bergslid Salvesen's absence)

Alternate members:

Benedict de Vibe, lawyer, Oslo

Vidar Stensland, Hålogaland Court of Appeal judge

The Norwegian Criminal Cases Review Commission's secretariat

The Commission's chairperson is employed full-time as the head of the secretariat. The secretariat otherwise has 11 employees - seven investigating officers with a legal background, two investigating officers with a police background, one office manager and one secretary.

The investigating officers have experience of working for law firms, the courts, the Ministry of Justice and the Police, the Parliamentary Ombudsman for Public Administration, the police, the Institute of Forensic Medicine, the Armed Forces and the Norwegian Inland Revenue Service.

The secretariat's premises are located in Teatergata 5 in Oslo.

Gender equality in the secretariat

As at 31 December 2009, the chairperson of the Commission and head of the secretariat is a woman. The 11 employees in the secretariat consist of seven women and four men, i.e., men make up 36% of the employees. The seven women include the administrative deputy head and office manager as well as the secretary. The rest of the secretariat employees are investigating officers. This means that the organisation's management positions are held by women.

All the employees are full-time employees, but two of the female employees have applied for and been granted a reduction to 80% of full-time work due to caring for children. The secretariat makes little use of overtime and normally does not have anti-social working hours.

Parental leave was taken by two female employees and one male employee during parts of 2009, and the female employees took longer parental leave than the male employee.

The Commission's sickness absence rate does not seem to be related to gender differences.

All the employees are urged to give notice of their interest in measures/courses to increase their expertise.

The above figures are small, so it is difficult to see whether there are large unintentional or unwanted differences between the sexes. Otherwise, it seems that female employees have a tendency to take slightly longer parental leave and apply for reduced working hours. However, the figures are small and only relate to 2009, so caution should be demonstrated about deducing too much from these. The differences cannot be seen to have led to differences in pay apart from that due to the part-time work.

Planned and implemented measures that promote equality on the basis of gender, ethnicity and impaired functional ability

No vacant jobs in the secretariat were advertised in 2009. If any vacancies are advertised, a diversity declaration will be included in the advertisement wording.

Applicants from under-represented groups will be called in for an interview, cf PM 2004-12.

The attitudes to and measures to combat discrimination, bullying and harassment are stated in the Commission's SHE plan.

The Commission's financial resources

Proposition to the Storting no. 1 (2008-2009) for the 2009 budget year contained a budget proposal of NOK 13 621 000. The Proposition states the following:

The grant to this item is to cover remuneration to the Commission's members, the salaries of the secretariat's staff and other operating expenses linked to the Commission's secretariat. The secretariat's staff consisted of 11 man-years as at 1 March 2008.

In connection with the follow-up of Official Norwegian Report (NOU) 2006:10 Fornærmede i straffeprosessen - nytt perspektiv og nye rettigheter (Victims in criminal proceedings – a new perspective and new rights), the grant was increased by NOK 0.25 million as from 1 July 2008 as a result of increased victims' rights in connection with any reopening of a criminal case. In connection with the all-year effect for 2009, it is proposed to increase the grant under chapter 468, item 01, by a further NOK 0.25 million.

The Commission has been allocated funds in accordance with the budget proposal.

In general about the Norwegian Criminal Cases Review Commission

The Commission is an independent body which is to ensure that the protection afforded by the law is safeguarded when dealing with petitions to reopen criminal cases. If the Commission decides to reopen

a judgment or court order, the case is to be referred for retrial before a court other than that which imposed the original conviction.

The Commission determines its own working procedures and cannot be instructed as to how to exercise its authority. Members of the Commission may not consider cases for which they are disqualified by reason of prejudice according to the provisions of the Courts of Justice Act. When a petition to reopen a criminal case is received, the Commission must objectively assess whether the conditions for reopening the case are present.

A convicted person may petition for the reopening of a criminal case on which a legally enforceable judgment has been pronounced if:

- There is new evidence or a new circumstance that seems likely to lead to an acquittal, the application of a more lenient penal provision or a substantially more lenient sanction.
- In a case against Norway, an international court or the UN Human Rights Committee has concluded that the decision on or hearing of the convicted person's case conflicts with a rule of international law, so that there are grounds for assuming that a retrial of the criminal case will lead to a different result.
- Someone who has had crucial dealings with the case (such as a judge, prosecutor, defence counsel, expert witness or court interpreter) has committed a criminal offence that may have affected the judgment to the detriment of the convicted person.
- A judge or jury member who dealt with the case was disqualified by reason of prejudice and there are reasons to assume that this may have affected the judgment.
- The Supreme Court has departed from a legal interpretation that it has previously adopted and on which the judgment is based.
- There are special circumstances that cast doubt on the correctness of the judgment and weighty considerations indicate that the question of the guilt of the defendant should be re-examined.

The rules governing the reopening of convictions are also applicable to court orders that dismiss a case or dismiss an appeal against a conviction. The same applies to decisions which do not allow an appeal against a conviction to be heard.

The Commission is obliged to give guidance to parties that ask to have their cases reopened.

The Norwegian Criminal Cases Review Commission ensures that the necessary review of the case's legal and factual aspects is carried out and may gather information in any way it sees fit. In most cases, direct contact and dialogue will be established with the convicted person. When there are special grounds for this, the party petitioning for a case to be reopened may have a legal representative appointed at public expense.

If a petition is not rejected and is examined further, the prosecuting authority is to be made aware of the petition and given an opportunity to submit comments. Any victim (or surviving next of kin of a victim) is to be told of the petition. Victims or surviving next of kin are entitled to examine documents and to state their views on the petition in writing, and they may ask to be allowed to make a statement to the Commission. The victim or surviving next of kin must be told of the outcome of the case once the Commission has reached its decision. The Commission may appoint a counsel for the victim/next of kin pursuant to the Norwegian Criminal Procedure Act's normal rules in so far as these are appropriate.

Petitions are decided on by the Commission. The Commission's chairperson/vice chairperson may reject petitions which, due to their nature, cannot lead to a case being reopened, which do not stipulate any grounds for reopening a case according to the law or which clearly cannot succeed.

Should the Commission decide that a case is to be reopened, the case is to be referred for retrial to a court of equal standing to that which imposed the judgment. If the conviction has been handed down by the Supreme Court, the case is to be retried by the Supreme Court.

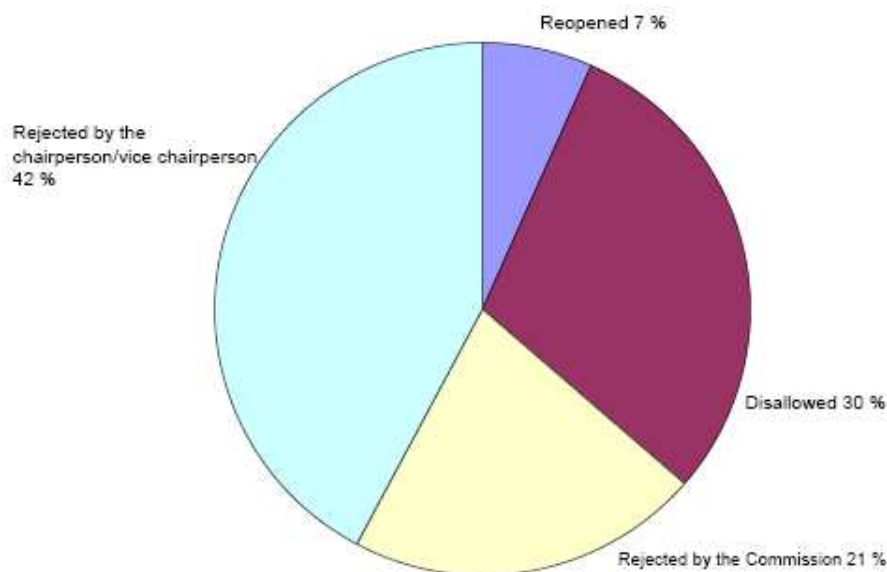
Cases and procedures

During the year, the Commission held nine meetings lasting for a total of 17 days. The Commission received 148 petitions to reopen cases in 2009, compared to 157 in 2008, 150 in 2007, 173 in 2006, 140 in 2005 and 232 in 2004. In 2009, a total of 153 cases were concluded, of which 137 were reviewed on their merits. Of these 137 petitions, nine cases were reopened while 41 petitions were disallowed. The remaining 87 petitions were rejected by the Commission or the chairperson/vice chairperson because they could clearly not succeed. All nine decisions to reopen cases were unanimous. The Commission disagreed on five of the 41 petitions that were disallowed. The decisions to reject the petitions were unanimous.

The other 16 cases that were concluded were dismissed on formal grounds because they did not fall within the Commission's mandate. These were, for example, petitions to reopen administrative decisions, penalties/fines that had been agreed to or investigations into discontinued prosecutions. In addition, some petitions were submitted by persons that are not permitted by law to submit such petitions (such as victims or the surviving next of kin of victims) or were withdrawn for various reasons. A complete overview of the number of petitions received and cases concluded in 2009 is shown in the table:

	Received	Concluded	Reopened	Disallowed	Rejected by the Commission	Rejected by the chairperson/vice chairperson	Dismissed	misc/request for info
General	7	4						4
Sexual offences	2	13		4	3	4		2
Indecent assault	18	8	1	2	1	4		
Indecent assault on minors	9	1				1		
Violence, threats	3	30	2	6	3	19		
Threats	7	3			3			
Violence	21	11		3	2	5		1
Murder	7	1		1				
Drugs	18	25	2	12	4	6		1
Crimes of gain	4	20	1	8	5	5		1
Theft and embezzlement	6	4			1	2		1
Fraud, breach of trust, corruption	18	9	3	1	3	2		
Miscellaneous crimes	5	7		1	2	3		1
The Alcohol Act	1							
Miscellaneous misdemeanours	4	8		2	1	5		
The Road Traffic Act	14	4		1	1	2		
Discontinued prosecutions	2	2						2
Temporary rulings								
Seizure or extinguishment								
Inquiries	1	2						2
Fines								
Sivile saker	1							
Other, regarding professional cases		1						1
Total	148	153	9	41	29	58		16

The figure below shows the outcome of the cases heard on their merits in 2009:

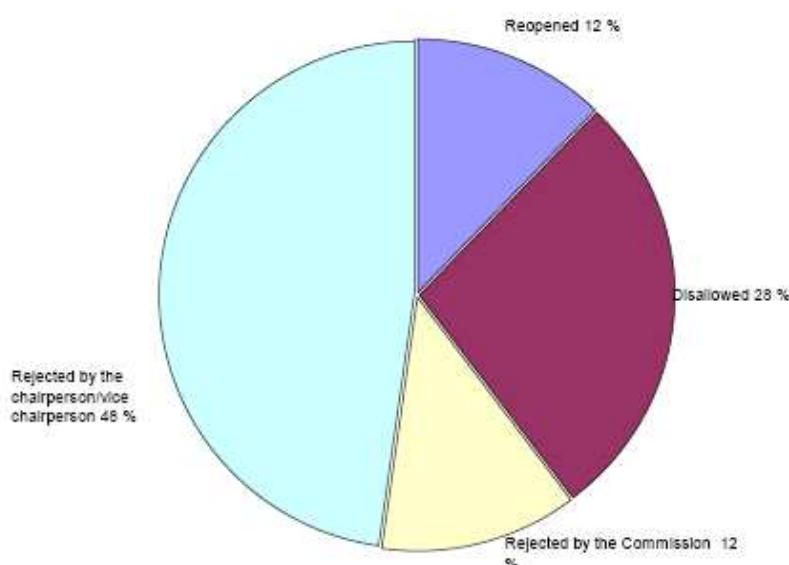


Since it was established on 1 January 2004, the Commission has received a total of 1,000 petitions and 885 of these cases have been concluded. A total of 88 cases have been reopened and 202 have been disallowed. 438 of the cases have been rejected by the Commission or chairperson/vice chairperson because they could clearly not succeed, while the remainder, 157 cases, have been dismissed on formal grounds

The table showing the total figures for the Commission's first six years of operation is thus as follows:

	Received	Concluded	Reopened	Disallowed	Rejected by the Commission	Rejected by the chairperson/vice chairperson	Dismissed on formal grounds
General	18	15				2	13
Sexual offences	171	151	15	44	16	68	8
Violence, threats	266	236	24	66	25	103	18
Drugs	120	105	14	27	11	47	6
Crimes of gain	170	147	23	40	19	52	13
Miscellaneous crimes	58	50	6	10	8	20	6
Miscellaneous misdemeanours	110	95	6	15	10	54	10
Discontinued prosecutions	13	12					12
Temporary rulings	1	1					1
Seizure or mortification	1	1				1	
Inquiries	31	31			1		30
Fines	6	6					6
Civil actions	31	31				1	30
Other concerning professional cases	4	4					4
Total	1000	885	88	202	90	348	157

The figure below shows the outcome of the cases heard on their merits during the 2004-2009 period:

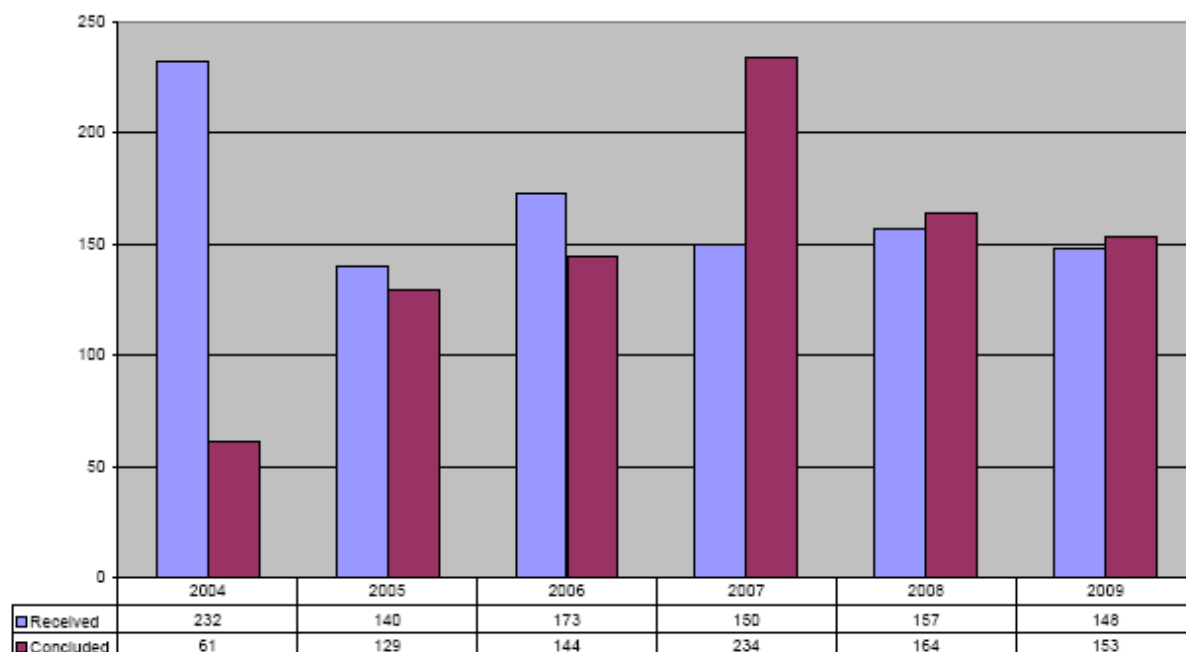


As mentioned above, the Commission may reject petitions that clearly cannot succeed. This decision may also be reached by the Commission's chairperson or vice chairperson. A slightly smaller percentage of the petitions were rejected by the chairperson/vice chairperson in 2009 than in previous years. The reason for the chairperson/vice chairperson being able to reject petitions is primarily that the Commission receives many petitions to reopen cases which are in reality simply "appeals". Therefore, in order to utilise the Commission's total resources in the best possible way to deal with cases that require further investigation, it is sometimes necessary for the chairperson and vice chairperson to exercise their authority to reject petitions that obviously cannot succeed.

The number of cases during the first six years has been greater than was expected when the Commission was established. The number of petitions to reopen cases is still higher than that presumed by the legislature but seems to have stabilised. The Commission has control over the backlog of cases but still aims to reduce the time taken to process cases. The Commission has an independent duty to investigate, which sometimes requires a lot of work to be carried out in extensive cases. This work utilises a lot of resources but is also one of the main reasons for the creation of the Commission and is thus an important task. Several of the cases being dealt with by the Commission must be expected to still require a lot of investigatory work.

In order to ensure that cases are dealt with efficiently, the Commission has determined tentative deadlines for each part of the procedure. However, large cases will still take more time than these deadlines allow, and the deadlines must under no circumstances have a negative effect on the quality of the Commission's work.

Petitions received and cases concluded 2004–2009:



Appointment of defence counsels

The law allows the Commission to appoint defence counsels for convicted persons when there are special grounds for doing so. A specific assessment of whether a defence counsel is to be appointed is conducted in each case. In practice, the Commission appoints a defence counsel when there is reason to assume that the convicted person may be unfit to plead. Otherwise, a defence counsel has been appointed in especially comprehensive or complicated cases or if the convicted person lives in a remote location so that providing satisfactory guidance to the convicted person would utilise a lot of the secretariat's resources.

The appointment is in most cases limited to a specific number of hours, for example to provide a more detailed explanation of the petition's legal and factual basis. Such a ceiling has also been set for large or complicated cases, but this can be reassessed as required. In 2009, the Commission appointed a defence counsel in 38 cases, while a defence counsel was appointed in 26 cases in 2008. Some of these cases concerned petitions where doubt was raised as to whether the convicted person was responsible for his/her acts when the matter that has been adjudicated on took place, so that a defence counsel must be appointed pursuant to section 397, second subsection of the Criminal Procedure Act, cf section 96, last subsection.

Appointment of counsel for the victim/next of kin – the rights of the victim and victim's surviving next of kin

As from 1 July 2006, the Commission has been authorised to appoint a counsel for a victim/next of kin pursuant to the rules stated in section 107, et seq, of the Criminal Procedure Act. This has been particularly relevant in connection with interviewing victims in cases of indecent assault/sexual abuse.

In 2008, the Criminal Procedure Act was amended to strengthen the victim's and surviving next of kin's positions in criminal cases. These amendments mean, among other things, that the victim or surviving

next of kin have a better opportunity to be heard, receive more information and are entitled to counsel to a greater extent than before. The Commission appointed a counsel for the victim/surviving next of kin in four cases in 2009, while such a counsel was appointed in eight cases in 2008. The amendment, which came into force on 1 July 2008, has thus so far not led to any increase in the number of counsels being appointed for victims/surviving next of kin.

Appointment of expert witnesses

Pursuant to section 398 b, second subsection of the Criminal Procedure Act, the Commission is authorised to appoint expert witnesses in accordance with the rules stated in chapter 11. Since its formation, the Commission has appointed expert witnesses in the fields of forensic medicine, forensic psychiatry, forensic toxicology, photogrammetry, finance, fire technicalities, vehicle knowledge and traditional forensic science, etc. Expert witness statements are obtained from both Norwegian and foreign specialist environments. In 2009, the Commission appointed expert witnesses in 11 cases. These were in the fields of forensic medicine, forensic psychiatry, auditing and history.

Denials of leave to appeal

In 2009, the Commission had to decide on fundamental legal issues in connection with petitions it received to reopen cases regarding denial of leave to appeal. These are cases where the Court of Appeal has unanimously decided, on the basis of the written material in the case, to disallow appeals to be referred for a new, full main hearing with reference to the fact that the court "finds it clear that the appeal will not succeed". No individual reason based on the facts of the case has been given for why the appeal would not succeed, but such a procedure has been regarded as being in accordance with section 321, fifth subsection of the Criminal Procedure Act, which stipulates that this decision is to be made as a court decision. Unlike court orders, there is no duty to state the reasons for court decisions, cf section 53, first subsection of the Criminal Procedure Act which refers to section 52, second subsection but not to the duty to state reasons stipulated in section 52, first subsection.

Following a decision of the UN Human Rights Committee in a case against Norway (the Restaurateur case), the Norwegian Supreme Court has in three grand chamber decisions decided that individual reasons are to be stated for decisions which denies appeals to be referred for a new, full main hearing. This requirement has led to the Courts of Appeal now giving reasons for these decisions. It has also been proposed that amendments are to be made to the Norwegian statutory rules regarding the statement of a reason for such decisions.

Following the three grand chamber decisions, the Commission received several petitions to reopen decisions regarding denial of leave to appeal that had been made *before* the grand chamber decisions and for which no individual reason had been stated. The Commission had to decide whether the Criminal Procedure Act's rules concerning reopening provided authority for allowing one or more or perhaps all of these petitions, and if so whether these decisions should be reopened.

Since these were fundamental issues that had to be clarified and the facts in the cases were rather different and thus shed light on these issues from different sides, the Commission chose to deal with several cases together, as so-called pilot cases. None of these petitions led to a reopening on a general basis. The cases do, however, contain fundamental discussions so a summary of one of these decisions is provided below. This decision is in its entirety published on the Commission's website, www.gjenopptakelse.no. However, the decision was brought before the District Court according to the rules concerning the opportunity to have an administrative decision reviewed by the courts.

The Commission's other activities

Contact with other authorities and organisations, etc

The Commission's chairperson has informed the Minister of Justice and the Police about the Commission's activities every six months. The chairperson has also had contact with the Ministry of Justice and the Police's administrative management and has attended the Minister's annual conference for heads of government departments. The chairperson has also had a meeting with the Director General of Public Prosecutions to discuss general issues between the Commission and prosecuting authority relating to the treatment of petitions to reopen criminal cases.

In March 2009, the Commission's chairperson and representatives of the secretariat had a meeting with the Method Control Committee's chairperson and secretariat. The Commission underlined the necessity of having regulations that safeguard the storage of evidence with regard to any later petition to reopen a case. The Commission later sent its views in writing to the Committee. The Method Control Committee submitted its report to the Ministry of Justice and the Police on 6 June 2009 (Official Norwegian Report (NOU) 2009:15 *Skjult informasjon – åpen kontroll* (Hidden information – open control)).

In April 2009, the Commission's chairperson and representatives of the secretariat met with Professor Ragnhild Hennum PhD and Dr Jane Dullum, a researcher at the Law Faculty of Oslo University. The reason for this was that the Ministry of Justice and the Police issued a report entitled *Forskning og forskningsbehov i lys av Fritz Moen-sakene* (Research and Research Needs in light of the Fritz Moen cases). One of the report's proposals was to analyse cases that had been reviewed by the Commission, and Hennum and Dullum had been given this assignment. The research project basically aimed to map cases that the Commission had reviewed on their merits in order to look for possible patterns in the types of cases, information on those that had petitioned for a reopening (gender, age, etc), the background to the case, documentation and outcome. It was also relevant to take a closer look at factors linked to interpreting in the courtroom, interview situations and the role of expert witnesses. The research project submitted its report to the Ministry of Justice and the Police in December 2009.

Comments on consultation documents

In 2009, the Commission responded to the invitation sent out by the Ministry of Justice and the Police on 18 June 2009 to comment on proposed permanent rules concerning live link meetings and live link questioning in criminal cases and to the invitation sent out by the Ministry on 5 August 2009 to comment on changes to the rules concerning the justification of decisions to refuse to allow appeals to be heard.

The Commission also responded to the invitation sent out by the National Courts Administration on 9 October 2009 to comment on sound and picture recordings of the testimony of parties and witnesses in court.

International work

The collaboration with the criminal cases review commissions in England and Scotland has continued and in April 2009 the Commission participated in the ceremony to celebrate the 10th anniversary of the creation of the Scottish commission, SCCRC, in Glasgow. In addition to a wide ranging professional seminar, the English, Scottish and Norwegian commissions held a meeting. Representatives of the secretariat had a meeting with the Scottish commission's secretariat and were shown around and exchanged views.

Information activities

In 2009, the Commission started the work of renewing its website. The objective of this work is to make the website more reader-friendly and to improve access to information on the Commission and its operations. The aim is to complete this work during the first half of 2010.

The Commission's chairperson and representatives of the secretariat had a meeting with the Lovdata foundation in November 2009 with the aim of publishing the Commission's decisions in Lovdata's

database. As from 2010, all the Commission's decisions will be published in Lovdata. This applies both to decisions made by the Commission and decisions made by the Commission's chairperson or vice chairperson pursuant to section 397, third subsection, third sentence of the Criminal Procedure Act. Over time, all older decisions (2004-2009) will also be incorporated in the database. A summary will be written and search words will be entered for each decision, so that the Commission's decisions will be easily accessible.

The Commission has previously prepared an information brochure (fact sheet) for convicted persons, providing brief information on the Commission and its activities, and on the conditions which must be met in order to have a legally enforceable conviction reopened. A separate fact sheet has also been prepared for victims/the surviving next of kin of victims, containing information on the rights these have in connection with a case that it has been petitioned to have reopened. These fact sheets, which are also published on the Commission's website, have previously been available in the two types of Norwegian and in English. In 2009, the fact sheets were also translated into Sami, Albanian, Arabic, French, Chinese, Polish, Romanian, Serbo-Croatian, Spanish, German, Urdu and Vietnamese. These will be published on the website in 2010.

Internal factors

Work has started to prepare an electronic experience archive for the Commission's internal use. The objective has been to ensure better experience transfer in the Commission and to make it easier to ensure a uniform practice.

Relevant decisions

In this chapter, abbreviated versions are given of all the cases that the Commission has referred for a retrial. However, cases that have been referred solely because it has later proven that the convicted person may have been unfit to plead when the offence of which he/she has been convicted took place are not stated here. The reason for this is that these cases do not normally raise any issues of a legal or fundamental nature and are therefore of little general interest. Cases that have not been referred for a retrial are also stated in this chapter if they have been of major public interest. In 2009, this applied to the decision on one of the cases regarding denial of leave to appeal (a pilot case), refer to case no. 3 below.

The abbreviated versions are also published on the Commission's website, www.gjenopptakelse.no.

1. 29.01.2009 (2007 00096) Threats – section 391 no. 3 (new witness)

A 35-year-old man was sentenced to imprisonment for 30 days in 2003 for having aided and abetted in threats over the telephone in connection with a dispute regarding a debt owed by the victim.

A petition to reopen the case had been submitted to the Commission once before but did not succeed.

A new petition was submitted in August 2007. The Commission conducted a new review of the case.

On 16 February 2002, the convicted person called the victim to hear if the victim intended to pay a debt the victim owed in connection with work that the convicted person had carried out for the victim. The victim was at a party and they agreed to talk a few days later. Shortly after the call, a message was left on the victim's mobile phone answering service stating that the convicted person's claim had been sold to a debt collection agency, and threats were made to "break arms and legs" and that the convicted person would "call at regular intervals in the future". The threat was made from an undisclosed number and it was clear that it was not the convicted person who was talking.

No evidence was presented in court to show who had left the message on the victim's mobile phone answering service. The District Court found that there was only a theoretical chance that the threat had been made without the convicted person's assistance.

The new circumstances that were pleaded to the Commission were the same as in the first petition. These were that a third party had made a declaration acknowledging that it was he who had called the victim from his telephone with an undisclosed number. He had made the call without the convicted person's knowledge. This party was not called as a witness during the main hearing. The Commission was asked to review the case once again.

After receiving the first petition, the Commission had questioned the convicted person and the person who claimed to have left the message. The Commission had also talked to the victim.

Following a new review of the case, the Commission found that, under doubt, the declaration from this third party seemed likely to lead to an acquittal, and that the conditions for reopening the case pursuant to section 391 no. 3 of the Criminal Procedure Act had been met. The Commission placed emphasis on the fact that the new explanation meant that there was no longer only a theoretical possibility that the convicted person did not know about the threat. Emphasis was also placed on the fact that no good reasons could be found for the third party wishing to incur criminal liability.

The Commission unanimously decided to allow the petition for a reopening of the case.

Following this, the District Court acquitted the convicted person.

2. 20.08.2009 (2008 00102) Organised crime – section 391 no. 3 (new circumstance or new evidence)

Together with five other accused, a 49-year-old man was convicted by the District Court in 2006 of importing and selling considerable quantities of beer. All six were convicted of contravening section 60a of the General Civil Penal Code – of having acted in an organised criminal group.

The convicted person lodged a limited appeal with the Court of Appeal, but he did not appeal against the assessment of evidence regarding the question of guilt. The other convicted persons appealed against the assessment of evidence regarding the question of guilt, among other things. The convicted person's trial thus became different to those of the other five convicted persons.

The Court of Appeal referred the convicted person's appeal to an appeal hearing. The Court of Appeal decided that no part of the appeal could succeed and dismissed the appeal. The Court of Appeal's judgment was appealed against to the Supreme Court, but the Appeals Selection Committee of the Supreme Court decided not to allow the appeal to be heard. The convicted person later petitioned for a reversal of the Appeals Selection Committee's decision, but this petition was disallowed.

After the court proceedings for the other five, the result for these persons was that section 60a of the General Civil Penal Code was not applicable.

The Commission found that the convicted person was thus the only one of the group with a conviction pursuant to section 60a of the General Civil Penal Code. This was a factor that had not been pleaded as a ground for an appeal against the evidence on his part, and could also not have been pleaded on the date when his appeal was lodged. In the Commission's view, this represented a "new circumstance" pursuant to section 391 no. 3 of the Criminal Procedure Act. It was therefore not necessary to examine in further detail what the Appeals Selection Committee of the Supreme Court had at a later date found to be any weaknesses in the application of the law. It was commented in general that in any case the Supreme Court does not specifically decide on the assessment of evidence regarding the question of guilt.

The question for the Commission was thus whether such a new circumstance "seems likely to lead to an acquittal or dismissal or to the application of a more lenient penal provision or a substantially more lenient sanction". The Commission commented that section 60a of the General Civil Penal Code – concerning organised criminal groups – is to be dealt with as part of the question of guilt, and pointed out that the convicted person was the only one in the case who was left as a convicted person pursuant to the provision. In the Commission's view, there was a reasonable possibility that the convicted person would have been acquitted of contravening section 60a of the General Civil Code if the final outcome of

the cases against his co-defendants had been known when his case was adjudicated on. The case was therefore reopened pursuant to section 391 no. 3 of the Criminal Procedure Act in relation to his conviction pursuant to section 60a of the General Civil Penal Code.

The Commission decided unanimously to allow the petition for a reopening of the case.

Following this, the District Court handed down a judgment without a main hearing. The convicted person was acquitted in relation to the indictment's items II, IV and VI as regards contravening section 60a of the General Civil Penal Code, but was otherwise convicted in accordance with the counts in the indictment. He was given a suspended sentence of nine months' imprisonment, with a probation period of two years.

3. 20.08.2009 (2008 0070) A refusal to hear an appeal, fraud – section 392, first subsection

A man was sentenced to imprisonment for six years and to pay damages of NOK 19 million for gross fraud and for having obstructed the administration of justice. The Court of Appeal refused to allow an appeal against the District Court conviction to be heard in relation to the gross fraud, stating that the appeal would clearly not succeed, cf section 321, second subsection of the Criminal Procedure Act. The petition to reopen the case was submitted on the basis of a decision of the UN Human Rights Committee on 17 July 2008 and a decision of the Supreme Court's grand chamber on 19 December 2008, which had stated that decisions regarding denials of leave to appeal, based on no other reason than simply a reference to the Act's requirements (that the appeal would clearly not succeed) were in contravention of the UN Convention on Civil and Political Rights, article 14, no. 5. It was alleged that an individual reason should have been stated for the Court of Appeal's decision and that this procedural error provided grounds for reopening the case.

The Commission started off by making some comments relating to section 391 no. 2 of the Criminal Procedure Act. According to this provision, petition may be submitted for a case to be reopened when an international court or the UN Human Rights Committee has in a case against Norway found that "the decision conflicts with a rule of international law that is binding on Norway, and it must be assumed that a new hearing should lead to a different decision, or the procedure on which the decision is based conflicts with a rule of international law that is binding on Norway if there is reason to assume that the procedural error may have influenced the substance of the decision and that a reopening of the case is necessary in order to remedy the harm that the error has caused." However, the Commission stated that, based on statements in the preparatory works and Supreme Court case law, the provision is only applicable when it is the party that has appealed to and had his/her views accepted by the international body who later petitions for the case to be reopened. Since the convicted person who petitioned for his case to be reopened here was not a party to the invoked decision of the UN Human Rights Committee, section 391 no. 2 of the Criminal Procedure Act was not applicable.

The Commission then discussed whether section 392, first subsection of the Criminal Procedure Act was applicable. Here the Commission was divided into a majority and a minority. The minority, which consisted of one member, found that the provision was not applicable and referred to the Supreme Court decision in Rt 1994, p. 278, which has been interpreted in legal theory as stating that a changed interpretation of procedural factors is not likely to be covered by section 392, first subsection, cf Bjerke and Keiserud's book *Straffeprosessloven kommentarutgave* (The Criminal Procedure Act's commentary edition) (3rd edition), p. 1232. The minority also referred to Andenæs's book *Norsk Straffeprosess* (Norwegian Criminal Procedure) (Oslo 2008), which states the following on p. 579 regarding the interpretation of section 392, first subsection: "The prerequisite is naturally that the Supreme Court's new interpretation of the law would have led to an acquittal or at least to a more favourable result for the person charged than the previous one." The minority therefore recommended that the petition be rejected.

However, the Commission's majority found that section 392, first subsection basically had to be applicable. The majority referred to Rt 2003, p. 359, where the Supreme Court applied the provision to a matter that, in the majority's opinion, had to be regarded as being at least mainly procedural, namely the

question of the procedural opportunity to prosecute a person who had already been ordered to pay a tax penalty for the same matter. In the majority's view, this indicated that the provision could be applied to a changed interpretation of procedural factors. The majority found that this was further supported by the fact that the Supreme Court's Appeals Selection Committee's decision in Rt 2009, p. 62, stated that reopening a case is the correct legal remedy when the Court of Appeal has refused to allow an appeal to be heard and this decision is final and enforceable. The Appeals Selection Committee stated in this decision that it would be section 392, first subsection of the Criminal Procedure Act, that could provide grounds for reopening a case. The Commission's majority found that the law had developed since the decision referred to in Rt 1994, p. 278.

The Commission's majority thereafter discussed whether there were sufficient grounds for reopening the case. The majority referred to the fact that a case "may" be ordered to be reopened pursuant to section 392, first subsection, which means that there is no unconditional right to have a case reopened when the conditions stated in the provision are otherwise met. According to the preparatory works, the crucial factor will be whether it would be offensive if the conviction remained in force, cf p. 343 of the Criminal Procedure Act Committee's recommendation (1969). The majority found that the crucial issue in the case would be if it could be regarded as offensive that the Court of Appeal's decision to refuse to allow the appeal to be heard, without stating any reason for this other than that the appeal would clearly not succeed, remained in force, cf section 401 of the Criminal Procedure Act, cf section 321, second subsection.

The Commission's majority referred to the considerations the Supreme Court had stated in the decision in Rt 2003, p. 359, including the considerations of predictability, arrangements and the courts' efficiency and law-making activities, and that the Supreme Court had in this plenary session decision placed crucial weight on the dynamic nature of international law, and found that the decision was a result of such a development in the law. The majority found that these factors were also relevant in this case and that the Human Rights Committee's decision of 17 July 2008 in the *Restaurateur* case and the Supreme Court's plenary session ruling on 19 December 2008 seemed to be the results of a dynamic development in the law according to which the more detailed interpretation of article 14 no. 5 of the UN Convention on Civil and Political Rights had changed over time. The Commission also referred to the fact that article 14 no. 5 of the Convention did not itself state anything about reasons having to be given but that the Committee had in several decisions interpreted into article 14 no. 5 a requirement that the convicted person was entitled to be given a written statement of the reasons within a reasonable time in order to ensure an effective review of the conviction. However, these decisions could not be compared without further ado with the case that the Commission was dealing with. The dissenting judge's opinion in the *Restaurateur* case also made it clear that it was not until the *Restaurateur* case that the Committee had stated clearly that an individual reason should, as a general rule, be given for the appeals body's decisions. The Commission's majority found that it was not until the Human Rights Committee's decision of 17 July 2008 that it was stated that the right to review stated in article 14 no. 5 included a requirement of a reason in order to be sure that the Appeals Selection Committee of the Supreme Court had conducted a real review of the appeal.

The majority found no evidence that – as alleged by the convicted person – the Norwegian authorities knew, when they repealed the provisos relating to article 14 no. 5 when the two-body reform entered into force on 1 August 1995, that decisions regarding denial of leave to appeal for which no reasons were given could come into conflict with this provision. Reference was made to the reservations stated by the Two-body Committee in Official Norwegian Report (NOU) 1992:28, including Erik Møse's annex to this report, and to Proposition to the Odelsting no. 78 (1992-93), which showed that the Ministry of Justice stated to the Norwegian parliament that it found it justifiable to assume that the proposed system regarding denials of leave to appeal, was in accordance with the UN Convention's requirements.

The Commission's majority then referred to Rt 2009, p. 252, where the Supreme Court states:

“The interpretation of the Convention on Civil and Political Rights is developing over time. Factors which are today regarded as breaches of the Convention do not therefore have to have been breaches earlier on. In this case, however, I find it clear that the Court of Appeal’s lack of a reason – even though it complied with the accepted practice in Norway - entailed a breach of the Convention on the date when the decision was made.

I have accordingly decided that the fact that the Court of Appeal did not provide a reason for its decision of 22 October 2007 to refuse the appeal to be heard was a procedural error.”

In the majority’s opinion, this meant that a requirement that a reason had to be given applied before 22 October 2007. In the Restaurateur case, the Court of Appeal made its decision on 1 June 2006. On 17 July 2008, the Human Rights Committee found that this decision contravened the Convention on Civil and Political Rights, article 14 no. 5, so that a requirement that a reason must be given had to be regarded as existing on this date. In the convicted person’s case, the Court of Appeal handed down its decision on 26 February 2007. The Commission’s majority stated that it did not know of other decisions by the Committee that shed light on when the requirement that a reason had to be stated for decisions to disallow appeal could be regarded as forming part of article 14 no. 5 of the Convention on Civil and Political Rights. However, the majority did not find it necessary to have any opinion on from what date before the plenary session decision on 19 December 2008 there was any general requirement that individual reasons were to be stated for the Court of Appeal’s decisions to disallow appeal.

The majority referred to the fact that, in the plenary session decision on 19 December 2008, the Supreme Court had departed from the interpretation of the Act that had previously formed the basis for no reason generally being given for decisions to disallow appeal pursuant to section 321, second subsection of the Criminal Procedure Act, apart from a reference to the statutory wording. As regards the question of whether the Court of Appeal’s decision in the case being reviewed by the Commission should be reopened, the majority referred to the considerations that the Supreme Court had referred to in Rt 2003, p. 359, namely predictability, arrangements, the legal force of judgments and the efficiency of the courts. The fact that an extensive retroactive effect for final and enforceable judgments too might impede the development of the law and the court’s law-creating activities was also referred to. The majority stated that the same considerations with the same weight were against a reopening of the many decisions to disallow appeal handed down pursuant to section 321, second subsection of the Criminal Procedure Act for which no reason had been given. The result of the discussions was that the Commission’s majority found that decisions to disallow appeal for which no reason had been given could not in themselves provide a general opportunity to reopen a case, but that a specific assessment of whether there were ground for reopening had to be conducted in each case, and that the crucial factor will be whether it can be regarded as offensive if the Court of Appeal’s decision remains in effect. There were therefore no grounds for reopening this case pursuant to section 392, first subsection of the Criminal Procedure Act.

4. 04.11.2009 (2009 0040) Narcotics – section 391 no. 3 (new circumstances)

Six men were convicted in 2005 for importing a large consignment of a narcotic substance and later storing, acquiring and selling this substance. After the District Court had convicted them, new information was revealed concerning contact between one of the convicted men and the police during the investigation, and the question arose of whether there had been provocation by the police that was important to the issue of guilt. Based on this, the prosecuting authority appealed against the conviction in favour of all the convicted persons. The Court of Appeal set aside the District Court’s conviction and, in a new trial in 2007, the District Court found there were no factors that could be regarded as illegal police provocation. One of the defendants was acquitted on other grounds.

Following an appeal by the convicted men, the case was heard by the Court of Appeal. This Court had a jury and the answers given to the question of guilt meant that the jury also found no grounds for an acquittal due to provocation by the police.

Two of the convicted men appealed to the Supreme Court regarding the application of the law and sentencing. These appeals were based on the question of whether the Court of Appeal had assumed the correct standard of proof with regard to whether there had been any illegal provocation by the police. The appellants referred especially to the fact that the record of the judge's directions to the jury stated that the jury was to disregard provocation if there was a normal preponderance of the evidence showing that this had not taken place. In the convicted persons' view, any reasonable and sensible doubt should benefit the defendants here too. The Supreme Court set aside the Court of Appeal's conviction in an appeal hearing for the two who had appealed to the Supreme Court, with reference to the fact that some of the judge's instructions to the jury expressed an incorrect understanding of the standard of proof which applied.

The Court of Appeal thereafter, in 2009, acquitted these two persons of importing the narcotic substance. This time, too, the question of guilt was determined by a jury, and it was clear from the context that it had to be assumed that it was the police provocation that was the issue for the jury and which led to an acquittal.

After this, the two other convicted persons, who had final and enforceable convictions handed down by the Court of Appeal in 2007, petitioned for their cases to be reopened. One of the convicted persons had been involved in the import of narcotics, while the other had received some of the narcotics after the substance had arrived in Norway. The prosecuting authority became a party to the petitions.

The Commission reopened both men's cases pursuant to section 391 no. 3 of the Criminal Procedure Act. The Commission found that the Supreme Court's setting aside of the Court of Appeal's conviction and the later Court of Appeal acquittal comprised new circumstances which seemed likely to lead to an acquittal for these two men as well.

The Commission unanimously decided to allow the petition to reopen the case.

5. 04.11.2009 (2009 0043) Narcotics substances - section 391 no. 3 (new circumstances)

Refer to the decision dated 04.11.2009 (2009 0040) – the same facts in issue

6. 04.11.2009 (2009 0126) Sexually offensive behaviour - section 391 no. 3 (new circumstance or new evidence) – substantially more lenient sanction – a reopening petitioned for by the prosecuting authority

In 2008, the Court of Appeal sentenced a 20-year-old man to imprisonment for nine months for sexually offensive behaviour. The sentence was combined with a sentence imposed in a conviction dated 23 June 2008 in which the convicted person was ordered to carry out 240 hours of community service for attempted aggravated robbery. The Court based the sentence on the fact that the convicted person had completed 55 hours of the community service sentence.

On 21 October 2009, the prosecuting authority petitioned the Commission asking for the case to be reopened. It referred to the fact that the Court of Appeal's sentence assumed that the convicted person had served 55 hours of the community service he was sentenced to carry out in 23 June 2008. Following the final and enforceable conviction, the prosecuting authority was told by the Norwegian Correctional Services that the convicted person had served 170 hours of community service on the date when the Court of Appeal sentenced him. It was alleged that the wrong number of community service hours carried out had been assumed when determining the combined sentence. The prosecuting authority alleged that the correct sentence would have been six – and not nine – months' imprisonment if the court had known of the actual number of community service hours he had carried out.

The Commission's assessment was that there were new circumstances which seemed likely to result in a substantially more lenient sanction according to section 391 no. 3 of the Criminal Procedure Act. Neither the prosecuting authority nor the court knew that, during the period between the District Court's conviction and the Court of Appeal's conviction, the convicted person had carried out an additional 115 hours of community service, so that the total number of hours was 170. This was considered to be a

significant difference compared to the 55 hours that were assumed by the court and would mean the sentence being reduced by one third. This was considered to be a significantly more lenient sanction.

The Commission unanimously decided to allow the petition to reopen the case in so far as the sentencing was concerned.

7. 17.12.2009 (2009 0119) Fraud – section 391 no. 3 (new circumstance)

In 2007, a man was convicted by the District Court of value added tax fraud equal to NOK 72 190, attempted value added tax fraud equal to NOK 416 607, failing to submit a tax return with a trading statement for the 2004 and 2005 financial years and failing to submit VAT returns from the 2nd instalment 2004 to the 6th instalment 2006 inclusive. The District Court sentenced him to six months' imprisonment, of which 90 days were suspended. The conviction was appealed against to the Court of Appeal, which only allowed the appeal against the sentence to be heard. The Court of Appeal gave him a suspended sentence of five months' imprisonment.

The convicted person petitioned for the case to be reopened and referred to a decision by the Directorate of Taxes in an appeal that had been made after the conviction became final and enforceable. An underlying department's decision had been altered by the Directorate in that the amounts on which the conviction was based were considerably reduced. The prosecuting authority became a party to the petition.

The Commission found that the conditions for reopening the case pursuant to section 391 no. 3 of the Criminal Procedure Act were present in that the Directorate of Taxes' decision was a new circumstance which seemed likely to lead to the convicted person being acquitted in relation to item I of the indictment, which related to VAT fraud. There was also a reasonable chance of an acquittal in relation to item II of the indictment, attempted VAT fraud, or of a substantially more lenient sanction for this crime in that the amount on which the sentence was based was too high. Items III and IV of the indictment, which related to the failure to submit VAT returns and tax returns with trading statements, were also reopened in that the Commission stated that both the question of guilt and any sentencing relating to these items should be looked at together with the result of a new hearing regarding the other issues in the indictment.

The Commission unanimously decided to allow the petition to reopen the case.

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