



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

FOURTH SECTION

CASE OF POSTI AND RAHKO v. FINLAND

(Application no. 27824/95)

JUDGMENT

STRASBOURG

24 September 2002

FINAL

21/05/2003

In the case of Posti and Rahko v. Finland,

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

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mr A. PASTOR RIDRUEJO,

Mrs E. PALM,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr L. GARLICKI, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 3 September 2002,

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

PROCEDURE

1. The case originated in an application (no. 27824/95) against the Republic of Finland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Finnish nationals, Mr Mauno Posti and Mr Erkki Rahko ("the applicants"), on 2 July 1995.

2. The applicants were represented before the Court by Mr M. Wuori, a lawyer practising in Helsinki. The Finnish Government ("the Government") were represented by their Agents, Mr H. Rotkirch, Director-General for Legal Affairs, and Mr A. Kosonen, Director, both of the Ministry for Foreign Affairs.

3. The applicants complained, in particular, that a fishing restriction imposed and maintained by governmental decree had violated their right to peaceful enjoyment of their possessions, which allegedly comprised a right to fish certain waters. They also complained of having had no access to a tribunal, or any other effective remedy, in order to challenge the fishing restriction.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 10 May 2001 the Chamber declared the application admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants are fishermen operating in the coastal region of the Gulf of Bothnia on the basis of leases contracted with the State in 1989 and renewed in 1995 (for a further period ending in 1999) as well as in 2000 (for the period 2000-04).

9. By virtue of section 116, subsection 3, of the 1982 Fishing Act (*kalastuslaki, lag om fiske* 286/1982) the Ministry of Agriculture and Forestry may restrict fishing, *inter alia*, if this is deemed necessary in order to safeguard future fish stocks. Since 1986 the Ministry has imposed such restrictions by issuing decrees. The restrictions have varied to some degree as regards their timing, territorial scope, the fish species in question and the prohibited fishing gear. The restrictions may also extend to private waters.

10. In 1991 Mr Rahko and others challenged the lawfulness of Decree no. 684/1991 ("the 1991 Decree"), whereby fishing with certain gear had been prohibited, *inter alia*, in waters leased by him. In its judgment of 14 June 1991 the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltningsdomstolen*) declined to examine the merits of the appeal, considering that it lacked jurisdiction to consider the appellants' demands that the decree be revoked and the implementation thereof stayed.

11. By Decree no. 231/1994, which entered into force on 1 April 1994 ("the 1994 Decree"), the Ministry prohibited salmon fishing with certain gear during certain periods in the main basin of the Baltic Sea, in the Gulf of Bothnia and in the Simojoki River. The restrictions concerned the fishing of salmon between certain latitudes in the open sea and in coastal waters as well as in certain rivers and their estuaries, and extended to the fishing waters which the applicants were leasing from the State. The decree was later repealed and replaced by Decree no. 258/1996 ("the 1996 Decree"). The date of entry into force of the last-mentioned decree (29 April 1996) was specified by Decree no. 262/1996. In so far as the restriction concerned the applicants, it was maintained on substantially similar terms by Decree no. 266/1998, which entered into force on 16 April 1998 ("the 1998 Decree").

12. On 25 November 1994, in response to a petition lodged by the applicants and others, the Parliamentary Ombudsman (*eduskunnan oikeusasiamies, riksdagens justitieombudsman*) found no indication that the Ministry of Agriculture and Forestry had, in restricting the salmon fishing in certain waters, acted contrary to, *inter alia*, the Supreme Administrative Court's decision of 30 May 1980 (see paragraph 25 below) or otherwise incorrectly.

13. On 21 March 1995 the applicants and the State extended their respective leases up to the end of 1999. In so far as relevant to the present case, the leases referred back to the terms of the 1989 leases.

14. In a further decision of 26 May 1995, in response to a petition by others, the Ombudsman considered that, in issuing the 1994 Decree, the Ministry had not exceeded the powers which the Fishing Act had conferred upon it. After hearing submissions from the Ministry he concluded that the restrictions set forth in the decree had been justified in order to safeguard the fish stocks. In so far as the petitioners had complained of discriminatory treatment, the Ombudsman noted that the restrictions had differed from area to area in order to take into account the spawning routes of the salmon. He therefore accepted that there had been sufficient justification for the different timing of the prohibition in the respective water areas and for prohibiting different fishing gear in different areas.

15. Having reviewed the territorial scope of the restrictions, the Ombudsman considered, however, that the Ministry had not sufficiently taken into account the need for equal treatment of fishermen in different areas. He noted that the decree had been based on a report of the Working Group on salmon fishing in the open sea which the Ministry had appointed in 1993 (*avomerilohityöryhmä, havslaxarbetsgruppen* 1993:15). The Working Group had found certain fishing restrictions necessary so as to enable the salmon to reach the northernmost rivers and thereby to safeguard the fish stocks. It had been of the further opinion that in order to be non-discriminatory in character the restrictions should apply equally to fishing in the open sea and to coastal fishing (within village boundaries) within the whole of the areas located between certain latitudes. The Ombudsman noted that the terms of the decree had differed from the opinion of the Working Group, without any convincing reasons having been given therefor. The resultant differential treatment, without any generally acceptable grounds, of certain water owners and fishermen who had contracted leases, was therefore in violation of section 5 of the Constitution.

16. On 19 September 1996 the Lapland District for the Economic Development of the Countryside (*maaseutuelinkeinopiiri, landsbygds-näringsdistrikt*) granted Mr Posti 20,274 Finnish markkas (FIM) (3,405 euros (EUR)) and Mr Rahko FIM 32,464 (EUR 5,460) in compensation for losses suffered as a result of the fishing prohibition imposed by the 1996 Decree. Their average salmon catch per year during

the periods in 1990-94 when a fishing prohibition had been in force was estimated at 2,150 kg and 3,848 kg respectively, at the price of FIM 15.93 per kg. The applicants' average catch of whitefish was estimated at 257 kg and 110 kg respectively, at the price of FIM 12.85 per kg. The overall compensation amounts were reduced by 15% in order to accommodate the awards within the funds foreseen in the State budget. An appeal lay to the Appellate Board for Countryside Commerce but the applicants did not avail themselves of that possibility.

17. On 2 May 2000 the applicants' respective leases were further prolonged until the end of 2004. The leases stipulated, *inter alia*, that salmon fishing was allowed within the leased areas "in so far as prescribed in the ... decree on salmon fishing or other provisions".

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. According to the Constitution of 1919 (*Suomen hallitusmuoto, Regeringsform för Finland* 94/1919), as in force up to 1 March 2000, everyone was to be equal before the law and his or her property was to be protected (sections 5 and 6). A judge or other officer was under an obligation not to apply a provision in a decree which conflicted with constitutional or other laws of Parliament (section 92, subsection 2). The Convention has been incorporated into Finnish law by an Act of Parliament with the status of ordinary law (Law no. 438/1990).

19. Under the Constitution of 1919, anyone who had suffered an infringement of his rights, or damage, through an illegal act or negligence on the part of a civil servant was entitled to demand that the civil servant be convicted and held liable for damages, or to report him for the purpose of having charges brought (section 93, subsection 2). A similar provision appears in section 118, subsection 3, of the Constitution of 2000 (*Suomen perustuslaki, Finlands grundlag* 731/1999). Chapter 2 ("Basic rights and liberties") of the Constitution of 1919 was amended by Law no. 969/1995, which entered into force on 1 August 1995. The new Chapter 2 includes, *inter alia*, the right to property (section 12; as from 1 March 2000 section 15) and has been incorporated as such into the Constitution of 2000. Under the current Constitution a court of law must give precedence to a provision therein if the application of a provision of ordinary law would be in evident conflict with the Constitution. If a provision in a decree or any other statute of lower rank than an Act of Parliament is in conflict with the Constitution or ordinary law, that provision shall not be applied by a court of law or any other public authority (sections 106-07).

20. Under the Tort Liability Act (*vahingonkorvauslaki, skadeståndslag* 412/1974) proceedings for damages may be initiated against the State on the basis of its vicarious liability for mistakes or omissions in the exercise of public authority. The State's vicarious liability comes into play only if the

responsible official fails in his or her duty to take a measure or perform a task that could reasonably be required in the light of the nature and purpose of the activity in question (Chapters 3 and 4). The claim for damages must be made within ten years from the date when the damage occurred, unless a shorter limitation period applies (Chapter 7, section 2).

21. According to the 1961 Water Act (*vesilaki, vattenlag* 264/1961), the holder of a building permit relating to a water area may, if the construction would clearly damage the fish stocks, be ordered to restock the area and take other necessary measures in order to safeguard the fish stocks in the affected waters (Chapter 2, section 22, subsection 1).

22. An application concerning a measure alleged to be in violation of the Water Act whereby it is sought to have such a measure prohibited, the previous conditions re-established or damage compensated may be lodged with the competent water court (Chapter 16, section 33, subsection 1).

23. The general right to fish in public water areas and within the Finnish fishing zone does not include the right to fish for salmon and sea trout (see, for example, section 6, subsection 3, and section 12 of the Fishing Act). According to section 31 of the Fishing Act, provisions restricting fishing with certain gear may be introduced by decree. Restrictions on fishing within or outside the territorial waters of Finland may likewise be imposed by decree for the purpose of fulfilling obligations set in an international agreement binding on Finland, for safeguarding fish stocks or for any other comparable special reason (section 116). The decrees of 1994, 1996 and 1998 which are of relevance to the present case (see paragraph 11 above) were issued on the basis of section 31. Non-compliance with a fishing restriction may be subject to prosecution (sections 107-09).

24. The provisions concerning the State's fishing waters and fishing rights can now be found in Chapter 5 of the Fishing Decree (no. 1116/1992).

25. On 28 December 1979 the Water Court of Northern Finland (*Pohjois-Suomen vesioikeus, Norra Finlands vattendomstol*) ordered that certain companies permitted to construct hydroelectric power stations in the Kemijoki River should annually restock its estuary with an average of 615,000 young salmon. This compensation order aimed at safeguarding the future salmon stocks in the waters affected by the construction. (The Kemijoki River flows into the Gulf of Bothnia at Kemi, not far from Tornio.) The Water Court's decision was upheld by the Supreme Administrative Court on 30 May 1980.

26. In a judgment of 9 June 1982 (no. 33/1982) the Supreme Water Court (*vesiylioikeus, vattenöverdomstolen*) found that since time immemorial the owners of fishing waters in the Kemijoki River and its estuary had been engaged in fishing for salmon and sea trout without any State interference and with its *de facto* consent. Compensation for the loss of fishing benefits resulting from permitted construction should therefore be

awarded to all individuals who had been engaged in such fishing in the area, provided they had been using legal fishing gear. The Supreme Water Court further found that the State too was entitled to compensation for the permanent loss of the use of its limited right *in rem* in respect of the fishing waters. In addition, compensation was awarded to the State for its loss of income from leasing out those waters.

27. The Supreme Court (*korkein oikeus, högsta domstolen*) found in its decision of 3 February 1983 (no. 1983 II 28) that the damage which a company had caused by setting up timber floating routes in the Simojoki River had caused the private owners of water areas to suffer losses which were to be compensated under the Water Act. The State, which traditionally had the right to fish for salmon in the river, had not used that right for decades, either by leasing out its waters or in any other way.

28. By a judgment of 7 September 1995 (no. 133/1995) the Supreme Water Court upheld a decision of the Water Court of Northern Finland of 14 April 1994 which had dismissed various fishery associations' claim for compensation for the alleged failure to restock the estuary of the Kemijoki River as ordered on 28 December 1979. The Water Court had found that the defendants had complied with the obligations imposed on them in 1979 for the purpose of safeguarding the relevant fish stocks. In such circumstances the defendants could not be held responsible for the reduction in catches for which compensation had been sought.

29. In its precedent 2000:97 the Supreme Court examined an action for damages which a hydroelectric power company had brought against the State on the grounds that a contract between the two with a view to establishing three power plants along the Kyrönjoki River could not be implemented in full, as Parliament had enacted legislation for the protection of the river (1139/1991). The company had sought compensation for wasted planning costs in so far as those had exceeded the amount paid out following the assessment procedure provided for in the Act on the Redemption of Immovable Property and Special Rights (603/1977). The Supreme Court declined to examine this part of the claim, as the costs to be compensated had already been finally determined in the procedure under the 1977 Act.

30. In so far as the company had claimed compensation for projected profit and related losses, the Supreme Court dismissed the action after having examined its merits. The Supreme Court reasoned, *inter alia*, as follows:

“... The contract did not bind the legislative arm. Possible legislative changes and the possibility that no building permit would be granted were specifically taken into account in the contract. The government is therefore under no obligation to compensate the company for the economic losses it suffered on account of the fact that the contract for the construction of the power plant was never implemented. The company is therefore not entitled to any compensation ... other than that stipulated in [Law no. 1139/1991 on the protection of the river]. ...”

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

31. The Government submitted that the applicants had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. Matters related to fishing fell to be considered either by a water court or by an ordinary court of first instance. A claim for damages from the State could have been dealt with by the ordinary courts. Given that the Convention was directly applicable, the competent court would have been required to consider whether the 1994 Decree complied with the Convention. In the negative, the court would have been obliged to refrain from applying that decree. Furthermore, under the Constitution anyone who had suffered an infringement of his or her rights – or damage – through an illegal act or negligence on the part of a civil servant was entitled to demand that the civil servant be convicted and held liable for damages, or to report him or her for the purpose of having charges brought. These various remedies offered such reasonable prospects of success that the applicants' petition to the Parliamentary Ombudsman could not be a substitute for them.

32. In the alternative, the Government submitted that part of the application had been lodged out of time. A decision made in response to a petition to the Ombudsman could not extend the six-month period prescribed by Article 35 § 1 of the Convention. Were the Court to find that no effective domestic remedy had been – or remained – available to the applicants, the six-month period would therefore have started to run from the entry into force of the 1994 Decree on 1 April 1994. As the applicants had introduced their application only on 2 July 1995, only those impugned measures occurring after 2 January 1995 could be examined by the Court.

33. The applicants agreed that, theoretically, a fisherman could claim damages from the State for interference with the exercise of his occupation. In the applicants' case, however, a court would have had no legal grounds on which to base a compensation award, given that the impugned regulations had been based on formally correct statutory law and the Convention had the status of ordinary law only. It would also have been impossible to prove the precise damage which the State's general policy decisions had inflicted on individual fishermen such as the applicants. In these circumstances the Tort Liability Act would have been inapplicable.

34. Neither did any criminal-law provision appear to apply in the applicants' case. While it would have been open to the applicants to challenge the constitutionality of the fishing restriction imposed by decree, such a procedure would not have addressed their specific grievance or have enabled them to pursue a pecuniary claim against the State. Given that the Supreme Administrative Court had declined to examine Mr Rahko's and others'

appeal concerning the 1991 Decree for want of jurisdiction, any challenge to the subsequent decrees would have been equally futile. In these circumstances the applicants' petition to the Ombudsman should be considered sufficient for the purposes of their obligation to exhaust domestic remedies.

35. The applicants furthermore contended that their application had not been lodged out of time, since it concerned an ongoing situation.

36. The Court joins to the merits of the complaint under Article 6 § 1 of the Convention the Government's first preliminary objection to the effect that the applicants failed to avail themselves of domestic court remedies.

37. Turning to the Government's second preliminary objection, the Court notes that the Ombudsman's decision in response to the applicants' own petition was taken on 25 November 1994, that is to say more than six months before they introduced their application in Strasbourg. Moreover, the Ombudsman's decision of 26 May 1995 was not made in response to a petition by the applicants themselves. In these circumstances the Court need not decide whether a decision by the Finnish Ombudsman in response to a petition can serve as a basis for the calculation of the six-month period prescribed by Article 35 § 1 of the Convention.

38. According to the Government, only those impugned measures occurring after 2 January 1995 can be examined by the Court, since the applicants introduced their application only on 2 July 1995. The Court reiterates, however, that the six-month rule, in reflecting the wish of the Contracting Parties to prevent past decisions being called into question after an indefinite lapse of time, serves the interests not only of the respondent State but also of legal certainty as a value in itself. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible. It is therefore not open to the Court to set aside the application of the six-month rule solely because a Government have not made a preliminary objection based on it – or have chosen to limit their objection to a certain period, as in the present case (see, for example, *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I).

39. In so far as the applicants complained that they were victims of a continuing violation to which the six-month rule did not apply, the Court reiterates that the concept of a “continuing situation” refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims (see, for example, *McDaid and Others v. the United Kingdom*, no. 25681/94, Commission decision of 9 April 1996, Decisions and Reports (DR) 85-A, p. 134).

40. The applicants' complaints have as their source specific events which occurred on identifiable dates, namely the issuing of the 1994 Decree and – as their application must be understood – of the 1996 and 1998 Decrees. These cannot be construed as a “continuing situation” for the purposes of

the six-month rule. The fact that an event has significant consequences over time – such as the restriction on the applicants' fishing during specific periods in 1996 and subsequent years – does not mean that the event has produced a “continuing situation”.

41. In the Court's view the first six-month period of relevance to the applicants' case therefore started to run from the entry into force of the 1994 Decree on 1 April 1994. As their application was lodged on 2 July 1995, it has been lodged out of time in so far as it concerns the fishing restriction resulting from the 1994 Decree.

42. The Court notes, however, that the restrictions imposed by the 1994 Decree were, in relevant parts, maintained by the decrees issued in 1996 and 1998. As the applicants are effectively complaining about the restriction imposed by those decrees as well, their complaints meet the six-month requirement in Article 35 § 1 in this regard.

43. It follows that the Government's preliminary objection must be accepted in part and rejected in part.

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

44. The applicants complained that they had no access to a tribunal within the meaning of Article 6 § 1 of the Convention in order to challenge the fishing restriction imposed by governmental decree. The Court will examine this grievance under Article 6 § 1 of the Convention, the relevant part of which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ...”

45. Even assuming that this complaint met the formal conditions under Article 35, the Government submitted that Article 6 § 1 had not been violated. Under the Fishing Act the right to engage in fishing usually belonged to the owner of the water area. Even so, the owner could only exceptionally enjoy an exclusive right to engage in fishing within that area, this right being restricted by the rights of other joint owners and holders of limited rights *in rem*, and by the general right to use the waters. In addition, the Fishing Act itself contained provisions restricting the right to fish, and further restrictions could be issued by virtue of the said Act.

46. In the view of the Government the right to fish for salmon and sea trout in the coastal waters of the Gulf of Bothnia and in the rivers emptying into the Gulf of Bothnia was independent of the ownership of the water areas. No person had a subjective right to fish those species. Neither the Supreme Water Court's judgment of 9 June 1982 nor the Supreme Court's judgment of 3 February 1983 had concluded otherwise. An award of compensation under the Water Act could be made even if the State's limited

right *in rem* continued to exist. Unlike certain private property owners, the applicants could not rely on any special grounds entitling them to fish for salmon.

47. The Government noted that from 1989 onwards the applicants had been leasing several sites from the State for the purpose of fishing for salmon and sea trout. The respective leases had remained in force until the end of 1994 and the subsequent leases had been in force for a further five-year period. The Government conceded that as a consequence of the 1994 Decree the fishing in question had been restricted in some of the areas allotted to the applicants. Considering also the pecuniary nature of the leases, the Government did not exclude that the applicants' engagement in fishing on that contractual basis up to the end of 1994 could be considered a "right" within the meaning of Article 6 § 1.

48. The Government furthermore considered that the circumstances of the Supreme Court's case no. 2000:97 differed from those of the present application. As that precedent had concerned a specific contract it could not be considered to apply generally to all potential contractual arrangements. The leases concluded by the applicants contained no explicit reference to legislative amendments such as those appearing in the contract under examination in case no. 2000:97, nor were their leases governed by any legislation or other arrangements of an *ad hoc* nature.

49. The applicants contended that they had an arguable "right" under domestic law to engage in fishing in the coastal waters of the Gulf of Bothnia, including, *inter alia*, the estuary of the Kemijoki River, to an extent exceeding the limits set by the 1994 Decree. The State prerogative which still existed with respect to the fishing right in question was incompatible with the demands of a society based on the rule of law. The leases had accorded the applicants clearly defined contractual rights which had been curtailed unilaterally by the State without due process or equality considerations.

A. Applicability of Article 6 § 1

50. The Court must first ascertain whether there was a dispute over a "right" within the meaning of Article 6 § 1 which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise, and the result of the proceedings must be directly decisive for the right in question. Finally, the right must be of a "civil" character (see, for example, *Zander v. Sweden*, judgment of 25 November 1993, Series A no. 279-B, p. 38, § 22).

51. Article 6 § 1 of the Convention is not aimed at creating new substantive rights without a legal basis in the Contracting State, but at providing procedural protection of rights already recognised in domestic law (see, for example, *W. v. the United Kingdom*, judgment of 8 July 1987,

Series A no. 121, pp. 32-33, § 73). The term “right” must nevertheless be given an autonomous interpretation under Article 6 § 1 of the Convention (see, for example, *König v. Germany*, judgment of 28 June 1978, Series A no. 27, pp. 29-30, §§ 88-89).

52. It is true that Article 6 of the Convention does not guarantee a right of access to a court with power to invalidate or override a law enacted by the legislature (see, for instance, *Ruiz-Mateos and Others v. Spain*, no. 14324/88, Commission decision of 19 April 1991, DR 69, p. 227). In the instant case, however, the Court must limit its examination to the direct effect which the 1996 and the 1998 Decrees – issued on the basis of a law – had on the applicants' livelihood, that is to say the continued restriction on their fishing in certain State-owned waters allotted to them in their respective leases for the period 1995-99 and from 2000 to date. Considering the terms of those leases – which were directly related to their occupation as professional fishermen – as well as the domestic case-law preceding the 1996 and the 1998 Decrees, the Court finds it established that up to the end of 1999 the applicants could arguably claim a “civil right” to fish for salmon and sea trout in the relevant waters to an extent exceeding the limits set out in the 1996 and the 1998 Decrees (see, for instance, *Procola v. Luxembourg*, judgment of 28 September 1995, Series A no. 326, pp. 13-15, §§ 34-40).

53. Furthermore, the Convention is intended to safeguard rights which are “practical and effective” as opposed to “theoretical” or “illusory” (see, for instance, *Papamichalopoulos and Others v. Greece*, judgment of 24 June 1993, Series A no. 260-B, p. 69, § 42). It follows that where a decree, decision or other measure, albeit not formally addressed to any individual natural or legal person, in substance does affect the “civil rights” or “obligations” of such a person or of a group of persons in a similar situation, whether by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons, Article 6 § 1 may require that the substance of the decision or measure in question is capable of being challenged by that person or group before a “tribunal” meeting the requirements of that provision.

54. The Court's position in this respect resembles that adopted in the law of the European Community, where a general measure such as a regulation can, in certain circumstances, be of individual concern so as to be open to an action for annulment before the Court of Justice (see Article 230 (former Article 173) of the EC Treaty and, for example, Case C-358/89, *Extramet Industrie SA v. Council of the European Communities* [1991] ECR I-2501, § 13).

55. The Court finds, moreover, that a genuine and serious dispute over the existence and scope of the applicants' civil right to fish for certain species within a clearly delineated area of the State-owned waters may be said to have arisen as a result of the 1996 and the 1998 Decrees, given the terms of the respective leases which the applicants and the competent

authority of the executive arm had contracted to respect until the end of 1999. The genuineness and seriousness of that dispute was underscored by the Ombudsman's finding that the preceding, largely similar 1994 Decree had had a discriminatory impact on the applicants.

56. In sum, Article 6 § 1 of the Convention applies in respect of the dispute concerning the applicants' right, as in force until the end of 1999, to fish the designated waters in accordance with the terms of their respective leases of 1995.

57. The Court notes that the respective leases contracted in 2000 stipulated, *inter alia*, that salmon fishing was allowed within the leased areas only in so far as prescribed in the relevant decree on salmon fishing or other provisions. In the light of those explicit contractual terms the applicants could not arguably claim a "right" to engage in fishing in State-owned waters from 2000 onwards to an extent exceeding the limits set by law or decree.

58. Article 6 § 1 of the Convention does not therefore apply in so far as the 1996 and the 1998 Decrees may have created a dispute concerning the applicants' right, from 2000 onwards, to fish the designated waters subject to the provisions of the relevant decree on salmon fishing or other provisions.

B. Compliance with Article 6 § 1

59. In so far as Article 6 has been found applicable, it remains to be ascertained whether the applicants had effective access to the courts for the purpose of challenging the impact of the 1996 and the 1998 Decrees on their contractual fishing rights.

60. The Court notes at the outset that the Supreme Administrative Court had already declined jurisdiction to examine Mr Rahko's appeal concerning the lawfulness of a similar decision of normative nature, namely the 1991 Decree. It has not been demonstrated that a challenge to the 1996 and the 1998 Decrees would have been any more successful.

61. Neither has the evidence adduced convinced the Court that the applicants were required by the terms of Article 35 § 1 of the Convention to lodge a claim for damages under the Tort Liability Act so as to obtain compensation from the State for the effects of the 1996 and the 1998 Decrees on their livelihood. It is true that the courts would have been competent in constitutional terms – and even required – to refrain from applying the decrees had they found them incompatible with the Constitution or ordinary law such as Law no. 438/1990 incorporating the Convention. Even so, the State could have been held vicariously liable only if the applicants had succeeded in establishing that a representative of the executive branch had failed in his or her duty to take a measure or perform a task that could reasonably have been required in the light of the nature and purpose of the activity in question. It

has not been convincingly demonstrated that the applicants could have expected with any reasonable degree of probability to obtain damages from the State on the basis of its liability for such mistakes or omissions in the exercise of public authority – even less so as the impugned decrees were undoubtedly based on formally correct statutory law, namely the Fishing Act.

62. The Court will next examine, notably in the light of the Supreme Court's judgment no. 2000:97, whether the applicants were required for the purposes of Article 35 § 1 to sue the State for a breach of the leases signed in 1995 and 1999. The Court notes that, in contrast with the leases signed in 2000, the previous ones contained no reservation or other explicit clause entitling the State unilaterally to restrict the applicants' fishing rights as defined in those leases. Even so, the Court has not been made aware of any precedent where a decree was found to have resulted in a breach of contract in comparable circumstances. On the overall evidence before it the Court concludes therefore that the applicants would not have had such a reasonable prospect of success with an action for breach of contract as to require that remedy to be used for Convention purposes.

63. Neither is the Court convinced that the prosecution of a civil servant under section 93 of the former Constitution or section 118 of the current Constitution would have been an adequate remedy to be used in the circumstances of this case. The Court notes, in particular, that for such a remedy to have been successful the applicants would have had to show that a representative of the executive branch had committed an illegal act or, at the very least, had acted negligently in the context of the issuing of the 1996 and 1998 Decrees.

64. Finally, in so far as it might be argued that the applicants could have obtained access to a court by violating the 1996 and the 1998 Decrees and awaiting prosecution, the Court considers that no one can be required to breach the law so as to be able to have a “civil right” determined in accordance with Article 6 § 1.

65. The Court therefore concludes that, for the purposes of Article 6 § 1, no remedy was available whereby the applicants could have obtained a court determination of the effect which the 1996 and the 1998 Decrees had on the contractual terms of their leases on State-owned fishing waters.

66. It follows that the Government's preliminary objection of non-exhaustion of domestic remedies must be dismissed and that there has been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TAKEN BOTH ALONE AND IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

67. The applicants complained that the fishing restrictions imposed by the State had violated their right to the peaceful enjoyment of their possessions, which allegedly included a right to fish certain coastal waters of the Gulf of Bothnia. The applicants further alleged that they had been discriminated against in comparison with fishermen operating in the open sea of the gulf. They relied on Article 1 of Protocol No. 1 taken both alone and in conjunction with Article 14 of the Convention.

68. Article 1 of Protocol No. 1 reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

69. Article 14 of the Convention reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

A. Article 1 of Protocol No. 1 alone

70. The applicants complained that the fishing restrictions imposed by the State had violated their right to the peaceful enjoyment of their possessions, which included a right to fish the coastal waters of the Gulf of Bothnia within a given area.

71. The Government first argued that since Article 1 of Protocol No. 1 was limited to enshrining the right to the peaceful enjoyment of already existing possessions, the applicants could not rely on any exceptional grounds affording them a right to fish salmon and sea trout independently of the State's limited right *in rem*. Accordingly, Article 1 of Protocol No. 1 was inapplicable.

72. In the alternative, the Government observed that the restriction resulting from the 1994 Decree might have constituted, during that year, an interference with the applicants' right to the peaceful enjoyment of their possessions under the then existing leases. The contested measure nonetheless amounted to a mere control of the use of those possessions.

Accordingly, assuming Article 1 of Protocol No. 1 was applicable at all, only its second paragraph could come into play. The fishing restriction had been aimed at protecting a limited natural resource, which was in the general interest. Although the State had an exclusive right to control the fishing of salmon and sea trout, this did not prevent the owner of a water area from fishing for other species, within the limits set by the Fishing Act or European Community law. The applicants had not adduced any evidence as to the concrete economic loss or other damage which the impugned measures had caused them. Since there were not enough fishing grounds for salmon and sea trout, these had been leased out on the basis of tenders. In cases of equal tenders precedence had been given to professional fishermen who had previously fished for salmon in the relevant waters. The applicants had been able to fish for salmon and sea trout on the basis of such leases.

73. Having regard to the legitimate aim pursued as well as to the wide margin of appreciation allowed to States in matters relating to Article 1 of Protocol No. 1, the Government submitted that the measures complained of had been appropriate and proportionate, and that a fair balance had been struck between the general interests of the community and the rights of the applicants.

74. The applicants disagreed.

75. The Court has found the application to have been lodged out of time in so far as it concerns the fishing restriction resulting from the 1994 Decree (see paragraph 41 above). It follows that the examination of this complaint must focus on the restrictions as maintained by the 1996 and the 1998 Decrees.

76. The Court finds that the applicants' right to engage in certain types of fishing in State-owned waters on the basis of their lease constituted a "possession" for the purposes of Article 1 of Protocol No. 1. The limitation of that right through the 1996 and 1998 Decrees amounted to a control of the use of those possessions, within the meaning of the second paragraph of Article 1 of Protocol No. 1.

77. The Court finds, essentially for the reasons relied on by the Government and the Ombudsman, that this interference with the applicants' property rights was justified, being lawful and pursuing, by means proportionate to that aim, the legitimate general interest in protecting the fish stocks. Moreover, the interference did not completely extinguish the applicants' right to fish for salmon and sea trout in the relevant waters. The applicants also received compensation for losses suffered as a result of the fishing prohibition imposed by the 1996 Decree.

78. Accordingly, there is no appearance of any violation of Article 1 of Protocol No. 1 taken alone.

B. Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention

79. The applicants further complained that the fishing restriction had discriminated against them in their capacity as coastal fishermen, in comparison with fishermen operating in the open sea of the Gulf of Bothnia.

80. The Government submitted that the restrictions in question had been imposed equally on all fishermen. The applicants' long-lasting leases with the State had actually afforded them a rather privileged position. The restrictions complained of had also been of short duration. Given the State's wide margin of appreciation, there had been a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

81. The applicants did not dispute the legitimacy of the aim sought to be realised through the restriction on the right to fish salmon and sea trout. They maintained, however, that the overall fishing policy discriminated against coastal fishermen such as themselves to the advantage of fishing fleets in the open sea. The applicants pointed to various official documents and letters showing that the coastal fishermen had had to bear the heaviest burden resulting from the government policy introduced in 1986, which sought to reduce salmon catches so as to safeguard the stock. In reality, coastal fishing of salmon and whitefish had been severely curtailed, whereas open-sea fishing had been encouraged through budgetary and legal measures. Moreover, in contrast with the official policy and the provisions of the Fishing Act – according to which the State was to organise the industry in such a way as to provide an equal opportunity for all – there had been a dramatic increase in catches in the open sea in the period 1987-93.

82. The Court notes that Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Article 14 does not presuppose a breach of one or more of such provisions and to this extent it is autonomous. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols. The right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated not only when States – without providing an objective and reasonable justification – treat differently persons in analogous situations but also when they fail to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece* [GC], no. 34369/97, §§ 40 and 44, ECHR 2000-IV). States nonetheless enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (see, for instance, *Stubbings and Others v. the United Kingdom*, judgment of

22 October 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1507, § 72).

83. In the present case the Court is satisfied that the allegation of discrimination falls within the ambit of Article 1 of Protocol No. 1. It must next examine whether this differential treatment – whether or not caused by positive action on the part of the State or by a failure to ensure non-discrimination – pursued a legitimate aim. In the affirmative, the Court will have to examine whether there was a reasonable relationship of proportionality between the aim sought to be realised and the means employed to that end (see *Thlimmenos*, cited above, § 46).

84. The Court takes as its starting-point the Ombudsman's finding that the 1994 Decree and the restrictions set forth therein were in principle lawfully grounded on the Fishing Act and justified in order to safeguard the relevant fish stocks. He furthermore accepted that there was sufficient justification for the different timing applied in the different water areas subject to the restrictions as well as for prohibiting different fishing gear in different areas in order to take into account the spawning routes of the salmon. Appearing to agree with the Working Group on Salmon Fishing in the Open Sea, the Ombudsman nevertheless found that in order to be non-discriminatory in character the restrictions should apply equally to fishing in the open sea and to coastal fishing within the whole of the areas located between certain latitudes. The terms of the 1994 Decree had differed from the opinion of that Working Group, without any convincing reasons having been given therefor. The resultant differential treatment of certain water owners and lease holders without generally acceptable grounds had therefore been in violation of section 5 of the Constitution as in force at the time, which prescribed that everyone was to be equal before the law (see paragraph 15 above).

85. The Court notes the applicants' reference to the overall policy of the executive branch, which had allegedly sought to favour open-sea fishing to the detriment of coastal fishermen such as themselves. The Government for their part contended that the restrictions which formed the object of the present case applied to open-sea and coastal fishermen alike and that the applicants were actually somewhat privileged by the fact that priority was given to extending their leases rather than contracting with other fishermen.

86. Confining its examination to the circumstances of the present case, the Court cannot find it established that there has been differential treatment to the detriment of the applicants in the exercise of their contractual right to fish salmon and whitefish in designated State-owned waters.

87. Accordingly, there has been no violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

88. The applicants additionally complained that – apart from the absence of a court remedy – there was no other remedy available to them whereby they could have challenged the fishing restriction resulting from the 1994 Decree. They relied on Article 13 of the Convention which reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

89. Given its above finding in respect of Article 6 § 1 of the Convention (see paragraphs 59-66 above), it is not necessary for the Court to consider whether there has been a violation of Article 13.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. 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

1. Pecuniary damage

91. The applicants alleged that the losses suffered by them amounted to 180,444.79 euros (EUR) (1,072,876 markkas (FIM)) for Mr Posti and to EUR 134,073.70 (FIM 797,166) for Mr Rahko.

92. The Government considered that the Court's judgment should include appropriate compensation for any pecuniary damage sustained by the applicants were it to find a breach of Article 1 of Protocol No. 1. The Government nevertheless found their claim excessive, as it had not been calculated with reference to the year 1994 – that being the only year for which compensation should be paid – and as the applicants had failed to take into account their subsequent leases which had referred explicitly to legislative provisions and other rules. The Government also queried whether the applicants' right to a livelihood had been interfered with to the alleged extent, since they had actually received permission to fish within the areas designated in their leases despite the general prohibition imposed by decree.

93. The Government nevertheless accepted that the calculation method which the applicants had used in respect of losses suffered in 1996 could provide guidance when calculating compensation for losses in 1994. According to that method, the average amount of fish caught while the

fishing prohibition had been in force had been calculated by dividing the total amount of fish caught in 1990-94 by the number of years. This average amount was to be multiplied by 0.6 (corresponding to 60% of the fishing quota) in order to arrive at the maximum catches which the applicants had been permitted to take while the general prohibition was in force.

94. Applying the aforementioned method, the Government arrived at the amounts of EUR 3,409.84 (FIM 20,274) and EUR 5,460.05 (FIM 32,464) to be paid to Mr Posti and Mr Rahko respectively in compensation for losses suffered in 1994. The principle of full compensation required that these amounts be increased by 15% to offset the sums which had been deducted from the compensation paid to the applicants in 1996 so as to avoid exceeding the budget.

95. Should the Court find that compensation should be awarded for losses suffered during any other calendar year, the Government considered that the applicants' claims had not been made out sufficiently.

96. The Court has found a violation of the applicants' right of access to a court but finds no sufficient causal link between that violation and the pecuniary damage allegedly suffered. This claim must therefore be rejected.

2. Non-pecuniary damage

97. Each applicant claimed compensation for non-pecuniary damage in the amount of EUR 42,046.98 (FIM 250,000) for the loss of their opportunity to continue their traditional livelihood and way of life as well as for the feeling of insecurity and distress which they experienced.

98. The Government accepted that the Court's judgment should include sufficient just satisfaction in respect of non-pecuniary damage, were it to find a breach of the Convention. The sum claimed was nevertheless excessive.

99. The Court reiterates that only the applicants' lack of access to a court within the meaning of Article 6 § 1 of the Convention can be the basis for any award under this head. The Court can nevertheless accept that the applicants' inability to bring the matter in dispute before a court caused them distress through feelings of frustration and injustice. That non-pecuniary damage suffered by them cannot be made good by the Court's mere finding of a violation of Article 6. Making its assessment on an equitable basis, the Court therefore awards each of the applicants EUR 8,000 in compensation for non-pecuniary damage.

B. Costs and expenses

100. The applicants initially claimed EUR 5,745 (FIM 34,160) for counsel's fees for 34 hours of work at his customary rate of EUR 138 (FIM 820) per hour, not taking into account 22% value-added tax (VAT) in

the amount of EUR 1,036 (FIM 6,160). They also claimed a further EUR 20 (FIM 120) for postage and other costs.

101. In December 2001 the applicants claimed a further sum of EUR 757 (FIM 4,500) to be paid to Mr Alpo Tuikkala, a former representative of the Coastal Fishermen's League, for his supplementary work on the case (50 hours at an hourly rate of EUR 15.14).

102. The Government objected to the applicants' supplementary claim, considering that it had been lodged out of time. They also considered the hourly rate of counsel's fees excessive and were prepared to compensate them up to a ceiling of EUR 118 (FIM 700) per hour. As to the remainder of the claim, the Government left the matter to the Court's discretion.

103. The Court reiterates that an award under this head may be made only in so far as the costs and expenses were actually and necessarily incurred in order to avoid, or obtain redress for, the violation found (see, among other authorities, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, p. 2334, § 63). Not only the costs and expenses incurred before the Strasbourg institutions but also those incurred before the national courts may be awarded. However, only those fees and expenses which relate to a complaint declared admissible can be awarded (see, for example, *Mats Jacobsson v. Sweden*, judgment of 28 June 1990, Series A no. 180-A, p. 16, § 46).

104. The Court finds that the claim for reimbursement of counsel's fees and expenses has been properly substantiated and reiterates that the applicants' complaints were declared admissible in their entirety. The costs and expenses claimed can therefore be considered actually and necessarily incurred in order to obtain redress for the violation found.

105. As to the applicants' claim for reimbursement of Mr Tuikkala's work, the Court may leave open the question whether it was filed out of time (see Rule 60 § 1 of the Rules of Court). The Court finds no evidence that Mr Tuikkala's work was actually paid for by the applicants or that they owe him the amount claimed. This part of the claim must therefore be rejected (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 205-07, ECHR 2001-VII).

106. In these circumstances, and making its assessment on an equitable basis, the Court awards the applicants jointly EUR 5,765, to be increased by any relevant VAT.

C. Default interest

107. The Court considers that the default interest should be fixed at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 124, ECHR 2002-VI).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that, by reason of the six-month rule, it is unable to take cognisance of the merits of the complaints in so far as they relate to the fishing restriction imposed by Decree no. 231/1994;
2. *Dismisses* the remainder of the Government's preliminary objection concerning the six-month rule;
3. *Dismisses* the Government's preliminary objection based on the non-exhaustion of domestic remedies;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention in that the applicants had no effective access to a court whereby they could have challenged the fishing restriction maintained by Decrees nos. 258/1996 and 266/1998 in so far as it affected the applicants' fishing in accordance with their leases of 1995;
5. *Holds* that there has been no violation of Article 1 of Protocol No. 1 taken alone;
6. *Holds* that there has been no violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention;
7. *Holds* that it is not necessary to examine whether there has been a violation of Article 13 of the Convention;
8. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) to each of the applicants EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage;
 - (ii) jointly to both applicants EUR 5,765 (five thousand seven hundred and sixty-five euros) in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;
 - (b) that simple interest at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;
9. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 24 September 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President