



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

FOURTH SECTION

CASE OF NARINEN v. FINLAND

(Application no. 45027/98)

JUDGMENT

STRASBOURG

1 June 2004

FINAL

01/09/2004

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

In the case of Narinen v. Finland,

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

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mrs V. STRÁŽNICKÁ,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Mr J. BORRERO BORRERO, *judges*,

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

Having deliberated in private on 11 May 2004,

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

PROCEDURE

1. The case originated in an application (no. 45027/98) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Finnish national, Mr Jukka Narinen ("the applicant"), on 1 December 1998.

2. The applicant, who had been granted legal aid, was represented by Mrs M. Toivio-Kaasinen, a lawyer practising in Järvenpää. The Finnish Government ("the Government") were represented by their Agent, Mr A. Kosonen, Director, Ministry for Foreign Affairs.

3. The applicant complained about the interference with his correspondence following his bankruptcy, invoking Article 8 of the Convention.

4. 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.

5. By a decision of 14 October 2003, the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1957 and lives in Klaukkala.

8. The applicant was declared bankrupt on 2 September 1993 by the District Court (*kihlakunnanoikeus, häradsrätten*) of Hyvinkää. J., a lawyer practising in Helsinki, was appointed by a court order to act as the official receiver to his estate.

9. By a written notice, dated 16 September 1993, J. requested the postal service to send all the mail addressed to the applicant to the law office of J. The day before, on 15 September 1993, a meeting was held between the debtor, *i.e.* the applicant, and the official receiver in the law office of J. According to the Government, it was agreed that the applicant's mail be transferred to the office and handled so that the official mail was opened, whereas the private mail was put aside to be further transmitted to the applicant. According to the applicant, no such agreement was reached.

10. The applicant contacted a lawyer at the postal service who informed him that the personal mail of a person declared bankrupt should not be transferred to the official receiver. The applicant received his mail from 23 September 1993 onwards.

11. While the mail was being transferred to the law office (between 16 and 23 September 2003), J. received and opened a letter sent by an insurance company and addressed to the applicant. The letter was sent to the applicant in an official envelope of the company and signed by the representative of the company's legal department. Apparently the letter concerned a valuation of an apartment owned by the applicant's ex-wife.

12. On 4 June 1996, the applicant requested the police to investigate the matter. During the police investigation J. said that the applicant had sent him a message after the meeting of 15 September 1993, withdrawing his consent to the transfer of mail and that on 22 or 23 September 1993 the applicant requested the postal service to transfer the mail back to his own address as he considered that the transfer of mail to the law office had been unlawful.

13. On 22 July 1996, finding that the requested prosecution of the alleged offence had become time-barred, a prosecutor issued a decision not to prosecute.

14. The applicant then instituted civil proceedings against J., requesting that J. be ordered to return all missing letters to the applicant and, failing which, he be ordered to pay 21,911 Finnish Marks (FIM) (approximately 3,685 Euros (EUR)) in compensation for non-pecuniary damage as well as the applicant's legal fees and expenses. The proceedings were based on the fact that J. had opened the letter sent by the insurance company.

15. A legal counsel of the postal service who was heard before the District Court of Espoo (*käräjäoikeus, tingsrätt*) stated that the postal service applied the principles that were included in the repealed Postal Service Decree (*postiliikenneasetus, posttrafikförordning*; 692/1980) concerning the sorting of mail belonging to estates in respect of which an official receiver had been appointed by the court. According to him, it was a duty of the postal service to sort the debtor's mail and put aside official mail belonging to the estate. In cases where the official nature of the mail was not clear, post offices decided on a case by case basis where to send the mail.

16. On 7 February 1997 the District Court rejected all the claims submitted by the applicant, finding that both J. and the postal service had acted in accordance with the Bankruptcy Act (*konkurssisääntö, konkursstadga*; 759/1991 as in force at the relevant time), and the established practice and internal instructions of the postal service concerning the sorting of mail. The applicant was ordered to pay FIM 27,487 (approximately EUR 4,620) in compensation for J.'s legal expenses. The District Court reasoned its decision, *inter alia*, as follows:

“The District Court agrees with the view of [J.] in that the official receiver has, in accordance with Section 50, subsection 2, of the Bankruptcy Act, a right to request that the debtor's mail be received by the official receiver, excluding the debtor's personal mail.

...

[J.] denied that the estate was in the possession of any other mail addressed to [the applicant], excluding a letter from the insurance company [P.]. That letter was related to the clarification of the assets and debts of [the applicant] and, thus, was included in the documents belonging to the estate. The estate was not obliged to return any of the material which belonged to it.

...

In the light of the evidence, [J.] has acted in accordance with the provisions of the Bankruptcy Act.

The [applicant's] claims are rejected as a whole.”

17. The applicant appealed to the Court of Appeal (*hovioikeus, hovrätten*) of Helsinki which, on 15 January 1998, upheld the District Court's decision. The applicant was ordered to pay J.'s costs of FIM 2,500 (approximately EUR 420). On 2 July 1998 the Supreme Court (*korkein oikeus, högsta domstolen*) refused the applicant leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. Section 40 of the Postal Service Decree, which was issued in 1980 and repealed in its entirety in 1991 (945/1991), but was nonetheless applied as an internal instruction within the postal service, read as follows:

“Declaration of bankruptcy of a mail recipient does not affect his right to receive mail and postal orders. Where a person who proves that he has the right to represent the bankruptcy estate requires that mail and postal orders addressed to the person declared bankrupt be transferred to him, the amounts indicated on the postal order shall be paid to the bankruptcy estate.

A mail delivery addressed to a recipient declared bankrupt, the receipt of which needs to be acknowledged, shall be returned to the sender unless the sender has otherwise ordered before the return of the mail.

Notwithstanding the provisions in subsections 1 and 2 above, a natural person declared bankrupt shall nevertheless have the right to mail deliveries which clearly indicate that they do not belong to the bankruptcy estate.”

19. According to Chapter II, Section 12 of the former Constitution of Finland (*hallitusmuoto, regeringsformen*; 94/1919) as in force at the relevant time, the right to the secrecy of correspondence, telegraph messages and telephone conversations is inviolable, subject to exceptions provided for in the law.

20. The relevant sections of the Bankruptcy Act (*konkurssisääntö, konkursstadga*) provided at the relevant time as follows:

“Chapter 4 – Property belonging to the bankrupt’s estate (759/1991)

Section 45

(1) The property belonging to a bankrupt’s estate shall consist of any property which was in the debtor’s possession at the time of lodging a request for the transfer of property with a court of law, or at the time of issue of a court decision on the transfer of property upon a creditor’s request, or which the debtor was to get in his possession before the termination of the bankruptcy proceedings, and which may be lawfully seized, as well as of any property which may be recovered for the estate by virtue of the Act on the Recovery of Property for the Estate of a Bankrupt Person. (759/1991).

Chapter 5 – Administration of a bankrupt’s estate

Section 50

Should a hearing of creditors be ordered in bankruptcy proceedings under Section 13, without a prior order on the administration of property as provided for in Sections 3, 5 and 7, the court or its president may appoint an appropriate person to take, for the purposes of the hearing, such measures in respect of the estate as may be necessary in the particular circumstances of the case.

... (a) temporary estate trustee shall receive the documents and property belonging to the bankruptcy estate, list the assets and debts of the estate, and take any other measures necessary for the performance of his or her duties.

Section 65 (Reception of the estate)

Upon a court order, the executors of the estate (*toimitsijamiehet, sysslomännen*) shall without delay request the bankruptcy trustees (*uskotut miehet, gode männen*) to account for the assets and debts of the estate and of its administration, shall take the property of the estate in their possession and take the necessary actions for the benefit and relief of creditors. If the trustees refuse to account for the assets and debts, the court shall place them under an obligation to do so. Should a person who is appointed executor have previously acted as trustee, he or she shall also give such account to the creditors.”

21. As the Bankruptcy Act was rather old, a well-established interpretation of its provisions developed. According to literature concerning bankruptcy in Finland (Erkki Havansi, Finnish Bankruptcy Law, 3rd revised edition, Helsinki 1992; in Finnish), the normal duties of temporary bankruptcy trustees during the temporary administration of the bankrupt’s estate included the following: (A) taking over the possession of the property, including (a) collecting information on property, (b) taking into possession, and (c) preservation of property by means of protective measures, and (B) listing of assets and liabilities with the cooperation of the debtor. The taking into possession of the property made the assessment of the property’s value, its preservation and administration possible. Cash reserves, arriving mail and accounts were included.

22. In 1999 the Finnish Office of the Bankruptcy Ombudsman gave the following recommendations concerning the matter:

“Recommendations 11/99: Rights and Obligations of the Debtor in Bankruptcy Proceedings

10. Personal documents and possessions of the debtor

The private life of individual persons is protected by the Constitution and international conventions. This shall be paid attention to in the administration of the bankrupt’s estate.

Secrecy of correspondence is one of the rights protected by the Constitution, and there shall be no interference with the exercise of this right except such as is in accordance with a specific provision of the law. The bankruptcy trustee shall collect information on the debtor’s business correspondence. He shall try and follow practices that ensure access to such information on the business correspondence as is necessary for the management and settlement of the estate, without violating the secrecy of the debtor’s correspondence.

The estate trustee shall not have the right to take over the possession of or examine the debtor’s private correspondence or other personal documents. Any personal documents of the debtor, which are of no relevance to the administration of the estate, shall be delivered to the debtor.”

23. New legislation concerning bankruptcy will enter into force on 1 September 2004, repealing the previous bankruptcy legislation (see paragraph 20 above. According to Chapter 4, section 4(1) of the new Bankruptcy Act (*konkurssilaki, konkurslag*: 120/2004) the bankruptcy trustee shall have the right, without the debtor's consent, to receive and open mail and other messages, as well as parcels, addressed to the debtor which pertain to his or her economic activities.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

24. Article 8 provides as relevant:

“1. Everyone has the right to respect for his ... correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. The parties's submissions

1. *The applicant*

25. The applicant complained that the letter addressed to him and sent to his home address by the insurance company was received and opened by J. Nothing in the recipient or address information on the envelope indicated anything other than that it was a private letter. He noted that the prosecutor's decision of 22 July 1996 was based on the statute of limitations, not giving an opinion on the actual subject matter.

26. As regards the sorting of his mail by the postal service, the applicant submitted that no instructions given by J. had been found. To the contrary, all the mail was sent to the applicant as from 23 September 1993 onwards at his request and no sorting took place afterwards.

27. The applicant maintained that the Finnish law did not contain at the relevant time provisions governing restrictions on a bankrupt's right to the secrecy of his correspondence. Neither the Bankruptcy Act nor the Postal Service Decree (which was not even in force at the relevant time) provided for any such restrictions. In the absence of relevant legislation, the interference with his rights was not “in accordance with the law”. In this

connection the applicant recalled that in order to be a law, the rule had to be accessible and written in a form sufficiently precise to ensure foreseeability. As encroachment upon the right protected by Article 8 involved a serious invasion of privacy and violation of secrecy of correspondence, it should, therefore, be based on a law which was especially precise. It should clearly define the persons covered and the conditions in which the secrecy of correspondence could be interfered with. The internal instructions for the authorities, such as the repealed Postal Service Decree which was applied as an internal instruction within the postal service, did not meet the requirements of accessibility and foreseeability.

28. The applicant reiterated that, while J. had admitted having opened one letter, J. had had all the applicant's mail forwarded to him and there was no certainty about the number of letters he received and opened. He argued that the creditors' rights were sufficiently secured by the Bankruptcy Act without such measures. The property of the debtor was at the disposal of the creditors and, with the threat of punishment, the debtor was obliged to declare his property. The securing of the creditors' rights did not require an interference with the debtor's private correspondence. Thus, it was not an interference "necessary in a democratic society".

2. The Government

29. The Government observed that the applicant did not contest the right of the official receiver to receive mail belonging to the estate. As the official receiver in fact had such a right and duty under the law, there had been no interference as the letter opened by him was to be considered as belonging to the estate. They noted that the transfer of the applicant's mail by the postal services to the law office of J. was based on the provisions of Sections 45 and 65 of the then Bankruptcy Act, as well as on established practice applied to the management of bankruptcy estates. It was, thus, in accordance with the Finnish law. The postal service further applied, as internal instructions, the principles enshrined in Section 40 of the repealed Postal Service Decree. According to these internal instructions, the postal service was under an obligation, upon a request made by the estate trustee, to sort out official mail to be sent to the bankruptcy estate and private mail, clearly identifiable as such, to be sent to the debtor.

30. The Government noted that in bankruptcy proceedings the official receiver represented creditors having claims to the property and, in this capacity, had a right and a duty to list the property belonging to the estate and protect it. They also pointed out that the procedure applied by the official receiver was agreed on with the applicant in the meeting with J. on 15 September 1993.

31. The Government submitted that the authorisation of the official receiver to have access to the applicant's correspondence could be considered to be in furtherance of the protection of the "rights of others"

within the meaning of Article 8 § 2 of the Convention and thus to pursue a legitimate aim. In order to prevent the concealment of a bankrupt's assets to the detriment of his creditors, the authorities may consider it necessary to have recourse to the interception of a bankrupt's correspondence in order to identify and trace the sources of his income. In the present case, J. had opened one single letter addressed to the applicant, which had been sent by an insurance company. The said letter concerned the price of an apartment which had been pledged as security for the payment of debts. Neither the sender's name nor any other external fact gave reason to assume that the letter could have been, as is alleged by the applicant, of a private nature. It was also of relevance that the delivered mail was a letter sent by an insurance company, and there was reason to believe that the letter related to property belonging to the bankrupt's estate. The letter could have, for example, been sent for the purpose of repudiating an insurance policy. It must also be remembered that the official receiver was under an obligation to administer the property of the bankrupt's estate, subject to liability for damages, and this included a duty to ensure that the property was covered by an appropriate insurance. The various domestic courts that examined the case all observed that the contents of the letter were such that the letter could have concerned property belonging to the bankruptcy estate. Any interference may, thus, be regarded as necessary in a democratic society. It had not been shown that any other mail addressed to the applicant was received by J. during the relevant period.

B. The Court's assessment

1. The existence of an interference

32. The Court notes that the Government only admit that one letter addressed to the applicant was received by the official receiver, J. There is no evidence to show that any other correspondence was sent to J.'s office during the relevant period. The opening of one letter is, however, sufficient to disclose an interference with the applicant's right to respect for his correspondence. The Court is not persuaded by the Government argument that mail sent to a bankrupt which potentially concerned his estate ceased, for the purposes of Article 8, to be his correspondence because of the practice under Finnish law that such mail could be directed to the official receiver.

33. The Court must therefore examine whether this interference was in conformity with the requirements of the second paragraph of Article 8, namely whether it was "in accordance with the law", pursued a legitimate aim and was necessary in a democratic society in order to achieve that aim (*Valašinas v. Lithuania*, no. 44558/98, 24.7.2001, § 128, ECHR 2001-VIII).

2. Compliance with Article 8 § 2 of the Convention

34. The Court sees no reasonable doubt that the redirecting and opening of the applicant's letter pursued the legitimate aim of protecting the rights of others, namely the creditors of the estate (*mutatis mutandis*, *Luordo v. Italy*, ECHR 2003-IX, § 94). The question arises in the present case as to whether the measure was "in accordance with the law". This expression requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law (see *Kruslin v. France* and *Huvig v. France*, judgments of 24 April 1990, Series A no. 176-A, p. 20, § 27, and Series A no. 176-B, p. 52, § 26, respectively).

35. In the present case, the Court recalls that the Government have stated that the redirecting and opening of the applicant's letter was based on sections 45 and 65 of the then Bankruptcy Act, as well as on the established practice applying to the administration of bankruptcy estates, and that the District Court in its decision of 7 February 1997 considered that J. and the postal service had acted in accordance with the above-mentioned sections of the Bankruptcy Act. The Court notes however that neither provision makes any reference to correspondence and that both are framed in very general terms concerning such measures as may be necessary to administer and secure the bankrupt's estate. It further observes that instructions followed by the postal service concerning the mail of bankrupts were contained in a decree that was repealed and no longer in force (see paragraph 18 above). This lack of specific legally binding rules governing interference with a bankrupt's mail is striking given the clear prohibition on interference with correspondence contained in the Constitution.

36. The Court therefore considers that, even if there could be said to be a general legal basis for the measures provided for in Finnish law, the absence of applicable regulations specifying with any degree of precision as to the circumstances in which correspondence will be redirected or opened or as to the categories of correspondence concerned deprived the applicant of the minimum degree of protection to which he was entitled under the rule of law in a democratic society (see, *mutatis mutandis*, *Ollila v. Finland*, no. 18969/91, Commission Report of 30 June 1993).

37. The Court finds that in these circumstances it cannot be said that the interference with the applicant's right to respect for his correspondence was "in accordance with the law" as required by Article 8 § 2 of the Convention.

38. In view of the above finding, it is unnecessary to examine whether the interference in the present case was necessary in a democratic society for one of the legitimate aims set out in Article 8 § 2 of the Convention.

39. There has therefore been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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. Pecuniary damage

41. The applicant claimed EUR 11,411.78 euros, inclusive of VAT, in respect of his costs in the domestic proceedings which he brought against the official receiver (EUR 6,368.30) and in respect of the costs of the other party which he had to pay in the District Court and Court of Appeal (EUR 5,043.48). He made no other claim under this head.

42. The Government submitted that they were not liable to pay for any costs and expenses from the applicant’s domestic proceedings unless there was a direct causal link between the violation and the damage claimed.

43. The Court has considered this claim under the head *Costs and Expenses*, below.

B. Non-pecuniary damage

44. The applicant claimed EUR 2,379.79 for non-pecuniary damage.

45. While acknowledging that the applicant had a right to an award if there was a violation, the Government submitted that his claims were excessive and noting that only one letter was involved, considered that any award should not exceed EUR 500.

46. Having regard to the relatively short duration of the interference and its limited impact, the Court considers that the finding of a violation in this case may be regarded as constituting sufficient just satisfaction for any non-pecuniary damage suffered.

C. Costs and expenses

47. In addition to the costs of the domestic proceedings referred to above, the applicant claimed EUR 6,248.65 for costs and expenses incurred in the Strasbourg proceedings, inclusive of VAT. This included a sum of EUR 3,665.67 for his own time and work on the application and fees of EUR 1,211.46 for his counsel’s two page submission on the merits and just satisfaction.

48. The Government noted that the applicant had been given free legal aid for his costs in the domestic proceedings and that he could not claim

these amounts a second time. They also considered that the applicant could not claim costs and expenses in respect of his own work and time spent on his case. In any event, the amounts were excessive and the hours claimed by counsel for work on this application were insufficiently specified or appeared to relate to other matters. In their view, the amount awarded should not exceed EUR 1,300.

49. The Court recalls that the established principle in relation to domestic legal costs is that an applicant is entitled to be reimbursed those costs actually and necessarily incurred to prevent or redress the breach of the Convention, to the extent that the costs are reasonable as to quantum (see, for example, *I.J.L., G.M.R. and A.K.P. v. the United Kingdom (Article 41)*, nos. 29522/95, 30056/96 and 30574/96, § 18, 25 September 2001). It finds that the proceedings brought by the applicant against the official receiver may be regarded as incurred to redress the breach of Article 8 of the Convention complained of by the applicant. Noting however that the applicant received free legal aid and that the Government do not contest that he had to pay his opponent's costs, the Court awards the applicant EUR 5,043.

50. As regards the Strasbourg costs, the Court would recall that under Article 41 no awards are made in respect of the time or work put into an application by the applicant as this cannot be regarded as monetary costs actually incurred by him. Having regard to the limited number of issues in this application and the procedure adopted before the Court in this case as well as the somewhat inflated claim for recent submissions, the Court finds that the amount claimed for the proceedings in Strasbourg cannot be regarded as either necessarily incurred or reasonable as to quantum (see, amongst other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II). Taking into account the legal aid paid by the Council of Europe, it awards the sum of EUR 1,800 for legal costs and expenses in the proceedings before this Court.

D. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention;
2. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
3. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 6,843 (six thousand eight hundred and forty three euros) in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 1 June 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Maruste is annexed to this judgment.

N.B.
M.O.B.

DISSENTING OPINION OF JUDGE MARUSTE

To my regret I do not share the findings of the majority of the Chamber.

In essence the action of the bankruptcy trustee was in conformity with his legal duties and the logic of the situation. According to domestic law (section 50, sub-section 2 of the Bankruptcy Act) the official receiver takes over the possession of the property in all respects. The letter was official, it was sent by an insurance company and there was reason to believe that it related to property belonging to the bankruptcy estate. It did not bear any explicit indication that it was of a private or personal nature. Neither were there any indications that the receiver had acted in bad faith. Under these circumstances I find that the interference was of a minimal and formal nature and did not amount to a violation of the Convention.