



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

FOURTH SECTION

CASE OF PUOLITAIVAL AND PIRTIAHO v. FINLAND

(Application no. 54857/00)

JUDGMENT

STRASBOURG

23 November 2004

FINAL

23/02/2005

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 Puolitaival and Pirttiahho 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 J. CASADEVALL,

Mr S. PAVLOVSKI,

Mr J. BORRERO BORRERO,

Mrs E. FURA-SANDSTRÖM, *judges*,

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

Having deliberated in private on 1 June and 26 October 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 54857/00) 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 two Finnish nationals, Mr Olavi Puolitaival and Mr Esko Pirttiahho, on 3 November 1999.

2. The applicants were represented by Mr David Guy, a barrister practising in London. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen, Director in the Ministry for Foreign Affairs.

3. The applicants alleged that they had not had a fair hearing by an independent and impartial tribunal as one of the Court of Appeal judges, P.L., had represented the respondent in earlier proceedings instituted by the applicants.

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 1 June 2004, the Court declared the application partly admissible.

6. The applicant 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 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants, Olavi Puolitaival and Esko Pirttiaho, are Finnish nationals who were born in 1945 and 1958 and live in Jääli and Tampere respectively.

1. The first set of proceedings

8. The applicants were owners of a former company called Konekersantti Oy (hereinafter “the applicants' company”), which was a claimant in civil proceedings initiated on 3 December 1991 against another company called M.R. Ky (hereinafter “the M.R. company”). The proceedings concerned a dispute about the sale of movable property: the M.R. company had refused to pay the applicants' company the purchase price of an engine as they claimed, *inter alia*, that it did not contain all the components ordered.

9. The lawyer of the M.R. company in the proceedings before the Vaasa District Court and in the lodging of an appeal with the Vaasa Court of Appeal on 4 March 1992 was P.L., who was also at that time a judicial secretary (*hovioikeudenviskaali, hovrättsfiskal*) at the Vaasa Court of Appeal. Together with her husband, she owned a law firm until 1995. At the material time, P.L. worked part-time for the law firm as a partner, having been given permission to do so by the Court of Appeal.

10. In her notice of appeal of 4 March 1992 on behalf of the M.R. company P.L. submitted to the Court of Appeal, *inter alia*, that the applicants' company “seems to use concepts quite carelessly in its agreements in general”; that “what is essential about the case is that the seller must not act fraudulently and must not, even in good faith, draw up agreements the contents of which are unclear”; and, further, that “if we follow the logic of the City Court, overcharging is not a crime if you manage to overcharge more than one victim”.

11. The final decision in the above case was given by the Court of Appeal on 22 February 1993 in favour of the applicants.

2. The second set of proceedings

12. The applicants' company was also the claimant in another set of civil proceedings initiated on 26 February 1992 in the Ylivieska District Court (*kihlakunnanoikeus, häradsrätten*), in which the respondent was an investment bank. That case concerned the bank's refusal to grant the applicants' company a bank guarantee for acquiring financing from abroad, and compensation for the ensuing loss of business profits. The applicants

maintained, *inter alia*, that their company had been dissolved in 1992 because of the bank's failure to fulfil its contractual obligations. The applicants claimed, *inter alia*, 9,800,000 Finnish marks (FIM, equivalent to 1,648,242 euros (EUR)) in compensation for the business they had lost.

13. On 3 December 1992 the Ylivieska District Court refused to examine the applicants' claims as it found them to be too unspecific to provide a basis for any court proceedings.

14. On 3 November 1993 the Vaasa Court of Appeal (*hovioikeus*, *hovrätten*) remitted the case to the District Court (from 1 December 1993 *käräjäoikeus*, *tingsrätten*), finding that the District Court should have examined the applicants' claims. P.L. did not take part in those proceedings.

15. On 25 March 1994 the case was opened for re-examination by the District Court. It found that although the bank had breached its obligations towards the applicants' company, it had not caused the company's liquidation, and dismissed its claims on 30 April 1997.

16. The applicants' company appealed against that decision to the Court of Appeal, which upheld the District Court's decision and dismissed the appeal on 18 August 1998. The bench of the Court of Appeal which examined the case was composed of three judges, including P.L., who was now a judge.

17. The applicants' company requested leave to appeal to the Supreme Court, stating, *inter alia*, that P.L. was biased as she had taken part in other proceedings in 1992 (the first set of proceedings), in which the opposing party had been represented by the law firm in which P.L. had been a partner at that time. She had, for example, signed her client's submissions to the District Court and to the Court of Appeal.

18. Before making its decision concerning the request for leave to appeal, the Supreme Court requested a statement from P.L. The statement, dated 26 March 1996 (the date was apparently erroneous in that the year should have been 1999), read as follows:

“In addition to full-time judge's duties, I practised law as a partner in a law firm on a part-time basis, with the permission of the President of the Vaasa Court of Appeal, until 1995, when the firm was closed down. Thereafter I have had no part-time duties.

It is true that our law firm represented a client in a civil case between [the M.R. company] and [the applicants' company] before the Vaasa District Court. At that time the pleadings before the District Court were handled by J.I. ... and, after an appeal was lodged with the Court of Appeal, the pleadings before the Court of Appeal were handled by the advocate J.V., as I found that it was not appropriate for me to continue with the case in the Court of Appeal.

At the time of participating in the consideration of the present civil case between [the applicants' company] and the investment bank, I did not even remember that our law firm, which had been closed down, had approximately seven years earlier represented a client in a different case in which [the applicants' company] was the opposing party. Thus, no question of possible disqualification arose to be considered.

My personal view is that, when assessed on objective grounds, [the applicants' company] had no real reason to doubt my impartiality, considering in particular that the period of time between my earlier representation and the decision-making stage in the present case was long, and that there was no factual link between the two cases.”

19. On 11 May 1999 the Supreme Court refused the applicants' company leave to appeal. According to the decision, Judge P.L.'s statement had been communicated to the applicants for information.

20. On 20 April 2000 the applicants applied to the Supreme Court for annulment of the decision, again drawing attention, *inter alia*, to the alleged bias on the part of P.L. The application was refused by the Supreme Court on 21 May 2001.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. The provisions concerning the disqualification of judges were at the relevant time contained in Chapter 13, section 1, of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*). It contained a list of grounds on which a judge might be disqualified. The relevant provisions concerning the impartiality of judges were subsequently amended (Act no. 441/2001).

22. According to the domestic courts' case-law, the question of possible bias on the part of a judge was addressed, *inter alia*, by assessing whether his or her earlier activities as legal counsel constituted a justified reason to doubt his or her impartiality.

23. The Supreme Court found in a decision of 8 December 1997 (no. 1997:192) that a judge was not disqualified on the ground that he had earlier assisted one of the parties to the case in separate proceedings, as his duties as a legal representative and counsel did not pertain to the case at hand and his conduct and standpoint in his capacity as counsel or legal representative did not give rise to any objective reason to doubt his impartiality in respect of matters concerning the other party.

24. Chapter 25, section 12 (Act no. 165/1998), of the Code of Judicial Procedure provides that the deadline for lodging an appeal is thirty days from the date when the decision of the District Court was delivered or made available to the parties. Chapter 25, section 12, of the Code of Judicial Procedure, as in force at the relevant time, corresponded in essence to the current provision in the above-mentioned respects.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

25. The applicants complained under Article 6 § 1 of the Convention that they had not had a fair hearing by an independent and impartial tribunal as one of the Court of Appeal judges, P.L., had represented the respondent in earlier proceedings brought by the applicants. Article 6 § 1 of the Convention, in so far as relevant, reads as follows:

“1. 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.”

A. The parties' submissions

1. The applicants

26. The applicants maintained that there was an overlap between the two cases in which P.L. had taken part in her different capacities, from 26 February 1992 to 22 February 1993. Although the final decision of the Court of Appeal in the case involving the M.R. company (the first set of proceedings) had been given on 22 February 1993, the first appeal in the second case had already been referred to it by that date (its decision in those proceedings having been given on 3 November 1993). The cases had therefore both been pending at the same time.

27. The applicants asserted that the overlap of a judge's functions required, at the very least, an assessment and discussion with the parties as to whether it was necessary for him or her to withdraw. If a party expressed legitimate concern, that should have sufficed for the judge to withdraw. The fact that the judge, in her previous capacity as counsel, had been supplied by her clients with information about that party which might have been false or defamatory would have been a legitimate concern. The passage of time alone could not allay the party's apprehensions, nor was it sufficient that the judge/counsel had handed over responsibility for the later stages of the case to another member of the same firm.

28. The applicants maintained that P.L.'s submissions in the notice of appeal of 4 March 1992 amounted to an allegation of fraudulent trading by the applicants' company. Although there was no direct factual link between the two proceedings at issue, the credibility of the applicants' company was a factor in both cases. The applicants submitted that the overlap, together with the notice of appeal, cast doubt on the appearance of P.L.'s impartiality.

29. The applicants also submitted that the Court of Appeal proceedings had been conducted in writing and that they had not been notified of the court's composition until they had received its judgment. They submitted that it was always essential for the parties to be able to raise an objection to a court's composition as soon as they learned of it and, in any event, before a final decision was taken.

30. In their submissions of 13 August 2004 they maintained that they had personally seen P.L.'s submissions only after the Supreme Court's decision. They maintained that it had recently emerged that the submissions in question had in fact been sent to their representative before the Supreme Court, a professor of law, who had not, however, forwarded them to the applicants. In their submissions of 21 September 2004 the applicants maintained that they had not been aware of P.L.'s statement until they had received the Government's observations; nor had they been aware that their previous legal counsel before that court had faxed P.L.'s statement to the Court on 4 December 1999. In any case, the Supreme Court had not invited the applicants to make comments in reply to P.L.'s submissions. Because of this error there had been no other opportunity to submit comments, as there had been no oral hearing in the Supreme Court.

The applicants also maintained that P.L.'s submissions to the Supreme Court had not mentioned that she had signed the pleadings filed with the Court of Appeal in the previous case, or that the pleadings had reflected adversely on the conduct of the applicants' company, or that she had been the lawyer in charge of that case.

31. The applicants further maintained that the duty of judges to offer sufficient guarantees to dispel reasonably held doubts required P.L. to keep a full and proper record of the parties whom she had acted for and against in her capacity as counsel. Her forgetfulness should not decide the issue. There appeared to be no system for checking possible overlapping cases in the Court of Appeal. They also submitted that the Government had not shown whether P.L.'s law firm had had a database or other non-computerised system to detect conflicts of interest; if there had been one, P.L. had plainly not consulted it. Keeping a list of cases in which a lawyer had taken part would not paralyse the legal profession, as alleged by the Government. This was especially important in a small country like Finland.

32. The applicants concluded that the overlap of the two cases, together with the part played by P.L. as counsel in the previous case, raised a legitimate doubt sufficient at least to require an assessment and the provision of guarantees to dispel it. However, there had been no such assessment and no such guarantees had been available. The procedure in the Court of Appeal whereby judges were not identified in advance of the judgment deprived litigants of the opportunity to express their doubts or to receive reassurance. Nor was there a system to ensure that dual-capacity judges were aware of possible conflicts of interest, or a procedure to allow

litigants to challenge the judge's views on the matter. The Supreme Court's decision no. 1997:192 (see paragraph 23 above) had been given before the Court's decision in *Wettstein v. Switzerland* (no. 33958/96, ECHR 2000-XII), and the latter precedent should have been followed instead.

2. The Government

33. In the Government's view, there had been nothing to indicate any subjective prejudice or bias on the part of Judge P.L. They emphasised that, in contrast to the *Wettstein* case (cited above), P.L. had not examined the present applicants' case as a judge of the Court of Appeal at the same time as she had represented the party opposing the applicants in separate proceedings. The duties of P.L. as legal counsel for the M.R. company had ended in February 1993 and she had given up her work in the law firm in 1995 – in other words, before the applicants' case had come back to the Court of Appeal in May 1997. There had been a gap of more than four years between the two sets of proceedings in which P.L. had taken part.

34. The Government further noted that, although P.L. had signed the written submissions, she herself had not participated in the hearing in the case. Moreover, the two sets of proceedings were in no way related to each other in substance, one concerning the sale of movable property and the other concerning the cancellation of a loan granted by the investment bank and compensation for the related loss of business profits. Furthermore, the two sets of proceedings had been pending before different district courts.

35. The Government disputed the applicants' contention that they had not seen the full text of P.L.'s submissions of 26 March 1999 sent to the Supreme Court. They maintained that according to the record (*diaari, diarium*) of the Supreme Court, the statement in question had been received at the Supreme Court on 1 April 1999 and forwarded to the applicants' legal counsel on 9 April 1999. The Supreme Court's judgment of 11 May 1999 specifically stated that the statement had been communicated to the applicants for information. Having already received the views of both parties, the Supreme Court had obviously not found it necessary to request further comments. The courts had to stop requesting further observations from the parties at some point and it was within their discretion to decide when the facts and evidence had been submitted to the extent necessary to enable the court to make a fair and balanced decision.

Whether their legal counsel had communicated the observations to his clients was not the issue here and the Government could not in any event be held responsible for the acts or omissions of a private person. They further submitted that the applicants' previous legal counsel before the Supreme Court had faxed the statement to the Court on 4 December 1999.

36. The Government submitted that according to the Code of Judicial Procedure, a judge was not regarded as biased when he or she had previously been a judge in another set of proceedings to which one of the

current parties had been a party. Nor did a judge's previous involvement in the proceedings against one of the current parties' former adversaries affect the impartiality of the judge in question.

The Government also relied on *Nikula v. Finland* (no. 31611/96, ECHR 2002-II), in which the Court had stated that counsel had the right to use even harsh language within the right to freedom of expression without fear of retribution.

37. As regards the safeguards preventing situations in which a judge examined a case in which he or she had previously been involved in another capacity, the Government submitted that in 1995, when P.L.'s partnership had ceased to exist, computerised client files were rare, especially in small law firms such as the one in question.

38. They relied on the Court's inadmissibility decision in *Walston v. Norway* ((dec.), no. 37372/97, 11 December 2001), maintaining that the time-frame could be relevant when assessing the significance of a judge's previous relationship to the opposing party. In the present case a considerable period of time, over four years, had elapsed. If the general concept of bias were extended to cover all previous clients and counterparts over a period of even more than four years prior to the relevant date, the functions of the courts could be severely compromised. In this connection they pointed out that the Court of Appeal's decision of 3 November 1993 (to refer the case back to the District Court) had been of a procedural nature and that P.L. had not taken part in those proceedings. They further submitted that were the criterion of impartiality taken so far as to require judges to keep records of all the parties they had previously represented or the proceedings in which they had sat in their career, this would paralyse the entire legal profession. It was natural in a democratic society that experience in varied fields of law gave legal professionals a broader perspective of the law and the legal questions arising in society and therefore made them more qualified in their profession.

39. The Government also argued that it was not reasonable to request that the parties to a case have the opportunity to make submissions about the composition of a court in advance.

40. In the Government's view, the allegation that the Court of Appeal had not been impartial in examining the appeal could not be objectively held to be justified; the proceedings in the present case had in no way been conducted in a manner incompatible with Article 6 § 1 of the Convention.

B. The Court's assessment

41. The Court notes that the case raises questions of impartiality rather than independence proper. The existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test, that is to say whether the judge held any personal prejudice or bias in a given case, and

also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia*, *Fey v. Austria*, judgment of 24 February 1993, Series A no. 255, p. 12, §§ 27, 28 and 30). It must be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 794, § 38).

42. The Court further notes that in determining whether there are ascertainable facts which may raise doubts as to a judge's impartiality even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Castillo Algar v. Spain*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3116, § 45). This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports* 1996-III, pp. 951-52, § 58).

43. The personal impartiality of a judge must be presumed until there is proof to the contrary. In the present case there is no reason to doubt the personal impartiality of P.L. in the absence of any proof to the contrary.

44. As regards objective impartiality, the Court observes at the outset that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it (see *Minelli v. Switzerland*, judgment of 25 March 1983, Series A no. 62, p. 17, § 35). Accordingly, there is no reason to doubt that legislation and practice concerning the part-time judiciary in general was framed so as to be compatible with Article 6. In the present case the Court notes, however, that there is no indication that there was any system in the Court of Appeal to ensure that judges were reminded of their prior involvement in particular cases or with former clients. The Court would observe that there is a risk of problems arising in a system where such matters are left entirely to the judges' own assessment, which may, inevitably, suffer from a lack of recollection of a particular instance of prior involvement. The Court's task at hand is, however, limited to assessing whether the particular circumstances of the present case disclosed any appearance of bias in the Court of Appeal's composition in the second set of proceedings.

45. The Court reiterates that a judge's dual roles in a given case may in certain circumstances compromise a tribunal's impartiality. In *Piersack v. Belgium* (judgment of 1 October 1982, Series A no. 53, pp. 14-16, §§ 30-31) the fact that a judge had presided over a criminal trial after having been the head of the public prosecutor's office in charge of the prosecution in the

case was capable of rendering the tribunal's impartiality open to doubt, in breach of Article 6 § 1 of the Convention. In *Wettstein* (cited above, § 47) there was an overlapping in time of two sets of proceedings in which R. had exercised the function of judge in one case, and of legal representative of the party opposing the applicant in the other. As a result, the applicant had reason for concern that Judge R. would continue to see him as the opposing party. The Court concluded that this situation could have raised legitimate fears in the applicant that Judge R. was not approaching his case with the requisite impartiality. Further, in *Walston* ((dec.), cited above) the time-frame was regarded as relevant when assessing the significance of a judge's previous relationship to the opposing party.

46. In the present case it is undisputed that P.L. did have a dual role, as counsel representing a party opposing the applicants' company in the first set of proceedings and as a Court of Appeal judge in the second set of proceedings. However, unlike in *Wettstein* (cited above), those dual functions did not overlap in time.

47. The Court observes that the first and second sets of proceedings briefly overlapped from 26 February 1992 (when the second set of proceedings began) to 22 February 1993 (when the first set of proceedings ended), that is for almost one year. It is, however, to be noted that the appeal by the applicants' company against the District Court's decision of 3 December 1992 must have been submitted within 30 days from that date (see paragraph 24 above), that is on 3 January 1993 at the latest. Although the exact date on which the appeal was lodged is not apparent the Court may nevertheless conclude that the first and second sets of proceedings were simultaneously pending in the Court of Appeal for approximately two to three months during the period from December 1992 to February 1993.

48. As regards P.L.'s activities either as counsel or as a judge during this period, the Court observes that she limited herself to drafting and signing the notice of appeal of 4 March 1992 in the first set of proceedings and that another lawyer dealt with the subsequent stages of the proceedings in the Court of Appeal. It is unclear what, if any, further submissions or procedural steps were taken after the notice of appeal was submitted. Be that as it may, there is no indication that P.L. was active as counsel in the case in the later stages of the first set of proceedings, between December 1992 and February 1993.

It is furthermore evident that during the period from December 1992 to February 1993 P.L. did not take part in the second set of proceedings as a judge. P.L. was not on the bench of the Court of Appeal when it gave its decision of 3 November 1993 to remit the case to the District Court. There is nothing to suggest any other possible involvement by her in those proceedings, either. According to the case file P.L.'s personal involvement in the second set of proceedings as a judge did not begin until some time after 30 April 1997, approximately three and a half years after the above-

mentioned period of overlap and more than five years after she had signed the notice of appeal on 4 March 1992.

49. The Court notes that in *Walston* (cited above) it considered it significant that a period of five years had elapsed from the time when a judge's previous employment with a bank had ended to the point at which the judge's participation in subsequent civil proceedings was first contested. It also had regard to the nature and duration of the judge's previous employment, to its remoteness in time and place and to the absence of any prior personal involvement or interest in the subject matter, and concluded that the applicants could not have entertained any legitimate doubts as to the judge's impartiality. Similarly, in the present case, P.L.'s prior involvement was remote in time and the subject matter of the two sets of proceedings was completely different.

50. The Court has considered whether there were other ascertainable facts in the present case which could have raised doubts as to P.L.'s impartiality. It notes that in the first set of proceedings P.L. would have received information from her clients about the applicants and their company and that the notice of appeal which she signed on 4 March 1992 contained critical remarks.

51. However, assessing the circumstances as a whole and having regard to their connection with and significance to the subject matter of the second set of proceedings, the Court observes that the second set of proceedings centred on the question whether the respondent, the investment bank, had breached its contractual obligations towards the applicants' company (to provide a bank guarantee to enable foreign financing for the company), and if so, whether any damage had resulted from the breach. On the other hand, the principal issue in dispute in the first set of proceedings was whether an engine sold by the applicants' company to the M.R. company contained all the necessary components.

52. Having regard to the difference in the subject matter of those two proceedings, and finding that the content of P.L.'s notice of appeal was unexceptionable by the standards of normal litigation, the Court is of the opinion that P.L.'s prior involvement as counsel in the first set of proceedings gave no reasonable grounds for fearing that she might have a preconceived attitude against the applicants' company in the second set of proceedings.

53. The Court lastly observes that P.L.'s statement of 26 March 1999 was communicated to the applicants' legal representative. There is thus no indication of any procedural unfairness as regards the manner in which the question of P.L.'s alleged bias was examined in the Supreme Court.

54. In these circumstances, having regard in particular to the remoteness in time and subject matter of the first set of proceedings in relation to the second set and to the fact that P.L.'s functions as counsel and judge did not

overlap in time, the Court finds that the applicants could not have entertained any objectively justified doubts as to P.L.'s impartiality.

The Court accordingly concludes that there has been no violation of Article 6 § 1 of the Convention in the present case.

FOR THESE REASONS, THE COURT

Holds by five votes to two that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 23 November 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 following dissenting opinion of Mr Casadevall joined by Mrs Strážnická is annexed to this judgment.

N.B.
M.O.B.

DISSENTING OPINION OF JUDGE CASADEVALL
JOINED BY JUDGE STRÁŽNICKÁ

(Translation)

1. I do not share the view of the majority in the present case. In my opinion, the case raises problems concerning objective impartiality and appearances, and as a result Article 6 § 1 of the Convention has been breached.

2. Although it is not my place to call into question the Finnish system whereby a person may act simultaneously or successively as a judge and as counsel (see paragraph 23 of the judgment), and although such a combination of functions should not in principle impair the right to a fair hearing set forth in Article 6, I consider that in certain situations there are minimum requirements in terms of protective and precautionary measures. Over and above statutory provisions and judicial precedent, the principle established by the Court that “*any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw*” should prevail in order to preserve the confidence which the courts must inspire in the public in a democratic society¹.

3. The present case may be distinguished from *Walston v. Norway* (no. 37372/97, decision of 11 December 2001), in which a judge had been employed several years previously by a bank that was a party to the proceedings in issue. It bears a much closer resemblance, however, to the case of *Wettstein v. Switzerland* (no. 33958/96, ECHR 2000-XII), which concerned the position of part-time judges who also practised – or had practised – as lawyers. In the present case, the applicants' dispute against a bank was heard by the Court of Appeal, one of whose members was Judge P.L., who had previously acted as counsel for the opposing party in a separate set of proceedings. The two sets of proceedings came before the Court of Appeal within the space of a few months, but the applicants did not have the opportunity to challenge the judge because they did not know in advance that she was to sit in their case.

4. Having regard to the facts of the case and to the consideration that even appearances may be of a certain importance, I am of the opinion that the applicants could have had objectively justified concerns about the judge in question². It is understandable that the applicants should have continued to see P.L., who had previously been counsel for an opposing party, as someone whose interests were contrary to theirs and who might give them cause to doubt her impartiality.

1. See, among other authorities, *Castillo Algar v. Spain*, § 45, cited in paragraph 42 of the judgment.

2. See *Wettstein v. Switzerland*, §§ 42 et seq., cited in paragraphs 32 and 45 of the judgment.

5. For the following reasons, I am not persuaded by the majority's arguments in favour of finding that there has been no violation.

(a) The applicants raised the question (see paragraph 31 of the judgment) whether P.L.'s law firm had had a database or system to detect any conflicts of interest. On this point, I share the majority's view (see paragraph 44 of the judgment) that the lack of such a system for carrying out checks at the Court of Appeal and the fact that the matter is left entirely to the judges' own assessment may inevitably entail the risk of forgetting an incident or involvement in a previous case.

(b) The applicants complained (see paragraph 32 of the judgment) about the procedure in the Court of Appeal whereby they were unable to challenge the judge because the names of the judges sitting in the case were not disclosed in advance. On this point, the majority merely note (see paragraph 53 of the judgment) that Judge P.L.'s statement of 26 March 1999 was communicated by the Supreme Court to the applicants' legal representative, but they omit to mention that the statement was communicated for information only and that the applicants were not given the opportunity to contest it (see paragraphs 19 and 30 of the judgment).

(c) As to the applicants' argument that the first and second sets of proceedings before the Court of Appeal overlapped between February 1992 and February 1993, the majority conclude (see paragraph 47 of the judgment) that the two sets of proceedings were simultaneously pending for approximately two to three months, between December 1992 and February 1993. The Court therefore accepts that the applicants' two cases overlapped before the national appellate court. Bearing in mind appearances and the legitimate doubts on the litigants' part, whether the overlap lasted three months, six months or one year does not alter the essence of the problem.

(d) The Court observes (see paragraph 48 of the judgment) that P.L.'s activities as counsel were limited to drafting and signing the notice of appeal of 4 March 1992 in the first set of proceedings and that there is no indication of any further intervention on her part. A supposed "limitation" of this kind does not appear either relevant or sufficient to me. In any event, it is indisputable that any lawyer, after examining a particular case file, will have access to a whole range of information about the opposing party which may easily, even if unconsciously, influence his or her personal judgment regarding that party.

(e) Lastly, it should be pointed out that although the judge in question admitted in her statement of 26 March 1999 to the Supreme Court that her law firm had represented a client in a case against the applicants and that J.I. had acted as counsel in the proceedings before the District Court and J.V. as counsel before the Court of Appeal "*... as I found that it was not appropriate for me to continue with the case in the Court of Appeal*", she nonetheless omitted to mention that she had drafted and signed the notice of

appeal, merely citing a lapse of memory and her personal view that there was no reason to doubt her impartiality (see paragraph 18 of the judgment).