



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

FOURTH SECTION

CASE OF LOMASEITA OY AND OTHERS v. FINLAND

(Application no. 45029/98)

JUDGMENT

STRASBOURG

5 July 2005

FINAL

05/10/2005

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 Lomaseita Oy and Others v. Finland,

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

Sir Nicolas BRATZA, *President*,

Mr G. BONELLO,

Mr M. PELLONPÄÄ,

Mr K. TRAJA,

Mr L. GARLICKI,

Mr J. BORREGO BORREGO,

Ms L. MIJOVIĆ, *judges*,

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

Having deliberated in private on 18 May 2004 and on 14 June 2005,

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

PROCEDURE

1. The case originated in an application (no. 45029/98) 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 two limited liability companies, Lomaseita Oy and CPT Data Oy, and a Finnish national, Mrs Kaisaleena Laaksonen ("the applicants"), on 1 December 1998.

2. The applicants were represented by Mr Timo Salminen, a lawyer practising in Helsinki. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen, Director in the Ministry for Foreign Affairs.

3. The applicants alleged in particular that the Court of Appeal's failure to communicate to them the additional material submitted by the other party to the proceedings after the relevant time-limit for appeal had elapsed and to inform them about discussions between the representative of the other party and the judicial secretary of the Court of Appeal rendered the proceedings unfair.

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 18 May 2004 the Court declared the application partly admissible.

6. The applicants 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*).

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first and the second applicant, Lomaseita Oy and CPT Data Oy, are limited liability companies. The third applicant, Mrs Kaisaleena Laaksonen was born in 1947 and lives in Espoo.

9. In 1987, the third applicant founded a company called CPT Informations Systems Oy (“CPT IS” hereinafter) together with two others. On 20 October 1993 the company was ordered to be wound-up.

10. The official receiver of the estate of CPT IS, P., a lawyer practising in Helsinki and a member of the Finnish Bar Association, instituted civil proceedings against the third applicant and the applicant companies, which are at least partly owned by the third applicant. In the proceedings before the District Court of Espoo (*käräjäoikeus, tingsrätten*), P. requested that assets allegedly transferred from CPT IS to the applicants before the winding-up order was issued be returned to its estate.

11. On 31 January 1996, the District Court found partly in favour of the estate insofar as the first and second applicants were concerned and as a whole in favour of the estate in so far as the third applicant was concerned.

12. All the parties to the proceedings appealed to the Helsinki Court of Appeal (*hovioikeus, hovrätten*) and subsequently submitted their observations in reply. After the relevant time-limit for appeal had elapsed, the estate on two occasions in August 1997 submitted additional documentary material to the Court of Appeal, requesting that it be taken into account.

13. By its judgment of 23 December 1997 the Court of Appeal found in favour of the estate. Insofar as the additional material submitted by the estate after the time-limit for appeal had elapsed was concerned, the Court of Appeal stated as follows:

“The Court of Appeal has not found any such particular reason as prescribed by chapter 26, section 5 (1) of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*) to take into account the additional submissions with enclosures submitted by the estate after the relevant time-limit set for the appeal had elapsed. Therefore, they are not taken into account and, accordingly, the [estate’s] request for an oral hearing is rejected.”

14. On 18 June 1998 the Supreme Court (*korkein oikeus, högsta domstolen*) refused the applicants leave to appeal.

15. Having received the Supreme Court's decision, the applicants' representative at the time requested copies of all the relevant documents from the Court of Appeal. He found out that, despite what was said in the Court of Appeal's judgment about the additional submissions by the estate after the relevant time-limit for appeal had elapsed, the judicial secretary (*hovioikeudenviskaali, hovrättsfiskal*) of the Court of Appeal had made 71 remarks to the submissions in question and as many as 161 remarks to an enclosure, an inspection report drafted by the National Bureau of Investigation (*keskusrikospoliisi, centralkriminalpolisen*).

16. On 30 November 1998, the applicants requested that the Supreme Court reopen the proceedings, claiming that they had been denied a fair trial before the Court of Appeal as the estate's submissions, which had clearly been relevant and which had been taken into account even though there was a statement to the contrary in the Court of Appeal's judgment, had not been communicated to them. They also noted that it appeared from the invoice concerning the estate's legal costs included in the court file, that P. had consulted the Court of Appeal's judicial secretary several times during the proceedings. In this respect, the applicants complained that they had not been informed of any such discussions.

17. By its decision of 31 January 2001 the Supreme Court refused to reopen the proceedings. Insofar as the second applicant was concerned, the Supreme Court gave the following reasons:

"In the present case, the Court of Appeal decided not to take the new submissions into account. Under the provisions of law cited above [chapter 26, sections 5 and 6 of the Code of Judicial Procedure], the Court of Appeal did not therefore need to inform the other parties of the said submissions. The new submissions in question were, however, of such relevance for the issue at stake that, although there were no mandatory provisions of law to that effect, it might have been appropriate in those circumstances to communicate the submissions to the adverse parties.

The decision-making before the Court of Appeal depended on both judicial argumentation and evaluation of evidence. The Court of Appeal reached its conclusions on the basis of the material submitted to the District Court and the material in the appeal documents and the observations in reply. In its judgment, the Court of Appeal gave an account of the grounds on which it reached its conclusions. Neither the judgment nor the other documents in the file give any reason to conclude that the additional submissions by the estate after the time-limit for appeal had elapsed have *de facto*, and contrary to the wording of the judgment, affected the outcome of the Court of Appeal's judgment, as alleged by the company. Thus, there is no proof of such a procedural error as could be assumed to have affected the outcome of the proceedings and as would make it necessary or possible to annul the judgment under chapter 31, section 1 (4) of the Code of Judicial Procedure. ..."

18. The Supreme Court also rejected the annulment requests by the first and third applicants on the ground that the said police inspection report had

been submitted to the Court of Appeal only in support of the estate's appeal in respect of the second applicant. Nothing indicated that the inspection report had *de facto* affected the outcome of the judgment.

19. However, the decision of the Supreme Court was not unanimous, as one of the judges in his dissenting opinion stated the following:

“One of the basic principles of court proceedings is that all relevant material submitted to the court and which may have a bearing on the outcome of the case, shall be communicated to the parties (Supreme Court's decision No. 1995:95). According to the case-law of the European Court of Human Rights (*Nideröst-Huber v. Switzerland*, *Werner v. Austria*, *Kuopila v. Finland*) it is up to each party to decide whether the material is such that it may affect the case and, whether it calls for the party to comment on it. A court's view that a submission or a statement has no bearing on the outcome of the case does not therefore automatically justify the non-communication of such material to a party. Such a justification cannot be drawn from chapter 26, section 6 of the Code of Judicial Procedure, which concerns requesting written observations.

The estate of CPT Information Systems Oy submitted to the Court of Appeal, after the time-limit for appeal had elapsed, a supplementary police report, drafted by the Economic Offences Department of the police, together with an additional legal submission. The estate considered the material to be relevant to the case, requesting that it be taken into account in the decision-making. In the alternative, it requested that an oral hearing be held in order to call as a witness the person who had drafted the report. It is clear from the case-file that the official receiver and the judicial secretary of the Court of Appeal several times discussed over the telephone the submission of the additional material and apparently about the timetable of the proceedings. The occurrence of numerous remarks in the police report and the submission indicate that the material was at least not regarded as manifestly irrelevant. Based on general experience, economic reports, which have been drafted in an official capacity, are usually of relevance in cases concerning recovery of assets. In its judgment, the Court of Appeal revoked the District Court's judgment, accepting the essential parts of the estate's claims.

Under these circumstances, a fair trial would have required that the parties be informed, during the proceedings, of the additional material submitted by the estate as well as of the discussions concerning the schedule of the proceedings. I find that the Court of Appeal proceedings, in which one of the essential legal principles was disregarded, amounts to a procedural error within the meaning of chapter 31, section 1 (4) of the Code of Judicial Procedure. Therefore, the judgment must be annulled and the case returned to the Court of Appeal for re-examination. Having regard to the contents of the supplementary police report, this has to be done in respect of all three applicants. ...”

20. Meanwhile on 13 December 1999, the first and third applicants complained to the Chancellor of Justice (*oikeuskansleri, justitiekanslern*) about the conduct of the official receiver, P., as he had allegedly knowingly given incorrect information to the Court of Appeal in a submission on behalf of the estate during the above-mentioned proceedings. The Chancellor of Justice transferred the complaint to the Finnish Bar Association. On 23 February 2001, the Bar Association Disciplinary Board

admonished P. The Disciplinary Board found, *inter alia*, that P. had not corrected a piece of information he had submitted to the Court of Appeal on 24 April 1996, even though he had subsequently learned, on 29 August 1997, that the information was not true.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. Chapter 26, section 5 (661/1978) of the Code of Judicial Procedure, as in force at the relevant time, provided that the Court of Appeal could on special grounds take into account a submission or other document submitted by a party after the expiry of the time-limit for lodging an appeal.

22. Chapter 26, section 6 (661/1978), as in force at the relevant time, provided that if the Court of Appeal was to take into account such a submission filed after the time-limit had expired and it could have a bearing on the case, the Court of Appeal was to request the parties to submit written observations, unless it was manifestly unnecessary.

23. The Supreme Court issued a precedent on 31 August 2004 concerning the Court of Appeal's obligation to communicate to the parties a statement invited on the Court of Appeal's own motion (*KKO 2004:79*). Paragraph 7 of the decision reads:

“Proper administration of justice requires that a decision by a court is based only on files of which the parties to the proceedings are aware and which they have had an opportunity to examine. The parties must have the right to be informed of the contents of a document submitted to the court, even if the document is to be kept secret pursuant to section 24 of the Publicity Act, because only then can they be guaranteed an adequate possibility to participate in the proceedings. The precondition to disclosure of such a secret document to the parties is not that the court's decision is based on it. The mere fact that the document may have or may have had an effect on the proceedings and on the decision suffices. Having regard to this, the parties as well as the court must have the possibility to assess the relevance of the documents submitted to the court.”

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

24. The Government argued that the estate of CPT IS had appealed against the District Court's judgment and relied on the relevant additional submissions only in respect of the second applicant. Thus, the submissions had not concerned the first and the third applicant in any way.

25. The applicants maintained that the submissions had affected the Court of Appeal proceedings in respect of all three applicants.

26. The Court notes that, following all the parties' appeals against the District Court's judgment, the case was open for review in the Court of Appeal in respect of all three applicants. Having regard to the contents of the supplementary police report and the subject matter of the proceedings, *i.e.* the recovery of assets allegedly transferred to the applicants, the Court concludes, as did the dissenting judge in the Supreme Court, that the material concerned all three applicants. Accordingly, the Government's preliminary objection must be rejected.

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

27. The applicants complained, under Article 6 § 1 of the Convention, about the non-communication of additional material submitted by the other party to the Court of Appeal and that they had not been informed of telephone discussions between the judicial secretary and the official receiver.

Article 6 § 1 provides, in relevant part:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ..."

A. The parties' submissions

28. All three applicants maintained that it was not credible that the Court of Appeal had not *de facto* taken the additional submissions into account, in particular as the official receiver allegedly had admitted that shortly before lodging the submissions in question he had discussed some procedural issues with the judicial secretary, who had fixed a time-limit for lodging the submissions in question. Having received them, the judicial secretary had included a summary of them in his report to the judges. Eventually, the Court of Appeal had decided the case in exactly the way requested by the estate in those submissions.

29. The applicants also alleged that the submissions and the relevant part of the judicial secretary's report had been withheld from them when they had first asked for a copy of the public part of the report. They had been given all the material only when they had asked for it for the second time in July 1998.

30. The applicants argued that the mere fact that they had not been given an opportunity to comment on the submissions amounted to a violation of Article 6 § 1 of the Convention.

31. The Government observed, first, that according to the express wording of the decision of 23 December 1997 by the Court of Appeal, the said additional material had not been taken into account in the judgment on the merits. Nor was there reason to question that statement. The judicial

secretary's notes did not indicate that the material in question had been taken into account, as they merely showed that the material had been thoroughly read with a view to assessing whether it should be taken into account. Nothing suggested that it had any bearing on the Court of Appeal's judgment. Secondly, the material in question had been available to the parties on request, and the applicants indeed had obtained it from the Court of Appeal. Thirdly, the applicants had an opportunity to comment on the additional material when requesting leave to appeal from the Supreme Court. Article 6 § 1 of the Convention did not require that they be given the opportunity to comment on the additional material.

32. The Government also argued that the fact that the applicants had not been informed of the telephone conversations, between the official receiver and the judicial secretary of the Court of Appeal, concerning the submission of additional material, did not give reason to call into question the fairness of the trial. While it was apparent that the discussions had related to the submission of the additional material and to its possible admission as evidence, the Government submitted that they had not involved any information that should have been communicated to the other parties, and they did not have any relevance for the consideration of the case by the Court of Appeal. It indeed appeared that the applicants had referred to the telephone calls mainly as showing that the Court of Appeal, at least preliminarily, had considered that the additional material could affect the assessment of the case. As already observed, that possibility was excluded. The Government maintained that the applicants had been able to participate properly in the proceedings and the telephone conversations had not denied them a fair hearing before the Court of Appeal.

B. The Court's assessment

33. The Court reiterates that the principle of equality of arms - one of the elements of the broader concept of fair trial - requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports of Judgments and Decisions* 1997-I, § 23).

34. In the present case the parties disagree as to whether the supplementary police report and the additional legal submission had any relevance to the proceedings and whether the Court of Appeal put any emphasis on them in its assessment of the case. The Government argue in any event that these did not have any relevance to the case as far as the first and the third applicant were concerned as the estate lodged no appeal against the District Court's judgment in respect of them.

35. The Court finds that whether, contrary to the wording of its judgment, the Court of Appeal took them into account *de facto* is not

decisive from the point of view of the applicants' right to adversarial proceedings. The Court observes that the estate expressly asked the Court of Appeal to take the documentary material into account, despite the expiry of the relevant time-limit. The material was not communicated to the applicants. Yet it appears that it was studied in connection with the preparation of the case in the Court of Appeal. As noted above in connection with the preliminary objection, the Court considers that the material was of relevance in respect of all three applicants.

36. The Court reiterates that only the parties could properly decide whether or not the submissions called for their comments. What is particularly at stake here is the confidence of the parties to the proceedings in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file (see *Nideröst-Huber*, cited above, § 29).

37. In the instant case, the representative of the estate expressed his opinion on the relevance of the supplementary police report and the additional legal submission to the Court of Appeal, thereby intending to influence the court's judgment. The Court considers that procedural fairness required that the applicants too should have been given an opportunity to assess the relevance and weight of the material and to formulate any such comment on it as they deemed appropriate.

38. In the light of these considerations, the Court finds that the procedure did not enable the applicants to participate properly and in conformity with the principle of equality of arms in the proceedings before the Court of Appeal.

39. As regards the applicants' complaint that they were not informed of discussions between the judicial secretary and the estate's representative, this complaint is ancillary to the essential shortcoming found above. Consequently, no separate issue arises as to this part of the application.

40. Accordingly, there has been a violation of Article 6 § 1 of the Convention on account of the failure to communicate to the applicants the material that the other party submitted to the Court of Appeal.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. Under the head of pecuniary damage the second applicant company claimed 756,845 euros (EUR) as compensation for the shares in the housing company, which it had been ordered to return to the estate. The third applicant claimed EUR 16,647 as compensation for the amount of money, which she had been ordered to return to the estate. They both claimed that there was a causal link between the violation and the damage and that they had suffered a real loss of opportunity to defend themselves and thereby to secure a more favourable outcome of the proceedings.

Under the head of non-pecuniary damage the third applicant claimed EUR 8,000 for frustration.

43. As to pecuniary damage, the Government argued that there was no causal link between the alleged violation and any damage. In any event, the claims were vague and poorly substantiated.

As to non-pecuniary damage, the Government considered that a finding of a violation would in itself constitute just satisfaction. In any event, the claim was not substantiated and it was excessive as to *quantum*.

44. The Court cannot speculate about the outcome of the proceedings had they been in conformity with Article 6. The Court has found a violation of the applicants' right to a fair trial but finds no sufficient causal link between that violation and the pecuniary damage allegedly suffered. These claims must therefore be rejected.

The Court accepts that the lack of the guarantees of Article 6 has caused the third applicant non-pecuniary damage, which cannot be made good by the mere finding of a violation. Making its assessment on an equitable basis, it awards the third applicant EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

45. The first applicant company claimed reimbursement for its own costs such as photocopying, telephone and travel expenses in the total amount of EUR 840 in the Supreme Court and this Court.

The second applicant company claimed reimbursement for its own costs such as photocopying and the like in the total amount of EUR 2,460 in the

Supreme Court and this Court. In addition, the company claimed reimbursement for the legal fees and expenses of its counsel before this Court in the amount of EUR 6,968.64.

The third applicant claimed reimbursement for her own costs such as photocopying and the like in the total amount of EUR 1,170 in the Supreme Court and this Court. In addition, she claimed reimbursement of legal costs before this Court in the amount of EUR 1,750.

46. The Government submitted that the claims should be reduced having regard to the fact that part of the complaints had been declared inadmissible. Further, the legal fee amounting to EUR 6,968.64 appeared to relate to all three applicants. They agreed that the second applicant had incurred some costs and expenses before the Court. However, the number of hours claimed to have been spent by the lawyer on the case and the hourly rate appeared somewhat excessive. The Government considered that the total amount of compensation for costs and expenses for the second applicant should not exceed EUR 1,500 (including value-added tax). They rejected the claims relating to the Supreme Court proceedings, arguing that the costs appeared to concern future proceeding with a view to having the case reopened and thus, these claims were premature. The remaining claims were not substantiated.

47. 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).

The Court finds that the claims regarding counsel's fees and expenses incurred in the Strasbourg proceedings are substantiated only as regards the second applicant. However, the application was declared partly inadmissible and thus, they cannot be reimbursed in full. Taking into account all the circumstances the Court awards the second applicant EUR 4,000 to be increased by any relevant value-added tax.

As to the claims appearing to relate to the Supreme Court proceedings ending on 31 January 2001 and the remaining claims in respect of the proceedings before this Court, the applicants have not submitted any documentation as to any of these costs as required by Rule 60 of the Rules of Court. Accordingly, the Court makes no awards in those respects.

C. Default interest

48. 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 UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay, 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 the third applicant EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;
 - (ii) to the second applicant EUR 4,000 (four thousand euros) in respect of costs and expenses to be increased by any relevant value-added tax plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 5 July 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President