



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

THIRD SECTION

CASE OF ALATULKKILA AND OTHERS v. FINLAND

(Application no. 33538/96)

JUDGMENT

STRASBOURG

28 July 2005

FINAL

28/10/2005

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 Alatulkkila and Others v. Finland,

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

Mr B.M. ZUPANČIČ, *President*,

Mr J. HEDIGAN,

Mr L. CAFLISCH,

Mr C. BÎRSAN,

Mrs A. GYULUMYAN,

Ms R. JAEGER, *judges*,

Mr E.-J. TAIPALE, *ad hoc judge*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 5 July 2005,

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

PROCEDURE

1. The case originated in an application (no. 33538/96) against the Republic of Finland lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Mr Paavo Alatulkkila and other Finnish applicants and associations (“the applicants” set out in full at paragraph 9 below), on 17 October 1996.

2. The applicants, who had been granted legal aid, were represented by Mr Veikko Hyvönen, professor emeritus in land and water law at the University of Helsinki and resident in Espoo. The respondent Government were represented by their Agent, Mr Holger Rotkirch, then Director-General for Legal Affairs in the Ministry for Foreign Affairs, and subsequently by Mr Arto Kosonen, Agent and Director in the same Ministry.

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

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

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

Finland, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr E.-J. Taipale to sit as an *ad hoc* judge in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

7. By a decision of 27 March 2003, the Court declared the application admissible in so far as lodged by the applicants listed below (paragraph 10).

8. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicants, all Finnish nationals, are:

(i.) Mr Paavo Alatulkkila, born in 1935 and resident in Ylitornio, both as the owner of the real properties Harju 15:124 and Töysä 16:43 in Alkkula and as Chairman of the Alkkula fishing association;

(ii.) Mr Toivo Honkaniemi, born in 1954 and resident in Ylitornio, both as the owner of the real property Mattila 2:5 in Armassaari and as Chairman of the Armassaari fishing association;

(iii.) Mr Aatos Korpi, born in 1957 and resident in Kainuunkylä, both as owner of the real property Marjala 19:43 in Kainuunkylä and as Chairman of the Kainuunkylä fishing association;

(iv.) Mr Lauri Rousu, born in 1945 and resident in Karunki, both as owner of the real properties Koivuranta 9:33 and Kaivosoja 27:53 in Karunki and as Secretary to the Karunki fishing association;

(v.) Mr Matti Kanninen, born in 1934 and resident in Kukkola, both as owner of the real property Niskala 15:42 in Kukkola and as Chairman of the Siikala whitefish fishing association;

(vi.) Mr Kaarlo Lampinen, born in 1934 and resident in Tornio, both as owner of the real property Kaishannu 25:33 and as Chairman of the Nuotioranta fishing association;

- (vii.) Mr Pekka Mäkinen, born in 1954 and resident in Tornio, both as owner of the real properties Luotola 1:47, Hanhisaari 1:51, Viheriälä 1:79 and Paavola 1:103 in Pirkkiö and as Chairman of the Pirkkiö association for joint ownership;
- (viii.) Mr Timo Kanninen, born in 1949 and resident in Tornio, both as owner of the real property Kanninen 8:21 and as Chairman of the Alaraumo association for joint ownership;
- (ix.) Mr Ville Alakuijala, born in 1941 and resident in Tornio, both as owner of the real property Rantalahti 29:36 in Laivaniemi and as Chairman of the Laivaniemi association for joint ownership;
- (x.) Mr Antti Stark, born in 1944 and resident in Lautiosaari, both as owner of the real property Stark 33:14 in Kaakamo and as Chairman of the Kaakamo fishing association and the Kaakamo association for joint ownership.

The applicants are owners of water areas, or are fishermen, in the Gulf of Bothnia. They are also elected representatives of their respective local fishing co-operative (*kalastuskunta, fiskelag*) or association for joint ownership (*jakokunta, osakaskunta; samfällighet, delägarlag*).

11. By decision of 26 April 1996 and in application of the Fishing Regulation (*kalastussääntö, fiskestadgan*) for the Tornio River (*Torniojoki/Torne älv*) Area, the Finnish-Swedish Frontier Rivers Commission (*suomalais-ruotsalainen rajajokikomissio, finsk-svenska gränsälvskommissionen*) prohibited *inter alia* all fishing of salmon and sea trout in the relevant waters in the open sea during 1996 and 1997. Fishing other species in the relevant sea area with fixed equipment was prohibited during the periods 1 May-5 July 1996 and 1 May-5 July 1997. The Commission further prohibited all fishing of salmon and sea trout in the river area, except for fishing with hand-held equipment which was authorised on certain days of the week during the period 1 May-15 August 1996 and 1 May-15 August 1997. With some minor exceptions, all fishing in the river area was prohibited during the periods 15 September-15 November 1996 and 15 September-15 November 1997.

12. The Commission's decision was announced publicly on 29 April 1996.

13. The Fishing Regulation was issued following the enactment of Act no. 902/1971 incorporating the Finnish-Swedish Frontier Rivers Agreement (as far as Finland was concerned). A subsequent agreement to amend Annex B of the Agreement was incorporated into Finnish law by Decree no. 67/1987, entitling the Frontier Rivers Commission to decide on the protection of a particular fish species or on the prohibition or restriction of fishing with equipment which had proved harmful for the species either in the entire fishing area or in a specific part thereof, provided such a measure was deemed necessary for the preservation of the species in question for a

maximum period of two years at a time (section 22, subsection 2 of the Regulation).

14. The applicants indicated at paragraph 10(x.) above received FIM 14,183.75 (EUR 2,385.54) in compensation paid out of the supplementary State budget for 1996 with a view to covering economic losses which they suffered during the 1996 fishing season due to the restrictions imposed by the Frontier Rivers Commission. The relevant Government decision (no. 328/1996) was applicable to professional fishermen fishing in the sea area adjacent to the Tornio river.

15. Meanwhile, on 13 June 1996 the Supreme Court of Sweden (*högsta domstolen*) dismissed charges concerning fishing in violation of the prohibition which the Frontier Rivers Commission had imposed on fishing with certain equipment. The Supreme Court held that the Commission's order issued by virtue of section 22, subsection 2 of the Fishing Regulation could not be applied, since the Agreement and the Regulation had not been brought into force and implemented as required by the Swedish Constitution, namely by an Act of Parliament (decision No. DB 118; NJA 1996 p. 370).

16. At the beginning of 1997 Finland and Sweden declared that certain provisions of the Fishing Regulation, including section 22, subsection 2 of the Regulation, should not be applied.

17. Thereafter Finland enacted the Act on Fishing in the Tornio River Fishing Area (494/1997) which entered into force on 5 June 1997. The Act entitles the Ministry of Agriculture and Forestry to issue rules concerning fishing on the Finnish side of the Tornio river. A decision to that effect (496/1997) entered into force at the same time as the Act. The decision was essentially identical to the Frontier Rivers Commission's decision of 26 April 1996. In 1998 the Ministry issued a new decision (319/1998).

18. Meanwhile, on 5 August 1997 the Rovaniemi Court of Appeal (Finland) found that the sections of the Fishing Regulation concerning prohibited fishing equipment and applicable sanctions fell within the scope of the legislation. As Annex B (containing the Fishing Regulation) had been brought into force by a Decree, the Court of Appeal decided not to apply certain sections of the Regulation by virtue of section 92, subsection 2 of the Constitution Act of Finland (*Suomen hallitusmuoto, Regeringsformen för Finland*, 94/1919) which was in force at the material time (decisions nos. 625-628).

19. On 31 December 1998 the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltningsdomstolen*) dismissed a request lodged by, among others, the associations represented by applicants listed at paragraph 10(vii.)-(x.) above, and whereby they sought to have the Frontier Rivers Commission's decision of 26 April 1996 annulled. The associations had argued that the decision was contrary to the Constitution and ordinary law (including Article 6 of the Convention and Article 1 of Protocol No. 1

as incorporated). Furthermore, the Commission had allegedly failed to hear the associations in a matter affecting the civil rights both of individual owners of fishing waters and of fishermen entitled to the continued enjoyment of the compensation *in natura* which had been awarded by the Water Court of Northern Finland in 1979. The applicants did not request an oral hearing before the Supreme Administrative Court.

20. In its submissions to the Supreme Administrative Court the Frontier Rivers Commission had stated, *inter alia*, that it was hardly for an organ established by a bilateral agreement to examine whether the Fishing Regulation contravened the Finnish Constitution. The fishing restriction addressed in the annulment request had been imposed of the Rivers Commission's own motion after it had afforded the known parties an opportunity to comment in writing on the fishing restrictions proposed by the Finnish and the Swedish expert whom the Rivers Commission was regularly consulting. According to the dispatching list, all those who had sought an annulment – except for the Laivaniemi association for joint ownership (the applicants at paragraph 10(ix.) above) – had been so consulted and had also commented on the proposal. The nature of the matter had not been such that an oral hearing could have been expected to further the examination thereof.

The Rivers Commission further opined that the prohibition in question had only concerned salmon and trout and had been consistent with the restriction imposed simultaneously in respect of the Swedish coastal waters. Moreover, as the Commission's decision of 26 April 1996 was to be considered administrative in nature, the Fishing Agreement did not provide for any ordinary appeal against it, nor for any extraordinary remedy.

21. The Supreme Administrative Court had also obtained opinions on the annulment request from the Ministry for Foreign Affairs and the Ministry for Agriculture and Forestry. The applicants had commented on the aforementioned three opinions.

22. In its decision the Supreme Administrative Court held:

"The Frontier Rivers Agreement between Finland and Sweden, annex B of it being the Fishing Regulation for the Tornio River fishing area, has been incorporated by law no 902/1971.

Article 8 of chapter 1 of the Frontier Rivers Agreement ordains that, unless there are other special provisions in the Agreement, the applicable law in each State is the law in force in that State. With regard to the above, the national Fishing Act is applicable where the Frontier Rivers Agreement does not contain special provisions on fishing.

According to paragraph 116, subsection 1 of the Fishing Act, the Act and the Decree issued on the basis of the Act are applied also to waters located at the frontier of a State, unless there are provisions stating otherwise that are based on a contract with another State. Paragraph 116, subsection 2 ordains, that when an international agreement binding on Finland or the preservation of fish stocks so requires, a decree can be used to bring into force provisions regarding the fishing or catching of seafood

by Finnish nationals outside Finnish waters. On the basis of subsection 3 of the same paragraph the decree may also, if an agreement referred to in subsection 2 so requires or for another reason, contain provisions regarding restrictions on catching within or outside Finnish waters.

A subsection 2 has been added to paragraph 22 of the Fishing Regulation for the Tornio River area on the basis of an agreement with Sweden, incorporated with decree no 667/1987, amending annex B of the Frontier Rivers Agreement. According to subsection 2, the Frontier Rivers Commission may protect by law a species of fish or limit the use of a trap that has proven harmful, either for the entire fishing area or a part of it, if this is necessary for preserving the species in question, for at most two years at a time. With regard to the above-mentioned paragraph 116 of the Fishing Act, the said addition of subsection 2 to paragraph 2 of the Fishing Regulation could be brought into force with a decree.

It appears from the documents that a reply to the proposal by the Frontier Rivers Commission concerning fishing restrictions for 1996 and 1997 was submitted in writing on 12 April 1996 by *inter alia* the Kaakamo fishing association, the Alaraumo fishing association, the Laivaniemi fishing association, which on the basis of paragraph 6 of the Common Land Act acts as legal representative in matters concerning the Laivaniemi area and the common special prerogative, as well as by the Pirkkiö fishing association and certain other associations. Considering the fact that the decision of the Frontier Rivers Commission was issued on 26 April 1996, all the applicants for annulment have been aware of the pending project and have had the opportunity to make known their opinions on the matter before it was decided.

Chapter 2, paragraph 22, subsection 2 of the Water Act ordains, that if building in the waterways causes the fish or fishing apparent harm, the permit-holder should be charged with the duty to take action to prevent or reduce damage to the fish and fishing as well as, if needed, to monitor the results of his action in the water area where damage has also been done (fish preservation duty). Such action may consist, according to the nature of the building and its effects, *inter alia* of planting fish stocks. According to chapter 10, paragraph 24a subsection 3 the same duty may be imposed on the holder of a permit.

The purpose of the above-mentioned fish preservation duty is not primarily to ensure certain amounts of catch, but to ensure the preservation of stocks of fish, which has also been the aim of the decision by the Frontier Rivers Commission concerning the prohibition on the fishing of salmon and trout. The decision of the Frontier Rivers Commission does not invalidate the aim of restocking obligations in the way presented in the annulment application. The purpose of the decision is to strengthen fish stocks and thus ensure fishing opportunities in the future. The decision of the Frontier Rivers Commission cannot on the grounds specified in the annulment application be held to be contrary to Article 6 of the European Convention of Human Rights or paragraphs 5 and 12 of the 1919 Constitution.

On the basis of the above, the decision sought to be annulled is not based on manifestly incorrect application of the law or a (procedural) error that might have fundamentally affected the decision. Neither does the application contain any other annulment ground mentioned in paragraph 63 of the Administrative Procedure Act. "

23. Informal negotiations between Finland and Sweden on further amendments to the Agreement began in June 1999.

24. In a judgment of 6 April 2001 the Swedish Supreme Court ordered the State to compensate fishermen for economic losses suffered as a result of the fishing restrictions imposed in the Tornio river area on the basis of the Frontier Rivers Agreement at the time when it had been implemented by a Government Decree delegating to the Rivers Commission, without a basis in an Act of Parliament, the power to restrict fishing (case no. T 3310-00).

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. According to the 1919 Constitution, as in force up to 1 March 2000, everyone was to be equal before the law and his or her property was to be protected (sections 5 and 6). A judge or other official was under an obligation not to apply a provision in a Decree which conflicted with constitutional or other laws of Parliament (section 92, subsection 2). The Convention has been incorporated into Finnish law by an Act of Parliament with the status of ordinary law (438/1990).

26. Under the 1919 Constitution anyone who had suffered an infringement of his rights, or damage, through an illegal act or negligence on the part of a civil servant was entitled to demand that the civil servant be convicted and held liable for damages, or to report him for the purpose of having charges brought (section 93, subsection 2). A similar provision appears in section 118, subsection 3, of the Constitution of 2000 (*Suomen perustuslaki, Finlands grundlag* 731/1999). Chapter 2 (“Basic rights and liberties”) of the 1919 Constitution was amended by Act no. 969/1995 which entered into force on 1 August 1995. The new Chapter 2 includes, *inter alia*, the right to property (section 12; as from 1 March 2000 section 15) and has been incorporated as such into the Constitution of 2000. Under the current Constitution a court of law shall give primacy to a provision therein, if the application of a provision of ordinary law would be in evident conflict with the Constitution. If a provision in a Decree or any other statute of lower rank than an Act of Parliament is in conflict with the Constitution or ordinary law, that provision shall not be applied by a court of law or any other public authority (sections 106-107).

27. Under the Tort Liability Act (*vahingonkorvauslaki, skadeståndslag* 412/1974) proceedings for damages may be initiated against the State on the basis of its vicarious liability for mistakes or omissions in the exercise of public authority. The State's vicarious liability comes into play only if the responsible official fails in his or her duty to take a measure or perform a task that could reasonably be required in the light of the nature and purpose of the activity in question (Chapters 3 and 4). The claim for damages must be made within ten years from the date when the damage occurred, unless a shorter limitation period applies (Chapter 7, section 2).

According to section 63, subsection 1 of the Administrative Judicial Procedure Act, a decision may be annulled if a procedural error which may

have had a relevant effect on the decision has been committed, if the decision is based on a manifestly erroneous application of law or on an error which may have had a fundamental effect on the decision, or if new evidence which could have had a relevant effect on the decision appears and it is not the fault of the applicant that the evidence was not presented in time.

28. According to the Water Act, the holder of a construction permit relating to a water area may, if the construction would clearly damage the fish stocks, be ordered to restock the area and take other necessary measures in order to safeguard the fish stocks in the affected waters (chapter 2, section 22, subsection 1).

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

30. The general right to fish in public water areas and within the Finnish fishing zone does not include the right to fish salmon and sea trout (see, for example, section 6, subsection 3, and section 12 of the Fishing Act). Restrictions on fishing within or outside the territorial waters of Finland may be imposed by decree for the purpose of fulfilling obligations set in an international agreement binding on Finland, for safeguarding fish stocks or for any other comparable special reason. Domestic law applies to watercourses located in frontier areas, unless otherwise agreed on in an agreement between Finland and another State (section 116 of the Fishing Act). Non-compliance with a fishing restriction may be subject to prosecution (sections 107-109).

31. A State Committee Report concerning fishing legislation (no. 1977:47) suggested, in 1977, that limited rights *in rem* be abolished. However, in the Government Bill for a new Fishing Act (no. 214/1980), it was suggested that these rights of the State be maintained as being relevant for the protection of the salmon stocks. The provisions concerning the State's fishing waters and fishing rights can now be found in chapter 5 of the Fishing Decree (1116/1982).

32. In a judgment of 9 June 1982 (no. 33/1982) the Supreme Water Court (*vesiylioikeus, vattenöverdomstolen*) found that since time immemorial the owners of fishing waters in the Kemi river (*Kemijoki*) and its estuary had been engaged in the fishing of salmon and sea trout without any state interference and with its *de facto* consent. Compensation for the loss of fishing benefits resulting from permitted construction should therefore be awarded to all individuals who had been engaged in such fishing in the area, provided they had been using legal fishing gear. The Supreme Water Court further found that the State too was entitled to compensation for the permanent loss of the use of its limited right *in rem* in

respect of the fishing waters. In addition, compensation was awarded to the State for its loss of income from leasing out those waters.

33. The Supreme Court (*korkein oikeus, högsta domstolen*) found in its decision of 3 February 1983 (no. 1983 II 29) that the damage which a company had caused by setting up timber floating routes in the Simo river (*Simojoki, Sim älv*) had engendered effects on private owners of water areas, causing them losses which were to be compensated by virtue of the Water Act. The State, which traditionally had the right to fish salmon in the river, had not used that right for decades, either by leasing out its waters or in any other way.

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

35. In its precedent no. 2000:97 the Supreme Court examined an action for damages which a hydro-electric power company had brought against the State on the ground that a contract between the two with a view to establishing three power plants along the Kyrö river (*Kyrönjoki, Kyrö älv*) could not be implemented in full, as Parliament had enacted legislation for the protection of the river (1139/1991). The company had sought compensation for wasted planning costs in so far as those had exceeded the amount paid out following the assessment procedure provided for in the Act on the Redemption of Immovable Property and Special Rights (603/1977). The Supreme Court declined to examine this part of the claim as the costs to be compensated had already been finally determined in the procedure under the 1977 Act.

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

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

An account of domestic law can also be found in the Court's judgment in *Posti and Rahko v. Finland* (no. 27824/95, §§ 18-30, 24 September 2002).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

37. The Government objected that the applicants indicated at paragraph 10(x.) above had failed to appeal in the last resort to the Supreme Administrative Court even though they were allegedly of the view that the compensation awarded to them for the losses suffered in 1996 was insufficient. The applicants indicated at paragraph 10(vii.)-(ix.) had likewise failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention as they did not apply for any compensation at all, although as professional fishermen fishing in the sea area adjacent to the Tornio river they would have qualified for such compensation out of the 1996 supplementary budget.

38. The applicants contended that they had no adequate remedy at their disposal. In its submissions to the Supreme Administrative Court the Frontier Rivers Commission explained that it had issued the 1996 fishing restriction of its own motion, regarding it as an administrative matter against which there was no appeal. The Commission moreover stated to the Supreme Administrative Court that the institution of extraordinary proceedings was also not possible in the matter. The applicants underlined that at any rate, under section 92 of the then Constitution the Supreme Administrative Court was unable to review whether a law was in conflict with the Constitution or even with the Act incorporating the Convention. As to the Government's argument that all applicants should have sought compensation for their losses, they pointed out that the compensation which they received or could have received, covered or would have covered, only a maximum of 85 per cent of their losses during 1996, whereas their grievance under the Convention related to an ongoing deprivation of their possessions. Moreover, compensation was payable only to certain professional fishermen and provided they met a number of conditions.

39. In its decision on admissibility the Court noted that this preliminary objection concerned the availability of court remedies which the applicants claim would not have been effective in their specific circumstances. The Court therefore joined this objection to the merits of the complaint under Article 6 § 1.

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

40. The applicants complained of being unable to have the Frontier Rivers Commission's decision reviewed by a tribunal within the meaning of Article 6 § 1 of the Convention. This provision reads, in its relevant parts, as follows:

“In the determination of his civil rights ..., 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

41. The applicants maintained that in conceding that the right to fish belonged to the owner of the waters the Government recognised that the applicants enjoyed a “right” within the meaning of Article 6 § 1. The affected water areas were owned by the respective fishing co-operatives or associations for joint ownership which appear as co-applicants before the Court. The Government had misrepresented domestic law in so far as it purported to afford to the State a general right to fish salmon. On the contrary, this fishing right had always belonged to the owner or other lawful beneficiary of a water area, just like the right to fish any other species. It was true that pursuant to section 6, subsection 3, and section 12, of the Fishing Act the State enjoyed a right to fish salmon in certain designated areas such as the Simo river, as confirmed by the Supreme Court in its decision of 3 February 1983 (see “Relevant domestic law”). Those areas – which were normally leased out to fishermen – were not in issue in the applicants' case. Domestic judgments, in their view, had established the principle that where a claim was made that the right to fish exceptionally belonged to someone other than the owner of the water area, the burden was on that claimant to refute the general presumption that the right belonged to the owner. If the State made such a claim, it too had to produce convincing proof to that effect.

42. The applicants added that, in its judgment of 17 August 1994, the Supreme Court confirmed the absence of any state-owned water area off the city of Tornio in the northern part of the Gulf of Bothnia (judgment no. m 91/202). A judgment of the Land Court of Northern Finland of 14 May 1998 furthermore confirmed that the waters surrounding some state-owned islands within the aforementioned area belonged to the applicant association indicated at paragraph 10 vii. and not to the State.

43. The applicants submitted that the procedure before the Supreme Administrative Court did not satisfy Article 6 § 1 of the Convention as they were not properly heard in the annulment proceedings. In particular, the Supreme Administrative Court held no public hearing. No other avenues of redress in the courts had been open to them.

2. The Government

44. The Government contested the applicability of Article 6 § 1. In light of section 12 of the Fishing Act, other legislation and various jurisprudence,

they argued that the prohibition and restrictions imposed by the Frontier Rivers Commission did not affect a “right” of the applicants within the meaning of Article 6 § 1. On the Finnish side of the Tornio River area and most other rivers and some sea areas, the salmon and sea trout as well as the right to fish them belonged to the State on the basis of a restricted right *in rem* (*regaalioikeus, regale*). This right was independent of the ownership of water areas and belonged to the State on the basis of public law. The restricted right *in rem* had been introduced into Finnish legislation and case-law already in the 1540s. Taxes were levied by the State on all salmon caught and over the centuries this transformed into a right to collect rent on fishing areas. The State's right to fish remained in force where it continuously used its rights, notably and publicly. This requirement was satisfied where it leased out its right or issued temporary fishing permits for payment. There was accordingly a prohibition on the fishing of salmon or sea trout without a specific permission by the State to do so. Landowners of river areas could not sell or lease fishing rights for those fish.

45. In the present case, the applicants were owners of the water areas in question but the right to fish salmon belonged to the State independently of that ownership. Domestic law did not recognise that the applicants had any right to the fishing in question, although they did enjoy rights in respect of other types of fish.

46. Were the Court to have another view on the question of applicability, the Government considered that the applicants had effective access to court. The Convention had been incorporated into Finnish law by an Act of Parliament with the status of ordinary law. Even assuming therefore that the decision of the Frontier Rivers Commission affected a “right” of the applicants within the meaning of Article 6 § 1, the applicants were properly heard in the annulment proceedings before the Supreme Administrative Court. They had not asked for any oral hearing at any stage and therefore waived the possibility. Furthermore, if the applicants had considered that their rights had been violated through unlawful proceedings they could have presented a claim for damages in a district court or sought damages under tort legislation.

B. The Court's assessment

1. Applicability of Article 6 § 1

47. The Court must first ascertain whether there was a dispute over a “right” within the meaning of Article 6 § 1 which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise, and the result of the proceedings must be directly decisive for the right in question. Finally, the

right must be of a “civil” character (see, for example, *Zander v. Sweden*, judgment of 25 November 1993, Series A no. 279-B, p. 38, § 22).

48. Article 6 § 1 of the Convention is not aimed at creating new substantive rights without a legal basis in the Contracting State, but at providing procedural protection of rights already recognised in domestic law (see, for example, *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121-A, p. 32-33, § 73). The term “right” must nevertheless be given an autonomous interpretation under Article 6 § 1 of the Convention (see, for example, *König v. Germany*, judgment of 28 June 1986, Series A no. 27, pp. 29-30, §§ 88-89).

49. The Court observes in the present case that it is not disputed that the applicants were owners of water areas and enjoyed rights to fish those waters. The Government have not disputed that, prior to the decision to prohibit fishing of salmon and sea trout, the applicants also carried out fishing of these species. It is not asserted that the applicants carried out fishing under lease granted by a state authority or under any express agreement or that they made any payment to the state authorities in respect of any catches. Notwithstanding the restricted right *in rem* over salmon and sea trout vested in the State relied on by the Government, the Court finds therefore that the applicants can claim to have exerted rights over the fishing stocks in general linked to their ownership of the waters that arguably gave rise to a “right” which is civil in nature and falls within the scope of Article 6 § 1 of the Convention. The Court is reinforced in this view by the fact that the applicants at paragraph 10(x.) above received compensation for loss of income as professional fishermen arising from their inability to continue to fish salmon and sea trout.

50. Although Article 6 cannot guarantee a right of access to a court with power to invalidate or override a law enacted by the legislature (see, for instance, *Ruiz-Mateos and Others v. Spain*, application no. 14324/88, Commission decision of 19 April 1991, DR 69, p. 227; *Posti and Rahko v. Finland*, no. 27824/95, ECHR 2002-VII, § 52), the Court may examine the direct effect of the decisions of the Finnish-Swedish Frontier Rivers Commission which prohibited fishing under the powers bestowed on them by various decrees. Since these decisions impinged on the previously exercised fishing rights of the applicants, the Court is satisfied that a genuine and serious dispute over the existence and scope of the applicants' civil right to fish for certain species within their waters arose. The Court must accordingly examine whether the applicants had effective access to court in respect of that dispute.

2. Compliance with Article 6 § 1

51. The Court recalls that it has already had occasion to consider whether access to court concerning disputes about fishing rights was provided in *Posti and Rahko v. Finland* (cited above, §§59-65). It found that

a claim for damages in tort would only succeed against the State if the applicants succeeded in showing that a representative of the executive branch had failed in his or her duty to take a measure or perform a task that could have reasonably been required in the light of the nature and purpose of the activity in question. No prospect of such a possibility existed where the impugned measures were undoubtedly based on statutory law. The same considerations apply in the present case.

52. Some of the applicants (at paragraph 10(vii.)-(x.) above) did, however, contest the decision of the Frontier Rivers Commission before the Supreme Administrative Court in the context of an application for annulment. While it is true that the examination of an annulment or reopening request will not generally satisfy the requirements of Article 6 § 1 where such is an extraordinary remedy with limited scope of review and not involving an examination of the merits (see, *e.g.*, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 31, § 86), the Court recalls that a certain respect must be accorded to decisions taken by administrative authorities in particular in specialised areas of the law, such as planning which involved the exercise of discretion involving a multitude of local factors inherent in the choice and implementation of policies (see, *mutatis mutandis*, *Zumtobel v. Austria*, judgment of 21 September 1993, Series A no. 268-A, § 32; *Bryan v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335-A, § 47; *Buckley v. the United Kingdom*, judgment of 25 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 75). The Court considers that similar considerations arise in the field of environmental protection, where there are important conflicting considerations and interests and, as in this case, a wider international context in the form of a co-operation agreement with a neighbouring State implicated in the environmental concerns in issue.

In the present case, the Supreme Administrative Court considered the lawfulness of the prohibition applied to the applicant associations and its conformity with the Constitution as well as Article 6 of the Convention. While there is no express reference to Article 1 of Protocol No. 1, the reasoning does give attention to the fairness of the procedure, finding that the applicants were given an adequate opportunity to put their objections to the Frontiers River Commission and also includes considerations as to the necessity and proportionality of the prohibition in reaching the conclusion that it was necessary for safeguarding fish stocks. It did not at any point decline jurisdiction in answering the applicants' points (see, *mutatis mutandis*, *Zumtobel v. Austria*, cited above, § 32; *Posti and Rahko*, cited above, § 60). The Court considers that having regard to the context in this case, the implementation of an international agreement geared to the general preservation of fishing stocks over an extensive area, the proceedings available before the Supreme Administrative Court provided the applicants with effective access to court for review of their claims.

53. Insofar as the applicants complained that there was no oral hearing before the Supreme Administrative Court, which was the only judicial instance to consider the applicants' case, the Court recalls that the entitlement to a "public hearing" in Article 6 § 1 implies a right to an "oral hearing" at least before one court instance. This obligation is not an absolute one and a hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest making a hearing necessary. A waiver can be made explicitly or tacitly, in the latter case for example by refraining from submitting or maintaining a request for a hearing (see, among other authorities, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 66; and *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, pp. 19-20, § 58). The Court observes that in the present case there is no indication that the applicants made any request for an oral hearing, as was open to them. It considers that the applicants could have been expected to ask for an oral hearing before the Supreme Administrative Court, if they had found it important that one be held in the proceedings at issue. However, they chose not to do so and must thereby be considered to have unequivocally waived their right to an oral hearing in those proceedings. It does not appear that the proceedings involved any questions of public interest which would have made it incumbent on the Supreme Administrative Court to hold an oral hearing of its own motion.

54. The Court concludes that there has been no violation of Article 6 § 1 of the Convention either as regards the scope of review by the Supreme Administrative Court or the lack of an oral hearing.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1, BOTH IN ISOLATION AND IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

55. The applicants complained that the fishing prohibitions imposed in the decision of the Frontier Rivers Commission violated their property rights under Article 1 of Protocol No. 1 and also discriminated against them in comparison with fishermen in adjacent waters.

Article 1 of Protocol No. 1 reads as follows:

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

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

Article 14 of the Convention provides as follows:

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

A. The parties' submissions

1. The applicants

56. The applicants contended that the complete prohibition on fishing species other than salmon and sea trout from 1 May to 5 July 1997 was arbitrary and unjustified. In the coastal waters other species than salmon could well be fished without jeopardising the salmon stock. This prohibition, for which the applicants received no compensation, prevented them from exercising their profession and enjoying their possessions. Nor was a complete prohibition required by the Frontier Rivers Agreement. The restrictions imposed on the Swedish side and particularly in the Kalix river, while not as lengthy and far-reaching as those imposed on the applicants' waters, had successfully ensured the fish stocks without placing an excessive burden on the holders of the fishing. The restrictions on the fishing of salmon and trout were likewise excessive with a view to safeguarding the stocks. The restrictions applied at the period when it was possible to benefit from their possessions and nearly all their value had been lost.

57. While agreeing on the necessity of salmon protection as such, the applicants considered that the prohibition in question was not supported by adequate reasoning showing its necessity in place and time, particularly in comparison with the adjacent water areas both on the Finnish and the Swedish side, where there were more lenient restrictions. The applicants' water areas were the only ones in the Baltic Sea and the Gulf of Bothnia to be governed by a system of complete prohibition of salmon fishing as opposed to a quota system. While maintaining a system of complete prohibition on owners, the State was able to collect revenue through selling licences for hand-held fishing by non-residents, such fishing being permissible throughout the year. This was inconsistent.

58. The applicants underlined that their losses included diminution in the overall value of their water areas and not just the restricted opportunity to fish. They contested the Government's argument that strict control of the fishing of salmon in the relevant waters was necessary in view of the EU Salmon Action which required that the production of fry in the Tornio river area attain 50 percent of the potential level of production by 2010. A statement by the National Research Institute for Game and Fishing of 10 July 2001 indicated that the planting of fry would be discontinued in 2003

as nearly 100 percent of the potential level of production had already been attained.

59. The applicants also referred to the judgment of 6 April 2001 in which the Swedish Supreme Court ordered the State to compensate fishermen for economic losses suffered as a result of the fishing restrictions imposed in the Tornio river area on the basis of the Frontier Rivers Agreement. On the other hand, the judgments of the Rovaniemi Court of Appeal which have been invoked by the Government were of no relevance to the applicants' case as they were rendered prior to the enactment of the new Constitution of 2000. At the time the courts were barred from examining whether a law of ordinary rank was in conflict with the 1919 Constitution and therefore could not avoid applying Act no. 902/1971 incorporating the Finnish-Swedish Frontier Rivers Agreement and the Fishing Regulation. Nor did the 1998 decision of the Ministry for Agriculture and Fishery (no. 319/1998) in substance remove the conflict between the fishing restrictions and the Constitution and Convention. In refusing to annul the decision of the Frontier Rivers Commission the Supreme Administrative Court failed to examine this alleged unconstitutionality, one of the grounds on which the applicants had sought an annulment.

60. The applicants considered the discrimination against them obvious and contested the Government's suggestion that the fishing restriction did not impact on them in an excessively hard manner. During the two summer months when fishing was permitted the catches were small as the fish did not move around much during that period. The waters were covered by ice during seven other months of the year, when fishing was difficult. Accordingly, even though the restrictions lasted only a few months, their impact was severe in that most of the applicants' potential catches would otherwise occur during that period. By contrast, the owners of the waters adjacent to those owned by the applicants were allowed to fish other species than salmon throughout the year and thus able to fish most of their potential catches.

2. The Government

61. The Government contested the applicability of this provision in the instant case. Neither the Convention nor any of its Protocols protected a right to obtain possessions. The applicants could not rely on any special grounds entitling them to fish salmon and sea trout, as an exception to the State's limited right *in rem*. Moreover, as the Supreme Administrative Court noted, the objective of the decision of the Frontier Rivers Commission was to increase the fish stock and to ensure future fishing possibilities.

62. Even assuming that the restricted fishing right did form a part of the applicants' "possessions" for the purposes of Article 1 of Protocol No. 1, the Government submitted that the contested measures amounted to a control of

the use of those possessions and the second paragraph of Article 1 would be applicable. They were especially necessary for the protection of salmon and sea trout in the conditions at hand. In order to implement such protection, the legislature must have a wide margin of appreciation in determining whether the problem warranted measures of control and in choosing how to implement such measures. The decision of the Frontier Rivers Commission sought to safeguard the future stocks of salmon and sea trout. In the Government's view the aforesaid aim of the interference undoubtedly served the general interest, even if the fishing restrictions targeted private fishermen. Nor was the interference based on manifestly unreasonable grounds. The protection of salmon and sea trout in the sea and in the Tornio river fishing area and the restriction of the use of harmful fishing equipment was necessary in order to ensure the existence of natural stocks of salmon and sea trout. Due to the strict control of the fishing of salmon, the number of fish moving up the Tornio river has significantly increased in the past few years. The fact that the restrictions concerned different periods of time for different areas was based on the migration of the salmon. The idea was not to prohibit all fishing, only the use of such fishing equipment that caught salmon too efficiently.

63. The Government submitted, moreover, that with the exception of the applicants indicated at paragraph 10(x.) above they have not adduced evidence on any concrete economic loss or other damage caused by the impugned measures. All fishermen who suffered economic losses as a result of the restrictions governing the salmon fishing in the open sea adjacent to the Torniojoki river, were in principle entitled to compensation within the limits of an earmarked sum in the State's supplementary budget for 1996. The applicants indicated at paragraph 10(i.)-(ix.) above failed to seek such compensation.

64. At any rate, the applicants had sufficient remedies at their disposal for challenging the fishing restrictions, and accordingly also the procedural requirements inherent in Article 1 of Protocol No. 1 were fulfilled. In light of the above considerations and having regard to the legitimate aim pursued by the legislation as well as the wide margin of appreciation allowed to States in matters relating to Article 1 of Protocol No. 1, the Government concluded that the measures taken to achieve this aim were appropriate and proportionate, and that there was a fair balance between the general interests of the community and the rights of the applicants.

65. In respect of the alleged discrimination the Government argued that as the applicants' restricted fishing-right did not form part of their "possessions" for the purposes of Article 1 of Protocol No. 1, Article 14 was not applicable. Were the Court to have another view, the Government questioned whether the fishermen in adjacent waters were in such a similar position that their treatment could be compared with that afforded to the applicants. At any rate, it was necessary to restrict the fishing of salmon in

order to safeguard the relevant wild salmon stocks. The differences between the restrictions imposed were justified by fishery-related reasons indicated by the Frontier Rivers Commission. There was an objective and reasonable justification to restrict fishing more in the coastal waters, estuaries and rivers than, for example, in the open sea. The impugned restrictions were of a short duration. Taking also the State's margin of appreciation into account, there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised, and the applicants were not discriminated against in the enjoyment of their assumed property rights.

B. The Court's assessment

1. Article 1 of Protocol No. 1 in isolation

66. The Court finds that the applicants enjoyed fishing rights linked to their ownership of the waters. The limitation of those rights through the decision of the Frontier Rivers Commission amounted to a control of the use of their possessions, within the meaning of the second paragraph of Article 1 of Protocol No. 1.

67. The Court finds, essentially for the reasons invoked by the Government, that this interference with the applicants' property rights was justified, being lawful and pursuing, by means proportionate to that aim, the legitimate and important general interest in protecting the fish stocks (see *mutatis mutandis Posti and Rahko v. Finland*, cited above, § 177). Noting the margin of appreciation accorded to Contracting States in such matters, it has no reason to doubt that the state of fish stocks required conservation measures and that the timing and application of the measures were geared to local conditions. Moreover, the interference did not completely extinguish the applicants' right to fish in the relevant waters. Professional fishermen, whose livelihood was affected by the ban, were provided with the possibility of applying for compensation for economic losses and the applicants at paragraph 10(x.) above made use of this. While the applicants complain that this would not provide a full measure of compensation for their purported losses, they do not deny that such compensation is available. Insofar as compensation was not available as such for loss of leisure or sporting possibilities, the Court has previously stated that the national authorities must enjoy a wide margin of appreciation in determining not only the necessity of the measure of control concerned but also the types of loss resulting from the measure for which compensation will be made; the legislature's judgment in this connection will in principle be respected unless it is manifestly arbitrary or unreasonable (see *Lithgow v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, p. 51, § 122, and *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III, § 75). The Court finds in the present case that it

is not unreasonable for the authorities to distinguish between losses linked to livelihood and the effects on enjoyment of property which are not so connected.

68. Accordingly, the Court finds that the control of use was compatible with the requirements of Article 1 of Protocol No. 1 and disclosed no breach of that provision taken alone.

2 Article 1 of Protocol No. 1 read in conjunction with Article 14 of the Convention

69. The Court recalls that Article 14 of the Convention has no independent existence and that to be applicable the facts of a case must fall within the ambit of another substantive provision of the Convention. For the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it is based on personal characteristics such as race or association with a national minority and if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Moreover, the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Camp and Bourimi v. the Netherlands*, no. 28369/95, ECHR 2000-X, § 37).

70. In the present case the Court is satisfied that the allegation of discrimination falls within the ambit of Article 1 of Protocol No. 1. However, on the material submitted, it finds no reason to doubt that there was sufficient justification for the different timing of restrictions applied in the various water areas as well as for differing prohibitions of fishing gear in particular locations, namely to take into account the spawning routes of the salmon and the more confined nature of coastal, estuary and river waters. To the extent therefore that the applicants have been treated differently from those with fishing rights in other areas, the Court considers that it may be regarded as having objective and reasonable justification. For the reasons given above under Article 1 of Protocol No. 1, the principle of proportionality has also been respected.

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 6 § 1 of the Convention;
2. *Holds* that there has been no violation of Article 1 of Protocol No. 1 in isolation;
3. *Holds* that there has been no violation of Article 1 of Protocol No. 1 read in conjunction with Article 14 of the Convention;

Done in English, and notified in writing on 28 July 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President