



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

FOURTH SECTION

CASE OF TAAL v. ESTONIA

(Application no. 13249/02)

JUDGMENT

STRASBOURG

22 November 2005

FINAL

22/02/2006

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 Taal v. Estonia,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr M. PELLONPÄÄ,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr J. BORRERO BORRERO,

Mr J. ŠIKUTA, *judges*,

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

Having deliberated in private on 3 November 2005,

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

PROCEDURE

1. The case originated in an application (no. 13249/02) against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Estonian national, Mr Hermo Taal ("the applicant"), on 17 August 2001.

2. The applicant was represented before the Court by Mr H. Vallikivi, a lawyer practicing in Tallinn. The Estonian Government ("the Government") were represented by their Agent, Mrs M. Hion, Director of the Human Rights Division of the Legal Department of the Ministry of Foreign Affairs.

3. The applicant alleged that he had not received a fair trial in violation of Article 6 §§ 1 and 3 (d) of the Convention.

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

5. By a decision of 31 August 2004 the Court declared the application partly admissible.

6. 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).

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1954 and lives in Tallinn.

9. On 5 June 2000 the Tallinn police initiated criminal proceedings against the applicant on suspicion of having committed extortion under Article 142 of the Criminal Code. On 17 June 2000 the applicant was taken into custody.

The applicant was charged with having threatened, by way of telephone calls, to explode a bomb in the supermarket *Pirita Selver* if his demands for a sum of money were not met.

10. Following the conclusion of the preliminary investigation the criminal case-file was sent to the Tallinn City Court (*Tallinna Linnakohus*). On 11 January 2001 witnesses K., R. and V. failed to appear at the hearing in the City Court and the hearing was adjourned to 5 February 2001. At the hearing of 5 February 2001 the applicant was questioned. The City Court again adjourned the hearing, since the witnesses had not appeared. Subsequently, the City Court heard the case on 20 February 2001.

11. According to the record of the City Court hearing, which set out the documents disclosed to the prosecution and defence at the public hearing, the City Court's case-file included, *inter alia*, written witness statements made during the preliminary investigation by K. and R., who were both employees of the supermarket. Witness K. had stated that the phone calls on 2 and 4 June 2000 had been made by a male person, probably 40-50 years of age or more. She had submitted that it was possible that she would recognise the voice. Witness R. had submitted that she had received phone calls from a male person on 3 and 4 June 2000. The case-file further contained six tapes with recordings of several phone calls made to the supermarket (from 4, 5, 7, 8 and 11 June 2000) and one tape with an undercover recording of a phone call by the applicant from 29 June 2000, as well as transcripts of the tape recordings.

According to the written records of witness V.'s statements during the preliminary investigation, on 13 June 2000 the applicant had asked him to dial a phone number of the applicant's girl-friend and hand the handset over to the applicant. They tried to make four phone calls, but none of the calls was answered. The number called to was a local number, the last three digits containing a combination of "fives", possibly "550" or similar.

The City Court's case-file also included a written statement of witness R.'s testimony, according to which, on 10 August 2000, she had been presented with an undercover recording of a phone call made by the applicant for recognition. She had been of the opinion that the male voice in the recorded conversation closely resembled the voice of the person who in

June 2000 had made the bomb threats to the supermarket. She had answered four phone calls to the supermarket. When the threats were made, the voice had been more nervous, but otherwise the voices were identical.

The case-file further contained a written record of the examination of an anonymous witness “Artur”, who stated that in June 2000 he had met the applicant at a party, where the latter had said that he had made the threats to the supermarket. In this way the applicant had had a chance to make good money. The owner of a shop located near the supermarket had asked him to make the threats. Every time after making the threats he had called the owner of the shop. Witness Artur stated that from the recordings of the bomb threats on six tapes he recognised the applicant’s voice. Witness Artur considered that the sound of the voice bore a resemblance to that of the applicant, as did some expressions and the manner of speaking.

In the case-file there was included a written record of an examination of witness R., who said that, as of 11 June 2000, the information line of the supermarket did not answer calls made from public payphones. Witness R. stated that, based on the voice, the manner of speaking and the references to earlier phone calls, the threats had been made by one person.

12. All the witnesses failed to appear at the City Court’s hearing of 20 February 2001. Witnesses K. and R. submitted that they were unable to attend the hearing but that they maintained the statements given during the preliminary investigation; witness V. did not live at the address noted by the City Court. At that hearing the City Court refused the request of the applicant’s lawyer to call witnesses K. and R. The record of the hearing does not disclose the reasons why the request was refused.

13. By a judgment of 20 February 2001 the Tallinn City Court convicted the applicant of the charge and sentenced him to 3 years’ imprisonment. It relied on the testimony of the witnesses K., R., V. and of the anonymous witness Artur, given during the preliminary investigation, as well as on the transcripts of tape recordings of telephone conversations.

14. According to the judgment, the anonymous witness Artur had recognised the applicant’s voice on the tape and had heard him brag about his bomb threats. Witnesses K. and R. testified that they had received repeated phone calls from the same person, approximately 40-50 years of age, threatening to explode a bomb and demanding a sum of money. In addition, witness R. stated that the applicant’s voice on the tape played to her closely resembled the voice of the man who had made the bomb threats. According to the testimony of witness V., the applicant had told him that he was in need of money and asked him to dial a number, using public phones, of which he remembered the first and last digits. In the event that somebody should answer, he was supposed to hand over the phone to the applicant. The first and last digits of the phone number corresponded to the phone number of the supermarket.

15. On 26 February 2001 the applicant's lawyer filed an appeal against the judgment requesting the applicant's acquittal. She argued that the City Court had not heard any of the witnesses at its hearing and that her request to summon the witnesses had been denied. The City Court had convicted the applicant on the basis of insufficient evidence. The record of the court hearing had stated incorrectly that several items of evidence in the case-file had been disclosed. In fact, this had not been done. As regards the voice identification, the applicant's lawyer noted that, as the witness R. had been presented with only one voice for recognition, she had not been able to compare voices. In his appeal the applicant noted that the bomb threats continued in July and August 2000, after he had been taken into custody.

The applicant's lawyer did not request in her appeal that any witnesses be called to the appeal court's hearing.

16. On 28 March 2001 the Tallinn Court of Appeal (*Tallinna Ringkonnakohus*) heard the appeal at a public hearing. The applicant's lawyer reiterated that at the hearing in the City Court it had not been possible to put questions to the witnesses and that her request to summon the witnesses had been denied.

According to the record of the Court of Appeal's hearing neither the applicant nor his lawyer requested that any witnesses be summoned to the hearing.

The Court of Appeal dismissed the appeal. It noted in its judgment:

"The [Criminal] Chamber [of the Court of Appeal] finds, as did the City Court, that [the applicant's] guilt has been established on the basis of an aggregate of evidence and that this aggregate [of evidence] does not include solely the statements of witnesses; all the evidence collected during the pre-trial investigation and examined at the court hearing has been taken into account."

The Court of Appeal found no substantial infringement of the procedural law which would have entailed a reversal of the lower court judgment.

17. On 18 April 2001 the applicant's lawyer filed an appeal with the Supreme Court (*Riigikohus*) repeating the arguments raised before the Court of Appeal. She reiterated that, in violation of the law of criminal procedure, the City Court had not based its judgment on evidence examined at the hearing. The applicant requested in his appeal that an independent expert assessment of the voice be carried out.

18. On 17 May 2001 the Supreme Court refused the applicant leave to appeal.

II. RELEVANT DOMESTIC LAW

19. Pursuant to Articles 205 and 206 of the Code of Criminal Procedure, as in force at the material time, a judge was to preside over court hearings so that all facts were examined thoroughly, from all perspectives and objectively and the truth was ascertained. When hearing a criminal case a

court of first instance had to examine the evidence directly by hearing the accused, the victims, witnesses and expert opinions, inspecting physical evidence and disclosing records and other documents. Article 262 § 2 of the Code provided that a court judgment had to be based only on evidence that had been heard at a court hearing. Article 274 of the Code provided that the statement of facts and reasons in a court judgment had to set out, *inter alia*, the facts ascertained in the examination by the court and the evidence on the basis of which the court deemed the facts to be established, the reasons why the court based its judgment on such evidence and deemed other evidence in the case to be unreliable, the charges on which the court convicted each of the defendants and the evidence on which such a conclusion was based.

20. Article 233 § 1 of the Code of Criminal Procedure provided that where a witness failed to appear, the court heard the opinions of the participants in the proceedings as to whether it was possible for the hearing to proceed and ruled on the continuation or adjournment of the hearing.

21. According to Article 243 of the Code of Criminal Procedure, after a witness had given testimony, he or she could be examined by the participants in the proceedings, including the accused and his or her lawyer. Additional questions could be submitted to a witness to clarify and supplement the testimony previously given by him or her. If a court deemed it necessary to hear a witness who had been granted anonymity, the witness could be heard in the absence of the participants in the proceedings on the basis of the questions submitted by them. The content of the testimony had to be disclosed at a court hearing.

22. Pursuant to Article 246 of the Code of Criminal Procedure, testimony given by a witness during the pre-trial investigation could be disclosed if the witness failed to appear at a court hearing or if the whereabouts of the witness was unknown, or if the witness had been granted anonymity.

23. According to Article 79¹ § 1 of the Code of Criminal Procedure, in order to ensure the security of a victim or a witness or persons close to him or her, the person in question could be granted anonymity. Anonymity could be granted in a reasoned order by a preliminary investigator at the request of a witness or a victim, or on the initiative of the preliminary investigator.

24. According to the criminal procedure law the trial in second instance court was, in substance, trial *de novo*, within the limits of the appeal and according to what the appeal court considered necessary under the law.

25. Article 8 § 3 of the Code of Criminal Court Appeal and Cassation Procedure provided that, in an appeal, the appellant had to set out the names and addresses of the persons whom he or she wished to have examined by the court of appeal.

26. Under Article 15 § 1 of the Code of Criminal Court Appeal and Cassation Procedure a court of appeal could order expert assessments and demand evidence during pre-trial proceedings. Under Article 17 § 2(3) of

the Code, a judge, when assigning a criminal case for hearing by means of a ruling, also decided who should be summoned to the hearing as participants in the proceedings, witnesses or experts. Article 17 § 4 of the Code provided that a court of appeal could, of its own motion, summon to the hearing witnesses and experts and also order expert assessments and demand evidence. Article 17 § 5 of the Code provided that applications by the participants in the proceedings for the re-summoning of witnesses had to be granted if the court of first instance had denied such applications incorrectly or if a witness or expert summoned had failed to appear in the court of first instance or if the court of appeal found that a further examination of a witness or expert was of material importance.

27. Article 20 of the Code of Criminal Court Appeal and Cassation Procedure provided that, in appeal proceedings, the court of appeal had to verify whether a decision of the court of first instance was lawful and reasoned only to the extent set out in the appeal, and an appellant had no right to exceed the limits of an appeal during a court hearing.

Under Article 31 of the Code of Criminal Court Appeal and Cassation Procedure, insufficiency or one-sidedness of the examination of the case by the court of first instance and discrepancy between the conclusions of the court as set out in the judgment and the facts were among the grounds on which a court of appeal could set aside the judgment of a court of first instance.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

28. The applicant complained that he did not have a fair trial and that his rights of defence had been violated since he had had no opportunity to examine or have examined, both during the investigation and at the trial, any of the witnesses against him. He relied on Article 6 §§ 1 and 3 (d) of the Convention, which, in so far as relevant, provide:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

A. Submissions of the parties

29. The applicant submitted that the courts had based his conviction on the statements made in the course of the preliminary investigation by two witnesses, one of whom was anonymous. These statements had not been examined by the courts, nor even formally disclosed at the hearings. A request by the applicant’s lawyer to call witnesses had been rejected by the City Court. The applicant considered that the Court of Appeal not only had the possibility to express an opinion on the necessity of hearing the witnesses, it also had an obligation to do so. The applicant’s lawyer stressed in her appeal that the conviction of the applicant on the basis of written witness statements that could not be verified by the defendant through direct questioning of the witnesses was inconsistent with the law. In fact, the very essence of the appeal concerned the reliability of the testimony given by the witnesses.

30. According to the Government, Article 6 of the Convention had not been violated. In their submission it was not the Court’s function to deal with errors of fact or of law allegedly committed by a national court. The admissibility of evidence was primarily a matter for regulation by national law and, as a general rule, it was for the national courts to assess the evidence before them. The Court of Appeal could only examine the matter within the limits of the appeal. If the applicant indeed wished to challenge the City Court’s judgment on the basis of the same evidence which was relied on by the City Court, the applicant should have advanced substantial reasons as to why the court should have assessed the same evidence differently. The Government argued that this had not been done in the case under consideration.

The Government further observed that, although it was true that the evidence normally had to be produced in the presence of the accused at a public hearing with a view to adversarial argument, the use of statements obtained at the pre-trial stage was not in itself inconsistent with Article 6 §§ 1 and 3 (d), provided that the rights of the defence had been respected. They also noted that, while the Court had found violations of Article 6 of the Convention when the conviction had been based only or mainly on the statements disclosed at the court hearing or only or mainly on the statements of an anonymous witness, this had not been the case in the proceedings in question. Both the City Court and the Court of Appeal had based their judgments on an aggregate of evidence, including many other items of evidence. The Government were of the opinion that the criminal

proceedings as a whole had been fair and that the applicant had been placed on an equal footing with the prosecution.

B. The Court's assessment

31. The Court reiterates that all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with Article 6 §§ 1 and 3 (d) of the Convention, provided that the rights of the defence have been respected. As a rule these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings (see, among other authorities, *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, p. 56, § 43).

Moreover, according to the Court's case law, the use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention (see, for example, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 69; and *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 52). However, a conviction should not be based either solely or to a decisive extent on anonymous statements (see *Doorson*, cited above, p. 472, § 76; and *Van Mechelen and Others*, cited above, p. 712, § 55).

32. With regard to the present case, the Court observes that in his appeals to the Court of Appeal and to the Supreme Court, the applicant complained that the City Court had not heard any of the witnesses at its hearing and that he had been convicted on the basis of insufficient evidence. The Court finds it established that none of the witnesses were heard at the court hearings and that the defence could not put questions to them, either during the pre-trial investigation or during the court proceedings. Moreover, the courts did not question the witnesses directly but they relied on the records of their statements made during the pre-trial investigation, which had been included in the trial court's case file.

33. As to the further question whether the national courts based their conviction of the applicant solely or to a decisive degree on the above-mentioned witness evidence, the Court first notes that the City Court mentioned in its judgment statements made by the applicant, witnesses K., R., V. and anonymous witness Artur. Reference was also made to a report concerning inspection of evidence and transcripts of tape recordings of telephone conversations appended to the report. The Court further notes the City Court's general statement that it examined written evidence ("reports of inspection of evidence, etc.") and analysed the evidence as a whole.

Meanwhile, as transpires from the reasons given for convicting the applicant, the City Court relied mainly on the statements of anonymous witness Artur who had heard the applicant saying that he had made the threats and who had recognised the applicant's voice on tape recordings of the bomb threats. In addition, according to witness R., the applicant's recorded voice example closely resembled the voice of the man who had made the bomb threats.

The Court moreover observes that according to the Court of Appeal's judgment it agreed with the reasoning of the City Court as regards the applicant's conviction and considered it unnecessary to repeat the City Court's reasoning in its judgment. The Court of Appeal referred to "an aggregate of evidence" (see paragraph 16 above), but without specifying which items of evidence it had in view.

Against this background, the Court finds that the applicant's conviction was based to a decisive extent on the statements of witnesses he had been unable to question.

34. The Court recalls that the City Court twice adjourned the hearing of the case due to the failure of witnesses K., R. and V. to appear. They failed to appear also at the third hearing, K. and R. having submitted that they had been unable to attend the hearing and V.'s whereabouts being unknown to the court. The Court notes that it is for the judicial authorities to secure proper conduct of the trial. However, in this case, not every reasonable effort was made in order to ensure the attendance of the witnesses in court. The Court of Appeal made no attempt to hear the witnesses, failing to summon them, although it was, under Article 17 § 4 of the Code of Criminal Court Appeal and Cassation Procedure, authorised to do so of its own motion.

35. Having regard to the fact that neither the applicant nor his representative were enabled to question any of the witnesses at any stage of the proceedings and that none of the witnesses were ever examined by the courts, the Court finds that the applicant's defence rights were restricted to an extent incompatible with the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention.

36. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. 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

38. In respect of non-pecuniary damage the applicant recalled that in his appeal to the Supreme Court he had claimed 1,400,000 kroons (EEK) (corresponding to approximately 89,500 euros (EUR)) as compensation for his unjustified conviction and sentence. In his application to the Court he claimed 10,000 dollars of the United States of America (USD) for each year of imprisonment, i.e. altogether USD 30,000 (approximately EUR 33,100).

In his final submission concerning the just satisfaction, the applicant noted that he had suffered extreme distress and discomfort during the criminal proceedings and during the imprisonment that had lasted for three years. He was of the opinion that his conviction and sentence had resulted from a miscarriage of justice by Estonian courts. He requested the Court to award compensation at its discretion, taking into account the claims he had made to the Estonian courts during the domestic proceedings and in his application to the Court.

39. The Government noted, first, that should the Court find a violation of the Convention, the applicant would have the possibility to request the Supreme Court to reopen the case and by means of new proceedings the applicant would be guaranteed the rights under the Convention.

The Government was of the opinion that in the event that the Court were to find a violation of the applicant's rights under Article 6 of the Convention, it could be reasonable to award him some non-pecuniary compensation, which, however, should not exceed EUR 2,000, the award made in the case of *Veeber v. Estonia* (no. 2) (no. 45771/99, § 46, ECHR 2003-I).

40. The Court reiterates that it cannot speculate as to whether the outcome of proceedings would have been different if no violation of the Convention had taken place (cf. *Van Mechelen and Others v. the Netherlands* (Article 50), judgment of 30 October 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2432, § 18). Nevertheless, the fact remains that the criminal proceedings against the applicant were not conducted in conformity with the Convention.

The Court finds that the applicant has sustained damage, which cannot be compensated by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant the sum of EUR 6,500 by way of compensation for non-pecuniary damage.

B. Costs and expenses

41. The applicant claimed reimbursement of the legal fees related to the proceedings before the Court. The costs had been EEK 47,156 (corresponding to approximately EUR 3,000) plus value-added tax of 18%, consisting of EEK 46,200 for the lawyer's work (38.5 hours at the rate of

EEK 1,200 per hour) and EEK 956 for related costs, value-added tax to be added to both sums.

Since the Council of Europe had paid EUR 685 as legal aid, the applicant's final request was that the sum not covered by the legal aid, i.e. EEK 42,996.84 (EUR 2,748) (value-added tax included) be reimbursed.

42. The Government noted that the applicant's lawyer had represented him only in the proceedings before the Court and that the case had not been particularly complex. They found that the sum claimed by the applicant for costs and expenses was not reasonable as to quantum and requested the Court to award the applicant a reasonable sum for costs and expenses.

43. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. The Court notes that the applicant received legal aid in the amount of EUR 685. It further notes that he has duly documented the sum claimed. Having regard to the circumstances of the case, the Court finds it reasonable to award EUR 2,300 plus any tax that may be chargeable on that amount for costs and expenses in respect of the Convention proceedings in addition to the amount already granted for legal aid.

C. Default interest

44. 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. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Estonian kroons at the date of settlement:
 - (i) EUR 6,500 (six thousand five hundred euros) in respect of non-pecuniary damage;
 - (ii) EUR 2,300 (two thousand three hundred euros) for costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;

(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;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President