



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

FOURTH SECTION

CASE OF ESKELINEN AND OTHERS v. FINLAND

(Application no. 43803/98)

JUDGMENT

STRASBOURG

8 August 2006

FINAL

08/11/2006

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 Eskelinen and Others v. Finland,

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 S. PAVLOVSKI,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 14 June 2005 and on 4 July 2006,

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

PROCEDURE

1. The case originated in an application (no. 43803/98) 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 four Finnish nationals, Mr Teuvo Eskelinen, Mr Juha Ruhanen, Mr Timo Kiljunen and Mr Jorma Vesterinen (“the applicants”), on 9 July 1998.

2. The second applicant was represented by Mr Henrik K. Dahlman whereas the remaining applicants were represented by Mr Kristian V. Bonsdorff, lawyers practising in Lappeenranta and Porvoo respectively. The Finnish Government (“the Government”) were represented by their Agent, Mr Arto Kosonen of the Ministry for Foreign Affairs.

3. The applicants alleged a violation of the rights of the defence in respect of witnesses.

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. By a decision of 14 June 2005, the Court declared the application partly admissible.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1943, 1956, 1958 and 1944 respectively and live in Lappeenranta.

A. The business arrangements

8. A Finnish company called Hackmann Sisustus Oy (hereinafter “HCS”) and an Estonian company called Viisnurkka A/S (hereinafter “VIS”) agreed that they would gradually switch production of coated decorative panels known as “Halltex-panels” from Finland to the VIS factory in Estonia, so that HCS would eventually become responsible for their marketing only. HCS had a monopoly over Halltex-panels in Finland.

At the beginning of 1993 HCS and VIS signed another contract, according to which HCS would buy wind-block panels from VIS. The cooperation between the two companies covered, as a result, all the marketing rights of VIS products in Finland, Sweden and west-European countries.

HCS, which was still producing Halltex-panels of its own, later allegedly ignored the above-mentioned cooperation contracts, causing VIS financial difficulties. VIS considered that the agreements had been terminated and decided to build its own production line to make coated decorative panels. The production line was ordered through Oy Finnhallex Ltd, a Finnish company apparently owned by the first, second and fourth applicants, from a company called Lappeenrannan Konemetalli Oy, owned by the third applicant.

B. The criminal investigation

9. On 10 August 1994 the managing director of HCS, Mr H.H., requested the police to investigate whether there had been a disclosure of their business secrets, alleging that their exclusive rights to the design of a production line to make coated decorative panels had been used without their permission to build the VIS production line in Estonia.

10. The investigations were carried out by the National Bureau of Investigation (*keskusrikospoliisi, centralkriminalpolisen*), which appointed Mr L.T., a mechanical engineer, as their expert in the case. He had worked for a company called Hackman Wood Oy, which belonged to the same consolidated group as HCS. The National Bureau of Investigation also requested expert statements from Professor H.K. in respect of technical

questions, and from Professor M.C. in respect of the legal aspects of the protection of business secrets. Professor M.C. was asked to address in particular whether the first and second applicants had provided Oy Finnhallex Ltd with information covered by business secrecy. Further, he was asked to give an opinion on the third applicant's activities in the planning of the production line, whether he had possessed information covered by business secrecy and whether he had availed himself of such information. Professor M.C. was provided with the pre-trial statements of the applicants and six others. On 9 November he submitted his opinion comprising 25 pages of which some 15 pages concerned his assessment of the nature of the applicants' alleged actions.

11. The applicants requested that an Estonian citizen, Mr K.P., also be heard as a witness in the pre-trial investigation, but the National Bureau of Investigation made no attempt to call him as a witness. The applicants were not able to appoint their own expert as the HCS production line, with which the VIS production line was to be compared, was protected by the exclusive business secrecy of HCS. According to the applicants, their expert was therefore prevented from examining the HCS production line. The VIS production line went into operation only after the Kouvola Court of Appeal (*hovioikeus*, *hovrätten*) proceedings had come to an end.

C. The proceedings before the domestic courts

12. The public prosecutor brought charges against the applicants for, *inter alia*, disclosure of a business secret. In the indictment, he alleged that the applicants had undertaken to carry out a project for the production of coated decorative panels on the basis of information they had on the production and marketing of a similar product known as Halltex-panels of HCS, in cooperation with VIS. Oy Finnhallex Ltd had been established for the purposes of the project, which was to provide VIS with the production line for the panels corresponding to Halltex-panels and otherwise to take care of the supply of equipment, training and know-how. According to the indictment, the information used for carrying out the project constituted a business secret of HCS. Although the third applicant had no association with HCS, he was allegedly aware of the fact that the project in which he had participated was to a large extent based on the business secrets of HCS.

13. On 30 May 1995 the Lappeenranta District Court (*käräjäoikeus*, *tingsrätten*) began its examination of the charges. The applicants pleaded not guilty, arguing, *inter alia*, that HCS had deliberately given up its allegedly exclusive right to any secrets as it had handed over all the relevant information to VIS anyway. They also argued that the design was a matter of common knowledge and was not protected in any way, as the patent for Halltex-panels had already expired at the time of the events in question and the HCS factory had been accessible to anyone. They also noted that a

similar panel was produced in Lithuania. According to the applicants, HCS intended to exploit its monopoly status with the help of the court proceedings.

14. The applicants called K.P., among others, as their witness. They also requested that the former members of HCS's board of directors, Mr H.H. and Mr J.L., called by HCS, should not be heard as witnesses as their real status was that of a complainant given their close relationship with the company. The District Court rejected their claims and took evidence from H.H. and J.L. The District Court also heard oral evidence from the applicants, from ten witnesses called by the prosecution and from seven witnesses for the defence. One witness for the complainant company was also heard.

15. In September 1995, during a three-day hearing, the fourth applicant requested that two engineers, both witnesses for the defence, should be allowed to acquaint themselves with HCS's production line. However, he withdrew the request during the hearing. At no stage during the proceedings did anyone request that Professor M.C., who had given a written expert opinion during the pre-trial investigation, be heard as a witness before the District Court. Nor was there any objection to the inclusion of the opinion in the case file.

16. On 30 November 1995 the District Court found the applicants guilty as charged and fined them. Professor M.C.'s written expert opinion was quoted several times in the judgment.

17. The parties appealed. The applicants were each represented by different counsel and therefore lodged separate writs of appeal. The second applicant explicitly requested that Professor M.C., among others, be called as a witness before the Court of Appeal, as the applicants had not had an opportunity to put questions to him. The first and fourth applicants for their part drew the court's attention to the fact that Professor M.C. had given his written opinion in the course of the pre-trial investigation, having had at his disposal only limited knowledge about the facts of the case. Thus, no weight should be given to his written opinion. The applicants also complained that the District Court had failed to take into account any of the statements made by the witnesses called by them. Some of these arguments were advanced by all of the applicants, others by only one of them.

18. On 16 December 1996 the Court of Appeal held an oral hearing. However it refused to hear any witnesses, finding that the allegation that the evidence had been wrongly assessed did not warrant a rehearing since the credibility of the evidence in question had not been challenged. It also considered that the taking of witness evidence would not produce any new information relevant to the case.

19. In its judgment of 5 June 1997 the Court of Appeal upheld most of the District Court's reasoning. It did not give any reasons for its decision not to hear Professor M.C. even though the second applicant had explicitly

requested that he be heard. It upheld their conviction and increased their sentences to suspended terms of imprisonment.

20. The applicants requested leave to appeal, alleging, *inter alia*, that the principle of equality of arms between the public prosecutor and the defence had been violated. The applicants had not been able to appoint an expert who could have examined the production line in question, nor had they been allowed to put questions to Professor M.C. at an oral hearing, even though the District Court's judgment had essentially been based on the expert opinion he had submitted to the police during the pre-trial investigation.

On 22 January 1998 the Supreme Court (*korkein oikeus*, *högsta domstolen*) refused leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. The rules of evidence are laid down in Chapter 17 of the Code of Judicial Procedure (*oikeudenkäymiskaari*, *rättegångsbalken*; Act no. 571/1948). In criminal proceedings, the forms of submission of evidence are 1) examination of witnesses, 2) hearing of experts, 3) hearing of parties under oath (in criminal proceedings only the injured party can be heard under oath and only about the establishment of losses suffered by him or her), 4) hearing of parties without an oath, 5) submission of documentary evidence, and 6) inspection *in situ*.

22. Section 3 (1) provides that a fact that is a matter of common knowledge or known to the court *ex officio* need not be proven. In addition, evidence need not be presented on the content of domestic law (*jura novit curia*). If the court does not know the foreign law applicable to the case, it is for the parties to submit evidence on it.

23. Section 44 (1) provides that if an expert witness with special professional knowledge is deemed necessary, the court can obtain an opinion on the matter from, for example, a public official or an expert in the relevant field who is known to be honest and competent. Section 49 provides that an expert who is heard before the court must take an oath.

24. Section 50 (Act no. 1052/1991) provides that an expert must give a detailed account of the findings in his or her investigation and, on the basis of the account, a substantiated opinion on the questions put to him or her. The opinion shall be compiled in writing, unless the court deems it necessary that the opinion be presented orally. An expert witness who has given a written opinion shall be heard orally in court, if a party so requests and the hearing of the expert witness is not clearly irrelevant or if the court deems the hearing of the expert witness to be necessary. If there are several expert witnesses, one or more of them may be called to be heard.

25. Section 55 (Act no. 571/1948) provides that if a party to the proceedings relies on an expert not appointed by the court, the provisions on

witnesses apply. However, such an expert may be ordered to give a substantiated opinion, as mentioned in section 50.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. The parties' submissions

26. The applicants complained that the proceedings had been unfair in that the courts had failed to hear Professor M.C. as a witness even though the District Court had based its judgment on his expert statement. They relied on Article 6 §§ 1 and 3(d) of the Convention, which read in relevant part:

“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;

...”

27. The applicants argued that Professor M.C. must be regarded as a witness for the purposes of Article 6 § 3(d) as he had given a written testimony on the basis of information provided by the National Bureau of Investigation. That information had been one-sided, incomplete and prejudiced. The opinion had addressed the question of guilt in a given case. Only witnesses called by the prosecution or the complainant company had been able to examine the production line in question.

28. The Government contested that argument, observing that Professor M.C. was a legal expert. On the basis of evidence submitted to him he had addressed questions of law, and expressed an opinion as to whether the applicants had transmitted information that could be considered a business secret. Under Finnish law his opinion was not seen as a testimony and he could not therefore be regarded as a witness for the

purposes of Article 6. The opinion had been communicated to the courts and to the parties, who had presented their counter-arguments. The applicants had the possibility to request an opinion from another legal expert and they could have requested Professor M.C. to be heard before the District Court, but they did not do so. Nor did they call him in the Court of Appeal. The mere fact that the District Court had drawn, to a large extent, the same conclusions on questions of law as Professor M.C. did not mean that the opinion had been treated as evidence in the proceedings. Since legal opinions were not comparable with observations on questions of fact, legal experts were not heard as witnesses before the courts. A written opinion by a legal expert and its relevance as evidence can be compared to academic commentaries on legal issues. In the present case the courts were attentive to the fact that the opinion had been given on the basis of certain facts presented to Professor M.C. by the police, thus weakening its probative value. If a legal expert were to go beyond the legal expertise required, the probative courts were to attach no weight to the expert's opinion. Under Finnish law it was not even possible to hear witnesses on the content or interpretation of law.

B. The Court's assessment

29. The basis of the applicants' complaint was the alleged use as evidence of an expert opinion drawn up by a professor of law. The opinion had been requested by the National Bureau of Investigation for its own enlightenment in the course of the pre-trial investigation. On the request of the prosecution the opinion was admitted to the case file. Professor M.C. was not himself heard before the courts, although the second applicant requested that he be heard before the Court of Appeal.

30. The Court takes note of the Government's argument that the author of the opinion was not regarded as a "witness" under Finnish law. Read literally, sub-paragraph (d) of Article 6 § 3 relates to witnesses and not experts. Although "witness" has an autonomous meaning within the Convention system, the Court notes that the role of Professor M.C. in the proceedings was not that of someone who had made observations as to the facts of the case but that of a legal expert. In any event, the Court would recall that the guarantees contained in Article 6 § 3 are constituent elements, amongst others, of the concept of a fair trial set forth in Article 6 § 1 (see, *inter alia*, *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p. 15, § 32, *Goddi v. Italy*, judgment of 9 April 1984, Series A no. 76, p. 11, § 28, and *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, p. 14, § 26). In the circumstances of the instant case, the Court, while also having due regard to the Article 6 § 3 guarantees, including those enunciated in sub-paragraph (d), considers that it should examine the applicants'

complaint under the general rule of fairness contained in Article 6 § 1 (see *Colozza*, cited above).

31. The Court notes that one of the elements of a fair hearing within the meaning of Article 6 § 1 is the right to adversarial proceedings; each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see *Mantovanelli v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 436, § 33 and *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports* 1997-I, p. 108, § 24). The Convention does not lay down rules on evidence as such. It is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced. The Court has nevertheless to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair as required by Article 6 § 1 (see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, § 46).

32. It is not disputed that the court proceedings complied with the adversarial principle. The applicants could challenge, and did challenge, the expert opinion in their written observations as well as orally during the hearings at two court levels. The question which arises in this case is whether the courts were able to assess for themselves all the issues considered or whether the expert's opinion replaced the taking of evidence and the assessment of the issues by the courts themselves.

33. It is true that the questions the expert was instructed to answer were effectively the same as those that the courts had to determine. This case must however be distinguished from, for example, *Mantovanelli v. France* (cited above) in which the court-appointed expert was instructed to answer whether the circumstances in which halothane had been administered to the applicants' daughter disclosed negligence on the part of the hospital. That question pertained to a technical field that was not within the judges' knowledge and the expert's report had been produced by interviewing witnesses, *inter alia*, and it was likely to have a preponderant influence on the assessment of the facts by the court.

34. In the present case, Professor M.C. had based his expert opinion on documentary material fully available to the parties. The courts received that material and heard oral evidence on it. The courts were not legally bound by Professor M.C.'s legal expertise, nor did they base their conclusions exclusively on his expert opinion. The courts were obliged under the Convention to rule on the applicants' objections to the charges brought against them, and they complied with that obligation (see, *mutatis mutandis*, *Terra Woningen B.V. v. the Netherlands*, judgment of 17 December 1996, *Reports* 1996-VI, pp. 2122-23, §§ 52-54 and *I.D. v. Bulgaria*, no. 43578/98, § 45-50, 28 April 2005).

35. The Court concludes that the refusal to call Professor M.C. to be heard in the Court of Appeal did not render the proceedings unfair.

Accordingly, there has been no violation of Article 6 § 1 in the present case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 8 August 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President