



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

FOURTH SECTION

CASE OF S. H. v. FINLAND

(Application no. 28301/03)

JUDGMENT

STRASBOURG

29 July 2008

FINAL

29/10/2008

This judgment may be subject to editorial revision.

In the case of S. H. v. Finland,

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

Lech Garlicki, *President*,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 8 July 2008,

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

PROCEDURE

1. The case originated in an application (no. 28301/03) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Finnish national, Ms S. H. (“the applicant”), on 4 September 2003. The President of the Chamber acceded to the applicant’s request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr Kari Uoti, a lawyer practising in Helsinki. The Finnish Government (“the Government”) were represented by their Agent, Mr Arto Kosonen of the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that she had been denied a fair hearing within the meaning of Article 6 of the Convention on account of the Insurance Court’s failure to provide her with an opportunity to comment on two medical opinions which were included in her case file.

4. On 25 April 2007 the President of the Fourth Section of the Court decided to communicate to the Government the complaint concerning the alleged non-communication of medical opinions by the Insurance Court. It was also decided to examine the merits of the application at the same time as its admissibility.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1952 and lives in Porvoo.

6. In 1986 the applicant became allergic to ink used in her work as a window-dresser and decorator and was diagnosed as asthmatic. She was granted a rehabilitation allowance in order to be able to change career and to qualify for a new profession. From 1989 onwards she worked as an accountant.

7. In 1997 her asthma became worse. The insurance company granted her a temporary accident pension in 1998 based on her annual income in 1986 when the asthma first started.

8. The applicant appealed to the Accident Board (*tapaturmalautakunta, olycksfallsnämnden*), demanding that the accident pension be calculated on the basis of her income as an accountant instead of her income in 1986 since she was no longer employed in the same work as when the occupational disease was diagnosed. Moreover, she stated in her appeal that she was undergoing further tests for asthma in order to find out if she was suffering from a new occupational disease.

9. On 14 January 1999 the Accident Board issued a decision rejecting her appeal with regard to the income. In so far as the applicant demanded compensation on grounds of having contracted a new occupational disease in her new work, the Accident Board referred the matter to the insurance company for consideration.

10. On 18 August 1999 the insurance company refused her request for a further allowance as it found that, according to the most recent medical opinion, the applicant was not suffering from a new occupational disease and that her symptoms were caused by her previously diagnosed asthma. The applicant disagreed and appealed to the Accident Board, submitting two medical opinions in support of her claim.

11. On 12 January 2000 the Accident Board found that the medical opinions did not support the applicant's claims and rejected her appeal.

12. Represented by a lawyer, she appealed to the Insurance Court (*vakuutusoikeus, försäkringsrätten*), claiming that the decision should be quashed. The insurance company filed its observations with the court and the applicant was given an opportunity to reply. On 24 January 2002 the insurance company filed two further medical opinions dated 20 April 2001 and 8 November 2001.

13. The Insurance Court upheld the decision on 11 June 2002, finding that the new evidence did not allow it to reach a different conclusion.

14. On 10 July 2002 the applicant acquainted herself with the case file before the Insurance Court. According to the applicant, she saw in the case file an opinion prepared by J., a doctor on the Accident Board, as well as two medical opinions from the insurance company.

15. The applicant sought leave to appeal to the Supreme Court (*korkein oikeus, högsta domstolen*). She alleged that the Insurance Court had obtained two medical opinions from the insurance company and an opinion from J., a doctor on the Accident Board, which had not been communicated

to her. She also claimed that the domestic decisions were inadequate, the medical opinions erroneous and the doctors biased.

16. On 5 March 2003 she was refused leave to appeal.

17. On 10 October 2003 the applicant again examined the case file before the Insurance Court. As she did not find J.'s opinion in the public part of the case file, she asked the Insurance Court to give her access to it. She repeated her allegation that she had seen the said opinion in the case file in July 2002, and said that it must have been subsequently removed.

18. On 23 October 2003 the Insurance Court remitted the applicant's request to the Accident Board, being the competent first-instance body.

19. On 11 December 2003 the Accident Board rejected her application. It stated that the provisions of the Code on Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*) on a judge's professional conduct applied equally to the medical members of the Accident Board. Consequently, J.'s commentary was part of the Accident Board's internal deliberations, and not a document which was made public even to the complainant.

20. As the applicant did not appeal to the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltningsdomstolen*), the Accident Board's decision became final on 11 December 2003.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. Section 34 of the Act on Administrative Judicial Procedure (*hallintolainkäyttölaki, förvaltningsprocesslagen*, Act no. 586/1996) provides that, before the disposal of the case, the parties shall be reserved an opportunity to comment on the requests of other parties and on evidence that may affect the outcome of the case. The matter may be resolved without a hearing of the party only if his claim is dismissed without considering its merits or immediately rejected or if a hearing is manifestly unnecessary for some other reason.

THE LAW

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

22. The applicant complained that she had been denied a fair hearing within the meaning of Article 6 § 1 of the Convention as the Insurance Court had failed to communicate to her the opinions of two doctors submitted by the insurance company on 24 January 2002. She also complained that she had not been given an opportunity to participate in the

proceedings by acquainting herself with the opinion of J., the medical member on the Accident Board and, further, that this opinion had been removed from the case file after the court had reached its decision. Moreover, the doctors had been biased and the documents and test results had been altered during the proceedings.

23. Article 6, in its relevant part, reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

24. The Government contested those arguments.

A. Admissibility

25. The Court notes that the complaint about the non-communication by the Insurance Court of two medical opinions is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

26. The applicant also complained that she had not been given the opportunity to participate in the proceedings by acquainting herself with the opinion of J., the medical member on the Accident Board and, further, that this opinion had been removed from the case file after the court had reached its decision.

27. The Government argued that the applicant had not, as far as this complaint was concerned, exhausted all domestic remedies available to her as she had not appealed against the Accident Board’s decision of 11 December 2003.

28. The applicant contested the Government’s view. She conceded that she had not appealed to the Supreme Administrative Court but argued that the Court should still consider her case in this respect as she believed that an appeal could not have changed her situation.

29. The Court observes, as far as the opinion of J. is concerned, that the applicant did not avail herself of the possibility to have the decision reviewed by the Supreme Administrative Court. Therefore, the Court accepts the Government’s objection that the applicant has not exhausted domestic remedies. In any event, there is no indication that the refusal to disclose to the applicant an opinion of a medical member of the Accident Board, whose opinions form part of the internal deliberations of that body, deprived the applicant of a fair and effective opportunity to put forward her own case or to answer the arguments of the other party. There is in the circumstances no appearance of a violation of Article 6 § 1 of the Convention (see *Markko v. Finland*, no. 61113/00, 13 December 2005). It follows that the complaint concerning this part of the application must be

rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

30. As for the remaining complaint, the applicant has not substantiated her allegations about the bias of the doctors and alteration of the documents and test results. Accordingly, this part of the application is manifestly ill-founded for lack of substantiation and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

B. Merits of the complaint concerning the non-communication of medical opinions

31. The applicant maintained that the proceedings had not been adversarial as her case file before the Insurance Court had included two medical opinions which had not been communicated to her before the decision was taken in her case. The question before the Insurance Court was whether the applicant was suffering from a new occupational disease that had begun in the 1990s or whether it was the previously diagnosed disease that had worsened due to new circumstances. The two new medical opinions dated 20 April and 8 November 2001 were the most recent ones concerning the applicant's health at the time and were thus relevant for the assessment of her case. The applicant referred in this respect to the case *K.P. v. Finland* (no. 31764/96, 31 May 2001).

32. The Government, referring to the judgment *Kukkonen v. Finland* (no. 57793/00, § 25, 7 June 2007), contested the applicant's claim that she had been placed at a disadvantage *vis-à-vis* the insurance company. The medical opinions in question had not been relevant in determining whether the occupational disease had broken out in 1986 or whether the symptoms causing the applicant's incapacity to work in the late 1990s could be considered as a new occupational disease. Moreover, the non-communicated medical opinions, in the Government's view, had not adversely affected the applicant's ability to challenge the Insurance Court's decision in question before the Supreme Court.

33. The Court points out that the fairness of proceedings must be assessed with regard to the proceedings as a whole (see *Dallos v. Hungary*, no. 29082/95, § 47, ECHR 2001-II). One of the elements of the broader concept of a fair trial is the principle of equality of arms, which requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* his opponent (see, among many other authorities, *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 107-08, § 23). That right means, in principle, the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision (see *Lobo Machado v. Portugal*, judgment of

20 February 1996, *Reports* 1996-I, p. 206, § 31). This position is not altered when the observations are neutral on the issue to be decided by the court (see *Göç v. Turkey* [GC], no. 36590/97, § 55, ECHR 2002-V) or, in the opinion of the court concerned, they do not present any fact or argument which has not already appeared in the impugned decision. Only the parties to a dispute may properly decide whether this is the case; it is for them to say whether or not a document calls for their comments (see *Nideröst-Huber*, cited above, § 29).

34. In the instant case it is undisputed that the opinions submitted by the applicant's insurance company were not communicated to her for possible comments prior to the Insurance Court's decision in 2002.

35. The Court notes that the opinions in question constituted reasoned opinions on the merits of the applicant's appeal. Whatever actual effect these opinions may have had on the decision of the Insurance Court, it was for the applicant to assess whether they required her comments. The onus was therefore on the Insurance Court to afford the applicant an opportunity to comment on the opinions prior to its decision.

36. The procedure followed, however, did not enable the applicant to participate properly in the proceedings and thus deprived her of a fair hearing within the meaning of Article 6 § 1 of the Convention. Accordingly, there has been a violation of that provision.

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. The applicant claimed EUR 7,000 in respect of non-pecuniary damage for suffering and distress.

39. The Government considered the claim too high as to quantum. In the Government's view the applicant should be awarded reasonable compensation for non-pecuniary damage not exceeding EUR 1,200.

40. The Court accepts that the lack of guarantees of Article 6 has caused the applicant non-pecuniary damage which cannot be made good by the mere finding of a violation. Making its assessment on an equitable basis, the Court therefore awards the applicant EUR 2,500 in respect of non-pecuniary damage.

B. Costs and expenses

41. The applicant also claimed EUR 6,026.80 (inclusive of value-added tax) for the costs and expenses incurred before the Court.

42. The Government left it to the Court's discretion to decide whether sufficient detailed information to support the claims had been submitted, as was normally required by the Court. In the Government's view the total amount of compensation for costs and expenses should not exceed EUR 2,000 (inclusive of value-added tax).

43. The Court reiterates that an award under this head may be made only in so far as the costs and expenses were actually and necessarily incurred in order to avoid, or obtain redress for, the violation found (see, among other authorities, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, p. 2334, § 63).

44. In the present case, regard being had to the information in its possession, the above criteria and the fact that the application was examined under the joint procedure provided for under Article 29 § 3 of the Convention and that the applicant was represented by counsel only after the case had been communicated, the Court considers it reasonable to award the applicant the sum of EUR 3,000 (inclusive of value-added tax) for the proceedings before the Court.

C. Default interest

45. 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. *Declares* the complaint concerning the non-communication of two medical opinions admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the non-communication of two medical opinions;
3. *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:

- (i) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 29 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President