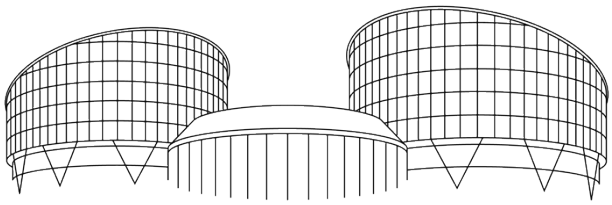

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FOURTH SECTION

CASE OF KARI-PEKKA PIETILÄINEN v. FINLAND

(Application no. 13566/06)

JUDGMENT

STRASBOURG

22 September 2009

FINAL

18/11/2009

This judgment may be subject to editorial revision.

In the case of Kari-Pekka Pietiläinen v. Finland**,**

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

Nicolas Bratza, *President,*
Giovanni Bonello,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges,*

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 1 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 13566/06) 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, Mr Kari-Pekka Pietiläinen ("the applicant"), on 10 April 2006.

2. The applicant was represented by Mr Ari Halonen, 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 his right to a fair trial and to defend himself in person or through legal assistance of his own choosing had been violated as his appeal in the Appeal Court had been discontinued due to the fact that he had not attended a hearing in person but had been represented by his counsel.

4. On 30 June 2008 the Acting President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1967 and lives in Helsinki.

6. On 24 February 2004 the applicant was convicted of aggravated fraud by the Tuusula District Court *(käräjäoikeus, tingsrätten*) and sentenced to conditional imprisonment for one year and eight months.

7. On 25 March 2004 the applicant appealed to the Helsinki Appeal Court (*hovioikeus, hovrätten*) requesting, *inter alia*, that an oral hearing be held. The other defendants and one of the complainants also appealed to the Appeal Court.

8. On 28 December 2004, after having received written observations from the parties, the Appeal Court decided to hold an oral hearing. On 29 December 2004 the parties were summoned to attend the oral hearings which were to take place on 28 February, 14 to 16 March, 18 March, and 21 to 24 March 2005. It was stated in the decision and in the summons that the applicant was to appear in person at the hearing on all of those days, under penalty of a default fine. His presence was required due to his own appeal as well as the opposing parties' appeal and in order to be heard by the public prosecutor. However, the hearing of witnesses was to take place between 14 and 24 March 2005. Moreover, it was stated in the summons that, if the applicant were to be absent from the main hearing without a valid excuse and despite the penalty of a default fine being imposed, his appeal would be discontinued. As far as the opposing parties' appeal and the hearing by the public prosecutor were concerned, a new threat of a higher fine could be imposed on the applicant, he could be ordered to be brought to the same or a later hearing, and the case could be decided regardless of his absence. A valid excuse meant circumstances of *force majeure* or an illness certified by a medical certificate. Work or holiday reasons were normally not considered as valid reasons. The Appeal Court was to examine whether the excuse was valid.

9. The summons was served on the applicant on 4 January 2005.

10. The applicant did not attend the hearing on 28 February 2005 but was represented by his counsel. He could not be reached by telephone despite several attempts. The public prosecutor requested that the applicant be brought to the hearing but this was not done. The applicant's counsel indicated that the applicant could most likely be found at his home but that his presence at the hearing on 28 February 2005 was not necessary as it had been planned in advance that he would be heard only on 15 March 2005.

11. On 28 February 2005 the Appeal Court decided, on the basis of Chapter 26, section 20, subsection 1, of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*; Act no. 381/2003), that the applicant's appeal was to be discontinued due to his absence. It found that, since the applicant had not attended the hearing on 28 February 2005 or notified the court of a valid excuse for his absence, he had to be considered to have been absent even though his counsel had been present. It was stated in the decision that an ordinary appeal was not allowed but if the applicant had had a valid excuse that he had not been able to announce in time, he had

the right to a reopening of the case on the basis of the same appeal, by notifying the Appeal Court in writing within thirty days of the decision to discontinue the appeal. If he could not provide a valid excuse, the case would be ruled inadmissible.

12. On 15 March 2005 the applicant attended the hearing as planned and was questioned as a witness.

13. On 24 March 2005 the applicant notified the Appeal Court in writing that he had had a valid excuse for his absence and that he wanted his case to be reopened. He claimed that the national provision in question, Chapter 26, section 20, subsection 1, of the Code of Judicial Procedure, had been too strictly applied. He referred to a Supreme Court judgment in which the court had stated that it was not necessary to summon an applicant to appear in person unless his presence was strictly necessary, for example for questioning. According to the Supreme Court, the national provision in question should not be interpreted too strictly. If the applicant was absent from the main hearing but his presence was not deemed strictly necessary, his appeal should not be discontinued due to his absence.

14. Furthermore, the applicant claimed that the above-mentioned provision most likely failed to comply with the requirements of the European Convention on Human Rights. When the provision in question had last been amended, the Government had proposed some textual changes in order to reflect better the Court's case-law in this respect. These changes were not, however, accepted by the Parliament.

15. Moreover, the applicant claimed that, as there were no rules on how national law was to be applied when the main hearing lasted for several days, a Convention-friendly approach should have been adopted. The Appeal Court had set up a procedural plan according to which the applicant was to be heard in person only on 15 March 2005. It was not indicated in the summons that even one day's absence would be regarded as absence from the whole main hearing. The applicant's presence at the hearing on 28 February 2005 was thus not strictly necessary and the Appeal Court should not have discontinued his appeal. The applicant had never intended to discontinue his appeal.

16. In any event, the applicant claimed that he had had a valid excuse as he had been ill. He provided a medical certificate and two medical documents to that effect.

17. On 21 June 2005 the Appeal Court rejected the applicant's notification. It found that the medical certificate had been dated eight days after the hearing and that the doctor had thus not examined the applicant's health on 28 February 2005. On that date, the applicant had not received any treatment in a hospital or in a similar medical institution. The applicant was suffering from a long-term illness and his treatment was estimated to last two to three years. Despite the applicant's state of health, he had been able to attend the hearing on 15 March 2005. His illness was thus not of a kind to

constitute a valid excuse for absence. The applicant had time to prepare himself well in advance for the hearing and also to take the hearing into account when planning his treatment. Thus, the applicant had not shown that he had had a valid reason to be absent from the hearing on 28 February 2005 and he had no right to have his case reopened.

18. On 18 August 2005 the applicant appealed to the Supreme Court (*korkein oikeus, högsta domstolen*), reiterating the grounds of appeal relied on before the Appeal Court and pointing out that the Appeal Court had taken no stand on his claims concerning national law and the Court's case-law.

19. On 11 October 2005 the Supreme Court refused leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

20. According to Chapter 26, section 20, subsection 1, of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*; Act no. 81/2003), if the appellant is absent from the main hearing, the appeal shall be discontinued. According to Chapter 12, section 29 of the same Code (Act no. 1052/1991), a party who, in spite of having been ordered to appear in court in person, sends an attorney in his place without a valid excuse, shall be deemed to be absent.

21. When the current provisions concerning appeals to the Appeal Court were amended in 2002 and 2003, the following was mentioned in the Government Proposal HE 91/2002 vp.:

> "The provision [Chapter 26, section 20, subsection 1, of the Code of Judicial Procedure] is interpreted [by the Supreme Court, KKO 2000:44] to mean that an appeal of an applicant summoned to appear in person is discontinued if he or she is absent from the main hearing even if he or she is represented by counsel. However, the European Court has on many occasions stated that it was of crucial importance for the fairness of the criminal justice system that the accused be adequately defended by counsel, in spite of having been properly summoned to appear in person. In its judgments of *Lala and Pelladoah v. The Netherlands* (application nos. 14861/89 and 16737/90, judgment of 22 September 1994, points 34 and 40) and *Van Geyseghem v. Belgium* (application no. 26103/95, judgment of 21 January 1999, points 33—35) as well as most recently in its judgment *Stroek and Goedhart v. Belgium* (application nos. 36449/97, 36467/97 and 34989/97, judgment of 20 March 2001), the European Court stated that an accused does not lose this right to be defended effectively by a lawyer merely on account of not attending a court hearing. It is immaterial whether the absence is due to a valid excuse or whether an appeal is possible. It is also immaterial that the defendant was adequately defended in the lower instance. The judgment in the *Van Geyseghem* case concerned an action for recovery of a higher court judgment which was given *in absentia*. The applicant, who was an accused in the criminal proceedings, was represented by her counsel in the recovery proceedings. The higher court "declared the application void". The proceedings were thus similar to those in Finland when an appeal is discontinued. On the other hand, in its judgment of *Eliazer v. The Netherlands* (application no. 38055/97, judgment of 16 October 2001, point 35), the European Court found no violation when counsel was heard and the

case was decided thereafter. In the light of the above Court's case-law, it is not entirely clear what should be done regarding an appeal of an applicant who is an accused in criminal proceedings and who, despite being summoned, does not appear in person at the main hearing."

22. However, it was proposed that Chapter 26, section 20, subsection 1, of the Code of Judicial Procedure be amended so that an appeal by an applicant summoned to appear in person would no longer be discontinued if he or she were absent from the main hearing but represented by counsel. It was felt that it was better that the applicant in such situations received a decision on material rather than procedural grounds.

23. The Parliamentary Legal Committee estimated, however, in its report LaVM 27/2002 vp., that as it was debatable whether these amendments were necessary, and since they were causing inconvenience for the functioning of the appeal courts, the amendments should not be adopted. The proposed amendments were thus withdrawn.

24. The Supreme Court took a stand on this issue in its judgment of 1 October 2004 (KKO 2004:94). It found, *inter alia,* the following:

"13. The European Court has in many judgments stated that it was of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, and that he could not be deprived of this right merely on account of not attending a court hearing. According to the Court, even if the legislature had to be able to discourage unjustified absences, it could not penalise them by creating exceptions to the right to legal assistance (see *Poitrimol v. France*, judgment of 23 November 1993, *Lala v. The Netherlands* and *Pelladoah v. The Netherlands*, judgments of 22 September 1994, as well as *Van Geyseghem v. Belgium*, judgment of 21 January 1999, *Van Pelt v. France*, judgment of 23 May 2000 and *Goedhart v. Belgium*, judgment of 20 March 2001).

.....

16. When deciding in what situations a case can be examined only when the applicant is present in person and in what situations the applicant has the right to defend himself through legal assistance of his choosing, one has to distinguish different situations in the criminal proceedings. If the applicant is heard in order to clarify the matter, his presence in person is necessary. When, however, other witnesses are heard or the parties are heard in order to assess legally the act described in the indictment or the defence, it is appropriate that questioning is undertaken and the statements are given by a legal representative. It is also clear that when the applicant exercises his right to question or to give legal statements, he cannot be deprived of his right to use legal assistance and that his presence in person in those situations is not necessary. Therefore, the applicant should not be obliged to appear in person under penalty of a default fine unless the outcome of the case might depend on the reliability of his account or his presence in person is necessary for some other reason.

17. According to the provisions concerning the proceedings in appeal courts, an appeal court cannot, without any particular grounds, change the district court's conclusions concerning the evidence if persons meant to be heard as witnesses are absent from the main hearing. The starting point is that a higher instance should have the same possibility to assess the oral testimony as a district court, the correctness of

whose judgment is being assessed by the higher instance. This means, *inter alia,* that the principle of immediate presentation of evidence must be applied also on appeal. It does not follow from the wording of Chapter 26, section 20, subsection 1, of the Code of Judicial Procedure, nor did it follow from it at the time when the Appeal Court examined the case, that an appeal should always be entirely discontinued when the applicant is absent from the main hearing, even though summoned to appear in person. The court which has the right and the obligation to conduct the proceedings can and indeed must then decide whether the examination of some parts of the appeal by hearing only counsel is necessary or reasonable. When considering this, the court must take into account the applicant's justified legal expectations. If it becomes clear that the applicant's presence in person is, in spite of the given order, not necessary, his appeal should not in this kind of situation be even partly discontinued due to his absence."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 6 § 3 (C) OF THE CONVENTION

25. The applicant complained that his right to a fair trial and to defend himself in person or through legal assistance of his own choosing had been violated as his appeal in the Appeal Court had been discontinued due to the fact that he had not attended the hearing on 28 February 2005 but was represented by his counsel. He claimed, referring to the Court's case-law, that the provision on the basis of which his appeal was discontinued, namely Chapter 26, section 20, subsection 1, of the Code of Judicial Procedure, was contrary to the requirements of the Convention.

26. He invoked Articles 6 § 1 and 6 § 3 (c) of the Convention, which read in the relevant parts as follows:

"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:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

27. The Government contested these arguments.

A. Admissibility

28. The Court notes that the application 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.

B. Merits

29. The applicant pointed out that, according to the Court's case-law, an accused could not be deprived of his or her right to legal assistance solely on the ground that he or she had not attended a hearing. Even though the legislator had a power to prevent unjustified absences, it could not penalise them by creating exceptions to the right to legal assistance. An accused's right to legal assistance was not dependent on his or her behaviour. In the present case, the content of the summons had been unclear. Moreover, the hearing on 28 February 2005 was not connected to the rest of the hearing and it was not even intended that the applicant would be heard on that day. Chapter 26, section 20, subsection 1, of the Code of Judicial Procedure did not comply with the requirements of the Convention and it had not been interpreted in a Convention-friendly manner in the applicant's case.

30. The Government maintained that an oral hearing in an appeal court was an immediate and uninterrupted court session although it would have been held over several days. The hearing could be cancelled if, *inter alia*, the defendant failed to appear and the case could not be decided notwithstanding this failure. The relevant domestic legislation was in accordance with the requirements of the Convention. Moreover, Chapter 26, section 20, subsection 1, of the Code of Judicial Procedure was flexible and allowed Convention-friendly interpretation. In the present case the applicant's hearing in person had been necessary and he had been made aware of the consequences of his absence. As the applicant could not be contacted by telephone during the oral hearing, he could not be brought to court.

31. The Court points out that it is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim, whose interests need to be protected, and of the witnesses. The legislature must accordingly be able to discourage unjustified absences (see *Poitrimol v. France*, 23 November 1993, § 35, Series A no. 277-A). However, it is also of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal (see *Lala v. the Netherlands*, 22 September 1994, § 33, Series A no. 297-A; and *Pelladoah v. the Netherlands*, 22 September 1994, § 40, Series A no. 297-B). The latter interest prevails and consequently the fact

that a defendant, in spite of having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right under Article 6 § 3 of the Convention to be defended by counsel (see *Lala v. the Netherlands,* cited above, § 33; and *Pelladoah v. the Netherlands*, cited above, § 40). It is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence is given the opportunity to do so (see *Lala v. the Netherlands,* cited above, § 34; and *Pelladoah v. the Netherlands*, cited above, § 41).

32. The right of everyone charged with a criminal offence to be defended effectively by a lawyer is one of the basic features of a fair trial. An accused does not lose this right merely on account of not attending a court hearing. Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance. The legitimate requirement that defendants must attend court hearings can be satisfied by means other than deprivation of the right to be defended (see *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 34, ECHR 1999-I.).

33. Moreover, the Court reiterates that the right to a fair trial, guaranteed under Article 6 § 1 of the Convention, comprises *inter alia* the right of the parties to the proceedings to present the observations which they regard as pertinent to their case. As the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37), this right can be regarded as effective only if the applicant is in fact "heard", that is, his observations are properly examined by the courts. Article 6 § 1 of the Convention places the courts, *inter alia*, under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see *Van de Hurk v. the Netherlands*, 19 April 1994, § 59, Series A no. 288; *Dulaurans v. France*, no. 34553/97, § 33, 21 March 2000; and *Virgil Ionescu v. Romania*, no. 53037/99, § 44, 28 June 2005; in the context of the right to access to a court see *Perez v. France* [GC], no. 47287/99, § 80, ECHR 2004-I; and *Albina v. Romania*, no. 57808/00, § 30, 28 April 2005; and in the context of the applicant's right to a re-examination of his conviction see *Nedzela v. France*, no. 73695/01, §§ 55-56, 27 July 2006).

34. The principles established in the above-mentioned cases apply to the present case. It was the Helsinki Appeal Court's duty to allow the applicant's counsel, who attended the hearing, to defend him, even in his absence. That was particularly true in this case as the Appeal Court had set up a procedural plan according to which witnesses were to be heard only from 14 March 2005 onwards. Although the intended scope of the hearing on 28 February 2005 is not entirely clear, it apparently did not concern any

issues for which the applicant's attendance in person was strictly necessary. In addition, the hearing was to last several days and it had not been indicated in the summons that even one day's absence would be regarded as absence from the whole main hearing. In these circumstances, the discontinuation of the applicant's case despite the fact that his counsel had been present on 28 February 2005 constituted a particularly rigid and heavy sanction for his absence which cannot be considered justifiable, having regard to the rights of the defence and the requirements of the fair trial.

35. In conclusion, there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicant considered that the best just satisfaction would be *restitutio in integrum* as far as possible, which would mean reopening his case at the domestic level. The reopening would be the only way to be awarded compensation for pecuniary damage. Therefore the applicant claimed no award under this head. As to non-pecuniary damage, the applicant claimed 5,000 euros (EUR).

38. The Government pointed out that the respondent States remained free, subject to supervision by the Committee of Ministers of the Council of Europe, to choose the means of complying with their obligations to put an applicant, as far as possible, in the position in which he or she would have been had there been no violation of the Convention requirements. Under Chapter 31, sections 1 and 2, of the Code of Judicial Proceedings a case could be reopened under certain circumstances. As to the non-pecuniary damage, the Government contested the applicant's claim as being too high as to *quantum* and considered that the reasonable compensation should not exceed EUR 2,000.

39. 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. The Court considers that the award of non-pecuniary damage provides a sufficient redress in this case.

B. Costs and expenses

40. The applicant also claimed EUR 4,464.71 for the costs and expenses incurred before the Court.

41. The Government maintained that no specification related to all costs and expenses, as required by Rule 60 of the Rules of Court, had been submitted but left it to the Court's discretion whether the documentation provided was sufficient in this respect. Costs such as postage, telephone and copying costs should not be compensated as they were included in counsel's fee. In any event, the total amount of compensation for costs and expenses should not exceed EUR 2,500 (inclusive of value-added tax).

42. According to the Court's case-law, an applicant is entitled to the reimbursement of 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. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 (inclusive of value-added tax) for the proceedings before the Court.

C. Default interest

43. 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 application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention;

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 claim for just satisfaction.

Done in English, and notified in writing on 22 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Deputy Registrar	Nicolas Bratza President