AS TO THE ADMISSIBILITY OF

Application No. 30408/96
by Kari Ilkka Heikki JÄRVINEN
against Finland

The European Commission of Human Rights (First Chamber) sitting in private on 15 January 1998, the following members being present:

MM N. BRATZA, Acting President
M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs M. HION
Mr R. NICOLINI

Mrs M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 4 June 1994 by Kari Ilkka Heikki JÄRVINEN against Finland and registered on 8 March 1996 under file No. 30408/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Finnish citizen, born in 1931. He resides in Helsinki.

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant had a heart by-pass operation in April 1992. On 29 September 1992 he was found in a confused state in the courtyard of his home and his neighbours called an ambulance. He told the rescue service to take him to the University Central Hospital, as he felt he was suffering from a stroke, but they took him to the local hospital.

The applicant was brought to the emergency ward of the hospital at about 16.30 hours. The hospital had no previous patient records of the applicant as his heart by-pass operation had been carried out at the University Central Hospital and they had no other information of his medical history.

The doctor on duty at the hospital at the time examined the applicant when he arrived to the hospital and concluded provisionally that the applicant was suffering from either a psychosis or from aphasia (inability to generate speech due to brain damage). She told the nurses that the applicant had to wait until she had taken care of some other patients. The applicant apparently tried to get up from the hospital bed. As the nursing staff found him to be aggressive and in a confused state and as the doctor had diagnosed him to be psychotic, he was given medication related to this diagnosis according to the doctor's orders to calm him down. Straps were also used to tie him to his hospital bed. Soon after the medication he lost his consciousness.

The hospital staff contacted the applicant's wife who arrived at the hospital later in the evening. She requested that the applicant be transferred to the University Central Hospital as soon as possible and informed the doctor about the applicant's recent heart by-pass operation.

The applicant was then examined once more by the doctor on duty. She now concluded that the applicant's symptoms indicated that he had suffered a stroke and he was transferred to the Central University hospital at 23.35 hours still unconscious.

At the University Central Hospital the applicant was diagnosed as having suffered a massive stroke in the left side of his brain. He was hospitalised until 23 October 1992. The applicant has since suffered from chronic aphasia.

On 30 October 1992 the applicant complained about the alleged incorrect treatment to the County Administrative Board (lääninhallitus, länsstyrelsen) claiming that he had been diagnosed and treated wrongly. The County Administrative Board obtained a copy of the applicant's patient records. It also obtained written submissions from, inter alia, the hospital staff from which the following appeared:

The applicant had arrived at the emergency ward with the ambulance. According to the rescue service he had been found in a confused state and his neighbours had called the ambulance. The applicant had only been at the local hospital once, in 1989, for which reason they did not have medical records of him. The neighbour, who had called the ambulance, had not seen him in such a state before. Dr TH, on duty at the emergency ward on 29 September 1992, met the applicant for the first time as the applicant was lying on the hospital stretcher. The applicant was trying to get up from the stretcher and, moving all his limbs, shouted something about being "God's own". He did not reply to any questions. He did not appear to be under the influence of alcohol. The doctor considered him to be psychotic or suffering from aphasia. The doctor decided that the applicant should be given a tranquillizer injection. In order to give the injection the nurses strapped the applicant to the stretcher. The applicant calmed down after the medication. The nurses tried to contact the applicant's wife all evening to get information about his medical history. There were several other patients at the emergency ward, so the applicant was left to wait his turn to be examined further.

A few hours after the applicant's arrival to the ward, the nurses told the doctor that the applicant's right side seemed to be weakening. Dr TH did not have time to examine the applicant prior to the arrival of the applicant's wife. At about 22.30 hours Dr TH noticed that the applicant suffered from a mild motor paralysis on his right side. The applicant's wife demanded that he be transferred immediately to the University Central Hospital to get thrombolytic treatment. As Dr TH had never heard that such treatment could be used for a stroke, she thought that the applicant's wife was mixing thrombolytic treatment with another treatment usually given to persons suffering from a heart attack. Dr TH told the applicant's wife that such treatment could be given to heart attack patients also at the local hospital, but it could

not be used in this case. Dr TH consulted the neurophysician at the University Central Hospital. As the neurophycisian recommended that the applicant be transferred to the University Central Hospital, the applicant was transferred there at about 23.35 hours.

Dr TH later talked about the requested treatment with the neurophysician at the University Central Hospital and was told that such treatment was not commonly used at the University Central Hospital either, but that there was a medical study carried out about such treatment (thrombolytic treatment trial). This had, however, not yet commenced on 29 September, so the applicant could not have received the treatment there.

Dr TH submitted that she had acted according to the relevant recommendations and that it was necessary to control the symptoms at the ward for several hours. In her opinion, the waiting time at the emergency ward did not affect the outcome of the treatment.

The superiors of Dr TH submitted to the County Administrative Board that diagnosing a stroke patient is demanding, especially when the patient is in a confused state. It was not easy to diagnose the symptoms and the treatment given to the applicant was correct according to the common medical practice in such cases. The ambulance service employees had also acted according to their instructions. The kind of treatment requested by the applicant and his wife was not available at the University Central Hospital either at the time in question. On the basis of the investigations made the County Administrative Board decided 5 May 1993 as follows:

(Translation)

> "On the basis of the documents, the County Administrative Board finds, that the ambulance service employees acted according to the given rules and instructions when taking [the applicant] to the local hospital. The Board has not found negligence in the treatment given to [the applicant] at the local hospital either. The County Administrative Board finds that diagnosing a stroke is a difficult task, especially if the patient is in a confused state. This would presuppose that the situation be observed at the ward. The County Administrative Board also notes that it is not a common practice to give thrombolytic treatment to patients suffering from a stroke but only to those suffering from a heart attack. In the situation in question, the County Administrative Board finds that there was nothing else which could have improved [the applicant's] situation. There is no reason to criticise the subsequent treatment either. The County Administrative Board also notes that thrombolytic treatment could have been given also at the local hospital if needed for a heart attack - which was not the case.
>
> Thus, the County Administrative Board sees no reasons for further measures in this matter."

According to the Act on Judicial Review of Certain Administrative Decisions (laki muutoksenhausta hallintoasioissa, lag om ändringssökande i förvaltningsärenden) it was not possible to appeal against the decision of the County Administrative Board.

In the meantime, on 31 March 1993 the applicant had reported the alleged incorrect treatment to the Patient Insurance Association (potilasvakuutusyhdistys, patientförsäkringsföreningen) which also obtained a copy of the applicant's patient records.

On 30 August 1993 the Patient Insurance Association rejected the applicant's complaints stating that the treatment had been given in a

correct manner and there was no evidence that the applicant suffered damage which should be compensated. The applicant appealed against the decision to the Patient Damage Board (potilasvahinkolautakunta, patientskadenämden) which decided on 13 December 1995 not to recommend that compensation be paid. Accordingly, the Patient Insurance Association rejected the compensation claims on 11 January 1996.

The applicant also complained to the Parliamentary Ombudsman (eduskunnan oikeusasiamies, riksdagens justitieombudsman) about his treatment. On 27 January 1994 the Deputy Parliamentary Ombudsman (eduskunnan apulaisoikeusasiamies, riksdagens biträdande justitieombudsman) rejected his claims referring, inter alia, to the fact that the matter had already been investigated in due form by the County Administrative Board.

On 13 October 1994 the applicant complained to the National Board of Medicolegal Affairs (terveydenhuollon oikeusturvakeskus, rättskyddscentralen för hälsovården) maintaining that the ambulance service employees had taken him to a wrong hospital even though he had requested to be taken to another hospital, that Dr TH had misdiagnosed his condition and the examination had been delayed causing further delays in his treatment and that he had therefore fallen into a severe chronic state of aphasia. The National Board of Medicolegal Affairs obtained a copy of the applicant's patient records from both hospitals. It also obtained written submissions from the hospital staff and two expert opinions.

In its decision of 3 March 1995 the National Board of Medicolegal Affairs rejected all the complaints stating the following:

(Translation)

> "On the basis of an evaluation of all the documents the National Board of Medicolegal Affairs finds no reason for any further action concerning medical care received by [the applicant] at the local hospital. The actions taken by the rescue service have all been according to the normal practice in such matters.
>
> The National Board of Medicolegal Affairs is not authorised to consider the question of compensation.
>
> There is no reason for any further action in this case."

According to the Act on Patient Damage (potilasvahinkolaki, patientskadelag) the patient may also institute civil proceedings against the hospital and the doctor in the District Court (käräjäoikeus, tingsrätt) within three years of the alleged damage. The applicant has not pursued this remedy.

COMPLAINTS

1. The applicant complains that he was subjected to degrading treatment as he was diagnosed as being mentally ill and given medication accordingly and as he was not taken to the hospital he had requested. He invokes Article 3 of the Convention.

2. The applicant also complains that he was deprived of his liberty as he was not allowed to leave the hospital and as he was tied to the stretcher with straps. He invokes Article 5 para. 1 of the Convention.

THE LAW

1. The applicant complains that he was subjected to degrading treatment as he was diagnosed as being mentally ill and given

medication accordingly. He invokes Article 3 (Art. 3) of the Convention which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission need not decide whether the applicant has complied with the requirements of Article 26 (Art. 26) of the Convention as the application is in any event inadmissible for the following reasons.To fall within the scope of Article 3 (Art. 3) of the Convention ill-treatment must attain a minimum level of severity. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the person in question (cf. No. 27249/95, Dec. 14.9.95, D.R. 83-A, p. 91 and No. 27776/95, Dec. 26.10.95, D.R. 83-A, p. 101)

In the present case the applicant had been brought to the emergency ward of a hospital in a very confused state. The doctor had no information of the applicant's medical history; yet in the emergency situation in question she had to act. There is no indication that the treatment to which the applicant was subjected could not be regarded as justified by medical necessity as assessed in the light of these circumstances (cf. Eur. Court HR, Herczegfalvy v. Austria judgment of 24 September 1992, Series A no. 244, p. 26, para. 83.). Moreover, the applicant was taken to another hospital as soon as his transfer was ready to be made. In these circumstances, the Commission finds that the treatment the applicant received does not disclose any appearance of a violation of Article 3 (Art. 3) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains that he was deprived of his liberty as he was not allowed to leave the hospital and as he was tied to the stretcher with straps. He invokes Article 5 para. 1 (Art. 5-1) of the Convention which secures the right to liberty and security of person.

In support of his complaint the applicant maintains that he was not allowed to leave the hospital so that he could go to the other hospital himself. He instead received a tranquillizer and was strapped to his stretcher against his will. He notes that he was not suffering from a mental disorder and his present chronic state of aphasia could allegedly have been avoided if he had received the correct treatment within six hours of his stroke. Thus, the aphasia is a consequence of the deprivation of his liberty.

The Commission recalls the case-law of the Convention institutions to the effect that in order to determine whether a person is deprived of his liberty within the meaning of Article 5 (Art. 5) of the Convention, it is necessary to examine his or her actual situation and take into account the type, duration, effects and manner of implementation of the measure in question (cf. No. 24722/94, Dec. 10.4.95, D.R. 81-B, p. 130). The Commission recalls further that Article 5 para. 1 (Art. 5-1) of the Convention may apply to deprivation of liberty of a very short duration (cf. No. 8819/79, Dec. 19.3.81, D.R. 24, p. 158).

In this case the Commission notes that the medical personnel acted out of concern for the applicant's health. The Commission also notes that the applicant never objected to being brought to a hospital, although he had expressed the wish to be taken to another hospital than the one where he was first taken. The Commission, having also regard to its above findings concerning Article 3 (Art. 3), considers that the

measurescomplained of cannot be characterized as a deprivation of liberty within the meaning of Article 5 para. 1 (Art. 5-1) of the Convention. The Commission concludes that the examination of this complaint does not, therefore, disclose any appearance of a violation of that provision.

It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

N. BRATZA
Acting President
of the First Chamber