CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 26323/95
by Esa KIISKINEN and Mikko KOVALAINEN
against Finland

The European Court of Human Rights (Fourth Section) sitting on 1 June 1999 as a Chamber composed of

Mr G. Ress, *President*,
Mr M. Pellonpää,
Mr A. Pastor Ridruejo,
Mr L. Caflisch,
Mr J. Makarczyk,
Mr I. Cabral Barreto,
Mrs N. Vajić, *Judges*,

with Mr V. Berger, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 1 November 1994 by Esa KIISKINEN and Mikko KOVALAINEN against Finland and registered on 26 January 1995 under file no. 26323/95;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 5 September 1997 and the observations in reply submitted by the applicants on 31 October 1997;

Having deliberated;

Decides as follows:

THE FACTS

The application was originally submitted by Esa Kiiskinen (hereinafter "the applicant") and Mikko Kovalainen. The latter's complaints were declared inadmissible by the European Commission of Human Rights ("the Commission") on 28 May 1997. The present applicant is a Finnish national who was born in 1948. He is a businessman resident in Villala. Before the Court he is represented by Mr Mikko Kovalainen, a lawyer practising in Joensuu.

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

A. Particular circumstances of the case

In March 1989 the applicant sued two companies, a limited partnership company P (hereinafter "P Company") and a finance company I (hereinafter "I Company"), for damages resulting from a breach of contract relating to his hire-purchase of a forestry vehicle and related equipment. He argued, *inter alia*, that the relevant vehicle model had not been officially approved by the authorities for the purpose and could therefore not be used. In a further suit of July 1989 he requested that the hire-purchase contract be dissolved.

The parties appeared twelve times before the then City Court (*raastuvanoikeus, rådstuvurätten*) of Helsinki. The presiding judge apparently changed on a number of occasions.

The court heard thirteen witnesses called by the applicant and ten witnesses called by the companies. The parties did not call any further witnesses.

The applicant objected to the hearing of two witnesses called by the companies. Firstly, he objected to the examination of witness K on the grounds that K was a limited partner in P Company. The court dismissed the applicant's objection and heard evidence from K. Secondly, the applicant objected to the examination of PP, a lawyer employed by I Company, stating that PP had sat among the audience at least during the first three court sessions. The City Court asked PP whether he had participated in the previous pleadings. PP having answered in the negative, the City Court dismissed the objection. According to the minutes of the case, the applicant asked PP whether he had been present in the courtroom during the three first court sessions. PP replied that he had been among the audience. Furthermore, the City Court heard evidence, among others, from KK, who was the Head of Service Department of P Company.

In November 1989 I Company countersued the applicant for breach of the hire-purchase contract. On 7 December 1989 the applicant objected to the countersuit, claiming that the summons had not been duly served on him since he had only been given copies of the annexes to the writ of summons. The City Court rejected the objection, noting that the applicant had acknowledged that, although he had received only copies of certain annexes, the relevant original documents had nevertheless been shown to him.

The City Court's last session on 28 October 1991 was presided over by Judge T. On that day the City Court rejected the applicant's action. The judgment comprises three pages. The minutes of the last court session state, *inter alia*, as follows:

> "... After judgment had been pronounced [the applicant's counsel] stated that the lack of an official approval of the ... vehicle model had been one of the grounds for the action and today ... the principal issue. Counsel ... therefore requested

that the City Court pronounce itself on the question of the model approval. The parties having stepped out, the City Court inserted a finding on this point in its judgment and pronounced it to the parties. ..."

On this point the City Court found that it had not been shown that the vehicle required a model approval and that, in any case, the applicant had inspected and accepted the vehicle before concluding the hire-purchase contract.

In November 1991 the applicant appealed against the City Court's judgment. He stated, *inter alia*, that witness KK should not have been heard and that his testimony should therefore be ignored. In addition, he criticised the proficiency of the judges of the City Court.

On 20 October 1993, the Court of Appeal (*hovioikeus, hovrätten*) approved the City Court's decision as regards the two procedural objections concerning witnesses K and PP. Furthermore, it found no indication that KK had been prevented from testifying on account of his position in P Company. The Court of Appeal went on to reject the appeal as a whole.

In December 1993 the applicant requested leave to appeal. He stated, *inter alia*, that during the hearings one of the judges of the City Court had made improper eye contact with the companies' counsels.

In a document signed by the applicant's wife on 11 January 1994 she confirmed that prior to being heard as a witness before the City Court a lawyer named PP, employed by I Company, had sat among the audience during at least two or three court sessions. At the beginning of the oral hearings, the applicant's counsel had already objected to PP's presence. The document was submitted to the Commission as an annex to the application.

On 13 May 1994, the Supreme Court (*korkein oikeus, högsta domstolen*) refused the applicant leave to appeal. It does not appear whether the above-mentioned document of 11 January 1994 was submitted to the Supreme Court.

In a document signed by the applicant and his wife on 13 June 1994 they stated, among other things, that while the case was pending before the City Court, I Company's counsel and the lawyer PP employed by it repeatedly stated that because of their contacts with the judiciary the applicant's action was bound to fail.

In a later civil case, completely unrelated to the applicant's case, one of the parties requested that the above-mentioned Judge T step down on account of his being a member of the Freemasons (*vapaamuurarit, frimurarna*) as were some of the directors of the other party. The Helsinki District Court (the former City Court), were the case was pending, rejected this request on 21 August 1995. Thereafter, the Parliamentary Ombudsman (*eduskunnan oikeusasiamies, riksdagens justitieombudsman*) was filed with a petition. On 4 September 1995 Judge T excluded himself from the case on his own initiative.

The applicant became aware of Judge T's membership of the Freemasons through a newspaper report of 9 September 1995. It does not, however, appear when he started to believe that some of the members belonging to the management of I Company were, or might be, Freemasons.

It does not appear which members belonging to I Company's management, if any, were Freemasons at the relevant time.

The applicant did not request the case be reopened.

B. Relevant domestic law and practice

According to chapter 31, section 1, of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångs balk*), a judgment which has acquired legal force may be nullified (*poistaa, undanröja*) by a court of appeal or the Supreme Court on account of a procedural error if, for instance, the case was examined even though the court lacked quorum or should of its own motion have declined to examine the case for a particular reason (1); or if another procedural error has occurred which is found to have or can be presumed to have essentially influenced the outcome of the case (4). If nullification is sought on these grounds, the application shall be lodged within six months from the date when the judgment sought to be annulled acquired legal force (section 2).

According to chapter 31, section 7, of the Code of Judicial Procedure, a judgment in a civil case which has acquired legal force may be annulled (*purkaa, återbryta*) by the Supreme Court if, for instance, a member or an official of the court has committed a criminal act which can be presumed to have influenced the outcome of the case (1); if a circumstance or piece of evidence, which was not introduced previously, is referred to and its introducing would probably have led to a different outcome of the case (3); or if the judgment is based on manifestly incorrect application of the law (4). Such an application shall be lodged within one year from the date when the applicant became aware of the circumstance on which the application is based (3), or judgment concerning the criminal act (1), or the judgment sought to be annulled (4) acquired legal force. In the two first-mentioned cases the application shall at any rate be made within five years from the date when the judgment sought to be annulled acquired legal force, unless weighty reasons are put forward for a later application (section 10 and the Supreme Court's precedent No. 1994:111).

In a judgment of 28 March 1997, the Supreme Court nullified, by virtue of chapter 31, section 1, of the Code of Judicial Procedure, a decision of its own for a reason relating to the disqualification of a judge who had participated in the taking of that decision.

COMPLAINTS

The applicant complains that he was denied a fair hearing before an impartial tribunal.

The applicant maintains that the City Court heard biased witnesses called by the applicant's adversaries but ignored inspection reports drawn up by witnesses called by the applicant. The court examined I Company's countersuit, although the summons had not been properly served on the applicant. Furthermore, the court failed to examine the applicant's principal argument. Lastly, there was a lack of equality of arms between the parties.

On 11 September 1995 the applicant supplemented his complaint referring to the fresh information concerning Judge T's membership of the Freemasons. He now also complains that that same Judge T of the City Court was partial when examining his case, being a

Freemason like several members of I Company's Board of Directors and possibly belonging to the same branch of Freemasons as they did.

The applicant invokes Article 6 of the Convention in this respect.

PROCEDURE

The application was introduced before the Commission on 1 November 1994 and registered on 26 January 1995.

On 28 May 1997, the Commission decided to communicate the first applicant's complaint concerning the alleged partiality of Judge T of the Helsinki City Court to the respondent Government, to adjourn the examination of his complaint relating to the alleged unfairness of the proceedings and to declare the remainder of the application inadmissible.

The Government's written observations were submitted on 5 September 1997, after an extension of the time-limit fixed for that purpose. The applicants replied on 31 October 1997.

On 9 December 1997, the Commission granted the applicant legal aid.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

The applicant complains that he was denied a fair hearing before an impartial tribunal and that Judge T of the City Court was partial when examining his case since he was a Freemason.

The Court considers that the present complaints fall to be considered under Article 6 § 1 of the Convention which, in so far as relevant, reads as follows:

> "In the determination of his civil rights ... , everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ..."

1. Concerning the fairness of proceedings

Firstly, the applicant states that biased witnesses were heard and that testimony given by witnesses called by the applicant was ignored.

The Court recalls that it is normally not competent to deal with complaints alleging that errors of law or fact have been committed by domestic courts. Furthermore, the Court notes that the admissibility of evidence is primarily governed by the rules of domestic law, and as a general rule it is for the national courts to assess the evidence before them (see, *inter alia*, the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 20, § 43, and the Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, p. 21, § 66). It is not

within the province of the Court to substitute its own assessment of the facts for that of the national courts. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was permitted, were "fair" within the meaning of Article 6 § 1.

The Court does not find any reason to question the findings of the domestic court in respect of hearing the witnesses in question. Furthermore, the domestic court relied on evidence in addition to the statements of the three witnesses at issue.

Secondly, the applicant complains that the service of the writ of summons was incorrect since its annexes had been only copies.

As regards the complaint concerning the summons relating to the countersuit, the Court notes, firstly, that the summons in this case did not in any way affect the proceedings in the original case initiated by the applicant. Secondly, the fact that the documents annexed to the summons were not certified does not affect the fairness of the proceedings regarding the countersuit given that the authenticity of the copies was not contested.

Thirdly, the applicant contends that the City Court failed to examine his principal argument.

Article 6 § 1 obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. Nor is the Court called upon to examine whether arguments are adequately met (see, *inter alia*, the Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, pp. 19-20, § 59-61).

The Court notes that the City Court set out the facts and made the relevant recapitulation on which the judgment was based. The Court considers that the reasons given in the City Court's judgment do not give rise to any appearance of the proceedings having been unfair.

Lastly, the applicant argues that there was a lack of equality of arms between the parties.

The Court notes that the City Court heard all the thirteen witnesses called by the applicant as well as all the ten witnesses called by the companies. The Court cannot find any indication that the applicant was placed at a disadvantage vis-à-vis the companies.

An examination by the Court of the complaints submitted by the applicant does not therefore, when considering the proceedings as a whole, disclose any appearance of a violation of his rights and freedoms set out in Article 6 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. Concerning the alleged partiality of Judge T

(a) The Government allege that this part of the application should be rejected for the non-exhaustion of domestic remedies or, in the alternative, as having been introduced out of time.

They argue that, although extraordinary remedies are not generally considered to be such effective and adequate remedies which an applicant has to exhaust, in the present case an extraordinary appeal would have offered an effective remedy for the purposes of former Article 26 (Article 35 § 1 since the entry into force of Protocol No. 11) of the Convention. To show the effectiveness of an extraordinary appeal, the Government refer to the Supreme Court's judgment of 28 March 1997 by which the that court nullified its own judgment on grounds relating to bias. Therefore, the Government maintain that the applicant has failed to exhaust domestic remedies.

The Government argue, furthermore, that the applicant's initial application does not include references to the effect that Judge T would have been biased when presiding over the City Court's last session. Accordingly, the Government consider that the initial application does not constitute a sufficient introduction of his later application for the purposes of former Article 26 (Article 35 § 1 since the entry into force of Protocol No. 11) of the Convention. Therefore, the Government maintain that the later application was introduced out of time.

The applicant disputes these arguments.

The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention, that there is an effective remedy available in respect to the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 22, § 48, and, *mutatis mutandis*, the Akdivar and Others v. Turkey judgment of 16 December 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 65).

The Court reiterates that the rule of exhaustion of domestic remedies in Article 35 § 1 of the Convention requires an applicant to have normal recourse to remedies within the national legal system which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. There is no obligation to have recourse to remedies which are inadequate or ineffective (see, *inter alia*, the Andronicou and Constantinou v. Cyprus judgment of 9 October 1997, *Reports* 1997-VI, p. 2097, § 159).

The Court notes that the applicant did not become aware of Judge T's membership of the Freemasons until about 15 months after the City Court's judgment had acquired legal force. However, under domestic law the applicant could have requested the Supreme Court to annul the City Court's judgment. The time-limit for an application for annulment was one year from

the day on which the applicant became aware of the fresh circumstance that might have caused disqualification of the judge.

In the circumstances of this case, the annulment of the judgment was the only means by which the respondent State would have been provided an opportunity to put matters right through their own legal system. In view of the fact that in the Supreme Court's practice a reason relating to the impartiality of a judge has been regarded as a ground for nullification of a judgment that had acquired legal force, the remedy should be regarded as effective. Although Article 35 § 1 of the Convention does not normally require resort to extraordinary remedies, the Court concludes that in the circumstances of this case the applicant was, in principle, obliged to exhaust the extraordinary remedy in question, unless there were special circumstances absolving him from this obligation (see, *mutatis mutandis*, the above-mentioned Akdivar and Others judgment, *Reports* 1996-IV, p. 1210, § 67).

However, the Court considers that in the instant case it is not necessary to decide whether there were such special circumstances or whether this part of the application has been introduced within the six-month period because this part of the application is in any event inadmissible for the following reasons.

(b) As regards the substance of the complaint, the Government state that they have not been able to find any information indicating that I Company's executive manager or any members of its board were or would have been at the relevant time members of a Masonic organisation. The Government had consulted the membership catalogue published by the Finnish Freemasons. Furthermore, they had asked the persons in question whether they were Freemasons. They had all denied that they ever were Masons.

The applicant maintains that the facts are as stated in his application.

It is well established in the case-law of the Convention organs that there are two aspects to the requirement of impartiality in Article 6 § 1. First, the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see, *inter alia*, the Fey v. Austria judgment of 24 February 1993, Series A no. 255, p. 12, § 28).

As to the question of subjective impartiality, it has not been shown that judge T would have been biased against the applicant because of his membership in the Freemasons or for other reasons.

As to the question of objective impartiality, it is indisputable that Judge T is a Freemason. Considered from the objective viewpoint, this cannot, in itself, prevent him from being a judge.

Regarding the question of whether the membership of some of the directors of I Company could cast doubt on the objective impartiality of Judge T in this particular case, the Court notes that the applicant has not produced any evidence in support of his allegation that some of the directors would, in fact, be Freemasons as Judge T is.

The Court is not called to give an opinion on whether, *in abstracto*, a bond between a judge and a party on the basis of Freemasonry would disqualify the judge. As in the instant case there is no evidence that such a bond existed between Judge T and I Company's directors, the Court concludes that the allegation concerning the partiality of the City Court is unsubstantiated. An examination by the Court of the complaint submitted does not, therefore, disclose any appearance of a violation of the rights and freedoms set out in the Convention, particularly in Article 6.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE REMAINDER OF THE APPLICATION INADMISSIBLE.

Vincent Berger
Registrar

Georg Ress
President