CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 39737/98
by Airi AARNIOSALO and Others
against Finland

The European Court of Human Rights (Fourth Section), sitting on 5 July 2005 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr K. TRAJA,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 19 January 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants are Ms A. Aarniosalo, Mr P. Aarniosalo, Ms H.A. Liljeroos, Ms H.M. Liljeroos, Mr R. Liljeroos, Ms S. Nurminen, Mr M. Nurminen, Mr R.T.J. Nurminen and Mr R.R.K. Nurminen. They are Finnish nationals, born in 1930, 1933, 1928, 1927, 1924, 1915, 1979, 1947 and 1940, respectively, and living in the Island of Onkisalo in Luhanka. They are represented before the Court by Mr T. Kivilaakso, a lawyer practising in Espoo.

A. The circumstances of the case

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

In the 1980's construction work was started in order to build a road to the Island of Onkisalo, which has no connection to the mainland. The part of the road (the Kattilaniemi road) which is situated on the mainland, and in the construction of which the applicants also participated, was finished at the end of the 1980's.

On 16 December 1991, the Water Court (*vesioikeus, vattenrätt*) of Eastern Finland entitled the applicants to build a bridge from Kattilaniemi to a place called Kiviniemi on the Island of Onkisalo as it was found to be the most advantageous place to build the road with a view to connecting with the network of public roads.

The County Administrative Board (*lääninhallitus*, *länsstyrelsen*) of the Central Finland, represented by Ms P.H., appealed against the Water Court's decision to the Supreme Water Court (*vesiylioikeus, vattenöverdomstolen*) which, on 1 February 1993, upheld the Water Court's decision.

On 22 November 1993, the proceedings concerning the construction of the private road to Onkisalo concluded and established the right to the road of those who owned property in the area in which the road was to be built, excluding the owners of such property which was used only for leisure activities and who had objected to the road plan. Three private persons as well as the County Administrative Board appealed against the decision in the road construction proceedings to the Land Court (*maaoikeus, jorddomstolen*), claiming, *inter alia*, that the road would, if built as planned, destroy conservable nature values in the area.

The Land Court decided, in its decision of 31 August 1994, not to examine the appeals lodged by the County Administrative Board and one of the private individuals as it found that they were not parties to the road construction proceedings in question. The rest of the appeals were rejected as the Land Court found, *inter alia*, that there was an important public interest to build a connecting road from the island to the mainland. Some of

the private individuals whose appeals had been rejected by the Land Court applied to the Supreme Court (*korkein oikeus, högsta domstolen*) for leave to appeal. The Supreme Court granted them leave to appeal on 9 May 1995. On 6 March 1996, the Supreme Court rejected the relevant appeals and upheld the Land Court's decision.

Meanwhile, on 8 September 1994, to prevent the enforcement of the Land Court decision, the County Administrative Board of Central Finland had issued an interim order prohibiting works in the area, for the period of two years, for the purpose of protecting the habitat of the white-backed woodpecker. The County Administrative Board's decision was signed by, *inter alia*, Ms P.H. who had represented the County Administrative Board in the appeal proceedings against the Water Court's decision. The road construction work which had already started was thus discontinued.

One of the applicants and the administrative committee for the maintenance of forest roads in Onkisalo appealed against the order to the Supreme Administrative Court on the grounds that an error had allegedly taken place in the hearing of the parties and that the construction of the road would not endanger the protection of the white-backed woodpecker. On 9 January 1995, the Supreme Administrative Court found that no error had taken place in the hearing of the parties, noting that trees had already been cut down. Insofar as the decision depended on the assessment of the appropriateness of the decision, it transferred the issue to the Council of State.

Following the transfer, the Ministry for Environment (*ympäristöministeriö, miljöministeriet*) found, on 20 January 1995, that there was no reason to change the decision of the County Administrative Board. The Ministry's decision was appealed to the Supreme Administrative Court, *inter alia* on grounds that the Minister for Environment, Ms S. Pietikäinen, was biased as she had already participated in the decision-making before the County Administrative Board in so far as the prohibition was concerned. On 26 May 1995, the Supreme Administrative Court rejected the appeal. The applicants' request to reopen the proceedings was refused by the Supreme Administrative Court on 19 August 1996.

As the owner of the Kiviniemi estate had refused to sell her real estate to the State, the Council of State granted, on 19 June 1996, permission for the expropriation of the Kiviniemi estate with a view to protecting the white-backed woodpecker even though the municipality of Luhanka had, in its statement of 15 April 1996, objected to the expropriation, taking the view that the prohibition against building the Onkisalo road would render the relevant part of the municipality more and more isolated and deserted as living there would become too difficult and unsafe. According to the Municipal Board, the expropriation would violate the general sense of justice if the interests of a species of a bird were preferred to those of the

inhabitants of the municipality. It was also noted in the statement that the Supreme Court had already decided to allow the road to be constructed and that a contrary decision would be surprising and dubious.

The applicants appealed to the Supreme Administrative Court which, on 31 December 1997, dismissed the applicants' appeal and upheld the expropriation. It held that the land was part of a larger area which was, due to its natural features, a suitable habitat for the white-backed woodpecker and that observations of the species had been made there. Thus the area was, with respect to the protection of the white-backed woodpecker, of such importance that it could be defined as a special protection area within the meaning of section 1, subsection 2 of the 1923 Nature Conservation Act. On 20 April 2004, the applicants asked for the annulment of this decision. The matter is pending.

By letter dated 18 June 1999, the administrative committee of Onkisalo requested the Council of State to lift the expropriation insofar as the right to the road was concerned. By reply dated 24 September 1999, the Ministry stated that it was impossible to establish a right to a road in the area, as it was so small that that no measures changing the nature of the forest could be allowed without endangering the existence of the bird which had been sighted in the area since 1989.

The applicants' request to reopen the proceedings was refused by the Supreme Administrative Court on 14 July 2000.

The expropriation proceedings concerning the Kiviniemi estate were completed on 20 October 2000. The area concerned 8.5 hectares and was delimited so that, as a biotope, it covered the habitat of the white-backed woodpecker only. The compensation paid to Ms Liljeroos amounted to FIM 715,549 with costs and expenses of FIM 15,649.75.

On 1 March 2001, the executors of the expropriation of the Kiviniemi estate decided, after a vote, to expropriate the right to the road attached to the estate in accordance with the Ministry decision and then to establish a new right to a road for the same area to which the earlier right to a road was attached. In his dissenting opinion, the engineer considered that a right to the road could not be established for the same area as there was an alternative.

On 29 March 2001, the Environmental Authority of Central Finland lodged an appeal with the Kuopio District Court (acting as Land Court), which on 14 August 2001 upheld the decision of the executors. On 24 October 2001, the Supreme Court suspended the execution of the decision of the District Court. On 7 October 2002 the Supreme Court reversed the judgment of the District Court and returned the matter to the executors stating that the right to a road could not be re-established on an area which under a decision of the Council of State had been expropriated. The executors were to take up the matter without delay in order to establish

another route. On 20 April 2005, the applicants appealed for the annulment of the Supreme Court's judgment. The matter is pending.

Meanwhile, the inhabitants of the Island of Onkisalo continued to live on their island without any connection to the mainland during time when there was no open water or the ice was too thin to build an ice-road from the island to the mainland. Such a period could last for weeks each autumn and spring. In the summer time, when the water areas were not frozen, boats were used, for example, for delivering the daily mail and groceries as well as the medication needed by the elderly islanders. There was no medical care nor fire and rescue service available to the islanders. The closest shop was twenty-five (25) kilometres away.

The applicants referred to a number of incidents as illustrating the risk to human life arising from the lack of proper connection to the mainland. A mailman was drowned in the lake when delivering the mail to the Island of Onkisalo and a father, forced to leave the island by foot to get medicine for his sick child, was also drowned in the lake as the ice was too thin to carry him. On 25 December 1998, a local cabdriver risked his life by driving his cab to the island to fetch an islander to the hospital even though the ice was thin at the time. Allegedly, the islander in question would have died in a matter of hours if he had not been taken to hospital in time. It has also happened that a fire brigade was forced to watch from the other side of the lake when a barn was burned down by lightning as they could not reach the island with their equipment.

On 12 October 1999 a question concerning the justification of the prohibition in terms of the cost of human lives was put in the Parliament by a Member of Parliament, Mr L. Oinonen. The question was answered by the Ministry for Environment at the time, Ms S.Hassi, on 5 November 1999. She referred to the decisions given by the Supreme Administrative Court and found that the road could and should be constructed to the island but through another estate than the Kiviniemi estate. She also noted that the loss to the islanders would be compensated for in accordance with the Act on Expropriation (*lunastuslaki, inlösningslag*). Mr L. Oinonen and another Member of Parliament, Mr S. Lahtela, repeated the question in Parliament on 9 February 2000, requesting that the Minister for Environment would herself visit the island. The question has been left unanswered. The applicants also sent an invitation to the Minister for Environment to visit the island.

The applicants in addition twice approached the Chancellor of Justice, who on 19 January 1995 and 12 April 1996 rendered decisions rejecting their complaints.

COMPLAINTS

1. The applicants complained, under Articles 3 and 5 of the Convention, that they had been subjected to inhuman treatment, endangering their lives and that they had been deprived of their liberty as they were forced to stay on their island without any connection to the mainland and without any fire and rescue service or medical care.

2. They also complained, under Article 1 of Protocol No. 1 that one of the applicants, *i.e.* the owner of the Kiviniemi estate (Ms H.A. Liljeroos) had been deprived of her possessions, and that all of them had been deprived of their right to the road after such a right had already been upheld by the Supreme Administrative Court on 6 March 1996.

3. The applicants also complained, without reference to any Articles of the Convention, that Ms P.H. was biased in dealing with the decision-making concerning the prohibition as she had already represented the County Administrative Board in the proceedings concerning the applicants' right to build the road, and appealed against the Water Court's decision which had been in the favour of the applicants.

4. The applicants, finally, complained that the Supreme Administrative Court deliberately held up its final decision, given on 31 December 1997, for eighteen months even though it had given all the preceding decisions within three or four months. The applicants did not invoke any Articles in this respect.

THE LAW

1. The applicants complained that they were confined to the island, at risk to their life and health, invoking Articles 3 and 5 of the Convention, which provide as relevant:

Article 3 of the Convention:

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

Article 5 of the Convention:

> "1. Everyone has the right to liberty and security of person. ..."

Insofar as the applicants invoke Article 3 of the Convention, the Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the

sex, age and state of health of the victim (see, among other authorities, *Tekin v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1517, § 52).

Furthermore, an examination of the Court's case-law indicates that Article 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of State agents or public authorities (see, amongst other authorities, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25). It may be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction. While the Court has held that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, may require States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, this has so far arisen only in particular contexts (for example, concerning the protection of children, *A. v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VI, § 22 and *Z and Others v. the United Kingdom* ([GC], no. 29392/95, ECHR 2001-V; and concerning the obligation on the authorities to safeguard the welfare of prisoners under their responsibility, for example *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III and *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI; or *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports* 1997-III, § 49, an exceptional cases where an applicant, scheduled for expulsion, was suffering serious illness close to death).

It cannot be said in the circumstances of the present case that the authorities have in any way ill-treated the applicants in the sense prohibited by Article 3. Any obstacle to obtaining necessary medical treatment derives not from any action of the authorities but from the location of, and weather conditions at, the applicants' place of residence, which problems have always been present and are not of the authorities' creation. Nor is it apparent that these applicants, notwithstanding the reference to difficulties and several tragic incidents, can claim that they have suffered any injury or damage to health as a result of any difficulty in having access to services.

Insofar as the applicants refer to Article 5, this complaint is misconceived. The applicants have not been subject to any deprivation of liberty by the authorities within the meaning of that provision and have remained free to leave the island, weather conditions permitting.

It follows that this part of the application is manifestly ill-founded as a whole and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicants complained that the applicant, Miss Liljeroos, owner of the Kiviniemi estate had been deprived of her possessions through expropriation and that all of them had been deprived of their right to the road which was to be built through the estate.

Article 1 of Protocol No. 1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. The parties' submissions

The Government submitted that the question of the amount of compensation to be paid by the State in respect of the expropriation of the right to a road vested in the share-holders of the Onkisalo forest road was still to be decided in the proceedings in the District Court of Kuopio. Accordingly the applicants had not yet exhausted domestic remedies as required by Article 35 § 1 of the Convention.

In any event, although the impugned measures restricted the applicants' right to use their property as regards their right to a road on the Kiviniemi estate, the Government submitted that it was necessary to control the use of that property in the general interest. The measures were in conformity with Finnish law. They submitted that the legislature had a wide margin of appreciation both as regards the existence of a problem warranting measures and as to the means of implementation of those measures. Its judgment could not be said to be manifestly unreasonable in the circumstances. The Kiviniemi estate was an important and longstanding nesting site in Finland of the white-backed woodpecker, which was the most critically endangered bird in the Finnish forests. Only some 35 nesting couples were estimated to remain. The species had been observed continuously in the area between 1989 and 1999, no similar observations having been made in any other location. The World Wildlife Fund had intervened in the expropriation proceedings, underlining that the continuation of construction works would seriously endanger the bird there.

The Government submitted that a fair balance with individual rights had been struck as compensation terms were applicable and these were pending in the District Court. Full compensation had already been paid to the owner of the estate. They also pointed out that they had been willing to compensate the extra costs attaching to the construction of an alternative road, but that

the administrative committee had not been willing to apply for a change to the road plan, while under national law the Government had no possibility to initiate such a procedure.

The applicants submitted that delay and the conduct of the authorities had prevented them from using domestic remedies. The Supreme Administrative Court would not change the expropriation decision and the possibility of an alternative road was meaningless as it was longer and more expensive and would not be built in their lifetime. There was therefore no remedy to obtain the building of the road which they needed. They contended that the District Court would eventually decide the location of the road, not the question of compensation.

The applicants argued that the protection of the white-backed woodpecker was only an excuse to prevent the building of the road and that the protection of the environment did not entitle the Government to endanger the lives and rights of citizens. The owner of the land only acquiesced to the expropriation under pressure and with an assurance that the right to a road would not also be expropriated. Monetary compensation did not make up for the emotional loss or the loss of value of the land, if used for summer holiday accommodation.

The applicants submitted that it was not true that the white-backed woodpecker had nested in the area regularly since 1989. They claimed that it had moved elsewhere and that there was no evidence to show that the road would disturb it. The prohibition was therefore arbitrary. The interests of the islanders in transporting milk from their farms and wood products, as well as the general interest in protecting life, rendered a road necessary. The option of the longer road had only been put forward to vacate the island, since it would take so long to build that the inhabitants would be dead by the time it was finished. The Government had the money and equipment but had not immediately built a connection to the island when the applicants had been deprived of their right to a road.

B. The Court's assessment

1. Exhaustion of domestic remedies

The Government argued that the applicants had not yet exhausted domestic remedies as the matter of compensation for the loss of their right to a road had not yet been determined by a court.

The Court would observe however that the applicants' complaints centre on the building of a connection with the mainland and the steps taken to prohibit the road through the Kiviniemi estate. It may be doubted whether the payment of damages would provide them with a remedy in respect of their complaints. The Court does not however need to decide this question, as the application is in any event inadmissible for the following reasons.

2. Alleged interference with property rights

The Court notes that one of the applicants lost the ownership of her estate, while all the applicants lost the right to a road through that estate which would have linked the island to the mainland and had a significant effect on their ability to enjoy their property on Onkisalo.

Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with the general interest. The three rules are not, however, distinct in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among other authorities, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37, which reiterates in part the principles laid down by the Court in the case of *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 24, § 61; see also *Broniowski v. Poland*, cited above, § 134).

The Court proposes for the purpose of the present application to regard the measures as falling within the first sentence of the first paragraph, as an interference with the applicants' right of peaceful enjoyment of their property. The interference must accordingly comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (see, for example, *Beyeler v. Italy* [GC], no. 33202/96, §§ 108-14, ECHR 2000-I). It must strike a "fair balance" between the demands of the public or general interest of the community and the requirements of the protection of the individual's fundamental rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions or controlling their use. Compensation terms under the relevant legislation are material to the assessment of whether the contested measures respect the requisite fair balance, and notably, whether they do not impose a disproportionate burden on the applicant (see *Former King of Greece and Others*, [GC], no. 25701/94, § 89, ECHR 2000-XII).

In the present case, the purpose of the interference was given as the protection of the environment, in particular protection of the habitat of the white-backed woodpecker. There is no reason to doubt that this was the genuine purpose of the expropriation both of the estate and the right to a

road through the estate. The necessity of the measure was examined in proceedings before the Supreme Administrative Court, which heard evidence from the various parties as well as submissions from the World Wildlife Fund. That court found that it was established that the road would jeopardise the white-backed woodpecker, a species so rare as to be on the point of extinction. It found that the site was of such environmental importance as to render it a special protection area. There is no evidence before this Court which would indicate that this conclusion, reached after an adversarial procedure, was arbitrary or unreasonable (see, *mutatis mutandis*, *Kukkola v. Finland*, no. 26890/95, decision on admissibility of 30 November 2004). Insofar as the length of the proceedings may raise issues under the Convention, the Court notes that the length question is under consideration in a separate case (21480/05).

As regards the proportionality of the measure, the Court would note, as regards the applicant who was owner of the estate, that she was awarded compensation in respect of the land. It is not apparent that this amount was not reasonably related to its value. It also appears that damages, for loss of the right to the road through the estate, may be payable to the other applicants (they have not disputed this possibility, only that it would furnish adequate redress). While it is true that it is a connection with the mainland which is their main concern, the Court observes that an alternative route is available, albeit one which is longer and more costly. Although the applicants appear to contest the viability of the alternative route, the Government stated that they were prepared to fund the extra costs but that the administrative committee, with whom the initiative lay at the domestic level, had not applied for the necessary change in the road plan. The applicants' doubts as to the timing or likely delay in progress of any alternative scheme do not, in the circumstances of this case, provide a strong counter-weight.

In conclusion, the Court considers that it has not been shown that there has been failure to strike a proper balance between the general interest in the protection of the environment and the interests of the applicants. It follows that this part of the complaint must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

3. The applicants complained, without reference to any Articles of the Convention, that Ms P.H. was biased as she had already represented the County Administrative Board in the proceedings concerning the applicants' right to build the road. The Court would note however that the final decision in this respect was given by the Supreme Administrative Court on 26 May 1995 while the application was introduced before the Commission on 9 January 1998, more than six months later. It follows that this complaint must be rejected as out of time pursuant to Article 35 §§ 1 and 4 of the Convention.

4. The applicants, finally, complained that the Supreme Administrative Court deliberately delayed its decision on the applicants' appeal against the expropriation. However, this complaint is unsubstantiated and does not in the circumstances of the case disclose any appearance of a violation of any of the provisions of the Convention.

It follows that this complaint must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President