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. 48907/99
by Seppo AHTINEN
against Finland

The European Court of Human Rights (Fourth Section), sitting on 31 May 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 Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 29 April 1999,

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

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Seppo Ahtinen, is a Finnish national who was born in 1949 and lives in Rovaniemi. He was represented before the Court by Mr Kauko Nevala, a lawyer practising in Rovaniemi. The respondent Government were represented by their Agent, Mr Arto Kosonen, Director in the Ministry for Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties and as they appear from the documents, may be summarised as follows.

The applicant was employed by the Evangelical Lutheran Church as a parish priest in the Parish of Rovaniemi from 1 January 1988 until 31 October 1998. On 12 May 1998 the Cathedral Chapter (*tuomiokapituli, domkapitlet*) issued him with a warning, which was upheld by the Supreme Administrative Court on an unspecified date.

On 15 September 1998 the Cathedral Chapter decided to transfer the applicant to the Parish of Keminmaa, which is situated more than 100 kilometres from his home in Rovaniemi. He did not consent to the transfer. The Cathedral Chapter reasoned its decision as follows (translation from Finnish):

> "The post as parish priest in the Parish of Keminmaa is open ... and therefore it is for the Cathedral Chapter to find a suitable person to hold the post. It has come to the Cathedral Chapter's knowledge that the parish priest of the Parish of Rovaniemi, Seppo Ahtinen, has announced that he considers himself unable to discharge all his duties. Therefore, the Cathedral Chapter has decided to discontinue Seppo Ahtinen's appointment as regards his current post and give him a new appointment as parish priest in the Parish of Keminmaa.
>
> The Cathedral Chapter has heard the Keminmaa Church Council (*kirkkoneuvosto, kyrkorådet*) and Seppo Ahtinen. The Church Council has given a positive statement, whereas Seppo Ahtinen has announced that he does not accept a transfer and that he considers that there are no legal grounds for a transfer.
>
> However, considering the need to find a parish priest for the Parish of Keminmaa and the difficulties that Seppo Ahtinen has had in discharging all his functions in his current post, there is a justified reason as required by law for transferring him from the Parish of Rovaniemi to the Parish of Keminmaa.
>
> Therefore, the Cathedral Chapter appoints Seppo Ahtinen to the post as parish priest in the Parish of Keminmaa from 1 November 1998 until further notice and terminates his appointment as parish priest in the Parish of Rovaniemi by 31 October 1998.
>
> ..."

The decision indicated that the Cathedral Chapter had applied chapter 6, section 8a (6) of the Church Act (*kirkkolaki, kyrkolagen*; 1054/1993), which

provides that there has to be a justified reason for making a decision such as the above. It was also indicated that no appeal lay under chapter 24, section 9 (1), as in force at the relevant time.

According to the applicant, the transfer had been orchestrated by the Vicar of the Parish of Rovaniemi, who had not been satisfied with the applicant's contribution to his parish work.

The applicant had been consulted in advance and in writing about the proposed transfer. On 28 August 1998 the applicant's counsel had informed the Cathedral Chapter as follows (translation from Finnish):

> "As the representative of the parish priest Seppo Ahtinen I would like to inform you that he does not intend to change his place of employment. He declares that he enjoys his present post in the service of the Parish of Rovaniemi. There are no legal grounds for transferring him without his consent."

On 30 September 1998 the applicant lodged an extraordinary appeal (*kantelu, klagan*) with the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltningsdomstolen*), alleging procedural errors in the decision. He claimed that the Cathedral Chapter had not been impartial as the Vicar of the Parish of Rovaniemi, who was also the chairperson of the Church Council of Rovaniemi, had been present when the decision had been taken. However, he did not allege that the Vicar had participated in the decision-making. He also argued that he had not been heard prior to the decision and that his opinion had not been taken into account. In particular, the fact that his entire family lives in Rovaniemi had not been given any weight.

The Supreme Administrative Court invited the Cathedral Chapter's observations and communicated them to the applicant. According to the Cathedral Chapter, it was an old tradition that a parish priest could be transferred to another parish with or without his consent if the transfer was considered to be in the interests of the Church. According to this tradition, which was comparable to a similar tradition in the armed forces, there was no appeal against a transfer decision. If an appeal were to be allowed, it would cause an unreasonable delay to the organisation of parish work. The Cathedral Chapter also reiterated that it was known to all parties in question that the applicant had not been able to discharge all his functions in the Parish of Rovaniemi and that he had also faced disciplinary proceedings, resulting in a written warning. As the applicant had not denied this, the Cathedral Chapter found it undisputed that he was incapable of fulfilling his duties in the Parish of Rovaniemi. The aim of the transfer was to avoid future disciplinary proceedings. Thus, it was also in the interests of the applicant that he be transferred. Moreover, there was a lack of parish priests in the Parish of Keminmaa. The Cathedral Chapter disputed the applicant's contention that he had a right to be heard on the reasons discussed when his transfer was being considered. It also contested that the presence of the

Vicar of the Parish of Rovaniemi had raised any disqualification issue. The Vicar had not taken part in the decision-making.

In his observations in reply the applicant maintained that the Cathedral Chapter had not given him an opportunity to be heard about the grounds on which it had subsequently based its decision and according to which there was a shortage of priests in the Parish of Keminmaa and the applicant allegedly had difficulties in performing his duties in the Parish of Rovaniemi. He pointed out that he could be removed only on grounds provided for by law and that the decision certainly concerned his rights. As to his partiality allegation, he submitted that before the meeting there had been no report on the matter, which thus meant that the decision had been based solely on the discussion in which the Vicar of the Parish of Rovaniemi had taken part.

On 9 March 1999 the Supreme Administrative Court upheld the Cathedral Chapter's decision without examining the merits of the case. It reasoned as follows (translation from Finnish):

> "Section 59, subsection 1, paragraph 1 of the Administrative Judicial Procedure Act (*hallintolainkäyttölaki, förvaltningsprocesslagen*; 586/1996) provides that a final decision may be set aside following a procedural complaint, if a person concerned has not been provided with an opportunity to be heard and the decision violates his or her right. Paragraph 2 provides that a decision may be set aside, if there has been another procedural error which may have had a relevant effect on the decision.
>
> Ahtinen has requested that the Cathedral Chapter's decision be set aside on the ground that he had not been properly heard. However, Ahtinen had, as noted in the decision, been heard prior to the decision being issued. Having regard to the fact that the case concerns appointment to a position under chapter 6, section 33 (1) of the Church Rules of Procedure (*kirkkojärjestys, kyrkoordning*; 1055/1993) Ahtinen has been heard in a sufficient manner.
>
> Ahtinen has also requested that the decision be set aside on the ground that the Vicar of the Parish of Rovaniemi had been disqualified to take part in the examination of the matter before the Cathedral Chapter. As neither the Vicar nor the Parish of Rovaniemi is a party to the proceedings in issue and as neither can be expected to derive particular benefit or suffer particular loss from the decision, there has not been any procedural error in respect of disqualification in the matter as provided by section 10, subsection 1, paragraph 5 of the Administrative Procedure Act (*hallintomenettelylaki, lagen om förvaltningsförfarande*; 598/1982), as in force at the relevant time. On these grounds and having regard to chapter 19, section 6 of the Church Act, the Supreme Administrative Court rejects the application.
>
> ..."

It appears that the applicant has been an assistant Vicar of the Parish of Rovaniemi since 1 April 2002.

B. Relevant domestic law and practice

The position of the Evangelical Lutheran Church

The Evangelical Lutheran Church of Finland is regarded as a State Church. Section 76 of the Constitution of 2000 (*Suomen perustuslaki, Finlands grundlag; 731/1999*) provides that the internal organisation and administration of the Church are regulated by the Church Act, which is an Act of Parliament.

The applicant's duties as a civil servant of the Church

The duties of a parish priest are outlined in the Church Rules of Procedure (*kirkkojärjestys, kyrkoordningen*; 1055/1993) adopted by the Synod (*kirkolliskokous, kyrkomötet*). Chapter 5, section 1 (1) provides that a priest's specific duty is to hold public services, give holy sacraments, hold other church ceremonies, provide for the care of souls and take confessions.

Under the Church Act and the Church Rules of Procedure, parish priests have no independent decision-making powers.

Assignment of a parish priest and termination of the assignment

Chapter 6, section 33 (1) of the Church Rules of Procedure provides that the Cathedral Chapter may appoint a qualified member of the diocese (*hiippakunta, stiftet*) to perform the functions of a parish priest. Prior to an appointment, the Cathedral Chapter provides the Church Council or the Parish Council with an opportunity to submit its opinion, unless the matter is urgent.

Chapter 6, section 8a (6) of the Church Act provides that a parish may not terminate through dismissal the employment of an office-holder appointed or a person assigned to the office of a priest. The Cathedral Chapter may suspend or withdraw an assignment given to a person to perform the functions of a parish priest where there is a justified reason to do so. Section 8b (1), paragraph 4 provides that a prior assignment is considered automatically terminated without notice where the priest in question is appointed, assigned or permanently transferred to another position within the Church or a parish.

According to the Government, parish priests are considered to serve the entire diocese and the Church, without being bound to a particular parish or position. A parish priest who works on an assignment given by the Cathedral Chapter is under an obligation to accept any new assignment. It is also an established principle that, having consecrated someone as a priest, the Cathedral Chapter is under an obligation to ensure that the priest also has a valid assignment in the future.

Chapter 19, section 5, as in force at the relevant time, of the Church Act, provided that the Cathedral Chapter examined, in the capacity of a judicial authority, appeals in respect of which it had decision-making competence under law and complaints made by means of extraordinary appeal. In the capacity of an authority of first instance the Cathedral Chapter examined administrative disputes concerning an obligation or a right based on that Act or the Church Act and any such disputes between the Church or a parish and their officeholders concerning employment for which no other means of settlement were provided for by law.

Chapter 19, section 6, as in force at the relevant time, provided that subject to other provisions of the Act the Cathedral Chapter, in its consideration of administrative cases, applied the provisions of the Administrative Procedure Act and, in the administration of justice, the provisions of the Administrative Judicial Procedure Act.

Appeal and extraordinary appeal

Chapter 24, section 3, as in force at the relevant time, of the Church Act, provided that anyone whose interests had been violated by a decision by the Cathedral Chapter had a right of appeal. Section 8, as in force at the relevant time, provided that the Administrative Judicial Procedure Act applied to appeal and decision-making subject to other provisions of the Church Act. The Administrative Judicial Procedure Act is based on the principle of a general right of appeal and it refers, in section 8, to the Church Act stating that the latter contains provisions on appeal against a decision of the Evangelical Lutheran Church.

Chapter 24, section 9 (1), as in force at the relevant time, of the Church Act provided that without prejudice to other restrictions on the right of appeal, decisions by the Cathedral Chapter on the appointment of officeholders, assignment to a given position or related withdrawal of a prior assignment, decisions on the engagement of an officeholder on probation, temporarily or as substitute, and decisions on the termination of employment of probationary, temporary or substitute officeholders could not be appealed against.

Section 59 (1) of the Administrative Judicial Procedure Act provides that a final decision may be set aside following a procedural complaint, if a person concerned has not been provided with an opportunity to be heard and the decision violates his or her right or if there has occurred another procedural error which may have had a relevant effect on the decision.

Section 10 (1) of the Administrative Procedure Act (repealed) provided that a public official was disqualified if he or she was a member of the board of directors, the supervisory board or a comparable body or was the managing director or held a comparable position in a corporation, foundation, institution of a public-law character or public enterprise which was a concerned party or which could be expected to derive particular

benefit or suffer particular loss as a result of a decision in the matter. Section 11 provided that a disqualified person could neither consider the matter nor be present at the proceedings, except where the disqualification could not affect the outcome because of the nature of the matter, or where the proceedings could not be deferred.

Section 15 provided that a concerned party had to be given an opportunity to comment on the claims made by others and on any evidence that could affect the decision. However, a matter could be decided without hearing a concerned party if the claim was dismissed without prejudice or immediately rejected, if the claim that was approved did not affect another concerned party, if it was obviously superfluous for some other reason, if the matter concerned entry into a service relationship or voluntary training or the granting of a benefit based on an assessment of the qualities of an applicant, if a hearing could jeopardise realisation of the purpose of the decision, or if a decision in the matter could not be postponed.

According to the Government, the prohibition of appeal against a decision concerning assignment to a given position or a withdrawal of an assignment is based on the need to ensure that the duties of parish priests are discharged as appropriate, in accordance with the respective needs of different parishes. The Government noted, however, that this purpose was not indicated in the Government Bill (*HE 23/1993 vp*) for the enactment of the Church Act.

COMPLAINTS

1. The applicant complained, under Article 6 of the Convention, that he has not had a fair hearing as he was not properly heard on the real reasons for his transfer, and as the Cathedral Chapter was partial because the Vicar participated in the decision-making.

2. The applicant also complained, under Article 8, that the right to respect for his family life has been violated as he was forced to work at another parish over 100 kilometres from his home.

3. Lastly, he complained that he has not had an effective remedy as guaranteed by Article 13.

THE LAW

The applicant submitted complaints under Articles 6, 8 and 13 of the Convention. The Court has also examined of its own motion whether the application raises an issue under Article 2 of Protocol No. 4.

A. The Government's preliminary objection

The Government argued that the Cathedral Chapter had rendered its decision on 15 September 1998, whereas the applicant had lodged his application with the Court only on 29 April 1999 and thus outside the six months' time-limit.

The applicant argued that the six months' time-limit had begun to run from the Supreme Administrative Court's decision of 9 March 1999. Thus, he had complied with the time-limit.

The Court observes that in the present case there was no ordinary appeal against the Cathedral Chapter's decision. The applicant lodged an extraordinary appeal with the Supreme Administrative Court with a view to having the decision set aside. While it is true that as a rule Article 35 § 1 of the Convention does not require recourse to extraordinary remedies or allow that the running of the six months' period be postponed on the ground that such remedies have been resorted to, the Court accepts, in the particular circumstances of this case, that the six months' period should be counted from 9 March 1999 for the following reasons.

First, the extraordinary appeal provided the only judicial remedy and it could arguably have provided a remedy as to part of the applicant's complaints. Secondly, the applicant resorted to the extraordinary appeal within fifteen days from the decision of the Cathedral Chapter, thus speedily providing the respondent State with an opportunity to put things right through their own legal system. Lastly, having received the decision of the Supreme Administrative Court he lodged his complaint with this Court in less than two months i.e. without undue delay. In these circumstances, it would not be consonant with the purpose of Article 35, which has to be interpreted with some flexibility, to consider that the application has been introduced out of time.

It follows that the application cannot be declared inadmissible for failure to comply with the six months' time-limit. The Government's objection is accordingly rejected.

B. Article 6 of the Convention

The applicant complained, under Article 6 of the Convention, that he was not properly heard on the real reasons for his transfer and that the Cathedral Chapter was partial. Article 6 reads in so far as relevant:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

The Government contested the applicability of Article 6. Notwithstanding the fact that the applicant was a civil servant without any independent decision-making competence, the present case did not concern

the termination of service but the transfer of a civil servant to another place of duty. Assignment and the related withdrawal of a prior assignment were largely based on the Cathedral Chapter's discretionary powers in an administrative procedure. As a parish priest the applicant was considered to serve the entire diocese and the Church, without being bound to a certain parish or position, and he was under an obligation to accept a new assignment which terminated the prior one. Thus, he had a special bond of trust and loyalty to the Church (see *Pellegrin v. France* [GC], (no. 28541/95, § 65, ECHR 1999-VIII). Thus, the case did not concern the applicant's "civil rights".

Should the Court come to another conclusion, the Government argued that the right of access to court was not an absolute one. Indeed, the applicant's right of access to court had been limited as no ordinary appeal lay. The provisions of the Church Act are based on the principle of a general right of appeal, as anyone whose interests are violated by a decision of the Cathedral Chapter has a right of appeal. The prohibition of appeal against a decision concerning, *inter alia*, assignment to a given position or the related withdrawal of a prior assignment is based on the need to ensure that the duties of parish priests are discharged as appropriate in accordance with the respective needs of different parishes, which aim is a legitimate one. Neither is the limitation of the right to appeal disproportionate to the aim sought to be realised. The limitation concerns withdrawal of a prior assignment only when the withdrawal is connected with a new assignment and it has to be seen against the nature of the work of the Church as a whole. The margin of appreciation allowed to States in limiting individual's access to court has not been exceeded.

Should the Court differ from this view, the Government submitted that the applicant lodged an extraordinary appeal with the Supreme Administrative Court, alleging that he had not been heard in the proceedings before the Cathedral Chapter, which had allegedly also been partial. However, in its decision of 9 March 1999, the Supreme Administrative Court found that the applicant had been provided with an adequate opportunity to be heard before the decision was made, considering that the case concerned assignment to a position within the meaning of chapter 6, section 33 of the Church Rules of Procedure. As to the partiality allegation, the minutes from the Cathedral Chapter's meeting showed that although the Vicar had been present during the session he had not participated in the decision-making.

In his observations in reply the applicant did not put forward any further arguments in reply to those of the Government.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, including the question of applicability of Article 6, the determination of which requires an examination of the merits. The Court concludes therefore

that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

C. Article 8 of the Convention and Article 2 of Protocol No. 4

The applicant also complained, under Article 8, that the right to respect for his family life has been violated as he was forced to work at another parish over 100 kilometres from his home. Article 8 reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The change in the applicant's place of work might also raise an issue under Article 2 of Protocol No. 4 which reads as follows:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right ... to choose his residence.
>
> ...
>
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

Assuming that the applicant has exhausted domestic remedies and assuming that there was an interference with the applicant's family life or his right to choose his residence, the Court considers that there is no appearance of a violation of the provisions quoted.

It follows that this aspect of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

D. Article 13 of the Convention

Lastly, the applicant complained about the lack of an effective remedy. Article 13 provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court has declared the complaints under Article 6 admissible and it finds no separate issue arising under Article 13 of the Convention.

As to the complaint under Article 8 and any aspect of the application raising an issue under Article 2 of Protocol No. 4, the Court reiterates its case-law according to which Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52). The Court has above found that the said aspects of the application are manifestly ill-founded. It follows that the applicant does not have an "arguable claim" and that this part of his application does not therefore attract the guarantees of Article 13.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaint under Article 6 of the Convention;

Declares the remainder of the application inadmissible.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President