CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FORMER FOURTH SECTION

CASE OF NIKULA v. FINLAND

(Application no. 31611/96)

JUDGMENT

STRASBOURG

21 March 2002

FINAL

21/06/2002

In the case of Nikula v. Finland,

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

Mr G. RESS, *President*,
Mr A. PASTOR RIDRUEJO,
Mr L. CAFLISCH,
Mr I. CABRAL BARRETO,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 20 September 2001 and 28 February 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 31611/96) against the Republic of Finland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Finnish national, Ms Anne Nikula ("the applicant"), on 20 May 1996.

2. The applicant alleged that her freedom of expression had been infringed on account of her having been convicted of defamation for having criticised, in her capacity as defence counsel, the public prosecutor's decisions to press charges against a certain person (thereby preventing the applicant's client from examining him as a witness) and not to charge another person (who had therefore been able to testify against the applicant's client).

3. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11). The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

4. By a decision of 30 November 2000 the Chamber declared the application partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry]. The applicant and the Government each filed observations on the merits (Rule 59 § 1). In addition, third-party comments were received from Interights (The International Centre for the Legal

Protection of Human Rights), which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3). The parties replied to those comments (Rule 61 § 5).

5. A hearing on the merits of the case took place in public in the Human Rights Building, Strasbourg, on 20 September 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr A. KOSONEN, Director, Ministry of Foreign Affairs, *Agent*,
Mr A. VÄLIMAA, Adviser on Legislation, Ministry of Justice, *Adviser*;

(b) *for the applicant*

Mr Z. SUNDSTRÖM, of the Finnish Bar, Doctor of Laws,
Mr M. KAUPPI, of the Finnish Bar, *Counsel*.

The Court heard addresses by Mr Kosonen, Mr Sundström and Mr Välimaa.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Fourth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The criminal proceedings against the applicant's client

7. In 1992-93 the applicant appeared as defence counsel in the Kokkola City Court (*raastuvanoikeus, rådstuvurätt*) in two sets of criminal proceedings against her client I.S. and others. The applicant acted as counsel under the 1973 Cost-Free Proceedings Act (*laki maksuttomasta oikeudenkäynnistä, lag om fri rättegång 87/1973*) with the City Court's consent.

8. In the 1992 trial the public prosecutor, T., requested that I.S., his brother S.S. and L.O. be temporarily barred from conducting business (*liiketoimintakielto, näringsförbud*). The request had been triggered by the winding up of various companies which the defendants had owned or in

which they had held positions of trust. At a hearing on 4 March 1992 T. argued, *inter alia*, that regardless of whether S.S. had actually participated in the administration of the companies, he should be barred from conducting business, given his formal membership of their boards of directors. Evidence was heard from the companies' bookkeeper, M.H., who was one of the witnesses. Those proceedings ended with a decision of 9 February 1993 rendered by the Supreme Court (*korkein oikeus, högsta domstolen*).

9. In the meantime, I.S., S.S., L.O. and M.H. had been questioned as suspects in relation to a complaint lodged by M.S. (the wife of S.S.) alleging that they had, among other things, abused their positions of trust within one of the companies. On 7 December 1992 T. decided not to bring charges against S.S., having found no evidence that he had participated in any meeting of the board at which the funds invested by the complainant had been allocated for purposes to which she had not agreed, or that S.S. had otherwise consented to such allocation.

10. On 2 February 1993 I.S. was charged with aiding and abetting fraud and abusing a position of trust. L.O. was accused, *inter alia*, of aggravated fraud and fraud, whereas M.H. was charged with abusing a position of trust. The public prosecutor, T., had summoned S.S. to testify but the applicant and the other defence counsel objected to this on behalf of their clients. Before the City Court the applicant read out and handed in a memorial entitled "Role manipulation and unlawful presentation of evidence" (in Finnish, "*Roolimanipulointi ja kiellonvastainen todistelu*") in which, among other arguments, she made the following points:

> "... The indictment seeks to hide the fact that S.S. ... was ... chairman of the board of the company in question. ...
>
> The blatant abuse in respect of the presentation of evidence must lead the court to reject such evidence. ...
>
> The prosecutor's arrangement shows that he seeks, by means of procedural tactics, to make a witness out of a co-accused so as to support the indictment. In order to prevent the accused from submitting evidence on those points the prosecutor has, in the same case, brought trumped-up charges against a person who would qualify as a witness. ... Such deliberate abuse of discretion on the part of a public authority is highly unusual in a State governed by the rule of law.
>
> As regards, in particular, the procedural tactics which the prosecutor has adopted in the present case, namely as many as two instances of role manipulation in one and the same case, I submit that a milder form of such manipulation has been condemned by the Norwegian Supreme Court. That precedent disclosed unlawful behaviour similar to that of the prosecutor in the present case ...
>
> The prosecutor has, in this case, committed role manipulation, thereby breaching his official duties and jeopardising legal security ..."

11. T. having denied the above allegations and maintained his request, the City Court rejected the objection of the defence and allowed S.S. to

testify. On 23 February 1993 the defendants were convicted. I.S. and L.O. were given suspended prison sentences and fines, and M.H. sentenced to fines. They were all ordered to pay damages and costs. All appealed, I.S. and L.O. arguing, *inter alia*, that S.S. should not have been heard as a witness.

12. In its judgment of 20 December 1993 the Vaasa Court of Appeal (*hovioikeus, hovrätt*) upheld the decision to hear S.S. as a witness but acquitted I.S. and M.H. of the charges regarding abuse of a position of trust. They were nonetheless ordered to pay damages to the complainant.

13. M.H. and T. requested leave to appeal to the Supreme Court. Having been invited to comment on T.'s request, the applicant maintained on behalf of I.S. that S.S. should not have been heard as a witness. Leave to appeal was granted to M.H. only. In its decision of 9 March 1995 the Supreme Court set aside the order requiring M.H. to pay damages.

B. The defamation proceedings against the applicant

14. T. reported the applicant's statements of 2 February 1993 to the Prosecuting Counsel (*kanneviskaali, hovrättsfiskalen*) of the Court of Appeal for consideration of possible defamation charges. On 27 December 1993 the Acting Prosecuting Counsel formed the view that the applicant had been guilty of defamation but decided not to indict her, since the offence had been of a minor character. The Acting Prosecuting Counsel gave the following reasons, among others:

> "The defamation now in question cannot be expected to result in a more severe punishment than a fine.
>
> [The applicant] made her aforementioned ... submission in order to prevent the examination of [S.S.] as witness. By acting in this manner [the applicant] attempted to defend her client's interests in the trial. ... In her submission [she] attempted, perhaps in part due to her inexperience, to place ... the case before the City Court in the context of the ... Norwegian precedent and its formulations. The submission was thereby worded quite sharply with the effect of offending T. ..., although [the applicant] was not able to show the requisite factual grounds for the allegations concerning [T.]
>
> At the same hearing ... the City Court found no obstacles to examining [S.S.] as a witness. In its reasons the City Court noted that no elements had transpired from the pre-trial record or other material on the basis of which the prosecutor could be seen as having deliberately selected certain persons as the accused in the case. The ... Court of Appeal did not reverse [that] decision of the City Court. In the circumstances the [applicant's offence] has not caused any particularly significant harm to [T.] ..."

15. Using his independent right of private prosecution, T. nevertheless brought criminal proceedings against the applicant in the Court of Appeal. Before the Court of Appeal the applicant argued that, as defence counsel, she had to be afforded far-reaching freedom of expression. Prosecutors and legal counsel were obliged to tolerate criticism to a much wider extent than

private individuals. The applicant's statements had been addressed exclusively to the City Court and had been limited to criticising the procedure which T., as prosecutor, had adopted in her client's case. As the City Court had dismissed the applicant's objection to hearing S.S. as a witness, the statements could not qualify as defamatory within the meaning of Chapter 27, Article 2, of the Penal Code (*rikoslaki, strafflag*).

16. T. argued that the applicant's statements to the City Court on 2 February 1993 were capable of subjecting him to contempt and hampering the performance of his professional duties and his career. He referred to his lengthy service as public prosecutor, to his municipal position of trust and to his chairmanship of the local branch of a political party.

17. On 22 August 1994 the Court of Appeal convicted the applicant of public defamation committed "without better knowledge" (*julkinen ei vastoin parempaa tietoa tehty herjaus, offentlig smädelse dock inte emot bättre vetande*), i.e. negligent defamation, to be distinguished from public defamation "despite better knowledge", that is to say, intentionally imputing an offence to T. whilst knowing that he had not committed it (rather than voicing a mere suspicion that he had). The applicant was sentenced to a fine of 4,260 markkas (FIM) (716 euros (EUR)). She was further ordered to pay FIM 3,000 (EUR 505) in damages for the harm suffered by T. and FIM 8,000 (EUR 1,345) for his costs (both sums with 16% interest). Lastly, she was ordered to pay FIM 300 (EUR 50) in costs to the State. The Court of Appeal gave the following reasons, among others:

> "The obligation of an advocate is to safeguard his or her client's interests within the confines of the law and good advocacy ethics. The requirements relating to an advocate's activities appear in rather general provisions and rules. According to generally recognised principles, an accused must be provided with all necessary guarantees for his or her defence. Similarly, an advocate may request that every aspect of his or her client's case be correctly and properly dealt with by the court. [Counsel] is under a duty to point out the errors and deficiencies which he or she notices. To this end an advocate is free to criticise anything of relevance to the case. Such criticism must nonetheless be appropriate and based on facts. The grounds for the criticism must be carefully considered. ... The manner in which an advocate proceeds is also limited, *inter alia* by the provisions in Chapter 27 of the Penal Code.
>
> In the [present] case it has been established that [the applicant] alleged, in her aforementioned written submission, that [T.] had, in assessing who should be charged in the case, deliberately abused his discretion and thereby breached his official duties.
>
> T. was thus accused of an intentional offence in office within the meaning of Chapter 40, Article 10, of the Penal Code. [The applicant's] conduct would ... constitute a criminal offence if her statements were capable of subjecting [T.] to contempt or of hampering the performance of his duties or career. On this point the Court of Appeal notes that the statement was made by a legal practitioner trained as a judge (*varatuomari*, *vicehäradshövding*). The statements were made at a public hearing before the City Court. The statement may thus have spread into the public domain. The statements concerning the ... abuse of discretion in breach of official

duties may therefore have subjected [T.] to contempt or may have hampered the performance of his duties or his career progress.

[T.] had decided not to bring charges against [S.S.] in the absence of evidence sufficient for an indictment. The Court of Appeal notes that no elements have transpired which would lead [it] to believe that [T.'s] aforementioned decision was not based on the appropriate reasons set out in the decision. In its decision made at the same hearing ... the City Court found no obstacle to examining [S.S.] as witness. In its judgment of 20 December 1993 the ... Court of Appeal did not reverse the City Court's decision.

On the basis of the charges which [T.] brought against [M.H.] the City Court convicted [him] of having abused a position of trust. In its aforementioned judgment the Court of Appeal ... acquitted [M.H.] but upheld the City Court's decision in respect of his obligation to pay damages. The Court of Appeal notes that in this respect no elements have transpired which would lead [it] to believe that [T.] decided to bring charges against [M.H.] so as to prevent his being examined as a witness.

[The behaviour imputed to T.] has not been proved.

There is no reason to believe that [the applicant] acted with intent ..., although she did express her criticism in a manner defaming [T.]. In order to defend her client's interests [the applicant] attempted to prevent [S.S.] from being heard as a witness and to put forward elements relating to his credibility. [The applicant] was in principle entitled to criticise the public prosecutor and to voice her suspicion that the prosecutor had acted incorrectly. In the assessment of [the applicant's] guilt no reason has been disclosed for reaching any conclusion other than that she failed to take sufficient care in considering the grounds for her criticism. The Court of Appeal therefore concludes that [the applicant] did not act contrary to her better knowledge. [She] must have realised, however, that her statements were defamatory in nature and were capable of subjecting [T.] to contempt or of hampering the exercise of his official duties or career. ...”

18. Both T. and the applicant appealed to the Supreme Court. On 15 February 1996 (Korkein oikeus 1996:17) the Supreme Court, sitting as a Chamber of five judges with Justice Tulenheimo-Takki holding a casting vote, upheld the Court of Appeal's reasons but set aside the applicant's sentence, considering that her offence had been minor in nature. Accordingly, the fine imposed on her was lifted but her obligation to pay damages and costs was upheld. Justices Krook and Vuori voted in favour of upholding the Court of Appeal's judgment as a whole, whereas Justices Lehtimaja and Portin found that the applicant should be acquitted and relieved of her obligation to pay damages. According to the voting procedure laid down in Chapter 23, Article 4, of the Code of Judicial Procedure (O*ikeudenkäymiskaari, Rättegångs Balk*), the judges in favour of imposing a penalty on the applicant were considered to form the majority, and the more lenient of the two views within that majority prevailed. Justice Lehtimaja, whose opinion was joined by Justice Portin, reasoned as follows:

"This case concerns, on the one hand, the freedom of speech of the defence lawyer of an accused in criminal proceedings and, on the other hand, the threshold for considering criticism of a public prosecutor's official actions a criminal offence.

It is in the nature of a fair trial that counsel for the defence must, if the client's best interests so require, be free to criticise the public prosecutor's official actions without thereby being threatened with punishment. This is considered to be an essential principle of human rights in the Western countries where the rule of law prevails. The ... principle [becomes devoid of meaning] if defence counsel's freedom of expression is excessively restricted in such a situation. Legal provisions which restrict this freedom of expression must therefore be interpreted narrowly. Correspondingly, one can expect a public prosecutor to tolerate even sharp criticism of his or her official actions at a public hearing. This is due to the specific nature of the post of public prosecutor.

The act imputed [to the applicant]

On the basis of the Court of Appeal's reasoning, I consider that [the applicant] did not have any intention to offend [T.] or to act contrary to her better knowledge. The question ... is therefore whether [she] is guilty of the defamation imputed to her by the Court of Appeal.

In the trial in question [the applicant] considered the interests of her client to require that the [prosecution witness] be disqualified from testifying against his brother. To this end [the applicant] stated her suspicion that [T.], in considering whether to press charges, had been guilty of ... role manipulation. [The applicant] considered it necessary to stress, in particular, that such action was, in her opinion, incompatible with Finnish law and therefore in breach of the ... duties of the prosecutor. As her client's defence counsel, [the applicant] had a right to express such opinions and, as a public prosecutor, [T.] was obliged to tolerate such criticism. As a party to the proceedings, [T.] had an opportunity to respond to [the applicant's] statements and dismiss the opposing party's suspicions if he regarded them as groundless.

On the other hand, there was no need for [the applicant], in her capacity as defence counsel, to state her opinion as to whether [T.] had possibly committed an offence in office by acting in the alleged manner ... In this respect I consider [the applicant's] statements inappropriate.

Constitutive elements of defamation

But did [the applicant] commit defamation? Is it enough for the fulfilment of the elements in Chapter 27, Article 2, of the Penal Code, to allege that someone is 'guilty of a specific offence' in the circumstances mentioned in this provision - or is it also required that the alleged offence is capable of subjecting the said person 'to contempt or harming his professional life or career'? The provision is linguistically open to various interpretations. The Court of Appeal has applied the interpretation which is more favourable to the accused by finding that [her] conduct would constitute a criminal offence [only] if her statements were capable of subjecting [T.] to contempt or of harming his professional life or career. I agree with the Court of Appeal's interpretation.

Considering the broad definition of this offence, it is not reasonable to consider that any allegation of an offence would suffice to cause ... the injurious consequences

mentioned in this provision. In order for the definition of defamation to be satisfied evidence is therefore also required in a given case that ... the allegation ... of an offence did produce an injurious consequence.

Assessment of the injurious character of the allegation of an offence

It is common knowledge that the role of an accused person's defence counsel includes criticising the prosecutor's decision to bring charges ... This is almost a rule, especially when the charges against counsel's client are denied. It is also known that the language used by counsel may be sharp and counsel's view particularly subjective. The public present at a trial are therefore usually able to adopt a prudent attitude towards the criticism to which the parties subject each other. Neither is all criticism likely to be taken literally even if those who have presented it are legally trained.

As regards [T.'s] alleged role manipulation as such, [the applicant] did not state that [T.] had done something he had not done. Instead, she questioned the appropriateness of [his] decisions ... [The applicant] alleged that the actual purpose of [T.'s] actions had not corresponded to the stated grounds for the actions. On that basis [the applicant] made known that she considered [T.'s] official actions unlawful and purposely harmful to her client. Despite their unconditional tone and formulation [the applicant's] statements could be understood more or less as [her] own doubts as to the reasons why [T.] had acted the way he did.

Conclusion

In the light of the above-mentioned considerations, I do not consider that [the applicant's] allegation that [T.] had committed an offence in office was capable of subjecting [him] to contempt or of harming his professional life or career within the meaning of Chapter 27, Article 2 § 1, of the Penal Code. Therefore I consider it not proved that [the applicant] committed defamation ... I would quash the Court of Appeal's judgment and dismiss the charges and compensation claims against [the applicant].

Costs

In so far as court costs are concerned, I consider, despite the outcome of the case, that [the applicant], given the inappropriate tone of her remarks, gave cause for [T.] to initiate proceedings against her. Considering the facts, I nonetheless find ... that both parties should bear their own costs."

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. According to Chapter 27, Article 2, of the Penal Code, as in force at the relevant time, a person alleging, albeit not contrary to his or her better knowledge, that someone had committed an offence was to be convicted of defamation, unless he or she could show probable cause in support of the allegation.

20. The current Chapter 24, Article 9 § 2, of the Penal Code, as amended by Law no. 531/2000, provides that where criticism is aimed at the conduct of another person in his or her political or business activity, public office or

function, scientific, artistic or other comparable public activity, and where this criticism clearly does not exceed the limits of acceptable conduct, it shall not be considered defamation within the meaning of paragraph 1.

21. According to Chapter 15, Article 10a, of the Code of Judicial Procedure, the court may order that an unsuitable legal representative should no longer appear in the case before it. The court may also, on similar grounds, revoke the appointment of counsel instructed under the legal-aid scheme (section 14 of the Cost-Free Proceedings Act).

III. COMPARATIVE LAW AND PRACTICE

A. Submissions by Interights

22. The intervener concluded from its survey of a number of member States of the Council of Europe (i.e. Belgium, Denmark, France, Italy, the Netherlands, Spain, Sweden and the United Kingdom) as well as of certain other States (Australia, Canada and South Africa) that a great majority of them accord a privilege to lawyers for statements they make while representing clients in court. Although the extent and application of such privilege may differ from jurisdiction to jurisdiction, every surveyed State recognises that a lawyer's ability to express himself or herself is closely linked to counsel's obligation to defend the client. The privilege for allegedly defamatory statements allows counsel to argue as effectively as possible, relying even on facts which they cannot be sure are true. For example, in the Netherlands allegations that the prosecutor has abused his or her discretion are regularly made by defence lawyers. Potentially relevant allegations which are entirely unsubstantiated are simply disregarded.

23. To the extent that restrictions are permitted on a lawyer's statements in court, most of the jurisdictions surveyed by Interights tend to favour the use of disciplinary measures over criminal sanctions. In the view of the intervener, this might reflect the position taken by the Court in the context of Article 10, namely that a relatively light criminal sanction may already serve to chill even appropriate and measured criticism (see, for example, the *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239).

24. Where criminal sanctions are permitted in theory, in most of the jurisdictions surveyed by the intervener they are rarely used in practice, and then usually only in extreme circumstances and provided that intent can be shown, as opposed to mere negligence. Even where a lawyer's statements may in principle be subject to restrictions, those are generally imposed only when the statement is not only defamatory but also entirely unrelated to the proceedings or the parties.

25. Furthermore, almost all of the jurisdictions surveyed by the intervener recognise the fundamental difference between the roles of the prosecutor, being the opponent of the accused, and the judge. This distinction generally provides an increased protection for statements that are critical of the prosecutor.

26. It is the intervener's conclusion that in most of the surveyed jurisdictions it is unlikely that a defence lawyer would be criminally prosecuted for having criticised the manner in which a prosecutor is handling a case or for having indicated that the prosecutor has abused his or her discretion. On such facts recourse to criminal proceedings would not be deemed necessary.

B. Principles adopted by international organisations

27. According to paragraph 20 of the Basic Principles on the Role of Lawyers (adopted in 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders), lawyers should enjoy "civil and penal immunity for relevant statements made in good faith in written or oral pleadings in their professional appearances before a court, tribunal or other legal or administrative authority".

28. In its Recommendation (2000) 21 the Committee of Ministers of the Council of Europe recommends the governments of Member States to take or reinforce, as the case may be, all measures they consider necessary with a view to implementing the freedom of exercise of the profession of lawyer. For instance, "lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards". Lawyers should, however, "respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards" (principles I:4 and III:4).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

29. The applicant complained that her right to express herself freely in her capacity as defence counsel was violated in that she was found guilty of having defamed prosecutor T. She relied on Article 10 of the Convention, the relevant part of which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to ... impart information and ideas without interference by public authority ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Existence of an interference

30. The participants in the proceedings agreed that the applicant's conviction amounted to an interference with the exercise of her right to freedom of expression. The Court sees no reason to conclude otherwise.

B. Justification of the interference

31. An interference contravenes Article 10 unless it is "prescribed by law", pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10 and is "necessary in a democratic society" for achieving such an aim or aims.

1. "Prescribed by law"

32. The applicant challenged the domestic courts' interpretation of the Penal Code, namely that it could be applied even to defence counsel's submissions to a trial court.

33. The Government submitted that the applicant had been convicted of defamation on the basis of Chapter 27, Article 2, of the Penal Code, as in force at the relevant time. The interpretation of that provision in the case in point had not been arbitrary in any way and the interference had thus been "prescribed by law".

34. The Court accepts that the interference was based on a reasonable interpretation of Chapter 27, Article 2, of the Penal Code, as in force at the relevant time. It was thus "prescribed by law".

2. Legitimate aim

35. The applicant argued that the interference served none of the legitimate aims enumerated in Article 10 § 2.

36. In the Government's view, the interference served the legitimate aim of protecting the reputation and rights of prosecutor T. and further sought to maintain the authority of the judiciary and the justice system as a whole.

37. The Court notes that in her written submissions as defence counsel the applicant criticised prosecutor T.'s decision to press charges against a certain person, thereby preventing the applicant's client from examining that person as a witness. In addition, the applicant criticised the prosecutor's

decision not to charge another person, who was therefore able to testify against her client. The applicant considered these two decisions to form part of a prosecution strategy which she described as "role manipulation", a term appearing in a Norwegian precedent to which she referred.

38. The Court need not decide whether the proceedings instituted by T. as a private prosecutor served the legitimate aim of protecting the judiciary, as the Court can accept that the interference in any case pursued the legitimate aim of protecting the reputation and rights of T.

3. "Necessary in a democratic society"

(a) The parties' submissions

39. The applicant maintained that the interference in question had not met the requirement of "necessity". The criticism leading to her conviction for defamation had been appropriate and based on facts which have not been contested. A defence counsel must be free to express truthful statements which the opposite party does not want to hear. Article 10 must be interpreted so as to proscribe any interference by a public authority, and any threat of such an interference, with the manner in which the defence of an accused is being conducted.

40. The Government considered that the interference could be deemed "necessary in a democratic society" in order to pursue the above-mentioned aims. They did not accept the conclusions drawn by the intervener, noting that they were based only on a small sample of legal systems, some of which were non-European. The exercise of the freedom of expression carried with it certain duties and responsibilities, as also emphasised in Recommendation (2000) 21 to Council of Europe member States. The applicant's statements had been made in her capacity as defence counsel and not with the intention of generally imparting information and ideas. Not being a member of the Bar, the applicant was not subject to possible disciplinary proceedings within that institution. Not applying the Penal Code to her would therefore have placed her in a preferential position compared with members of the Bar.

41. It was the Government's submission that public prosecutors formed part of the judicial machinery in the broad sense and must therefore, like the courts, enjoy public confidence. Having regard to the key role of the legal profession, it was also legitimate to expect its members to contribute to the proper administration of justice, and thus to maintain public confidence therein. Although the limits of acceptable criticism of civil servants were wider than in relation to a private individual, the national courts were better placed to strike a balance between the various interests at stake, including the dignity of the legal profession.

42. The Government reiterated that the applicant had been convicted for alleging that T. had acted contrary to his official duties as a public

prosecutor, thereby committing an offence in office. Such an allegation was neither necessary nor even helpful from the point of view of the applicant's client's defence. Whereas counsel for the co-accused had also objected to the hearing of the applicant's client's brother as a witness, they had done so without resorting to allegations that prosecutor T. had committed an offence in office and without describing his behaviour as "deliberate" or as a "blatant abuse of discretion" or accusing him of bringing "trumped-up charges", to mention but a few of the sharply worded statements which the applicant had prepared in advance of the hearing and which could not therefore be equated with statements made in the course of a heated oral exchange of views. Had the applicant succeeded in proving the truthfulness of her allegations, T. could have been sentenced to imprisonment and dismissed.

43. The Government conceded that the threat of an action for defamation, whether in the form of a private prosecution initiated by a civil servant or on behalf of the public, could have an inhibiting effect on the freedom of expression of counsel, who might be inclined not to voice even appropriate criticism. In the specific circumstances, however, the interference in question had not been disproportionate to the legitimate aim pursued, having ultimately taken the form of a mere conviction without any resultant criminal penalty, and the domestic courts had not therefore exceeded their margin of appreciation.

(b) The Court's assessment

(i) General principles

44. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including in this case the content of the remarks held against the applicant and the context in which she made them. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

45. The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Moreover, the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein (see

Schöpfer v. Switzerland, judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1052-53, §§ 29-30, with further references).

46. The Court also reiterates that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. While lawyers too are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession. The national authorities have a certain margin of appreciation in assessing the necessity of an interference, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them (see *Schöpfer*, cited above, pp. 1053-54, § 33). However, in the field under consideration in the present case there are no particular circumstances – such as a clear lack of common ground among member States regarding the principles at issue or a need to make allowance for the diversity of moral conceptions – which would justify granting the national authorities a wide margin of appreciation (see, for example, The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, pp. 35-37, § 59, with further reference to *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24).

(ii) Application of the above principles to the instant case

47. Turning to the facts of the present case, the Court's task is to determine whether, in all the circumstances, the restriction on Ms Nikula's freedom of expression answered a "pressing social need" and was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national courts in justification of it were "relevant and sufficient".

48. The limits of acceptable criticism may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. It cannot be said, however, that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to criticism of their actions. Civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks. It may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty (see *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I, with further references). In the present case the requirements of such protection do not have to be weighed in relation to the interests of

the freedom of the press or of open discussion of matters of public concern since the applicant's remarks were not uttered in such a context.

49. The Court would not exclude the possibility that, in certain circumstances, an interference with counsel's freedom of expression in the course of a trial could also raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial. “Equality of arms” and other considerations of fairness therefore also militate in favour of a free and even forceful exchange of argument between the parties. The Court nevertheless rejects the applicant's argument that defence counsel's freedom of expression should be unlimited.

50. The present applicant was convicted for having criticised a prosecutor for decisions taken in his capacity as a party to criminal proceedings in which the applicant was defending one of the accused. The Court reiterates the distinction in various Contracting States between the role of the prosecutor as the opponent of the accused, and that of the judge (see paragraph 25 above). Generally speaking, this difference should provide increased protection for statements whereby an accused criticises a prosecutor, as opposed to verbally attacking the judge or the court as a whole.

51. It is true that the applicant accused prosecutor T. of unlawful conduct, but this criticism was directed at the prosecution strategy purportedly chosen by T., that is to say, the two specific decisions which he had taken prior to the trial and which, in the applicant's view, constituted “role manipulation ... breaching his official duties”. Although some of the terms were inappropriate, her criticism was strictly limited to T.'s performance as prosecutor in the case against the applicant's client, as distinct from criticism focusing on T.'s general professional or other qualities. In that procedural context T. had to tolerate very considerable criticism by the applicant in her capacity as defence counsel.

52. The Court notes, moreover, that the applicant's submissions were confined to the courtroom, as opposed to criticism against a judge or a prosecutor voiced in, for instance, the media (see *Schöpfer*, cited above, p. 1054, § 34, and *Prince v. the United Kingdom*, no. 11456/85, Commission decision of 13 March 1986, Decisions and Reports 46, p. 222). Nor can the Court find that the applicant's criticism of the prosecutor, being of a procedural character, amounted to personal insult (see *W.R. v. Austria*, no. 26602/95, Commission decision of 30 June 1997 (unreported) in which counsel had described the opinion of a judge as “ridiculous”, and *Mahler v. Germany*, no. 29045/95, Commission decision of 14 January 1998 (unreported), where counsel had asserted that the prosecutor had drafted the bill of indictment “in a state of complete intoxication”).

53. The Court further reiterates that even though the applicant was not a member of the Bar and therefore not subject to its disciplinary proceedings, she was nonetheless subject to supervision and direction by the trial court.

There is no indication that prosecutor T. requested the presiding judge to react to the applicant's criticism in any other way than by deciding on the procedural objection of the defence as to hearing the prosecution witness in question. The City Court indeed limited itself to dismissing that objection, whereas the presiding judge could have interrupted the applicant's pleadings and rebuked her even in the absence of a request to that end from the prosecutor. The City Court could even have revoked her appointment as counsel under the legal-aid scheme or excluded her as counsel in the trial. In that connection, the Court would stress the duty of the courts and the presiding judge to direct proceedings in such a manner as to ensure the proper conduct of the parties and above all the fairness of the trial – rather than to examine in a subsequent trial the appropriateness of a party's statements in the courtroom.

54. It is true that, following the private prosecution initiated by prosecutor T., the applicant was convicted merely of negligent defamation. It is likewise relevant that the Supreme Court waived her sentence, considering the offence to have been minor in nature. Even though the fine imposed on her was therefore lifted, her obligation to pay damages and costs remained. Even so, the threat of an *ex post facto* review of counsel's criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential "chilling effect" of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred.

55. It is therefore only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society. Both the Acting Prosecuting Counsel's decision not to bring charges against the applicant and the minority opinion of the Supreme Court suggest that the national authorities were also far from unanimous as to the existence of sufficient reasons for the interference now in question. In the Court's view such reasons have not been shown to exist and the restriction on Ms Nikula's freedom of expression therefore failed to answer any "pressing social need".

56. In these circumstances the Court concludes that Article 10 of the Convention has been breached in that the Supreme Court's judgment upholding the applicant's conviction and ordering her to pay damages and costs was not proportionate to the legitimate aim sought to be achieved.

II. ALLEGED VIOLATION OF ARTICLES 17 AND 18 OF THE CONVENTION

57. The applicant did not pursue her complaint under Articles 17 and 18 of the Convention after the application was declared admissible and the Court finds no separate issue arising under either of those provisions.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

59. The applicant claimed compensation for the pecuniary damage resulting from her obligation to pay damages to T. in the amount of 4,464 markkas (FIM) (750.80 euros (EUR)) and his costs in the amount of FIM 8,000 (EUR 1,345), with 13% interest on the total amount of FIM 14,480 (EUR 2,345) from 27 February 1996.

60. The applicant further claimed FIM 800,000 (EUR 134,550), with 13% interest from 15 February 1996, in compensation for having suffered disadvantages and loss of job opportunities. The Supreme Court's judgment in her case had been published and thus made known to the profession as well as to her prospective clients. The case had also received extensive scrutiny both in the media and in the academic world. As a result the applicant had allegedly been hampered in the pursuance of her profession and in seeking membership of the Bar. She had allegedly also been deprived of any chances of obtaining a post as a civil servant. She asserted that her conviction for defamation had placed her at a professional disadvantage which had lasted over seven years.

61. The Government considered that, should the Court find a violation of Article 10 of the Convention, the aforementioned claim would be excessive. Whereas the applicant should be reimbursed the sums she had been ordered to pay in the Supreme Court's judgment, there could be no causal link between the other alleged pecuniary damage and any violation of Article 10.

62. Should the Court hold that there had been a violation of this provision, the Government were also prepared to pay compensation for non-pecuniary damage in the amount of FIM 30,000 (EUR 5,042).

63. The Court notes the causal link between the violation of Article 10 and the applicant's obligation to compensate the harm suffered by prosecutor T. in the amount of FIM 3,000 (EUR 505) and to pay his costs in the amount of FIM 8,000 (EUR 1,345). Lastly, she was ordered to pay FIM 300 (EUR 50) in costs to the State. The applicant has not explained the grounds on which she is seeking an award for damages and costs which exceeds the sums appearing in the Court of Appeal's judgment of 22 August 1994, as upheld by the Supreme Court in those respects (see paragraphs 17 and 59 above). The Court therefore awards her the sums appearing in that judgment (EUR 1,900).

64. Finding no causal link between the remainder of the alleged pecuniary damage and the violation found, the Court rejects that part of the claim.

65. The Court accepts that the violation of the applicant's freedom of expression caused her non-pecuniary damage which cannot be made good merely by the finding of a violation. Making its assessment on an equitable basis, the Court therefore awards her EUR 5,042 in compensation under this head.

B. Costs and expenses

66. The applicant claimed compensation for her costs in the domestic proceedings in the amount of FIM 22,000 (EUR 3,700), with 16% interest on FIM 15,000 (EUR 2,523) from 22 September 1994 and with 13% interest on FIM 7,000 (EUR 1,177) from 15 March 1996. She further claimed FIM 300 (EUR 50.46) in compensation for the costs which the Court of Appeal had ordered her to pay to the State.

67. The applicant also claimed compensation for her costs before the Convention institutions in the amount of FIM 124,869.42 (EUR 21,001.53) with due interest.

68. The Government observed that only one of the applicant's seven complaints had been declared admissible, and that the compensation which might be awarded under this head should therefore be adjusted accordingly. While acknowledging that the applicant had certainly incurred some costs and expenses both before the national courts and the Strasbourg organs, the Government left it to the Court's discretion to decide to what extent her claims had been sufficiently substantiated.

69. An award under this head may be made only in so far as the costs and expenses were actually and necessarily incurred in order to avoid, or obtain redress for, the violation of Article 10 (see, among other authorities, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, p. 2334, § 63). Not only the costs and expenses incurred before the Strasbourg institutions but also those incurred before the national courts may be awarded. However, only those fees and expenses which relate to a

complaint declared admissible can be awarded (see, for example, *Mats Jacobsson v. Sweden*, judgment of 28 June 1990, Series A no. 180-A, p. 16, § 46).

70. The Court has already awarded the applicant compensation for the costs she was obliged to pay to the State, considering those to form part of the pecuniary damage suffered by her. She has not submitted any invoices in support of the remainder of her claim for costs and expenses incurred before the domestic courts and the Convention institutions. At the domestic level she was assisted by counsel only at the hearing before the Court of Appeal. In the Convention proceedings she chose to represent herself up to the Court's decision to declare her complaint under Article 10 admissible and to declare inadmissible her six complaints under Articles 6 and 13.

71. In these circumstances and making its assessment on an equitable basis, the Court awards the applicant compensation for costs and expenses in the amount of EUR 6,500, to be increased by any relevant value-added tax.

C. Default interest

72. According to the information available to the Court, the statutory rate of interest applicable in Finland at the date of adoption of the present judgment is 11% per annum. This interest is to be applied to any compensation awarded, except for the damages and costs the applicant was ordered to pay to T. (see paragraphs 59 and 63 above) which should be compensated with 13% interest from 27 February 1996.

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that there has been a violation of Article 10 of the Convention;

2. *Holds* unanimously that no separate issue arises under Articles 17 or 18 of the Convention;

3. *Holds* by five votes to two that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,042 (five thousand and forty-two euros) in respect of non-pecuniary damage;

4. *Holds* unanimously that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

(i) EUR 1,900 (one thousand nine hundred euros) in respect of pecuniary damage;
(ii) EUR 6,500 (six thousand five hundred euros) in respect of costs and expenses, together with any value-added tax that may be chargeable;

5. *Holds* unanimously
(a) that simple interest at an annual rate of 13% shall be payable on the sum EUR 1,900 from 27 February 1996;
(b) that simple interest at an annual rate of 11% shall be payable on the other sums awarded from the expiry of the above-mentioned three months;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 March 2002.

Vincent BERGER
Registrar

Georg RESS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Caflisch and Mr Pastor Ridruejo is annexed to this judgment.

G.R.
V.B.

DISSENTING OPINION OF JUDGES CAFLISCH AND PASTOR RIDRUEJO

1. The applicant in the present case is a defence lawyer who, at a public hearing before a Finnish court, accused prosecutor T. of "blatant abuse in respect of the presentation of evidence", of procedural tactics designed "to make a witness out of a co-accused so as to support the indictment", of "trumped-up charges", of "deliberate abuse of discretion", of "role manipulation" and, to sum up, of "breaching his official duties and jeopardising legal security" (see paragraph 10 of the judgment). These are accusations of professional misconduct and, indeed, dishonesty levelled at prosecutor T. Yet, at the end of a long journey through the domestic courts, the main sanction – a fine – was waived, and all the applicant was required to do was to pay court costs and damages to the prosecutor.

2. The Court's majority finds that Finland has violated Article 10 of the Convention, pointing out, in particular, that the State's margin of appreciation in matters covered by this provision is a narrow one, also in cases where the conduct of counsel in court is involved (see paragraph 46 of the judgment), and that it should primarily be up to counsel themselves to decide what it is appropriate to say, so as not to inhibit their attitude by the "chilling effect" of possible penalties (see paragraphs 54-55 of the judgment).

3. Article 10 of the Convention protects the freedom of expression. In its second paragraph it specifies that the exercise of that freedom carries duties and responsibilities and may be subjected to limitations if they are prescribed by law and are "necessary in a democratic society" to meet certain objectives, such as "the protection of the reputation or rights of others" and "maintaining the authority and impartiality of the judiciary", to which defence counsel are expected to contribute (see *Schöpfer v. Switzerland*, judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1052-53, § 29). In other words, restrictions may be imposed on the exercise by counsel of their freedom of expression in court and outside, but they must be proportionate and appropriate to meet the aim pursued by them, that is, protection of the rights of others and the judiciary – the latter encompassing the dignity of the judicial process – without crippling the freedom guaranteed by Article 10.

4. Turning to the case at hand, it is therefore necessary to weigh the interests protected by the measures complained of against those of the applicant.

5. Clearly the accusations made by the applicant in open court were of some gravity. They amounted to stating, not only that prosecutor T. had acted wrongly – which, in and of itself, was legitimate – but also that he had abused his functions and acted dishonestly. This is one of the worst things

to say about a public official, magistrate or not. Not only does it mean that the magistrate is unfit to discharge his/her duties and, possibly, to fill other posts; it also taints the reputation of the judiciary. In other words, the interests protected by the measure are of considerable importance.

6. It is also evident, however, that counsel must enjoy considerable latitude in criticising prosecution strategies and in developing his/her own. But this latitude cannot be viewed as a blanket permission to engage in personal attacks impugning the probity of a prosecutor or other public officials. The applicant's attacks seem far more extreme than they were in *Schöpfer*, cited above, where the Court found no violation – a finding that cannot be explained simply by the fact that the attacks were made in public and not, as in the present case, in court at a public hearing (see paragraph 52 of the judgment). They certainly were damaging to the individual concerned, and equally damaging to the dignity of the judicial process.

7. The two sets of interests described must now be weighed against the impugned measures which, in the course of the national judicial proceedings, were whittled down to the mere payment of damages and costs (see paragraph 18 of the judgment). No mention was made in the criminal records. Thus it could hardly be argued that the decision complained of was such as to jeopardise the applicant's future career.

8. While one may agree or disagree with the outcome of the proceedings on the national level, it seems to us that the measure taken, as it finally emerged from the decision of the Finnish Supreme Court, was justified when weighing the interests of prosecutor T. and of the judiciary against those of the applicant, considering, in particular, that the latter could have made exactly the same points on behalf of her client without using excessive language.

9. We therefore conclude that, in the case at hand, a reasonable relation of proportionality existed between the interests involved and the measures taken. Accordingly, Article 10 of the Convention has not been violated.