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. 41674/98
by JÄRVI-ERISTYS OY
against Finland

The European Court of Human Rights (Fourth Section), sitting on 15 March 2005 as a Chamber composed of

Sir Nicolas BRATZA, *President*,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Ms L. MIJOVIĆ, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 12 June 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 applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Järvi-Eristys Oy, is a Finnish limited liability company. Before the Court it was represented by Jouko Kauppila, a lawyer practising in Pori. The respondent Government were represented by their Agent, 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.

In October 1993 the applicant bought 38 tons of copper in Russia and paid for it in cash with US dollars. During the customs clearance the Finnish customs authorities found that the information noted in a bill of consignment was false insofar as the identity of the seller company and the buyer company were concerned. Furthermore, a certain other company was mentioned in the false documents as a forwarding company. The signature of M.M., operational manager of that company, had been forged in those documents. None of these companies had anything to do with the freight. It also appeared that the seller did not have a licence to sell the copper even though such a licence was obligatory when exporting copper from Russia.

The Finnish customs issued a prohibition of transfer of the copper and reported the case to the police. It appears that in December 1993 the Russian authorities announced that the copper had been stolen in Russia. The owner of the applicant company was suspected of aggravated concealment of illegally obtained goods and of having forged the bill of consignment.

On 7 June 1994 the Russian customs authorities informed the Finnish police that the Russian company which purported to sell the copper to the applicant did not exist. The Russian managing director who had supposedly signed the contract and the company from which the Russian seller had purported to buy the copper did not exist, either. As the copper had not been sold legally in Russia and as it had been illegally exported to Finland, the Russian authorities claimed that the Russian Federation was its legal owner and that it had to be returned to Russia.

By a letter of 29 July 1994, Inspector K. from the Police District of Kotka informed the Finnish customs that according to the pre-trial investigation carried out into the matter, and on the basis of reports obtained from Russia concerning the identification of the copper, the Russian Federation was the legal owner of the copper. He stated that there were no obstacles on the part of the police to returning the copper to its legal owner. The applicant argued that the letter had the character of a decision. The Government argued that the purpose of the letter was to communicate information to the custom authorities.

On 13 October 1994, after the pre-trial investigation had been completed, the matter was transferred to a public prosecutor for consideration of charges. On 30 January 1995 the public prosecutor decided not to prosecute the owner of the applicant company as there was no evidence supporting the allegations that the copper had been stolen or that he had known that the bill of consignment had been forged.

Meanwhile, in May and October 1994 the applicant company instituted civil proceedings before the Kotka District Court (*käräjäoikeus, tingsrätten*) against the State of Finland and the Russian Federation, respectively, requesting that the prohibition of transfer be revoked and that the District Court confirm that the applicant company was the legal owner of the copper. In its decision of 20 October 1995 the District Court found that it was not competent to examine the request that the prohibition of transfer be revoked. As to the ownership issue the District Court considered, taking into account that no one had ever claimed that the State of Finland was the legal owner of the copper, that it could not be considered a party to the proceedings. Thus, the claims made against the State of Finland could not be examined. Insofar as the Russian Federation had claimed the ownership of the copper but had not made any submissions to the District Court, the court found that it had no competence to examine an issue concerning a foreign State's ownership rights, being prevented by the international principles concerning the foreign sovereign states' immunities. It appears that the applicant company appealed and that on 27 June 1996 the Kouvola Court of Appeal (*hovioikeus, hovrätten*) upheld the decision.

Meanwhile on 23 October 1995, the applicant company requested that the customs authorities hand over the copper. The same day the forwarding agency informed the applicant company that the copper had been sold on to a Finnish company by the Russian Federation in co-operation with the Finnish customs.

On 5 December 1995, the applicant company instituted civil proceedings for public-sector liability for damages under the Tort Liability Act (*vahingonkorvauslaki; skadeståndslagen*; 412/1974) against the State of Finland, claiming the amount of 463,000 Finnish marks (equivalent to EUR 77,871) as compensation for the lost copper. It argued that the State was liable for the damage as a police officer, K., when acting as public authority, had overstepped his powers in ordering that the copper be returned to Russia even though there was no proof that it had been stolen.

On 24 May 1996 the Pori District Court rejected the applicant's claims, finding that the police officer in question had been entitled to agree with the findings of the Russian authorities that the copper had been stolen, having regard to the fact that the bill of consignment was forged, that the purchase price amounted to only about one fourth of the copper's real value and was paid in cash, that the company's representative did not know the identity of the seller's representatives, that the driver had been instructed to visit the

customs authorities at a precise time and that the applicant company's representatives had not contacted the seller to sort things out following the prohibition of transfer. These circumstances warranted the conclusion that there was something shady and secret about the purchase. The wording of the police officer's communication to the customs indicating that there was no obstacle to returning the copper to Russia did not, however, decide the question of the ownership of the copper. As the copper had most probably been stolen in Russia, the applicant company had, in accordance with section 11 of the Decree Implementing the Penal Code (*rikoslain voimaanpanemisesta annettu asetus, förordningen om införande av strafflagen*), been obliged to return the copper to its legal owner without compensation. In accordance with the said provision, the applicant was entitled to seek compensation from the seller of the copper or from the person who had stolen it. Insofar as the State had argued that the applicant company, prior to commencing an action for compensation, should have appealed against the customs' decision with a view to minimising any possible damage, the District Court noted that the applicant had no interest in demanding a written decision as to the refusal to customs clear the copper delivery and to appeal against such a decision, as the company had considered that the customs' actions so far had been justified.

On 4 February 1997 the Turku Court of Appeal upheld the District Court's judgment.

On 5 September 1997 the Supreme Court refused the applicant leave to appeal.

B. Relevant domestic law

Section 11 (515/1948) of the Decree Implementing the Penal Code reads, in so far as relevant, as follows:

> "If a dispute arises concerning an item that has been stolen, ... from its previous holder, and if the one who has become the holder of the item proves that he received it in good faith, the holder of the item in dispute shall be obliged to hand it over without compensation and may seek compensation from the person he received the item from or from the person through whose offence he received it."

According to the amended section 48 (1165/1987; as in force at the relevant time) of the Customs Act (*tullilaki, tullagen*), a decision of the district customs office could be appealed against to the National Board of Customs. According to section 50 of the Customs Act, unless otherwise provided, a decision of the National Board of Customs may be appealed against to the Supreme Administrative Court in accordance with the provisions of the Act on Appeals in Administrative Matters (*muutoksenhausta hallintoasioissa annettu laki, lagen om ändringssökande i förvaltningsärenden*; 154/50), as in force at the relevant time.

According to section 8 (f) of the Customs Act (573/1978), as in force at the time, a person had the right of possession of goods if he was their importer, exporter or owner or otherwise had possession or control over the goods.

According to section 9 (2) of the Customs Decree (574/1978; *tulliasetus, tullförordningen*), as in force at the time, the customs authorities had to ensure, to the extent possible, that the goods were delivered to the person who has a lawful right of possession in respect of them.

According to chapter 3, section 4 of the Tort Liability Act a person, who has suffered injury or damage owing to an erroneous decision by a state or municipal authority and without an acceptable reason has failed to appeal against the said decision, shall not be entitled to damages from the state or the municipality for injury or damage that could have been avoided by appealing.

COMPLAINTS

1. The applicant company complained, under Article 1 of Protocol No. 1 to the Convention, that it had been unlawfully deprived of its possessions without compensation as the copper had been returned to the Russian Federation even though the public prosecutor had explicitly found that it had not been proven to be stolen.

2. The applicant also complained, under Article 6 § 1 of the Convention, that it did not have a fair trial as there had been no proceedings instituted in order to establish who was the legal owner of the copper, and as the decision to return the copper to Russia had been made without hearing the applicant.

3. Lastly, the applicant complained, under Article 13, about the lack of an effective remedy to recover the copper after it had been returned to Russia, and as the company's compensation claim had been rejected.

THE LAW

A. Article 1 of Protocol No. 1 to the Convention

The applicant company complained that it had been unlawfully deprived of its possessions without compensation as the copper had been returned to the Russian Federation even though the public prosecutor had explicitly found that it had not been proven to be stolen. It invokes Article 1 of Protocol No. 1 to the Convention which reads as follows:

"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."

1. Article 35 § 1 of the Convention

1. The parties' submissions

First, the Government submitted that the applicant company had failed to introduce its application within the six months' time-limit imposed by Article 35 § 1 of the Convention. As the company knew, at the latest, at the date of the lodging of its claim in the District Court on 5 December 1995 that the copper had been returned to the Russian Federation, its application submitted to the Commission on 4 March 1998 was long out of time.

Second, the applicant had in any event failed to exhaust domestic remedies as required by Article 35 § 1. The Government submitted that at no stage had the applicant company presented any claim to the Finnish customs authorities to obtain the copper. Nor did it submit a request to the customs for a written decision concerning the delivery of the copper to the Russian Federation. Had the applicant made such a request, the decision would have been given from which an appeal would have lain to the National Board of Customs and further to the Supreme Administrative Court. The applicant had not challenged the ownership of the copper before a court in Russia nor brought claims against its Russian business partners. Accordingly the applicant company had not exhausted all the domestic remedies available under Finnish law or elsewhere.

The applicant company submitted that it lodged the application with the Commission within six months from the date of the final decision in the compensation proceedings, which was rendered on 5 September 1997.

The company emphasised that it had instituted proceedings before the domestic courts with a view to having the ownership of the copper examined, referring to the District Court's decision of 20 October 1995 in this respect and to the subsequent decision issued by the Court of Appeal. It submitted that it could not institute proceedings before the Russian courts against its business partners in respect of the ownership of the copper as the applicant's ownership had not been contested by them. No other party, excluding the Russian Federation, had requested to be acknowledged as the legal owner of the copper. On the other hand, had the copper been stolen, no such party would have been interested in claiming the ownership as, in that

case, it would only have lost it to the Russian Federation on the basis of the theft.

The company submitted that it did not contest the right of the State of Finland to prohibit the transfer of the copper until its origin was clarified. It had agreed to wait until the question concerning the relevant investigation was terminated and the origin was finally established. The applicant had not, however, anticipated that the copper would be returned to the Russian Federation without communicating such a decision to the applicant and it argued that this unilateral step prevented it from taking the steps referred to by the Government.

2. The Court's assessment

The Court recalls that according to the principles set out in its judgment in the case of *Akdivar and Others v. Turkey* (judgment of 16 September 1996, Reports of Judgments and Decisions No. 15, 1996-IV, pp. 1210-1222, §§ 65-69) the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitration organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body before they have had an opportunity to put matters right through their own legal system. The machinery established by the Convention is subsidiary to the national system safeguarding human rights. The Court further ruled that, under Article 35 § 1, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the alleged breaches. Moreover, the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law, and any procedural methods that might prevent a breach of the Convention should have been used.

Moreover, in the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement. According to the case-law a domestic remedy must be tried where doubts exists as to the effectiveness of that remedy (e.g. *D.S. and E.S. v. the United Kingdom*, no. 13669/88, (dec.) 7.3.1990, D.R. 65, p. 245).

In the present case, the Court observes that the applicant company could have appealed to the National Board of Customs in December 1993 and further to the Supreme Administrative Court when the customs ordered a prohibition of transfer. It did not do so. The Court is not persuaded that the applicant's wish to have the origin of the copper clarified by the police constitutes an excuse for the failure to exhaust this remedy. Having regard also to the subsequent development of the case, the Court notes that had the applicant company at the initial stage availed itself of the fact that an appeal lay as a result of which the prohibition of transfer might have been considered unlawful, the applicant company would have had a stronger case when it sought damages.

The Court further notes that the applicant company did not request any written decision from the customs authorities after the public prosecutor had decided, on 30 January 1995, not to prosecute anyone and before it learned, on 23 October 1995, that the copper had been sold on. Taking into account the copper's financial value, the Court finds that this period of inactivity has not been satisfactorily explained by the applicant. The applicant could have requested a written decision from the customs authorities and appealed against it in accordance with the Customs Act.

Insofar as it might be argued that an appeal to the National Board of Customs against the prohibition of transfer would not have been sufficient to afford redress after the copper had been sold on and that the appropriate remedy at that point was an action for damages against the State of Finland, the Court considers that such an action would have offered a reasonable prospect of success had it been based on the measures taken by the customs authorities, *i.e.* on the allegedly unlawful handing over of the copper to the Russian Federation. The applicant company based its action for damages on the alleged fault by the aforementioned police officer. Having regard to the fact that the police never had possession of the copper and that the investigation report issued by the police officer to the customs authorities was not a decision as to title or ownership and did not constitute an order to return the copper to the Russian Federation, it may be questioned whether the action commenced by the applicant can be regarded as an effective remedy for the purposes of Article 35 § 1 of the Convention.

Moreover, the applicant has not instituted any compensation proceedings against the Russian Federation in a Russian court, or against the persons or companies it bought the copper from. The Court recalls that the respondent State may only be expected to provide legal protection against the applicant's claims insofar as the claims made can be examined under national law before its own domestic courts.

However, the Court finds that it need not decide whether the applicant company has complied with Article 35 § 1 of the Convention, as the question of exhaustion of domestic remedies is closely connected with the

merits of the case and as the application is in any event inadmissible for the following reasons.

2. Compliance with Article 1 of Protocol No. 1 to the Convention

Article 1 of Protocol No. 1 in substance guarantees the right of property. It 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, amongst other things, to control the use of property in accordance with the general interest However, the three rules are not "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 many other authorities, *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, p. 17, § 48).

The Government questioned whether the copper constituted the applicant's "possessions" having regard to the fact that the purported sales transaction had not been carried out in accordance with Russian law. The applicant had not been able to have the goods custom cleared and imported into Finland due to the lack of an export licence. Were the Court to find that the prohibition of transfer and the subsequent measures concerned the applicant's "possessions", the Government submitted that the control of the use of property was lawful and necessary in accordance with the general interest. The Russian Federation claimed ownership, but the applicant did not challenge the claim before any court although it had a reasonable opportunity of putting its case to the relevant authorities.

The applicant company argued that the sales transaction had been carried out in accordance with Russian law and thus, the application concerned its "possessions". Had the company retained the copper, it might have been able to sell it in Russia. The company questioned the lawfulness of the handing over of the copper to the Russian Federation already on 29 July 1994, whereas the pre-trial investigation was completed only on 12 October 1994. Moreover, the company submitted that as it had not been informed about the handing over of the copper to the Russian Federation, it had no remedy at its disposal to prevent the measure.

The Court recalls that, in accordance with Article 19, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible

violation of any of the rights and freedoms set out in the Convention (see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 25, § 45). Accordingly, it is not for the Court to examine the question of ownership to the copper as such an issue would clearly have been for the domestic, be it the Finnish or the Russian, authorities to decide.

The Court further notes that the notion "possessions" in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. In the present case, it is therefore not necessarily decisive whether the applicant company obtained the right to ownership of the copper. Assuming that Article 1 of Protocol No. 1 applied, the Court considers that the prohibition of transfer amounted to an "interference" with the applicant company's right "to the peaceful enjoyment" of a "possession" as protected by the first sentence of Article 1. The Court must determine whether the material provision in the present case is the second sentence of the first paragraph or the second paragraph. The prohibition of transfer clearly constituted a control of the use of property. The subsequent events did, of course, involve a deprivation of property, but in the circumstances the deprivation formed a constituent element of the procedure for the control of the use. It is therefore the second paragraph of Article 1 which is applicable in the present case (see, mutatis mutandis, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 30, § 63).

The second paragraph of Article 1 recognises 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". Undoubtedly, the prohibition of transfer was in itself compatible with the terms of this provision. Nevertheless, as the second paragraph is to be construed in the light of the general principle enunciated in the opening sentence of Article 1 there must, in respect of enforcement of this prohibition, also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised; in other words, the Court must determine whether a fair balance has been struck between the demands of the general interest in this respect and the interest of the individual or individuals concerned (see *Sporrong and Lönnroth v. Sweden*, judgment, p. 26, § 69 and p. 28, § 73, and *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 34, § 50). In determining whether a fair balance exists, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.

The Court notes that the copper delivery did not clear customs due to the fact that the bill of consignment and other documents were false and due to the fact that the importer, the applicant company, did not present documentation according to which the Russian seller had an export licence. Thus, the Finnish customs authorities considered that the importing company had not fulfilled the requirements laid down in the Customs Act. Accordingly, they exercised their powers under the Customs Act and issued a prohibition of transfer. Thus, the interference was based on law. As to the subsequent handing over of the copper to the Russian Federation, the Court considers that the mere fact that it took place before the pre-trial investigation was completed does not render the measure unlawful.

For the measures to be justified under the terms of the second paragraph of Article 1, it is enough that the explicit requirements of this paragraph are met and that the State has struck a fair balance between the interests of the State and those of the individual. The striking of a fair balance depends on many factors and the behaviour of the owner of the property, including the degree of fault or care which he has displayed, is one element of the entirety of circumstances which should be taken into account (see *AGOSI v. the United Kingdom*, cited above, § 54).

Accordingly, although the second paragraph of Article 1 contains no explicit procedural requirements, the Court must consider whether the applicable procedures in the present case were such as to enable, amongst other things, reasonable account to be taken of the degree of fault or care of the applicant company or, at least, of the relationship between the company's conduct and the irregularities which undoubtedly occurred; and also whether the procedures in question afforded the applicant company a reasonable opportunity of putting its case to the responsible authorities. In ascertaining whether these conditions were satisfied, a comprehensive view must be taken of the applicable procedures (see among other authorities, *mutatis mutandis*, *X v. United Kingdom*, judgment of 5 November 1981, Series A no. 46, p. 26, § 60).

The Court recalls that there was a procedure available to the applicant company against the customs authorities' decision to prohibit transfer of the goods. The company could have challenged it by lodging an appeal with the National Board of Customs from which an appeal lay to the Supreme Administrative Court. The Court notes the applicant's argument that the above avenue of appeal would not have furnished a remedy with regard to the subsequent handing over of the copper to the Russian Federation and that the only remedy at that point was the lodging of the compensation claim. It is not however persuaded by it. According to the Tort Liability Act, failure to appeal against a decision by a State authority results in a refusal of compensation from the State for damage that could have been avoided by appealing against the decision in question. In addition, the alleged responsibility of the Finnish

State for police officer K's actions was thoroughly examined by the District Court.

The Court finds that it has not been established that the Finnish system failed to afford the company a reasonable opportunity to put its case before a competent authority. The fact that the company, for reasons of its own, chose not to appeal against the prohibition of transfer and hence did not obtain full advantage of the safeguards available to importers of goods cannot invalidate this conclusion (see *AGOSI v. the United Kingdom*, cited above, § 62).

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

B. Article 6 § 1 of the Convention

The applicant company also complained, under Article 6 § 1 of the Convention, that it did not have a fair hearing as there were no proceedings instituted in order to establish who was the legal owner of the copper, and as the decision to return the copper to Russia was made without hearing the applicant. It invokes Article 6 § 1 of the Convention which reads, insofar as relevant, as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

The Court recalls its reasoning above concerning Article 1 of Protocol No. 1. It follows, on the basis of the same reasoning, that there were steps that the applicant company could have taken at the relevant time to bring its claims effectively before the domestic courts.

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

As to the complaint that the copper was forwarded to the Russian Federation without giving the applicant company an opportunity to be heard, the Court notes that the handing over of the copper did not constitute a determination of the applicant's civil rights and obligations or of a criminal charge against it. Thus, Article 6 was not applicable.

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

C. Article 13 of the Convention

Finally, the applicant company complained about the lack of an effective remedy to recover the copper after it was returned to Russia and the rejection of his compensation claim. It invokes Article 13 of the Convention which reads as follows:

> "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 recalls that 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). Since the Court has rejected above the complaints under Article 1 of Protocol No. 1 and Article 6, the applicant company does not have an arguable claim under Article 13.

Thus, also this part of the application must be rejected as being 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