AS TO THE ADMISSIBILITY

Application No. 18291/91
by Pertti KINNUNEN
against Finland

The European Commission of Human Rights (First Chamber) sitting in private on 13 October 1993 the following members being present:

Present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber.

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 5 February 1991 by Pertti Kinnunen against Finland and registered on 30 May 1991 under file No. 18291/91;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Finnish citizen born in 1935 and resident at Vilamoura, Portugal. He is a lawyer.

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

Particular circumstances of the case

In 1985 the applicant was detained for three days suspected of fraud in connection with a transaction involving shares. In the context of the arrest he was fingerprinted and photographed by the police.

The applicant was subsequently charged with, inter alia, instigation of fraud but was finally acquitted by the Court of Appeal (hovioikeus, hovrätten) of Kouvola in 1988.

In the meantime, the applicant had instituted damage proceedings against the State, the police officers in charge of the pre-trial investigation and certain companies involved in the transaction which

was the subject of the criminal proceedings.

The damage claim was rejected by the City Court (raastuvanoikeus, rådstuvurätten) of Lahti in 1987 and by the Court of Appeal in 1989.

On 24 November 1989 the Supreme Court refused leave to appeal.

On 20 September 1990 the Supreme Court rejected the applicant's request for a re-opening of the civil proceedings.

By a decision of 25 January 1991 the Deputy Chancellor of Justice (apulaisoikeuskansleri, justitiekanslersadjointen) rendered his decision in regard to the applicant's request that the information pertaining to him be deleted from the police file. The Chancellor referred to, inter alia, Sections 11 and 15 of the 1987 Act on Personal Files (henkilörekisterilaki 471/87, personregisterlag 471/87). As the applicant had not shown it to be likely that information regarding him was unlawfully being retained in police files or that any such information would be incorrect and as the remedies stated in the Act were at his disposal, the Chancellor found no need for taking any measures.

Relevant domestic law

Under Chapter 6, Section 4, para. 1 of the Coercive Criminal Investigation Means Act (pakkokeinolaki 450/87, tvångsmedelslag 450/87), which entered into force on 1 January 1989, a police officer may, for the purpose of identifying the suspect, investigating crime and registering criminals fingerprint, handprint and footprint the suspect, take samples of his or her handwriting and voice, take his or her photograph as well as record other personal details of the suspect.

Under Chapter 3, Section 11 of the Act of Personal Files anyone shall, despite the confidentiality rules, have access to possible file information pertaining to him or her, provided that access to the information is not restricted in accordance with Section 12 of the Act and provided that he or she submits information making the file search possible. A request for access shall be made by the person concerned either orally before the authority or in writing.

No access to information exists in the cases prescribed in Section 12, that is,

- if the information could jeopardise the security of the State or its relations with other countries or international organisations, hamper the prevention and investigation of crime or be contrary to some other particularly important general interest;

- if the information could seriously endanger the person's health or care or if access could be contrary to some other particularly important individual interest;

- if the personal data to which access is requested is being used exclusively for statistical research and planning purposes; or

- if the data to which access is requested form, under certain circumstances, part of an employer's file for assessing employees (para. 1).

If only part of the information to which access is requested is covered by the access prohibition in para. 1, nos. 1 and 2, access shall be granted to the remainder of the information (para. 2).

Under Section 15 the authority responsible for keeping the file shall see to it that information which, having regard to the purpose of the file, is incorrect, unnecessary, incomplete or outdated, be speedily corrected, deleted or completed, if the information clearly

jeopardises the integrity, interests or rights of the person to which the information pertains. Incorrect information shall always be corrected at the request of the person concerned.

At the request of the person concerned the Data Protection Ombudsman (tietosuojavaltuutettu, dataombudsmannen) can order the authority responsible for keeping the file to allow the person access to a file and to correct incorrect information. If the authority does not comply with the order, the Ombudsman can bring the matter before the Data Protection Board (tietosuojalautakunta, datasekretessnämnden). If the Ombudsman refuses to take measures in order to have access granted and information corrected, the person concerned can himself bring the matter before the Board (Chapter 6, Section 35). A further appeal lies with the Supreme Administrative Court (Chapter 7, Section 38).

As regards files referred to in the Act on Personal Files which are administered by the police in the performance of its duties, that Act shall be applicable, if otherwise not stated in the 1987 Decree on the Personal Files of the Police (asetus 1056/87 poliisin henkilörekistereistä, förordning 1056/87 om polisens personregister, hereinafter "the 1987 Decree") (Section 1 of the Decree).

The personal files of the police are either nationally or locally administered (Section 2).

Anyone who has been registered in a police file has the right to verify the information pertaining to him or her in the file kept by the police (Section 3 para. 1).

Under Section 3, para. 2, however, there is no access to

- a file kept for State security purposes (no. 1);

- to information categorising a suspect or an offence or information on the technique used in the carrying out of an offence (no. 2); or

- to information in files kept for the prevention and investigation of professional and habitual crime or information pertaining to such criminality (no. 3).

The person wishing to make use of his right of access shall prove his identity and submit other necessary information necessary for the search and handing out of the information requested. Access to information in a file kept for the prevention and investigation of other offences than those stated in Section 3 para. 2 may be granted as soon as this would not hamper the investigation of an offence (Section 4 paras. 1 and 2).

Information in a police file which, having regard to the purpose of the file, is incorrect, unnecessary, incomplete or outdated shall be corrected. Incorrect information shall be corrected by the file keeping authority ex officio or at a reasoned request of the person concerned (Section 5).

Irrespective of what is stated in the Act on Personal Files and irrespective of the purpose of a police file, the police has the right to make use of information in such a file in the performance of its duties, provided the law does not provide otherwise and if the information is necessary

- in order to ensure the security of the State;

- for the investigation of offences for which imprisonment is prescribed;

- for the prevention and investigation of professional and

habitual crime;

- for the consideration of whether the conditions for granting or revoking a permit are at hand;

- for identification purposes in the course of a criminal investigation or a similar investigation; or

- in order to avert a danger to someone's life or health or for the protection of some other important public or individual interest (Section 6).

According to the 1988 Decree on National and Permanent Police Files Based on Electronic Data Processing (asetus 1337/88 poliisin valtakunnallisista pysyvistä atk-henkilörekistereistä, förordning 1337/88 om polisens riksomfattande permanenta adb-register) nationally administered police files are, inter alia,

- the file on arrested persons;

- the file comprising the descriptive features of a suspect which are necessary for the prevention and investigation of crime and for the purpose of identifying criminals, as well as other information of value to the investigation of crimes; and

- the fingerprint file comprising the fingerprints of a suspect necessary for the prevention and investigation of crime and for the purpose of identifying criminals (Section 4).

COMPLAINTS

1. The applicant complains that he was unlawfully detained, that he was not promptly informed of the reasons for his arrest and of the charges against him and that during his arrest he was refused access to his lawyer. He invokes Article 5 paras. 1 and 2 of the Convention.

2. The applicant further complains that the pre-trial investigation was partial, that he was denied the right to be assisted by a lawyer and that the court proceedings were unfair. He invokes Article 6 paras. 2 and 3 (a) and (b) of the Convention.

3. The applicant further complains of the lack of reasoning in the court decisions rejecting his damage claim in the ordinary civil proceedings and subsequently refusing a re-opening of the proceedings. In particular, the courts gave no sufficient reasoning in support of their refusals to hear the witnesses called by him. He invokes Article 5 para. 5 and Article 6 paras. 1 and 2 of the Convention.

4. The applicant finally complains of the recording of his fingerprints and photograph in a police file to which there is no access under Section 3, para. 2, no. 3 of the 1987 Decree. He further alleges that his personal details unlawfully remain in this file despite his acquittal on the charges brought against him. He invokes Article 6 para. 2 of the Convention.

THE LAW

1-3. The applicant complains of the lawfulness and manner in which his arrest was carried out. He further complains of the pre-trial investigation and the criminal proceedings and also alleges that the court decisions in respect of his damage action lacked reasoning. He invokes Articles 5 and 6 (Art. 5, 6) of the Convention.

(i) The Commission must first ascertain whether, and to what extent, it is competent ratione temporis to deal with these complaints. It observes that, with the exception of the re-opening proceedings ending

on 20 September 1990, the events of which the applicant complains took place prior to 10 May 1990, which is the date of the entry into force of the Convention with respect to Finland.

It follows that, with the above-stated exception, the complaints are incompatible ratione temporis with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

(ii) Insofar as the applicant complains of the re-opening proceedings the Commission recalls that neither the Convention nor any of its Protocols contains an obligation for a Contracting State to allow someone the opportunity to apply for a review of a decision having become res iudicata. Article 6 (Art. 6) of the Convention does not apply to proceedings in which the re-opening of a case is requested (No. 7761/77, Dec. 8.5.78, D.R. 14 p. 171).

It follows that this complaint is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

4. The applicant finally complains of the registration and retaining of his personal distinguishing marks in a register of criminals kept by the police despite his acquittal. He invokes Article 6 (Art. 6) of the Convention.

The Commission considers that this complaint falls to be examined under Article 8 (Art. 8) of the Convention, which 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."

(i) As regards the recording of the applicant's personal details the Commission observes that this took place in 1985, that is again before the entry into force of the Convention with regard to Finland.

It follows that the complaint in this respect is incompatible ratione temporis with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

(ii) Assuming that the applicant's personal details recorded in 1985 are still being retained by the authorities, the Commission considers that the retention must be regarded as a continuing situation falling within the Commission's competence ratione temporis (cf. No. 10454/83, Dec. 23.1.86, D.R. 45 p. 91 and, mutatis mutandis, No. 214/56, Dec. 9.6.58, Yearbook 2 p. 214 (234) and, as regards Finland, No. 19823/92, Dec. 9.2.93).

Under Article 26 (Art. 26) of the Convention the Commission may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.

In the present case the applicant has not requested access to the alleged police file in accordance with Section 11 of the 1987 Act. As a reason for not availing himself of this remedy he has argued that access to the file in which he is recorded is restricted in accordance with Section 12 of the 1987 Act and Section 3, para. 2, no. 3 of the 1987 Decree.

The Commission recalls that an applicant must make normal use of remedies likely to be effective and adequate, having regard to the matter complained of (see Eur. Court H.R., De Jong, Baljet and Van den Brink judgment of 22 May 1984, Series A no. 77, p. 19, para. 39 and e.g. No. 10978/84, Dec. 14.10.86, D.R. 49 p. 144 [155] with further references; No. 14369/88, Dec. 12.10.92, not yet published). The burden of proving the existence of available and sufficient remedies lies upon the State (Eur. Court H.R., Deweer judgment of 27 February 1980, Series A no. 35, p. 15, para. 26). However, in cases of doubt as to whether or not a remedy is effective, that remedy should be tried (No. 10148/82, Dec. 14.3.85, D.R. 42 p. 98).

In the present case the Commission observes that, irrespective of the status of the file in which the applicant's personal details are allegedly being retained, he has not asserted his right under Section 11 of the 1987 Act of access to that file by lodging a request to the police authority administering the file. If access is refused on the ground that the file falls within one of the categories stated in Section 12, the applicant has further remedies at his disposal in accordance with Sections 35 and 38. The applicant's right under Section 15 to have information corrected or deleted is subsidiary to his right of access under Section 11. However, also in this respect he has the same remedies at his disposal, should the authority responsible for keeping the file reject his request.

In these circumstances the applicant cannot be considered to have exhausted the remedies available to him under Finnish law. Moreover, an examination of the case as it has been submitted does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies and that the complaint in this respect must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)