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. 53835/00
by Markus LAMMI
against Finland

The European Court of Human Rights (Fourth Section), sitting on 29 June 2004 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI,
Mr J. BORREGO BORREGO,
Mrs E. FURA-SANDSTRÖM,
Ms L. MIJOVIĆ, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 18 September 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, Mr Markus Lammi, is a Finnish national who was born in 1936 and lives in Vantaa. He was represented before the Court by Mr Pertti Meronen, a lawyer practising in Vantaa. The respondent Government were represented by their Agent Mr Arto Kosonen, Director in the Ministry for Foreign Affairs.

The circumstances of the case

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

The applicant's company, S., was dissolved on 23 July 1987 by the District Court (*käräjäoikeus, tingsrätten*) of Vantaa. The winding-up order was upheld by the Helsinki Court of Appeal (*hovioikeus, hovrätten*) on 4 November 1987. On 20 June 1988 the Supreme Court (*korkein oikeus, högsta domstolen*) refused the applicant leave to appeal.

In 1988 the official receiver of the estate, Mr O., requested the applicant to hand over to him all the assets of the company. The applicant, who was in possession of shares in a housing company, refused to deliver those shares to O.

The applicant instituted civil proceedings before the District Court of Vantaa against the estate and requested the court to confirm that the shares were owned by him and that he was under no obligation to hand them over to O. On 17 December 1987 the District Court held, however, that the shares belonged to the estate and ordered the applicant to hand them over to O. On 30 November 1988 the decision was upheld by the Helsinki Court of Appeal. On 5 June 1989 the Supreme Court refused the applicant leave to appeal. Subsequently, the applicant lodged an extraordinary appeal, but it was rejected by the Supreme Court on 23 August 1994.

Meanwhile, O. requested the Bailiff to seize the shares from the applicant. The Bailiff's attempt to this effect failed on 13 October 1989, the applicant having argued that he held the shares by way of guarantee and refused to inform the Bailiff about the shares' whereabouts.

On 6 November 1989 the estate requested that the police investigate whether the applicant had committed an offence by refusing to provide information about the ownership and the whereabouts of the shares. On 7 December 1989 and on 9 February 1990 the police carried out searches of the applicant's apartment, but to no avail. On 27 February 1990 the applicant was questioned by the police.

On 3 September 1992 a local public prosecutor decided not to bring charges against the applicant.

The estate lodged a complaint with the Chancellor of Justice, who on 12 November 1992 gave instructions that a new pre-trial investigation be

carried out. The applicant was questioned by the police on 9 February 1993 and it appears that the pre-trial investigation was completed the same day.

On 13 January 1995 O. requested that the District Court of Vantaa declare the shares null and void as their legal owner, the estate, had not received them from the applicant despite numerous attempts. On 24 April 1995 the District Court refused the estate's request since the applicant appeared at the District Court and produced the shares without handing them over and since, according to Finnish law, only shares which had gone missing could be declared null and void.

Meanwhile, on 2 February 1995 the County Prosecutor charged the applicant with aggravated embezzlement before the District Court of Vantaa. The District Court held three hearings, on 23 November 1995, on 1 February 1996 and on 16 March 1996. In its judgment of 21 March 1996 the District Court acquitted the applicant. It noted that the ownership of the shares had been finally decided by the Supreme Court's relevant decision of 5 June 1989, that the applicant had admitted that the shares were in his possession and that he had failed to prove that he had a right to withhold them from O., on the basis of a contract of guarantee, or any other document. However, the embezzlement could not be regarded as an aggravated one and, as the charges for a "normal" embezzlement should have been brought against the applicant within five years of the date on which the offence had taken place, the relevant time limit had elapsed and the charges were time barred. The applicant was, however, ordered to pay FIM 518,682.99 (approximately 87,200 euros) in compensation for pecuniary damage, and FIM 6,000 (approximately 1,000 euros) in compensation for the estate's legal costs.

All the parties, including the public prosecutor, appealed. On 5 December 1996 the Helsinki Court of Appeal, having found that the estate had failed to request a court order according to which a conditional fine would have been imposed had the applicant refused to hand over the shares to the estate, it declared the District Court's judgment null and void. All the estate's claims were also rejected. It appears that the judgment was not unanimous.

Only the estate requested leave to appeal. On 29 May 1997 the Supreme Court granted leave to appeal. The applicant lodged an extraordinary appeal against the decision, arguing that the Supreme Court Judges X and T had been disqualified from deciding the leave to appeal matter, but it was rejected by the Supreme Court on 21 January 1998.

At the oral hearing in the Supreme Court on 6 February 1998, the applicant argued that the Supreme Court Judges T and P were biased as they had been involved in the decision-making concerning some extraordinary appeal proceedings in the applicant's previous cases before the Supreme Court. The objection was dismissed by the Supreme Court as the cases

referred to by the applicant had not concerned the same issues as the present proceedings.

In its judgment of 19 March 1998 the Supreme Court convicted the applicant of aggravated embezzlement and sentenced him to a seven months' suspended term of imprisonment. He was also ordered to pay the estate FIM 350,000 (approximately 58,800 euros) in compensation for the latter's pecuniary damage. Having first found the estate's official receiver, O., competent to act on behalf of the estate in the proceedings, and having rejected the applicant's argument according to which the estate's compensation claim for pecuniary damage had been submitted after the relevant time limit had elapsed, the Supreme Court found the applicant guilty as charged. It considered that the applicant had failed to prove that he had any legal right to refuse to hand the shares over to O. As the estate had been prevented from selling the shares because of the applicant's resistance, the estate had suffered financial loss in the form of lost interest it would have earned from the sales price had the shares been sold in the summer of 1989 for the sales price of FIM 1,100,000 (approximately 185,000 euros) which was the estimated sales price at the relevant time.

On 30 April 1999 the Supreme Court refused the applicant's request of 28 June 1998 to re-open the criminal proceedings.

Meanwhile, on 9 October 1998 the applicant complained about the Supreme Court criminal proceedings to the Parliamentary Ombudsman. It is not known whether the complaint is still pending before the Ombudsman.

COMPLAINTS

1. The applicant complains, under Article 6 § 1 of the Convention, about the length of the criminal proceedings.

2. The applicant also complains, under Article 6 § 1 of the Convention, that he was not afforded a hearing by an independent and impartial tribunal as one of the Supreme Court judges, Judge P, was biased because he had participated in the applicant's earlier cases, and as the Supreme Court did not accept his arguments, according to which the estate's claim for compensation was time barred and its representative was not competent by law to institute proceedings against the applicant.

3. Moreover, the applicant complains that he was not presumed innocent as he was convicted even though the estate's representative was not legally competent to institute criminal proceedings against him. He invokes Article 6 § 2 of the Convention in this respect.

4. The applicant furthermore complains under Article 6 § 3 (a), (b) and (d) of the Convention that he was not able to defend himself properly as he was not informed promptly of the nature and cause of the accusation against

him, as he did not have adequate time and facilities for the preparation of his defence, and as he was not allowed to examine witnesses.

5. Finally, he complains under Article 7 of the Convention that he was held guilty of a criminal offence on account of an act which did not constitute a criminal offence under national law at the time when it was committed. He had not embezzled any of the estate's assets.

THE LAW

The applicant alleges breaches of Articles 6 §§ 1-3 and 7 § 1 of the Convention.

A. Article 6 § 1 of the Convention

1. The applicant complains, under Article 6 § 1 of the Convention, about the length of the criminal proceedings.

Article 6 § 1 provides in relevant part:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time ..."

The Government argue that in his appeal to the Court the applicant did not present any explicit complaint as to the length of the criminal proceedings.

The Government submit that the proceedings began on 4 October 1995 when the indictment was served upon the applicant and ended on 19 March 1998 when the Supreme Court delivered judgment. As to the pre-trial investigation they submit that the period to be taken into account began on 10 May 1990 when the Convention entered into force with respect to Finland.

The Government argue that the case was complex, which was illustrated by the local public prosecutor's decision not to prosecute for a criminal offence related to bankruptcy and by the County Prosecutor's decision to prosecute for embezzlement on the one hand and by the courts' diverging conclusions on the other.

As to the conduct of the parties and the authorities the Government submit that the applicant requested that the pre-trial investigation should await certain decisions by the Supreme Court and the Chancellor of Justice. The police carried out the investigation within a reasonable time. The District Court held three hearings. On 23 November 1995 the case was adjourned upon request by the applicant and the complainant. On 1 February 1996 the District Court decided to adjourn the case upon the applicant's request. As to the proceedings before the Supreme Court, the applicant requested on 29 December 1997 that the Supreme Court deal with

the case in February 1998 at the earliest. Moreover, the applicant did not reside at his official address, which delayed the serving of the summons *etc*. In the Government's view, the courts handled the case expeditiously. There was no period of inactivity. Indeed, at no stage did the applicant invoke the length of the proceedings.

As to what was at stake, the Government submit that the applicant was neither arrested nor imprisoned.

The applicant submits that the proceedings began on 13 October 1989, *i.e.* on the day of the alleged offence. As the Supreme Court delivered judgment on 19 March 1998, it meant that he was convicted of an alleged offence that had taken place over eight years and five months ago.

The applicant contests the Government's view that the case was complex. All relevant information was at hand as from June 1989 when the Court of Appeal delivered judgment in the ownership proceedings. In any case he argues, referring to the case of *Unión Alimentaria Sanders SA v. Spain* (judgment of 7 July 1989, Series A no. 157, §32-33), that the complexity of the case has no relevance to the reasonable time requirement.

The applicant also submits that the respondent State is responsible for all delays, not only for the delays before the courts. The delay between the public prosecutor's decision not to prosecute on 3 September 1992 and the subsequent indictment by the County Prosecutor on 3 February 1995 was excessive.

Finally, the applicant argues that the prejudice suffered from a delay is worse when the accused is convicted for the first time by the highest court instance.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant complains, *inter alia*, that since the Supreme Court Judge P had taken part in the decision-making concerning the applicant's cases prior to convicting him on 19 March 1998, P was disqualified from deciding the embezzlement case.

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ..."

(a) Insofar as the applicant objects to Judge P's participation in the embezzlement case, the Court notes that the applicant lodged an extraordinary appeal against the Supreme Court's decision to grant leave to appeal in the embezzlement case, arguing that the Supreme Court Judges X and T had been disqualified from deciding the leave to appeal matter. On

29 January 1998 the Supreme Court, consisting of Judge P and four others, rejected the extraordinary appeal.

Later on, the applicant lodged an extraordinary appeal against his conviction of 19 March 1998, arguing that Judge P had been disqualified from deciding the embezzlement case since on 23 August 1994 the Supreme Court, consisting of P and four others, had rejected the applicant's extraordinary appeal concerning four earlier judgments, one of which concerned the question of ownership of the above shares. As mentioned above, P had also taken a stand as to whether Judges X and T had been disqualified from granting leave to appeal in the embezzlement case.

The Court notes that the complaint raises questions of impartiality rather than independence proper. The existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test, that is to say whether the judge held any personal prejudice or bias in a given case, and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia*, the *Fey v. Austria* judgment of 24 February 1993, Series A no. 255, p. 12, §§ 27, 28 and 30).

As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary. Under the objective test, when determining whether there were ascertainable facts capable of raising doubts as to the impartiality of a judge, even appearances may be of a certain importance.

In the present case there is no reason to doubt the personal impartiality of Judge P in the absence of any proof.

As regards his objective impartiality, the Court observes that the decision of 29 January 1998 concerned only the issue whether two judges had been partial. Judge P's participation in that decision had thus no bearing on his assessment in the embezzlement case. Accordingly, Judge P's impartiality is not capable of being called into question on this ground.

As to the participation of Judge P in the decision of 23 August 1994, the Court observes that the issue concerning ownership of the shares had been finally settled when the Supreme Court refused the applicant leave to appeal on 5 June 1989. In those proceedings Judge P had neither taken a stand as to whether leave to appeal should be granted nor as to the merits of the case. In the embezzlement proceedings the applicant argued that he had a right to withhold the shares from the official receiver as the shares were security for his pecuniary claims. Having regard to the fact that the ownership issue was neither open for review nor even invoked by the applicant during the embezzlement trial, the Court does not find it established that there were objective grounds to call into question the impartiality of P in deciding the embezzlement case. Accordingly, there is no appearance of a violation of Article 6 § 1 in this respect either.

(b) Nor do the other facts complained of, namely the stand taken by the Supreme Court in the embezzlement case, disclose any appearance of a violation of the right to be tried by an independent and impartial tribunal.

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

B. Article 6 § 2 of the Convention

The applicant alleges a violation of the presumption of innocence in that he was convicted of an offence although the official receiver was not legally competent to institute criminal proceedings on behalf of the complainant company.

Article 6 § 2 provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Court recalls that, in accordance with Article 19 of the Convention, 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). The Court considers that the facts relied on in support of the applicant's complaint do not disclose any appearance of a violation.

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

C. Article 6 § 3 of the Convention

The applicant makes various complaints under Article 6 § 3 (a), (b) and (d) of the Convention.

Article 6 § 3 provides in relevant part:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

The Court recalls that Article 35 § 1 of the Convention provides that it may only deal with a matter after all domestic remedies have been exhausted. In the present case, the applicant has not raised the complaints in question before the domestic courts.

It follows that these complaints must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

D. Article 7 of the Convention

The applicant complains, under Article 7 of the Convention, that he has been convicted of an offence on account of an act which did not constitute a criminal offence at the time when it was committed.

Article 7 § 1 of the Convention provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Court recalls its reasoning above according to which 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.

The Court considers that the applicant's complaint is, essentially, that he was wrongfully convicted by the Supreme Court. The facts relied on in support of this complaint do not disclose any retrospective imposition of a criminal offence or penalty within the meaning of Article 7 of the Convention.

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

For these reasons, the Court by a majority

Declares admissible, without prejudging the merits, the applicant's complaint concerning the length of the criminal proceedings;

Declares the remainder of the application inadmissible.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President