AS TO THE ADMISSIBILITY OF

Application No. 18686/91
by Kai OJANEN
against Finland

The European Commission of Human Rights sitting in private on 31 March 1993, the following members being present:

MM. J.A. FROWEIN, President of the First Chamber
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER

Mrs. M.F. BUQUICCHIO, Secretary to the First 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 18 October 1990 by Kai OJANEN against Finland and registered on 19 August 1991 under file No. 18686/91;

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 1944 and resident in Helsinki. He is retired.

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

Particular circumstances of the case

On 10 December 1987 the applicant's attorney (oikeudenkäynti-asiamies, rättegångsombud) requested that criminal charges be brought against the applicant, alleging that he had been insulted by the applicant over the telephone.

On 26 January 1989 the City Court (raastuvanoikeus, rådstuvu-rätten) of Helsinki convicted the applicant of continuous disturbance of domiciliary peace and insults and sentenced him to fines. The applicant was found to have insulted his attorney by telephoning him at work "on numerous occasions in 1987". Some telephone calls had reached the attorney directly and some had been taped by a telephone answering machine. The contents of two cassettes had been transcribed and included in the pre-trial record.

The City Court's reasoning was the following:

"[The applicant] has, on numerous occasions in 1987, called P. at his work place with a clear intention of disturbing him. (He has) thereby, either directly or by leaving messages on P.'s telephone answering machine, insulted P.

by very insulting expressions and threats."

At a hearing on 3 November 1988 the applicant had stated that he did not remember having made any of the telephone calls included in the pre-trial record. He admitted, however, having telephoned the attorney in regard to a commission and having used strong language (in Finnish "suorat sanat"). At the Public Prosecutor's request the trial was postponed in order to enable him to present further evidence in the form of recordings on the attorney's telephone answering machine. The applicant's request to be assisted by official counsel was rejected.

Also the attorney attended the first hearing.

At the second hearing on 26 January 1989 the Prosecutor presented the two cassettes, the contents of which had been transcribed and included in the pre-trial record. These were included in the Court's file. The applicant again denied the charges. He further requested that the tape recordings be played by the City Court and that the time when the calls allegedly made by him had taken place be specified, as the latter was of importance with regard to the period of limitation for the offences in question.

The attorney did not attend the second hearing.

The applicant, now represented by counsel, appealed against the City Court's judgment to the Court of Appeal (hovioikeus, hovrätten) of Helsinki, referring to his submissions before the District Court. He further stated that he had commissioned the attorney in 1985 for legal proceedings to begin in 1986. He had subsequently called the person in question a few times and also written to him, particularly in 1986, in order to obtain a settlement regarding the case for which the lawyer had been commissioned. However, only some of the applicant's letters had contained expressions referred to by the Prosecutor.

On 5 June 1990 the Court of Appeal rejected the appeal, finding no reasons for changing the City Court's judgment.

The applicant's request for leave to appeal to the Supreme Court (korkein oikeus, högsta domstolen) was rejected on 26 September 1990.

Relevant domestic law

The period of limitation for reporting to the prosecutor the offence of which the applicant was convicted is one year from the date when the complainant finds out about the offence and the perpetrator and two years for the prosecutor to bring charges (Chapter 8, Section 1, para. 1 and Section 6 of the Criminal Code (rikoslaki, strafflagen).

Courts shall see to it that cases are being thoroughly dealt with (Chapter 14, Section 4 of the Code of Judicial Procedure). Insofar as oral submissions to a court can be assumed to be of relevance, they shall be reproduced and immediately be read out. The party shall be asked whether he objects to the way in which his submission has been reproduced. Any remark not leading to an amendment to the minutes shall be noted in the minutes (Chapter 14, Section 5 of the Code of Judicial Procedure).

COMPLAINTS

The applicant complains that he did not receive a fair trial. The charges brought against him were not thoroughly examined by the courts. Although the messages recorded by the answering machine had been transcribed in the pre-trial record, no distinction had been made between the persons who had telephoned the applicant's former counsel. It was never exactly determined when the calls which had led to the applicant's conviction, had been made. Moreover, the prosecutor handed

the tape recordings over to the City Court in the applicant's absence, and these were neither played at a public hearing, although this was requested by the applicant, nor were they examined by the City Court in any other manner. The President of the City Court allegedly refused to show him the tape recordings and the telephone answering machine. In his observations of 6 May 1992 the applicant further complained that he was unable to challenge the complainant's allegations before the courts, as the case was decided in the complainant's absence.

The applicant further complains that nothing of his 3-4 minute-long oral submission to the City Court at its first hearing was reproduced in the court's minutes, for which reason he had to repeat his submission in writing at the second hearing; that at the second hearing the President refused to reply to his question why his oral submission had been left out from the minutes of the first hearing, as well as to his request that the tape recordings be played by the City Court; and that the events at the hearing were not reproduced in the minutes in the correct order. Thus, the City Court was in breach of Chapter 14, Sections 4 and 5 of the Code of Judicial Procedure.

The applicant finally complains of the lack of reasoning in the court decisions.

He invokes Article 6 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 18 October 1990 and registered on 19 August 1991.

On 10 January 1992 the Commission decided to request the respondent Government to submit their written observations on the admissibility and merits of the application. It further decided to refer the application to the First Chamber.

On 30 March 1992 the Government submitted their observations.

The applicant's observations in reply were submitted on 6 May 1992. Further observations were submitted by him on 10 January 1993.

THE LAW

The applicant complains of the way in which evidence was taken and assessed in his case, and, in particular, of the fact that the telephone calls recorded by the answering machine were not played at a public hearing for the purpose of establishing whether the calls for which he had been indicted had really been made by him. Moreover, the applicant was refused access to the recordings. In his observations of 6 May 1992 the applicant further complained that he was unable to challenge the complainant's allegations before the courts, as the case was decided in the complainant's absence.

The applicant further complains that nothing of his oral submission to the City Court at its first hearing was reproduced in the court's minutes, for which reason he had to repeat his submission in writing at the second hearing. He further alleges that at the second hearing the President of the City Court refused to reply to certain questions put by him, and that the events at the hearing were not reproduced in the minutes in the correct order. Thus, the City Court was in breach of Chapter 14, Section 5 of the Code of Judicial Procedure.

The applicant invokes Article 6 (Art. 6) of the Convention, which reads, in so far as it is relevant:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:
...
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 Government submit that the complaints are manifestly ill-founded. The tape recordings were admittedly handed over to the City Court in the applicant's absence. The courts found it more suitable for the purpose of a hearing that the tape recordings be transcribed and included in the pre-trial record. Part of their contents were, however, attached to the minutes from the first hearing before that court. The applicant had adequate time to comment on them during the second hearing as well as in his submissions to the courts of appeal. The applicant's defence was thereby not significantly impeded and the transcription of the recordings had the same effect as the playing of the tapes before the courts. Reference is made to the Gillow judgment (Eur. Court H.R., judgment of 24 November 1986, Series A no. 109, pp. 27-28, para. 71). The courts considered that the contents of part of the telephone calls linked them to the applicant's commission to the complainant. Those calls could be dated with some accuracy through indications in other telephone calls recorded.

The Government further submit that the telephone recordings as such were not the sole evidence forming the basis for the applicant's conviction. The courts further had regard to testimony by the complainant. Finally, the applicant himself, although denying having intended to disturb or insult the complainant, did admit having telephoned him on some occasions and having resorted to strong language. A more specific indication in the City Court's decision of the dates when the telephone calls forming the basis for the applicant's conviction had been made would have been irrelevant to the question whether part of the charges had been brought after the expiry of the period of limitation. The City Court's decision included the charges brought, a description of the offence, the legal provisions applied and the sanction imposed. This reasoning sufficiently informed the applicant of the court's assessment of the charges and the outcome of the case.

The Government finally point out that Chapter 14, Section 5 of the Code of Judicial Procedure provides Presiding Judges with a wide discretion when it comes to conducting hearings and determining the relevance of oral submissions for the purpose of reproducing them in the minutes. The failure of the Presiding Judge to have the applicant's oral submissions reproduced and to reply to the applicant's questions being matters which cannot be corrected in a later hearing, the complaint in this respect is, in the Government's view, incompatible ratione temporis.

The applicant contends that before the City Court he did admit having telephoned the complainant and having used "strong language". He had submitted, however, that he could not remember having made the calls transcribed in the pre-trial record. Although the City Court's reason for holding a second hearing was to enable the prosecution to present the tape recordings, the contents of the tapes presented at the second hearing had never been and were not shown to him and their contents in no way verified. The City Court thereby violated not just

the Convention but also Chapter 14, Section 4 of the Code of Judicial Procedure, which prescribes that courts shall carefully investigate matters before them. It cannot be excluded that someone else had disguised himself as the applicant when telephoning the complainant. The applicant chose not to comment on the transcription in the pre-trial record, as the Presiding Judge had refused to play the recordings. The appropriate time for such comments would have been after the recordings had been played to him.

The applicant refutes the Government's assertion that the transcriptions of the recordings indicated with sufficient clarity when the calls had been made. The call which did indicate the day and the month when it had been made did not, however, indicate the year.

The applicant further points out that he was not represented by counsel before the City Court. Moreover, the complainant was never heard by the City Court about the contents of the recordings. The refusal by the Presiding Judge to read out loud the parts of the applicant's oral submissions which had been reproduced in the court's minutes was clearly in breach of Chapter 14, Section 5 of the Code of the Judicial Procedure. The questions which the applicant put to the Presiding Judge and which remained unanswered were pertinent.

(i) The Commission first has to ascertain whether, and to what extent, it is competent ratione temporis to deal with the application. It recalls that in accordance with the generally recognised rules of international law, the Convention only governs, for each Contracting Party, facts subsequent to its entry into force with regard to that Party (see e.g. No. 9453/81, Dec. 13.12.82, D.R. 31 pp. 204, 208). In its case-law the Commission has held that, where the facts consist of a series of legal proceedings, the date of entry into force of the Convention in respect of the Contracting State in question has the effect of dividing the period in two, the earlier part escaping the Commission's jurisdiction ratione temporis, whereas a complaint relating to the latter part cannot be rejected on this ground. On the other hand, where a court gives judgment after the entry into force of the Convention, the Commission is competent to ensure that the proceedings leading up to this judgment were in conformity with the Convention as the proceedings before a court are embodied in its final decision which thus incorporates any defect by which they may have been affected (cf. No. 8261/78, Dec. 11.10.79, D.R. 18 p. 150, confirmed in No. 11306/84, Dec. 16.10.86, D.R. 50 p. 162; see further, as regards Finland, No. 17925/91, Dec. 8.10.91, unpublished).

In the present case the proceedings before the City Court of Helsinki terminated with the judgment of 26 January 1989, i.e. prior to 10 May 1990, which is the date of entry into force of the Convention with respect to Finland. These proceedings are therefore, as such, outside the competence of the Commission ratione temporis.

(ii) The Commission has next considered the application insofar as it pertains to the proceedings before the Court of Appeal of Helsinki and the Supreme Court.

The proceedings before the Court of Appeal started before the entry into force of the Convention with respect to Finland, i.e. prior to 10 May 1990, but terminated after that date, i.e. on 5 June 1990. The Commission is therefore competent to examine whether the proceedings before the Court of Appeal leading to the judgment rendered on the last-mentioned day were in conformity with the Convention, as the proceedings before the Court are embodied in its judgment which thus incorporates any defects by which they may have been affected. Also the proceedings before the Supreme Court are within the Commission's competence ratione temporis.

The Commission notes, however, that the applicant does not complain about the proceedings before the Court of Appeal or the

Supreme Court as such, but rather about the failure of those courts to rectify the alleged procedural errors made by the City Court. The question therefore arises whether the acceptance of these alleged errors by the higher courts can bring the alleged violations of Article 6 (Art. 6) into the Commission's competence.

The Government submit in this respect that "[t]he Court of Appeal of Helsinki had competence to examine the case of [the applicant] in full." Referring further to the fact that "[t]he City Court's decision [was] in a way included in the 'no change' decision of the Court of Appeal", as well as to the fact that the applicant raised all the alleged errors before the Court of Appeal and the Supreme Court, the Government conclude that

> "the procedural errors by the City Court committed before the entry into force of the Convention seem to fall within the competence of the Commission. It is the view of the Government that such [an] error, which has occurred before the entry into force of the Convention with regard to Finland, and which could not be corrected in any later hearing, is, however, beyond the competence ratione temporis of the Commission."

The Commission considers that, insofar as compatibility has been admitted by the Government, it is competent ratione temporis to examine the application. It is further not required to decide whether some of the complaints fall outside the Commission's competence for the reason stated by the Government, as the application is in any case inadmissible as a whole for the reasons stated below.

(ii) The Commission observes that in its examination of the case it is not required to take into account the fact that the applicant was unable to question the complainant before the City Court violates Article 6 (Art. 6) of the Convention, as it follows from Article 26 (Art. 26) of the Convention that the Commission may only entertain a complaint raised within a period of six months from the date of the final domestic decision. In this case, the Supreme Court's decision was rendered on 26 September 1990, while the particular complaint at issue was made on 6 May 1992, which is more than six months later. It follows that this part of the application has been lodged out of time and must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

(iii) As regards the remainder of the applicant's complaints the Commission recalls that the guarantees in paragraph 3 of Article 6 (Art. 6-3) of the Convention are specific aspects of the right to a fair trial enshrined in paragraph 1. The application should therefore be examined under the two provisions taken together (Eur. Court H.R., Eur. Court H.R., Artner judgment of 28 August 1992, para. 19, to be published in Series A no. 242-A).

The admissibility of evidence is primarily a matter of regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Convention organs' task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 26).

The Commission considers that the Gillow case referred to by the Government is distinguishable from the present one. True, the applicant in that case was refused access to tape recordings in order to verify whether they had been correctly transcribed. The recordings were, however, not evidence submitted to the first-instance court, but were recordings of the hearing before such a court and were, thus, the court's own material. The recordings at issue in the present application constituted an important part of the evidence submitted by the prosecution and leading to the applicant's conviction. The applicant was not present when the prosecutor submitted the tapes to

the City Court, nor were the tapes played in his presence before that court or during the pre-trial investigation. The applicant insisted that they should have been played before the City Court, in order to enable it to judge whether or not the telephone calls at issue had been made by him.

The Commission recalls that all the evidence in criminal proceedings must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument (cf. the above-mentioned Asch judgment, para. 27). Nevertheless, the Commission cannot find any appearance of a violation of Article 6 (Art. 6) because of the manner in which the City Court dealt with the recordings. Although the recordings were handed over to the City Court in the applicant's absence it is clear from his complaint that he was aware that this had been done. The contents of the recordings were reflected in the pre-trial record. Thus, they were available to the applicant, who had the possibility to comment on them before the courts.

The Commission further notes that the tape recordings were not the only evidence on which the conviction was based. In addition, the City Court took into account the testimony presented by the complainant, with whom the applicant was confronted at the first hearing before the City Court, as well as the statements by the applicant himself in which he admitted having made some telephone calls to the complainant and having used strong language in that connection.

The Commission notes that the City Court referred to the telephone calls as having been made "on numerous occasions in 1987". However, even assuming that some of the calls had been made in the very beginning of 1987, a specification of the dates when those had been made would not have affected the period of limitation, as the period of limitation as prescribed by Chapter 8, Sections 1 and 6 of the Criminal Code had, in any case, been complied with.

The Commission further observes that, while admittedly the applicant's oral submissions at the City Court's first hearing were not reproduced in the minutes, the applicant did not, at the second hearing, avail himself of the possibility to submit those observations in writing. Moreover, there is no indication that the refusal of the Presiding Judge to reply to the applicant's questions created inequality between the parties. In these circumstances the Commissions finds no appearance of a violation of Article 6 (Art. 6) of the Convention.

The Commission finally recalls that in exceptional circumstances the absence of reasons in a court decision may raise an issue as to the fairness of the procedure which is guaranteed by Article 6 para. 1 (Art. 6-1) of the Convention (e.g. No. 10857/84, Dec. 15.7.86, D.R. 48 pp. 106-153 at pp. 150-151; No. 8769/79, Dec. 16.7.81, D.R. 25 pp. 240-242 at p. 241). The national courts must indicate with sufficient clarity the grounds on which they have based their decision (Eur. Court H.R., Hadjianastassiou judgment of 16 December 1992, para. 33, to be published in Series A no. 252). Article 6 (Art. 6) does not require, however, that reasons given by a court should deal specifically with all points and arguments which may have been considered by one party to be essential to his case (the above-mentioned Application No. 10857/84, loc. cit.). In the assessment of the sufficiency of the reasoning under Article 6 (Art. 6) an important consideration is whether the reasons given by a lower court in a criminal case have made it possible for the accused to exercise usefully the rights of appeal available for him (the above Hadjianastassiou judgment, loc. cit.). Insofar as appeal instances are concerned, however, Article 6 (Art. 6) does not require that a court, when rejecting an appeal by reference to the reasoning given by a lower court, accompanies its decision by detailed reasons (No. 10733/84, Dec. 2.10.84, unpublished).

The Commission notes that in the present case the City Court's

decision, though brief, explained the proven facts, their legal qualification, the legal provisions applied and the sanction imposed. Although a more detailed reasoning might have been preferable from the applicant's point of view, the Commission finds that the reasoning by the City Court was sufficient for the purpose of enabling the applicant to exercise his right of appeal in a normal way.

True, the decision of the Court of Appeal was not accompanied by any other reasoning than a statement that there were no reasons for changing the City Court's judgment. However, as the Court of Appeal must be interpreted thereby to have fully accepted the reasoning by the City Court, the lack of detailed reasons in the Court of Appeal's decision raises as such no issue under Article 6 (Art. 6).

In the above circumstances the Commission cannot find any indication of a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

(iv) The applicant finally complains about the allegedly defective reasoning in the decision of the Supreme Court refusing him leave to appeal.

The Commission recalls, however, that proceedings leading to the refusal of leave to appeal do not involve a "determination" of a criminal charge (No. 19823/92, T. and S. v. Finland, Dec. 9.2.93, unpublished; cf., mutatis mutandis, No. 11855/85, Dec. 15.7.87, D.R. 53 p. 190 at pp. 199-200).

It follows that this part of the application must be rejected as being incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

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) — (J.A. FROWEIN)