AS TO THE ADMISSIBILITY OF

Application No. 19583/92
by Vesa PELTONEN
against Finland

The European Commission of Human Rights sitting in private on 20 February 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
I. BÉKÉS
J. MUCHA
D. SVÁBY
E. KONSTANTINOV
G. RESS

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 20 September 1990 by Vesa PELTONEN against Finland and registered on 4 March 1992 under file No. 19583/92; Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 22 December 1993, the observations in reply submitted by the

applicant on 17 March and 31 August 1994, the Government's additional observations submitted on 30 September 1994 and 3 February 1995 and the applicant's additional observations in reply of 9 November 1994 and 9 February 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Finnish citizen, born in 1970, and resident in Märsta, Sweden. He is a cleaner by profession. Before the Commission he is represented by Mr. Martin Scheinin, LL.D., Helsinki, Finland.

The facts of the case, as submitted on behalf of the parties, may be summarised as follows.

Particular circumstances of the case

The applicant has been permanently resident in Sweden since December 1986. On 29 June 1990 he requested a ten-year passport at the Finnish Embassy in Stockholm. On 20 July 1990 the Embassy informed the applicant that he could not be issued with a passport, as he had failed to attend the call-up for military service. In a final refusal of 10 September 1990 the Embassy referred to the fact that the applicant was wanted in Finland for not having attended a call-up. The Embassy did not rely on any specific provision of the 1986 Passport Act (passilaki 642/86, passlag 642/86) for the refusal. On 1 November 1990 the applicant was informed of his right to appeal against this decision.

In his appeal to the County Administrative Court (lääninoikeus, länsrätten) of Uusimaa, the applicant contended that he was wanted for an offence punishable with a maximum of six months' imprisonment and that, consequently, section 9, subsection 1(1) of the Passport Act was not applicable in his case.

The Embassy's refusal was upheld by the County Administrative Court on 22 January 1991 and by the Supreme Administrative Court (korkein hallinto-oikeus, högsta förvaltningsdomstolen) on 19 September 1991. Both courts considered that the refusal was lawful under Section 9, subsection 1(6) of the Passport Act. The County Administrative Court also stated that this provision did not violate the Convention.

Relevant domestic law

1. The constitutional duty to defend the country

Every Finnish citizen is obliged to participate in the defence of the country or to assist therein, as further described by law (section 75, subsection 1 of the 1919 Constitution Act (Suomen hallitusmuoto 94/19, Regeringsform för Finland 94/19)).

Under the 1950 Military Service Act (asevelvollisuuslaki 452/50, värnpliktslag 452/50) every Finnish male citizen is obliged to serve in the military (section 1). The punishment for failure to attend a call-up is either a fine or imprisonment of up to six months (section 40, subsection 1, as amended by Act no. 325/83).

After expiry of the year during which a person liable for military service turns thirty years of age he can no longer be called up to perform his service (section 27, subsection 3, as amended by Act no. 1169/88).

A person liable for military service shall attend a call-up if he has reached or will reach the age of eighteen during the year of the call-up or if, for instance, he has failed to attend a previous call-up despite his age (section 23, subsections 1 and 2, as amended by Act no. 1169/88 and in force at the relevant time, and section 24, as in force at the relevant time). According to the 1951 Military Service Decree (asetus asevelvollisuuslain soveltamisesta 63/51, förordning 63/51 ang. tillämpning av värnpliktslagen), a person liable for military service and resident abroad shall attend the call-up in the Finnish municipality where he was most recently residing (section 18).

2. Passport regulations

A Finnish citizen is entitled to a passport, unless otherwise is prescribed by law (section 3, subsection 1 of the Passport Act). A passport shall normally be issued for ten years (section 7, subsection 1). Under section 9, subsection 1 of the Passport Act a passport may be refused, inter alia, to the following persons:

- a person suspected of an offence punishable with more than one year's imprisonment, a person who is wanted as such a suspect or who is charged with such an offence (para. 1, as amended by Act no. 1037/88); or

- a person who is liable for military service and who is between seventeen and thirty years of age, unless he shows that his liability for military service does not constitute an obstacle to the issuing of a passport (para. 6).

Even if one of the above grounds for refusing a passport exists, regard shall be had to the importance for the passport applicant of travelling in view of his or her family life, state of health, subsistence, profession and other circumstances (section 10, subsection 1). For instance, if a ten-year passport is refused on one of the

above-stated grounds a passport of shorter validity may, nevertheless, be issued (section 8, subsection 1).

If the passport applicant is between seventeen and thirty years of age and has not yet performed his military service, he must show that his liability for military service is not an obstacle to the issuing of a passport. This may be done by submitting a so-called clearance certificate (esteettömyystodistus, hinderlöshetsintyg) or a certificate that he is exempted from military service (section 4 of the 1986 Passport Decree (passiasetus 643/86, passförordning 643/86)). If the passport application is lodged abroad a clearance certificate must be obtained from the police authority at his most recent domicile in Finland (cf. section 6).

3. Freedom of movement within the Nordic countries

Under an agreement between the Nordic countries, no passport is needed for a Nordic citizen travelling from one Nordic country to another (see, e.g., Finnish Treaty Series no. 17/54, as later amended).

COMPLAINTS

1. The applicant complains about the refusal to issue him with a Finnish passport, which prevents him from travelling outside the Nordic countries and thereby interferes with his freedom under Article 2 para. 2 of Protocol No. 4 to the Convention to leave any country. The applicant alleges that the passport refusal was not "in accordance with the law", as it was not foreseeable. He accepts that the refusal was aimed at securing "ordre public", but argues that it was not necessary in a democratic society for the purpose of achieving that aim. Instead of instituting criminal proceedings against him for draft evasion the authorities have imposed a de facto punishment consisting of a travel ban lasting until his thirtieth birthday (in the year 2000). The passport refusal is disproportional to the offence of draft evasion and the punishment prescribed therefor.

2. As far as the refusal to issue him with a passport is alleged to constitute a de facto punishment for draft evasion, the applicant also invokes Article 7 para. 1 of the Convention. Allegedly, Finnish law does not prescribe a travel ban as punishment for draft evasion.

3. The applicant finally complains that he was denied a fair hearing of his case. He submits that the County Administrative Court, without first hearing him either orally or in writing, rejected his appeal on another ground than that on which the Embassy's refusal had been based and which he had challenged in his appeal. The Supreme Administrative Court further upheld the reasoning of the County Administrative Court allegedly without hearing the applicant. In this respect, the applicant invokes Article 6 para. 1 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 September 1990 and registered on 4 March 1992.

On 11 October 1993 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit written observations on the admissibility and merits thereof.

The observations were submitted by the respondent Government on 22 December 1993. Observations in reply were submitted by the applicant on 17 March and 31 August 1994. The Government submitted additional observations on 30 September 1994 and 3 February 1995. Additional observations in reply were submitted by the applicant on 9 November 1994 and 9 February 1995.

THE LAW

1. The applicant complains of the refusal to issue him with a passport which prevents him from travelling outside the Nordic countries and thereby interferes with his freedom under Article 2 para. 2 of Protocol No. 4 (P4-2-2) to the Convention to leave any country. The relevant part of Article 2 of Protocol No. 4 (P4-2) reads as follows:

> "2. Everyone shall be free to leave any country, including his own.
>
> 3. No restrictions shall be placed on the exercise of [the above right] other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In their observations of 22 December 1993 the Government, referring to Article 27 para. 1 (b) (Art. 27-1-b) of the Convention, drew the Commission's attention to the fact that the applicant's brother has submitted a communication with contents similar to those of the present case to the United Nations Human Rights Committee in accordance with the Optional Protocol to the Covenant on Civil and Political Rights.

The Government furthermore accept that the refusal to issue the applicant with a passport interfered with his freedom under Article 2 of Protocol No. 4 (P4-2). They consider, however, that it was justified under para. 3 of that provision. The refusal was in accordance with the law, since the provision invoked by the administrative courts was

accessible, sufficiently precise and thus foreseeable. The refusal further had the legitimate aim of securing that the applicant would perform his duty as a male Finnish citizen to serve in the military and was therefore necessary primarily for the maintenance of "ordre public". The Government underline that the applicant has consistently failed to attend a call-up. The passport refusal is not, by definition, valid until the year 2000, since a passport could be issued, if the applicant would perform his military service. Furthermore, in accordance with a Nordic agreement the applicant can travel freely within the Nordic countries. Moreover, in his passport application or subsequent appeals he made no reference to any of the particular grounds mentioned in section 10 of the Passport Act allowing for an exemption from the general rule under Section 9, subsection 1(6) implying that a passport shall not be issued to a person in his situation.

The Government also point out that the passport refusal is not a substitute for possible criminal proceedings which could be instituted, should the applicant return to Finland and be caught by the police. Criminal proceedings cannot, however, be instituted during his absence from Finland, as he cannot be extradited for the offence of failing to attend a call-up.

In the above circumstances the Government consider that the passport refusal was proportional to the aim sought to be achieved, having regard to the particularly wide margin of appreciation which should be afforded to the State in matters concerning national defence.

The applicant maintains his complaint and refers, in particular, to the circulars issued by the Ministry for Foreign Affairs in regard to the interpretation of the Passport Act. He considers that this shows that the passport refusal in his case was not foreseeable and thus was not in accordance with the law. Moreover, since the refusal has not prevented him from continuing to reside in another Nordic country it is not an effective way of enforcing the obligation to perform military service. It cannot therefore be considered "necessary in a democratic society" for the aim pursued. Finally, while stating, in his application, that he would need a passport for holiday travelling, the applicant has later, in his observations of 17 March and 31 August 1994, emphasised that he would need freedom of movement outside the Nordic countries also for employment purposes.

The Commission recalls that under Article 27 para. 1 (b) (Art. 27-1-b) of the Convention it shall not deal with any petition submitted under Article 25 (Art. 25) which is, inter alia, substantially the same as a matter which has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information. It is true that the freedom guaranteed by Article 2 para. 2 of Protocol No. 4 (P4-2-2) resembles that protected by Article 12 of the International Covenant on Civil and

Political Rights, which entered into force with regard to Finland in 1976. The Commission recalls, however, that if the complainants before the Commission and, for instance, the United Nations Human Rights Committee are not identical, the complaint to the Commission cannot be considered as being substantially the same as the communication to the Committee (cf. No. 11603/85, Dec. 20.1.87, D.R. 50 pp. 228-258, at p. 237). The Commission is therefore called upon to deal with the complaint.

The Commission observes that the refusal to issue the applicant with a Finnish passport has not prevented him from leaving that country, nor is it preventing him from leaving a Nordic country for another Nordic country. Article 2 para. 2 of Protocol No. 4 (P4-2-2) provides, however, that everyone shall be free to leave "any country", which implies a right to leave for such a country of the person's choice to which he may be admitted. The Commission therefore considers that the passport refusal interfered with this freedom of the applicant. It remains to be examined whether the interference was justified under para. 3 of Article 2 (Art. 2-3).

The Commission accepts that the passport refusal was "in accordance with the law", it being based on Section 9, subsection 1 (6) of the Passport Act. The Commission further considers, and it is not in dispute between the parties, that the refusal had the legitimate aims of maintaining "ordre public" and ensuring national security.

As for the question whether the refusal was proportional to such an aim, the Commission observes that instead of refusing the requested ten-year passport the authorities could, of their own motion, have issued the applicant with a passport of a shorter validity. The Commission further notes that before the domestic courts the applicant did not invoke any particular grounds warranting a departure from the general rule under which a passport could be refused to a person liable for military service who has failed to show a so-called clearance certificate. The passport refusal is, moreover, not, by definition, valid until the applicant's thirtieth birthday in the year 2000. He is free to lodge a fresh passport request at any time, invoking, if he so wishes, such particular grounds as prescribed in section 10 of the Passport Act. Like the Government, the Commission also considers that Contracting States are entitled to a wide margin of appreciation in the organisation of their national defence.

The Commission therefore concludes that in the particular circumstances of this case the refusal to issue the applicant with a ten-year passport could reasonably be considered necessary in a democratic society for the purposes of pursuing the above aims. Accordingly, there is no appearance of a violation of Article 2 para. 2 of Protocol No. 4 (P4-2-2).

It follows that this complaint must be rejected as being

manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. As far as the refusal to issue him with a passport is alleged to constitute a de facto punishment for his draft evasion, the applicant also invokes Article 7 para. 1 (Art. 7-1) of the Convention. Article 7 (Art. 7) of the Convention reads as follows:

> "1. 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.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

The Government consider that, although "in general terms" all domestic remedies have been exhausted, this complaint was not raised in substance before the domestic courts. Under Article 26 (Art. 26) of the Convention the Commission is therefore prevented from examining it. In the alternative, the Government submit that Article 7 (Art. 7) does not apply.

The applicant contends that his de facto punishment by virtue of the passport refusal had no basis in the Constitution Act or the Military Service Act.

Even assuming that the applicant has exhausted the domestic remedies in regard to the present complaint, as required by Article 26 (Art. 26) of the Convention, the Commission considers that the refusal to issue him with a passport is not tantamount to a conviction of a "criminal offence" within the meaning of Article 7 para. 1 (Art. 7-1). Article 7 (Art. 7) is therefore not applicable.

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).

3. The applicant finally complains that he was denied a fair hearing of his case, contrary to Article 6 para. 1 (Art. 6-1) of the Convention which, as far as relevant, reads as follows:

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

The Government primarily submit that Article 6 para. 1 (Art. 6-1) is inapplicable in the instant case. Whilst accepting that there was a dispute regarding a "right" of the applicant, they claim that this right was not of a "civil" character. Should the Commission find otherwise, the Government refer to their reservation to the Convention which excludes a right to an oral hearing insofar as current Finnish laws do not provide such a right, as in the present case. As for the other aspects of the applicant's right to a fair hearing the Government argue that the complaint is manifestly ill-founded.

The applicant contends, in particular, that his right to travel abroad falls within the ambit of Article 6 para. 1 (Art. 6-1). Moreover, Finland's reservation to the right to an "oral" hearing does not exclude the applicant's right to a "fair" hearing, assessing the proceedings at issue as a whole.

The Commission must ascertain whether Article 6 para. 1 (Art. 6-1) of the Convention is applicable in the instant case and, first of all, whether there was a dispute over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law (e.g., Eur. Court H.R., Zander v. Sweden judgment of 25 November 1993, Series A no. 279-B, p. 38, para. 22). The term "right" must be given an autonomous interpretation under Article 6 para. 1 (Art. 6-1) of the Convention (e.g., Eur. Court H.R., König judgment of 28 June 1978, Series A no. 27, pp. 29-30, para. 88).

The Commission recalls that this case does not primarily concern the applicant's freedom to leave his country of nationality. However, even assuming that the applicant could arguably claim, as a citizen of Finland, a personal and individual "right" to a passport of that country, the Commission cannot find that this right was "civil", given that it was not as such of a pecuniary or otherwise of a private law character (cf., mutatis mutandis, No. 7902/77, Dec. 18.5.77, D.R. 9 p. 224 and, e.g., Eur. Court H.R., Salesi judgment of 26 February 1993, Series A no. 257-E, pp. 59-60, para. 19). Accordingly, Article 6 para. 1 (Art. 6-1) does not apply.

It follows that this complaint is also 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 Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)