



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF KUOPILA v. FINLAND

(Application no. 27752/95)

JUDGMENT

STRASBOURG

27 April 2000

FINAL

27/07/2000

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subject to editorial revision.

In the case of Kuopila v. Finland,

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

Mr G. RESS, *President*,
Mr M. PELLONPÄÄ,
Mr A. PASTOR RIDRUEJO,
Mr L. CAFLISCH,
Mr J. MAKARCZYK,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 6 April 2000,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 27752/95) against the Republic of Finland lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Finnish national, Ms Kaija Kuopila (“the applicant”), on 23 November 1994.

2. The applicant, who was granted legal aid, was represented by Mr Markku Fredman, a lawyer practising in Helsinki (Finland). The Finnish Government (“the Government”) were represented by their Agent, Mr Holger Rotkirch, Director General for Legal Affairs of the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that she was not afforded a fair trial, within the meaning of Article 6 § 1 of the Convention, due to the fact that a statement from the National Gallery of Finland was withheld from her in the proceedings before the Court of Appeal.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 1 June 1999, the Chamber declared the application admissible.

7. The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*). The parties also made submissions concerning a possible friendly settlement. The Court, however, now finds that there is no basis on which such a settlement can be effected.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a Finnish national, born in 1927 and living in Uusikaupunki. She is an art dealer. At the beginning of November 1990, she obtained through a transfer of a sales commission a painting that was to be sold by the end of November. A statement of 1955, according to which the painting was an authentic work of Helene Schjerfbeck (a famous Finnish artist), was attached on the back of the painting.

9. On 9 April 1991, the original owner of the painting reported to the police that the applicant had refused to return the painting despite the expiry of the sales commission and his repeated requests. He considered that a crime had been committed. Subsequently, a police investigation was initiated. The police questioned the applicant and the original owner of the painting. As it appeared that the applicant had sold the painting to a third person, the police questioned him, too. Furthermore, the painting was seized.

10. The applicant was charged with aggravated fraud and aggravated embezzlement, committed concurrently, contrary to chapter 28, section 5 (1), and chapter 36, section 2 (1), of the Criminal Code (*rikoslaki, strafflag*). According to the indictment, the applicant had on 14 April 1991 stolen the painting, worth at least 250,000 Finnish marks (FIM), entrusted to her, by selling it to a third person, deceitfully as her own, for FIM 250,000. Her intention had been to obtain an unjust pecuniary advantage, and the action had caused financial loss to the buyer. The Prosecutor considered that both the embezzlement and the fraud were aggravated in particular since the property in question was very valuable and since considerable benefit had been sought.

11. On 26 September 1991 the court proceedings in the District Court (*kihlakunnanoikeus, häradsrätten*) of Hyvinkää commenced. The court ordered that the painting remain seized. The court heard the applicant, the original owner and the buyer. The applicant pleaded not guilty to the above-mentioned charges, claiming that there was only a dispute over the ownership and payment of the painting. Furthermore, three witnesses were

questioned relating to the circumstances of the sales commission and the applicant's business activities. Later, the applicant was accused of four additional counts of embezzlement and fraud.

12. On 20 February 1992, the applicant, who now had doubts as to whether the painting was authentic, requested the court to authorise and order the examination of its authenticity. The District Court ruled, as far as relevant, as follows:

(Translation)

"... the examination of the authenticity of the painting at this stage does not concern [the applicant's] interests and rights and thus the request concerning such an interlocutory decision cannot be complied with. ..."

13. On 7 May 1992, the District Court convicted the applicant on all five charges brought against her, i.e. also on the charge of aggravated embezzlement and aggravated fraud now at issue. The court sentenced her to imprisonment totalling two years and six months. The seizure of the painting was lifted, and the court ordered that it be returned to the estate of the buyer.

14. On 5 June 1992, the applicant appealed to the Court of Appeal (*hovioikeus, hovrätten*) of Helsinki requesting that she be acquitted or her sentence be reduced. She submitted that the first charge had led to the other four charges. She stated that she would attempt to obtain new evidence concerning the authenticity of the painting and requested that an oral hearing be held or that the case be returned to the District Court in case such new evidence appeared.

15. On 13 July 1992, the applicant, represented by counsel, requested the Prosecutor to order an investigation into the authenticity of the painting. Following her request an investigation was initiated. The police obtained from the National Gallery of Finland a statement, dated 15 September 1992, according to which the painting was not authentic. On 21 October 1992, the police questioned the original owner of the painting. The applicant was not questioned.

16. On 2 August 1993, the Prosecutor submitted a supplementary police report, including the National Gallery's statement, to the Court of Appeal. In the accompanying letter the Prosecutor asked the Court of Appeal to take the report into account by virtue of chapter 26, section 5, of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalk*). The Prosecutor found that, from the angle of criminal law, the non-authenticity of the painting did not essentially affect the assessment of the case. He stated further that the police had made attempts in order to question the applicant but they had not been able to reach her. The Prosecutor did not specify these attempts any further.

17. On 14 September 1993, the Court of Appeal upheld the judgment of the District Court without inviting the applicant to submit comments or

holding an oral hearing. Furthermore, neither the original owner nor the estate of the buyer were heard. The court did not make any separate decision as to whether the supplementary police report had been taken into account as evidence or not. The Court of Appeal approved the District Court's reasoning without making any changes to it and, consequently, in its own reasoning it did not in any way mention the content of the supplementary police report or of the National Gallery's statement.

18. The applicant found out about the above-mentioned National Gallery's statement in the autumn of 1993. Following her request, the Prosecutor sent it to her on 12 November 1993.

19. On 14 November 1993, the applicant, assisted by counsel, requested leave to appeal to the Supreme Court (*korkein oikeus, högsta domstolen*). She referred to the fresh statement and maintained that if this information had been available in the lower courts the outcome of the case would have been a different one. She invoked the concept of a fair trial guaranteed by human rights conventions.

20. In his comments to the Supreme Court the Prosecutor stated that the authenticity of the painting was not relevant for the assessment of the criminal case at issue.

21. On 24 May 1994, the Supreme Court on 24 May 1994 refused the applicant leave to appeal.

22. On 14 April 1995, the applicant lodged a petition with the Parliamentary Ombudsman (*eduskunnan oikeusasiamies, riksdagens justitieombudsman*) concerning the Prosecutor's failure to communicate to her the police report concerning the authenticity of the painting.

23. On 22 July 1996, the Deputy Parliamentary Ombudsman (*apulaisoikeusasiamies, biträdande justitieombudsman*) found that the Prosecutor, by failing to communicate the supplementary police report to the applicant or her representative, had shown negligence in respect of his official duties. The Deputy Parliamentary Ombudsman took into account that the supplementary police investigation concerned the value of the painting, this being an important element when considering the nature of the offence and the punishment thereupon. As a result, the Deputy Ombudsman addressed a critical remark (*huomautus, anmärkning*) to the Prosecutor.

24. The applicant served two thirds of the total thirty months imprisonment, which means that she spent one year and eight months in prison.

II. RELEVANT DOMESTIC LAW

25. According to chapter 26, section 5, of the Code of Judicial Procedure, the court of appeal may take into account a written pleading or other documents submitted to it after a time-limit has expired if special grounds therefor exist. If the pleading or document can affect the outcome of the case the court of appeal is obliged, under section 6, to request the parties to give written comments, if such a measure is not considered to be manifestly unnecessary.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

26. The applicant complained that she was not afforded a fair trial due to the fact that vital evidence, in this case the statement from the National Gallery of Finland, was withheld from her. She invoked Article 6 of the Convention, which provides, in so far as relevant:

“1. In the determination of ... 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 ... facilities for the preparation of his defence;...”

27. The applicant stressed the importance of procedural equality of the parties and the adversarial principle. A party must have an opportunity to present his case in circumstances which do not put him at a disadvantage vis-à-vis the other party. In the present case, the prosecutor had communicated the additional police investigation to the applicant on 12 November 1993, when the Court of Appeal’s judgment had already been given. As the Supreme Court refused the applicant leave to appeal and did not return the matter to a lower court to be re-examined, the applicant had no opportunity to present her view to any domestic courts. Thus, the applicant received a copy of the relevant statement only when all the domestic proceedings on the merits had already come to an end.

28. The applicant further stressed that both the prosecution and court had a copy of the statement. It is not important whether the statement influenced the Court of Appeal's decision or whether that court mentioned the statement or the supplementary investigation in its decision. Important is the fact that the applicant was given no opportunity to refer to the statement in her defence under the same conditions as the prosecutor. It cannot fulfil the requirements of a fair trial if a prosecutor or a judge is left to decide whether a statement or another document is regarded important enough to be communicated to another party of the proceedings. It is a matter for the defence to assess whether a submission deserves a reaction.

29. The applicant also considered that the Court of Appeal should have addressed the statement in its judgment. The issue would clearly have been decisive as the statement proved that the applicant had not stolen or sold a painting worth FIM 250,000. The real value of the painting is only the value of its frame, i.e. about FIM 2,000. With reference to the Court's judgment in the case of Ruiz Torija (the Ruiz Torija v. Spain judgment of 9 December 1994, Series A no. 303-A, § 30) the applicant maintained that, in the absence of such a reply, it is impossible to ascertain whether the Court of Appeal simply neglected to deal with the statement or whether it intended to dismiss it and, if the latter was the case, why. If the Court of Appeal had taken into consideration that the object of the crime was only a fake painting, the total punishment for the applicant for all her crimes would have been less severe.

30. Finally, the applicant argued that the domestic courts' margin of appreciation to decide how to assess the evidence submitted to them does not mean that the national courts can freely decide which part of the documents submitted to the court by a party should or should not be communicated to the other party. Accordingly, the applicant maintained that her right to a fair trial under Article 6 of the Convention was violated.

31. According to the Government, the Court of Appeal considered the National Gallery's statement irrelevant to the resolution of the case pending before it and that, therefore, the communication of the statement to the applicant was unnecessary. The Government pointed out that the Court of Appeal neither changed the District Court's decision nor mentioned the supplementary report in its own decision. The question of whether the painting was genuine or not was of no significance for the outcome of the domestic proceedings.

32. The Government also pointed out that the applicant had the opportunity to submit to the Supreme Court the question of the relevance of the authenticity of the painting, and that she did so. Also the prosecutor referred to this question in his reply to the Supreme Court.

33. The Government emphasised the power of the domestic courts freely to evaluate the relevance and significance of documents sent to them.

34. As the requirements of Article 6 § 3 are specific aspects of the right to a fair trial guaranteed by Article 6 § 1 (see, *inter alia*, the Pullar v. the United Kingdom judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, § 45; and the Foucher v. France judgment of 18 March 1997, *Reports* 1997-II, § 30), the Court will examine the complaints under Article 6 § 1 and Article 6 § 3 taken together.

35. The Court notes that the supplementary police report, including the National Gallery's statement concerning the authenticity of the painting, was submitted to the Court of Appeal by the prosecutor only about a month before it delivered its judgment. The latter did not refer to that report in its reasoning. Whether the Court of Appeal put any emphasis on the report in its assessment of the case is not known. The Court finds, however, that this is not decisive from the point of view of the applicant's right to adversarial proceedings.

36. The Court observes that in his accompanying letter the prosecutor expressly asked the Court of Appeal to take the report into account, despite the expiry of the relevant time-limit. Furthermore, he went on to state as his own opinion that the report was not relevant for the outcome of the criminal case. Neither the supplementary police report nor the prosecutor's opinion as regards its relevance were communicated to the applicant.

37. The Court recalls that under the principle of equality of arms, as a feature of the wider concept of a fair trial (see, among other authorities, the Borgers v. Belgium judgment of 30 October 1999, Series A no. 214-B, § 24), each party must be afforded a reasonable opportunity to present one's case in conditions that do not place him at a disadvantage *vis-à-vis* to his opponent (see the Bulut v. Austria judgment of 22 February 1996, *Reports* 1996-II, § 47).

38. In the instant case, the prosecutor had expressed his opinion on the relevance of the report to the Court of Appeal, thereby intending to influence the court's judgment. The Court considers that procedural fairness required that the applicant too should have been given an opportunity to assess the relevance and weight of the supplementary police report and to formulate any such comment as she deemed appropriate. It is also noted that the applicant had requested a supplementary investigation and that throughout the proceedings she had considered it to be important.

In the light of these considerations, the Court finds that the procedure did not enable the applicant to participate properly and in conformity with the principle of equality of arms in the proceedings before the Court of Appeal.

Accordingly, there has been a violation of Article 6 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

40. The applicant claimed FIM 200,000 as just satisfaction for non-pecuniary damage for suffering, distress and feelings of injustice caused by the alleged violation as well as compensation for the time she had to stay in prison because of the judgment of the Court of Appeal. According to her, her sentence would have been six months shorter if the fact that the painting was fake had been taken into account.

41. The Government replied that the Court cannot speculate about what would have been the outcome of the domestic proceedings had the statement concerning the painting's non-authenticity been communicated to the applicant. No causal link between the non-communication and the applicant's imprisonment can therefore be established.

42. Since the Court, as noted by the Government, cannot speculate about the outcome of the trial had it been in conformity with Article 6, an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of that Article. The Court accepts that the lack of such guarantees has caused the applicant, who was sentenced to unconditional imprisonment, non-pecuniary damage which cannot be made good by the mere finding of a violation. The Court, making its assessment on an equitable basis, awards the applicant FIM 15,000 in respect of non-pecuniary damage.

B. Costs and expenses

43. The applicant sought a total of FIM 51,021.20 in respect of her costs relating to her representation before the European Commission of Human Rights and the Court, including FIM 12,200 for the applicant's first legal counsel, Mr Matti Nurmela, for preparing the application to the Commission of Human Rights; FIM 27,502.20 for the applicant's present counsel, Mr Markku Fredman, involving the applicant's observations on the admissibility and merits of the case and the submission of further observations to the Court and counselling in the friendly settlement negotiations; and FIM 11,616 for an expert's opinion concerning the calculation of the alleged length of the applicant's imprisonment had the

real value of the painting been taken into account in the Court of Appeal's judgment.

44. The Government maintained that the expert opinion and the related parts of Mr Fredman's invoice (at least FIM 1,000) cannot be taken into account in the assessment of the applicant's claims. The Government also considered the applicant's claims concerning the two lawyers' fees, together FIM 39.405,20, somewhat excessive as regards the working hours. The Government considered a lump sum amounting to FIM 30,000, reduced by any sum already paid by the Council of Europe, as appropriate.

45. The Court has concluded above (§ 42) that, in accordance with its established case-law, it cannot speculate as to the outcome of the trial had the proceedings been in conformity with Article 6. In view of this, the costs incurred for the expert opinion cannot be regarded as having been necessarily incurred. Consequently, this part of the claim must be rejected.

Taking into account that there was no hearing before the Court, the Court finds the two lawyers' fees excessive. Making its assessment on an equitable basis, the Court awards the applicant FIM 30,000 in respect of the proceedings before the Commission and the Court and for domestic costs together with any relevant value added tax, from which must be deducted the FRF 5,100 already received for legal fees from the Council of Europe by way of legal aid.

C. Default interest

46. According to the information available to the Court, the statutory rate of interest applicable in Finland at the date of adoption of the present judgment is 10 % per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts: in respect of non-pecuniary damage 15,000 (fifteen thousand) Finnish marks and in respect of legal costs and expenses, 30,000 (thirty thousand) Finnish marks, together with any value-added tax that may be chargeable, less 5,100 (five thousand one hundred) French francs to be converted into Finnish marks at the rate applicable on the date of delivery of the present judgment;

(b) that simple interest at an annual rate of 10 % shall be payable from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 April 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President