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HUMAN RIGHTS COMMITTEE
Forty-sixth session

DECISIONS

Communication No. 387/1989

Submitted by : Arvo O. Karttunen
[represented by counsel]

Alleged victim : The author

State party : Finland

Date of communication : 2 November 1989 (initial submission)

Documentation references : Prior decisions - Special Rapporteur's rule 91 decision, transmitted to State party on 2 March 1990

(not issued in document form)

- CCPR/C/43/D/387/1989 (decision on admissibility, dated 14 October 1991)

Date of adoption of Views : 23 October 1992

On 23 October 1992, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 387/1989. The text of the Views is annexed to the present document.

[Annex]

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*/ Made public by decision of the Human Rights Committee.

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ANNEX */

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights
- Forty-sixth session -

concerning

Communication No. 387/1989

Submitted by :	Arvo O. Karttunen [represented by counsel]
Alleged victim :	The author
State party :	Finland
Date of communication :	2 November 1989
Date of decision on admissibility :	14 October 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 1992,

Having concluded its consideration of communication No. 387/1989, submitted to the Human Rights Committee by Arvo O. Karttunen under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

*/ An individual opinion by Committee member Mr. Bertil Wennergren is appended.

The facts as submitted by the author :

1. The author of the communication is Arvo O. Karttunen, a Finnish citizen residing in Helsinki, Finland. He claims to be a victim of violations by Finland of article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 The author was a client of the Rääkkyla Cooperative Bank, which financed his business activities through regular disbursement of loans. In July 1983, he declared bankruptcy, and on 23 July 1986, he was convicted on a charge of fraudulent bankruptcy by the Rääkkyla District Court and sentenced to thirteen months of imprisonment. The Itä-Suomi Court of Appeal (Court of Appeal for Eastern Finland) confirmed the judgment of first instance on 31 March 1988. On 10 October 1988, the Supreme Court denied leave to appeal.

2.2 Finnish district courts are composed of one professional judge and five to seven lay judges, who serve in the same judicial capacity as the career judge. The latter normally prepares the court's decision and presents it to the full court, which subsequently considers the case. The court's decisions are usually adopted by consensus. In the event of a split decision, the career judge casts the decisive vote.

2.3 In Mr. Karttunen's case, the court consisted of one career judge and five lay judges. One lay judge, V.S., was the uncle of E.M., who himself was a partner of the Säkhöjohto Ltd. Partnership Company, which appeared as a complainant against the author. While interrogating the author's wife, who testified as a witness, V.S. allegedly interrupted her by saying "She is lying". The remark does not, however, appear in the trial transcript or other court documents. Another lay judge, T.R., allegedly was indirectly involved in the case prior to the trial, since her brother was a member of the board of the Rääkkyla Cooperative Bank at the time when the author was a client of the bank; the brother resigned from the board with effect of 1 January 1984. In July 1986, the Bank also appeared as a complainant against the author.

2.4 The author did not challenge the two lay judges in the proceedings before the District Court; he did raise the issue

before the Court of Appeal. He also requested that the proceedings at the appellate stage be public. The Court of Appeal, however, after having reevaluated the evidence in toto, held that whereas V.S. should have been barred from acting as a lay judge in the author's case pursuant to Section 13, paragraph 1, of the Code of Judicial Procedure, the judgment of the District Court had not been adversely affected by this defect. It moreover found that T. R. was not barred from participating in the proceedings, since her brother's resignation from the board of the Rääkkyla Cooperative Bank had been effective on 1 January 1984, long before the start of the trial. The Court of Appeal's judgment of 31 March 1988 therefore upheld the lower court's decision and dismissed the author's request for a public hearing.

The complaint :

3.1 The author contends that he was denied a fair hearing both by the Rääkkyla District Court and the Court of Appeal, in violation of article 14, paragraph 1, of the Covenant.

3.2 The author claims that the proceedings before the Rääkkyla District Court were not impartial, since the two lay judges, V.S. and T.R., should have been disqualified from the consideration of his case. In particular, he claims that the remark of V.S. during the testimony of Mrs. Karttunen, amounts to a violation of article 14, paragraph 1, of the Covenant. In this context, he argues that while Section 13, paragraph 1, of the Code of Judicial Procedure provides that a judge cannot sit in court if he was previously involved in the case, it does not distinguish between career and lay judges. If the court is composed of only five lay judges, as in his case, two lay judges can considerably influence the court's verdict, as every lay judge has one vote. The author further contends that the Court of Appeal erred in finding that (a) one of the lay judges, T.R., was not disqualified to consider the case, and (b) the failure of the District Court to disqualify the other lay judge because of conflict of interest had no effect on the outcome of the proceedings.

3.3 Finally, the author asserts that article 14, paragraph 1, was violated because the Court of Appeal refused to examine the appeal in a public hearing, despite his formal requests. This allegedly prevented him from submitting evidence to the court and

from having witnesses heard on his behalf.

The State party's information and observations :

4.1 The State party concedes that the author has exhausted available domestic remedies but argues that the communication is inadmissible on the basis of article 3 of the Optional Protocol. In respect of the contention that the proceedings in the case were unfair because of the alleged partiality of two lay judges, it recalls the Court of Appeal's findings (see paragraph 3.2) and concludes that since the career judge in practice determines the court's judgment, the outcome of the proceedings before the Rääkkyla District Court was not affected by the participation of a judge who could have been disqualified.

4.2 Concerning the author's contention that the Court of Appeal denied him his right to a public hearing, the State party contends that the right to an oral hearing is not encompassed by article 14, paragraph 1, and that this part of the communication should be declared inadmissible ratione materiae , pursuant to article 3 of the Optional Protocol.

The Committee's admissibility decision :

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 During its 43rd session, the Committee considered the admissibility of the communication. While noting the State party's contention that the communication was inadmissible under article 3 of the Optional Protocol, it observed that the material placed before it by the author in respect of alleged irregularities in the judicial proceedings raised issues that should be examined on the merits, and that the author had made reasonable efforts to substantiate his claims, for purposes of admissibility.

5.3 On 14 October 1991, the Committee declared the communication admissible in respect of article 14 of the Covenant. It requested the State party to clarify, in particular: (a) how Finnish law

guarantees the impartiality of tribunals and how these guarantees were applied in the instant case, and (b) how domestic law safeguards the public nature of proceedings, and whether the procedure before the Court of Appeal could be considered to have been public.

The State party's observations on the merits :

6.1 In its submission on the merits, the State party observes that the impartiality of Finnish courts is guaranteed in particular through the regulations governing the disqualification of judges (Chapter 13, Section 1, of the Code of Judicial Procedure). These provisions enumerate the reasons leading to the disqualification of a judge, which apply to all court instances; furthermore, Section 9 of the District Court Lay Boards Act (No. 322/69) provides that the disqualification of district court lay judges is governed by the regulations on disqualification of judges. These rules suffer no exception: no one who meets any of the disqualification criteria may sit as judge in a case. The Court must, moreover, ex officio take the disqualification grounds into consideration.

6.2 The State party concedes that the proceedings before the Rääkkyla District Court did not meet the requirement of judicial impartiality, as was acknowledged by the Court of Appeal. It was incumbent upon the Court of Appeal to correct this procedural error; the court considered that the failure to exclude lay judge V.S. did not influence the verdict, and that it was able to reconsider the matter in toto, on the basis of the trial transcript and the recording thereof.

6.3 The State party concedes that the Court of Appeal's opinion might be challenged, in that the alleged improper remarks of V.S. could very well have influenced the procurement of evidence and the content of the court's decision. Similarly, since the request for a public appeal hearing was rejected by the Court of Appeal, it could be argued that no public hearing in the case took place, since the procedure before the District Court was flawed, and the Court of Appeal did not return the matter for reconsideration by a properly qualified District Court.

6.4 Concerning the issue of publicity of the proceedings, the State party affirms that while this rule is of great practical

significance in proceedings before the lower courts (where they are almost always oral), the hearing of an appeal before the Court of Appeal is generally a written procedure. Proceedings as such are not public but the documents gathered in the process are accessible to the public. Wherever necessary, the Court of Appeal may hold oral proceedings, which may be confined to only part of the issues addressed in the appeal. In the author's case, the Court of Appeal did not consider it necessary to hold a separate oral hearing on the matter.

6.5 The State party notes that neither the Committee's General Comment on article 14 nor its jurisprudence under the Optional Protocol provides direct guidance for the resolution of the case; it suggests that the interpretation of article 6 of the European Convention of Human Rights and Fundamental Freedoms may be used to assist in the interpretation of article 14 of the Covenant. In this context, the State party observes that the evaluation of the fairness of a trial in the light of article 14 of the Covenant must be made on the basis of an overall evaluation of the individual case, as the shortcomings in the proceedings before a lower court may be corrected through a hearing in the Court of Appeal. It is paramount that the principle of equality of arms be observed at all stages, which implies that the accused must have an opportunity to present his case under conditions which do not place him at a disadvantage in relation to other parties to the case.

6.6 The State party contends that while the Committee has repeatedly held that it is not in principle competent to evaluate the facts and evidence in a particular case, it should be its duty to clarify that the judicial proceedings as a whole were fair, including the way in which evidence was obtained. The State party concedes that the issue of whether a judge's possible personal motives influenced the decision of the court is not normally debated; thus, such motives cannot normally be found in the reasoned judgment of the court.

6.7 The State party observes that if the obvious disqualification of lay judge V.S. is taken into account, "neither the subjective, nor the objective test of the impartiality of the court may very well said to have been passed. It may indeed be inquired whether a trial held in th[ese] circumstances together with its documentary evidence may be regarded to such an extent reliable that it has been possible for

the court of appeal to decide the matter solely ... by a written procedure".

6.8 On the other hand, the State party argues, the author had indeed the opportunity to challenge the disqualification of V.S. in the District Court, and to put forth his case in both the appeal to the Court of Appeal and the Supreme Court. Since both the prosecutor and the author appealed against the verdict of the District Court, it could be argued that the Court of Appeal was in a position to review the matter *in toto*, and that accordingly the author was not placed in a position that would have significantly obstructed his defence or influenced the verdict in a way contrary to article 14.

6.9 The State party reiterates that the publicity of judicial proceedings is an important aspect of article 14, not only for the protection of the accused but also to maintain public confidence in the functioning of the administration of justice. Had the Court of Appeal held a public oral hearing in the case, or quashed the verdict of the District Court, then the flaw in the composition of the latter could have been deemed corrected. As this did not occur in the author's case, his demand for an oral hearing may be considered justified in the light of article 14 of the Covenant.

Examination of the merits :

7.1 The Committee is called upon to determine whether the disqualification of lay judge V.S. and his alleged disruption of the testimony of the author's wife influenced the evaluation of evidence by, and the verdict of, the Rääkkyla District Court, in a way contrary to article 14, and whether the author was denied a fair trial on account of the Court of Appeal's refusal to grant the author's request for an oral hearing. As the two questions are closely related, the Committee will address them jointly. The Committee expresses its appreciation for the State party's frank cooperation in the consideration of the author's case.

7.2 The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1. "Impartiality" of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in

ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14.

7.3 It is possible for appellate instances to correct the irregularities of proceedings before lower court instances. In the present case, the Court of Appeal considered, on the basis of the written evidence, that the District Court's verdict had not been influenced by the presence of lay judge V.S., while admitting that V.S. manifestly should have been disqualified. The Committee considers that the author was entitled to oral proceedings before the Court of Appeal. As the State party itself concedes, only this procedure would have enabled the Court to proceed with the reevaluation of all the evidence submitted by the parties, and to determine whether the procedural flaw had indeed affected the verdict of the District Court. In the light of the above, the Committee concludes that there has been a violation of article 14, paragraph 1.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 14, paragraph 1, of the Covenant.

9. In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to provide the author with an effective remedy for the violation suffered.

10. The Committee would wish to receive from the State party, within ninety days, information about any measures adopted by the State party in respect of the Committee's Views.

APPENDIX

Individual opinion pursuant to rule 94, paragraph 3, of the rules of procedure submitted by Committee member Mr. Bertil Wennergren, in respect of the Committee's Views on communication No. 387/1989 (Arvo O. Karttunen v. Finland)

Mine is not a dissenting opinion; I merely want to clarify my view on the Committee's reasoning in this case. Mr. Karttunen's case concerns procedural requirements before an appellate court in criminal proceedings. The relevant provisions of the Covenant are laid out in article 14, firstly the general requirements for fair proceedings in paragraph 1, secondly the special guarantees in paragraph 3. Paragraph 1 applies to all stages of the judicial proceedings, be they before the court of first instance, the court of appeal, the Supreme Court, a general court of law or a special court. Paragraph 3 applies only to criminal proceedings and primarily to proceedings at first instance. The Committee's jurisprudence, however, has found the requirements of paragraph 3 to be also applicable to review and appellate procedures in criminal cases, i.e. the rights to have adequate time and facilities for the preparation of the defence and to communicate with counsel of one's own choosing (article 14, paragraph 3(b)), to be tried without undue delay (article 14, paragraph 3(c)), to have legal assistance assigned in any case where the interests of justice so require and without payment by the accused if he does not have sufficient means to pay for it (article 14, paragraph 3(d)), to have free assistance of an interpreter if the accused cannot understand or speak the language used in court (article 14, paragraph 3(f)), and finally the right not to be compelled to testify against himself or to confess guilt (article 14, paragraph 3(g)). That all these provisions should, *mutatis mutandis*, also apply to review procedures is only normal, as they are emanations of a fair trial, which in general terms is required under article 14, paragraph 1.

Under article 14, paragraph 1, everyone is entitled not only to a fair but also to a public hearing; moreover, according to article 14, paragraph 3(d), the accused is entitled to be tried in his presence. According to the *travaux préparatoires* to the Covenant, the concept of a "public hearing" must be read against the background that in the legal system of many countries, trials take place on the basis of written documentation, which is deemed

not to place at risk the parties' procedural guarantees, as the content of all these documents can be made public. In my opinion, the requirement, in paragraph 1 of article 14, for a "public hearing" must be applied in a flexible way and cannot prima facie be understood as requiring a public oral hearing. I further consider that this explains why, at a later stage of the travaux préparatoires on article 14, paragraph 3(d), the right to be tried in one's own presence before the court of first instance was inserted.

In accordance with the Committee's case law, there can be no a priori assumption in favour of public oral hearings in review procedures. It should be noted that the right to be tried in one's own presence has not explicitly been spelled out in the corresponding provision of the European Convention on Human Rights (article 6, paragraph 3(c)). This in my opinion explains why the European Court of Human Rights, unlike the Committee, has found itself bound to interpret the concept of "public hearing" as a general requirement of "oral". The formulations of article 14, paragraphs 1 and 3(d), of the Covenant leave room for a case by case determination of when an oral hearing must be deemed necessary in review procedures, from the point of view of the concept of "fair trial". With regard to Mr. Karttunen's case, an oral hearing was in my view undoubtedly required from the point of view of "fair trial" (within the meaning of article 14, paragraph 3(d)), as Mr. Karttunen had explicitly asked for an oral hearing that could not a priori be considered meaningless.

Bertil Wennergren
November 1992

[Done in English, French, Russian and Spanish, the English text being the original version.]

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