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

FOURTH SECTION

CASE OF PABLA KY v. FINLAND

(Application no. 47221/99)

JUDGMENT

STRASBOURG

22 June 2004

FINAL

22/09/2004

In the case of Pabla Ky v. Finland,

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

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 16 December 2003 and 1 June 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 47221/99) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Finnish limited partnership company, Pabla Ky, ("the applicant company"), on 2 November 1998.

2. The applicant company was represented by Mr Hans Mannstén, a lawyer practising in Helsinki. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen, Director, Ministry of Foreign Affairs.

3. Relying on Article 6 § 1 of the Convention, the applicant company alleged that the court of appeal which had sat in the civil proceedings in which it was a party had not been independent or impartial since one of the judges was a member of parliament,.

4. 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.

5. By a decision of 16 September 2003, the Chamber declared the application admissible.

6. The applicant company and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant is a limited partnership company founded in 1986 and based in Helsinki.

8. The applicant company, which was running a restaurant in Helsinki, rented the restaurant premises from an insurance company, Keskinäinen Henkivakuutusyhtiö Suomi (KHS). In 1994 it was offered the opportunity to rent more premises, which would be renovated to be suitable for restaurant use. When the renovation was finished, the applicant company found that there were excessive toilet facilities and that part of the planned restaurant facilities were missing, especially those planned to be built in the cellar. The applicant company paid 251,000 Finnish marks (approximately 42,200 euros) for the renovation expenses and the monthly rent was raised considerably. The amended rent contract had been signed before the extension work commenced.

9. In 1997 the applicant company instituted civil proceedings against KHS before a Division of the Helsinki District Court (*käräjäoikeus, tingsrätt*) known as "the Housing Court" (*asunto-oikeus, bostadsdomstolen*). The applicant company claimed that there had been a breach of the rent contract, as the newly renovated facilities did not correspond to the original plan, on the basis of which the applicant company had signed the amended rent contract. KHS disagreed with the applicant company, arguing that even though there had originally been a plan to build restaurant facilities in the cellar, it had later proved to be impossible to build such an extension and that the applicant company had been aware of this before signing the contract (see paragraph 19 below).

10. On 17 September 1997 the Housing Court found in favour of the insurance company, rejecting the applicant company's action for compensation in accordance with the Act on Commercial Leases.

11. The applicant company appealed to the Helsinki Court of Appeal (*hovioikeus hovrätt*), requesting that the District Court's decision be quashed. On 11 December 1997 the Housing Court Division of the Court of Appeal upheld the District Court's decision without an oral hearing. One of the members of the Court of Appeal, M.P., was a member of the Finnish parliament at the time. He had been an expert member of the Court of Appeal since 1974. From 1987 to 1990 and from 1995 to 1998 he was also a member of parliament. For the latter period the date of election was 19 March 1995.

12. On 9 February 1998 the applicant company applied to the Supreme Court (*korkein oikeus, högsta domstolen*) for leave to appeal, complaining, *inter alia*, about the lack of independence of Judge M.P., who had both

legislative functions as a member of parliament and judicial functions as a member of the Court of Appeal. On 5 May 1998 the Supreme Court refused the applicant company leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

13. Under section 9 of the Parliament Act (*valtiopäiväjärjestys, riksdagsordning* 278/1983), which was in force in 1997, only certain military positions and certain high positions in the judiciary, as well as the duties of officials supervising the lawfulness of government activities, were incompatible with the duties of a member of parliament, but there were no such restrictions as regards membership of a court of appeal. That provision read as follows:

> "The Chancellor of Justice, the Assistant Chancellor of Justice, a Justice of the Supreme Court or of the Supreme Administrative Court, the Parliamentary Ombudsman and the Assistant Parliamentary Ombudsman may not hold the office of a representative. If a representative is appointed to one of the aforesaid offices or elected Parliamentary Ombudsman or Assistant Parliamentary Ombudsman, his parliamentary mandate shall expire."

This provision corresponds to the existing section 27 of the Constitution (*perustuslaki, grundlagen* 731/1999).

14. According to section 23 of the State Civil Servants Act (*valtion virkamieslaki, statstjänstemannalagen* 750/1994), a public official must be absent from office for the period of time he or she performs the duties of a member of parliament.

15. Under section 29(1) (504/1984) of the Act on Court Proceedings in Cases concerning Rental Matters (*laki oikeudenkäynnistä huoneenvuokra-asioissa, lag om rättegång i hyresmål* 650/1973), as in force at the relevant time, the court of appeal was required to consider appeals concerning rent contracts as a bench of three judges and two expert members, one of whom represented the views of landlords and the other the views of tenants. The expert members of the court of appeal were appointed by the President of the Republic for a period of four years. Members must be between 25 and 70 years old, and have full legal capacity (section 29(2)). Expert members were required to take an oath (section 31).

16. The Act on Court Proceedings in Cases concerning Rental Matters was repealed by Act no. 597/2002, which came into force on 1 January 2003. Expert members no longer take part in the proceedings before the district courts or courts of appeal. Instead, the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*) applies to the proceedings.

17. The provisions concerning the disqualification of judges are contained in Chapter 13, section 1, of the Code of Judicial Procedure. At the relevant time the said provision was worded as follows:

> "If the plaintiff or the defendant wishes to challenge a judge, he shall do so in a proper manner, and that judge shall decide whether or not to stand down. The following shall be the legal grounds for disqualification: where the judge is related by blood or marriage to one of the parties to a degree which would constitute a bar to marriage under Chapter 2 of the (1734) Marriage Code, including cousinship by blood although not by marriage; where the judge is the opposing party or a publicly known "enemy" of a party; where the judge or a listed relative has an interest in the case, where they stand to obtain particular benefit or suffer particular loss in it; where the judge has served as a judge in the case in another court; where the judge has served as an advocate or witness in the case; where the judge has previously, on the orders of a court, decided a part of the case; or where the judge has a similar case pending before another court. If the judge knows that such grounds exist in his regard, even though the parties are not aware of the same, the judge shall stand down of his own accord."

18. The provisions of Chapter 13 of the Code of Judicial Procedure concerning the impartiality of judges were amended by an Act (441/2001) which came into force on 1 September 2001. The government bill (HE 78/2000) contains an extensive account of the existing legislative provisions, the case-law of the European Court of Human Rights and precedents of the Supreme Court concerning the disqualification of judges. The amendment has not changed the Government's assessment of the present case.

19. The Act on Commercial Leases (*laki liikehuoneiston vuokrauksesta, lag om hyra av affärslokal* 482/1995) was presented as a government bill on 21 November 1994. It was adopted on 17 February 1995 and came into force on 1 May 1995.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

20. The applicant company complained about a lack of independence and impartiality as one of the expert members sitting on the Court of Appeal when it was determining its case was also a member of the Finnish parliament. The applicant company relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal..."

A. The parties' submissions

1. The applicant company

21. The applicant company submitted that while M.P. was a fully qualified member of the Court of Appeal, he was also a member of parliament. According to the theory of the separation of powers, a member of parliament should not act as a judge in an individual case since judicial and legislative powers should not be exercised by one and the same person. Thus a court of appeal in which a judge was a member of parliament could not be considered to be independent of the legislature. The applicant company argued that inclusion of members of parliament in the composition of judicial bodies disclosed serious structural problems.

22. The applicant company also pointed out that M.P. was a social democrat, as were the President and Prime Minister at the time. It submitted that social democrats considered their relations with insurance companies to be important and that Finnish judges generally favoured big companies as they wished to obtain arbitration assignments for lucrative fees.

2. The Government

23. The Government submitted that M.P. was one of the two expert members of the Court of Appeal, in a composition where the three other members of the court were professional judges and in the majority. The provisions in Chapter 13 of the Code of Judicial Procedure concerning the impartiality of judges were also applicable to expert members, who had to take an oath.

24. The Government noted, moreover, that the applicant company had not suggested that the parliament would have interfered in M.P.'s exercise of his duties as an expert member of the Court of Appeal. They considered that the position of a member of parliament was a position of trust which did not entail any statutory or other obstacle to prevent him or her from acting as an expert member of a court of appeal in cases concerning rental matters. M.P. had sat as a lay member in rental matters since 1974 and gained extensive expertise. The fact that he was a social democrat was of no relevance to the proceedings.

25. The Government emphasised the fact that the prerequisite for expert members is the same as for judges, that is, the expert member may not have a personal relationship with any party to the proceedings or with the case that would jeopardise his or her impartiality. The applicant company alleged that the group of insurance companies to which its adversary belonged offered funding and inexpensive lease contracts to members of parliament and that M.P. was partial because of this. The Government observed in this

respect that, according to the Court's constant case-law, a mere suspicion of partiality did not render M.P. partial. The applicant company had neither shown that M.P. rented an apartment from the opposite party, nor that he received any funding from them.

B. The Court's assessment

1. General principles

26. In order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1 of the Convention, regard must be had, *inter alia*, to the manner of appointment of its members and their terms of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence.

27. The "impartiality" requirement has two aspects. Firstly, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence that the courts in a democratic society must inspire in the public and above all in the parties to proceedings (see *Morris v. the United Kingdom*, no. 38784/97, § 58, ECHR 2002-I).

28. The concepts of independence and objective impartiality are closely linked, and the Court will accordingly consider both issues together as they relate to the present case (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 281, § 73, and *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 192, ECHR 2003-VI).

29. This case also raises issues concerning the role of a member of the legislature in a judicial context. Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV), neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question is always whether, in a given case, the requirements of the Convention are met. As in the other cases examined by the Court, the present case does not, therefore, require the application of any particular doctrine of constitutional law. The Court is faced solely with the question whether, in the circumstances of the case, the Court of Appeal had the requisite "appearance" of independence,

or the requisite "objective" impartiality (see *McGonnell v. the United Kingdom*, no. 28488/95, § 51, ECHR 2000-II, and *Kleyn and Others*, cited above, § 193).

30. Lastly, it should be borne in mind that in deciding whether in a given case there is a legitimate reason to fear that these requirements have not been met, the standpoint of a party is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see, *mutatis mutandis*, *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 21, § 48).

2. Application in the present case

31. The Court notes, first of all, that there is no indication that M.P. was actually, or subjectively, biased against the applicant company when sitting in the Court of Appeal in its case. The only issue is whether due to his position as a member of the legislature his participation cast legitimate doubt on the objective or structural impartiality of the court which decided the applicant company's appeal.

32. There is no objection *per se* to expert lay members participating in the decision-making in a court. The domestic legislation of the Council of Europe's member States affords many examples of tribunals in which professional judges sit alongside specialists in a particular sphere whose knowledge is desirable and even essential in settling the disputes (see, for example, *Ettl and Others v. Austria*, judgment of 23 April 1987, Series A no. 117, pp. 18-19, §§ 38-40, and *Debled v. Belgium*, judgment of 22 September 1994, Series A no. 292-B, p. 43, § 36). The Court observes that M.P. had sat on the Court of Appeal as an expert in rental matters since 1974 and had, in the Government's view, acquired considerable experience, permitting him to make a valuable contribution to the adjudication of these types of cases. The Court notes in that regard that two expert members sit alongside a majority of three judges in the composition of the court of appeal in such cases.

33. While the applicant company pointed to M.P.'s political affiliation, the Court does not find that there is any indication in the present case that M.P.'s membership of a particular political party had any connection or link with any of the parties in the proceedings or the substance of the case before the Court of Appeal (see, *mutatis mutandis*, *Holm v. Sweden*, judgment of 25 November 1993, Series A no. 279-A, pp. 15-16, §§ 32-33). Nor is there any indication that M.P. played any role in respect of the legislation which was in issue in the case. The Act on Commercial Leases had been submitted by the government for adoption by the parliament on 21 November 1994 and it had been adopted on 17 February 1995, before M.P. had been elected for his second term of office on 19 March 1995. Even assuming therefore that participation by a member of parliament in, for example, the adoption of a general legislative measure could cast doubt on later judicial functions,

it cannot be asserted in this case that M.P. was involved in any other capacity with the subject matter of the applicant company's case through his position as a member of parliament.

34. Accordingly, the Court concludes that, unlike the situation it examined in *Procola v. Luxembourg* (judgment of 28 September 1985, Series A no. 326) and *McGonnell* ,cited above, M.P. had not exercised any prior legislative, executive or advisory function in respect of the subject matter or legal issues before the Court of Appeal for decision in the applicant company's appeal. The judicial proceedings therefore cannot be regarded as involving “the same case” or “the same decision” in the sense that was found to infringe Article 6 § 1 in the two judgments cited above. The Court is not persuaded that the mere fact that M.P. was a member of the legislature at the time he sat on the applicant company's appeal is sufficient to raise doubts as to the independence and impartiality of the Court of Appeal. While the applicant company relies on the theory of separation of powers, this principle is not decisive in the abstract.

35. In these circumstances, the Court is of the opinion that the applicant company's fear as to lack of independence and impartiality of the Court of Appeal, due to the participation of an expert member who was also a member of parliament, cannot be regarded as being objectively justified. Consequently, there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

Holds by six votes to one that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 22 June 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Borrego Borrego is annexed to this judgment.

N.B.
M.O'.B.

DISSENTING OPINION OF JUDGE BORREGO BORREGO

(Translation)

I regret that I am unable to agree with the reasoning and the conclusion of the majority in the present case.

In my opinion, the separation of powers is an essential component of a State based on the rule of law and presupposes the separation of the relevant bodies.

As far back as 1980 the European Commission of Human Rights stated: "the term independent, appearing in Article 6 ... [means] that the courts must be independent both of the executive and of the parties..., and... the same independence must be established in respect of the legislature, i.e. Parliament" (see *Crociani and Others v. Italy*, nos. 8603/79, 8722/79, 8723/79 and 8729/79, Commission decision of 18 December 1980, Decisions and Reports 22, p. 220). Recently, the Court reiterated: "Article 6 § 1 of the Convention requires the courts to be independent not only of the executive and the parties but also of the legislature" (see *Filippini v. San Marino* (dec.), no. 10526/02, 26 August 2003).

For eight years, from 1987 to 1990 and from 1995 to 1998, M.P. was simultaneously a member of the Helsinki Court of Appeal and a member of the Finnish parliament. In December 1997 M.P., at the time a member of parliament, sat on the bench of the Court of Appeal that dismissed the applicant company's appeal.

Is it acceptable for a member of a national parliament to be able to act as a judge at the same time? The majority of the Chamber consider that it is: "this principle [of separation of powers] is not decisive in the abstract" (see paragraph 34 of the judgment). Having regard to the circumstances of the present case, the majority conclude that there has been no violation.

I would refer here to Montesquieu, father of the theory of separation of powers: "Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor."

I believe that this is the first time the Court has examined a complaint concerning the simultaneous exercise of legislative and judicial functions by the same person. I consider – humbly, as befits a minority voice, yet with strong conviction – that in the present case the requirement of independence of the courts from the legislature, as set forth in our case-law, was not observed. In addition, "the concepts of independence and objective impartiality are closely linked" (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 281, § 73). I can only conclude that the applicant company's concerns

about the independence and impartiality of the court that considered its case were objectively justified and that there was a violation of Article 6 § 1 of the Convention.