EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX
CFR-CDF

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN **FINLAND**

IN 2005

submitted to the Network by **Martin SCHEININ**[*]

on 15 December 2005

Reference: CFR-CDF/FI/2005

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union.

[*] This report was prepared within the Åbo Akademi University Institute for Human Rights, with the assistance of Ms Raija Hanski (editor) and Mr Mats Lindfelt (doctoral candidate). Professor Tuomas Ojanen (University of Turku) contributed for the Institute as consultant and wrote major parts of the report.

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Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

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Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

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The EU Network of Independent Experts on Fundamental Rights is composed of Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.
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ABBREVIATIONS

In this report, the following abbreviations have been used:

HE (hallituksen esitys, Government bill), e.g. HE 265/2002vp (‘vp’ refers to the institution of ‘valtiopäivät’, the annual session of the Parliament).
PeVL (perustuslakivaliokunnan lausunto, Opinion by the Constitutional Law Committee of Parliament)
KHO (korkein hallinto-oikeus, the Supreme Administrative Court), e.g. KHO 2002:86
KKO (korkein oikeus, the Supreme Court), e.g. KKO 2002:27

CHAPTER I. DIGNITY

Article 1. Human dignity

Article 2. Right to life

Domestic violence

Legislative initiatives, national case law and practices of national authorities

Amendments to the Act on the Restraining Order entered into force on 1 January 2005. (*Laki lähestymiskiellosta annetun lain muuttamisesta 711/2004)*

The main proposal in the government bill[1] was that a restraining order could be used also within the same household and irrespective of which family member is the owner or tenancy holder of the dwelling. Consequently, a violent family member who, e.g., owns the family house, may be prohibited from entering the property. In its opinion the Constitutional Law Committee held that the bill sought to implement section 7 of the Constitution (right to life and physical integrity) but at the same time could affect section 19–4 (right to housing). Upon the Committee's recommendation a clause was inserted to the Act that obliges authorities to provide assistance to the person subject to a restraining order in arranging housing.[2]

The provisions on a restraining order inside a family can also be applied when persons cohabit for other reasons than because they are a couple. A restraining order is possible for example when a parent encounters violence from an adult child living in the same house or household. A person placed under an inside-the-family restraining order has to leave the common residence and he/she may not return there. Nor may he/she otherwise meet or contact the person protected by the restraining order. It is forbidden to follow and observe the person protected. Also an inside-the-family restraining order may be imposed extended to cover presence in a certain other place, e.g. in the vicinity of the common residence.

An inside-the-family restraining order does not affect the economic obligations of the parties (e.g. the paying of rent), the ownership or rental relations of the residence or movable property in the home. Nor does the order have legal effects relating to the custody of common children, visiting rights or sustenance. Separate arrangements will have to be made regarding visiting rights of the children. An inside-the-family restraining order can, however, be imposed for a maximum of three months. Its period of validity will be decided case by case. An inside-the-family restraining order can, where necessary, be extended for a maximum of three months.

Because an obligation to leave one's home involves stronger interference with the rights of a person than an ordinary restraining order, the prerequisites for imposing an inside-the-family restraining order are stricter than those of an ordinary restraining order. The order may be imposed only to prevent a crime on the life, health or liberty of a person or to avert a threat thereof, but not if the case involves crime on or harassment of peace. In addition, what is required is that the likelihood of a crime referred to above would be greater if the order is not imposed.[3]

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[1] HE 144/2003 vp.
[2] Opinion by the Constitutional Law Committee 8/2004 vp.
[3] Information on matters relating to restraining orders is available in English at http://www.poliisi.fi/poliisi/home.nsf/ExternalFiles/restrainingorder/$file/restrainingorder.pdf

Reasons for concern

Amnesty International (Finland) carried out a survey in spring 2005 on domestic violence exercised against women in Finland. The survey had a focus on the preventive measures taken in Finnish municipalities.[4] The result of the survey showed that, *inter alia*, in most of the municipalities the political engagement is lacking in order to prevent domestic violence against women. Out of 432 Finnish municipalities only 97 answered to the survey. Out of these 97 municipalities, only 3 had made budgetary means available for preventive work on violence against women. It is not very well known in the municipalities how big of a problem violence against women is. Out of 97 municipalities, only 8 have investigated the extent of the problem. 88 municipalities did not have any statistics of the extent of the problem. The services provided for by the municipalities are inadequate, in particular with regard to women having an immigrant background. According to a survey some 20 % of women in a relationship have experienced violence.[5]

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Amendments to section 4 of the Act concerning executive assistance by the armed forces to the police authorities entered into force on 20 July 2005. (Laki puolustusvoimien virka-avusta poliisille annetun lain muuttamisesta 522/2005).

The Act intends to ensure that the armed forces may give executive assistance to the police authorities in order to stop or to prevent terrorist threats as defined in Chapter 34a, section 1–1 (2–7) (terrorist offences) of the Penal Code. The Constitutional Law Committee noted that terrorist activity has implications on many fundamental rights, such as on the right to life, personal liberty and integrity. Military assistance to combat terrorist activity may also have implications not only for persons being suspect of terrorist activity, but also other individuals. Such extreme measures might, however, be justifiable under certain circumstances of grave nature.[6] However, as the Committee noted, the bill is problematic in that it defines nowhere what is meant by an act of military aggression. The Constitutional Law Committee stressed that assistance by the armed forces should be restricted to means of assistance appropriate to carry out police duties. A new proposal was sent from the Ministry of the Interior according to which with military aggression is meant stronger means of assistance than what an officer can use with a handgun, i.e. use of armaments. The Committee insisted in its new opinion on its earlier position.[7] Outside the scope of military assistance is left the preparation of a terrorist offence, directing a terrorist group, or promotion and financing of terrorism.

Military assistance may include the use of force if it is necessary to protect against an imminent threat to the life and health of a great number of people and if this could not be achieved by any lesser means (section 4–2). The Committee stressed that such concrete imminent threat should be of significant seriousness and of a large scale. The Committee further stressed that a clause on the proportionality principle should be included. The proportionality principle is now prescribed in section 4–4. Also a warning of the use of

[4] The report is available in Finnish and Swedish at http://www.amnesty.fi/jokuraja/uutiset/uutiset.php?id=22. The Ministry of Social Affairs and Health has published a handbook on domestic violence against women and how municipalities should respond to the problem 2005:7.
[5] Heiskanen & Piispa, Usko toivo hakkaus: kyselytutkimus miesten naisille tekemästä väkivallasta. Tilastokeskus, tasa-arvoasiain neuvottelukunta. Oikeus 1998:12.
[6] Opinion of the Constitutional Law Committee 10/2005 vp.
[7] Opinion of the Constitutional Law Committee 23/2005 vp.

military assistance should be given if this is possible. Section 4–5 prescribes that military assistance by the armed forces is to be under the command of the police.

Just two days prior to the beginning of the period under scrutiny, i.e. on 29 November 2004, Finland ratified Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances (ETS No. 187).

Article 3. Right to the integrity of the person

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

Conditions of detention and external supervision of the places of detention

Penal institutions and institutions for the detention of persons with a mental disability

Reasons for concern

A special inquiry into deaths in police cells launched by the Deputy Parliamentary Ombudsman revealed serious deficiencies in the monitoring of remand prisoners with those in custody often left completely alone in their cells.[8]

Previously, prior to the period under scrutiny, the CPT had found that it was still common for persons to be held on remand in police custody, often for lengthy periods. None of the detention facilities visited offered a suitable regime of activities for persons on remand, who spent almost all of their time locked in their cells. Despite recommendations made by the CPT in 1998, the provision of health care also remained inadequate.[9]

Similarly, in its review of Finland's fifth periodic report, the UN Human Rights Committee had expressed concern at the situation of persons held in pre-trial detention at police stations and noted the lack of clarity as regards detainees' rights to a lawyer while in custody and the involvement and role of a doctor during that period. The Committee invited Finland to provide the necessary clarifications to assure that legislation and practice in this area are compatible with Articles 7 and 9 of the ICCPR.[10]

These problems are now coupled with an increasing problem of overcrowding. In October 2005, the Ministry of Justice (Mrs Leena Luhtanen) proposed that Finland might alleviate the problem of overcrowding by transferring prisoners of Estonian and Russian citizenship to prisons in Estonia and Russia.[11] Several human rights organizations, in particular Finnish League for Human Rights, objected to this proposal, emphasising that prison conditions in Russia failed to comply with the standards under the European Convention on Human Rights in light of several judgments by the European Court of Human Rights. The UN Committee against Torture has also continuously expressed serious concern over prison conditions in Russia. Subsequently, on 11 November 2005, the Ministry of Justice

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[8] See press release by the Deputy Ombudsman, 22 December 2003, T 45/2003.

[9] CPT noted that several of its recommendations made in 1998 had not been implemented. See preliminary observations made by the delegation of the CPT, 21 October 2003, CPT/Inf (2003)38.

[10] UN Human Rights Committee concluding observations at its 2239th meeting (CCPR/C/SR.2239), held on 27 October 2004.

[11] However, it is appropriate to note that, since joining the European Union in 1995, Finland has worked to assist the Central and Eastern European countries, and in particular the Baltic states, especially in relation to human rights, to make their prisons correspond to European standards.

assured in her letter to Finnish League for Human Rights that no transfer of prisoners will be made if there is a risk of violations of human rights.[12]

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Committee against Torture conclusions and recommendations on Finland[13]

The Committee against Torture found no evidence of torture in Finland under the period of scrutiny. The Committee noted among other things as positive developments the inclusion of the prohibition of torture and other degrading treatment violating human dignity in section 7 of the Finnish Constitution and that Finland considers to include a definition of torture in accordance with Article 1 of the CAT in the Penal Code. Currently, there is no definition of torture in the Penal Code. The measures taken by Finland as a result of the previous recommendations include judicial supervision of the use of isolation in pre-trial detention. The Committee recommended in its concluding observations that Finland should improve the situation and welfare among the Roma prisoners.

Legislative initiatives, national case law and practices of national authorities

As to the Extradition Treaty between the EU and the United States and related amendments to the bilateral extradition treaty between Finland and the United States, see text under Article 19.

Article 5. Prohibition of slavery and forced labor

Fight against the prostitution of others

Legislative initiatives, national case law and practices of national authorities

The Ministry of Justice plans to put forward a proposal to criminalise the purchase of sex services. A similar law is already in force in Sweden. The ministry aims at prohibiting all sex purchases, and not only in cases in which the provider of the services is a victim of pimping or trafficking in human beings. Under the proposed law, the buyer of sex services would be subject to a fine, or up to six months in prison. The proposal would also criminalise any attempts to buy sex, which would bring a smaller fine. The government is planning to put the bill before Parliament in December 2005.

Trafficking in human beings

Positive aspects

The Finnish government approved a national action plan against human trafficking on 25 August 2005. This is the first proposal for comprehensive measures to combat human trafficking in Finland. The national plan is based upon a report issued by a working group appointed by the Foreign Ministry.[14] A key factor raised in the report is rapid identification of

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[12] Letter to the Ministry of Justice, 31 October 2005, by Finnish League for Human Rights. See http://www.ihmisoikeusliitto.fi/

[13] CAT/C/CO/34/FIN, 34 session held on 9 and 10 May 2005.

[14] Ihmiskaupan vastainen toimintasuunnitelma: työryhmän ehdotukset Suomen kansallisen ihmiskaupan vastaisen toiminnan tehostamiseksi 31.3.2005.

and assistance to victims of human trafficking. Identification will be promoted through educational means of authorities and civil society actors. The government acknowledged that there is a potential problem of trafficking in Finland. Prosecution of human trafficking is important. The offences of human trafficking and aggravated human trafficking were added to the Penal Code in 2004. So far, there have not been any cases of alleged crimes of human trafficking. The report emphasised the needs of the victim and the provision of assistance by means of existing services. A fundamental difference here is whether the victim has a residence permit in Finland or not. Those with a residence permit are provided with service in the municipality they live in, while that is not the case for persons without residence permit except for urgent medical care. A provision concerning the granting of a residence permit to victims of human trafficking will be added to the Aliens Act. The current Aliens Act already indirectly provides for this, but for the sake of clarity and general knowledge a proposal is in the pipeline. The proposal for a residence permit for one year for victims of trafficking can be issued on grounds that the person is willing to cooperate and to help in solving the crime. The residence permit would be renewable. The victims of human trafficking shall have the possibility of receiving protection, guidance and support. At the background is directive 2003/81/EC and Finland's other international obligations.

Protection of the child

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee on the Rights of the Child expressed its concern in its concluding observations on Finland[15] of the information that persons including children are being trafficked to and through the country and urged Finland to strengthen its efforts to identify, prevent and combat trafficking of children.

Exploitation of undocumented workers

Legislative initiatives, national case law and practices of national authorities

Supreme Court (Report No. 1469; S2004/294, KKO 2005:72)

Abstract: A had been detained for 51 days in connection with the investigation of an extensive case of pandering. No charges were brought against A and she was released. A made her living as a prostitute. She claimed damages from the state for loss of income during the time in detention. On the basis of Chapter 5, section 6–2 of the Code of Judicial Procedure, all three court instances dismissed the claim as being manifestly unfounded.

In its decision, the Supreme Court acknowledged that, in Finland, prostitution is not prohibited or made punishable by law, whereas pandering is. Although everyone has a constitutional right to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice, A's activities were under Finnish legal order regarded as being against public decency, in particular because of their apparent link to pandering as admitted by A herself. Contracts which are against the law or public decency are generally held as invalid, and therefore A could not have claimed her fees from her customers through legal proceedings. Consequently, her claim for damages from the state could not be protected by law. The Supreme Court concluded that A's claim was manifestly unfounded and should be dismissed.

The decision was made after a vote. Two concurring justices referred to the constitutional right to choose an occupation and to the case law of the European Court of Justice (Case C–268/99 *Aldona Malgorzata Jany and Others*). Prostitution may be regarded as an economic or business activity pursued in a self-employed capacity, provided however

[15] CRC/C/15/Add.272 of 30 September 2005.

that it is based on genuine voluntariness and independence, outside any relationship of subordination or pandering. On the basis of A's claim it could be concluded that her activities were linked with a more extensive case of pandering. A's prostitution could therefore not be regarded as an economic activity pursued in a self-employed capacity, and her claim for damages could be dismissed as being manifestly unfounded.

One dissenting justice found that the case concerned fundamental rights (the right to choose an occupation, the right to personal liberty, access to court and the right to receive a reasoned decision). A's claim was based on the law, and it was genuine and serious. Moreover, in Finnish legal praxis, a prostitute's income has been considered as taxable income. The dissenting justice concluded that, on these grounds, A's claim was not manifestly unfounded and should therefore not have been dismissed.

CHAPTER II. FREEDOMS

Article 6. Right to liberty and security

Pre-trial detention.

Legislative initiatives, national case law and practices of national authorities

Imprisonment Act and Remand Imprisonment Act entered into force 1 October 2005. (Vankeuslaki and tutkintavankeuslaki 767 and 768/2005)

The main purpose of the new Acts is to form a statutory basis for any restrictions on prisoners' fundamental rights as well as for their rights and duties by taking into account the rights provided for in the Constitution and Finland's obligations under international human rights conventions. The Acts include provisions, among other things, on arrival to a prison, on placement in the prison, on communication with outsiders, on disciplinary matters and supervision and precautionary measures, on the use of force, and on the right to appeal or to submit complaints. Section 7–3 of the Constitution guarantees that the rights of the individuals deprived of their liberty shall be guaranteed by an Act. The government bill formed a package that introduced new legislation on imprisonment and remand imprisonment.

Chapter 1 section 3 of the Acts prescribes the general conditions on restrictions of fundamental rights of a person deprived of his/her liberty. The Constitutional Law Committee noted that the execution of imprisonment shall not have any effect on any other fundamental rights besides that being imposed by execution of a punishment or otherwise prescribed by an Act.[16] For instance, communications with outsiders by the prisoners shall not be restricted more than what is necessary in specific individual cases. The inviolability of the right to privacy and secrecy of communications may be restricted during a deprivation of liberty in accordance with section 10–3 of the Constitution and as laid down by an Act. This is regulated in Chapters 12 and 13 in the Imprisonment Act. However, the Constitutional Law Committee emphasised that a restriction of this kind must fulfill the necessity requirement and can be imposed only when there is ground for such restriction in specific particular cases. The Committee's views were taken into account in the Act which was made more specific than the original proposal.

The Committee stressed that the meaning of imprisonment should be defined clearly, as a deprivation of liberty or a restriction of liberty. This has now been specified in Chapter 1 section 3 in the Imprisonment Act. A similar clause was included in the Remand Imprisonment Act in Chapter 1 section 4 by stating that the rights of the person being held in remand imprisonment shall not be restricted more than what is necessary for the purpose of a person being held in custody. Chapter 5 section 5 prescribes further that a specific safety department in the prison can be established out of security reasons. Section 5–2 specifies that a prisoner's rights shall not be restricted more than necessary because of the placement of a prisoner in a safety department.

The Constitutional Law Committee stressed in general that administrative law is applicable with regard to prison authorities. A prisoner shall be heard in all matters concerning him/herself in accordance (Chapter 1 section 7) with what is prescribed in section 34 of the Administrative Procedure Act (434/2003). This is in line with section 21–2 of the Constitution.

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[16] Opinion of the Constitutional Law Committee 20/2005 vp.

The segregation of accused persons deprived of their liberty and convicted persons is regulated in Article 10–2–a of the ICCPR. Article 10–2–b prescribes that juveniles shall be segregated from adults. The segregation of juveniles from adults is confirmed in Chapter 4 section 8–2 and Chapter 5 section 2 of the Imprisonment Act as well as in the Remand Imprisonment Act in Chapter 3 section 1–2. The segregation between men and women prisoners and persons being held in custody is taken on board in Chapter 5 section 1–3 in the Imprisonment Act and in the Remand Imprisonment Act, Chapter 3 section 1–3. A remand prisoner shall be placed separately from convicted persons. This is in line with Article 10–2–a of the ICCPR. However, the Committee noted that the proposal included that non-segregation could be acceptable under special circumstances. No examples of special circumstances were given in the proposal. The Constitutional Law Committee found this to be problematic. The Human Rights Committee had addressed the issue in its latest concluding observations on Finland in November 2004 by stating that acceptable special circumstances for non-segregation should be defined clearly in law.[17] Section 1 in Chapter 3 of the Remand Imprisonment Act now defines "special circumstances" where it is possible to deviate from the segregation rule, as situations where it is necessary for the safety of prisoners, remand prisoners or for the staff in order to prevent a threat or in order to sustain peace and order in the prison during special situations.

The most critical point raised by the Constitutional Law Committee related to the loss of served time as a disciplinary sanction for a maximum of 20 days (Chapter 15 section 4–1–4 of the proposed Imprisonment Act). The proposal would have made it possible for an administrative official to prescribe imprisonment. The Committee discussed the issue under section 7–3 (liberty) of the Constitution where it is stated that a punishment entailing a deprivation of liberty may only be imposed by a court of law. This may be stricter than what could be in accordance with Article 5 of the ECHR. Consequently, the Committee found the government bill not to be in line with section 7–3 of the Constitution and stated that the possibility of loss of served time as a disciplinary sanction should be removed altogether from the Imprisonment Act. As a result, the loss of served time as a disciplinary sanction was removed from the Imprisonment Act.

Supreme Court (Report No. 2997; R2003/886, KKO 2004:128)

Abstract: X had been absent from a main hearing in two different criminal cases against him. The court of first instance had ordered that X is to be detained when caught, as his apparent intention was to avoid trial. X was later apprehended and sent to prison, in order to enforce both a sentence of imprisonment imposed by a court of appeal in an earlier case against X and the warrant for detention issued by the court of first instance. Having served his sentence X was released from prison but was almost immediately arrested again on the grounds that there was reasonable cause to believe that he would try to avoid trial in the cases pending before the court of first instance. The Coercive Measures Act provides that if a court has issued a warrant for the detention of a suspect absent from a hearing, the court shall be immediately notified of the enforcement of the warrant and shall review the grounds of the detention within four days from the detention at the latest. X's detention on the basis of the warrant issued by the first instance court was not reviewed until 22 days after the enforcement of the warrant, that is after he had first served his sentence and was re-arrested for the pending charges.

The Supreme Court ruled that as the court had not annulled the warrant for X's detention, it was still in force when X was released from prison. Considering what had been shown in the matter the Supreme Court saw that there was reasonable cause to believe that X would try to avoid trial and therefore there were legitimate grounds for his detention as provided for in the Coercive Measures Act. The Supreme Court then assessed whether X's detention was unreasonable having regard to the particulars of the case, X's age or his other

[17] CCPR/CO/82/FIN, para. 11.

personal circumstances. The Court found that X had not been granted the minimum legal safeguards applicable in a situation where a convicted prisoner is at the same time also a prisoner on remand. In the Court's opinion, X should have been able to rely on it that the lawfulness of his detention is immediately reviewed by a court ex officio and that he is heard in the process. The fact that X could have referred to Article 5–4 of the ECHR and requested on his own initiative that the lawfulness of his detention is reviewed by a court did not constitute a sufficient legal safeguard in this case. The Court also pointed out that the fact that X had first been released and then almost immediately detained again may have caused him unnecessary suffering. However, the Supreme Court concluded that in spite of these circumstances the continuation of X's detention could not be regarded as unreasonable as prescribed in the Coercive Measures Act.

The decision was made by a vote (3–2). Two dissenting justices were of the opinion that as X's detention had not been reviewed within the time limit prescribed in the Coercive Measures Act, X could not be re-arrested on the same grounds upon which his previous detention was based.

Detention following a criminal conviction

Legislative initiatives, national case law and practices of national authorities

Act amending the Penal Code and Act on the supervision of parole entered into force on 1 October 2005. (Laki rikoslain muuttamisesta and laki ehdonalaisen vapauden valvonnasta 780 and 782/2005)

A chapter on imprisonment was inserted in the Penal Code, with provisions on the conditions of parole and controlled parole. A person convicted for a fixed period is released on parole in accordance with Chapter 2c section 5–2 when he/she has served two thirds of the prison sentence. Persons under the age of 21 get parole after having served half of the sentence. The same applies to a prisoner who has not prior to committing his crime served time in prison within three years. A prisoner's parole can be postponed when decided by the criminal sanctions agency, subject to appeal to the court of first instance. This is relevant in light of section 7–3 of the Constitution. The postponing of parole can be understood as a punishment. However, the Constitutional Law Committee found that to postpone parole is more of a precursory measure than a punishment as there might be an apparent risk that the prisoner would commit a crime that could pose a threat to a person's life or health.[18] To postpone parole must be reconsidered at most after 6 months. Therefore, the Committee found that it is not contrary to section 7–3 of the Constitution to postpone release on parole within the term of imprisonment imposed by the courts, having in mind that the postponing of the parole can be appealed to a court of first instance.

Proposed Chapter 2c of the Penal Code in the government bill included provisions about parole for persons under the age of 21 after having served half of the punishment. This would have meant that that punishment would be more severe than under earlier law, as a person between 15–21 years of age was to be released on parole after having served 1/3 of the punishment. This change would, according to the Constitutional Law Committee, be ill-suited in light of Article 37–b of the Convention of the Rights of the Child. The Committee stressed that this would have to be reconsidered. The Act as adopted by Parliament now prescribes that a person being under the age of 21 is released on parole after having served half of the punishment. However, if the person under the age of 21 has not served time in prison during the last three years prior to committing the crime, he/she is released on parole after having served 1/3 of the punishment.

[18] Opinion of the Constitutional Law Committee 21/2005 vp.

The bill for an Act on the supervision of parole included a proposal that would have included regular meetings by the supervised with the supervisor during time on parole. The content of supervision would be fulfilled in accordance with a supervision plan. The Committee found this problematic in light of section 8 of the Constitution (legality in criminal cases) which requires that any punishment of an offence must be based on an Act of Parliament. The Committee noted that the content of the supervision plan was too loosely defined in the proposed Act and gave to civil servants too much power to define the content of the punishment. The proposal could also be problematic in terms of equality. The Act on the supervision of parole with regard to the content of supervision was subsequently defined in the Act as to the maximum time, so that no more than 12 hours monthly can be arranged for social activities by the supervised person together with the supervisor (section 5 of the Act on the supervision of parole). The more specific content of activities arranged during parole is left to be defined by the probation service.

Deprivation of liberty for juvenile offenders

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee on the Rights of the Child expressed its concern in its concluding observations on Finland[19] that children may be sent to unconditional imprisonment in particularly serious circumstances and that Finland has maintained its reservation to Article 10–2–b and 10–3 of the ICCPR which may hamper the full implementation of Article 37 of the CRC. Finland should consider withdrawing its reservations to the said articles of the ICCPR. The Committee recommended that Finland fully implements Articles 37, 39 and 40 of the CRC, concerning juvenile justice and continues to take all necessary measures to ensure that persons below 18 are only deprived of their liberty as a measure of last resort and will be separated from adults in such cases.

Deprivation of liberty for foreigners

Legislative initiatives, national case law and practices of national authorities

Act on the Administration of the Frontier Guard and the Frontier Guard Act entered into force on 1 September 2005 (Laki rajavartijalaitoksen hallinnosta 577/2005 and Rajavartijalaki 578/2005)

The Act on the Administration of the Frontier Guard is adjusted to the development of monitoring of outer borders within the European Union. The cooperation between the frontier guard, the customs and the police is being made easier in order to strengthen internal security.

In the same connection, section 123–3 of the Aliens Act was amended concerning the taking of aliens into custody. The Constitutional Law Committee stressed that it should be better clarified under which circumstances the taking into custody of an alien could take place in police establishments, for a maximum of 4 days, and in the frontier guard establishments, for a maximum of 48 hours. This was taken into account in the final text of the amendment of section 123–3 of the Aliens Act.

[19] CRC/C/15/Add.272 of 30 September 2005.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Government Bill 102/2003 on the Amendment of the Finnish Constitution

The bill seeks primarily to amend section 9–3 of the Constitution that currently prescribes that "Finnish citizens shall not be prevented from entering Finland or deported or extradited or transferred from Finland to another country against their will". The proposal would amend section 9–3 to include a possibility to extradite a citizen against his/her will to another country on the basis of an Act in situations of committed crimes or a criminal trial abroad. Removal of a citizen could also be prescribed by an Act of Parliament for the implementation of a decision over a child's custody. The proposal would underline that extradition can only be carried out to countries that are safe in terms of human rights protection. The current formulation of section 9–3 is unsatisfactory as it is worded in absolute terms. The extradition of Finnish citizens is currently enacted by way of exceptive Acts which amount to a limited derogation from the Constitution. This has proven to be problematic as the Constitution no longer reflects the current state of affairs. The Constitutional Law Committee took notice of the issue already in 2001[20] in its opinion of the Council framework decision of extradition between Member States. This meant that extradition became the main rule between EU Member States. The Committee noted in 2001 that this state of affairs was unsatisfactory as the wording in the Finnish Constitution no longer reflected the current state of affairs. The purpose with the bill is therefore to amend section 9–3 to concur with Finland's international obligations and obligations under EU law. The Constitutional Law Committee found the amendment necessary in particular with regard to extradition on grounds of crimes or for the purposes of a trial.[21] As the bill is currently pending for consideration in the Parliament, the outcome will be reported in the 2006 report.

Article 7. Respect for private and family life

Private life

Criminal investigations and the use of special or particular methods of inquiry or research

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Sallinen and Others v. Finland[22]

The applicants, Mr Sallinen, a lawyer and member of the Finnish Bar and 17 of his clients, filed an application to the ECtHR relating to a police investigation of Mr Sallinen's premises, alleging a breach of Article 8 and Articles 6 and 13 of the ECHR. The case originated in a search of Mr Sallinen's premises and the seizure of materials. At that time, he was considered to be a witness. A second search warrant was issued later on where Mr Sallinen was suspected of having aided and abetted the commission of aggravated debtor's fraud allegedly committed by two of his clients. The two clients were charged with aggravated debtor's dishonesty while no charges were brought against Mr Sallinen. The police had kept a copy of one of Mr Sallinen's computer hard disks containing details of three of the applicants. Proceedings were brought in domestic courts asking for the seizure to be revoked. The Supreme Court ruled that the computer files should have been returned immediately or destroyed. The applicants

[20] Opinion of the Constitutional Law Committee 42/2001 vp.
[21] Report of the Constitutional Law Committee 5/2005 vp.
[22] ECtHR (fouth sec.) *Petri Sallinen v. Finland* (Appl. n° 50882/99), judgment of 27 September 2005

complained that the search and seizure of the confidential material was in breach of Article 8 (respect for home and correspondence) and the right to a fair trial and to an effective remedy.

The ECtHR found that Finnish law was not sufficiently clear about the proper legal safeguards available in circumstances where privileged material could be subject to search and seizure. The Court found the text of the Code of Judicial Procedure unclear as far as it concerns confidentiality. Domestic law did not state clearly whether the notion "pleading a case" covers only the relationship between the lawyer and his clients in a particular case, or the relationship in general. The Court referred to the lawyer's general obligation of professional secrecy and confidentiality. The Court noted that the search and seizure represented a serious interference with private life, home and correspondence and must be based on particularly precise legislation, i.e. that the law has to be clear and detailed in this respect. Consequently, the Court found that the police interference was not permissible and held that there was a violation of Article 8.

Legislative initiatives, national case law and practices of national authorities

Amendment of the Police Act entered into force 20 July 2005. (Laki poliisilain muuttamisesta 525/2005)

The purpose with the amendments to the Police Act is to strengthen the fight against organised crime and terrorism by increasing the powers of the police regarding gathering of information. The Act includes provisions on technical monitoring, telecommunications monitoring, technical surveillance, undercover activity and conditions for pseudo purchases. The Act includes general regulations of the rights and duties of policemen/women. The Police Act has many provisions that have profound impact on fundamental rights. In particular, coercive measures concerning telecommunications regulated in the Coercive Measures Act (450/1987) have impact on an individual's right to privacy, including the right to confidential communication. The most important provisions are the following:

- Section 31d–1 prescribes that the police has a right, in order to prevent a crime, to telecommunications listening if a person is justifiably aiming to commit terrorist crimes as defined in Chapter 34a, section 1–1 (2–7) of the Penal Code. This would entail a restriction in the inviolability of confidential communications. Permission is given by a court of law.

- The preconditions for telecommunications monitoring in section 31c–1 are added to the current ones to include situations where a person is justifiably assumed to commit the crime of pimping or an attempt or preparation of terrorist crimes. A justifiable cause for using telecommunications monitoring is related to crimes where the maximum punishment is at least four years of imprisonment.

- Pre-conditions for technical surveillance: With technical surveillance is meant continuous or repeated listening to certain persons with the help of technical devices and the recording of voice, viewing and photographing or videotaping. Section 31–1 prescribes that police officers have the right to keep a person, vehicle or goods under technical surveillance in places other than a room or space used for permanent living if it can be justifiably assumed that information necessary for preventing an offence can be obtained by such a measure. Subsection 3 prescribes that if a person's behaviour or other circumstances give justifiable cause to suspect that the person could commit an offence for which the maximum punishment is at least four years' imprisonment or commit a narcotics crime or prepare a terrorist offence as defined in the Penal Code, Chapter 34a, section 2. A similar precondition concerns technical observation carried out on persons held in custody of the Prison Administration.

- The proposed technical surveillance in a place of dwelling for the purpose of the prevention of the preparation of a terrorist offence was rejected by the Parliament.[23]

- Section 31f prescribes that the police can be given permission to collect information of the location of means of communication (mobile phones), if this information is needed to prevent crimes the punishment for which is at least four years of imprisonment and, *inter alia*, the preparation of terrorist crimes. Such permission must be obtained from a court of law. An officer may decide, in case of urgency, on obtaining such information until a court of law has decided about a permission. This must be done at the latest within 24 hours.

- Section 5–1 prescribes that the police may postpone intervening in ongoing criminal activity if this is necessary for the purpose of collecting information and provided this is of no danger to the life and health of any person or anyone's freedom or property.

Section 22–3 prescribes that the police has the right to check the belongings of a person taking part in a public meeting or a similar event, in order to secure that no one has in his/her possession objects or substances that could be of danger, posing a threat to the persons taking part in such events. The Constitutional Law Committee found that the formulation was too vague in light of section 7–1 and section 15 of the Constitution, as it could lead to a risk of arbitrary use of police powers. The Committee found the formulation not to be precise enough in light of the restrictions clauses of section 7–1 and section 15 of the Constitution.[24] Section 22–3 was, however, not amended by Parliament.

Supreme Court (Report No. 1621; R2003/191, KKO 2005:82)

Abstract: In the presidential election of 2000, A was a personal assistant to candidate Y and responsible for his public relations. During the campaign, an afternoon paper published an article, telling about A's extramarital relationship with X, who was a prominent figure in economic life and whose ex-wife Z was a well-known TV-reporter. The Supreme Court, as well as the lower court instances, found that the article had violated A's right to respect for her private life. In its decision, the Supreme Court discussed at length the question of striking a balance between freedom of expression and protection of private life, referring to a number of judgments by the European Court of Human Rights, among them the cases of *von Hannover v. Germany* (judgment of 24 June 2004) and *Tammer v. Estonia* (judgment of 6 February 2001). The Court held that the provisions in the Penal Code concerning invasion of privacy corresponded to the principles emanating from the case law of the ECtHR. According to the Penal Code, the spreading of information about the private life of a person does not constitute invasion of privacy if it concerns the activities of a person in politics or in a public position and is necessary for the purposes of dealing with a matter with importance to society.

The Supreme Court noted that everyone, including persons known to the general public, must be able to enjoy a legitimate expectation of protection of and respect for their private life. Reports including intimate and sensitive details about a person's private life without that person's consent can be justifiable on clear and well-founded grounds only. Public curiosity alone does not justify the publishing of information about a person's private life. As Y's assistant A had had an important and public task in political life. However, she was not known to the public as a politician, nor was she herself running for a political office. While A and Y did not belong to the same political party, political considerations and tactics may have contributed to A's appointment as Y's assistant. Nevertheless, A's right to protection of her private life had not been narrowed because of her tasks in the same manner as that of the politician she was working for. Moreover, the Court held that A's position and her tasks were not of such nature that she would have committed herself to representing the

[23] See Opinion of the Administration Committee 10/2005 vp.
[24] Opinion of the Constitutional Law Committee 11/2005 vp.

traditional family values and Christian ideas promoted by candidate Y in his campaign. In the Court's view, an extramarital relationship is not a matter which would have been likely to affect A's abilities to attend to her tasks. As to the newspaper article, it was not about politics or the possible political dimensions of A's relationship with X. Instead, it aimed clearly at bringing the love affair before the public eye. The fact that X and Z were well-known public figures, did not justify the spreading of information about A's private life. Also, it had not been shown that A, by being in public places together with X, had tacitly consented to reports about her private life. The Supreme Court concluded that publishing the information about A's private life was not justifiable and did not contribute to a debate of general interest to society. The newspaper article had violated A's right to respect for her private life.

One dissenting justice of the Supreme Court held that A had exercised a public and political function. Her appointment as Y's assistant was a matter of political interest. As Y's assistant and representative, she had political influence. Because the presidential elections are of great public interest, it is natural that political interest is fixed on a public relations person who belongs to the immediate circle of one of the two main candidates. Furthermore, considering that Y in his campaign emphasized Christian and family values, the news about A's extramarital relationship was bound to affect people's voting decisions and had therefore a link to A's political function. As regards the contents of the newspaper report, the justice found that it described both the political background and activities of A, X and Z, as well as the relations between the three persons but did not amount to actual harassment. Because X and Z were prominent figures, their contacts with the campaign of one of the presidential candidates may have been of interest to the public. Therefore, the dissenting justice considered it plausible that the report about A's relationship with X was publicized not only in order to satisfy the curiosity of a particular readership but also in order to contribute to a debate of general interest. The justice regarded this as a borderline case between political journalism and celebrity gossip. However, with reference to the principle of proportionality, he held that, regarding political journalism, one should in general have recourse to criminal law and penal sanctions only in cases where the media has clearly overstepped the boundaries within which freedom of expression can legitimately be exercised. This case did not amount to such excess, so the charges should have been dismissed.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Government Bill 53/2005 for a new Food Act and amendments to the Health Protection Act

The purpose of the bill was to harmonize the Food Act, the Act on Specific Hygiene Rules for Food of Animal Materials and the Health Protection Act. The bill has relevance for many fundamental rights protected under the Finnish Constitution. Some of the most controversial issues will be noted.

Section 49–2 regulates the conditions for when a supervisory authority can perform an inspection that intervenes with everyone's right to sanctity of the home guaranteed under section 10–1 of the Constitution. The proposal aims to prescribe that an inspection can be made without the consent of the person working in the food industry if there is reason to believe that food regulations are being violated and that inspection is necessary for settling the issue of an alleged crime. Section 10–3 of the Constitution provides that measures encroaching on the sanctity of the home for the purpose of investigating a crime may be regulated by an Act of Parliament. The Constitutional Law Committee noted that the bill appeared to be based on the presumption that inspections would be carried out with the consent of those subject to the inspection, there would not be a need to regulate the matter by an Act of Parliament. The Committee held that this assumption was not correct in the light of section 2–3 of the Constitution prescribing that all exercise of public power shall be based on an Act. The Committee further held that such encroaching on the sanctity of the home was not

in conformity with section 10–3 of the Constitution.[25] The proposal was not precise enough with regard to the conditions for such encroachment of the sanctity of the home. Of relevance is the absence of conditions for giving and annulling consent. The Committee held that the clause about inspections on the basis of consent must be deleted from the bill.

Sections 73 to 76 in the bill concerned the conditions under which appeal can be made in respect of administrative decisions taken by government officials, municipal authorities or the National Food Agency. Appeal could be made to the regional administrative court, but subsequent appeal to the Supreme Administrative Court was restricted by a requirement that the Supreme Administrative Court granted leave to appeal. This proposal was held by the Constitutional Law Committee as problematic in light of section 21 of the Constitution. The argument used in the proposal for restriction of the right of appeal to the Supreme Administrative Court was a reference to section 13 of the Administrative Judicial Procedure Act providing that "Specific provisions in an Act shall define the cases where the decision of an authority referred to in sections 7–9 may not be challenged by an appeal and where leave is required for appeal in the Supreme Administrative Court". The Committee held that the restriction concerning appeal should be removed from the proposal. As the bill is currently under consideration in the Parliament, the outcome of the bill will be reported in the 2006 report.

Family life

Protection of family life

Rovaniemi Court of Appeal (Report No. 191; S04/460, RHO 2005:7)

Abstract: B had asked the court of first instance to order about the custody and access rights with regard to the four children she had with A. During the process, A and B reached agreement on joint custody and access rights, but disagreed on the question as to where one of the children should live. B demanded that the child should stay with her, whereas the three other children could stay with A. With reference to the reports of the social welfare authorities and to the children's own wishes, the court ruled that all four children should live with A. The court also ordered that A should pay for his own legal costs. A appealed against the decision as far as the legal costs were concerned and demanded that B should compensate his legal costs at the first instance court. A claimed that B had referred the matter to court without any justified cause. B was aware that the authorities' reports as well as certain other factors well known to B supported the conclusion that all four children should stay together and with A. B had not contested the reports, nor shown any evidence against them.

According to the Code of Judicial Procedure, in a case which is not amenable to settlement out of court, the parties shall be liable for their own legal costs, unless there is a special reason for rendering a party liable for the legal costs of the opposing party. Such a special reason may be that the matter is disputed or that the process has been abused. In the opinion of the court of appeal, the fact that a matter is in dispute is not alone a sufficient reason to make an exception to the main rule regarding legal costs. In legal matters concerning a child, both parents have a right to put forward claims concerning custody and access rights. In view of the fact that both parents also have the right to a respect for their family life, guaranteed by international human rights treaties, the court of appeal held that the relevant provision in the Code of Judicial Procedure should in this case be interpreted in a manner favourable to human rights. In cases concerning children, a parent should not be ordered to pay the legal costs of the other parent on insignificant grounds. Despite the contents of the authorities' reports, B had the right to bring the matter before a court. It had not been shown that B would have abused this right. The court rejected A's claim. The decision is final.

[25] Opinion of the Constitutional Law Committee 37/2005 vp.

Removal of child from the family

Legislative initiatives, national case law and practices of national authorities

Supreme Administrative Court (Report No. 3391; 3045/3/03, KHO 2004:121)

Abstract: The municipal social welfare board had taken B into care and had placed her in a children's home. B, who was 13 years of age, had occasionally used alcohol and had had outbursts of violent behaviour. She also tended to disobey her mother A, who was a single parent of six children. The social welfare authorities had provided economic assistance and counselling for the family. In the opinion of the social welfare board, assistance in open care had proved inadequate and the taking of B into care was necessary, as the circumstances in the family, along with B's own behaviour, threatened to endanger her health and development. A and B objected to the decision, but the administrative court agreed with the social welfare board.

The Supreme Administrative Court emphasized that the primary purpose of child welfare was to support the parents in upbringing their child, in the first place by means of assistance in open care. If such assistance is not appropriate or has proved inadequate, the child may be taken into care. In that case, in addition to national legislation, the relevant provisions of the Convention on the Rights of the Child and the ECHR must be taken into account. With reference to the decision of the European Court of Human Rights in the case of *Couillard Maugery v. France* (judgment of 1 July 2004), the Supreme Administrative Court noted that separating a family constitutes a serious interference with the right to family life. Therefore, such a measure has to be based on the best interests of the child and on weighty and justified grounds. The Court found that in B's case the social welfare board had not sufficiently considered other possible means of assistance. B had, for example, suggested that she could live with her uncle and his family. The Court ruled that it had not been shown in this case that assistance in open care had proved inadequate or that such assistance had not been appropriate or possible. In the Court's view, the requirements for taking a child into care as prescribed in section 16 of the Child Welfare Act had not been fulfilled. The Supreme Administrative Court quashed the decisions of the administrative court and the social welfare board and returned the case to the municipal board for a new consideration.

Private – and family life in the context of the expulsion of foreigners

Legislative initiatives, national case law and practices of national authorities

Supreme Administrative Court (Report No. 1892; 2105/3/04, KHO 2005:50)

Abstract: A had been issued a fixed-term residence permit on the basis of a family tie. She was married to B who resided in Finland with a permanent residence permit. Some six months after A had moved to Finland, she had to leave her home because of B's violent behaviour. She moved first to a shelter for women subjected to domestic violence, and later to an apartment of her own. When her first residence permit expired, A applied for a new fixed-term residence permit. The Directorate of Immigration rejected her application on the grounds that the requirements under which A had originally been issued a residence permit were no longer met. Though A did not intend to divorce her husband, her family life with B had according to the Directorate ended after a fairly short period of time and she had no other ties to Finland. The administrative court agreed with the Directorate of Immigration. Both instances based their decisions on the Aliens Act (378/1991) in force at that time. As the Act did not contain any explicit preconditions for issuing a new fixed-term residence permit, principles concerning revocation of residence permits were applied instead.

In its decision, the Supreme Administrative Court considered both the old (378/1991) and the new Aliens Act (301/2004), which entered into force 1 May 2004. As compared to the old Act, the new Aliens Act contains slightly different rules on the revocation of a residence

permit in cases where the requirements under which the permit was issued are no longer met. According to the government bill for the Act, one of the principal ideas behind these provisions is that in cases in which the changes in circumstances cannot be attributed to the applicant, the residence permit may not be revoked if the applicant is already residing in Finland. The new Aliens Act also contains explicit provisions concerning the requirements for issuing a new fixed-term residence permit. According to these provisions, an alien who has been issued a fixed-term residence permit on the basis of family ties may be issued a new residence permit on the basis of close ties to Finland, even when the family ties are broken.

The Supreme Administrative Court also referred to section 7 of the Constitution which provides for the right to life, personal liberty, integrity and security and states that the personal integrity of the individual shall not be violated. The Court held that in this case, the facts pertaining to A's separation from her husband must be taken into account when considering whether A should be issued a new fixed-term residence permit. Considering the principles in the new Aliens Act, the circumstances which had led to A's separation from her husband, as well as the circumstances A would face if she returned to her home country (Tunisia) as a woman separated from her husband, the Supreme Administrative Court ruled that refusing a residence permit in A's case would be manifestly unreasonable. The Court quashed the decisions of the administrative court and the Directorate of Immigration and returned the matter to the Directorate of Immigration for reconsideration in accordance with the new Aliens Act (301/2004).

<u>Other relevant developments</u>

Legislative initiatives, national case law and practices of national authorities

Supreme Court (Report No.1665; H2005/96, KKO 2005:84)

Abstract: Four Finns had each married Russian individuals. All four marriages ended after the Russian spouses had been granted residence permits in Finland. The Finns conceded that they had been paid or offered a reward for the marriage. Marriages of convenience contracted in order to circumvent immigration rules are not criminalized in Finnish law. However, the genuineness of a marriage may be assessed in the context of an application for a residence permit on the basis of a family tie. If the marriage has been contracted only in order to circumvent the rules on entry, the application for a residence permit is rejected.

In this case, the four Finns as well as one of the Russian spouses were charged with a registration offence under the Penal Code. Summoning the three other Russian spouses for trial failed. The court of first instance held that when saying "I do" as a part of the marriage ceremony, the defendants had provided false information and had thus caused a legally relevant error in the population register where marriages are registered. The defendants were sentenced to suspended imprisonment.

At the initiative of the Deputy Chancellor of Justice, the Supreme Court took up the case as a reversal of a final judgment. The Supreme Court held that in regard to the legality of a marriage, the motives for the marriage are irrelevant. Though the motives for a marriage may in some issues have legal relevance, they are not entered in the population register. Therefore, the faultiness of a register entry regarding marriage cannot be determined on the basis of the motives of the marriage. Consequently, a register entry about marriage cannot be deemed false on the grounds that the marriage is contracted in order to obtain a residence permit. The Supreme Court ruled that in this case the defendants' deeds did not constitute a registration offence under the Penal Code. It reversed the decision of the first instance court to the benefit of the defendants as being based on a manifest misapplication of the law.

Article 8. Protection of personal data

Article 9. Right to marry and right to found a family

Marriage and control of marriages suspect of being simulated

Legislative initiatives, national case law and practices of national authorities

Supreme Administrative Court (Report no. 56; 2975/3/03, KHO 2005:2)

Abstract: By its decision of 1 February 2002 the Directorate of Immigration had issued to A a residence permit for one year on the basis of a family tie. In 1999, when the application for a residence permit was made, A had been unmarried and under 18 years of age. According to the Aliens Act, A could thus be regarded as a family member of his father who resided in Finland and had come to the country as a quota refugee in 1998. While the application was pending A came of age. When he arrived in Finland in March 2002, he told the authorities that he had married on 20 February 2002 and that his wife was seven months pregnant. He had met his wife in his previous country of residence in 2000. With reference to section 21 of the Aliens Act, the Directorate of Immigration revoked A's residence permit in July 2002 on the grounds that A, in applying for a residence permit, had given false information and had concealed matters which would have had a bearing on the residence permit decision (i.e., his intention to get married). A appealed against the decision to the administrative court which rejected the appeal.

A appealed further to the Supreme Administrative Court which quashed the decisions of the Directorate of Immigration and the administrative court. The Court pointed out that the fact that A had come of age while his application was pending had been known to the Directorate of Immigration and could therefore not constitute a reason for revoking the residence permit. The Court referred to the right to marry as provided for in Article 12 of the ECHR and Article 23 of the ICCPR, the right to privacy as prescribed in section 10 of the Constitution, and section 1–4 of the Aliens Act according to which aliens' rights shall not be restricted more than is necessary. In the Court's view, it could not be held as a condition for a residence permit that a person who has come of age refrains from getting married for an indefinite time when that person has been issued a residence permit on the basis of a family tie. Under such circumstances a marriage could not be regarded as a considerable change affecting the grounds for entry or for issuing a residence permit. A's marriage could therefore not constitute a strong cause to revoke his fixed-term residence permit as prescribed in section 21 of the Aliens Act.

See, also, Supreme Administrative Court case KKO 2005:84, reported above under Article 7.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Helsinki court of first instance (Report no. 4531; 04/27224)

Abstract: A had been sentenced to imprisonment for several offences, among them the rape of his ex-wife B. A and B had two children, aged 2 and 3. A petitioned the court to grant him the right to meet his children twice a month in the prison premises as long as he is serving his sentence. He was to be released in September 2005. A claimed, among other things, that the fact that he was not able to see his children while he was in prison violated his human rights. B objected to A's request. When A was imprisoned in 2002, the younger child was 5 months old, and she could no longer remember her father. The older child remembered A, but was afraid of him and had, among other things, suffered from nightmares having witnessed A's violent behaviour towards B. B herself did not want to be present when A met with the children, and the children could not be left alone with a parent who was a stranger to them and whom they were scared of. The court of first instance agreed with B. It ruled that in order

to build a positive relationship of confidence between A and the children, the first meetings should preferably be brief and be arranged in an environment in which the children felt safe. In the court's opinion, it was not in the best interests of the children to grant A the right to meet with the children while he was in prison. The court rejected A's petition.

Article 10. Freedom of thought, conscience and religion

Incentives and reasonable accommodations provided in order to ensure the freedom of religion, including the right to conscientious objection

Legislative initiatives, national case law and practices of national authorities

An amendment to the Copyright Act will enter into force 1 January 2006. (Laki tekijänoikeuslain muuttamisesta 821/2005)

The purpose of the bill is to implement directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. Copyright as an immaterial right is protected under section 15 of the Constitution. The Constitutional Law Committee noted in its opinion that copyright legislation has become difficult to understand due to many revisions and changes. This is particularly problematic in terms of section 8 of the Constitution (legality in criminal cases) what comes to copyright crimes. The most controversial proposal of the bill in terms of fundamental rights was related to section 21–4 concerning whether music performed at church services should be copyright protected.

The bill included that pieces of creative work can be used for educational purposes, or where the public presentation of a work on public occasions is done without any intention to gain financially. This permission would not include plays and films. According to the bill, church services would no longer be treated as educational purposes. As a consequence, the performance of music pieces in public church services would become copyright protected (section 21–4). However, the Constitutional Law Committee found that this proposal would be problematic in terms of section 11 of the Constitution (freedom of religion), and concluded that such a proposal touches upon the core of religious practice and is therefore not permissible. The Committee found that the bill was problematic also in terms of section 6–2 (non-discrimination) of the Constitution as the proposal would set church services in a different position compared to other public occasions and therefore constitute discrimination seen from a freedom of religion point of view. The Committee concluded that church services shall be compared with other public occasions as provided for in section 21 (1–3)[26] The Committee concluded that section 21–4 should be deleted and that a church service should, analogously with teaching or a public occasion, be considered as being without any intention to gain financially. A new formulation for section 21 was presented by the Ministry of Education but it still included that a composer would be entitled to royalties for a work performed during church services. A new opinion was sought from the Constitutional Law Committee, which maintained its previous view.[27] However, the Education and Culture Committee held that, in line with the government bill, royalties for the performance of a work in church services was significant in terms of equality between composers, and compensation should be awarded for pieces particularly composed having in mind church services.[28] Therefore, the Committee proposed that section 21 be deleted from the bill in order for the bill to pass as an ordinary Act, subject to majority decision. The Education and Culture Committee proposed that section 21 be adopted separately in accordance with section 73 of

[26] Opinion 7/2005 of the Constitutional Law Committee vp.
[27] Opinion 24/205 of the Constitutional Law Committee vp.
[28] Opinion of the Education and Culture Committee 6/2005 vp.

the Constitution, prescribing the procedure for constitutional amendments or exceptions. The bill as a whole was rejected by the Parliament in the first reading and was subsequently transferred to the Grand Committee which proposed that section 21–4 was to be deleted.[29] After this reformulation the bill was adopted by the Parliament. Pieces, which have been made available to the public, may thus be performed at church services without paying any copyright fees to the composer.

Reasons for concern

In its concluding observations on Finland, issued in November 2004, the UN Human Rights Committee had expressed concern that the right to conscientious objection was only acknowledged in peacetime, and that civilian alternative service was disproportionately long. The Committee also reiterated its concern at the fact that the preferential treatment of Jehovah's Witnesses, who are exempted from the duty to serve either as conscripts or in alternative service, had not been extended to other groups of similarly situated conscientious objectors. The Human Rights Committee recommended that Finland fully acknowledges the right to conscientious objection and, accordingly, guarantees it both in wartime and in peacetime; it should also end the discrimination inherent in the duration of alternative civilian service and in the different treatment of various categories of conscientious objectors (Articles 18 and 26 of the ICCPR).

During the period under scrutiny, Finland took no concrete action to meet these recommendations. Two governmental working groups are, however, working on possible amendments to the Conscription Act and the Alternative Service Act.

Article 11. Freedom of expression and of information

Freedom of expression and of information

Legislative initiatives, national case law and practices of national authorities

Supreme Administrative Court (Report no. 2489; 1812/3/04, KHO 2005:62)

Abstract: A municipal executive board had given general instructions regarding the upcoming Parliamentary elections and the placing of election posters in publicly owned areas. In these areas, the municipality would arrange the placing of election posters by reserving an equal amount of space for each political party. Any other placing of posters was forbidden. In order to cover the costs for these arrangements, the municipality requested from each political party participating in the elections a sum of EUR 840. Political party X appealed against the decision to the administrative court and further to the Supreme Administrative Court claiming that the decision resulted in unreasonable restrictions of the right to freedom of expression and the right to vote and to be elected.

The Supreme Administrative Court held that a municipality has a right to decide in which way the areas owned by the municipality are used in election campaign publicity. The decision of the municipal executive board did not restrict the possibility to place election posters in privately owned areas. Considering the requirements of public order, public safety and a pleasant city environment, the municipality may decide that election campaign publicity is centralized, as defined in the decision by the executive board. The impact on freedom of expression was not unreasonable in relation to the purpose of such arrangements. The Supreme Administrative Court also noted that a municipality had no statutory duty to arrange election campaign publicity. In view of the fact that the municipality had, on the basis of municipal self-government, voluntarily undertaken to arrange the placing of election posters, it was within its authority to require compensation for such arrangements. The payment of

[29] Opinion of the Grand Committee 1/2005 vp.

EUR 840 was based on the actual costs of the arrangements. The Court pointed out that there were also other means than outdoor poster campaigns available for political parties in distributing information about their programme and their candidates. It concluded that requesting the sum of EUR 840 as compensation for a certain service did not unreasonably restrict the right to freedom of expression and was also not in violation of the principle of equal treatment.

Helsinki Court of Appeal (Report no. 158; R02/3844)

Abstract: In a radio programme, which was meant to serve as an open discussion forum for the public, radio journalists A and B had interviewed C who had expressed very critical views about the position of a father in a child custody case, basing his comments on his own experiences. C's ex-wife D and her counsel in the child custody case, E, sued A, B and C for defamation.

Taking into account the constitutional provisions on the right to freedom of expression and the protection of privacy as well as the case law of the European Court of Human Rights under Article 10 of the ECHR, the court of first instance convicted the defendants of defamation. In the court's view, the defendants had presented false insinuations in claiming that E had not observed proper professional conduct or the Advocates Act while counselling D in the custody case and that D was not capable of raising and caring for her children. The court ruled that C's views were value judgments rather than facts and that protecting D's and E's honour was in this case not in conflict with Article 10 of the ECHR.

The court of appeal did not agree with the first instance court. The court found it acceptable that a person who is being interviewed expresses his or her opinions in a sharp manner amounting to criticism. It could not be expected that a party in a child custody case also puts forth arguments which favour the adverse party, in particular when C's adverse party D had on previous occasions in a TV-programme and a newspaper interview criticised C and his actions in similar terms. Regarding C's views on E, the court of appeal held that in practising his profession E was expected to tolerate even sharp criticism, in particular when expressed by the adverse party of his client. C had presented his own, reasoned views about the proper professional conduct for advocates. In the radio programme, it was clearly stated that his views differed from those of the Finnish Bar Association. The court concluded that C's statements did not amount to defamation. Regarding D, the court pointed out that C's statements could not be assessed out of context and without taking into account the nature and tone of the interview as a whole. C had criticised the prevailing system in child custody cases in Finland. Some of his views corresponded to opinions and assumptions generally held by the public. These views could not as such amount to a violation of D's honour. The court held that C had expressed his strong, emotional and subjective opinion based on his own experiences without an express intention to insult D. Moreover, considering the nature of C's statements, it was difficult to assess whether they were true or false. The court ruled that it had not been shown that C would have violated D's honour. Regarding the radio journalists A and B, the court held, with reference to the case of *Jersild v. Denmark* (judgment of 23 September 1994, Publications of the ECtHR, Series A, Vol. 298), that the punishment of a journalist for assisting in the dissemination of statements made by another person in an interview is possible on extremely strong grounds only. In the radio programme, it had been made clear that these are C's personal opinions. In addition, it had been shown that the Finnish Bar Association did not share C's views and that D had already on previous occasions told in public that she found C's actions as offending her rights. Though A's and B's questions and comments had been slightly provocative, the court held that under the circumstances they did not amount to defamation. The decision is final. The Supreme Court did not grant leave to appeal in the case (decision no. 1872 of 18 August 2005).

Media pluralism and fair treatment of the information by the media

Legislative initiatives, national case law and practices of national authorities

Helsinki Court of Appeal Report No. 511; R02/1938

Abstract: A newspaper had published an article which included an interview with X. X had, among other things, been convicted of economic offenses, and at the time of the interview there were two other cases concerning economic offenses pending against him. These facts were mentioned in the newspaper article. In the interview, X told that he had applied for an annulment of a decision of the Helsinki Court of Appeal in one of the cases against him on the grounds that one of the judges who had decided the case should have been disqualified. The judge's name was not mentioned. X claimed that the judge was his enemy because X had on a previous occasion criticised the judge and his actions. X had also told earlier that the judge had taken a bribe by accepting a free luxury trip from a person who was suspected of a bankruptcy offence. In the newspaper article it was mentioned that the judge had wanted to bring charges against X for defamation but the prosecutor had decided not to prosecute. The judge to whom the article referred, A, brought charges for defamation against the newspaper and the journalist who had written the article. The accusations in the article were false. A had not taken the alleged bribe nor brought charges against X. Although the judge's identity had not been revealed in the article, it had become known to some persons at A's workplace at the Helsinki Court of Appeal and this had caused some inconvenience for A.

The court of first instance sentenced the newspaper and the journalist for defamation. In the court's view, a claim that a judge has accepted a bribe was an important matter of public interest which had to be publicized provided that there was sufficient factual basis for that claim. However, in this case the facts had not been checked and A's views had not been heard. The court found that on the basis of the information given in the article and with the help of the registers of the Helsinki Court of Appeal it had been possible for those who worked at the court and also for others interested to identify the judge the article was referring to, and this had caused damage to A. In its decision, the court of first instance referred, among other provisions, to sections 10 (right to privacy) and 12 (freedom of expression) of the Constitution, Article 19 of the ICCPR and Article 10 of the ECHR. One lay member of the court would have dismissed the charges as being contrary to the freedom of expression, the Constitution Act and the EU Charter of Fundamental Rights.

Both parties appealed to the court of appeal. In its decision, the court of appeal discussed at length the case law of the European Court of Human Rights and in particular the cases of *Barfod* (judgment of 22 February 1989, Publications of the ECtHR, Series A, Vol. 149), *Jersild v. Denmark* (judgment of 23 September 1994, Publications of the ECtHR, Series A, Vol. 298), *Prager and Oberschlick v. Austria* (judgment of 26 April 1995, Publications of the ECtHR, Series A, Vol. 313), *Bladet TromsE and Stensaas v. Norway* (judgment of 20 May 1999, Reports of Judgments and Decisions 1999–III), *Dalban v. Romania* (judgment of 28 September 1999, Reports of Judgments and Decisions 1999–VI), *Bergens Tidende and Others v. Norway* (judgment of 2 May 2000, Reports of Judgments and Decisions 2000–IV), *Colombani and Others v. France* (judgment of 25 June 2002, Reports of Judgments and Decisions 2002–V), *Pasalaris v. Greece* (decision of 4 July 2002), *Harlanova v. Latvia* (decision of 3 April 2003), *Perna v. Italy* (judgment of 6 May 2003, Reports of Judgments and Decisions 2003–V), and *Cumpana and Mazare v. Romania* (judgment of 10 June 2003). The court considered, among other issues, the responsibility of a journalist for statements made by another person in an interview, the duty of a journalist to check the factual basis of the imparted information as well as possible limitations of freedom of expression for maintaining the authority and impartiality of the judiciary.

The court found that the article contained incorrect and offensive information. On the basis of the article a reader could get the impression that the judge in question has possibly broken the law. In writing the article, the journalist had not checked the facts as carefully as he should have considering that the accusations were serious and that X because of his

background could not be regarded as a reliable source of information. Although A's name was not mentioned in the article, the journalist should under the circumstances have given A the possibility to present his views. However, unlike the court of first instance, the court of appeal did not find the journalist or the newspaper guilty of defamation. Several cases against X had been decided in the Helsinki Court of Appeal and a number of judges had participated in handling the cases. In the court's opinion, even those close to A could not have identified him on the basis of the information given in the article, especially as some of the information was incorrect. Also, for those who were not close to A, it was not easy to find out the identity of the judge solely on the basis of the information given in the article. The court of appeal dismissed the charges. The decision is final as the Supreme Court did not grant leave to appeal in the case (decision of 3 December 2004, no. 2798, R2004/329).

Supreme Court (Report no. 0001; R2004/183, KKO 2005:1)

Abstract: An afternoon paper had published a text in which a journalist criticized a meal he had been served in a restaurant. The writer had used fairly sharp and unpolished language. The question was whether this constituted defamation.

The Supreme Court referred to Chapter 24, section 9 of the Penal Code which prescribes, among other things, that criticism that is directed at a person's activities in business does not constitute defamation provided that it does not obviously overstep the limits of propriety. In this case, the writer had expressed his own opinion by using a metaphor which is likely to give the reader a strongly negative impression. However, taking into account the context in which the criticism was presented and the style in the text in general, the use of the metaphor did not give the impression that the writer had considered the meal unhygienic and not fit for food. The text was a humorous essay which had been published in the sports pages together with articles and interviews all dealing with local football, local people and local cuisine. The tone in the writer's criticism of the meal matched the humorous and exaggerating style used in the essay in general. The Supreme Court held that a person engaged in business has to tolerate even sharp public criticism against the products or services his or her business provides. The Court concluded that in this case, the criticism did not obviously overstep the limits of propriety and did not thus constitute defamation.

The Supreme Court decided the case on the basis of the Penal Code only. The court of first instance, which had come to the same conclusion as the Supreme Court, had also referred to the freedom of expression as prescribed in the Constitution and the ECHR. The court of appeal had held that the criticism went too far and the journalist was guilty of defamation. One dissenting member of the appeal court had referred to the freedom of expression and the freedom of the press and agreed with the court of first instance.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Supreme Administrative Court (Report no. 2193; 1111/1/03, KHO 2005:58)

Abstract: A member of a municipal council, A, had several times exceeded the time allowed in the council's rules of procedure for individual members in addressing the council and had continued his address despite the orders of the chairman of the council. On the basis of section 15a of the Municipality Act, the chairman ordered A to be removed from the council's meeting. As A had acted against his duties as a municipal councilman by breaching the council's rules of procedure, the council decided, on the basis of section 40 of the Municipality Act, to report the offence and to exclude A from the work of the council while the matter was investigated. The decision was enforced immediately. Some two months later, the district prosecutor decided not to carry out an investigation.

The Supreme Administrative Court found that A had acted against his duties when disobeying the orders of the chairman pertaining to the limitations prescribed in the council's

rules of procedure. The chairman was right in ordering A to be removed from the council's meeting. However, the Court held that, taking into account the right to freedom of expression as provided for in section 12 of the Constitution, section 15a of the Municipality Act, which restricted that right, must be given a narrow interpretation. Section 15a contains the measures a council chairman may have recourse to when a council member disturbs the meeting by his or her behaviour. A's actions as a council member cannot be restricted in excess of these measures. Though the Supreme Administrative Court accepted the council's decision to report the offence, it ruled that the council had exceeded its authority when excluding A from the council's work and had in that respect made a decision which was contrary to law.

Article 12. Freedom of assembly and of association

Freedom of association

Legislative initiatives, national case law and practices of national authorities

Amendment to the Polytechnics Act entered into force on 1 August 2005. (Laki ammattikorkeakoululain muuttamisesta 413/2005)

The government bill[30] concerned the intention to organise the student unions in polytechnics as associations established under public law with obligatory membership of full-time students as prescribed in section 42–1 of the proposal. The Constitutional Law Committee[31] held that membership in associations cannot be obligatory, but should be based upon free individual choice. An exception to the freedom of association is only permitted if it can be shown that there is a need to establish an association under public law with public functions. The Constitutional Law Committee held that obligatory membership of full-time students in the student unions of polytechnics was contrary to section 13 of the Constitution. Consequently, section 42–1 of the Polytechnics Act was amended not to impose obligatory membership.

Article 13. Freedom of the arts and sciences

Freedom of the arts

Legislative initiatives, national case law and practices of national authorities

The Copyright Act and the Penal Code were amended. As part of the reform of the Copyright Act (Laki tekijänoikeuslain muuttamisesta 821/2005), legislation was updated to take into account special issues related to the digital and network environment. The reform implements the EC copyright directive of 2001. The amendments will enter into force on 1 January 2006. Some of the major changes are:

- Distributing copyrighted files over the Internet without permission will be forbidden. Even if the distribution was not done with the intent to earn, actions that violate copyright can be punished as copyright crimes.

- Copying by consumers for their own use will still be permitted. Downloading illicit material from the Internet will be prohibited. Making backup copies of computer programs will still be permitted as before.

- Possible copy protection in recordings may not be circumvented for making a copy.

[30] HE 195/2004 vp.
[31] Opinion of the Constitutional Law Committee 39/2004 vp.

- Obtaining user licences for mass use will be made easier by new licence agreement provisions. For instance, it will be possible to conclude an agreement with an organisation representing the copyright holders about the digital use of the material in teaching.

Distribution of material using information networks will be the exclusive right of copyright holders (they have the right to decide on the form and terms of use).

Article 14. Right to education

Access to education

Legislative initiatives, national case law and practices of national authorities

Amendment to the University Act entered into force on 1 August 2005. (Laki Yliopistolain muuttamisesta 715/2004)

The main purpose with the amendment of the University Act (Government Bill 10/2004[32]) is to specify the tasks and administration of universities also related to the Bologna process of introducing two-step university degrees. In accordance with section 18 subsection 3, the applicants can be divided into different categories (subject to different entry requirements) based upon their previous educational background. This was unproblematic in light of section 6 of the Constitution (equality). The proposal included, however, a possibility to divide the applicants into different groups based upon other criteria comparable to educational background. The Constitutional Law Committee found this criterion to be too open and therefore problematic in light of section 6 of the Constitution and also problematic in light of section 16 subsection 2 of the Constitution (educational rights).[33] Consequently, section 18 subsection 3 was amended. Section 4 (the duties of the universities) is relevant in light of section 16 subsection 3 of the Constitution (the freedom of science, the arts, and higher education is guaranteed by an Act). The provision was to be taken into account in determining university tasks of interaction with the society as a whole.

Act on Police Training entered into force on 15 May 2005. (Laki Poliisikoulutuksesta 68/2005)

The government bill[34] included a proposal of the criteria of recruitment to police training according to which persons had to have performed military service. An exception to this main rule was made in respect of women and persons from the demilitarized Åland Islands. These exemptions were, according to the Constitutional Law Committee, in conformity with section 6 of the Constitution (equality). The proposal, however, put men not having performed military service because of their religious or ethical convictions in an unequal position. Section 127 subsection 2 of the Constitution prescribes the conditions under which a person has the right to be exempted from performing military service. The Constitutional Law Committee, however, noted that religious and ethical objections to military service do not necessarily result in an inability to use force as a police officer, and that this assessment has to be done by the person in question.[35] Consequently, the requirement of having performed military service was not included in section 6 of the Police Training Act.

The bill included a requirement that only a person with Finnish citizenship may become a police officer. Section 125 of the Constitution leaves room for requiring that only Finnish

[32] HE 10/2004 vp.
[33] Opinion by the Constitutional Law Committee PeVL 19/2004 vp.
[34] HE 28/2004 vp.
[35] Opinion by the Constitutional Law Committee PeVL 28/2004 vp.

citizens are eligible for appointment to certain public offices or duties. This is in the view of the Constitutional Law Committee to be applied restrictively on well-founded grounds. The Constitutional Law Committee has previously held that it is in conformity with section 6 subsection 2 of the Constitution that for instance judges must have Finnish citizenship due to the reason that they exercise a substantial amount of public power.[36] The Committee held that the citizenship requirement was also permissible concerning recruitment to police training. However, section 6 subsection 3 in the Police Training Act allows for exemptions from the rule. This was to be welcomed as Finland is slowly becoming culturally more diverse.

Article 15. Freedom to choose an occupation and right to engage in work

Article 16. Freedom to conduct a business

Freedom to conduct a business

Legislative initiatives, national case law and practices of national authorities

Government Bill 138/2004 for an Act on Lodging, Restaurant and Entertainment Establishments and related Acts (Esitys laiksi majoitus- ja ravitsemistoiminnasta sekä eräiksi siihen liittyviksi laeiksi)

The proposal would broaden the duty to report on a traveler arriving to a lodging establishment by including the social security number of the traveler and his/her accompanying spouse and minors. The proposal would include the right to keep electronic or manual travelers' registers. Information about foreigners should be automatically forwarded to the police. The police and, *inter alia,* the frontier guard would have the right to receive data of the travelers. The district police authorities supervise the billeting activity within their district. The proposal would include the right by the police to intervene in improper billeting activity by way of coercive measures. The proposal discusses the balancing between the freedom of commercial activity and the right of the police to restrict the said freedom.

With regard to the issue of the right of restaurants and other service providers to select customers, the Constitutional Law Committee emphasized the need to include a clause in the Act stating that the right to select customers must not amount to discrimination. Discrimination on ethnic grounds is still known to be to some extent a problem and it is important to express its impermissibility in the Act, either as a reference to section 6 of the Constitution, or to section 6 of the Equality Act, or to Chapter 11, section 9, of the Penal Code.

The Committee further found it problematic that the proposed bill goes a bit too far concerning the registration of information on foreign travelers by inquiring for instance the social security number of the person. The proposed bill was going further than what is required under the Schengen Agreement, Article 45. The Committee stressed that no more information should be registered of the travelers than what is required by the Schengen Agreement.

The proposal would include in section 12–3, in case of repeated breaches by the entrepreneur of opening hours or other breaches that cause unnecessary disturbance to public order, or pose a serious threat to the environment, a possibility to ban the activity by administrative decision partially or completely for a maximum of three months. The Constitutional Law Committee held that this proposal was an acceptable interference with the right to engage in commercial

[36] Opinion by the Constitutional Law Committee PeVL 13/1999 vp.

activity (section 18 of the Constitution).[37] A ban could be appealed to the administrative court. However, the Constitutional Law Committee noted that it would be advisable to include in section 14–2 of the proposed Act that the appeal has to be handled urgently, as the maximum sanction is proposed to be in place for three months. The bill is still pending before Parliament.

Article 17. Right to property

The right to property and the restrictions to this right

Legislative initiatives, national case law and practices of national authorities

Act amending the Income Tax Act (Laki tuloverolain muuttamisesta 772/2004) entered into force on 1 January 2005. Private pension savings that supplement general public or private sector pension schemes by enabling early retirement or higher pension benefits have been subject to wide tax benefits. The amendment aims at supporting the more general policy of encouraging people to stay longer in working life by reducing the tax benefits, in particular in cases of early retirement. However, when the bill was before Parliament, the Constitutional Law Committee took the view that the bill was in tension with section 15 of the Constitution (right to property) because it affected existing contractual relationships. For this reason, certain transitory provisions were included in the bill. [38]

Article 18. Right to asylum

Asylum proceedings

Legislative initiatives, national case law and practices of national authorities

Amendments to the Act on Integration of Immigrants and Reception of Asylum Seekers entered into force on 10 June 2005 (Laki maahanmuuttajien kotouttamisesta ja turvapaikanhakijoiden vastaanotosta annetun lain muuttamisesta 362/2005)

The amendment to the Act on Integration of Immigrants and Reception of Asylum Seekers seeks to implement directive 2003/9/EC of 27 January 2003 on the minimum standards for the reception of asylum seekers. The Act includes sections on unity of the family, restrictions of transportation of asylum seekers and provisions on asylum seekers in a vulnerable position.

Section 44–2 includes a prohibition to appeal when a reception centre decides to transfer an asylum seeker or a person in need of temporary protection to another reception centre. The asylum seeker has no right of appeal concerning the place where the person's reception is taking place. The person in need for protection has no obligation to accommodate him/herself in a reception centre. In accordance with section 19–3, the person in need of protection has the right to arrange his or her own accommodation. However, the Constitutional Law Committee noted that section 44–2 is not about transferring a person from one shelter to another, but rather that his/her accommodation can be arranged in another reception centre.[39] Taking into account that the accommodation in reception centres is of a temporary nature, the Committee concluded that section 44–2 was in conformity with section 21 of the Constitution (right to appeal).

[37] Opinion of the Constitutional Law Committee 49/2004 vp.
[38] Opinion by the Constitutional Law Committee 21/2004 vp.
[39] Opinion of the Constitutional Law Committee 8/2005 vp.

Statistics. By the end of October 2005, 3,145 people had applied for asylum in 2005. The Directorate of Immigration had decided 2,999 applications, 2,179 of which were rejected. 504 people had received either asylum or a residence permit.

The Directorate of Immigration has estimated that about 4,000 people will have applied for asylum in Finland by the end of the year 2005. About half of the applications are processed in Finland, and two thirds of them are rejected.[40]

Positive aspects

According to the new Aliens Act, women who have been persecuted because of their sex/gender can also be considered as members of a particular social group according to the Refugee Convention.

Reasons for concern

The Minister of the Interior, Mr Kari Rajamäki, repeatedly made public statements that are feared to generate among the general public a negative picture of asylum seekers. To take an example, the Minister of the Interior has talked about "asylum shoppers" who are only taking advantage of the system and, accordingly, become very expensive for tax-payers.

Several human rights organizations, in particular the Refugee Advice Center and the Finnish Refugee Council, reacted to these and similar statements. In essence, the criticism has been that, by blaming asylum seekers for various problems, the Minister of the Interior has stigmatized all asylum seekers and, accordingly, paved the way for increasing anti-immigrant sentiments in Finland.[41]

Recognition of the status of refugee

Legislative initiatives, national case law and practices of national authorities

Helsinki Administrative Court 5.2.2005/04/0176/7: The appellants originated from Grozny. X [the father of the family] worked as a guard in the National Forces of Chechnya in Grozny in 1996–1998. He participated in the first Chechnyan war with the Chechnyan forces between 1994 and 1996. After the war he participated in the electoral campaign of Mr Mashadov. In the autumn of 2001, the appellants returned to Grozny and X found out that Russian soldiers had been looking for him.

The decision of the Helsinki Administrative Court: The appellants must be recognised as refugees pursuant to Article 1 A (2) of the 1951 Geneva Convention. The administrative court revoked the decision of the Directorate of Immigration and returned the case to the Directorate for a new procedure. Statement of the reasons: The appellants have a well-founded fear of persecution because they belong to an ethnic group, and X possibly also for the activities mentioned above. They cannot be required to return to Chechnya under the present Chechnyan circumstances. Taking into consideration the position of Chechnyans in the Russian Federation, the administrative court holds that the appellants cannot reasonably be assumed to settle in other parts of Russia.

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[40] Press Release, the Directorate of Immigration, http://www.uvi.fi/netcomm/content.asp?article=2695&frontpage=true. For statistics regarding the year 2004, see e.g. European Council on Refugees and Exiles - Country Report 2004 – Finland, http://www.ecre.org/country04/Finland%20-%20FINAL.pdf

[41] See more on the statements by the Minister of the Interior and their critique e.g. press releases by the Refugee Advice Center and the Finnish Refugee Council, 23.8.2005 and 13.9.2005, http://www.pakolaisneuvonta.fi/?cid=107&lang=suo

The Directorate of Immigration 14.1.2005/646/0611/2001: The applicant's (from Iran) parents divorced when she was 15 and the court gave custody to her father. Her father is a drug addict who makes his living by selling drugs and letting drug addicts stay at his place. Her father used to hit her, lock her in a closet and sometimes strangle her with a scarf. Her father did not allow her to go to school. She has once attempted suicide. Her father tried to marry her off to a 40-year old, wealthy drug smuggler. She did not agree to the marriage which caused her father to beat her. She says that eventually she had to give her consent but managed to leave the country with the assistance of her mother before the marriage took place.

The decision of the Directorate of Immigration: The Directorate of Immigration does not grant asylum to the applicant but issues her a residence permit on grounds of need of protection. Statement of the reasons: The information available to the Directorate of Immigration on the handling of domestic and sexual violence cases by Iranian judicial authorities supports the applicant's view that she has no factual possibility to receive protection from the authorities of her country. According to the medical certificates, the applicant is severely traumatised by her experiences in her country of origin.

Unaccompanied minors seeking asylum

Reasons for concern

The problem of asylum-seeking minors disappearing from reception centres without any information about them coming up later has figured in the public discussion but has so far not resulted in legislative action or judicial pronouncements.

Other relevant developments

Reasons for concern

According to media reports, Finnish authorities and courts appear to put too much weight on the views of the security police in deciding issues relating asylum, residence permits and the like. The Ombudsman for Minorities has taken up a case in which an application for a residence permit was rejected on the basis that the security police had information about the person that could be relevant for national security. The court of appeal neither overturned the negative decision nor reviewed the security police's justifications.[42] Finland has no legislation on the balancing of national security and basic rights of individuals in situations as that described above.[43]

[42] The ECtHR has in the case of *Al-Nashif v. Bulgaria* stated that "the guarantee of an effective remedy requires as a minimum that the (…) appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available."*Al-Nashif v. Bulgaria (*Appl. no. 50963/99)*,* judgment of 20 September 2002, para. 137.

[43] See written question by Member of Parliament Heidi Hautala "Yksilön oikeuksien turvaaminen kun maasta poistamisen perusteena valtion turvallisuus," 22 December 2004.

Article 19. Protection in the event of removal, expulsion or extradition

Collective expulsions

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee against Torture in its conclusions on Finland[44] concluded that the "accelerated procedure" under the Aliens Act is problematic in that it allows a very limited time for asylum applicants to have their case considered in depth and in case of rejection, exhaust the appeals possibilities prior to deportation. The Committee recommended to review the accelerated procedure in order to ensure sufficient time for using all available possibilities of appeal and to strengthen the legal safeguards of asylum seekers to be in conformity with Article 3 of the CAT and other international obligations in the field of refugee law. The Committee took notice of a recent case of the deportation of an asylum seeker allegedly subjected to torture in his country of origin, according to a report by the Parliamentary Ombudsman.

The Committee on the Rights of the Child in its conclusions on Finland[45] for its part noted that the accelerated procedure of handling asylum applications may have a negative impact on children and urged Finland to ensure that the procedure respect the legal safeguards of asylum seekers.

Subsidiary protection and prohibition of removals of foreigners to countries were they face a real and serious risk of being killed or being subjected to torture or to other cruel, inhuman and degrading treatments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

N v. Finland[46]

The applicant arrived in Finland on 20 July 1998 requesting political asylum having been a member of the special division (Division Spéciale Présidentielle, DSP) responsible for protecting former President Mobutu in the Democratic Republic of Congo (DRC). The applicant was an infiltrator and informant in the DSP responsible for the protection of former President Mobutu, his family and property. The applicant claimed that if expelled to his country of origin, his life was in danger under the Laurent-Désiré Kabila regime which replaced President Mobutu's regime in 1997. The Kabila regime had started to kill those who worked under President Mobutu.

In March 2001 the Directorate of Immigration ordered the applicant's deportation to DRC after having found the applicant's submission inconsistent and considering that the applicant had failed to prove his identity. The Directorate of Immigration concluded that there was no real risk of degrading or inhuman treatment if deported. The applicant appealed the decision unsuccessfully. In March 2003, the Supreme Administrative Court refused a further appeal from the applicant, noting that his identity and ethnic origin remained unclear.

The case was lodged at the ECtHR and made subject to interim measures requested by the Court in October 2002. In March 2004 the Court arranged a fact-finding mission to Helsinki during which delegates of the Court questioned the applicant and witnesses, thus obtaining some evidence which was not available to the Finnish authorities when the

[44] CAT/C/CO/34/FIN, 34 session held on 9 and 10 May 2005.
[45] CRC/C/15/Add.272 of 30 September 2005.
[46] ECtHR (former 4th sect.) *N v. Finland* (Appl. no. 38885/02), judgment of 26 July 2005.

applicant's case was considered by them. In its judgment, the Court noted that some 8 years had passed since the applicant had left the DRC. The regime had also changed in 2001. What the court found to be of importance were the applicant's specific activities as an infiltrator and informant in the DSP reporting directly to very senior-ranking officers close to former President Mobutu. The applicant had never been in direct contact with Mobutu and did not hold a senior military rank when he left the DRC. The Court concluded that on account of his former activities, he would still run a substantial risk of treatment contrary to Article 3 of the Convention if expelled to the DRC, in particular from the side of relatives of former dissidents who might seek revenge for the applicant's past activities, and not necessarily from the side of the current authorities. The Court concluded that there was a risk of harassment, detention and possible execution. The judgment was a 6–1 vote. The Court consequently found a violation of Article 3 of the Convention. The dissenting opinion claimed that not enough substantial evidence had been presented for a violation of Article 3 of the Convention. The dissenting opinion argued that the applicant's claim put forward was not very credible, as he had presented four different identities, lacked any documentary evidence about his former position and activities in the DRC and as there was uncertainty about his knowledge of local languages.

Legislative initiatives, national case law and practices of national authorities

A Government Bill on the domestic ratification and incorporation of the Agreements on Extradition and Mutual Legal Assistance between the European Union and the United States of America[47], and related agreements (The United States of America is also linked with Finland by a mutual 1976 extradition and a mutual 2003 judicial cooperation agreement) is currently before Parliament.[48] As observed by e.g. the EU Network of Independent Experts on Fundamental Rights, the agreement package involves a risk of infringement of fundamental and human rights in the area of criminal justice cooperation with the United States.[49]

The challenge posed by the ratification and incorporation of the agreement package is added by the fact that Finland has adopted a practice of integrating fundamental and human rights considerations in Acts implementing similar EU measures. A reference can here be made to the Act on Extradition between Finland and EU Member States, 30 December 2003/1286 which implemented the Council Framework Decision of 13 June 2002 on the European Arrest warrant and the surrender procedures between Member States.[50] It is here significant to add that, in its *Concluding Observations on Finland on November 2004*, the UN Human Rights Committee expressed among "positive aspects" the position of Finland to integrate human rights considerations in the action to combat terrorism by maintaining a ban on extradition and refoulement or expulsion to a country where there is a risk to be exposed to death penalty or torture. This positive finding was also partly based on the fact that the Finnish Constitution and laws explicitly extend non-refoulement to the risk of death penalty in another country and that these clauses have been interpreted to prohibit even the handing over of information in cases where such information could be used to sentence a person to death.[51]

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[47] Agreement on Extradition between the European Union and the United States of America, OJ, 19 July 2003, L181, p. 27; Agreement on Mutual Legal Assistance between the European Union and the United States of America, OJ, 19 July 2003, L181, p. 34.

[48] Hallituksen esitys 86/2005 (rikoksen johdosta tapahtuvasta luovuttamisesta Euroopan unionin ja Amerikan yhdysvaltojen välillä tehdyn sopimuksen, Suomen ja Amerikan yhdysvaltojen allekirjoittamaan luovutussopimukseen tehdyn pöytäkirjan, Euroopan unionin ja Amerikan yhdysvaltojen välillä keskinäisestä oikeusavusta rikosasioissa tehdyn sopimuksen sekä Suomen ja Amerikan yhdysvaltojen välillä tietyistä keskinäiseen oikeusapuun rikosasioissa liittyvistä näkökohdista tehdyn sopimuksen hyväksymiseksi ja laeiksi).

[49] See http://europa.eu.int/comm/justice_home/cfr_cdf/doc/thematic_comments_2003_en.pdf

[50] Implementation of Council Framework Decision of 13 June 2002 on the European Arrest warrant and the surrender procedures between Member States. The Act entered into force on 1 January 2004.

[51] 2003 report p. 12.

One of the issues subject to debate in connection to the government bill on the EU-US extradition treaty package is related to the broader European discussion on the US practice of "extraordinary rendition" and the use of the airspace or airports of EU countries in that context. Article 12 of the EU-US extradition agreement and a related amendment to Article 20 of the 1976 bilateral extradition treaty between Finland and the United States appear to legalise the use by the US authorities of Finnish airspace for rendition purposes without any prior authorization, and even the use of Finnish airports through a summary administrative procedure. What is a matter of concern here is that these provisions of the respective treaties are not restricted to "extradition" of persons suspected or committed of a crime in the meaning otherwise regulated by the treaties, but apply a broader notion of "transfer" of a "person", at least seemingly opening the door for the practice of "extraordinary rendition", i.e. the transport by the US authorities of persons between third countries and without any requirement that the intention is to put the person on trial. At the end of the reporting period the bill was pending before Parliament, awaiting the opinion of the Constitutional Law Committee.

Legal remedies and procedural guarantees regarding the removal of foreigners

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

See the text above, under "Collective expulsions"

CHAPTER III. EQUALITY

Article 20. Equality before the law

Equality before the law

Legislative initiatives, national case law and practices of national authorities

Act on the Administration of the Frontier Guard, Frontier Guard Act and related Acts entered into force on 1 September 2005 (Laki rajavartijalaitoksen hallinnosta 577/2005 and Rajavartijalaki 578/2005)

The Act on the Administration of the Frontier Guard is amended and adjusted to the development of monitoring outer borders within the European Union. The cooperation between the border guard, the customs and the police is being made easier in order to strengthen internal security. The Act includes regulations on the requirement of Finnish citizenship for appointment to office within the frontier guard, the requirement of completed military service, professional discretion, frontier guard officers' secondary work, etc. Only the most relevant points will be mentioned.

Section 10–1 of the Frontier Guard Act prescribes that Finnish citizenship is required for appointment to office. The Constitutional Law Committee found this to be in conformity with section 6–2 of the Constitution (equality) as the office-holder exercises significant public power.[52] Section 10–2 prescribes that appointment as a military officer within the frontier guard requires that the person has completed his military service. Section 10–3 states that section 10–2 is not applicable to persons being exempted from military service on the basis of the Åland Islands Autonomy Act. The Constitutional Law Committee found that section 10 is in conformity with section 6–2 of the Constitution, as the frontier guard is militarily organized and could be connected to the armed forces.

The Act Amending the Act on Police Training and related Acts entered into force on 15 May 2005 (laki poliisikoulutuksesta sekä lait poliisin hallinnosta annetun lain ja poliisilain 7 §:n muuttamisesta, 68–70/2005). The major novelty of the new Act is that there is no longer a requirement for male applicants that they have done their military service. As a consequence, men who have served within the alternative civilian service system, may also apply for police training. In addition, the absolute requirement of Finnish citizenship has been abolished by the new Act.[53] (The introduction of these novelties to the Act owe to the opinion of the Constitutional Law Committee on *Government Bill on Police Training,* HE 168/2003). According to the Committee, a requirement of male applicants for police training having performed military service was contrary to section 6–2 the Constitution of Finland. Because of section 125 of the Constitution, allowing the determination by an Act of Parliament that certain public offices were reserved for Finnish citizens only, the requirement of Finnish citizenship was not contrary to the Constitution. However, from the perspective of multiculturality it would be important to allow for exemptions from this requirement.[54] As a consequence, the above-said novelties were introduced to the bill during its progress before Parliament.

The Act on Juvenile Punishment (Laki nuorisorangaistuksesta 1196/2004) already entered into force on 1 January 2004, but it also deserves to be mentioned in the 2005 report. For several years, alternative forms of punishment were "tested" by applying temporary special

[52] Opinion of the Constitutional Law Committee 19/2005 vp. See also 28/2004 vp.
[53] Opinion by the Constitutional Law Committee 28/2004 vp.
[54] Opinion by the Constitutional Law Committee 28/2004 vp.

legislation in some parts of the country, whereas in other parts of the country the institution of juvenile punishment was not applicable. This testing was introduced as an exception to the constitutional right of equality before the law (section 6) and was continued despite criticism by the Constitutional Law Committee that the "testing" of different punishments for the same crime might also be incompatible with Finland's human rights treaty obligations, especially ICCPR, Article 26.[55] As the previous legislation was to expire on 31 December 2004, the government presented a new bill extending juvenile punishment to all parts of the country but with certain transitory arrangements so that the geographical extension would in fact take place only on 1 July 2005. The Constitutional Law Committee, referring to its earlier opinion, stated that the proposed transitory arrangement was unconstitutional and also highly problematic in respect of Finland's human rights treaty obligations.[56] In particular, the Committee stated that the reference in the government bill to the financial implications of the extension was not an acceptable justification for the transitory arrangement. Consequently, the bill was amended so that juvenile punishment became applicable in all parts of the country as of 1 January 2005.

Article 21. Non-discrimination

Protection against discrimination

Legislative initiatives, national case law and practices of national authorities

The ratification and incorporation of Protocol 12 to the European Convention on Human Rights. Finland ratified Protocol 12 on 17 December 2004 as the third EU Member State (after Cyprus and the Netherlands). As there are eleven ratifications in total, the Protocol entered into force on 1 April 2005. The Act for the incorporation of Protocol 12 entered into force on 1 April 2005 (Laki ihmisoikeuksien ja perusvapauksien suojaamiseksi tehdyn yleissopimuksen kahdennentoista pöytäkirjan lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta 1076/2004.)

The National Discrimination Board issued its first discrimination case on ground of ethnic discrimination. A Russian woman was not allowed to enter a restaurant in Helsinki in February 2004. The restaurant owner and staff claimed that the refusal was not due to ethnicity, but to the person's previous behaviour in the restaurant. The National Discrimination Board, however, concluded that the refusal was due to ethnic origin and ordered to put an end to the discriminatory refusal of entry to the restaurant. The National Discrimination Board is a newly established independent organ promoting legal protection. Its decisions have legally binding effect, but they do not replace existing legal remedies and court reviews.

Positive actions aiming at the professional integration of certain groups

Legislative initiatives, national case law and practices of national authorities

The Act amending the Unemployment Benefit Act and related Acts (330–334/2004) entered into force on 1 January 2005. The Act is relevant for persons still working between the age of 65–67. The Act is complementary to the government objective to prolong the working career of persons up till the age of 67. Unemployment benefits are to be granted to a person between the age of 65–67 under conditions that he or she is not able to work because the person is laid off, due to strike activities or not able to work due to weather conditions.

[55] Opinion by the Constitutional Law Committee 59/2001 vp.
[56] Opinion by the Constitutional Law Committee 34/2004 vp.

Article 22. Cultural, religious and linguistic diversity

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

J. and E. Länsman and the Muotkatunturi Herdsmen's Committee v. Finland[57]
The authors alleged a violation of their rights as indigenous Sami reindeer herders under Article 27 of the ICCPR. The authors complained that since the 1980s some 1600 hectares of their Herdsmen's Committee grazing area in Paadarskaidi have been logged accounting to some 40 % of tree lichen (utilized by reindeer in the winter). The on-going logging in various parts of the area used by the Herdsmen's Committee threatens the economic sustainability of Sami reindeer husbandry. The case was a follow-up complaint to an earlier complaint by the same individuals, in which the Human Rights Committee had concluded that certain limited logging projects within the area used by the Muotkatunturi Herdsmen's Committee, while having negative effect on reindeer herding, did not amount to a "denial" of the authors' rights in the meaning of Article 27 of the Covenant. The authors now requested the Committee to revisit the case because the adverse consequences of the logging had proved to be more serious than known at the time, especially as the Ministry of Agriculture and Forestry had already twice reduced the total number of reindeer the Muotkatunturi Herdsmen's Committee was allowed to keep.

The Human Rights Committee concluded on the merits of the case relating the effects of logging in the areas in question that it is undisputed that the authors of the complaint are members of a minority within the meaning of Article 27 of the Covenant and therefore have the right to enjoy their own culture. The Committee further noted that it is undisputed that reindeer husbandry is an essential element of their culture as Sami and that economic activities may come within the ambit of Article 27 if they form an essential element of the culture of an ethnic community. The Committee noted that reindeer husbandry remains of low economic profitability. The Committee noted that although the number of reindeer had been cut down it nevertheless remained relatively high. As the authors and the State party were not in agreement as to the reasons behind the low economic profitability of reindeer herding and the need to cut down the number of reindeer, the Committee considered that it was not in the position to change its earlier assessment that the situation did not amount to a violation of Article 27.

R-L. Kasper and I.O. Sopanen v. Finland[58]
The authors of the communication claimed to be victims of a violation of Articles 2 paras. 1 and 3, 14 para. 1 and Article 26 of the ICCPR as not receiving equal treatment in relation to the compensation paid for expropriated land property. The case concerned an authorized expropriation of part of the authors' land in the area of Linnasaari National Park and the amount of pay issued by the Expropriation Commission. The authors claimed that their lands were expropriated by the government at a price that was considerably below the current price compared to voluntary purchases and other expropriations in the region. The Supreme Court issued its final decision in 1993, after a petition for reversal, dismissing the claim of the authors. The Committee noted in its admissibility decision under Article 2 that the decision of the Supreme Court was not manifestly arbitrary or ill-founded. The Supreme Court took into account the report of the national Board of Survey on the matter and concluded that compensation had not been incorrectly calculated and was therefore not contrary to sections 29 and 30 of the Act on the Expropriation of Immovable Property and Special Rights

[57] *Jouni Länsman, Eino Länsman and the Muotkatunturi Herdsmen's Committee v. Finland.* Communication No. 1023/2001. Views adopted by the Human Rights Committee on 15 April 2005.
[58] *Riitta-Liisa Kasper and Ilkka Olavi Sopanen v. Finland*. Communication No. 1076/2002. Views adopted by the Human Rights Committee on 18 April 2005.

(603/1977). The authors further claimed violation of Article 14 as the names of the judges who participated in the decision were not disclosed. The Committee found that there was no violation as the names of the judges could have at any time been requested from the Registry of the Supreme Court.

Legislative initiatives, national case law and practices of national authorities

Proposal for a Sami rights treaty. On 16 November 2005, a joint Finnish-Norwegian-Swedish-Sami expert commission delivered a proposal for a treaty between the three countries about the rights of the indigenous Sami people. The draft is fairly ambitious, including the recognition of the Sami people as the indigenous people of Finland, Norway and Sweden, and provisions on the Sami people's right of self-determination, on land rights, on consultation and co-deciding, on linguistic, cultural and other rights of the Sami, and on the establishment of a joint treaty monitoring body. According to the draft treaty, consent by the three national Sami parliaments would be required for the entry into force or amendment of the treaty. Work on the proposed Sami rights treaty will continue between the Presidents of the three Sami Parliaments and the Ministers responsible for Sami affairs in the three countries. Parliamentary consideration of the treaty is not expected before 2007.

Article 23. Equality between men and women

Gender discrimination in work and employment

Legislative initiatives, national case law and practices of national authorities

Amendments to the Act on Equality between Men and Women entered into force on 1 June 2005. (Laki naisten ja miesten välisestä tasa-arvosta annetun lain muuttamisesta 232/2005)

A major purpose of the amendment is to bring the existing law in line with the EU directive on gender equality in working life. The changes to the law introduce a range of improved measures, especially the following: Provisions concerning equality plans, drawn up by workplaces employing 30 or more employees, were specified. Such plans shall, in particular, deal with the division of workplace responsibilities among men and women, mapping pay distribution and ways to tackle gender-based inequalities. The carrying out of workplace equality plans is overseen by the Ombudsman for Equality, who is empowered to set deadlines for creating them. The reform also contains measures to define gender harassment as a form of discrimination subject to compensation. Finally, the Act includes provisions on reverse burden of proof. However, these provisions do not apply in criminal cases.

Article 24. The rights of the child

Possibility for the child to be heard, to act and to be represented in judicial proceedings

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Concluding Observations on Finland by the Committee on the Rights of the Child[59]
The concluding observations on Finland by the Committee on the Rights of the Child expressed a concern that Finland should strengthen its efforts to ensure the principle of the best interests of the child in all legislative and administrative decisions. The Committee is concerned that only children aged 15 and older have the right to be heard directly by a judge

[59] CRC/C/15/Add.272 of 30 September 2005.

or a court. The Committee urged Finland to take legislative measures in order to ensure that Article 12 of the CRC is fully implemented. The Committee noted that children are often placed in alternative care without taking into account adequately the views of the child and that this should be remedied. The Committee noted the long duration of custodial disputes and urged Finland to resolve such issues within an appropriate time and to provide support services for divorced families.

Legislative initiatives, national case law and practices of national authorities

*Act on the Ombudsman for Children (*Laki lapsiasiavaltuutetusta 1221/2004) entered into force on 1 September 2005. The post of the Ombudsman for Children is based on stipulations in the UN Convention on the Rights of the Child, which Finland ratified in 1991. The Ombudsman is an independent official, connected with the Ministry of Social Affairs and Health. The term of office is five years.

The tasks of the Ombudsman are to promote the interests of children and ensure that children's rights are met throughout the country. The Ombudsman does not handle individual cases or family matters but deals with broad questions of children's living conditions, legislation and decision-making. The Ombudsman gives advice and guidance to authorities and organisations working with children as well as to children themselves. The Ombudsman will promote the interests and rights of children at the public administration, social policy and legislative levels. A key task will be to assert the viewpoints of children within public debate and inform about children's rights.

Supreme Court (Report No. 2998; S2004/1008, KKO 2004:129)

Abstract: With reference to the Convention on Child Abduction, the Supreme Court had ordered the mother X, who resided in Finland, to return her two children, aged 13 and 10, to their father Y in the United States where the children had their habitual residence. In its decision, the Court found that the children's objection to being returned did not prevent their return to the United States in this case (decision of 5 August 2004, KKO 2004:76). For the enforcement of the Supreme Court decision the court of first instance ordered the bailiff to fetch the children. X appealed against the measure, claiming that the children did not want to return to the United States and that the bailiff had failed to take into account the views of the children.

The Supreme Court noted that the Child Custody Act gives a bailiff in some cases a possibility to assess whether the child's objection should be taken into account when enforcing a return order. However, the bailiff's discretion is limited if the child's views have already been heard and the matter has been decided by the court which issued the return order. With reference to the judgment of the European Court of Human Rights in the case of *Sylvester v. Austria* (judgment of 24 April 2003), the Supreme Court ruled that only a change in the relevant facts may exceptionally justify the non-enforcement of a return order, in particular if the child's ability to independent discretion has clearly developed or the child can put forth pertinent new grounds for his or her refusal. A repeated reassessment of the child's views tends to delay the enforcement of the return order, and this is against the main purpose of the Convention on Child Abduction, namely the prompt return of abducted children to the country of their habitual residence. The Court also noted that the ECtHR has in several cases found a breach of the right to family life owing to the failure of authorities to take adequate and effective measures to enforce a return order (e.g., *Sylvester v. Austria* mentioned above and *Ignaccolo-Zenide v. Romania*, judgment of 25 January 2000, Reports of Judgments and Decisions 2000–I).

The Court took note of the fact that X had tried to prevent the enforcement of the return order by hiding the children. She had also brought the case to the attention of the media and it had been reported extensively. In the Court's opinion, there was reason to doubt that X through her actions had tried to influence the children in forming their views, and under the circumstances it was not possible to find out the genuine views of the children. Since the

return order was issued no specific new reasons had emerged on the basis of which the children's objection to their return should have been assessed differently from the assessment made by the Supreme Court in August 2004. The Supreme Court also found that an additional hearing of the children was not necessary on the basis of the Convention on the Rights of the Child, either. The Court ruled that the enforcement of the return order is to be completed and the children are to be returned to the United States.

One concurring justice referred in particular to the Convention on the Rights of the Child and section 6–3 of the Constitution which prescribes that children shall be allowed to influence matters pertaining to themselves. In his opinion, a child has a right to be heard also in the enforcement of the return order, if possible. Hearing a child does not mean that the child has a right to a final decision in the matter. The concurring justice found that the children should have been heard by the Supreme Court in this case, irrespective of whether the grounds for their objection to return would in fact prevent their return or not.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Concluding observations on Finland by the Committee on the Rights of the Child[60]
The Committee reviewed Finland's third periodic report and adopted its concluding observations on 30 September 2005. The third periodic report extended from July 1998 to July 2003.

The Committee noted, inter alia, that

- Finland has adopted guidelines for interviewing minors in March 2002; and
- established the post on the Ombudsman for Children as of September 2005 and that an advisory committee representing a wide range of expertise has been set up where also NGO:s will be represented. The Committee noted that the mandate of the Children's Ombudsman is restricted to promotional work and advisory services. The Committee therefore recommended that the mandate of the Ombudsman should be expanded in line with General Comment 2 on the role of independent human rights institutions to include the ability to receive and investigate complaints from children. Finland should also provide sufficient human and financial resources in order to enable an effective monitoring of the implementation of the CRC throughout the country.
- Welcomed the ratification of the Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict in May 2002.
- Welcomed the ratification of ILO Convention No. 182 concerning Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour in January 2000.
- Welcomed the ratification of the Rome Statute of International Criminal Court in December 2000.
- Noted that the time for processing applications of unaccompanied children has been reduced.
- Welcomed the assurance that Finland will ratify the Optional Protocol to the CRC on sale of children, child prostitution and child pornography.

Main subjects of concern:
The Committee:

- Urged Finland to take all necessary steps to implement and address problems concerning violence against children including sexual abuse and children belonging to ethnic minorities.

[60] CRC/C/15/Add.272 of 30 September 2005.

- Recommended that Finland undertake a study to assess and analyse the resources provided for children and continue to ensure equal access and availability of services for all children irrespective where they live.
- Noted with concern that data collection and compilation of statistics of children, in particular, of disabled children, asylum-seeking children, children in conflict with the law and children belonging to ethnic minorities concerning their living conditions and implementation of their rights is inadequate.
- Urged Finland to continue its efforts to prevent discrimination of children and in particular Roma and foreign children.
- Noted that violence and sexual abuse within families is a serious obstacle to the full implementation of children's rights and urged Finland to prevent and combat all forms of child abuse and prosecute the perpetrators of these acts.
- Noted with concern the high suicide rate among adolescents and urged Finland to strengthen its mental health care.
- Expressed concern of the high rate of dropout of Roma children and difficulties in accessing education and urged Finland to fully implement Articles 28 and 29 throughout the country, including in respect of Roma children. The Committee also expressed concern of continued disparities between Finnish and Roma children which affect the enjoyment of the rights of Roma children, in particular as to housing and education. Finland was urged to continue to take measures towards social inclusion and combat marginalization and stigmatization of Roma children.

Legislative initiatives, national case law and practices of national authorities

Youth legislation to be amended. The government has decided on the content of new amendments to the Youth Act (Hallituksen esitys 28/2005 vp eduskunnalle nuorisolaiksi sekä laiksi opetus- ja kulttuuritoimen rahoituksesta annetun lain 1 §:n muuttamisesta) The new Youth Act will replace the current Youth Work Act of 235/1995. According to the bill, youth work refers not only to supporting the active citizenship and social inclusion of young people, but also to supporting their growth and independence, as well as dialogue between generations. By young people, the bill refers to those under 29 years of age. The bill proposes the introduction of a youth policy development programme, which the government would confirm every four years. The objective of the bill is to create favourable circumstances for leisure activities for young people. The aim is to promote young people's activeness within their own communities and the municipal decision-making when dealing with matters concerning the young.

Article 25. The rights of the elderly

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Elderly people entitled to service assessment. Elderly people over the age of 80 and recipients of special care allowances will be able to receive a service needs assessment from their local authority within seven days. The measure, which becomes law from March 2006, concerns non-urgent service needs. Urgent service needs are determined without an assessment procedure.

The aim of the move is to improve services for elderly people so that they are available when needed and that people using them can benefit from them properly. More timely delivery of services will help elderly people cope better in everyday life and in living at home.

Social service offices carry service needs assessments either by means of home visits or office appointments. Healthcare services may also contact social services about arranging urgent support to clients.[61]

Article 26. Integration of persons with disabilities

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Supreme Administrative Court (Report no. 89; 1593/3/02, KHO 2005:89)

Abstract: A municipal social welfare board had in its budget proposal suggested the allocation of funds for the purpose of granting certain allowances under the Act on Services for Persons with Disabilities. The municipal executive board had decided to cancel these funds from the budget proposal. The municipal council adopted the budget as proposed by the executive board. As a consequence, during that budget year no funds could be allocated under the Act on Services for Persons with Disabilities for the reimbursement of a car needed for the transportation of a disabled person.

The administrative court took note of the Constitution and the duty of public authorities to guarantee adequate social, health and medical services for everyone (section 19–3) and the duty of all public authorities to guarantee the observance of constitutional rights and human rights (section 22). It also referred to the Municipality Act which prescribes the duty of local authorities to perform the functions laid down for them by Act of Parliament as well as their duty to compile a budget which safeguards the preconditions for performing these functions. Under the Act on Services for Persons with Disabilities, the local authorities have a duty to assess as to what extent services are needed. The administrative court ruled that the budget adopted by the municipal council did not safeguard, as required by the Municipality Act, the preconditions for performing the functions assigned to the municipality under the Act on Services for Persons with Disabilities. The decision of the municipal council was therefore contrary to law.

The majority of the Supreme Administrative Court agreed with the administrative court. In its decision, the Court also referred to the principle of equality in section 6 of the Constitution. Within the framework of the funds allocated in the budget, a municipal social welfare board must be able to consider individually the need for services for persons with disabilities and to provide services in a priority order which is in accordance with the constitutional requirement that no one shall, without an acceptable reason, be treated differently on the ground of health, disability or other reason that concerns his or her person.

[61] Ministry of Social Affairs and Health,
http://www.stm.fi/Resource.phx/publishing/documents/3641/index.htx

CHAPTER IV. SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

Article 28. Right of collective bargaining and action

The right of collective actions (right to strike) and the freedom of the enterprise or the right to property and the issue of the intervention of the judiciary into collective actions

Legislative initiatives, national case law and practices of national authorities

Government reacted to border guards' strike by proceeding to curtail the right to strike.
Collective bargaining negotiations between the Frontier Guard (Rajavartiolaitos) and the Border Guard Union (Rajavartioliitto) had been conducted without success in the course of spring 2005, which led the union to begin a strike on the Finland-Russia border on 31 May. Following difficult negotiations and two strikes totalling three weeks in length, the Frontier Guard and the board of the Border Guard Union finally accepted, on 28 June, a mediation offer put forward by the national conciliator, Juhani Salonius. The proposal for a new collective agreement was then to be approved by the council of the Border Guard Union. This took place on 18 July after heated debate within the council, one third of whose members voted against the deal.

The main issue at stake in the negotiations was a reform of the pay structure. The Border Guard Union had opposed a reform that was to make salary determination increasingly dependent on individual work requirements and performance while lessening the importance of work experience. In the end, the union yielded and the new pay structure will come into effect with only minor modifications to the employers' original proposals. The union did, nonetheless, secure a hefty pay rise for its members, totalling 6.1% in the course of the two-year period of the agreement.

The definition of *essential work* during industrial action became a particularly sensitive issue during the negotiations. First tensions arose in early June between the Border Guard Union and the Frontier Guard when the latter defined the striking frontier guards' duties as essential work and, on these grounds, ordered the guards' supervisors to take over frontier posts. The union strongly opposed this move and was finally given support by the Labour Court which ruled that there was no legal ground for resorting to the notion of essential work. The court's decision was based on the fact that the Frontier Guard had not specified what kind of harm to people or property the strike would have entailed if no essential work was performed. Later on in June the government brought a bill to the Parliament that would have granted it powers to have essential work done by the strikers' supervisors at border posts during the World Championships in Athletics in Helsinki in August 2005. The bill was, nevertheless, blocked by the MPs of the Social Democratic Party, which belongs to the coalition government. Partly the MPs based their decision on not wanting to infringe upon the right to strike. As such they shared the position of the Border Guard Union. The government was planning to bring the bill again to the Parliament in July. However, on 28 June when the collective bargaining negotiations were concluded, the Border Guard Union also agreed that it would not strike during the sports competition even if its council did not accept the deal two weeks later. Thus there was no need from the part of the government to take further measures.

Finnish Seamen's Union and ITF won Rosella dispute at Court of Appeal in London in a case which raises major issues of the relationship between the rights of workers and the rights of employers under European law. On 3 November 2005, the Court of Appeal in London lifted an injunction issued by the United Kingdom Commercial Court last summer, preventing the Finnish Seamen's Union and the International Transport Workers' Federation (ITF) from engaging in any action that could affect the operations of the Viking Line shipping company

or the terms and conditions of service of employees aboard its vessels. Under the terms of the injunction, any measures taken to apply pressure on Viking Line would have constituted contempt of court and left the union open to sequestration of its assets.

The dispute concerned the Viking Line vessel Rosella, which plies the route between Helsinki and Tallinn under a Finnish flag and with an entirely Finnish crew. Viking Line has been preparing for the Rosella to sail under the Estonian flag for some time. The terms and conditions of the service by crew members working on the Rosella comply with the collective agreement negotiated by the Finnish Seamen's Union as a part of Finland's national collective agreement settlement in the autumn of 2004. Codetermination negotiations between the company and the trade unions are under way as a result of plans to reflag the vessel.

In its successful appeal the Finnish Seamen's Union had argued that the ruling of the Commercial Court was inconsistent with fundamental principles of the Finnish legal system. It conflicted with Finnish fundamental rights to freedom of expression and freedom of association, and with the right to strike.

The Court of Appeal also held that the legal issues in the case should be referred to the European Court of Justice under the Article 234 EC Preliminary Ruling Procedure. In its judgment the Court of Appeal referred to the ECJ ten questions (with some of them elaborated by further alternatives). The first question asks whether the industrial action falls 'outside the scope of Article 43 of the EC Treaty and/or Regulation 4055/86 by virtue of the EC's social policy including, inter alia, Title XI of the EC Treaty and, in particular, by analogy with the Court's reasoning in […] Albany, paras 52–64?' The other questions deal with the horizontal direct effect of establishment and services rules in EC law, existence of restrictions on free movement, relationship of establishment and services rules[62] and justification of restrictions. The last mentioned facet includes i.a. the assertion that 'the taking of collective action (including strike action) is a fundamental right protected by Community law' and the concept of the protection of workers as a justification ground; question No. 7. A separate question (No. 8) deals with the justification of the flag of convenience policy of the International Transport Workers' Federation. Thus, via the link to the ILO right to strike/industrial action even the possibility of striving after global social justice will be indirectly addressed in this case. Regarding the justification of the FSU's action, the Court of Appeal finally asks whether the collective action that has been taken strikes 'a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition'; question 9.

It is significant to add that similar legal proceedings are also under way in Sweden. An embargo of the Latvian construction company Laval un Partner has led to a situation in which the national employers' confederation is supporting an application to the European Court of Justice. It can thus be argued that in this way employers in both Finland and Sweden

[62] Case-law shows a sufficiently settled line of reasoning by the ECJ in assessing rivalling or overlapping internal market freedoms in a particular case. In Omega Spielhallen (Case C-36/02) the ECJ stated this, as follows (paragraph 26): '…where a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it...' The Court referred i.a. to the lottery case C–275/92 Schlindler [1994] ECR I–1039 where the full Court found that cross-border sending of advertisements and application forms, and possible ticket selling, thus importation and distribution of such objects, were, in the context of lottery activities, not ends in themselves. The case was decided only by applying the rules on free movement of services; paragraphs 22 to 25. On the line of this 'dominating freedom principle' in the particular circumstances of the case Viking the re-flagging in a certain Member State is not an end in itself. The core is the pay conditions (and the way to establish them — with or without the right to strike — before or after re-flagging) which falls under the free provision of services. It is essential to note that under the Maritime Services Regulation 4055/86/EEC the right to liner traffic is not bound to flagging in one of the two states; flagging within the Community suffices; see Articles 1(1) and 1(2). Besides, also 'triangle traffic' (e.g. Tallinn-Stockholm-Helsinki) might emerge.

have been systematically seeking judicial rulings that give priority to the freedom of movement of goods and services within the European internal market over the fundamental rights that are guaranteed to workers by the national legal order, such as the right to organise and engage in collective bargaining.

Article 29. Right of access to placement services

Article 30. Protection in the event of unjustified dismissal

Article 31. Fair and just working conditions

Health and safety at work

Positive aspects

Work health and safety improvements mapped.
Working conditions and occupational health and safety meet high international standards, according to an occupational safety strategy report produced by the Ministry of Social Affairs and Health. The report covers the situation reached by 2004 as a follow-up to strategies carried out in recent years.

Workplace accidents have dropped by some 50% in the last 20 years, but the good trends in the situation had ceased by the turn of the millennium. Now, positive trends have picked once more due to concerted efforts to improve the situation.

The report notes that employees' safety at work is better catered for now than in the past. But the aim of the report is further to improve Finnish working conditions, in part by raising the level of debate on working life and occupational safety. This meshes with efforts to improve the overall quality of working life as part of work attraction strategies aimed to boost the employment rate and reduce the rate of early retirement.

One of the major positive observations is also that, at work places, the experience of pressure has reduced in 1997–2003. This concerns all industries. The proportion of those who experienced their work mentally hard was in 2003 clearly smaller than in 1997 but slightly larger than in 2000.

Since 1997, about 5,000 new cases of occupational illness have been annually detected. Before that, the annual number decreased in many consecutive years. In 1990 over 9,000 new cases were detected. In 1993–2003 the number of cases of occupational illness decreased in all illness categories.

The annual number of new disability pensioners was in 2000–2003 clearly larger than in 1996–1999. The authors of the follow-up report suggest that this development should not be interpreted as an indication of the worsening of working conditions. Instead, they remind that the increase of new disability pensioners is partly natural as the age structure of the labour force becomes older.

Since 1980, the proportion of those on sick leave has annually stayed between three and four per cent. In industrial work the proportion was close to six per cent in 2000–2003 and slightly lower in 1991–1999.

The report maps the improvements in health and safety in working life over several years, offering comparative statistics to show changes in work conditions. One of its aims has

been to compile a strong statistical base so as to gain a full picture of changes in health and safety developments and regimes.[63]

Reasons for concern

An internal comparison among large construction companies in Finland shows that occupational safety on Finnish building sites is the worst in the Nordic countries. The total number of people dying annually as a result of industrial accidents in Finland is about 40. The proportion of foreigners is not indicated by the statistics, but Finnish authorities are particularly concerned about occupational accidents to foreigners.[64]

Working time

Legislative initiatives, national case law and practices of national authorities

New Act on Annual Vacation entered into force 1 April 2005. (Vuosilomalaki 162/2005). The scope of application of the Act on Annual Vacation is of a general nature applying to employees and civil servants. The Constitutional Law Committee of Parliament has recently held that under section 80–1 of the Constitution it is permissible to delegate certain matters relating to the rights of the individual to the collective agreements between the employers and the employees.[65] However, the Committee noted that certain issues relating to the rights of the individual cannot be delegated to be dealt with by way of collective agreements. The employer's right to annual leave must be regulated by an Act of Parliament.[66] Section 18–1 of the Constitution provides that public authorities shall take responsibility for the protection of the labour force. The Act on Annual Vacation does provide for the possibility to delegate to the level of collective agreements issues pertaining to annual holiday with pay, but such contracts cannot derogate from the minimum requirement that one part of the annual holiday is to be uninterrupted and constituting of at least 12 days of annual holiday with pay (section 21–1 of the Act).

Article 32. Prohibition of child labour and protection of young people at work

Article 33. Family and professional life

Article 34. Social security and social assistance

Social assistance and fight against social exclusion

Legislative initiatives, national case law and practices of national authorities

The Act on Rehabilitation Benefits and Rehabilitation Financial Support by the Social Insurance Institution of Finland (KELA) entered into force on 1 October 2005. (Laki Kansaneläkelaitoksen kuntoutusetuuksista ja kuntoutusrahaetuuksista 566/2005)

The Act includes regulations on the organisation of rehabilitation and conditions for receiving rehabilitation benefits.

[63] Press release, the Ministry of Social Affairs and Health, 15.8.2005. See also Occupational Safety and Health Strategy: Follow-up Report (pdf), Helsinki, 2005 (in Finnish, the English language summary on page 7).
[64] Helsingin Sanomat, 23.11.2005.
[65] Opinion of the Constitutional Law Committee 41/2000 vp.
[66] Opinion of the Constitutional Law Committee 1/2005 vp.

Chapter 2 of the Act regulates the conditions for professional rehabilitation, rehabilitation of severely handicapped persons and other forms of optional rehabilitation. Chapters 3 and 4 regulate the conditions for financial support due to need of rehabilitation, i.e. during periods of sickness and incapacity to work. Section 32–3 guarantees that the level of financial support due to rehabilitation is equivalent with what is provided for in the Health Insurance Act, Chapter 11, section 7.[67]

Changes to residence based social welfare legislation entered into force on 1 January 2005. *(*Laki asumiseen perustuvan sosiaaliturvalainsäädännön soveltamisesta annetun lain muuttamisesta 635/2004). The reform seeks more effectively to meet international demands and to increase labour mobility. It concerns new regulations on the national pension, family pension, child allowance, maternity allowance, disability support and child care support. Entitlement to these benefits has usually only covered people living in Finland. Legislation on sickness benefit will also be changed.

Under the new legislation, benefit entitlements are now available to people working in Finland or conducting business in the country from other EU and EEA countries, if their working presence in Finland lasts a minimum of four months in a stretch. The reform of legislation also includes sickness benefits. The altered benefit entitlements do not include unemployment benefits, which still require residence in Finland.

The Act on the Scope of Application of Legislation on Social Security Based on Residence was amended to cover the Act on Subsistence during Unemployment and the Act on Sickness Insurance (Laki asumiseen perustuvan sosiaaliturvalainsäädännön soveltamisesta annetun lain muuttamisesta ym., 635–648/2004). The reform entered into force on 1 January 2005. The provisions on the scope of application of social security on the basis of residence are of great relevance for the conditions under which social benefits are granted. The legislative package contains the conditions under which a person is granted social benefits on the basis of permanent residence. Section 3a of the Act prescribes that persons moving to Finland on a permanent basis shall benefit from social security from the day of arrival. Section 3 prescribes the conditions under which a person can be considered to have moved to Finland on a permanent basis. The requirement for instance relating to work is that the person must have a contract for at least two years. The benefits are closely related to section 19 subsections 2 to 4 of the Constitution.[68] The Constitutional Law Committee had addressed separately a clause in the proposed Act which could be interpreted as automatic exclusion of persons coming to Finland for studies from the scope of social security. Through the opinion of the Constitutional Law Committee[69] and the report by the Committee on Social Affairs and Health[70] it was clarified that while students, on the basis of reciprocity, are expected to fund their studies by support obtained from their home country, they are eligible to medical assistance and certain welfare services in Finland.

A new Sickness Insurance Act (Sairausvakuutuslaki 1224/2004) entered into force on 1 January 2005. Basing itself on the universality principle of social security, reflected in section 19–2 of the Constitution, the Constitutional Law Committee once again emphasized that all members of society should be covered by legislated schemes of social security, including sickness insurance. The Committee addressed separately a clause, imported from the earlier Sickness Insurance Act, according to which persons without income are entitled to sickness insurance payments only after an initial period of 55 days' illness. Referring also to section 22 of the Constitution and Article 12–3 of the European Social Charter and without directly

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[67] Opinion of the Committee on Social Affairs and Health 8/2005 vp.
[68] Report by the Constitutional Law Committee 25/1994 vp.
[69] Opinion by the Constitutional Law Committee 22/2004 vp.
[70] Report by the Committee on Social Affairs and Health 17/2004 vp.

proposing amending the bill,[71] the Committee expressed its view that this waiting period should be progressively shortened.[72]

Report: overall social security development positive but uneven
The social security of people in Finland has developed in a generally good direction in recent years but has not done so evenly among different population groups, according to a report issued by the Ministry of Social Affairs and Health, 17 December 2004.

Though the overall level of poverty in the country has dropped, that of relative poverty has risen, the report finds. This is reckoned to be because the level of minimum benefits and family benefits have fallen behind general income developments. Long-term unemployment remains a problem. The report states that there are yet no solutions to cutting poverty and exclusion.

At the same time, a better employment rate and tax reductions have improved the situation of families with children. But the available arrangements for child care vary according to the age of children.

In general, the health of the population has improved, but here again there are disparities between the better off and less well off population groups. The report also states that a special worry is the rapid increase in child obesity and the clear rise in alcohol consumption following the cut in the tax on alcohol.

The report also considers the welfare of the population in terms of new funding and service production in social and healthcare, changes in conditions in the workplace and certain improvements in gender equality.[73]

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

A working group of the Ministry of Social Affairs and Health has tabled proposals to improve the social security of entrepreneurs, particularly small business owners.

The proposals contain a range of measures that would upgrade occupational healthcare, sickness insurance and unemployment security for family members.

The proposals include measures to enable arrangements for medical treatment as part of the voluntary occupational health care system for business owners and farmers. The aim is to encourage them to join occupational health care schemes. The proposals also suggest bridging unemployment benefit schemes with entrepreneurial work, instead of the current system which requires that such work ceases before any entitlement to a benefit is allowed.

A major aim of the proposals is to set better conditions for people to become entrepreneurs and increase the numbers of start-up businesses in Finland.[74]

Article 35. Health care

Access to health care

Legislative initiatives, national case law and practices of national authorities

Act amending the Public Health Act (Laki kansanterveyslain muuttamisesta 855/2004), Act amending the Act on Specialized Medical Treatment (Laki erikoissairaanhoitolain muuttamisesta 856/2004) and Act amending the Act on the Status and Rights of Patients (Laki

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[71] Government Bills HE 50/2004 vp and 164/2004 vp.
[72] Opinion of the Constitutional Law Committee 33/2004 vp.
[73] Press release, the Ministry of Social Affairs and Health, 17.12.2004.
[74] Press release, Ministry of Social Affairs and Health, 9.8.2005.

potilaan asemasta ja oikeuksista annetun lain muuttamisesta 857/2004) entered into force on 1 March 2005.75

The reform introduced a time frame for access to health care. The new law puts a 6-month limit on waiting lists for non-emergency hospital treatment.

Over 6-month waiting lists for access to specialised hospital treatment halved
Legislation on time frames for access to health care which came into force at the beginning of March is now producing effect with respect to waiting lists for non-emergency hospital treatment.

The implementation of the legislation on such treatment puts a 6-month limit on waiting lists. The measure took effect from 1 September. Other measures on time frames for access to health care provided by health centres are already being carried out.

The statutory time frames are part of the nationwide project on the reform of the health service. Efforts to cut waiting lists for hospital treatment have already been put into effect since 2002, when EUR 50 million was allocated by the state and municipalities to speed up access to treatment.

At that time, some 66,000 people had been waiting for treatment for over six months. By mid-2005 the figure had been cut to 34,000, of whom some 2,000 had been offered treatment in another part of the country but had preferred to wait for treatment at their own local hospital. According to estimates by hospital districts, by the end of the year the overall waiting list should be halved again, to about 15,000 cases.[76]

The reform has also made it easier for patients to have immediate contact with their local health centres and to get access to treatment within three days.

Though the question of speedy access has improved significantly, problems remain in some localities. Overall, health centres have managed to stick to the time frames, but some 43% of the population live in areas where access to non-urgent health care takes about a week.[77]

<u>Other relevant developments</u>

Legislative initiatives, national case law and practices of national authorities

Government Bill 134/2005 for an Act on Repair, Energy and Health Hazard Subsidies of Apartments (Hallituksen esitys eduskunnalle laiksi asuntojen korjaus-, energia- ja terveyshaitta-avustuksista). The purpose with the bill is to grant financial support in order to repair apartments and to promote energy-saving arrangements in private housing. The support is also designed to give relief to private households that have been facing, in particular, mould problems in their dwelling. Section 13 of the bill prescribes that a civil servant has the right to inspect the housing to the extent it is being repaired. This is relevant for section 10–3 (right to privacy) of the Constitution prescribing that measures encroaching on the sanctity of the home, which are necessary for the purpose of guaranteeing basic rights and liberties or for the investigation of crime, may be laid down by an Act. The Constitutional Law Committee has held that an inspection on the basis of awarded public subsidy, by civil servants, is in accordance with section 10–3 of the Constitution for crimes where the maximum penalty is a fine.[78] Chapter 29 sections 5 to 8 of the Penal Code prescribe conditions for subsidy fraud and misuse. The proposal is, however, not connected to situations of subsidy fraud. The subsidy for the purposes of the bill can be viewed in light of the Constitution, section 19–4 (promotion of the right to housing), section 19–3 (promotion of health), and section 20–2 (right to a

[75] Opinion by the Constitutional Law Committee 20/2004 vp.
[76] Ministry of Social Affairs and Health, http://www.stm.fi/Resource.phx/publishing/documents/4119/index.htx.
[77] See press release, Ministry of Social Affairs and Health, 19.10.2005.
[78] Opinion of the Constitutional Law Committee 69/2002 vp.

healthy environment). The Constitutional Law Committee held accordingly that inspection encroaching on the sanctity of the home is in line with the Constitution as long as the inspections are made for the purpose of securing that the awarded subsidy is used for its purpose. The Committee, however, held that the bill was not precise enough as to the conditions for inspection and that it should be made clearer on this point.[79]

Section 11 of the proposed Act would prescribe that the person and household receiving the subsidy have to use the apartment as their home for 5 years after receiving the subsidy. This has implications for the right to sell the apartment and is relevant in the light of section 9–1 of the Constitution (freedom of movement and the right to choose one's place of residence). The Committee held that this clause should be restricted only to the person receiving the subsidy and not to other persons within the household. The proposed 5 years' limit was also considered to be rather a long time. However, as the Committee noted, release from the requirement could be granted by the authorities on the basis on free discretion. This was held to be problematic and the Act should include a clause on the circumstances that give rise to an exemption. As the bill is currently under consideration in the Parliament, the outcome will be reported in the 2006 report.

Legislation proposed to clarify social welfare and health care client charges
A government commission set up in December 2003 to look into the need to reform the policy and arrangements for customer fees in the municipal social welfare and health care system delivered its findings on 23 September 2005. The commission report details the effectiveness of the present fee system and suggests ways to overcome current weaknesses.

The report finds that the main principles of the present system should be retained and that the system is "for the most part effective and justified". The report does, however, make suggestions for enhancing transparency and clarity. Concerning customer fee ceilings, it is proposed that the municipal health care system should stop using so-called intermediate ceilings. Steps should also be taken to create a common fee ceiling or a comparable method.[80]

Article 36. Access to services of general economic interest

Article 37. Environmental protection

<u>The right to access to information in environmental matters</u>

Legislative initiatives, national case law and practices of national authorities

Act on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and related Acts entered into force on 30 November 2004 (Act No. 767/2004). The Act implements the 1998 Århus Convention on access to information, public participation in decision-making, and access to justice in environmental matters.

Working Group presents different alternatives for the preparation of a Class Action Act. A working group appointed by the Ministry of Justice has studied the possibilities of introducing class action in Finland. The working group also proposes alternatives which can be used as a basis for legislative drafting if this is considered necessary. The working group was not unanimous on the necessity of class action. Especially members representing consumers, environmental organisations and employee associations favoured a Class Action Act. Representatives of business, on the other hand, opposed it. However, the memorandum does

[79] Opinion of the Constitutional Law Committee 39/2005 vp.
[80] Ministry of Social Affairs and Health, news items, http://www.stm.fi/Resource.phx/publishing/documents/4946/index.htx

not clearly differentiate between the majority and the minority; instead it explains the viewpoints for and against introducing the institution of class action.[81]

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Legislation package on water management (Laki vesienhoidon järjestämisestä ym. 1299–1302/2004) entered into force on 31 December 2004. The legislative package implements the EU Water Framework Directive for integrated river basin management in Europe. The directive concerns both surface waters and ground water. The overall aim of the directive is to achieve a good state of all waters within the EU area by 2015. The main legislation is contained in the new Act on the Organisation of Water Management. It prescribes the classification of waters, general aims for the quality of water and investigation of factors affecting water quality, the tasks of the competent authorities, and the organisation of water management planning. A Decree contains more detailed regulations. The new Act also amended the Environmental Protection Act and the Water Act. The Act also contains provisions bringing into force regulations of the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

Individuals and parties using the water can participate in water management planning. The regional environment centres will organise participation and set up the cooperation groups required. Additionally, the public will have access to preparatory documentation and will be able to express their opinions on it in writing or electronically. The documentation is to be kept publicly available by the local authorities and will also be published on the Internet.

The aims expressed in the water management plans are not directly binding on business, industry, or private citizens, but central and local authorities have to take them into consideration as applicable. Provisions on the responsibilities of business and industry as well as private citizens are included in other legislation, in permits, and in environmental protection regulations by the local authorities.

Article 38. Consumer protection

[81] See press release, Ministry of Justice, http://www.om.fi/31611.htm.

CHAPTER.V. CITIZENS' RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Citizen Participation Policy Programme is one of the four policy programmes adopted by the government to strengthen Finnish democracy through the co-operation of several Ministries. Within the frame of the Policy Programme different development processes have been launched in the fields of education for active citizenship, social participation and civic activity. At the moment around 20 different projects and operational ensembles have been started. The Policy Programme aims to support its projects by promoting research regarding Finns as citizens, the changing challenges of citizenship, social capital, indicators of citizen participation and the state of democracy. It also promotes further research in social participation and supports studies as well as awakens discussion concerning the subject.[82]

Article 40. Right to vote and to stand as a candidate at municipal elections

Participation of foreigners in public life at local level

Legislative initiatives, national case law and practices of national authorities

Finland has ratified the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144) in 2001.

It is also significant to note that section 14 of the Constitution prescribes as follows: "Every Finnish citizen who has reached eighteen years of age has the right to vote in national elections and referendums. Specific provisions in this Constitution shall govern the eligibility to stand for office in national elections. Every Finnish citizen and every foreigner permanently resident in Finland, having attained eighteen years of age, has the right to vote in municipal elections and municipal referendums, as provided by an Act. Provisions on the right to otherwise participate in municipal government are laid down by an Act. The public authorities shall promote the opportunities for the individual to participate in societal activity and to influence the decisions that concern him or her".

Furthermore, section 26 in the Municipality Act (Kuntalaki 365/1995) provides that "In municipal elections held in a local authority, all citizens of Finland, other European Union Member States, Iceland and Norway who reach the age of 18 before the beginning of the election year and who were domiciled as referred to in the Act on Domicile in the local authority concerned on the first day of the election year have suffrage in municipal elections held in a local authority. Other foreigners fulfilling these preconditions also have suffrage in municipal elections if they have been domiciled in Finland for two years at that date (amended 22.12.1995/1647)". Section 33 provides for the general conditions for election by prescribing that: "Those qualified for election to a municipal elective office shall be persons:

1. domiciled in the local authority concerned;
2. entitled to vote in municipal elections in a local authority in the year in which councillors are elected or an election for some other elective office is held; and

[82] See more http://www.om.fi/29378.htm.

3. who are not under guardianship."

Only persons who have stated in writing that they are willing to accept the post of municipal councillor may be proposed as candidates for election to the council. This means that a person fulfilling the preconditions set out in section 26 regarding participation in local elections can by fulfilling the preconditions under section 33 be elected to a municipal elective office.

Article 41. Right to good administration

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 42. Right of access to documents

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 43. Ombudsman

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 44. Right to petition

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 45. Freedom of movement and of residence

<u>Right to social assistance for the persons who have exercised their freedom of movement</u>

Legislative initiatives, national case law and practices of national authorities

See text under Article 34, above.

<u>Prohibition to enter certain zones or portions of the national territory during particular events</u>

Legislative initiatives, national case law and practices of national authorities

Act on the Administration of the Frontier Guard and Frontier Guard Act and related Acts entered into force on 1 September 2005 (Laki rajavartijalaitoksen hallinnosta 577/2005 and Rajavartijalaki 578/2005). The new legislation seeks to adjust to the development of monitoring outer borders within the European Union. Cooperation between the border guard, the customs and the police was made easier in order to strengthen internal security. Section 16–1 in the Frontier Guard Act prescribes conditions for temporary closing of a frontier crossing point if this is necessary for reasons of public order, national security or public health, i.e. to prevent for instance the spreading of diseases. The closing of a frontier crossing point would not, however, prevent a Finnish citizen from entering Finland or otherwise

restrict the rights of persons exercising their freedom of movement based on Community Law or to enter Finland for the purpose of seeking international protection. Under section 16–2, everyone also enjoys the right to leave the country.

Checks at internal borders were reinstated due to the World Championships in Athletics in Helsinki in August. On 21 July, the Finnish government decided that border checks at internal EU borders were reinstated from 24 July to 14 August 2005. This was done for the purpose of ensuring security during the World Championships in Athletics which were held in Helsinki between 6 and 14 August 2005. The aim was not to check all traffic crossing internal borders but to carry out random checks on the basis of risk analysis and profiling. The decision did not affect the possibility to cross internal borders in accordance with existing legislation. Furthermore, the decision did not include any changes in passengers' obligation to carry travel documents. In practice, reinstating the internal border controls affected border control practices mostly at Helsinki-Vantaa and Tampere airports and international airports in northern Finland. It also affected passenger boat traffic at ports of Finland and crossing the inland borders from Sweden and Norway to Finland.[83]

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Government Bill 25/2005 for a Passport Act and related Acts.

The bill is based on Council Regulation 2252/2004 EC on standards for security features and biometrics in passports and travel documents. The Council regulation confirms the need for a coherent approach in the EU on biometric identifiers or biometric data. The biometric data would consist of a facial image and fingerprints. The Constitutional Law Committee of Parliament issued an opinion on the bill focusing on the right to privacy (section 10 of the Constitution) and freedom of movement (section 9).[84] Under section 9–2, "everyone has the right to leave the country". A passport is the main document used when leaving the country. Section 15–1 in the proposed Passport Act would prescribe the conditions under which a passport can be denied. A person could be denied a passport if he/she has been convicted to serve imprisonment and has not done so. A 28-year-old man could be denied a passport for not having served his military service unless the person can show that the duty to do military service is not an obstacle for granting a passport. A passport would be denied if a person is under the Coercive Measures Act or Bankruptcy Act under a restriction that he cannot leave the country. Section 9–2 of the Constitution prescribes that limitations on the right to leave the country may be issued if they are necessary for the purpose of safeguarding legal proceedings or enforcement of penalties or for fulfilment of the duty of national defence. Section 15–1–1 in the proposed Passport Act further prescribes the conditions for denial when a person is suspected of having committed a crime with a penalty of at least one year of imprisonment and the investigation is not finished. The Constitutional Law Committee called for certain further specifications in the Act.

Section 9–3 of the Constitution guarantees the right of a Finnish national to enter Finland. Section 2–1 of the proposed Passport Act is framed in such a way that a passport is the only document giving a right to enter Finland. The Constitutional Law Committee held this to be too restrictive as it is possible to prove one's nationality also otherwise. As the bill is currently under consideration in the Parliament, the final outcome will be reported in the 2006 report.

[83] See in more detail under Article 28.
[84] Opinion of the Constitutional Law Committee 27/2005 vp.

Article 46. Diplomatic and consular protection

Protection of EU citizens by diplomatic and consular representations abroad

Legislative initiatives, national case law and practices of national authorities

Directive 95/553/EC is based upon Article 20 TEC and is in Finland on that basis directly enforceable. The directive has not been transposed as such into national legislation. In practice, it is implemented by diplomatic and consular representations as consulate services to all EU citizens. The European Union Emergency Travel Document is recognised and works in practice. No difficulties have been recognised in the implementation of the right to diplomatic and consular protection.[85]

[85] The Director of Consular Services/legal department of the Ministry for Foreign Affairs, Mr Pekka Hyvönen was consulted.

CHAPTER VI. JUSTICE

Article 47. Right to an effective remedy and to a fair trial

Access to a court and, in particular, the right to legal aid / judicial assistance

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Alatulkkila and Others v. Finland[86]

The applicants, owners of water areas and fishermen in the Gulf of Bothnia, were restricted to fish in certain restricted waters due to a prohibition of all fishing of salmon and sea trout, issued by the Finnish-Swedish Frontier Rivers Commission, in the 1996 and 1997 fishing seasons. Compensation was given to cover economic losses of some of the applicants. An application to annul the decision was filed by the applicants and dismissed by the Supreme Administrative Court in 1998 on grounds that the applicants had a possibility to make known their opinions to the Frontier Rivers Commission prior to the issued restriction which therefore was not violating Article 6 of the ECHR. The goal with the restriction was to strengthen the fish stocks in order to ensure the future of fishing in that specific area. The ECtHR found that the applicants had been given an adequate opportunity to challenge the restriction and that the proceedings before the Supreme Administrative Court provided the applicants with access to court. The Court found no violation of Article 6–1 of the ECHR. The restriction issued, interfering with the applicants' property rights, was justified in being lawful and aimed at protecting fish stock and was proportionate and necessary considering local conditions. The loss was compensated to those who made use of the possibility to seek compensation. Consequently, the Court found no violation of Article 1 of Protocol 1.

Legislative initiatives, national case law and practices of national authorities

Supreme Administrative Court (Report no. 1573; 991/3/04, KHO 2005:43)

Abstract: The board of appeal of the National Board of Patents and Registration (NBPR) had ruled as inadmissible company A's appeal and complaint against the decision of the NBPR by which company B had been granted a patent. Company A was not a party in the patent application process and had therefore no right to lodge an appeal or a complaint against the decision on the patent application. The Supreme Administrative Court upheld the decision of the board of appeal and rejected company A's appeal. Under section 26 of the Patents Act, only an applicant may appeal against a final decision taken by the patent authority on a patent application. Company A's claim for a right of appeal cannot be based on section 21–1 of the Constitution concerning protection under the law, either, as a decision by which company B has been granted a patent is not pertaining to the rights and obligations of company A. Under section 24 of the Patents Act, any one may file an opposition against a granted patent, and thereafter an appeal against a final decision taken by the patent authority on account of the opposition if the decision is not in his or her favour. Company A had not used this possibility of lodging an opposition. As section 24 of the Patents Act provides for an effective remedy for third parties, the application of section 26 is not in conflict with section 21–1 of the Constitution. In its appeal, company A had also referred to the right of appeal under the Administrative Judicial Procedure Act. The Supreme Administrative Court ruled that the Act was a general Act and was not applicable in this case where the Patents Act provided for a specific right of appeal against decisions on patent applications.

[86] ECtHR (third sect.) *Alatulkkila and Others v. Finland* (Appl. n° 33538/96), judgment of 28 July 2005.

Supreme Administrative Court (Report no. 2546; 3086/2/04, KHO 2005:65)

Abstract: A had applied for legal aid at a state legal aid office for the purpose of lodging a complaint with the European Court of Human Rights. He also asked that B, who had been his counsel in the same matter before the national courts, is appointed his attorney covered by legal aid to represent him in the procedure before the ECtHR. Alternatively, A requested that he is given legal aid at least until he is granted legal aid by the ECtHR. The legal aid office rejected A's application with reference to section 23 of the Legal Aid Act which prescribes that in cases considered abroad, legal aid shall cover the provision of general legal advice. The legal aid office held that such advice is given by public legal aid attorneys and does not include drafting a complaint or pursuing a case before a court abroad. The administrative court rejected A's appeal.

The Supreme Administrative Court studied the wording and preparatory materials of section 23 of the Act and found that the meaning and scope of "general legal advice" remained unclear. Nevertheless, it can be concluded that "general legal advice" does not mean assistance in investigating a matter or representation before a court abroad. In the Court's opinion, it was not possible to fully agree to A's request to be given legal aid until he is eligible to legal aid by the ECtHR. However, the Court also held that it had not been clarified what kind of measures covered by "general legal advice" would have been possible in this case for the purpose of bringing the matter before the ECtHR. Therefore, the Supreme Administrative Court quashed the decisions of the legal aid office and the administrative court and referred the matter back to the legal aid office.

Reasons for concern

A number of judgments by the European Court of Human Rights throughout the period under scrutiny indicated that Finland continued to face difficulties in meeting certain basic standards of a fair trial (see also below).

Independence and impartiality

Legislative initiatives, national case law and practices of national authorities

Amendments to the Casualty Insurance Act and Workers' Pension Appeals Board Act entered into force on 1 January 2006 (Laki tapaturmavakuutuslain muuttamisesta and Laki työeläkeasioiden muutoksenhakulautakunnasta 681 and 677/2005)

Government Bill on Appeal Procedures in Social Security Matters (Hallituksen esitys 155/2003 vp eduskunnalle toimeentuloturvan muutoksenhakua koskevaksi lainsäädännöksi) aims at strengthening the independence and impartiality of the first instance appeal organ in social security matters, i.e. the retirement appeals body and the casualty insurance appeals board. An opinion was sought from the Constitutional Law Committee.[87] The bill was supplemented with an additional proposal (HE 47/2005) mainly concerning the funding of the above-mentioned appeal bodies. The decision-making concerning the funding and finances of the appeal organs is now detached from organs from which appeals are sent. The Constitutional Law Committee noted that in terms of the independence and impartiality of the appeal organs, the subsequent provisions relating to the composition of the appeal body, which includes representatives of the interest groups, shall not comprise more than 50 % of the members of the appeal body. The Committee has not considered that interest groups being part of such bodies would be problematic as long as they are not overrepresented in the

[87] Opinion by the Constitutional Law Committee 25/2004 vp.

meaning of comprising of more than half of the members.[88] Section 20 of the Workers' Pension Appeals Board Act was amended to reflect the opinion of the Constitutional Law Committee with regard to the composition of the appeals board. Section 53a of the Casualty Insurance Act, concerning the appeal organ (section and plenary) was amended to reflect the opinion of the Constitutional Law Committee.[89] The composition of the appeals body in the Workers' Pension Appeals Board Act was subsequently amended to reflect the views of the Constitutional Law Committee and the opinion of the Committee on Social Affairs and Health (sections 2, 8 and 11).[90]

Supreme Court (Report no. 0152; S2003/993, KKO 2005:14)

Abstract: The court of appeal had set aside an arbitral award on the grounds that there were justifiable doubts as to the impartiality of the chairman of the arbitrators, X. A party to the arbitration proceedings, A, sued X for damages caused by the setting aside of the arbitral award. The court of first instance and the court of appeal ruled that X was not liable, but the Supreme Court took a different view.

According to section 9 of the Arbitration Act, a person who is to be appointed as an arbitrator shall immediately disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality and independence. The provision offers the parties to an arbitration the possibility to review matters which may cause an arbitrator to be disqualified. Under section 10, an arbitrator may be challenged by a party, if the arbitrator had been disqualified to handle the matter as a judge, or if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence. In the opinion of the Supreme Court, these provisions correspond to the requirements concerning the impartiality of judges set in Article 6 of the ECHR and in the case law of the European Court of Human Rights, covering both subjective and objective impartiality.

The Arbitration Act does not include provisions on liability for damage. The lower courts had decided the case on the basis of the Civil Damages Act, whereas the Supreme Court ruled that the question of an arbitrator's liability was to be resolved on the basis of principles applicable to contractual relations. In the Supreme Court's view, an arbitrator may be liable to pay damages in exceptional cases only. In this way it is possible to guarantee the independence of arbitrators and to prevent any efforts to influence their decision. On the other hand, the fact that the arbitral award is final underlines the requirements set for the independence and thoroughness of the arbitrators. Therefore, neglect or clear procedural faults must be coupled with liability for damage.

In this case, two banks had intervened in the arbitration proceedings on behalf of A's adverse party, company B, and in fact one of the banks held the entire share capital of company B. During the proceedings, X had given several expert opinions to both banks albeit in matters not directly related to the arbitration in question. For his expertise X had received a considerable compensation from the banks. X had not brought these circumstances to A's knowledge. In the Supreme Court's view, X should have understood that his actions would give A justifiable grounds to doubt X's impartiality and independence. X had thus neglected his duty to inform the parties under section 9 of the Arbitration Act. The Supreme Court ruled that X was liable for the possible damage caused to A. The case was returned to the court of first instance in order for the lower court to consider the amount of possible damages.

Court of Appeal of Eastern Finland (Report no. 696; R03/1491, I-SHO 2005:10)

Abstract: The court of first instance had sentenced A and B to imprisonment for aggravated embezzlement and for concealment of illegally obtained goods, respectively. They were also

[88] Opinion by the Constitutional Law Committee 15/2002 vp and Opinion by the Constitutional Law Committee 55/2002.
[89] Opinion of the Constitutional Law Committee 22/2005 vp.
[90] Opinion of the Committee on Social Affairs and Health 11/2005 vp.

ordered to pay considerable damages to the adverse party, a company which was represented in the trial by a member of its board of directors, Y. In A's case the damages amounted to close to 156 000 euros and in B's case to some 90 000 euros. Both A and B appealed against the decision. In his appeal, B claimed, among other things, that the president of the first instance court, judge X, should have been disqualified. X and Y were both Freemasons and members of the same lodge, and therefore X's impartiality in this matter was in doubt.

The court of appeal discussed the disqualification of judges and the relevant provisions in the Code of Judicial Procedure against the background of the constitutional provisions concerning protection under the law and the independence of courts of law as well as Article 6 of the ECHR and the interpretation of that article in the case law of the European Court of Human Rights, paying particular attention to the notions of subjective and objective impartiality. In interpreting the provisions on the disqualification of judges on the grounds of the nature of the relationship between the judge and a party to the matter, the court of appeal held that, in some cases, there may be reason to doubt the impartiality of a judge when the judge and a party to the matter take part in the activities of the same society, in particular if that society is characterised by the binding nature of its goals and loyalty between its members. Taking into account the seriousness of this particular case and the considerable amount of damages the defendants had been ordered to pay, the court of appeal ruled that under the circumstances B's fears about X's impartiality were objectively justified. The case was returned to the court of first instance as regards both defendants because of the coherence of the offences allegedly committed by A and B, though A had not expressly challenged X's impartiality. The decision is final.

Reasons for concern

The independence of Finnish courts was raised as a concern in the 2004 report. This was a consequence of interference by certain members of the Government (notably Minister of Justice, Johannes Koskinen), and of Parliament (First Deputy Speaker Markku Koski) in the exercise of judicial powers by independent courts of law. While there was no evidence to indicate that these interventions *de facto* influenced the decision-making of the courts in concrete cases, the interventions by key politicians gave the public the impression of a lack of independence of the judiciary.

The UN Human Rights Committee in its concluding observations on Finland's fifth periodic report[91] noted with concern the overt attacks made by political authorities (members of the Government and Parliament) on the competence of the judiciary with a view to interfering in certain judicial decisions and recommended that Finland take action at the highest level to uphold the independence of the judiciary and to maintain public trust in the independence of the courts (Articles 2 and 14 of the ICCPR).[92] While there has been some domestic discussion and debate over the issue, no legislative actions to protect the independence of the judiciary and maintain public trust in the independence of the courts were undertaken during the period under scrutiny. However, judicial authorities themselves, including Mr Leif Sevón, President of the Supreme Court, expressed fairly straightforward public objections against politicians interfering with the operation of the courts. In September 2005, as a part of a broader rearrangement of its representation in Government, the Social Democratic Party decided to replace Minister of Justice, Mr Johannes Koskinen by Mrs Leena Luhtanen.

[91] UN Human Rights Committee, Concluding observations of the Human Rights Committee: Finland. 02/12/2004. CCPR/C/FIN/2003/5 (Concluding Observations/Comments), 2 December 2004, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6d5bb984e19b576ec1256f6b0052fe35?Opendocument.
[92] UN Human Rights Committee Concluding observations at its 2239th meeting (CCPR/C/SR.2239), held on 27 October 2004.

Publicity of the hearings and of the pronouncement of the decision

Legislative initiatives, national case law and practices of national authorities

A government bill is under preparation that would increase the publicity of trials in order to achieve greater transparency of judicial proceedings. The proposal would take into account in a more flexible way the requirements of public trials and the protection of privacy. The basic information of trials would be made public immediately. Closed hearing could be held on grounds of a threat to the security of the state or to Finland's international relations. A hearing could be held behind closed doors also when delicate private information would be exposed. Also asylum cases could be held behind closed doors.

A judgment would always be public unless there would be a need to protect the private life of a person. The new element here is that in order for a judgment not to be public, a separate decision must be made by the court. A public record would have to be made of not public judgments, covering the main issues and the reasoning of the court.[93] It should be noted that the proposal has not yet reached the Parliament.

Reasonable delay in judicial proceedings

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

T.K. and S.E. v. Finland[94]

The applicants, T.K. and S.E. were shareholders in two limited liability companies, which were in the process of being wound up in 1991. The applicants were charged with offences as dishonest debtors, but eventually the charges were dropped. The applicants claimed that the criminal proceedings against them were extensively lengthy and therefore in violation of Article 6–1 of the ECHR. The criminal proceedings had begun on 25 May 1993 and ended on 21 January 2002. The ECtHR noted that in criminal proceedings, the reasonable time begins with "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence". A proceeding has come to an end with an official notification to the accused, i.e. normally brought about with an acquittal or a conviction, including a conviction upheld on appeal or for instance when criminal proceedings have ended when the prosecution informed the accused that it has discontinued the proceedings. The ECtHR found that the proceedings against T.K. lasted some five years and eight months and against S.E. some eight years and eight months. The Court found that the case satisfied the criteria of being complex. However, the Court found that the overall time of the proceedings was extensive in length. The Court was not able to find a sufficient justification for the delay in the proceedings. The case was about procedural disputes where a trial on the merits never took place. The Court found a violation of the reasonable time requirement in Article 6–1 of the Convention.

Lehtinen v. Finland[95]

The applicant complained of the length of criminal proceedings for aiding and abetting in aggravated embezzlement. The total duration of the proceedings, starting with the first interrogation and ending in a judgment of the court of appeal, was five years, two months and 20 days. The ECtHR held that the period of reasonable time starts to run as soon as a person is charged, i.e. at the date of arrest, the date when a person is officially notified of prosecution or

[93] Ministry of Justice Reports 2005:7.

[94] ECtHR (4th sect.) *T.K. and S.E. v. Finland* (Appl. n° 38581/97), judgment of 31 May 2005.

[95] ECtHR (4th sec.) *Lehtinen v. Finland* (Appl. n° 34147/96, judgment of 13 September 2005.

the date when preliminary investigations were opened. Considering the circumstances of the case, being to some extent complex, and, in particular, the public prosecutor's delay for nearly two years and four months, the resulting total duration of over five years of proceedings failed to satisfy the "reasonable time" requirement. Consequently, the ECtHR found a violation of Article 6–1 of the Convention.

Legislative initiatives, national case law and practices of national authorities

Supreme Court (Report no. 1327; S2003/983, KKO 2005:66)

Abstract: A's driver's licence was temporarily suspended, because she was suspected of having been under the influence of narcotics when driving a car. The suspension took in fact close to four years, owing to the fact that the pre-trial investigation in the matter was not completed within a reasonable time. A had had a temporary driver's licence only, valid for two years. She had completed the first part of her training in driving school and, in order to obtain a permanent driver's licence, she was to take a second training session before the temporary licence expired. Because of the suspension, she was not able to do so, and was eventually obliged to start her training from the beginning. A sued the state for damages, demanding compensation for economic loss, including both the driving school costs and the inconvenience caused by the fact that she was not allowed to use her car for several years.

Under the Civil Damages Act, a public corporation is liable for damage caused through an error or negligence in the exercise of public authority, if the performance of the activity or task, in view of its nature and purpose, has not met the reasonable requirements set for it. In such cases, damages shall not only constitute compensation for personal injury or damage to property but also compensation for economic loss. In this case, it was undisputed that A was entitled to damages because of the excessive length of the pre-trial investigation and of the suspension of her driver's licence. The question was, rather, what kind of economic loss should be covered. The court of first instance ruled that A was entitled to damages from the state for the costs caused by her having to retake her courses in driving school, but rejected A's other claims as being without a foundation in law. The court of appeal held that the length of the pretrial investigation and of the suspension of A's driver's licence were unreasonable and in violation of Article 6–1 of the ECHR. In view of the case law of the European Court of Human Rights, the state was therefore liable to pay damages also for the inconvenience caused by the suspension of the driver's licence. The Supreme Court agreed with the court of appeal, but based its decision on the Civil Damages Act only, without any reference to the ECHR. It held that obtaining a driver's licence requires an investment, and losing the right to drive had in this case prevented A from making use of that investment. It had been difficult for A to move around and run her errands, and it may also have caused her difficulties in finding a job. The Supreme Court concluded that A was entitled to damages from the state also regarding the inconvenience caused by the suspension of her driver's licence.

Supreme Court (Report No. 1475; R2005/46, KKO 2005:73)

Abstract: A and B had been sentenced to 18 months of imprisonment for tax fraud and an accounting offence committed in 1993–1995. The pre-trial investigation began in 1995, proceedings before the court of first instance were initiated in 2001, and the court rendered its decision in 2002. A and B appealed against the decision before a court of appeal, and further before the Supreme Court. They claimed, among other things, that their sentences should be reduced or made conditional because of the excessive length of the proceedings. By its decision given in 2004, the court of appeal reduced the sentences to 16 months on the grounds that A and B had compensated the damage caused by their criminal acts. The appeal court did not refer to the length of proceedings as a mitigating factor.

The Supreme Court found that the crimes committed by A and B were typical economic offences and the matter was not especially complex or exceptionally extensive. A and B had not contributed to the delay in the pre-trial investigation and the court proceedings. As a whole, the case had been pending for an exceptionally long time (close to 10 years). The Supreme Court ruled that the length of the proceedings was in violation of the right to a fair trial within a reasonable time as prescribed in section 21 of the Constitution and Article 6 of the ECHR. Therefore, A and B were entitled to redress which could be afforded by reducing the sentences compared to what they normally would have been. In the Supreme Court's view, the punishment meted out by the court of appeal was reasonable on the grounds cited by the appeal court. However, the Supreme Court also took into account the length of the proceedings and paid specific attention to the preventive and retributive effect of punishment under the circumstances. It concluded that an equitable punishment in this case was 10 months' imprisonment for each defendant. Due to the fact that the sentence of imprisonment in comparable cases of economic offences has in general been unconditional, the Supreme Court found no justifiable reason to mitigate the sentence of each defendant to a conditional one.

In discussing the issue of the reasonable length of proceedings, the Supreme Court referred to the decisions of the European Court of Human Rights in the cases of *Kudła v. Poland* (judgment of 26 October 2000, Reports of Judgments and Decisions 2000–XI), *Beck v. Norway* (judgment of 26 June 2001), *Pietiläinen v. Finland* (judgment of 5 November 2002), *Kangasluoma v. Finland* (judgment of 20 January 2004) and *Uhl v. Germany* (judgment of 10 February 2005).

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Case of Lomaseita OY and Others v. Finland[96]

The applicant's co-founded company CPT Information Systems in 1987 was ordered to be wound up in 1993. The official receiver of the estate of the company instituted civil proceedings against the applicant, requesting that assets allegedly transferred from CPT Information Systems to the applicant prior to the winding-up were to be returned to the estate. The district court ruled in favour of the estate. The parties to the case appealed. The applicant companies Lomaseita Oy and CPT Data Oy claimed that they had not had the opportunity to comment upon evidence presented to the court of appeal on additional documentary material presented after the relevant time-limit for appeal had elapsed, including a police report. The court of appeal had stated that the additional material had not been taken into account. The Supreme Court refused the applicants leave to appeal. The applicants' representative requested copies of all relevant documents and found out that the judicial secretary of the court of appeal had in fact made substantial remarks on the additional material. The applicants argued that the additional material had been taken into account contrary to the court of appeal statement. The applicants claimed that the proceedings had been unfair, in particular, because the court of appeal had failed to communicate the additional material to the other parties. The ECtHR noted that the additional material had been studied by the court of appeal and had not been communicated to the applicants, and found that the material was relevant to all the parties. The representative of the estate had expressed his opinion on the police report in order to influence the court's judgment. Therefore, the ECtHR found that the proceedings before the court of appeal were not in conformity with the principle of equality of arms, and found a violation of Article 6–1 of the Convention.

[96] ECtHR (4th sect.) *Lomaseita Oy and Others v. Finland* (Appl. n° 45029/98), judgment of 5 July 2005.

Legislative initiatives, national case law and practices of national authorities

Vaasa Court of Appeal (Report no. 1059; U 04/540)

Abstract: A's property had been taken in execution for the payment of a punitive tax increase, among other debts. She claimed before the court of first instance that unlike decisions on taxes and public fees, those concerning a punitive tax increase cannot be enforced before they have been confirmed by a court. The court of first instance agreed with A. The punitive tax increase imposed on A was not based on court decisions but on administrative decisions against which A had appealed. With reference to the European Court of Human Rights and the case of *Janosevic v. Sweden* (judgment of 23 July 2002, Reports of Judgments and Decisions 2002–VII), the court held that a tax increase imposed in an administrative procedure is partly punitive and is thus covered by the requirements set in Article 6 of the ECHR. Therefore, the same rules apply as regarding, for example, the enforcement of a fine and, consequently, enforcement measures cannot be taken before the decision on a punitive tax increase is final. The court concluded that, as far as the punitive tax increase was concerned, the execution was contrary to Article 6 of the ECHR.

The court of appeal noted that, under Finnish law, taxes and public fees may be recovered through execution proceedings, although the decision in the matter is not final. In the court's view, this concerns also the enforced collection of a punitive tax increase. With reference to the case law of the ECtHR and the *Janosevic* case, the court of appeal affirmed that tax increases were both deterrent and punitive and that Article 6 of the ECHR was applicable. However, it also pointed out that the ECHR does not, in principle, exclude the immediate enforcement of punitive tax increases as long as decisions on such measures can be brought before a court with full jurisdiction. Under Act 367/1961, concerning the collection of taxes and public fees through execution, the taxpayer may request from the tax authorities a suspension of enforcement. As required under Article 6 of the ECHR, the taxpayer also has the right to appeal against the tax authorities' decision to an administrative court which may examine questions of both fact and law and has the power to quash the decision subject to appeal. Moreover, the taxpayer has the right to an effective remedy as prescribed in Article 13 of the ECHR. In this case, A had not shown that she would have exercised these rights. The court concluded that as no appeal or request for a suspension was pending when the execution was levied, the decisions on a punitive tax increase imposed on A were enforceable. The Supreme Court did not grant leave to appeal in the case (decision no. 234 of 7 February 2005).

The Act amending the Stock Market Act and the Act amending the Financial Inspection Act entered into force on 1 July 2005. (Laki arvopaperimarkkinalain muuttamisesta 297/2005 and Laki rahoitustarkastuslain muuttamisesta 299/2005)

The amendments to the Stock Market Act and to the Financial Inspection Act were brought before the Parliament as a "package" involving changes to the relevant Acts. The proposals aimed at implementing directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation. The government bill was sent to the Constitutional Law Committee, which discussed some aspects of the Financial Inspection Act. In particular, the Financial Inspection Act includes the possibility of administrative sanctions that can be issued by the financial inspection board if it encounters misuse within the meaning of the Stock Market Act. An appeal against administrative sanctions can be submitted to the Market Court. The right of appeal is relevant in light of section 21 of the Constitution. Section 26e of the Act would prescribe that also the financial inspection board can issue an appeal from the Market Court to the Supreme Administrative Court and to the Supreme Court as originally proposed in the bill. The Constitutional Law Committee found it peculiar that the proposal concerning the appeal was the Supreme Court and not the Supreme Administrative Court in appeals of administrative nature. Section 26e was subsequently amended. The Committee noted that it is unusual that a public authority such as the financial inspection board could submit an appeal

against the decision of the Market Court. The Constitutional Law Committee found, however, that this was acceptable for instance in seeking for uniformity of the case law.

Amendments to the Act on Courts of First Instance and related Acts entered into force 1 September 2005 (Laki käräjäoikeuslain muuttamisesta 629/2005).

The amendments to the Act on Courts of First Instance was concerning the possibility to create sections within a court of first instance on the basis of language in bilingual municipalities in order to secure that both the Swedish and Finnish speaking populations' right to judicial services in their mother tongue is guaranteed on an equal basis. Section 18a prescribes that sections can be created within a court of first instance in order to guarantee that both the Swedish and Finnish speaking populations have the right to judicial services in their mother tongue on an equal basis. The Legal Affairs Committee of Parliament noted, however, that despite the language being used in the court of first instance, the parties have the right in accordance with section 10 of the Language Act to use either Finnish or Swedish.[97] The amendments were passed in the Parliament on 14 June 2005.

Article 48. Presumption of innocence and right of defence

<u>The rules governing the evidence in criminal matters</u>

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Ivanoff v. Finland[98]

The applicant was convicted of vandalism and aggravated fraud and was given a one-year suspended prison sentence for deliberately setting on fire a snack bar in order to claim compensation from an insurance company. The applicant appealed to the court of appeal and was refused permission to call witnesses to give evidence about the reasons of the fire that had spread to the whole building. The appeal court only heard the witnesses of the prosecution. The court of appeal only dealt with the fire originating from the storage room (fire 2) in its oral hearing and not with, according to the applicant, the original source of the fire (fire 1). The applicant argued that the court accepted the prosecution's witness statements concerning "fire 1", while the Finnish Government denied that any such evidence had been given before the court of appeal. The court of appeal upheld the district court's judgment. The applicant relied on Articles 6–1 and 6–3–d of the ECHR alleging a breach of the rights of the defence in respect of hearing witnesses. A friendly settlement was reached between the parties stating that the Government of Finland offered to pay 4,000 euros to the applicant to cover pecuniary and non-pecuniary damage including costs and expenses.

M.S. v. Finland[99]

The applicant, M.S. was convicted of aggravated sexual assault on his then 15-year-old step-daughter. The applicant disputed the alleged sexual assault. The applicant was found guilty of the offence and was sentenced to 11 months' imprisonment and ordered to pay compensation. The applicant disputed before the district court that the complainant and the applicant ever had been alone together in the place where the offence allegedly took place. The evidence of the applicant's wife did not support the applicant's claim in that regard. The applicant's then wife, in an annex to the appeal of 28 October 1996, had changed her position to support the applicant. However, later in a separate letter sent on 26 November 1996 to the court of appeal,

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[97] Legal Affairs Committee 5/2005 vp.

[98] ECtHR (4th sect.) *Ivanoff v. Finland* (Appl. n° 48999/99), friendly settlement of 5 July 2005.

[99] ECtHR (4th sect.) *M.S. v. Finland* (Appl. n° 46601/99), judgment of 22 March 2005.

she retracted her previous submission stating that she had previously supported the applicant under heavy pressure. The applicant had requested an oral hearing in his appeal. In its judgment, without an oral hearing, the court of appeal upheld the district court's judgment. The applicant claimed on the basis of Article 6–1 of the ECHR that he was not given the possibility to respond to the letter dated 26 November 1996 by his ex-wife, submitted without the applicant's knowledge, to the court of appeal. The ECtHR found unanimously that there had been a violation of Article 6 of the ECHR.

Mild and Virtanen v. Finland[100]

In June 1995 the applicants were charged with aggravated theft, allegedly being involved in stealing fur coats worth of 55.081,55 euros. The prosecution had relied on statements made to the police by M and R, who had earlier been convicted of the same offence. In February 1996, M withdrew his earlier statement concerning the applicants as being false. The court of first instance was therefore not able, based on the evidence presented before the court, to convict the applicants. M and R were summoned to the court of first instance, but never showed up before the court. There was no basis in national legislation to enforce the attendance of M and R in the proceedings against the applicants. The prosecutor appealed to the Vaasa Court of Appeal, which held an oral hearing in November 1996. M and R were summoned, but did not appear before the court at that time either. The court of appeal, however, convicted Mr Mild for aggravated theft to 1 year and 10 months of imprisonment. Ms Virtanen was convicted for aiding and abetting. In June 1997, the Supreme Court refused the applicants' leave to appeal. An important part of the evidence was constituted of the statements given by M and R in the pre-trial investigation. The applicants complained that they had not had the possibility to challenge the statements given by M and R to the police before a court of law, i.e. not having the right to examine witnesses against them, and claimed a violation of Articles 6–1 and 6–3–d of the ECHR. The ECtHR noted that the applicants were at no point given the opportunity to question M and R, whose statements were taken into account as evidence in the appeal court. The ECtHR concluded that for the purposes of Article 6–3–d, M and R should be regarded as witnesses. The Court concluded further that every reasonable effort was not made, despite numerous attempts, to bring M and R before the court of appeal as witnesses. The Court concluded consequently that there had been a violation of Articles 6–1 and 6–3–d of the Convention.

Legislative initiatives, national case law and practices of national authorities

Government Bill 271/2004 concerning amendments to the Criminal Procedure Act, the Code of Judicial Procedure and related Acts

The purpose with the bill is to rationalize court proceedings in criminal trials by introducing a new written summary proceeding for cases of confession. The summary proceedings aim at shortening court proceedings, which is also beneficial from a process economical perspective. The confession must be given in writing at the stage of court proceedings. Furthermore, in the main hearings it would be possible to give testimony in the absence of the defendant. The proposal includes an extension to the time in custody prior to the trial.

Summary proceedings could replace the main hearing where the punishment is a fine or a maximum of two years' imprisonment. A conviction in written summary proceedings could not be more than a fine or a maximum imprisonment of 9 months. The defendant could not be sentenced to more than 6 months' imprisonment without the possibility of oral testimony. The basic formal requirement would be a confession and agreement by both the defendant and the

[100] ECtHR (4th sect.) *Mild and Virtanen v. Finland* (Appl. n° 39481/98 and 40227/98), judgment of 26 July 2005.

plaintiff. Summary proceedings would be for minor cases. A summary proceeding would mean that the proceedings would neither be oral nor public. This has relevance for section 21 of the Constitution and Article 6 in the ECHR and Article 14 in the ICCPR. A public and oral trial and the right to be heard are basic ingredients of a fair trial and are guaranteed in Article 6 of the ECHR and Article 14 of the ICCPR. These are, however, not absolute provisions. The Constitutional Law Committee has previously held that restrictions on one's fundamental rights on a voluntary basis cannot set aside fundamental guarantees in all situations. Restriction of one's fair trail rights in criminal cases must be based on a particular consent by the defendant and the defendant must understand the implications. Such a restriction of one's fair trial rights has been held to be in conformity with the ECHR by the ECtHR. The Constitutional Law Committee held that summary proceedings in criminal cases under the above-mentioned conditions are in conformity with section 21 of the Constitution and with Finland's obligations under international human rights law.[101]

The right to hear witnesses in the absence of the defendant pursuant to Chapter 6, section 3a, of the proposal amending the Criminal Procedure Act is relevant in light of Article 6–3–d of the ECHR. The Constitutional Law Committee held that the hearing of witnesses is possible on condition that the defendant is aware that witnesses against him may be heard, and that the defendant is in negligence as to the court proceedings and has no legal obstacle for taking part in the proceedings.

The time of deprivation of liberty is proposed to be extended from 3 days to 5 days concerning not only a defendant, but also a witness if it is believed that the witness will not show up for the trial. This is relevant for section 7 of the Constitution and Article 5–1–b of the ECHR. The Committee held that the extension of the deprivation of liberty is unproblematic as it aims at securing that the trial can take place. This is designed to be effective for persons who are trying to avoid court proceedings. The Committee held that the need for an extension from 3 to 5 days of deprivations of liberty should be considered carefully. As the bill is currently under consideration before Parliament, the outcome will be reported in the 2006 report.

Kouvola Court of Appeal (Report no. R04/493)

Abstract: The defendants A, B and C argued before the court of appeal that the recordings of A's telephone conversations, which had been received through telecommunications interception authorised by a court on account of A being suspected of an aggravated narcotics offence, could not be used as evidence in respect of certain other charges in an indictment which did not include the narcotics offence.

The court of appeal ruled that the Coercive Measures Act does not explicitly prohibit the use of extraneous information which has been obtained through legitimate telecommunications interception but does not pertain to the offence for which the authorisation to listen and record telemessages was granted. A court may on a case-by-case basis consider the admissibility of such evidence, taking into account the values and goals protected by declaring the evidence inadmissible, the requirements of a fair trial, the significance of the evidence as well as the pursuit of finding out the substantive truth. The court of appeal referred to the case law of the European Court of Human Rights, mentioning the *Schenk* case as an example (judgment of 12 July 1988, Publications of the ECtHR, Series A, Vol. 140). It found that the case law of the ECtHR left open the question as to the admissibility of unlawfully obtained evidence in a criminal procedure. The decisive factor has been that the trial as a whole is fair. In this case, the recording of the telemessages had been authorised by a court. Although it had not been demanded that A should be convicted of an aggravated narcotics offence, the other counts in the indictment concerned serious offences which were connected with the suspected aggravated narcotics offence. The recordings were

[101] Opinion of the Constitutional Law Committee 31/2005 vp.

not the only evidence in support of these other counts in the indictment, their authenticity had not been challenged, they did not involve third parties and, moreover, A had himself referred to the recordings as his own evidence. The court of appeal rejected the claim and admitted the recordings as evidence. The Supreme Court did not grant leave to appeal in the case (decision no. 1068 of 27 April 2005).

Article 49. Principles of legality and proportionality of criminal offences and penalties

Legality of criminal offences and penalties

Legislative initiatives, national case law and practices of national authorities

Court of Appeal of Eastern Finland (Report no. 874; R05/745, I-SHO 2005:13)

Abstract: In May 2005, a court of first instance sentenced A to a fine and a driving ban for the offence of drunken driving committed in April 2005. A had previously been convicted of aggravated drunken driving in July 2001. The main question in this case was whether the previous conviction affected the length of the driving ban imposed on A, considering that the provisions concerning a driving ban in the Road Traffic Act were amended during the time between the first and the second offence. Previously, the Act only gave the maximum period for a driving ban (five years) but did not define the minimum period. According to the amended provisions, which came into force 1 March 2005, the minimum period for a driving ban is six months in cases where the driver has within the previous five years already been convicted of drunken driving and commits the same offence again. The court of first instance tried A as a first-time offender and imposed the driving ban for a period expiring in mid-July 2005. The length of the ban corresponded to the court practice prevailing before the coming into force of the amended Road Traffic Act. The court held that because A's first offence was committed before the coming into force of the amended Act, the new provisions providing for a harsher penalty could not be applied without violating the principle of legality. Here the court referred to the case of *Achour v. France* (judgment of the European Court of Human Rights, 10 November 2004).

The court of appeal took a different stand. It agreed that the *Achour* judgment supported the interpretation that offences which the defendant had been convicted of before the coming into force of the amended Road Traffic Act could not be taken into account when imposing a driving ban under the new provisions. However, the court noted that in the *Achour* case the previous statutory limitation period for recidivism had expired before the defendant committed his second offence and before the new, harsher provisions and the longer limitation period came into force. The court of appeal held that the amended provisions concerning a driving ban are clearly formulated in the Road Traffic Act. A is not punished on the basis of these provisions for his previous offence but for an offence committed after the coming into force of the amended Act. After the amended Act had come into force, A had been aware of the consequences he would face if he were to be convicted as a recidivist under the Act. On these grounds the court of appeal found that offences committed before the coming into force of the amended Road Traffic Act can be taken into account as prescribed in the Act when considering the length of a driving ban imposed on a person who has been convicted of drunken driving after the coming into force of the amended Act. In the court's view, this was not in contradiction with the principle of legality. The court extended A's driving ban until mid-December 2005. The decision is final. One dissenting member of the court referred to the prohibition of retroactive application of criminal law and agreed with the decision of the first instance court.

Proportionality of criminal offences and penalties

Legislative initiatives, national case law and practices of national authorities

Government Bill 77/2005 for an Act amending the Act on the Prevention of Pollution from Ships as well as Section 1 of the Act on the Execution of Fines.

The purpose with the bill is to prevent environmental damage caused by ships by introducing a fine for such acts. The fine would constitute an administrative sanction for leaking oil into internal water areas, the sea within the Finnish exclusive economic zone. The proposed fine would be targeted to the owner of the ship or to the holder of the ship. A fine could not be imposed if a person has been convicted under criminal law for the same conduct as causing environmental damage. Criminal sanctions are still to be held as the primary sanction for causing environmental damage. The administrative sanction proposed might be problematic in light of section 21 of the Constitution and Article 6–2 of the ECHR with regard to the presumption of innocence. The Constitutional Law Committee held that the proposed sanction is not to be considered as a criminal sanction but is an administrative sanction. It is for the authorities to establish the evidence of the caused environmental damage and for the addressee to express evidence of the contrary. The Constitutional Law Committee held that imposing an oil pollution fee is an administrative measure that should be handled in accordance with the Administrative Procedure Act. In accordance with section 31 of the Administrative Procedure Act, it is for the authorities to gather sufficient evidence before they can impose an oil pollution fine. However, the Committee held that the requirements stemming from the principle of the presumption of innocence must be taken into account as the fine is comparable to a criminal sanction.[102]

An appeal is sent to the Maritime Court placed at the Helsinki first instance court due to reason of special expertise of the court and due to the reason that the court can impose a criminal sanction for the oil pollution damage. The Committee held this proposal to be in conformity with section 21 of the Constitution. As the bill is currently under consideration before Parliament, the final outcome will reported in the 2006 report.

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

[102] Opinion of the Constitutional Law Committee 32/2004 vp.