ROUND TABLE ON "REOPENING OF PROCEEDINGS FOLLOWING A JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS"

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Reopening of civil proceedings; experience of Finland

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1. General remarks

- I would like to start today with a general remark concerning the discussion on reopening and execution of judgments on a larger scale.

- From our point of view it should be noted that, beside the normal preparations for Government's observations, the analysis of the effect of a possible violation begins already once a case is communicated to the Government. Already at that point different considerations, such as concerning a friendly settlement (or if that fails, a unilateral declaration) or the necessity for the applicant to obtain a "real" judgment (as a friendly settlement, or a unilateral declaration do not include the Court's proper ruling in substance) from the Court for reopening purposes, or perhaps for issues relating to general measures are already for the first time considered.

- And of course, should a friendly settlement (or a unilateral declaration) not be applicable, once the Court's judgment is rendered a more thorough analysis on the required individual and general measures such as possible legislative amendments is (again) undertaken by the ministry or ministries in question as guided by the Government Agent and in coordination with the Agent. What is important is that these measures go in parallel with the possible reopening proceedings.

2. Legal basis

General

- In Finland, we do not have a specific provision or specific provisions providing for the reopening of proceedings following a judgment of the Court. The possibility to reopen domestic proceedings is examined based on the general provisions of the Code of Judicial Proceedings concerning extraordinary appeal, that is an appeal made after any national judgment has become final on grounds specifically provided in law.

- Thus, a violation found in its judgment by the Court does not as such guarantee an automatic reopening of the final domestic judgment or decision.

- This means, moreover, that the questions of *res judicata* and legal certainty as well as the other means already provided to the applicant to ensure *restitution in integrum* are examined when examining the possibility to reopen a case under the circumstances laid down in the Code of Judicial Proceedings. The examples I will give later on, demonstrate this, as well.

- However, it should already at this point be emphasized that the Supreme Court, which in most cases is the competent court to examine a request for reopening, has in various cases taken into account the case-law of the Court in general – not only concerning Finland or concerning a certain particular case - when reopening has been requested even in purely domestic proceedings where no application to the Court has been lodged against Finland.

    - For example already in the 1990's in a civil case where one of the parties did not have the opportunity to comment on documents submitted by the other party, the Supreme Court annulled the decision as being manifestly based on misapplication of the law. The Supreme Court based its decision on Article 6 of the Convention and the case-law of the Court relating to the importance of adversary proceedings.

Grounds

- The reopening of civil proceedings is possible on the basis of two different provisions of the Code of Judicial Proceedings concerning extraordinary appeal, the provisions concerning annulment of a judgment based on procedural error and the provisions concerning a reversal of a final judgment in a civil matter on the grounds of a substantive error in the contents of a decision that is already *res judicata*.

- The provision concerning the annulment of a judgment based on procedural error applies to both civil and criminal proceedings whereas the Code of Judicial Proceedings has separate provisions concerning the reversal of a judgment based on substantive errors civil and criminal matters.

The procedure

- Reopening may be requested by the applicant him or herself being a party in the original domestic case. Also, the Supreme Guardians of law, such as the Chancellor of Justice, are within their respective powers competent of filing a complaint or a request. In fact, our practice shows at least two examples of this, however, in criminal matters.

- For example already in 1998, following the Court's judgment of 1997 in case *Z v. Finland* concerning the declassification of certain medical documents gathered during the relevant domestic proceedings, the Government Agent first phoned the Deputy Chancellor of Justice explaining the matter, after which he sent the Deputy Chancellor a letter where he was asked to consider whether to take action by requesting from the Supreme Court to partially annul the domestic judgment in order to implement the Court's judgment. The Deputy Chancellor of

Justice did make such a request. As a result, the Supreme Court decided, referring to Article 8 of the Convention, to annul the domestic judgment to the extent it concerned the classification period of the aforementioned applicant's medical documents and ordered them to be kept classified for a longer period of time (40 years instead of 10). In addition, the names and social security numbers of the parties may not be disclosed to third parties during the classification period.

- This in fact shows also that in a small country like Finland we are able to handle also the matters relating to execution very flexibly and in my opinion shows the kind of pragmatic approach that has been called for here.

- A complaint concerning the annulment on the grounds of procedural error must be filed to the Supreme Court or in some cases to a Court of Appeal, within six months of the date when the judgment became final or from when the person filing the complaint received notice of the judgment. However, if a law enforcement or supervisory body competent in the supervision of international human rights obligations notes a procedural error in the consideration of a case, a complaint may be made within six months of the date when the final judgment of the supervisory body in question was given. The Court is not specifically mentioned in this provision but is considered such a body, among others.

    - The six month period was introduced in the Code of Judicial Procedure in 2005 as the normal 6 month period was deemed problematic as, for example the judgments of the Court, are rendered, by rule, only after this period and such a rule could, as such, create an obstacle for rectify an error. For example in *Kerojärvi v. Finland* of 1996 where a violation of Article 6 for non-communication of certain documents had been found and the applicant sought for the reopening of the domestic proceedings, the Supreme applied the normal six-month rule and rejected the complaint for the annulment of the judgment based on a procedural error on the ground that the time limit for lodging such an application had expired. The Supreme Court ruled also that a breach of the Convention regarding the notification of some documents was not a ground upon which the outcome a final judgment in a civil case could be reversed, either.

- A request for the reversal on substantive grounds shall usually be made within one year of the date on which the judgment became final and no exception similar to the complaint for the annulment of a judgment on the basis of a procedural error concerning judgments of international supervisory bodies was not included in the Code of Judicial Proceedings (in 2005). At that time, it was considered that a similar provision was not needed for the reversal of a final judgment as there is no time limit for reversing a judgment for the benefit of a defendant and as the time-limits for reversing a judgment were also otherwise longer than for the annulment of a judgment based on a procedural error and provide for the possibility for requesting the reversal after a longer period of time after the judgment has become final.

- At the same time, I would like to note that the Supreme Court has not applied the aforementioned time-limit at least in one known decision. Following the Court's judgment in *Mariapori v. Finland* where the Court found a violation of Article 10 and ordered the Government to pay the applicant non-pecuniary and pecuniary damage, the applicant

submitted a request to the Supreme Court requesting that the domestic judgment finding the applicant guilty of defamation and ordering her to pay damages be reversed. The Supreme Court found the request as far as it concerned the damages admissible even though it had been made more than a year after the domestic judgment became final and thus too late under the Code of Judicial Proceedings. The Supreme Court pointed out that the compensation ordered by the Court to be paid to the applicant by the Government did not cover all the amounts ordered to be paid by the applicant in the domestic proceedings. Thus, what was at stake was essentially the question of executing the Court's judgment properly. The Supreme Court referred to the new time-limit introduced to the Code of Judicial Proceedings in 2005 concerning the annulment of a judgment on the basis of a procedural error and stated that due to the time-limit applied to the reversal of judgments, the applicant could easily not be able to request for reversal even though the Court would have found a violation. Thus, the strict application of the aforementioned time-limit could result in a situation that was against the requirements of legal safeguards and the Convention. The Supreme Court applied the time-limit rule so that it in practice allows the examination of a request following a judgment of the Court as it was done without delay, i.e. 3 months after the Court's decision.

The effects of reopening

- Should the Supreme Court find that a procedural error referred to in the relevant procedure has occurred, it can annul the judgment as a whole or for certain parts and, if necessary, order new proceedings to be held in the court where the error occurred.

- Should the Supreme Court reverse a judgment based on substantive error and if new proceedings a deemed necessary, the Supreme Court may order the court where the case is to be re-examined. The Supreme Court may also rectify the reversed judgment itself under certain circumstances.

Administrative proceedings

- As I have already mentioned, our legislation includes also separate provisions for the reopening of proceedings in administrative cases.

3. Other examples of case-law

- A number of reopening proceedings following a judgment of the Court have been conducted in the Supreme Court already from the 1990's, perhaps more in criminal than in civil matters.

- In civil matters, in addition to the *Kerojärvi*-case concerning Article 6, I would to take up a couple of other examples that in my view demonstrate the domestic courts' approach to a lot of the issues we have already discussed here.

- One of them is the *Mariapori*-case also already referred to. In the questions concerning the substantive issues, the Supreme Court found that the amounts of the damages ordered to be paid by the applicant that were not covered by the judgment of the Court, could not be considered very high. It further found that the domestic decision was not clearly in contradiction with the case-law of the Court at the time of the decision and the decision could thus not be

deemed to have been manifestly based on misapplication of law, as is required by the Code of Judicial Proceedings for the reversal of a judgment in a civil matter. The Supreme Court found also that the damage ordered to be paid could not be considered a very serious negative result. There existed thus not grounds for reversing the domestic judgment in terms of the damages. And just to mention, the Supreme Court did not annul the judgment as far as the applicant had been found guilty of defamation but it annulled the judgment concerning the punishment.

- Another example which I would like to raise is the Supreme Court's decision following the Court's judgment in one of the so called paternity cases against Finland, *Grönmark v. Finland*. The Court had found a violation of Article 8 as the domestic legislation included a time-limit for submitting a claim for confirming paternity for persons born before a certain year.

  At the time of the Supreme Court's decision, a number of requests for reopening were pending in cases were the paternity could not have been confirmed due to the time-limit. In some of the cases the persons requesting for reopening had also appealed to the Court.

  The applicant in the case in question requested for the annulment of the domestic judgment from the Supreme Court. The Supreme Court referred to the ongoing legislative reform concerning the issue at hand and found that legislative measures were the primary way of resolving the problems arising from the aforementioned time-limit. It found also that the objective of the pending legislative project for the reform of the Paternity Act (11/2015, to be inforce as from 1 January 2016) was to also allow retroactive effect to solve these problems. It therefore left the application for reversal to rest until the legislative project is finished.

  It should, however, be noted that in another case concerning the confirmation of paternity the Supreme Court – as the last instance of normal court proceedings- found, referring, inter alia, to the Court's judgments in the aforementioned paternity cases against Finland that application of the time-limit for submitting a claim for confirming paternity would be in contradiction with the provision concerning protection of privacy of the Constitution of Finland and did not apply the time-limit. It confirmed the lower court's decision to this effect.

- These decisions show that in Finland the possibility reopen proceedings are used even individual cases where the violation found could also be deemed ongoing.