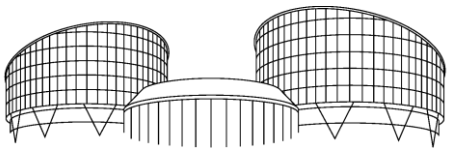

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF PENTIKÄINEN v. FINLAND

(Application no. 11882/10)

JUDGMENT

STRASBOURG

4 February 2014

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

In the case of Pentikäinen v. Finland,

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

Ineta Ziemele, *President*,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Vincent A. De Gaetano,
Paul Mahoney,
Faris Vehabović, *judges*,

and Françoise Elens-Passos, *Section Registrar*,

Having deliberated in private on 14 January 2014,

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

PROCEDURE

1. The case originated in an application (no. 11882/10) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Finnish national, Mr Markus Veikko Pentikäinen ("the applicant"), on 19 February 2010.

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

3. The applicant alleged, in particular, that his freedom of expression had been violated due to the fact that he had been arrested and found guilty of having disobeyed the police, when the police tried to prevent him from doing his job as a journalist and photographer.

4. On 19 May 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1980 and lives in Helsinki.

6. The applicant is a photographer and journalist for the weekly magazine *Suomen Kuvalehti*. On 9 September 2006 he was sent by his employer to take photographs of the demonstration which was being held in protest against the on-going Asia-Europe meeting (ASEM) in Helsinki. The

demonstration was an exceptionally large one in the Finnish context and all media followed it closely.

7. Before the demonstration took place, on 30 August 2006, the Helsinki Police Department was alerted by the Finnish Security Intelligence that the upcoming "Smash ASEM" demonstration would be a hostile one and would not aim to highlight any clear political message. The Police Department did not manage to establish contact with the organisers of the demonstration.

8. The demonstration was to start at 6 p.m. on 9 September 2006. A separate area was reserved for the representatives of the media so that they could freely and safely observe the situation and take photographs on the demonstration place.

9. At the start of the demonstration, bottles, stones and jars filled with paint were thrown at public and policemen. Some demonstrators kicked and hit police officers. The police announced several times over loudspeakers that a peaceful demonstration was allowed on the spot but that the crowd was not allowed to demonstrate by marching. The crowd tried to break through the police defence line. Relying on all the information in their possession, the police decided to interrupt the demonstration which had now turned violent. The police announced over loudspeakers that the demonstration was stopped and that the crowd should leave the scene. This announcement was repeated several times. Hundreds of people then left voluntarily.

10. After the escalation of violence, the police considered that the event had turned into a riot and decided to seal off the demonstration area. First only a few people were allowed to leave the area. Then the police established several exit routes and people were allowed to leave. When leaving, they were asked to show ID and their belongings were checked.

11. However, the core group of around 20 people remained in one of the demonstration spots, including the applicant and a former Member of Parliament, all of whom had been asked to leave the scene, failing which they would be arrested. According to the applicant, he thought that this request only applied to the demonstrators. He claims that sometime later he indicated to the police that he was a representative of the media. He further claims that he was wearing his press badge and that a police officer accepted this. After having called his colleague, the applicant decided to stay until the situation was over. A short time later the police arrested the demonstrators. When leaving the scene the applicant was also arrested. The police arrested altogether 121 persons in the context of the demonstration.

12. The applicant was detained from 9 September at 9.26 p.m. until 10 September at 3.05 p.m., that is, 17.5 hours.

13. On 23 May 2007 the public prosecutor brought charges against the applicant for disobeying the police (*niskoittelu poliisia vastaan, tredska mot polis*) under Chapter 16, section 4, subsection 1, of the Penal Code.

14. On 17 December 2007 the Helsinki District Court (*käräjäoikeus, tingsrätten*) found the applicant guilty of disobeying the police but did not

impose any penalty on him. The court found it established that the applicant had been aware of the orders of the police to leave the scene but had decided to ignore them. It appeared from the witness statements given before the court that the applicant had not told or indicated the arresting police officer that he was a journalist. According to the arresting officer, this fact only became known to him when the relevant magazine appeared. It appeared also from the witness statements that two other photographers, who had been in the sealed-off area, had been able to leave the scene without consequences just before the applicant was arrested. The court found it further established that the police orders had been clear and that they had clearly concerned everybody. The court balanced the Article 10 right against other interests, finding that the police had had the right to ask the applicant, among others, including the former Member of Parliament, to leave the scene. The interference with the applicant's right to exercise his freedom of expression had thus been based on law, and it had fulfilled the legitimate aim of preventing disorder. The interference had been necessary in a democratic society in order to put an end to a violent situation. However, relying on Chapter 6, section 12, of the Penal Code, no penalty was imposed as the offence was excusable. The court found that the applicant who, as a journalist, was confronted with contradictory expectations, stemming from obligations imposed on the one hand by the police and on the other by his employer.

15. By letter dated 23 January 2008 the applicant appealed to the Helsinki Court of Appeal (*hovioikeus, hovrätten*), claiming that the District Court should have dismissed the charges against him. He argued that his arrest and the fact that he was found guilty were against the Constitution and Article 10 of the Convention. The applicant was a journalist and that he had not participated in the demonstration or caused any disorder. The District Court had not reasoned why his arrest and conviction were "necessary in a democratic society" and had thereby failed to justify the interference.

16. On 30 April 2009 the Court of Appeal rejected the applicant's appeal without giving any further reasons.

17. By letter dated 24 June 2009 the applicant further appealed to the Supreme Court (*korkein oikeus, högsta domstolen*), reiterating the grounds of appeal already presented before the Court of Appeal.

18. On 1 September 2009 the Supreme Court refused the applicant leave to appeal.

II. RELEVANT DOMESTIC LAW

Penal Code

19. According to Chapter 16, section 4, subsection 1, of the Penal Code (*rikoslaki, strafflagen*, Act no. 39/1889, as amended by Act no. 563/1998),

"a person who

(1) fails to obey an order or prohibition issued by a police officer, within his or her competence, for the maintenance of public order or security or the performance of a duty,

(2) refuses to provide a police officer with the identifying information referred to in section 10, subsection 1, of the Police Act,

(3) fails to obey a police officer's clearly visible signal or order for stopping or moving a vehicle, as referred to in section 21 of the Police Act,

(4) neglects the duty to provide assistance, as referred to in section 45 of the Police Act, or

(5) alerts the police without reason or, by providing false information, hinders police operations,

shall be sentenced, unless a more severe penalty for the act has been provided elsewhere in the law, for *contumacy towards the police* to a fine or to imprisonment for at most three months."

20. Chapter 6, section 12, of the same Code (as amended by Act no. 515/2003) provides the following:

"A court may waive punishment if

(1) the offence, when assessed as a whole, taking into account its harmfulness or the culpability of the perpetrator manifested in it, is to be deemed of minor significance,

(2) the perpetrator has committed the offence under the age of 18 years and the act is deemed to be the result of lack of understanding or of imprudence,

(3) due to special reasons related to the act or the perpetrator the act is to be deemed comparable to an excusable act,

(4) punishment is to be deemed unreasonable or pointless in particular taking into account the factors referred to above in section 6, paragraph 3 and section 7 or the actions by the social security and health authorities, or

(5) the offence would not have an essential effect on the total sentence due to the provisions on sentencing to a joint punishment."

Criminal Records Act

21. Section 2, subsections 1-2, of the Criminal Records Act (*rikosrekisterilaki, straffregisterlagen*, Act no. 770/1993) provide that

"[o]n the basis of notices by courts of law, data shall be entered in the criminal records on decisions whereby a person in Finland has been sentenced to unsuspended imprisonment; community service; suspended imprisonment; suspended imprisonment supplemented with a fine, community service or supervision; juvenile punishment; a fine instead of juvenile punishment; or dismissal from office; or whereby sentencing has been waived under chapter 3, section 4, of the Penal Code (39/1889). However, no entries shall be made in the criminal records on the conversion of fines into imprisonment, nor on imprisonment imposed under the Civilian Service Act (1723/1991). Data on fines imposed on the basis of the provisions governing corporate criminal liability shall also be entered in the criminal records.

Furthermore, entries shall be made in the criminal records, as provided by Decree, on court decisions whereby a Finnish citizen or a foreigner permanently resident in Finland has been sentenced abroad to a penalty equivalent to one mentioned in paragraph (1)."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

22. The applicant complained under Article 10 of the Convention that his freedom of expression had been violated.

23. Article 10 of the Convention reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

24. The Government contested that argument.

A. Admissibility

25. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

26. The applicant contested the fact that the police were unaware of his status as a journalist at the time of the arrest. His press badge had been hanging round his neck at the end of the demonstration. The applicant also claimed that he had presented his press badge to the police when he had been taken to the bus to be taken into custody.

27. The applicant pointed out that it had been clear at the scene that he was there to practise his profession as a photographer. At the end of the demonstration there had remained about twenty demonstrators sitting in a

circle and holding hands, the applicant, a former Member of Parliament and the police. It had been clear to the police that neither the applicant nor the former MP had in any way participated in the demonstration. The applicant had been doing his duty as a journalist. It was clear that there had been an interference with his right to freedom of expression. The Government had not given any reasons why it had been necessary to remove the applicant from the scene. Nor had they given any reasons why it had been necessary to arrest him and to find him guilty of disobeying the police orders.

28. The Government noted that the applicant had not been in any way prevented from taking photographs during the demonstration or when the area was being sealed off by the police. The applicant had not been arrested for acting as a photographer but for refusing to obey police orders to leave the scene. The applicant had been quickly released the next day when the police had found out that he was a photographer for a magazine. The domestic courts had not imposed any sanctions on the applicant, nor had his camera or other equipment been confiscated. He had been allowed to keep all the photographs he had taken and to use them unrestrictedly. There was thus no interference with the applicant's right to freedom of expression.

29. In any event, were the Court of another opinion, the Government argued that the interference had been prescribed by law and that it had had a legal basis in the Constitution, the Police Act, the Assembly Act and the Penal Code. The interference had had the legitimate aim of protecting public safety, health or morals, and the rights of others as well as of preventing disorder and crime.

30. As to the necessity in a democratic society, the Government pointed out that the "Smash ASEM" demonstration had clearly been an event of considerable general importance. This had also been recognised by the police and, therefore, a separate safe area had been reserved for the media to observe the situation freely and safely. The applicant and some other journalists had chosen not to take this option. The domestic courts had found that the police had had justifiable reasons to seal the demonstration area and to order the demonstrators to disperse. Since they had not obeyed this order, the police had been entitled to arrest and detain them. When the demonstration had turned violent, the police had allowed the media to move outside the police line. Two other photographers, who had been in the sealed-off area, had left the scene, and no measures had been imposed on them at any point. Also the applicant could have left the scene at any point without any consequences.

31. The Government noted that the intention of the police had not been to prevent the applicant from exercising his profession but only to calm the situation and to restore public order. Everyone was equal before the law and the fact that the applicant was a journalist did not entitle him to disobey police orders. The other journalists had had no need to disobey police orders but the applicant had done so knowingly. The District Court found it established that the police orders had been clear and that they had clearly

concerned everybody. The fact that the applicant had also consulted a colleague by telephone and asked for advice on whether to stay or to leave clearly indicated that he had understood that the police orders also concerned him.

32. The Government pointed out that the policeman arresting the applicant had not noticed his press badge. When he had been taken to the bus to take him to custody, his ID had been requested and he had also presented his press badge. However, the applicant had failed to mention his profession to the policeman receiving him in the custody room. When the police had found out that he was a journalist, he had been allowed to call his employer. The applicant had been detained from 9 September at 9.26 p.m. until 10 September at 3.05 p.m., that was, 17.5 hours. It had not been possible to interrogate him on the same day as the law prohibited interrogations between 10 p.m. and 7 a.m. Altogether 121 persons had been arrested and detained due to the demonstration. The applicant had been one of the first to be released as he was a journalist.

33. The Government stressed that the applicant's arrest and detention had thus been justifiable and could not be regarded as disproportionate. Moreover, the domestic authorities had applied the domestic provisions in the light of Article 10 of the Convention and had based their decisions on acceptable assessment derived from the relevant circumstances. Considering the circumstances, the interference with the applicant's freedom of expression had been necessary in a democratic society.

2. The Court's assessment

1. Whether there was an interference

34. The Court notes that the Government claimed that there had been no interference with the applicant's right to freedom of expression whereas the applicant claimed that there clearly had been.

35. The Court notes that the applicant was arrested by the police in the context of a demonstration and that he was later found guilty by the domestic courts of disobeying the police. However, no penalty was imposed on him since the offence was excusable. The Court considers that, since the applicant's arrest and conviction were the consequence of his conduct as newspaper photographer and journalist when disobeying the police, the presumption is that there was an interference with his freedom of expression, as guaranteed by Article 10 of the Convention (see *Juppala v. Finland*, no. 18620/03, § 40, 2 December 2008).

2. Whether it was prescribed by law and pursued a legitimate aim

36. The Court notes that freedom of expression is subject to the exceptions set out in Article 10 § 2 of the Convention. The Court further notes that the parties agree that the impugned measures had a basis in Finnish law, in particular in section 4 of the Penal Code. It was thus

"prescribed by law". Moreover, the interference complained of had several legitimate aims, namely the protection of public safety as well as the prevention of disorder and crime.

3. Whether the interference was necessary in a democratic society

37. According to the well-established case-law of the Court, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". This freedom is subject to the exceptions set out in Article 10 § 2, which must, however, be strictly construed. The need for any restrictions must be established convincingly (see, for example, *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103; and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

38. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I).

39. The Court's task in exercising its supervision is not to take the place of national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

40. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient" (see Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 62, Series A no. 30; *Lingens v. Austria*, cited above, § 40; *Barfod v. Denmark*, 22 February 1989, § 28, Series A no. 149; *Janowski v. Poland*, cited above, § 30; and *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 52, ECHR 2000-I). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the

relevant facts (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298).

41. The Court further emphasises the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *Jersild v. Denmark*, cited above, § 31; *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports of Judgments and Decisions* 1997-I; and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III). Not only do the media have the task of imparting such information and ideas, the public also has a right to receive them (see, Sunday Times *v. the United Kingdom (no. 1)*, cited above, § 65).

42. Turning to the facts of the present case, the Court notes that the applicant was arrested, charged and found guilty of having disobeyed the police. His arrest took place in the context of a demonstration in which he had participated as a photographer and journalist. A separate, secure area had been reserved for the press but the applicant chose not to use it, preferring to stay among the demonstrators.

43. The Court notes that it does not appear that the applicant was in any way prevented from taking photographs of the demonstration. As the Government pointed out, his camera or other equipment was not confiscated and he was allowed to keep all the photographs he had taken and to use them unrestrictedly.

44. The Court further notes that when the demonstration turned violent, the police sealed the demonstration area and ordered the demonstrators to disperse. The domestic courts found subsequently that the police had had justifiable reasons to take these measures. Since these legal and legitimate orders were not obeyed, the police were entitled to arrest and detain the disobedient demonstrators. The Court also notes that the police allowed the media to move outside the police line. Two other photographers, who were in the sealed-off area, left the scene and no measures were imposed on them at any point.

45. The Court observes that the applicant had waived his right to use the separated, secured area for the press when he had decided to stay among the demonstrators also after the orders to disperse. The District Court found it established that the applicant had been aware of the orders of the police to leave the scene but had decided to ignore them. The applicant could have left the scene and moved to the secured press area without any consequences at any time while the sealing-off lasted. The applicant has not even claimed that he could not have carried out his professional duties from the secured press area. By not doing so, the applicant knowingly took the risk of being arrested for contumacy.

46. The Court notes that it is not entirely clear at what stage the police learned that the applicant was a journalist. It appears from the witness statements given before the District Court that the applicant did not tell or

indicate the arresting police officer that he was a journalist. According to the Government, it was only when he was taken to the bus taking him to custody and when he was asked to present his ID that he also presented his press badge. The applicant, however, failed to mention his profession to the policeman receiving him in the custody room. When the police found out that he was a journalist, he was allowed to call his employer. The Court notes therefore that it appears that the applicant failed to make clear efforts to identify himself as a journalist (compare and contrast *Najafli v. Azerbaijan*, no. 2594/07, § 68, 2 October 2012).

47. The Court further considers that the applicant was not as such prevented from exercising his freedom of expression and reporting the event. Moreover, he was offered the alternative to follow the demonstration from the secured area reserved to the press. His arrest and conviction only related to disobeying the police as he failed to obey their orders. As the Government pointed out, the fact that the applicant was a journalist did not give him a greater right to stay at the scene than the other people.

48. Moreover, the Court notes that the applicant was held in detention for about 18 hours. As the Government maintained, the length of the detention is mainly explained by the fact that the applicant was detained late at night and that the domestic law prohibited interrogations between 10 p.m. and 7 a.m. In addition, the Court notes that altogether 121 persons were arrested and detained due to the demonstration and that this fact may also have delayed the applicant's release. However, the next day the applicant was one of the first to be released due to his status as a journalist.

49. Taking into account the considerations outlined above, the Court finds that, in any event, any interference with the applicant's exercise of his journalistic freedom was only of limited extent, given the opportunities made available to him to cover the event adequately. The conduct sanctioned by the criminal conviction was not his journalistic activity as such, but his refusal to comply with a police order at the very end of the demonstration, when the latter was judged by the police to have become a riot.

50. In order to assess whether the "necessity" of the restriction of the exercise of the freedom of expression has been established convincingly, the Court must examine the issue essentially from the standpoint of the relevance and sufficiency of the reasons given by the domestic courts for convicting the applicant. The Court must determine whether the applicant's conviction struck a fair balance between the public and private interests involved and whether the standards applied were in conformity with the principles embodied in Article 10 (see *Nikula v. Finland*, no. 31611/96, § 44, ECHR 2002-II).

51. The Court considers that the demonstration was a matter of legitimate public interest, having regard in particular to its nature. From the point of view of the general public's right to receive information about matters of public interest, and thus from the standpoint of the press, there

were justified grounds for reporting the event to the public. This was also acknowledged by the authorities and therefore a separate, secure area had been reserved for the press. The event attracted a lot of media attention and was closely followed. The Court notes that the applicant was the only journalist claiming that his freedom of expression had been violated in the context of the demonstration.

52. The Court observes that the domestic courts found it established that the applicant had understood that the police orders to disperse also concerned him and that he had failed to obey these orders. The District Court found, by referring to Article 10 of the Convention, that the police orders interfered with the applicant's right to exercise his freedom of expression but that interference was prescribed by law and pursued a legitimate aim. As to the necessity, the court found that it had been necessary to disperse the crowd because of the riot and the threat to the public safety, and to order people to leave. Thus the restrictions on the applicant's freedom of expression were justified.

53. The Court notes that the District Court analysed the matter from the Article 10 point of view. In this analysis the court balanced the applicant's freedom of expression against the State's interests and found that there had been a pressing social need to take the impugned measures against the applicant.

54. As to the applicant's conviction, the Court observes that it appears from the case file that the prosecution was directed against altogether 74 defendants who were accused of several types of offences. The District Court found it established that the applicant had committed a crime by disobeying the lawful orders of the police. However, the court did not impose any penalty on the applicant as his act was considered excusable. He was considered, as a photographer and journalist, to be confronted with contradictory expectations, arising from obligations imposed on the one hand by the police and on the other hand by his employer. Moreover, the Court notes that, according to the domestic law, no entry of the conviction was made on the applicant's criminal record as no penalty was imposed (see paragraph 21 above).

55. In conclusion, in the Court's opinion the reasons relied on by the domestic courts were relevant and sufficient for the purposes of Article 10 of the Convention. Having regard to all the foregoing factors and taking into account the margin of appreciation afforded to the State in this area, the Court considers that the domestic courts struck a fair balance between the competing interests at stake. In sum, the Court concludes that the domestic courts were entitled to decide that the interference complained of was "necessary in a democratic society".

56. Accordingly, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by five votes to two that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 4 February 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Nicolaou joined by Judge De Gaetano is annexed to this judgment.

I.Z.
F.E.P.

DISSENTING OPINION OF JUDGE NICOLAOU JOINED BY JUDGE DE GAETANO

At the time of the applicant's arrest, on the evening of 9 September 2008, he was on duty as a journalist-photographer working for a weekly magazine. He had been assigned the task of covering a demonstration, held in Helsinki, against the Asia-Europe meeting (ASEM). It was a political demonstration with economic undertones and, by Finnish standards, an exceptionally large one. The Government themselves described it "as an event of considerable public importance". There was, unsurprisingly, strong media interest.

The authorities, expecting such interest, made provision for a separate area from which journalists might follow events and take whatever photographs they could. That area would, presumably, afford them some safety and comfort, especially if it proved necessary for the police to take unpleasant suppressive measures. The measure would not have been regarded as one meant to keep journalists at bay so that, while they would have a fair view of general developments, they would not be able to spot or adequately distinguish incidents occurring anywhere in the middle of the demonstration or at the far end. Instead, one might reasonably have thought that the use of the area was optional and that a journalist had freedom to move around and mingle with demonstrators in order to get a better understanding of events, to obtain statements from participants and – in the case of a photographer – to take close-ups, which sometimes speak volumes. As it turned out, journalists were denied this freedom.

According to prior intelligence, there was a risk of the demonstration turning violent, and unfortunately it did. The demonstration started at 6 p.m. and, after half an hour, the police considered that it had become a riot. They took measures to suppress it. Initially, for about forty-five minutes, no one was allowed to leave save for a few individuals. Then, in furtherance of an order to disperse, the police created exit routes through which people could go on condition of showing an identity card and having their belongings checked. Shortly after 9 p.m. only some twenty persons remained at the scene. The police called on them to leave and warned them that unless they did so they would be arrested. The applicant was among them, still covering the event. There is no indication that there was, at that stage, a threat to public order; the riot had already been quelled. That is not to say, of course, that the police orders ceased to have relevance as regards the demonstrators. But the applicant was not one of them. And it has never been suggested that he did anything inconsistent with his journalistic duties.

The applicant says that he did not expect that the order would apply to him as well. At that stage he spoke about the matter with a colleague over the phone and asked for advice on whether he should leave or stay. He decided to stay so as to cover the situation until it was completely resolved.

He was then arrested together with the others. He claims that he was wearing his press badge and had made his identity known. According to the Government, he had not revealed his identity to the arresting officer but, when taken to the police bus, he showed both his ID and his press badge. However, that made no difference at all.

Section 4(1) of Chapter 16 of the Penal Code (as amended) provides that the police may issue an order "for the maintenance of public order or security or the performance of a duty" and that to disobey would constitute "contumacy towards the police", a criminal offence punishable by a fine or by imprisonment for up to three months. In the present case the order, issued orally by the police, could also have been orally revoked or varied, according to what the circumstances might have required. The object of the order was to restore peace by dispersing the crowd in a controlled way. It is surprising that it should have been thought that it could also apply to a journalist who was lawfully present and covering the event in the context of his media duties and that it could lead to his arrest.

The criminal court before which the applicant, jointly with many others, was charged under the aforesaid provision simply found that he had been aware of police orders; that they had been clear and had covered everyone, including him; and that he had decided not to comply. The domestic court, having briefly considered Article 10 of the Convention, found that there had been an interference with the applicant's right to freedom of expression; that the interference had a lawful basis and pursued a legitimate aim, namely, preventing disorder; and that the interference had been necessary for the purpose of putting an end to a violent situation. Still, it may be noted that the situation had already been effectively dealt with by the time the applicant was arrested. The court found the applicant guilty as charged. However, it did not impose a sentence. It regarded the offence as excusable because it considered that the applicant, as a journalist, must have faced a dilemma between his duty to his employer and the obligation imposed on him by the police order. Consequently, by law, the conviction was not to be entered on the applicant's criminal record.

Thus, the applicant was first required to obey the police order and then, when he failed to do so, he had to be arrested and kept in detention for seventeen and a half hours. It is to be noted that the domestic court never said that the arrest and detention were wrong or unnecessary. Subsequently, the applicant had to be prosecuted and to stand trial, and to be convicted of a criminal offence. In the domestic court's view, all of that had been right and proper and well deserved, but on the other hand, the applicant would suffer no further consequences because the offence was excusable. The majority are content with that conclusion.

The applicant brought an appeal, complaining, *inter alia*, that the trial court had not given reasons why his arrest and conviction were "necessary in a democratic society". He was obviously right in what he indicated. But

his appeal was rejected, without the Court of Appeal itself giving reasons. The Supreme Court refused leave for a further appeal. It is not known why.

It seems to me that it was only natural that the situation, as it developed, would heighten journalistic interest. There was nothing improper about that. Where a demonstration is peaceful, the journalist's function is essentially one of collecting and transmitting information and, quite often, adding comment. But when tension builds up and violence breaks out, whereupon the authorities resort to suppressive control measures, the journalist assumes the role of "public watchdog" and his task then acquires even greater significance: as to this role of the press, see, for example, *Barthold v. Germany*, 25 March 1985, Series A no. 90. He is entitled to be in the very thick of things until the very end, and sometimes does so at considerable risk to himself. The reason is because in a democratic society the public have the right to know what happens during such difficult times. This right forms one of the basic safeguards of democracy. Hardly a day passes by when we are not made aware, in one way or another, of the need for journalistic freedom to perform that kind of role. The domestic court's view that the applicant was inevitably faced with a dilemma as to where his loyalty lay, and that this dilemma could only be resolved by giving precedence to the law, quite misses the point. It does not, in my respectful view, reflect the true nature of the situation in which the applicant found himself. He was not one of the demonstrators. He was a journalist-photographer covering what the Government themselves have described as an event of considerable public importance.

How could the police fail to realise the capacity in which the applicant was present at the scene, particularly at a stage when he was with a very small remaining group? As to whether he was wearing his media badge and whether he made his identity known to the police in good time, I have already referred to the controversy on this point. The domestic court made no finding on the matter. But, as I have noted, it was accepted that his identity was established before he was put on the police bus to the police station; and, further, one might ask whether the applicant, while locked up, had not asserted his identity and remonstrated about spending the night in a cell. There is a nagging question and it is this: Did the police really care whether the applicant was a journalist or not? The fact that he was prosecuted tends to suggest that they did not. It may also be added that if the police or the courts were to have taken the view that the applicant's prosecution should have been disconnected from his arrest and detention, they would have been expected to look at these aspects separately and to give relevant explanations. But they did not.

The majority take the view, in line with the Government's position, that "the fact that the applicant was a journalist did not give him a greater right to stay at the scene than the other people" (see paragraph 47 of the judgment). This aspect is seen as connected with the question of necessity.

The majority say (paragraph 44) that: "Since these legal and legitimate orders were not obeyed, the police were entitled to arrest and detain the disobedient demonstrators". But the applicant was not a demonstrator and no one has ever suggested that he was. The majority seem to be saying that since the applicant chose "to stay among the demonstrators" and not to use the area reserved for the press he should accept the same fate (see paragraphs 42 and 45). Again, referring to the question of necessity, the majority say (see paragraph 52) that: "As to the necessity, the court found that it had been necessary to disperse the crowd because of the riot and the threat to the public safety, and to order people to leave. Thus the restrictions on the applicant's freedom of expression were justified".

I would respectfully observe that the majority conflate the meaning of the undoubted necessity to quell the riot with what the domestic court also saw as the necessity of compliance with a police order irrespective of its essence and its rationale, an order which led to the imposition of restrictions on a journalist's freedom of expression through his arrest, detention, prosecution and conviction for a criminal offence simply because he had the courage to do his duty in furtherance of the public interest. The majority speak of an analysis of Article 10 of the Convention carried out by the domestic court. My own understanding is that, at least in the case of the applicant, there was no real analysis at all and that the domestic court's judgment was more by way of declaration than based on reasoning. It has not been substantiated why it was necessary in a democratic society to equate a professional journalist, operating within recognised professional limits in covering the demonstration, with any of the people taking part in the demonstration and to impose drastic criminal restraints on him.

I consider that the order should not have been intended or interpreted as directed against the applicant as a journalist covering the events in question, since his presence was not connected with what needed to be countered and resolved. I also consider that if the domestic courts were unable to adopt such an interpretative approach, they were bound, in applying Article 10 of the Convention, to balance the competing interests involved, yet they failed to do so. It is incumbent on the national authorities to convincingly establish, by relevant and sufficient reasons, that curtailing press freedom is necessary in the sense that it meets a "pressing social need": see, among many authorities, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 88-91, ECHR 2004-XI. The Court's case-law concerning the protection of journalistic sources illustrates the Court's concern in this regard: see *Goodwin v. the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1995-II, and subsequent cases, such as *Tillack v. Belgium* (no. 20477/05, 27 November 2007) and *Voskuil v. the Netherlands* (no. 64752/01, 22 November 2007), which are particularly instructive. In the latter case a journalist, who was called as a witness in criminal proceedings, refused to name his source even when the judge ordered him to

do so. He was punished by detention for non-compliance. The Court found a violation of Article 10. It held that the judicial order was not justified by an overriding requirement in the public interest and so, in balancing the competing interests, "the interest of a democratic society in securing a free press" had to prevail. There is no indication that any such balancing exercise was carried out in the present case. On the contrary, the case reveals a one-sided attitude on the part of the authorities, one likely to create a "chilling effect" on press freedom.

For the reasons I have set out I regret that I am unable to follow the majority.