



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

FIRST SECTION

CASE OF VRONCHENKO v. ESTONIA

(Application no. 59632/09)

JUDGMENT

STRASBOURG

18 July 2013

FINAL

18/10/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Vronchenko v. Estonia,

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

Isabelle Berro-Lefèvre, *President*,

Elisabeth Steiner,

Khanlar Hajiyeu,

Mirjana Lazarova Trajkovska,

Julia Laffranque,

Linos-Alexandre Sicilianos,

Erik Møse, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 25 June 2013,

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

PROCEDURE

1. The case originated in an application (no. 59632/09) against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Alexey Vronchenko (“the applicant”), on 2 March 2010.

2. The applicant was represented by Mr R. Kiviloo, a lawyer practising in Tallinn. The Estonian Government (“the Government”) were represented by their Agent, Ms M. Kuurberg, of the Ministry of Foreign Affairs.

3. The applicant, charged with sexual abuse of a child, alleged, in particular, that he had not been given an opportunity to have questions put to the alleged victim on whose video-recorded interview conducted during the pre-trial proceedings his conviction had been based.

4. On 18 November 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).

5. The Russian Government, having been informed by the Registrar of their right to intervene (Article 36 § 1 of the Convention), indicated that they did not intend to do so.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1976. He is currently serving a prison sentence.

7. On 11 December 2007 A.K., a school psychologist, informed the police of her suspicion that nine-year-old E. had been sexually abused by her stepfather, the applicant. She had learned about the alleged abuse through E.'s schoolmate.

8. On 12 December 2007 E. was interviewed by a police investigator in the presence of the psychologist. According to E. her stepfather had repeatedly sexually abused her between September 2006 and 9 December 2007.

9. Also on 12 December 2007 criminal proceedings were initiated in respect of the alleged rape and physical abuse by the applicant of his stepdaughter E.

10. On 13 December 2007 E. was again interviewed by a police investigator in the presence of a social worker. On the same day E. was also examined by medical experts. According to their opinion E.'s hymen was intact and without injuries; there was minimal hyperaemia, which could have been caused by urine or mechanical influence. "A strange, unclean smell" that was unusual for a child was noted around her sexual organs. No traces of sperm or lubricant were discovered by a biology expert. E. had two haematomas on the backs of the knees and a scratch on her leg.

11. Also on 13 December 2007 the applicant was taken into custody.

12. On 14 January 2008 E. was examined by a psychiatrist and psychologist, who gave an expert opinion, according to which attending a court hearing would cause her psychological trauma and damage her health, and in a stressful situation her statements might not be consistent. In the opinion reference was made to E.'s medical history, which stated that she had been diagnosed with epilepsy.

13. On 31 January 2008 the applicant asked the investigator to inform him about the course of the criminal proceedings. He also requested that a confrontation be held between him and E. On 4 February 2008 the investigator replied that information about the preliminary investigation could only be released on the authority of a prosecutor, and that no such authority had been given.

14. On 14 February 2008 E. was interviewed for the third time, by two police investigators in the presence of a social worker. The interview was video recorded. At the beginning of the interview an investigator explained to E. that the interview was to be recorded so that they would not have to talk again about what had happened.

15. In a letter to the investigator dated 20 February 2008, the applicant, *inter alia*, noted that only confrontation with E. could help to clarify the matter. In her reply, dated 26 February 2008, the investigator did not address the question of confrontation.

16. During an interview with the applicant on 14 April 2008 the investigator read out parts of the record of E.'s interview of 14 February 2008. The record of the interview with the applicant does not indicate that he was offered an opportunity to put questions to E. or that he made such a request himself.

17. On 14 April 2008 a psychiatrist gave an additional expert opinion, according to which remote examination of E. would also cause her psychological trauma, and in a stressful situation there was no guarantee that she would give any statements. Reference was made to her age, personality type, emotional state, illness (epilepsy) and what she had gone through.

18. At the outset of the court proceedings both the prosecution and the defence requested that a number of witnesses be called, but neither of the parties requested that E. be called as a witness.

19. According to an expert opinion dated 11 February 2009 no DNA from the applicant was found on E.'s underwear.

20. During the trial, the Harju County Court heard several witnesses who knew E. or had heard about the events in question. A.K. (a psychologist who worked at the school E. attended) had heard from M.K. (E.'s teacher) that E. had told her friend that her stepfather had kissed her and that they had watched pornographic films at home.

21. G.I. (a teacher) and T.S. (a psychologist at a children's refuge) gave statements about E.'s behaviour and the situation in the school. V.S. (E.'s ten-year-old friend) told what she had heard from E. M.K. (the teacher) had heard of the events from V.S.; she had also seen a male sexual organ made of play-dough by E. M.M. from the child protection service affirmed that E.'s behaviour indicated that she had been abused.

22. K.V. (the applicant's father-in-law), and J.V. (the applicant's wife) gave statements in support of the applicant.

23. In addition, the court heard an expert witness, K.G., who had carried out an internal examination of E. In respect of the "strange smell" noted at E.'s sexual organs she submitted that children had certain microflora; if that was interfered with by foreign substances or foreign objects – or sexual intercourse with a man – there would be a strange smell. She explained the essence of inter-labial intercourse and noted that in most cases of sexual abuse the abused children had no injuries. Other expert opinions were examined in writing. The court read out the transcripts of E.'s statements given during the preliminary investigation and the video record of the interview of 14 February 2008 was played at the hearing. The applicant's request for E. to be examined at a hearing was rejected.

24. By a judgment of 27 February 2009 the Harju County Court convicted the applicant. In its judgment the court summarised E.'s statements, according to which the applicant went to the toilet at night and then changed beds, came to sleep in her bed and kissed her. On another occasion the applicant had undressed and told her to undress as well; they had gone to bed and the applicant had attempted to insert his sexual organ into hers; she had felt pain but the applicant had told her to bear it. On two occasions the applicant had told her to undress; he had lubricated her sexual organ and told her to sit on his erect penis. Once the applicant had told E. to satisfy him orally and on some occasions manually.

25. The County Court found, considering the expert opinion and in order to protect E., that it had been justified in reading out her statements and watching the video interview made during the preliminary investigation and not examining her in court. It noted:

“During the criminal proceedings victim [E.] has given statements on three occasions. In the first two instances she was interviewed in the presence of a psychologist. Thereafter ... the health and mental condition of the nine-year-old girl was ascertained on the basis of an expert opinion, and two months later she was interviewed for the third time and the interview was recorded. On the basis of Article 291 (5) of the [Code of Criminal Procedure] the statements were read out at the hearing, because the court considered that the victim could not appear in court because of “another impediment” that could not be set aside: it is understandable that, in particular, attacks of a sexual nature cause harmful consequences for the personality, especially for minors, and that even for purely medical reasons it may be advisable to avoid recollection of such experiences; examination of sexual crimes may prove to be an ordeal for the victim.

Supplementing her statements in the course of the following interviews by a nine-year-old victim, compared to her earlier statements, does not necessarily result in a finding that the statements were unreliable as evidence. Depending on the temporal distance, different interviewers and different emotional background, the degree of detail in reproducing the event may vary, particularly in the case of a child ...

The court has not established such contradictions in the statements of the victim that would cause the statements to be unreliable. The child has given statements which are in accordance with her level of maturity, several teachers and psychologists ([T.S., M.M., A.K.]) considered that it was completely logical that the child did not want to talk about an unpleasant topic, and considering the child's behaviour at the video recording the notion that the child had invented the whole story could be ruled out. The court does not have the slightest ground to doubt the truthfulness of the statements given by victim E. during the preliminary investigation. These [statements] are plausible, correspond to her age and are sufficiently thorough for establishing that the events took place ...”

26. The County Court further analysed the testimony of the applicant's wife and father-in-law, according to whom E. had not been at home together with the applicant at the times indicated by E. The court made reference to the particularities of children's sense of time, noted that the establishment of the exact time of the events was not required in the particular circumstances

of the case at hand, and concluded that E.'s statements were not disproved by the statements of the applicant's wife and father-in-law. It found it implausible that E. had never stayed at home with only the applicant present.

27. The County Court further stated as follows:

"The argument of the [applicant] that the victim had seen sexual intercourse between her parents and had watched films on the computer is not sufficient to explain the victim's detailed statements about what happened during the intercourse. The victim has repeatedly reported in detail, and has described the feeling of pain which cannot be experienced by a child by merely watching a film or seeing sexual intercourse. Furthermore, the fact that the victim made a male sexual organ from play-dough at school proves one thing: the child has personally experienced sexual intercourse with an adult man. The sexual terms used by the victim (which the teachers have reported) also refer to a considerably deeper knowledge of sexual matters than is usual for girls of that age.

The argument of the [applicant] that the victim could have obtained her sexual knowledge at school and, moreover, that there was a certain [A.] at school, with whom the victim had closer relations, are disproved by the statements of [V.S.]: [A.] was nine years old, smaller than [V.S.] and the girls had beaten [A.] when [A.] and [E.] had kissed. The [applicant's] reaction to these statements by [V.S.] was characteristic: having heard at the court hearing that [A.], [a version referred to by the applicant], was a small nine-year-old boy, the [applicant] himself burst out laughing, which confirms the ridiculousness of the version offered [by him].

The court considers that all the [applicant's] objections are groundless and not based on the established facts. Thus, the four episodes described in the indictment have been proved: on one occasion putting the penis into the mouth [of the victim] and on three occasions into [her] sexual organ.

The court considers that the charges have been proved in full, including the episode of 9 December 2007, because there is nothing except the statements of the interested persons to prove that the victim and [the applicant] were never alone together at home. During the trial the court has become convinced that the victim's statements are truthful and they are not refuted by the statements of [J.V.] and [K.V.] ...

... According to the Supreme Court's judgments ... the defining criterion [for rape] is that at least one party's sexual organ is involved. The [applicant's] sexual organ was involved. According to the expert opinion there could have been inter-labial intercourse in the present case, in the course of which a penis is introduced between the labia and this is to be considered sexual intercourse."

28. The County Court concluded that the charges against the applicant had been proved in respect both of repeated rape and physical abuse of E. The applicant was sentenced to eight years and three months' imprisonment.

29. Both the applicant and his lawyer appealed. They complained, *inter alia*, that the defence had not had the opportunity to put questions to E., the only person on whose statements the applicant's conviction had been based.

30. By a judgment of 17 June 2009 the Tallinn Court of Appeal upheld the County Court's judgment. In respect of the complaint that the defence had had no opportunity to put questions to E., the Court of Appeal noted:

"During the preliminary investigation, when the [applicant] was interviewed as a suspect, he was presented and familiarised with the written record of victim [E.'s] interview. Neither the accused nor his lawyer made any requests ... In the indictment drawn up by the prosecutor and sent to the lawyer, the accused and the court a list of persons called to the court by the prosecutor was set out; the victim [E.] who was a minor, was not named ... Nor was [E.] named in the list [of witnesses called by the lawyer and the accused] ...

In the present case, experts, a child psychiatrist and a psychologist, have given their opinion that participation in the court hearing of [E.] who suffers from epilepsy, would cause her considerable psychological trauma, damage to her health and in the situation of heightened stress the consistency of her statements could not be guaranteed ... An expert, child psychiatrist has given an opinion that considering [E.'s] age, particularities of mind, emotional state, serious illness and what she had gone through, a remote interview would also cause her psychological trauma, and in a situation where she would be under heightened stress it could not be guaranteed that she would be able to make statements at all ... The [court] finds that in the present case the measures restricting the right of defence were indispensable, and the County Court lawfully declined to summon to the hearing the seriously ill ten-year-old child, on the basis of the opinions given by medical experts."

31. The Court of Appeal further rejected the argument of the defence that the time of the incriminated acts had not been specified with sufficient precision in the charges. It noted that the period between the summer of 2006 and [9] December 2007, as stated in the charges, resulted from the nature of the acts and the personality of the victim, who was only nine years old at the material time. According to the experts, it was extremely difficult for someone of that age to give a precise time for past events.

32. As regards the merits, the Court of Appeal agreed with the County Court's findings, and deemed it unnecessary to repeat the reasoning in full. It noted, *inter alia*:

"The [County] Court has sufficiently clearly reasoned why it considers trustworthy the victim's statements made during the preliminary investigation, it has assessed the evidence as a whole ... and has given reasons why it does not consider trustworthy the statements given by the accused, his wife [J.V.] and witness [K.V.]. The County Court has also disproved the appellants' arguments that the use by a nine- or ten-year-old child of expressions containing detailed description of sexual life [and] description of the conduct of [her] stepfather are mere fantasy or that [this] knowledge has been obtained from the school, where a nine-year-old boy had kissed the victim. In this context the [County] Court has lawfully relied on an [expert opinion] according to which the victim was not particularly inclined to invent things and had an adequate contact with the real external world ..."

33. The Court of Appeal went on to deal with the expert opinions concerning the DNA and medical examinations. In respect of the medical expert opinion, the Court of Appeal noted that E.'s hymen had been found

to be intact, but at the same time a “strange, unclear” smell and minimal hyperaemia had been noted. It referred to the expert’s opinion that these findings could imply that sexual intercourse had taken place with a man or that penetration with a mechanical object had taken place. Furthermore, reference was made to the medical expert’s opinion according to which the majority of sexually abused children did not have injuries to the hymen. The Court of Appeal considered that the fact that the applicant’s DNA had not been found on the victim’s underpants had no decisive importance.

34. In an appeal to the Supreme Court the applicant’s lawyer reiterated that the defence had had no opportunity to put questions to E. It was noted that during the preliminary investigation the applicant had on several occasions asked for a confrontation with E., but these requests had been disregarded. The applicant had initially not requested that E. be brought to court, as he had thought that the incoherent statements she had made during the preliminary investigation would not weigh against him and he had not wished to traumatise the child. Nevertheless, at the hearing a request for E. to be examined had been made, together with proposals on the conduct of the examination in such a manner as not to harm the child (video interview, putting questions through the court). The County Court had rejected the request without giving any reasons.

35. On 9 September 2009 the Supreme Court refused the applicant leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

36. Pursuant to Article 70 of the Code of Criminal Procedure (CCrP) (*Kriminaalmenetluse seadustik*), as in force at the material time, witnesses under fourteen years of age were heard in the presence of a child protection official, social worker or psychologist.

37. The Code of Criminal Procedure further provided:

Article 290 – Specifications concerning hearing of witnesses who are minors

“(1) when a witness under fourteen years of age, he or she shall not be cross-examined.

(2) A witness who is a minor of less than fourteen years shall be heard in the presence of a child protection official, social worker or psychologist, who may question the witness with the permission of the judge ...

(3) A judge shall make a proposal to a witness who is a minor of less than fourteen years of age to tell the court everything he or she knows concerning the criminal matter.

(4) After a witness who is a minor of less than fourteen years of age has given testimony, he or she shall be examined by the parties to the court proceeding in the order determined by the court.

(5) The court shall overrule leading and irrelevant questions.

(6) If the presence of a minor is not necessary after he or she has been heard, the court shall ask him or her to leave the courtroom.”

Article 291 – Disclosure in court proceedings of testimony given by witness in pre-trial procedure

“At the request of a party to court proceedings, the court may order that the testimony given by a witness in pre-trial procedure be disclosed if:

1. the witness is dead;
2. the witness refuses to give testimony in the course of examination by the court, except upon refusal to give testimony on the bases provided for in Article 71 of this Code;
3. the witness is suffering from a serious illness and therefore he or she cannot appear at a court session;
4. the whereabouts of the witness cannot be ascertained;
5. the witness fails to appear in court due to other impediment.”

38. In a judgment of 7 March 2007 (case no. 3-1-1-125-06) the Supreme Court dealt with the applicability of the framework decision of 15 March 2001 on the standing of victims in criminal proceedings of the Council of the European Union (200/220/JHA) and the *Pupino* judgment of the European Court of Justice (Case C-105/03 *Pupino* [2005] ECR I-5285). The Supreme Court held:

“9. ... The national procedural law is and remains the applicable law which must be if necessary and possible interpreted in the light of the principles emanating from the framework decision. The Criminal Chamber of the Supreme Court emphasises in this context that according to the generally acknowledged principles the interpretation of a framework decision (a directive) must not lead to an interpretation of the national criminal law according to which criminal liability not based on law is created or such liability is aggravated. If the law of procedure has to be interpreted in the light of a framework decision, the interpretation is limited by the wording of the act and its compatibility with the will of the legislator; the fundamental and human rights of an accused within the meaning of Article 6 of the Convention must also be kept in mind.

10. ... A framework decision must thus be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the Convention and interpreted by the European Court of Human Rights, are respected (§ 59). It is the court’s task in interpreting the national law to ensure that the application of the measures referred to in the framework decision is not likely to make the criminal proceedings against a person unfair within the meaning of Article 6 of the Convention, as interpreted by the European Court of Human Rights (§ 60). Thus, it also emerges from the *Pupino* ruling that a framework decision must merely be involved in the interpretation of national law. Interpretation cannot go beyond the

boundaries stipulated in the national law, and the proceedings in respect of the accused must not become unfair as a result of the interpretation of national law ...

13. The appellant rightly points out that on the basis of the judgment of the Criminal Chamber of the Supreme Court in the criminal case no. 3-1-1-86-06 ... the minority age of a witness and a victim is not such a circumstance that could be considered to be grounds for not summoning them to court or subsequently disclosing their statements given during the preliminary investigation within the meaning of Article 291 of the CCrP. In that judgment it was explained that certain reservations to the direct examination of evidence can be made, but only if the right of defence of the accused has been sufficiently taken into account at the same time. The Chamber agrees with the appellant that not only the interests of the victim but also the right of defence of the accused must be kept in mind. This principle has also been referred to in the *Pupino* ruling, on which the courts have based their argumentation ... [T]he Criminal Chamber notes that according to the case-law of the European Court of Human Rights, in cases where the conviction of an accused has been based solely or decisively on the statements of a person to whom the accused could not put questions either before or during the trial, the restriction of the right of defence exceeds the limits permissible under Article 6 of the Convention. In a situation where the only direct evidence against [the accused] was the statements given during the pre-trial proceedings, such a violation of the right of defence has taken place. ...

14. The Criminal Chamber also points out that the courts have not considered all possibilities foreseen by law in order to secure the protection of the interests of the witness who is a minor in the court proceedings. In addition to the restriction on public access to the court hearing, which gives ground for the court to hold a hearing or a part thereof *in camera* (Article 12 § 1 (3) of the CCrP), and the special rules for hearing witnesses who are minors (the same applies to victims), according to which a victim who is under fourteen years of age must be heard in the presence of a child protection official, social worker or psychologist (first sentence of Article 290 § 2 of the CCrP), the law also provides for the possibility of a witness who is a minor not attending court in person. Under Article 287 § 5 of the CCrP the court may allow, at the request of a party or on its own initiative, a remote hearing to be conducted under the procedure provided for in Article 69 of the CCrP (and also to use a screen separating the victim from the accused). Pursuant to Article 69 § 1 of the CCrP one of the grounds for conducting a remote hearing is the need to protect the victim. When applying that measure a victim can be heard by means of a technical solution as a result of which the participants in the proceeding, see and hear the witness giving evidence outside the court by live coverage, and may question the witness through the [court] (Article 69 § 2 (1) of the CCrP). The Criminal Chamber of the Supreme Court considers that by the use of the means foreseen in the Code of Criminal Procedure victims of crimes can be sufficiently protected against the impact of giving statements at a public hearing ...

15. Regardless of the above, situations cannot be completely ruled out in which a victim or a witness is not able to give statements, in spite of the application of the measures described above, for example because of excessive emotional tension and the resulting potentially negative consequences. It is understandable that, in particular, attacks of a sexual nature have harmful consequences for the personality, especially for minors, and that even for purely medical reasons it may be advisable to avoid recollection of such experiences. However, in such a case the assessment of the medical condition cannot be within the discretion of a court or the Prosecutor's Office; it must be established in each particular case on the basis of, for example, an

expert opinion. Only thereafter could disclosure of the victim's statements made during the pre-trial proceedings come into question under Article 291 (5) of the CCrP."

III. RELEVANT EUROPEAN AND INTERNATIONAL MATERIAL

A. Council of Europe documents

1. Recommendation No. R (91) 11

39. In Recommendation No. R (91) 11 of the Committee of Ministers of the Council of Europe to member states concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults (adopted on 9 September 1991) the Committee of Ministers recommended introducing and implementing the following measures:

"12. Ensure that the rights and interests of children and young adults are safeguarded throughout proceedings, while respecting the rights of the alleged offenders ...

14. Provide for special conditions at hearings involving children who are victims of or witnesses to sexual exploitation, in order to diminish the traumatising effects of such hearings and to increase the credibility of their statements, while respecting their dignity;"

2. Recommendation Rec(2001)16

40. Recommendation Rec(2001)16 of the Committee of Ministers of the Council of Europe to member states on the protection of children against sexual exploitation (adopted on 31 October 2001) reads:

"30. Ensure that the rights and interests of children are safeguarded throughout proceedings, in particular by enabling them to be heard, to be assisted or, where relevant, to be represented, while respecting the rights of the alleged offenders ...

33. Provide special conditions for the taking of evidence from children who are victims of or witnesses to sexual exploitation, in order to reduce the number of statements and hearings of the child and thus minimise the harm caused to the victims, witnesses and their families, and increase the credibility of their statements while respecting their dignity."

3. Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

41. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse that entered into force on

1 July 2010 (not ratified by Estonia) provides in its Chapter VII concerning investigation, prosecution and procedural law as follows:

Article 30 – Principles

“1. Each Party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child.

2. Each Party shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate ...

4. Each Party shall ensure that the measures applicable under the current chapter are not prejudicial to the rights of the defence and the requirements of a fair and impartial trial, in conformity with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.”

Article 31 – General measures of protection

“1. Each Party shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and criminal proceedings, in particular by ...

g. ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided, unless the competent authorities establish otherwise in the best interests of the child or when the investigations or proceedings require such contact.”

Article 35 – Interviews with the child

“1. Each Party shall take the necessary legislative or other measures to ensure that:

a. interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities;

b. interviews with the child take place, where necessary, in premises designed or adapted for this purpose;

c. interviews with the child are carried out by professionals trained for this purpose;

d. the same persons, if possible and where appropriate, conduct all interviews with the child;

e. the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings ...

2. Each Party shall take the necessary legislative or other measures to ensure that all interviews with the victim or, where appropriate, those with a child witness, may be

videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings, according to the rules provided by its internal law.”

Article 36 – Criminal court proceedings

“2. Each Party shall take the necessary legislative or other measures to ensure, according to the rules provided by its internal law, that:

- a. the judge may order the hearing to take place without the presence of the public;
- b. the victim may be heard in the courtroom without being present, notably through the use of appropriate communication technologies.”

B. European Union documents

1. The Council Framework Decision

42. Framework Decision of 15 March 2001 of the Council of the European Union on the standing of victims in criminal proceedings (2001/220/JHA) provided as follows:

Article 2 – Respect and recognition

“2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.”

Article 3 – Hearings, and provision of evidence

“Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.

Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.”

Article 8 – Right to protection

“4. Each Member State shall ensure that, where there is a need to protect victims - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles.”

2. Directive of the European Parliament and of the Council

43. Directive of 25 October 2012 of the European Parliament and of the Council (2012/29/EU) establishing minimum standards on the rights,

support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA provides as follows:

“(66) This Directive respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, it seeks to promote the right to dignity, life, physical and mental integrity, liberty and security, respect for private and family life, the right to property, the principle of non-discrimination, the principle of equality between women and men, the rights of the child, the elderly and persons with disabilities, and the right to a fair trial.”

Article 20 – Right to protection of victims during criminal investigations

“Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that during criminal investigations:

...

(b) the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation;”

Article 22 – Individual assessment of victims to identify specific protection needs

“1. Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation ...

4. For the purposes of this Directive, child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimisation, to intimidation and to retaliation. To determine whether and to what extent they would benefit from special measures as provided for under Articles 23 and 24, child victims shall be subject to an individual assessment as provided for in paragraph 1 of this Article.”

Article 23 – Right to protection of victims with specific protection needs during criminal proceedings

“1. Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that victims with specific protection needs who benefit from special measures identified as a result of an individual assessment provided for in Article 22(1), may benefit from the measures provided for in paragraphs 2 and 3 of this Article. A special measure envisaged following the individual assessment shall not be made available if operational or practical constraints make this impossible, or where there is an urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings.

2. The following measures shall be available during criminal investigations to victims with specific protection needs identified in accordance with Article 22(1):

(a) interviews with the victim being carried out in premises designed or adapted for that purpose;

(b) interviews with the victim being carried out by or through professionals trained for that purpose;

(c) all interviews with the victim being conducted by the same persons unless this is contrary to the good administration of justice;

(d) all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, being conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.

3. The following measures shall be available for victims with specific protection needs identified in accordance with Article 22(1) during court proceedings:

(a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;

(b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;

(c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and

(d) measures allowing a hearing to take place without the presence of the public."

Article 24 – Right to protection of child victims during criminal proceedings

"1. In addition to the measures provided for in Article 23, Member States shall ensure that where the victim is a child:

(a) in criminal investigations, all interviews with the child victim may be audiovisually recorded and such recorded interviews may be used as evidence in criminal proceedings;"

3. Case-law of the Court of Justice of the European Union

44. In a judgment of 16 June 2005 (Case C-105/03 *Pupino* [2005] ECR I-5285) the Court of Justice of the European Union held:

"59. The Framework Decision must thus be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the Convention and interpreted by the European Court of Human Rights, are respected ...

61. In the light of all the above considerations, the answer to the question must be that Articles 2, 3 and 8(4) of the Framework Decision must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place. The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

45. The applicant complained that he had not had a fair trial, since he could not put questions to the witness on whose testimony given during the pre-trial proceedings his conviction had mainly been based. He relied on Article 6 §§ 1 and 3 (d) of the Convention, the relevant parts of which read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights ...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ...”

46. The Government contested that argument.

A. Admissibility

47. The Court notes that this complaint 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

48. The applicant argued that that Article 6 §§ 1 and 3 (d) of the Convention had been breached, as the victim had neither been heard in court nor examined by any other means, such as a video link. Considering the controversial nature of her statements, as well as the fact that the applicant's conviction had been based on these statements alone, with no other direct evidence having been presented, cross-examination of the victim had been indispensable.

49. The Government argued that the fairness of the hearing was to be assessed taking into account the Estonian legal system and the national courts' authority to assess the evidence. The criminal procedure in Estonia was adversarial in nature and it was essentially the parties' obligation to present evidence and, if needed, to make pertinent requests in this connection. The applicant, who had been legally represented from the first time he was questioned, had himself failed to make use of the opportunity to have questions put to E. during the pre-trial proceedings. Furthermore, the applicant had not made a request to have E. summoned to court, either at the closure of the pre-trial investigation or at the outset of the trial. In the Government's view it could not be said that the applicant had never been given an opportunity to have questions put to E.

50. The Government further argued that Article 6 of the Convention did not guarantee the accused an unlimited right to secure the appearance of witnesses in court. It was sufficiently proved by expert opinions that putting questions to the victim in the courtroom would have damaged the victim and would have thus been incompatible with Article 8 of the Convention. At the same time, the applicant had the opportunity to present objections to E.'s statements when the video recording of her interview was played at the court hearing.

51. The Government argued that the applicant's conviction had not been based on E.'s testimony alone, but also on statements given by other witnesses to whom the applicant could put questions at the court hearing, as well as other evidence in the aggregate. The experts had characterised E.'s behaviour as typical of a victim of sexual abuse. Statements by other witnesses had also affirmed the credibility of E.'s statements. The applicant exercised his right to put questions to the witnesses heard at the hearing.

52. On this basis, the Estonian courts were justified in concluding that the decision not to examine E. at the county court, and instead to rely on her statements given during the pre-trial investigation, was justified to protect the victim and did not violate the applicant's procedural rights, and hence also did not violate Article 6 §§ 1 and 3 (d) of the Convention.

2. The Court's assessment

(a) General principles

53. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision, which must be taken into account in any assessment of the fairness of proceedings. For this reason, the Court considers it appropriate to examine the complaints under the two provisions taken together (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011, and *Aigner v. Austria*, no. 28328/03, § 33, 10 May 2012).

54. While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national legislation and the domestic courts (see, amongst others, *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140, and *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). The Court's only concern is to examine whether the proceedings have been conducted fairly (see *Al-Khawaja and Tahery*, loc. cit., and *Gäfgen v. Germany* [GC], no. 22978/05, § 162, ECHR 2010, with further references).

55. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, however. As a general rule, paragraphs 1 and 3 (d) of Article 6 cannot be interpreted as requiring in all cases that questions be put directly by the accused or his lawyer, whether by means of cross-examination or by any other means, but rather that the accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when the witness makes his statement or at a later stage. The use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with the provisions cited above, provided that the rights of the defence have been respected (see *Saïdi v. France*, 20 September 1993, § 43, Series A no. 261-C). Even where such a statement is the sole or decisive evidence against a defendant, its admission in evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. The Court will examine whether there were sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place (see *Al-Khawaja and Tahery*, cited above, §§ 118 and 147, and *Aigner*, cited above, § 35).

56. The Court must also have regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often

conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the alleged victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence (see, for example, *Aigner*, cited above, § 35; *A.S. v. Finland*, no. 40156/07, § 55, 28 September 2010; and *S.N. v. Sweden*, no. 34209/96, § 47, ECHR 2002-V).

(b) Application of the principles to the present case

57. Following the Grand Chamber's judgment in *Al-Khawaja and Tahery*, cited above, the Court will consider whether there was a good reason for the rejection of the applicant's request to hear E.; whether the evidence given by her was the sole or decisive basis for the applicant's conviction; and whether there were sufficient counterbalancing factors, including the existence of strong procedural safeguards, which permitted a fair and proper assessment of the reliability of that evidence (see *D.T. v. the Netherlands* (dec.), § 46, no. 25307/10, 2 April 2013, with further references, *mutatis mutandis*, to *Salikhov v. Russia*, no. 23880/05, §§ 112-113, 3 May 2012; *McGlynn v. the United Kingdom* (dec.), § 21, no. 40612/11, 16 October 2012; and *Lawless v. the United Kingdom* (dec.), § 25, no. 44324/11, 16 October 2012).

58. Firstly, the Court observes that in the criminal case against the applicant he was charged with the rape and physical abuse of his minor stepdaughter E. She was interviewed by investigators during the preliminary investigation, but pursuant to psychological and psychiatric expert opinions it was not considered safe for her to be cross-examined at the trial, even with the use of remote examination. Considering the need to take specific measures for the purpose of protecting victims in criminal proceedings concerning sexual offences, particularly in cases involving minors, it can be concluded that in the present case there was a good reason for the non-attendance of E. and for her pre-trial statements to be admitted in evidence (see *Al-Khawaja and Tahery*, cited above, § 120, and compare *Aigner*, cited above, §§ 38-39).

59. Secondly, the Court considers that the testimony of E. constituted decisive evidence on which the domestic courts' convictions of the applicant were based. The other witnesses examined at the hearing had no direct knowledge of the acts in issue, and only either testified on what E. had told them or made more general statements about her behaviour.

60. As to the third consideration, that is whether sufficient counterbalancing measures were taken to safeguard the rights of the

defence, the Court has had regard to the following. During the preliminary investigation E. was interviewed on three occasions: on 12 and 13 December 2007 and on 14 February 2008. In the meantime, on 14 January 2008, she was examined by a psychiatrist and psychologist, according to whose expert opinion attending a court hearing would be harmful to her health. It appears that the investigating authorities considered that E. was not expected to be examined at a court hearing, because at the interview on 14 February 2008 she was told by an investigator that the interview was being recorded so that they would not have to talk again about what had happened. Furthermore, another psychiatric expert opinion as to whether it was possible to use remote examination of E. – the question which was answered in the negative by the expert – was obtained on 14 April 2008. Subsequently, the prosecution did not request that E. be summoned to the court as a prosecution witness.

61. Thus, although the investigating authorities were already at an early stage of the investigation prepared for E. not to be examined at a court hearing, no steps were taken to give the defence an opportunity to have questions put to E. at that stage. The Court observes in this context that on 31 January 2008, that is before the video-recorded interview with E. took place, the applicant requested that a confrontation be held between him and E. He reiterated this request on 20 February 2008 (compare and contrast *D.T. v. the Netherlands*, cited above, §§ 14-15, where the applicant only appears to have requested the examination of the presumed victim before the court of appeal). While it is true that it was for the investigating authorities to decide on the use of investigative measures, it is noteworthy that they did not address the applicant's requests, let alone offer any alternatives less disturbing for the victim, such as allowing the applicant's counsel to take part in the interview, or giving the defence an opportunity to indirectly put questions to E. (see, for example, *A.G. v. Sweden* (dec.), no. 315/09, 10 January 2012, where the applicant's defence counsel was present in an adjoining room during a police interview of the presumed victim and posed questions to her via the police inspector interviewing her). The Court reiterates in this context that paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps, in particular to enable the accused to examine or have examined witnesses against him. Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (see *A.S. v. Finland*, cited above, § 53, and *Sadak and Others v. Turkey* (no. 1), nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII).

62. As regards the Government's argument that the applicant did not request that E. be summoned at the closure of the preliminary investigation or at the outset of the trial, the Court considers that in adversarial proceedings it is for each party to produce evidence supporting its case.

Therefore, it does not appear that the applicant can be reproached for not asking for a prosecution witness to be summoned. Moreover, at a later stage of the proceedings, after the video recording of E.'s pre-trial interview had been watched at the hearing, the applicant did ask for E. to be examined in court. The courts rejected this request on the merits. Thus, the Court considers that the courts' attention was sufficiently drawn to the handicaps under which the defence was labouring, and were, in principle, afforded an opportunity to remedy the situation.

63. The Court considers that the domestic courts cannot be reproached for refusing to have E. summoned to a hearing, on the basis of expert opinions. This decision was clearly taken in the best interests of the child. Furthermore, it is not the Court's role to place in question the opinion of the experts who found that E.'s attendance at a court hearing would cause her considerable psychological trauma and that in a stressful situation consistency of her statements could not be guaranteed. The Court considers, however, that for these very reasons it would have been essential to give the defence an opportunity to have questions put to the victim during the preliminary investigation. Moreover, as regards the possible lack of consistency in the statements of a witness, the Court considers that one of the purposes of putting questions to a witness is to test the witness testimony in order to reveal any inconsistencies – something the defence was prevented from effectively doing in the present case.

64. The Court considers that although several other witnesses were examined at the court hearing (E.'s friend, teachers and the school psychologist) and the applicant could put questions to them, these statements only provided indirect support to E.'s testimony (compare *Al-Khawaja and Tahery*, cited above, § 163). As regards the experts, the Court notes that, unlike in the case of *D.T. v. the Netherlands*, in the present case the psychological and psychiatric experts who examined the child did not give an opinion on the truthfulness of her video-recorded testimony, and their opinions were given in writing without them being questioned at the court hearing. The Court also notes that the other forensic expert examinations (concerning DNA and E.'s internal examination) yielded no conclusive evidence against the applicant.

65. In conclusion, the Court has no doubts that the domestic judicial authorities acted in the best interests of the child in declining to summon the presumed victim of the offence to a court hearing. Furthermore, playing the video recording of the victim's statements at the court hearing allowed the trial court, as well as the applicant, to observe the manner in which the interview had been conducted, to assess E.'s demeanour, and also to assess, at least to a certain degree, the credibility of her account. However, having regard to the importance of E.'s testimony, the Court considers that the above was insufficient to secure the applicant's rights of defence (compare, for example, *A.S. v. Finland*, cited above, §§ 65-66; *A.L. v. Finland*,

no. 23220/04, § 41, 27 January 2009; and *F. and M. v. Finland*, no. 22508/02, § 60, 17 July 2007). It remains a fact that the applicant was never given an opportunity to have questions put to the victim, despite the fact that the investigating authorities were preparing to proceed without E. being summoned to court (compare and contrast, for example, *B. v. Finland*, no. 17122/02, §§ 44-45, 24 April 2007, and *S.N. v. Sweden*, cited above, § 49, where the defence either did not avail itself of the opportunity to have questions put to the witnesses or consented not to be present at the interview conducted during the pre-trial investigation). The Court notes that there was no strong corroborative evidence supporting E.'s statements in the present case (compare *Al-Khawaja and Tahery*, cited above, § 165). It also considers that weighing, on the one hand, the applicant's defence rights – regard also being had to the substantial prison sentence he faced – and, on the other hand, the limited impact on E. of the applicant's questions put to her in addition to the questions that the investigators had anyway put to her during the preliminary investigation, the Court is unable to see that if the investigating authorities had paid due attention to the applicant's defence rights there would have been any significant additional damage to the child. The Court once more emphasises in this context that the above is not to be understood that the authorities were obliged to carry out a confrontation between E. and the applicant or to ensure E.'s cross-examination at a court hearing. Rather, what is at issue in a case like the present one is whether it was possible to put questions to the witness, for example through the defendant's lawyer, police investigator or psychologist in an environment under the control of the investigating authorities and in a manner that would not need to substantially differ from the interview which was in any event carried out by these authorities.

66. The foregoing considerations are sufficient to enable the Court to conclude that there were no such counterbalancing factors present which permitted a fair and proper assessment of the reliability of E.'s evidence. Accordingly, the applicant did not receive a fair trial.

Thus, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

67. Lastly, the applicant complained about a breach of his presumption of innocence, excessive length of the criminal proceedings and the length and unlawfulness of his pre-trial detention. He relied on Article 5 §§ 1 and 3 and Article 6 § 2 of the Convention.

68. However, having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that there is no appearance of a violation of the provisions cited. It follows that

this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

70. The applicant claimed fair compensation for non-pecuniary damage, without specifying its amount.

71. The Government argued that the claim for just satisfaction was completely unsubstantiated and had to be fully rejected.

72. The Court considers that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by a finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant 5,200 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

73. The applicant did not make a claim for costs and expenses. Accordingly, the Court considers that there is no call to award him any sum on that account.

C. Default interest

74. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 6 §§ 1 and 3 (d) concerning the applicant’s lack of an opportunity to put questions to the witness admissible and the remainder of the application inadmissible;

2. *Holds* by five votes to two that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;
3. *Holds* by five votes to two
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,200 (five thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 18 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges M. Lazarova Trajkovska and L.-A. Sicilianos is annexed to this judgment.

I.B.-L.
S.N.

JOINT DISSENTING OPINION OF JUDGES LAZAROVA TRAJKOVSKA AND SICILIANOS

1. With all due respect to the majority, we cannot share the view that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention in the present case. The approach chosen by the majority in *Vronchenko* seems to be inconsistent with previous case-law. It is true that the judgment sets out an accurate description of the relevant case-law, with an emphasis on the body of principles developed by the Grand Chamber in the case of *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, ECHR 2011). It is noteworthy, however, that most of the cases relating to criminal proceedings resulting from sexual offences against minors, highlighted in the judgment, pre-date the Grand Chamber case.

2. As far as we know, there has been only one application since the *Al-Khawaja and Tahery* case in which the Court has been called upon to assess the fairness of proceedings in which a person accused of sexual offences against a minor had no opportunity to question the victim and was convicted solely or to a decisive extent on the incriminating evidence given by the victim. In the very recent case of *D.T. v. the Netherlands* ((dec.), no. 25307/10, 2 April 2013), a Chamber of the Third Section found that, although the applicant had been unable to put questions to the victim and although the victim's evidence had been decisive for the finding of guilt, there had been sufficient counterbalancing measures present to ensure that the applicant had a fair trial. The Chamber had regard in particular to the following:

“... even though the applicant lacked the possibility to question R. [the victim] at any point of the domestic proceedings, the studio interview with R. had been videotaped, which recording had been made available to the defence. Moreover, this video recording was partially shown during one of the hearings before the Court of Appeal, which enabled the court to obtain a clear impression of R.'s evidence and the defence to bring up any issues regarding the credibility of her statement. The Court of Appeal also used in evidence the statements of R.'s mother and grandmother, to whom R. had related the events at issue almost directly after her return from the weekend spent with her father. These witnesses were heard at the trial and the applicant had been able to provide his own version of the events and point out any incoherence in R.'s statements or inconsistencies with the statements of the other witnesses heard.” (§ 50)

The Chamber also had regard to the fact that “*multiple experts reported on the studio interview with R. and that the applicant had been given an opportunity to question three of these experts in court*” (§ 51, emphasis added). The crucial issue therefore was whether there was confirmation of the reliability of the victim's evidence and whether the applicant's rights were safeguarded in answering that question.

3. The instant case raises very similar issues. The applicant, charged with sexual abuse of his nine-year-old stepdaughter E., complained that he

had not had a fair trial since he could not put questions to the victim, on whose testimony during the pre-trial proceedings his conviction had mainly been based. As the Court notes, however, E. was interviewed three times during the preliminary investigation. On 12 and on 13 December 2007 she was interviewed by a police investigator in the presence of a psychologist and a social worker respectively. On 14 January 2008 the stepdaughter was again interviewed by two police investigators in the presence of a social worker. This interview was video recorded. On the same day she was further examined by a psychiatrist and psychologist, who gave an expert opinion according to which attending a court hearing would cause her psychological trauma and damage her health, and in a stressful situation her statements might not be consistent. Reference was also made to E.'s young age, personality type and emotional state, and to her medical history and more particularly the fact that she had been diagnosed with epilepsy.

4. On the basis of this expert opinion, we agree with the majority that there was undoubtedly a good reason for the non-attendance of E., namely the best interests of the child. In this respect, one should also bear in mind the relevant provisions of international and European instruments on the protection of child victims during criminal proceedings. Although the Convention in question has not been ratified by Estonia, the national authorities acted in conformity with the essence of Articles 35 (Interviews with the child) and 36 (Criminal court proceedings) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (for the text see paragraph 41 of the judgment). It is also to be noted that the protection to be afforded to the victim in this case was of particular importance given the fact that the stepdaughter was not supported by her mother.

5. The main issue on which we disagree with the majority is whether sufficient counterbalancing measures were in place to safeguard the rights of the defence. Even though the applicant lacked the possibility to question E., the Harju County Court watched the video interview and thus had a clear impression of the reliability of the child's evidence. Moreover, the video was made available to the defence, which had the possibility to bring up any issues regarding the credibility of E's statement. The County Court also heard several witnesses concerning the events in question, including A.K. (a psychologist who worked at the school attended by E.), G.I. (a teacher) and T.S. (a psychologist at a children's refuge), M.M. from the child protection service and K.G., who had carried out an internal examination of E. It is also significant that according to M.M. the child's behaviour was consistent with that of a victim of a sexual offence.

6. To sum up, we would stress again that in the course of the domestic proceedings the applicant had been given the opportunity to question and to cross-examine all witnesses and experts and to call his own witnesses. With regard to the complaint that the defence had had no opportunity to put questions to E., the Court of Appeal noted that: “*During the preliminary investigation, when the [applicant] was interviewed as a suspect, he was presented and familiarised with the written record of victim [E.’s] interview. Neither the accused nor his lawyer made any requests ... In the indictment drawn up by the prosecutor and sent to the lawyer, the accused and the court a list of persons called to the court by the prosecutor was set out; the victim [E.] who was a minor, was not named ... Nor was [E.] named in the list [of witnesses called by the lawyer and the accused] ...*” (emphasis added). Looking at the background to the careful scrutiny of the evidence by the Court of Appeal, and viewing the fairness of the proceedings as a whole, we believe that the counterbalancing measures taken were sufficient and that the applicant was afforded the protection of his rights safeguarded by Article 6 §§ 1 and 3 (d).