



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

FOURTH SECTION

CASE OF M.S. v. FINLAND

(Application no. 46601/99)

JUDGMENT

STRASBOURG

22 March 2005

FINAL

22/06/2005

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 M.S. v. Finland,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr M. PELLONPÄÄ,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr J. BORRERO BORRERO,

Mr J. ŠIKUTA, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 4 May 2004 and on 1 March 2005,

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

PROCEDURE

1. The case originated in an application (no. 46601/99) against the Republic of Finland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Gambian national, Mr M.S. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court). The applicant was represented by Mr Joonia Streng, a lawyer practising in Helsinki.

2. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen, Director in the Ministry for Foreign Affairs.

3. The applicant alleged that the Court of Appeal's failure to give him an opportunity to respond to a statement, submitted by his ex-wife without his knowledge to the Court of Appeal, rendered the criminal proceedings against him unfair.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 4 May 2004, the Court declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the

parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1955 and currently lives in Gambia.

9. The applicant was convicted of aggravated sexual assault on his then 15 year-old stepdaughter, by a judgment of the District Court (*käräjäoikeus, tingsrätten*) of Hyvinkää issued on 27 September 1996. He was sentenced to eleven months' imprisonment and ordered to pay compensation amounting to 30,000 Finnish Marks (FIM; 5,045 euros (EUR)) to the complainant. The case was heard *in camera* before the District Court and the court documents were ordered to be kept secret until 27 September 2006.

10. The alleged offence (principally forced oral sex) had taken place repeatedly in the family home over a period of seven weeks beginning on 26 December 1994.

11. The pre-trial investigation of the alleged offence began when the complainant, i.e. the applicant's stepdaughter, reported it to the police on 14 August 1996. Earlier the same month, she had mentioned the alleged offence on separate occasions to two confidantes.

12. The District Court heard the testimony of the complainant and of the aforesaid confidantes, as well as that of the defendant's wife and of others more distantly connected with certain details pertaining to the matter. The defence disputed that the complainant and the applicant had ever been alone together in the place where the offence was alleged to have occurred. The evidence of the applicant's wife did not support his claims in this respect.

The District Court also had before it a medical certificate issued by the physician who attended to the complainant because of an illness she had. This medical certificate charted the progress of her illness over the period from late 1992 until 1995. Although the physician was unable to draw from his observations any inference concerning the alleged offence, the District Court, according to the applicant, found that the medical certificate supported the complainant's view in the matter.

13. On 28 October 1996 the applicant appealed to the Helsinki Court of Appeal (*hovioikeus, hovrätten*), annexing his wife's statement in which she changed her position so as to support the applicant. An oral hearing was also requested.

14. On 26 November 1996, i.e. after the expiry of the time-limit for adducing written submissions to the Court of Appeal pursuant to Chapter

26, section 25 of the Code of Judicial Procedure, the applicant's ex-wife submitted a letter to the Court of Appeal, retracting her previous submission. She explained that she had instigated divorce proceedings and could now think more clearly about the events.

15. In its judgment of 1 July 1997 the Court of Appeal, without having held an oral hearing, upheld the District Court's judgment.

16. The applicant learned about his ex-wife's submission of 26 November 1996 and of her changed position from the Court of Appeal's aforementioned judgment, in which it was stated as follows:

“[The applicant's ex-wife] has, in her statement submitted to the Court of Appeal, announced that she wants to retract her earlier written statement which was annexed to [the applicant's] letter of appeal and which she had, in her view, signed under heavy pressure. Therefore, there is no reason to doubt that her statement given at the District Court was not accurate. It is manifestly unnecessary to request [the applicant's] comments on the statement. ... Thus, the request to hold an oral hearing is rejected as unfounded.”

17. On 29 August 1997 the applicant applied to the Supreme Court (*korkein oikeus, högsta domstolen*) for leave to appeal raising, *inter alia*, questions concerning the overall evaluation of the evidence and maintaining that the Court of Appeal should not have accepted the withdrawal of the affidavit of 26 November 1996 without giving him an opportunity to comment on the matter. The Supreme Court refused the applicant leave to appeal on 13 November 1997.

18. After having served his sentence for his offence the applicant was expelled from Finland. The expulsion was enforced in the autumn of 1998.

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. Chapter 17, section 11(1) of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*, as in force at the relevant time; 571/1948) provided that a court of first instance may not use as evidence written affidavits, submitted for the purposes of pending or incoming proceedings, unless this is specifically provided for in the law or authorised by the court. Subsection 3 (as in force at the relevant time; 1052/1991) provided that in case a superior court of law relies on an affidavit referred to in subsection 1 and the court finds that attention must be paid to it, the person who has given the affidavit shall be heard as a witness either before the superior court or before a court of first instance designated by the superior court.

20. According to Chapter 26, section 5 of the Code of Judicial Procedure (as in force at the relevant time; 661/1978), the Court of Appeal had the possibility, on special grounds, to take into account written submissions or other documents provided by a party to the Court after the expiry of the time-limit.

21. According to Chapter 26, section 6 of the Code of Judicial Procedure (as in force at the relevant time; 661/1978), if the Court of Appeal took into account such evidence submitted after the expiry of the time-limit, the Court of Appeal had to request the parties to submit written observations unless it was manifestly unnecessary.

22. The Supreme Court issued a precedent on 31 August 2004 concerning the Court of Appeal's obligation to communicate to the parties a statement invited on the Court of Appeal's own motion (*KKO 2004:79*). Paragraph 7 of the decision reads as follows:

“[t]he appropriate proceedings in court require that the court decision is based on only such files which have been available to the parties of the legal proceedings and which they have also had the opportunity to examine. The parties accordingly have the right to be informed of the contents of a document submitted to the court, even if it according to section 24 of the Publicity Act should be kept secret, because only in this way can they be safeguarded a sufficient possibility to participate in the proceedings. The precondition to disclosure of this otherwise secret case-file to the parties is not that the court decision is based on such a file. It is already sufficient that the document may have or may have had an effect on the proceedings in the case and on the decision made in relation to it. Also in this respect, the parties as well as the court shall have the possibility to consider the significance of the case-file submitted to the court in the case.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

23. The applicant alleged a violation of Article 6 § 1 of the Convention as he was not given an opportunity in the criminal proceedings against him to respond to a statement, dated 26 November 1996, submitted by his ex-wife without his knowledge to the Court of Appeal. Article 6 § 1, in so far as relevant, reads as follows:

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

A. The parties' submissions

1. *The applicant*

24. The applicant submitted that the principle of equality of arms required that he be given an opportunity to evaluate the relevance of the statement and its withdrawal, and to comment if he considered it proper to

do so. The Court of Appeal was not free to set aside this fundamental principle of fair proceedings. In the applicant's opinion the Court of Appeal simply chose to uphold one version of the testimony of a wholly unreliable witness, whereas it should have excluded that witness's testimony entirely. The applicant's representative further claimed that the affidavit was made entirely voluntarily on the part of the applicant's then wife.

25. The applicant maintained that the position taken in the matter by his then wife was also considered by the District Court to have damaged his credibility. He had stated that he was never alone with his stepdaughter in the apartment. This claim was examined by the District Court at some length, and it was discredited based on the evidence presented by the applicant's then wife. However, although the latter evidence was later shown to be manifestly unreliable, the Court of Appeal – in the knowledge that the said evidence had been reversed three times at that stage – offered no re-evaluation of the applicant's damaged credibility. In view of the character of the evidence upon which the conviction was based, this assessment of credibility was crucial to the outcome.

2. The Government

26. The Government maintained that in the present case the affidavit and its withdrawal had no relevance for the assessment of the case by the Court of Appeal. The District Court's judgment was based on a significant amount of other evidence and the Court of Appeal's judgment was based on the evidence as a whole. The Government pointed out that affidavits are not a normal means of submitting evidence under domestic law.

27. In the Government's opinion the affidavit signed by the applicant's ex-wife and attached to the applicant's appeal documents, which denied the possibility that the applicant and his step-daughter could have been alone together at the relevant times, was made on the applicant's initiative.

28. The Government recalled that as a rule it is for the national courts to decide what evidence they choose to hear and to assess the evidence before them. In the present case, the Court of Appeal stated in its judgment that there was no reason to doubt the statement given by the applicant's ex-wife before the District Court. This indicated that the Court of Appeal found the original affidavit, which indeed was later withdrawn, unreliable. Thus, the national court clearly stated its opinion with reference to this particular evidence. In these circumstances the non-communication of the applicant's ex-wife's withdrawal disclosed no lack of fairness. Furthermore, the above-mentioned decision of the Court of Appeal did not result in any deviation from the District Court's judgment to the applicant's disadvantage.

29. The Government further claimed that the applicant had an opportunity to comment on the withdrawal and that he did in fact do so when requesting leave to appeal to the Supreme Court. On that occasion, the applicant had a possibility to submit further observations in respect of the

withdrawn affidavit and also to invoke the fact that he had not been informed of the withdrawal nor requested to submit observations thereon. Accordingly, the Supreme Court must be regarded as having taken the non-communication into account when deciding on the applicant's request for leave to appeal.

B. The Court's assessment

30. The Court recalls that the principle of equality of arms - one of the elements of the broader concept of fair trial - requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports of Judgments and Decisions* 1997-I, § 23).

31. The Court observes that in the present case the letter of 26 November 1996 was not communicated to either of the parties in the criminal proceedings, namely the applicant and the public prosecutor. No infringement of equality of arms has been established as none of the parties was placed at a disadvantage *vis-à-vis* the opposing party (cf. *Feldbrugge v. the Netherlands*, judgment of 29 May 1986, Series A no. 99, § 44).

32. However, the concept of fair trial also implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see *Vermeulen v. Belgium*, judgment of 20 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 234, § 33, *Rowe and Davis v. the United Kingdom [GC]*, no. 28901/95, § 60, ECHR 2000-II and *H.A.L. v. Finland*, no. 38267/97, § 44, 27 January 2004).

33. The Court cannot accept the Government's contention that the affidavit of 26 November 1996 did not have any relevance in the criminal proceedings. Nor is it decisive that affidavits are, indeed, not a normal means of submitting evidence under Finnish law or whether the affidavit attached to the applicant's letter of appeal was made on his own initiative or not. More importantly, the content of the letter of 26 November 1996 was directly linked with the question of reliability of a witness which formed a crucial part of the applicant's defence in the Court of Appeal. It is true that the statement of the applicant's ex-wife was not the sole item of evidence with regard to the applicant's opportunity to commit the acts with which he was charged. The letter of 26 November 1996, relating to the previous statements of the applicant's ex-wife, was however significant as it was clearly capable of influencing the Court of Appeal's decision. The Court of Appeal itself expressly held that the retraction in the letter of 26 November 1996 meant that it did not have reasons to doubt the ex-wife's statement given in the District Court.

34. However, only the parties could properly decide whether or not the letter of 26 November 1996 called for their comments. What is particularly at stake here is the confidence of the parties of criminal proceedings in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file (see the *Nideröst-Huber* judgment, cited above, § 29).

In this connection the Court notes that on 31 August 2004 the Finnish Supreme Court has reached a similar conclusion regarding the parties' right to proper participation in the proceedings (see paragraph 22 above).

35. However, as pointed out by the Government, the applicant complained about the Court of Appeal's failure to communicate the withdrawn affidavit to him in his application for leave to appeal and in his letter of appeal to the Supreme Court. This calls for an examination as to whether the Supreme Court was capable of remedying any perceived unfairness in the Court of Appeal proceedings. It is well-established in the Court's case-law that a defect at first instance may be remedied on appeal, as long as the appeal body has full jurisdiction. Where a complaint is made of alleged non-communication of documents, the concept of "full jurisdiction" involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and either to take the decision itself, or to remit the case for a new decision by an impartial body (*De Haan v. the Netherlands*, judgment of 26 August 1997, *Reports* 1997-IV, §§ 53-54; and more recently, *Kingsley v. the United Kingdom*, no. 35605/97, § 58, 7 November 2000, unreported).

In the present case the Court notes that the proceedings before the Supreme Court only concerned the question whether or not leave to appeal should be granted, not an examination of the merits of the appeal. A full examination of the case would have taken place only if leave to appeal had been granted.

In these circumstances the Court concludes that the applicant's application for leave to appeal to the Supreme Court did not remedy any perceived unfairness in the Court of Appeal proceedings.

36. The Court finds that respect for the right to a fair trial, guaranteed by Article 6 § 1 of the Convention, required that the applicant be informed that the Court of Appeal had received the letter of 26 November 1996 from the applicant's ex-wife and that he be given the opportunity to comment on it.

37. There has therefore been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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

39. The applicant maintained that his wrongful conviction had given rise to his subsequent expulsion from Finland and to interference with his family life. The process as a whole had inflicted damage upon him. As to pecuniary damage, he claimed EUR 20,000 for unlawful deprivation of liberty, EUR 22,000 for loss of employment and EUR 1,500 for travel expenses from Gambia to Finland. As to non-pecuniary damage, he requested a formal acknowledgement from the State that he had been wrongfully convicted, imprisoned and expelled; immigration clearance for himself and his new family and dependants; suitable housing; language courses; and defrayment of the costs of any professional help that he may require in order to repair relations with his son in Finland.

40. As to pecuniary damage, the Government maintained that there was no causal link between the alleged violation and the applicant's claim. They pointed out that he did not claim any compensation for non-pecuniary damage and therefore no such compensation should be awarded, either. Were the Court to hold otherwise, they argued that the amount should not exceed EUR 700. The remaining claims were considered inappropriate.

41. The Court observes that it declared five of the applicant's complaints, *inter alia*, under Article 8 of the Convention, inadmissible by its partial decision of 11 December 2001. It further notes that the applicant sought pecuniary damage, that he did not expressly claim any monetary compensation for non-pecuniary damage and that he failed to substantiate his other non-pecuniary claims.

The Court declines to issue consequential orders or declaratory statements such as those requested by the applicant (see *e.g. Orhan v. Turkey*, no. 25656/94, judgment of 18 June 2002, § 451). Further, it considers that his claim for non-pecuniary damage must be regarded as including some financial element. Since the Court cannot speculate about the outcome of the trial had it been in conformity with Article 6, an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of that Article. The Court accepts that the lack of such guarantees has caused the applicant, who was sentenced to unconditional imprisonment, non-pecuniary damage which cannot be made good by the mere finding of a violation (see *Kuopila v. Finland*,

no. 27752/95, § 42, 27 April 2000). The Court, making its assessment on an equitable basis, awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

42. The applicant sought reimbursement of his costs and expenses before the Court, but left the amount to its discretion.

43. First, the Government submitted that five complaints had been declared inadmissible and that the reimbursement of costs and expenses should be reduced accordingly. Second, the costs and expenses had not been clarified, though the applicant might have incurred some in the domestic proceedings and before the Court. As no documents concerning costs and expenses had been submitted, it was not possible for the Government to assess the nature, amount or necessity of the costs and expenses, which might be due to the applicant. At any rate, the amount of compensation should not surpass EUR 500 (without possible value-added tax).

44. The Court notes that the applicant did not specify his claims for cost and expenses. Having regard to all the circumstances, the Court awards him EUR 500 (inclusive of value-added tax) under this head.

C. Default interest

45. The Court considers it appropriate that the default interest 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 UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage; and
 - (ii) EUR 500 (five hundred euros) in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 22 March 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President