



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

FOURTH SECTION

CASE OF A.H. v. FINLAND

(Application no. 46602/99)

JUDGMENT

STRASBOURG

10 May 2007

FINAL

10/08/2007

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 A.H. v. Finland,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr K. TRAJA,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mrs P. HIRVELÄ, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 12 April 2007,

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

PROCEDURE

1. The case originated in an application (no. 46602/99) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Finnish national, ("the applicant"), on 30 November 1998. 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).

2. The applicant, who had been granted legal aid, was represented by Mr M. Jantunen, a lawyer practising in Jyväskylä. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen of the Ministry for Foreign Affairs.

3. The applicant alleged that the rights of the defence in respect of witnesses, *i.e.* the child complainant, had not been respected.

4. By a decision of 31 May 2005, the Court declared the application admissible.

5. The applicant and the Government each filed further written observations (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

A. The investigation

6. On 24 February 1997 T., a six-year old boy, described to S., a psychologist, that he had experienced improper touching while in day care and referred to the applicant in this connection. The interview was recorded on videotape in the Family Advice Centre.

7. The next day the alleged offence was reported to the police. On 13 March 1997, T. was interviewed again by S., on that occasion in the course of the pre-trial investigation which had been opened. That interview was also recorded on videotape.

8. The applicant was questioned on 26 and 27 March 1997. He was not aware of the existence of the above recordings.

9. On 7 April 1997 S. submitted a written opinion on the credibility of T.'s statements.

10. In his closing argument on an unspecified date the applicant contested the alleged improper touching. He noted that the videotape, which he had become aware of following the submission by S. of the above-mentioned written opinion, and the opinion itself, were indirect evidence, which in the light of the Convention had to be treated with extreme care. He questioned whether the questions put to the boy had not been leading in nature. He also submitted that the boy would have to be heard in court, should charges be brought. He did not request an additional investigation.

B. The Jyväskylä District Court

11. The applicant was charged with having indecently touched the boy when working at a day nursery which the boy attended. The alleged offence had taken place repeatedly over a period of several months beginning in the autumn of 1996.

12. The video recording was played back in the District Court (*käräjäoikeus, tingsrätten*) and the court heard evidence from the applicant, T.'s mother and S., the psychologist who had interviewed the boy. H., a doctor in psychology specialising in criminology and forensic psychology, who had not interviewed the boy herself, was also heard as a witness. Several other witnesses, including the applicant's colleagues and the parents of other children in day care, gave testimony. None of the witnesses made any observations on the alleged acts. The parents gave evidence only on the

perceived changes in their children's personality. The psychologist testified only about the reliability of T.'s statements.

13. On 29 October 1997 the District Court convicted the applicant of sexual abuse and sentenced him to a suspended term of seven months' imprisonment. It reasoned:

“...

S. has interviewed T. and the interviews have been recorded on videotape. The videotape has been played back in the District Court where witnesses S. and H. have also seen it. S. and H. have been heard as witnesses and [the applicant] has had an opportunity to put questions to them. The fact that [the applicant] had no opportunity to put questions to T., for example during the pre-trial investigation, does not mean that the above-mentioned evidence could not be taken into account. At the time of the pre-trial investigation T. was six years old and he had his seventh birthday in August 1997. Thus, he could not be heard before the court. Even though [the applicant] has had no opportunity to put questions directly to T., the rights of the defence cannot be considered to have been jeopardised. In the light of the evidence submitted to it, the District Court has no doubt that [the applicant] is guilty [...].

...”

C. The Vaasa Court of Appeal

14. The applicant, the prosecution and the complainant appealed, arguing that the lower court had based his conviction on T.'s testimony as given to his mother and also later recorded on videotape. He requested the appellate court to hold that this indirect evidence could not be used in evidence. He also repeated his view that leading questions may have been put to the boy. He stated that his right to examine witnesses had been violated as he had not had an opportunity to put questions to T.

15. On 26 June 1998 the Court of Appeal (*hovioikeus*, *hovrätten*), having held an oral hearing, upheld the conviction but increased the sentence to fourteen months' imprisonment with immediate effect. It found that the technical quality of the videotape, which had been played back in the court, was poor as regards its image and sound reproduction and that the contents of T.'s statements could not be reliably assessed merely on the basis of that recording. The recording however showed that S. had carried out the interview without any preconceived idea of its outcome. The statements of two of the applicant's colleagues showed that it would have been possible for the applicant to have acted as described in the indictment without anyone noticing. The statements of T.'s mother and other day care children's parents showed that there had been changes in their children's behaviour after they had been in contact with the applicant. The court did not mention the applicant's argument that he had not been able to put questions to T.

D. The Supreme Court

16. The applicant sought leave to appeal, arguing that he had not been afforded an opportunity to put questions to T. The indirect evidence should therefore have been rejected.

17. On 25 September 1998 the Supreme Court refused leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The pre-trial investigation

18. The Decree on Criminal Investigations and Coercive Measures (*asetus esitutkinnasta ja pakkokeinoista, förordning om förundersökning och tvångsmedel*; Act no. 575/1988) provides that when questioned during a pre-trial investigation the child must be treated with due respect having regard to his or her age and level of development. Where possible, the interview should be carried out by a police officer acquainted with that task. If need be, a doctor or an expert must be consulted before the interview (section 11).

19. The Criminal Investigations Act (*esitutkintalaki, förundersökningslagen*; Act no. 449/1987) provides that questioning and other investigation measures requested by a party must be carried out, if that party shows that there is a possibility that these measures could have an effect on the case, provided that the expenses so incurred are not disproportionate to the nature of the case (section 12). The competence to decide on investigation measures requested by a party lies with the head of investigation during the pre-trial investigation and with the public prosecutor after the case has been transferred to him or her (section 15(3)). A pre-trial investigation has to be carried out in such a manner that no one is placed under suspicion without due cause and no one is unnecessarily subjected to harm or inconvenience. Nor must the rights of those concerned be infringed more than is necessary for the achievement of the purpose of the investigation (section 8).

20. The investigator may permit a party and his counsel to be present during the questioning of another party or witness, provided this does not hinder the investigation of the offence (section 32(1)). A party and his or her counsel may, with the permission of the investigator, put questions to the person being questioned in order to clear up the case. The investigator may decide that the questions are to be put through him or her. Also, the prosecutor may put questions to the person being questioned. A party and his or her counsel have the right to request the investigator to ask the person being questioned about matters necessary for the clearing up of the case at other times also (section 34).

21. Before the closing of the criminal investigation, the parties must be afforded the opportunity to present to the criminal investigation authority their statement on the material gathered during the investigation, if this is conducive to hastening or facilitating the hearing of the case in court. The statement is to be appended to the investigation record (section 42).

B. The receipt of evidence in court

22. The Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*) lays down the applicable rules on receiving testimony.

23. A witness must give testimony orally before the court and must not refer to a written testimony. Oral evidence given during a pre-trial investigation may be read out when the witness in question is heard by the court only if he or she retracts in court an earlier statement or states that he or she is unable or unwilling to testify before the court (chapter 17, Article 32; Act no. 571/1948).

24. If a person called as a witness is less than 15 years of age, is mentally ill or mentally retarded, or his or her mental capacities have otherwise been impaired, the court shall, taking into consideration the circumstances, assess whether or not he or she may be heard as a witness (Chapter 17, Article 21). Although the hearing of evidence from children falls within the court's discretion, there has been a long-standing practice not to hear evidence in court from children under the age of ten.

25. At the time of the proceedings in question, there were no legal provisions concerning the use as evidence of a video recording of a statement given by a child during the pre-trial investigation. There was however a practice to admit such recordings as evidence.

C. Subsequent amendments

26. The Code of Judicial Procedure was amended with effect from 1 October 1997 to the following effect. A statement in a pre-trial investigation record or another document may as a rule not be admitted as evidence in court. The court may exceptionally admit as evidence such a statement, if the witness in question cannot be questioned before the court (chapter 17, Article 11; Act no. 690/1997).

27. The Code of Judicial Procedure was again amended with effect from 1 October 2003 to the effect that the testimony of a person under 15 years of age, or a mentally disturbed person, recorded on audio or videotape during a pre-trial investigation may be used as evidence if the accused has been provided with an opportunity to have questions put to the person giving the testimony (chapter 17, Article 11(2); Act no. 360/2003). According to the explanatory report to the relevant Government Bill (no. 190/2002), this new provision places emphasis on both the idea that giving testimony before the

court may be detrimental to *inter alia* a child and on the importance of respecting the rights of the defence.

28. Chapter 17, Article 21 (as amended by Act no. 360/2003) of the Code of Judicial Procedure reads with effect from 1 October 2003 as follows:

“(1) A person who has not attained the age of fifteen or whose mental capacities have been impaired, may be heard as a witness or for the purpose of obtaining evidence if the court finds it appropriate and:

(i) if the hearing in person is of significant relevance for the establishment of the facts of the case; and

(ii) the hearing is not likely to cause such suffering or other harm to the person to be heard as could be detrimental to the person concerned or his or her development.

(2) Where necessary, the court shall designate a support person for the person to be heard, pursuant to the provisions of chapter 2 of the Criminal Procedure Code (Act no. 689/1997).

(3) The person to be heard shall be questioned by the court, unless the court finds particular reason to entrust the questioning to the parties in accordance with the provisions of section 33. The parties shall be provided with an opportunity to put questions to the person to be heard through the intermediary of the court or, if the court finds it appropriate, directly to the person concerned. Where necessary, the hearing may take place on premises other than the court room.”

29. In 2003, the Criminal Investigations Act was supplemented with a new section 39a (Act no. 645/2003) that entered into force on 1 January 2004 and reads as follows:

“The questioning of a victim or a witness must be recorded on videotape, or by using other comparable audio-visual means of recording, if there is an intention to use the statement given in the interview as evidence in court proceedings, and where it is not possible to hear the victim or the witness in person, due to his or her young age or mental disturbance, without causing likely harm to him or her. The special requirements set by the level of maturity of the questioned person for the methods used, for the number of participating persons, and for other conditions, must be taken into account in the questioning. The person in charge of the criminal investigation may decide that authorities other than the investigators may, under the supervision of the investigator, put the questions to the person being interviewed. The suspect must be provided with an opportunity to put questions to the questioned person. On the request of the suspect, he or she may also put the questions through a legal counsel or other representative. However, the investigator may order that the questions be put through his or her intermediary.”

THE LAW

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

30. The applicant complained about a breach of Article 6 § 3 (d) of the Convention. Given that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1, it is appropriate to examine the complaint under the two provisions taken together (see *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 10, § 25). Article 6 reads in so far as relevant:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ...

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;”

A. The parties' submissions

1. *The applicant*

31. The applicant submitted that in his closing argument in the pre-trial investigation he had pointed out that his right under the Convention had not been respected in that the police had failed to afford him an opportunity to put questions to the boy. As they had also failed to inform him about the planned interviews and subsequently about the recording, the applicant had not, even in theory, had had an opportunity to have questions put to the boy. He had highlighted these shortcomings before the courts. Affording the applicant an opportunity to have questions put to the boy in the pre-trial investigation would have been vital as it would appear that the ability of children to form their own opinions and to reply to questions truthfully is greater in the initial phase of the proceedings, before they have been interviewed and received therapy.

32. The applicant argued that it should not be for the defendant to insist that he or she be given an opportunity to have questions put to a witness before the court, because the defence did not have a duty to contribute to the establishment of guilt. That is why the applicant had not requested that the

boy be heard by the courts. It was for the authorities to ensure that the rights of the defence were respected. In addition, there was a long-standing practice whereby courts did not hear very young children. The applicant could not have obtained the boy's attendance in court had he tried to do so.

33. Referring to domestic procedure and practice, the applicant submitted that it would have been possible to afford him an opportunity to have questions put to the boy during the pre-trial investigation or, at the very least, the prosecutor could have ordered an additional pre-trial investigation. He could have been given an opportunity to have questions put to the boy through his counsel or the psychologist during an additional investigation. This way of proceeding had by no means been rare at the time. The judicial authorities had failed to secure the rights of the defence in a situation where the defence had expressly pointed to the very breach of the Convention.

34. While agreeing that he had been provided with an opportunity to question the psychologist who had interviewed the boy and the other witnesses heard by the courts, the applicant pointed out that he had at no time had an opportunity to have questions put to the boy through, for instance, the intermediary of the psychologist.

35. The applicant contested the Government's assertion that the Court of Appeal had not relied on the recording in question. On the contrary, it had based his conviction on it to a decisive extent. The video recording had been the key evidence and S.'s statements had been based on T.'s account of the events as recorded on the videotape.

2. The Government

36. The criminal investigation had been carried out in accordance with the practice at the material time. It had been relatively rare to provide a suspect, or his or her counsel, with an opportunity to put questions to the victim during the investigation. The national legislation did not contain any explicit provisions on the obligation to provide an opportunity to put questions to other parties to the proceedings or to witnesses. This was at the investigator's discretion.

37. The Government submitted that the offence had been reported on the day after the boy had had his first discussion with the psychologist. The video recording of that discussion and of a subsequent interview had been communicated to the police by the Family Advice Centre. These interviews had not been requested by the police and were not therefore interviews within the meaning of the Criminal Investigations Act. No police officer had been present during the interviews. In his closing statement in the pre-trial investigation the applicant had not requested to be given an opportunity to have questions put to the boy but had only stated that should the case go to court, the boy would have to be heard in person so that he could put questions to him. He had also stated that he would adduce a statement by an

expert in child psychology as evidence regarding the credibility of the statements of child victims. He had considered that there had been no need to hear such an expert in the pre-trial investigation. The Government submitted that it would not have been possible, or it would have been very exceptional to hear the young boy in court. The videotape containing the interviews had been part of the investigation materials to which the parties as a rule had access before giving their closing statements.

38. The Government argued that the applicant had been given an opportunity to challenge the boy's statement and to present his own views on it first in the pre-trial investigation and later before the courts, although there had been no possibility of cross-examination. He had never requested an opportunity to put questions to the boy. The District Court had relied on the videotape only as additional evidence and thus the conviction had not been based solely or to a decisive degree on it. The court had also been aware of the fact that the videotape could not be used as evidence in the normal sense. The Court of Appeal, noting that the technical quality of the videotape was so poor that it did not provide reliable evidence on the details of the statement, had not relied on the videotape at all. Thus, the judgment of the appellate court had been entirely based on other evidence presented at the hearing. The applicant had been given the opportunity to put questions to all the witnesses including the psychologist interviewing the boy. There was no indication that grossly unfair or arbitrary conclusions had been drawn from the evidence.

39. The proceedings as a whole were fair, taking into account the number of witnesses, the oral hearing in the Court of Appeal, the fact that the District Court had not considered the videotape as constituting the main evidence but only additional evidence, and that the Court of Appeal had used the videotape only to support the finding that the boy's interviews had been carried out without any pre-conceived attitudes.

B. The Court's assessment

40. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 1 and 3 (d) of Article 6, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her either when the statements were made or at a later stage of the proceedings (see *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, p. 56, § 43, and *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX). A conviction should not be based either solely or to a decisive extent on statements which the defence has not been able to challenge (see, *mutatis*

mutandis, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 472, § 76). Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness (see, among other authorities, *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89).

41. The child complainant in this case should for the purposes of Article 6 § 3 (d) be regarded as a “witness”, a term to be given an autonomous interpretation (see *Asch v. Austria*, cited above, p. 10, § 25), because his statements, as recorded on videotape in the Family Advice Centre, were played back in court and used in evidence against the applicant.

42. Criminal proceedings concerning sexual offences 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 *Baegen v. the Netherlands*, judgment of 27 October 1995, Series A no. 327-B, opinion of the Commission, p. 44, § 77). In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours (see *Doorson v. the Netherlands*, cited above, p. 471, § 72, and *P.S. v. Germany*, no. 33900/96, § 23, 20 December 2001).

43. The Court observes that the applicant was never given an opportunity to have questions put to the child. Before the close of the pre-trial investigation and having contested the allegation that he had improperly touched the child, he noted that the videotape and the written opinion of S. were indirect evidence, which in the light of the Convention had to be treated with extreme care. He stated that leading questions may have been put to T. and that T. would have to be heard in court, should charges be brought. He did not request an additional investigation. As to the proceedings in the District Court and the Court of Appeal, it should first be noted that the applicant did not request T.'s attendance. In view of the apparent absence of cases where counsel for the defence had successfully requested the cross-examination of a child complainant of the same age as the child in the present case, the Court accepts that the applicant could not have obtained T.'s appearance in person before the courts.

44. T.'s statements as recorded on videotape in the Family Advice Centre, attached to the pre-trial investigation record and played back in the

District Court and the Court of Appeal, constituted the only direct evidence implicating the applicant. The witnesses heard by the courts had made no observations on the alleged acts (see paragraph 15 above). In contrast to the case of *S.N. v. Sweden* (no. 34209/96, ECHR 2002-V) in the present case neither the applicant nor his counsel had at any stage been afforded an opportunity to have questions put to the child. An examination of the case file does not disclose any particular circumstances which would have prevented this.

45. In these circumstances, the use of this evidence involved such limitations on the rights of the defence that the applicant cannot be said to have received a fair trial.

Therefore there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (d).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. Under the head of pecuniary damage the applicant claimed 118,258.43 euros (EUR) for loss of income following his sentence.

Under the head of non-pecuniary damage he claimed compensation for suffering and distress in the amount of EUR 85,900 broken down as follows: EUR 52,500 caused by the imprisonment; EUR 8,400 caused by the probationary period; and EUR 25,000 caused by the sentence itself.

48. The Government considered that there was no causal link between the alleged violation and the pecuniary damage alleged.

As to the claim for non-pecuniary damage the Government considered it excessive. Were the Court to find a violation, any compensation awarded should not exceed EUR 2,200.

49. The Court cannot speculate about the outcome of the proceedings had they been in conformity with Article 6. The Court has found a violation of the applicant's right to a fair trial but finds no sufficient causal link between that violation and the pecuniary damage allegedly suffered. This claim must therefore be rejected.

The Court accepts that the impossibility for the applicant to have questions put to T. caused the applicant non-pecuniary damage, which cannot be made good by the mere finding of a violation. 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

50. The applicant claimed costs and expenses in the Strasbourg proceedings in the amount of EUR 9,532. The legal aid granted by the Council of Europe (EUR 801) had been deducted in calculating the claim.

51. The Government considered the hourly rate excessive.

52. Having regard to the information in its possession, the Court awards the applicant EUR 6,000 (inclusive of value-added tax).

C. Default interest

53. 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 taken together with Article 6 § 3 (d) 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 in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 6,000 (six thousand euros) in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;
 - (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* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 10 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President