



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

FOURTH SECTION

CASE OF W.S. v. POLAND

(Application no. 21508/02)

JUDGMENT

STRASBOURG

19 June 2007

FINAL

24/09/2007

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 W.S. v. Poland,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Mrs L. MIJOVIĆ,

Mr J. ŠIKUTA,

Mrs P. HIRVELÄ, *judges*,

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

Having deliberated in private on 22 May 2007,

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

PROCEDURE

1. The case originated in an application (no. 21508/02) against the Republic of Poland lodged with the Court on 20 August 2001 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr W. 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).

2. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs. The applicant was initially represented by his parents, Ms and Mr K. and W. S. and, subsequently, by Ms Fatima Mohmand, a lawyer practising in Łódź.

3. The applicant alleged, in particular, that he had not received a fair trial, in violation of Article 6 §§ 1 and 3 (d) of the Convention.

4. On 4 July 2006 the Court decided to communicate this complaint to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1966 and lives in Pabianice.

6. On 11 April 1994 the applicant's wife filed an action for divorce, dated 8 April 1994, with the Łódź Regional Court. She submitted that the

parties had married in 1989, that the marriage had not been a happy one from the beginning, that the applicant was unworthy of any trust, that he had been battering her and that he was generally unable to fulfil the role of husband and father. She claimed maintenance for their daughter X. and custody of the child.

7. On 14 April 1994 she requested the Pabianice District Prosecutor to institute criminal proceedings against the applicant on charges of sexual abuse of their daughter X. The minutes of her deposition read:

“We have been married since 1989. In 1990 our daughter X. was born.

In April 1994, after a conversation I had with the child, I started to think that my husband could have been, for some time, sexually abusing her, of which I hereby inform the prosecuting authorities. I would like to stress that after I had acquired this information I moved out of our apartment to my sister's place ... It will be for several days only and afterwards I will move in with my parents in W. It seems to me to be a good decision as the child should be, at least for some time, separated from her father. At the same time, I realise that it would be nearly impossible to conduct any interview with my child, regard being had to her age...”

8. In an undated subsequent opinion, apparently prepared on the basis of a psychological examination of the child carried out on 14 April 1994 in the presence of her mother and maternal grandmother, E.K., a psychologist, described the child's stage of development and concluded:

“On 14 April 1994 an attempt was made to obtain from X. an account of the events concerned in the case. This attempt failed insofar as it was aimed at obtaining a verbal statement. It can, however, serve as a basis for a description of the child's psychological situation. (...) I think that any further attempt to interview X. would not make any sense. Moreover, it would be detrimental to her development. A child of this age is unable to make any confabulations, without there being a concrete factual basis for what she says. (...) Information obtained from third parties and observation of the child seem to suggest that it is likely that she has been a victim of sexual abuse:

- inflammation of sexual organs (medical records);
- secrets shared with her father rewarded by sweets or toys in order to remain unknown to other persons and to the mother; ...
- reluctance to have sexual organs washed;
- pains in the legs, bruises on the legs;
- bizarre play and behaviour.

The fact that so many such manifestations occur makes it possible to consider that the charges may be truthful.

In my view the child's father should be interviewed. It is also recommended that the child be examined once again, not before September.”

9. Later on, the child was interviewed by E.K. on 9 January 1995. Her mother was not present during the examination. X. was also requested to make drawings representing her family and to play with dolls representing herself, her father and her mother.

10. In an opinion dated 17 January 1995, E.K. explained various techniques she had used during this meeting, suited to the child's age. She stated that during the second meeting the child had evoked events which seemed to suggest that she had been sexually abused by her father; that, given her age, there was no possibility that she was talking about things which in reality had not happened; that the drawings she had made constituted a spontaneous form of communication which could not, given her age, have been suggested to her by other persons; that these drawings suggested that she had been sexually abused by her father, possibly also by anal intercourse as she had clearly referred to anal pain in connection with "playing" with her father.

11. The psychologist stressed that under no circumstances should the issue be raised with the child, who should be excluded entirely from the proceedings in order to safeguard her well-being and development. She noted that the child was more relaxed and confident than in April 1994, when she had realised that the "secrets" her father shared with her had been regarded as evil by other members of the family.

12. On 31 March 1995 a bill of indictment was laid against the applicant in the Łódź Regional Court. He was charged with having sexually abused his daughter from 1992 until April 1994.

The prosecution referred to interviews conducted during the investigations with the applicant, his parents, his wife, her parents and her sister and her aunt K.M.

Further, reference was made to: X.'s medical records, police information on the applicant, the opinions prepared by E.K. (referred to above), a psychiatric opinion on the applicant (prepared by N.G. and M.G.-L.), drawings made by X., an expert opinion dated 28 November 1994, prepared by J.B., a sexologist, on the applicant's sexual profile, another report about the applicant's mental health prepared by psychiatrists M.L. and D.J., dated 1 March 1996, and an opinion of a psychologist on the applicant's personality, dated 1 March 1995 and prepared by E.W.

13. On an unspecified later date the court instituted the proceedings.

14. On 9 February 1996 an expert opinion, prepared by J.K., a specialist in surgery with considerable experience of working with battered and abused children, was submitted to the court. He prepared it on the basis of his analysis of X.'s medical records, but without interviewing either X. or other persons. He concluded that the symptoms which X. had manifested could have been caused by sexual abuse, but that such symptoms could also have been caused by other physiological factors. He was of the view that, in any event, no evidence pointed with certainty to sexual abuse by her father.

15. By a decision of 25 April 1996 the court called further expert witnesses: M.K., a psychologist, and another psychologist working for a Diagnostic Centre in Łódź.

16. In its decision of 24 May 1996 the court observed that doubts had arisen, in the light of J.K.'s opinion, as to whether an expert opinion of a sexologist on the applicant's personality and which had already been prepared for the purposes of the investigation had been sufficient and clear. The court noted J.K.'s professional experience in a non-governmental organisation helping children, victims of cruelty and sexual abuse. It therefore ordered that another expert opinion be submitted on whether the applicant was suffering from any sexual disturbances, and if this was the case, how they might relate to the charges against him. It appointed a sexologist, Dr A.B., as an expert.

17. On 12 July 1996 A.B. examined the applicant and on an unspecified later date submitted his opinion to the court.

18. On 5 March 1997 another expert opinion was submitted to the court in which the procedure for examination as well as the adequacy and soundness of the method used by the psychologist E.K. were assessed. Its conclusion was that there were no grounds for doubting the thoroughness and soundness of the opinion.

19. On 6 November 1997 the Łódź Regional Court convicted the applicant of having sexually abused X. and sentenced him to four years' imprisonment.

The court first recalled the circumstances of the applicant's marriage and the difficulties that had arisen between the spouses. It further established that the applicant's wife, having considered their situation and having discussed the issue with her sister I.K., decided, on 8 April 1994, to petition for divorce. On the same day she had sought legal advice and agreed with the lawyer that a divorce petition would be prepared. In the evening she had surprised the applicant caressing X. in a manner which shocked her as it seemed that he had been touching the child's sexual organs. She had not reacted immediately, but left the apartment with her daughter on the next day and moved in with her sister. On the same day she had talked with X. about her father's conduct and her suspicions of sexual abuse had been confirmed. On 14 April 1994 she had requested the prosecutor to institute an investigation and had been interviewed on the same day.

20. On 14 April 1994 the psychologist E.K. had met with X., but an attempt to obtain verbal confirmation of the charges of sexual abuse failed. The expert had only established that the convergence of various manifestations in the child's behaviour was sufficient to suppose that sexual abuse could have occurred.

21. As shown by the expert opinion of 17 January 1995, a further attempt by the psychologist to interview the child had been successful. The psychological tests had allowed the specialist to conclude that the girl's

genitals had been touched and manipulated by her father and that this had happened on numerous occasions.

The court further referred to an expert opinion of Dr J.B, who had concluded that the applicant had a normal heterosexual drive and that he had a low self-esteem. The latter factor, in the expert's view, could have explained why he might have sought sexual experience with X. instead of normal adult sex.

22. The court recalled that it had decided not to interview X., having regard to the unequivocal opinion of the psychologist that it would not serve any useful purpose and would be harmful to her, and given that other evidence at its disposal was sufficient to give a ruling in the case.

23. The court considered that the expert opinions of E.K. were of decisive importance for its judgment. In particular, her second opinion of January 1995 in which she had categorically stated that X. had been sexually abused sufficed to conclude that the applicant was guilty. In that connection, the court recalled that already X's first contact with E.K. in April 1994 had given cause to believe that this had indeed been the case, even though the child had not wanted to talk at that time. Further, the examination carried out in January 1995 had confirmed these suspicions, the more so as the child at that time had been more relaxed and confident.

24. The court also referred to an expert opinion in which the methods used by E.K. were assessed by two further specialists as methodologically sound and appropriate to the situation and to the child's age. They had not found any grounds on which to challenge its validity.

The court further observed that in 1995 the girl had been treated for problems of foecal incontinence. In June 1995 a medical test had been carried out which showed that the muscular tension of her sphincter was too low for a child of her age. The court had heard the expert witness Dr A.D., who was of the view that damage to the child's sphincter might have been caused by anal penetration. The court observed that his medical findings corresponded to the conclusions made by E.K. in her opinion of January 1995 that the child could have been the victim of anal penetration.

25. The court referred to the opinion and testimony of Dr J.K. and was of the view that this opinion was merely of a theoretical character because he had not examined the child. Hence, his conclusions in which he had disagreed with the conclusions of certain other experts previously prepared in the case were not of decisive importance.

26. The court further noted that the members of the applicant's wife's family had been questioned in the proceedings, but that their testimony had been very emotional. As they had been interpreting all of the information about the applicant as pointing to his guilt, the court did not consider their testimony to be wholly credible.

27. The court concluded that in the light of the evidence seen as a whole, the applicant's guilt was not open to doubt.

28. The applicant appealed, arguing that the finding of his guilt had primarily been based on the opinions prepared by E.K. Having regard to these opinions, the court had refused to take further evidence which would have cast light on the real circumstances of the case. The court had ignored evidence pointing to the applicant's innocence and, on the whole, had failed to take evidence which would have allowed the facts of the case to be established in a full and convincing manner.

It was further submitted that the applicant had been effectively deprived of his defence rights. The authorities had decided, in the child's interest, not to interview X. As a result, its role had been limited to the assessment of the opinions submitted by E.K. and of her oral testimony. This had led to a situation in which the accused had been convicted on the basis of E.K.'s reports. Neither the prosecutor nor the court had ever seen the child. The court could not, therefore, form an opinion on the veracity of the charges.

29. On 12 March 1998 the Łódź Court of Appeal dismissed the appeal and upheld the impugned judgment. It first observed that the applicant's submission that the lower instance had failed to hear further evidence was incorrect.

30. It disagreed with the applicant's submission that the refusal to interview X. had deprived him of his defence rights. The applicant, who had been represented by a lawyer, had made full use of his defence rights and had put to the court numerous arguments in his defence.

31. The appellate court recalled that the first-instance court had concluded that in the light of the evidence seen as a whole, the applicant's guilt was not open to doubt, even in the absence of any oral testimony given by X. This conclusion of the first-instance court had met with the approval of the appellate court, despite the fact that it had been motivated in a rather succinct manner. Neither the prosecution nor the applicant had made a formal request to have X. interviewed by the court, and the attempt to obtain verbal testimony from her during the investigations had failed. Hence, such testimony should be regarded as "testimony impossible to obtain" within the meaning of the Code of Criminal Procedure.

32. It was further noted that the validity and soundness of the opinions prepared by E.K. were not open to doubt. The first-instance court had taken specific steps in order to have their probative value assessed by other experts. Further, E.K.'s conclusions had also been assessed by the first-instance court in the light of other evidence at its disposal. The appellate court referred to the evidence given by A.D., which corroborated the conclusions reached by E.K. The submissions made by A.D. had corresponded to other available evidence. The first-instance court had also taken into consideration the conclusions made by the experts who had examined the applicant.

The appellate court concluded that the assessment of the evidence had been thorough and logical and that there were no grounds on which to find

that the first-instance court had reached unreasonable or arbitrary conclusions.

33. On 22 February 2001 the Supreme Court dismissed the applicant's cassation appeal as being manifestly ill-founded.

On 2 March 2001 this judgment was served on the applicant.

II. RELEVANT DOMESTIC LAW

34. At the relevant time the rules governing the assessment and admissibility of evidence were contained in the Code of Criminal Procedure of 1969 ("the 1969 Code"). It was repealed and replaced by the Law of 6 June 1997 (commonly referred to as the "New Code of Criminal Procedure"), which entered into force on 1 September 1998.

35. Article 4 § 1 of the 1969 Code provided:

"Judges shall rule on the basis of their conviction derived from evidence obtained and founded on their free assessment of evidence [and they shall] draw on knowledge and life experience."

36. Under Article 155 of the 1969 Code, the trial court should dismiss a motion for evidence to be taken, if the taking of such evidence was inadmissible in law; if the fact to be proved was irrelevant to the assessment of the case, and if the evidence concerned was impossible to obtain.

37. Article 402 of the Code provided that the appellate court could not, in principle, take evidence. However, it could do so exceptionally at a hearing if it was of the view that this would expedite the proceedings. If the appellate court found that the evidence examined by the first-instance court was insufficient to give a judgment, it could also quash the judgment under appeal and remit the case to the trial court for reconsideration.

THE LAW

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

38. The applicant alleged that the proceedings brought against him had been unfair, in particular in that X. had never been questioned. He relied on Article 6 §§ 1 and 3 (d) of the Convention.

39. Given that the requirements of paragraph 3 (d) represent specific aspects of the right to a fair hearing guaranteed by Article 6 § 1, the Court will examine the applicant's complaints in the light of the two texts taken in combination (see, among many other authorities, *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I, and

Kamasinski v. Austria, judgment of 19 December 1989, Series A no. 168, pp. 31-32, § 62).

These provisions, in so far as relevant, read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal established by law. ...

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. Admissibility

40. The Government argued that the application had not been submitted within the six-month period provided for by Article 35 of the Convention. It had been submitted by the applicant's parents, acting on his behalf, on 20 August 2001. They submitted a form of authority, signed by the applicant, on 7 May 2002. The Government were of the view that the latter date was decisive for the assessment of compliance with the six-month requirement. The Government submitted, in addition, that the original application had been lodged by the applicant's parents, who could not claim to be victims of a violation of the right to a fair hearing in the proceedings concerning the determination of the criminal charge against their son.

The applicant disagreed.

41. The Court first notes that the final judgment including the reasoning was served on the applicant on 2 March 2001. The Court is thus satisfied that the six-month period started to run on 3 March 2001 and expired on 3 September 2001. It observes that the applications submitted on 20 August and 17 December 2001 were signed by the applicant's parents. On 7 May 2002 the Court received a power of attorney, signed by the applicant, authorising his parents to act on his behalf.

42. Where applicants choose to be represented by a solicitor under Rule 36 of the Rules of Court, rather than to introduce their application themselves, it is a requirement, under Rule 45 § 3 of the Rules of Court, that a power of attorney to act shall be supplied by their representatives. However, the Court recalls its case-law to the effect that the date on which a form of authority to represent an applicant in the proceedings before it has been submitted is not decisive for the purposes of assessment of the compliance with the six-month requirement (see, among other authorities, *Fitzmartin and Others v. the United Kingdom* (dec.), 34953/97, 21 January 2003). The Court has also taken the view that this approach is equally valid in the case of applicants who are not represented by a professional legal

representative (*Manole and Others v. Moldova* (dec.), no. 13936/02, 15 June 2004). Furthermore, for the Court, where an application has been lodged by the parents of an applicant, there is a presumption that they are acting on the latter's behalf in a representative capacity, irrespective of any formal signed statement to that effect.

43. Having regard to the above considerations, the Court notes that the initial application was lodged on 20 August 2001 by the applicant's parents acting on his behalf. They did not claim that they themselves were victims of a breach of the Convention but that they wished to represent him in the proceedings before the Court. Moreover, and in any event, when requested to do so by the Court, they later submitted an appropriate form of authority signed by the applicant.

44. Accordingly, the Court finds that the applicant has submitted the application in compliance with Article 35 § 1 of the Convention. It further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention or inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The arguments of the parties

45. The applicant submitted that during the proceedings the court had never ordered that the child be questioned. The applicant disagreed that the case should be distinguished from *S.N. v. Sweden* (no. 34209/96, ECHR 2002-V) merely on the ground of the difference in the age of the victims. Firstly, the Government's submission was inconsistent with the facts of the case as established in the proceedings. Secondly, the Government had failed to explain the significance of the difference in age of the victims for the assessment of the fairness of the proceedings.

46. In the light of serious doubts expressed by the witnesses as to the existence of sexual abuse and whether the applicant had indeed been involved, the authorities should have taken adequate measures to secure the applicant's rights of defence. They had failed to do so. The special measures taken in the proceedings in order to protect the victim had not been counterbalanced in any way.

47. The Government first referred to the *S.N. v. Sweden* judgment (cited above) in which the Court had noted that regard had to be had to the special features of criminal proceedings concerning sexual offences. The Court accepted that in criminal proceedings concerning sexual abuse certain measures might be taken for the purpose of protecting the victim, provided that such measures could be reconciled with an adequate and effective exercise of the rights of the defence. 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 (*Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 471, § 72, and *P.S. v. Germany*, no. 33900/96, § 23, 20 December 2001).

48. The Government submitted that in the present case the charges related to sexual abuse committed when the victim had been two years old. The psychologist E.K. concluded, having regard, *inter alia*, to the victim's age, that she should not participate in the proceedings. Later on, the two other experts considered that her opinion was well-founded. The evidence had therefore been impossible to obtain within the meaning of Article 155 of the 1999 Code of Criminal Procedure. The present case should therefore be distinguished from *Bocos-Cuesta v. the Netherlands* (no. 54789/00, (dec.) 10 November 2006), in that in the latter case no expert evidence had been obtained as to the advisability of hearing the evidence of the victims.

49. The Government argued that the applicant had not been put on an unequal footing *vis-à-vis* the prosecution, because the victim had never been questioned by the prosecutor. Hence, both the prosecution and the applicant had had at their disposal the same evidence.

50. The Government further submitted that during the proceedings before the first-instance court the applicant had not requested that the victim be questioned. His counsel had only requested his appeal against the first-instance judgment. In their view, the case was therefore similar to *S.N. v. Sweden* in that in both cases the applicants had not requested that the victims be heard by the first-instance courts. The only difference between these cases was that in the *S.N.* case the child was ten years old, while in the present case the victim of the sexual abuse was a two-year old at the time of the material events and four when she was examined by a psychologist.

51. The Government emphasised that Article 6 of the Convention did not grant the accused an unlimited right to secure the appearance of witnesses in court. It was normally for the national court to decide whether it was necessary or advisable to call a witness. In the present case the court had conducted fair, extensive, detailed and diligent proceedings when taking evidence. The applicant had been able to avail himself of all his procedural rights. He had requested that new evidence be taken and certain of his requests had been granted. All this evidence was examined in the applicant's presence.

52. The Government were of the view that the proceedings as a whole had been fair.

2. The Court's assessment

53. The Court first reiterates that the admissibility of evidence is governed primarily by the rules of domestic law. The Court's task under the Convention is not to rule on whether witnesses' statements were properly

admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among many other authorities, *Lucà v. Italy*, no. 33354/96, § 38, ECHR 2001-II). It will therefore confine its attention to establishing whether the manner in which the proceedings were conducted against the applicant in the domestic courts was compatible with the rights of the defence (see *De Lorenzo v. Italy* (dec.), no. 69264/01, 12 February 2004).

54. 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 call a witness (*S.N. v. Sweden*, cited above, § 44, ECHR 2002-V, with further references to *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89).

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 he makes his statements or at a later stage (*Van Mechelen and Others v. the Netherlands*, Reports 1997-III, p. 711, § 51; *S.N. v. Sweden*, cited above, § 44, *Bocos-Questa v. the Netherlands*, cited above, § 68; *Gossa v. Poland*, no. 47989/99, § 53).

56. With respect to statements of witnesses who proved to be unavailable for questioning in the presence of the defendant or his counsel, the Court recalls that paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps so as to enable the accused to examine or have examined witnesses against him (see, *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII).

57. 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 *S.N. v. Sweden*, cited above, § 47; see also *Lemasson and Achat v. France* (dec.), no. 49849/99, 14 January 2003).

58. Turning to the circumstances of the present case, the Court first observes that both the prosecuting authorities and the court heard evidence from various sources including members of the applicant's and his wife's close family who testified about the relations between the applicant and his daughter, the daughter's behaviour during and after the alleged events, the confidences that she might have shared with her mother or other relatives concerning the alleged sexual abuse, her health and any change of personality which could be indicative of her being a victim of sexual abuse. The applicant had ample opportunity to try to discredit any adverse conclusions which might have been drawn from their statements. In the event, the trial court chose not to attach any particular weight to their testimony since it was coloured by emotion (see paragraph 26 above). On the other hand, the trial court was of the view that the testimony of E.K. was of decisive importance (see paragraph 23 above) and that her findings based on her sessions with the child, one of which was conducted in the presence of the applicant's wife, conclusively showed that not only had the child suffered sexual abuse but that the applicant was guilty of the offence. It is true that the trial court had been at pains to have the soundness of the methodology used by E.K. confirmed (see paragraphs 18 and 24 above). However, it remains the case that the trial court was at no stage presented with any direct evidence of the applicant's guilt. E.K.'s crucial testimony, like that of Drs J.B. and A.D., was based on expert inference.

59. In contrast to many other cases in which the Court examined similar complaints, the decisive evidence on which the applicant was convicted could be challenged before the court (see in this respect, *mutatis mutandis*, *Van Mechelen and Others v. the Netherlands*, cited above, §§ 51-55; see also *Kostovski v. the Netherlands*, judgment of 20 November 1989, Series A no. 166, p. 20, § 41). However, for the Court, and as a matter of fairness, appropriate measures should have been taken so as to allow the trial court to take a broader view of the question of the applicant's possible guilt. It notes that at no stage was any consideration given to the possibility of video-recording the sessions which E.K. had had with X. It is to be observed in this connection that the complaint was made to the prosecutor on 14 April 1994 and that E.K. was able to conduct a first interview with the child on the same date. A further interview took place on 9 January 1995. On neither occasion was a video-recording made showing how E.K. had interacted with the child and had endeavoured to form an opinion as to whether the allegations of sexual abuse were founded and whether the applicant had been implicated.

Furthermore, X. was never at any stage questioned, either by the police, the prosecutor or the court. The prosecuting authorities, when declining to question the victim, had regard to the two opinions given by E.K. in which she had advised that it would be detrimental to X.'s well-being and development to hear her. It has not been shown that these opinions were not

sufficiently motivated or credible. However, it observes that later on, during the judicial proceedings, the courts simply accepted the expert's conclusions and did not, on their own motion, consider whether it might have been advisable to question X. at that stage (see *Gossa v. Poland* cited above, § 58, *a contrario*) or to have questions put to her as to whether the applicant had sexually abused her.

60. The Court observes that the circumstances of the present case differ from those it examined in the case of *S.N. v. Sweden* referred to above. In the latter case the Court found that no violation of the Convention had occurred. However, the Court notes that, in contrast to the present case, not only was the victim questioned twice by the police, but also a videotaped police interview with the child was made which could later be played back to the court, and indeed was, to give it an opportunity of assessing the reliability of the evidence given by the victim (*S.N. v. Sweden*, §§ 10, 13 and 15). Moreover, S.N failed to avail himself of an opportunity to put questions to the victim.

Likewise, in other similar cases, *P.S. v. Germany*, cited above, and *Bocos-Cuesta v. the Netherlands*, cited above, the victims of the alleged sexual offences were interviewed by the police during the investigations and the courts later relied on their recorded statements. The Court found in these cases that the use of this evidence involved such limitations on the rights of the defence, that the applicants could not be said to have received a fair trial, despite the fact that the victims' evidence was available to the courts.

61. In the present case the essence of the applicant's complaint is that the victim of the offence was never questioned during the proceedings and that, as a result, he was convicted without ever having been able to question her.

It is not for the Court to replace the domestic authorities in deciding on the manner in which evidence in criminal proceedings should be taken and presented to the courts. The Court is also fully aware that in the present case there were particular difficulties in establishing the facts of the case, if only because of the victim's very young age. It notes the efforts made by the prosecuting authorities to assess whether questioning her would have been detrimental to her development. However, the Court observes that it has not been shown or argued that the authorities envisaged or made attempts, either at the investigation stage, or later, before the court, to test the reliability of the victim in a less invasive manner than direct questioning. This could have been done, for example, by more sophisticated methods, such as having the child interviewed in the presence of a psychologist and, possibly, also her mother, with questions put in writing by the defence, or in a studio enabling the applicant or his lawyer to be present indirectly at such an interview, *via* a video-link or one-way mirror (*Accardi and Others v. Italy* (dec.), cited above; *S.N. v. Sweden* cited above, § 13). Had the authorities in the present case taken measures which would have allowed the court to have at its disposal, for instance, a recording of the interview which the psychologists

had with the victim, the applicant's defence rights would have been better safeguarded.

62. The Court notes the Government's argument that during the proceedings before the first-instance court the applicant had not requested that the victim be questioned, and had only complained of this in his appeal against the first-instance judgment (see paragraph 29 above). In this connection, the Court observes that under domestic law as it stood at the relevant time the appellate court was empowered to consider questions of both fact and law. Further, it was open to that court to quash the judgment under appeal and to remit the case for re-consideration to the first-instance court, with a view to taking additional evidence (see paragraph 37 above). However, despite the applicant's complaint that X. had never been questioned, the appellate court chose not to do that.

3. *The Court's conclusion*

63. Consequently, on no occasion could the prosecutor or the court observe the behaviour of the victim during questioning (compare *Kostovski v. the Netherlands*, cited-above, p. 20, § 42 *in fine*). Likewise, the applicant never had an opportunity of observing the demeanour of X. under direct questioning (see *P.S. v. Germany*, cited above, § 29). Hence, no procedures were introduced by the authorities to counterbalance the difficulties faced by the defence and the applicant was not given an adequate and proper opportunity to challenge and question this witness against him (compare and contrast *S.N. v. Sweden*, where the applicant failed to avail himself of the opportunity at the pre-trial stage to have questions put to the child complainant). The mere fact that the prosecuting authorities did not have such an opportunity either is not sufficient for a finding that the applicant was not put in a disadvantageous position *vis-à-vis* the other party.

64. In these circumstances, the way in which the proceedings were conducted 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. OTHER COMPLAINTS UNDER ARTICLE 6 OF THE CONVENTION

65. The applicant complained that he had been convicted on the basis of insufficient evidence. The court had accepted the evidence obtained from the medical examination of X., conducted by A.D. three and a half years after the alleged event, which for that reason could not be considered credible. On the whole, the courts had failed to establish the facts of the case convincingly and wrongly assessed the evidence.

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

67. However, having regard to its above finding of a violation of paragraph 3 (d) taken in conjunction with paragraph 1 of Article 6 of the Convention, the Court holds that it is not necessary to examine separately this complaint.

68. The applicant further complained that his *ex officio* defence lawyer had failed to ensure his proper defence during the proceedings.

69. The Court observes that this complaint has not been substantiated by any concrete arguments. It follows that the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION WITH RESPECT TO THE LENGTH OF THE PROCEEDINGS

70. In his application form dated 17 December 2001 the applicant complained that the proceedings had lasted four years and had therefore been excessively long.

71. The Court observes that the proceedings concerned came to end on 21 February 2001, when the Supreme Court dismissed the applicant's cassation appeal. The judgment of the Supreme Court was served on the applicant on 2 March 2001. It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

72. 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.”

73. The applicant claimed 150,000 Polish zlotys (PLN) in respect of the non-pecuniary damage he has suffered. He further sought an award of PLN 340,000 under the head of pecuniary damage, referring to lost earnings and to the costs he had had to bear in connection with the domestic proceedings.

74. The Government contested that claim. They added, however, that should the Court find a violation of the Convention this finding alone should constitute adequate just satisfaction or, in the alternative, that any

financial compensation awarded should be consistent with the Court's own case-law in other similar cases.

75. The Court accepts that the impossibility for the applicant to have questions put to X. 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 1,800 in respect of non-pecuniary damage.

B. Costs and expenses

76. The applicant also claimed PLN 15,860 for the costs and expenses incurred in the proceedings before the Court.

77. The Government argued that any award under this head should be limited to those costs and expenses that had been actually and necessarily incurred and were reasonable as to quantum.

78. The Court considers it reasonable to award the applicant EUR 1,000 for costs and expenses involved in the proceedings before it, less EUR 850 received by way of legal aid from the Council of Europe.

C. Default interest

79. 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

1. *Declares* unanimously the complaint concerning the applicant's inability to question or have questioned the child complainant and the alleged insufficiency of the reasons for his conviction 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 of the Convention taken in conjunction with Article 6 § 3 (d);
3. *Holds* unanimously that it is not necessary to examine separately the complaint under Article 6 § 1 of the Convention concerning the alleged lack of reasons for the applicant's conviction;
4. *Holds* unanimously

(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 to be converted into Polish zlotys at the rate applicable on the date of payment:

(i) EUR 1,800 (one thousand eight hundred euros) in respect of non-pecuniary damage;

(ii) EUR 150 (one hundred and fifty euros) in respect of costs and expenses;

(iii) any tax that may be chargeable;

(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;

5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) separate opinion of Sir Nicolas Bratza;

(b) joint partly dissenting opinion of Mr Casadevall and Mrs Mijović.

N.B.
T.L.E.

SEPARATE OPINION OF SIR NICOLAS BRATZA

1. While I am in agreement with the majority of the Court that there was a violation of Article 6 § 1 in the present case, I would have preferred that the applicant's complaint had been examined under that paragraph alone rather than in conjunction with paragraph 3 (d) of the Article.

2. The central problem in the case does not in my view derive from the fact that the applicant was unable to examine, or have examined, X. as a witness against him. X. was at most four years old at the time the criminal investigation commenced against the applicant and no more than seven years old at the time of the applicant's trial. Even if, on the latter occasion, X. could be said to be old enough to be examined by the applicant or his lawyer, either directly or through the trial judge, I do not consider that, in the particular circumstances of the present case, the failure of the trial court to require such examination gave rise to a violation of Article 6 § 3 (d).

3. The problem in terms of Article 6 stemmed in my view from the testimony of E.K., to which the trial court attached decisive importance. That testimony was based on two psychological examinations of X. which had been carried out by E. K. - the first on 14 April 1994, which took place in the presence of the mother and maternal grandmother of X. on the day that the former had requested the Pabianice District Prosecutor to institute criminal proceedings against the applicant on charges of sexual abuse of their daughter, and the second, some nine months later, on 9 January 1995. Neither examination was attended by a representative of the prosecutor's office or by representative of the applicant or by a psychologist appointed by him. Moreover, as noted in the Court's judgment, neither examination was recorded on video so as to enable the trial court, with the assistance of other expert evidence, to assess the validity of the opinion of E.K. founded on such examinations that X. had not only been sexually abused but that the applicant was the abuser. It is true that the applicant had an opportunity to challenge this opinion and to question the adequacy and soundness of the methods used by E.K. when examining X. However, in my view, the rights of the defence were not thereby sufficiently safeguarded. Where, as here, the examination of X. by E.K. alone played a crucial role in the conviction of the applicant, I consider that fairness required that the applicant should have had the opportunity of testing E.K.'s evidence with the benefit of a recording of the examination itself.

JOINT PARTLY DISSENTING OPINION OF JUDGES
CASADEVALL AND MIJOVIĆ

(Translation)

We do not share the opinion of the majority concerning point 2 of the operative provisions as, in our view, there has been no violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3(d), for the following reasons.

1. The fact that the applicant's daughter was subjected to very serious and repeated sexual assaults between the ages of two and four is not in dispute. Nor did any dispute arise as to the fact that the child was examined on two occasions, on 14 April 1994 and 9 January 1995, by E.K., an expert psychologist, or the fact that, leaving aside these two examinations and consultations of a strictly medical nature, no one questioned or took evidence from the child: not the police, the prosecutor, the accused or his lawyer, the court of first instance or the court of appeal.

2. It was established that neither the defence lawyer nor the prosecutor made a request at any point, during the investigation or before the first-instance court, for the court to hear evidence from the victim. This would appear to be a sensible precaution in the case of a four-year-old girl. As the appellate court found, such testimony was to be regarded as “testimony impossible to obtain” within the meaning of the Code of Criminal Procedure (see paragraph 31 of the judgment). This assessment seems wholly correct given that no testimony had been obtained from the victim, this having proved impossible.

3. The regional court convicted the applicant on the basis of the two reports from the psychologist E.K., the expert opinion of Dr J.B. on the applicant's sexual profile, the opinion of two other specialists as to the adequacy of the methodology used by E.K., the medical file of the victim (who received treatment during 1995 for faecal incontinence and low muscular tension of the sphincter) and the expert reports of Drs A.D. and J.K. The regional court decided against hearing evidence from the child, firstly because it considered it to be unnecessary and secondly in order to avoid causing her serious harm in view of her extreme youth. The appellate court upheld the reasoning of the regional court and found that, even in the absence of oral testimony from the victim, the first-instance court's assessment of the evidence had not been unreasonable or arbitrary.

4. The applicant complained in particular that the criminal proceedings against him had not been fair on account of the fact that X had never been questioned, and that the evidence on which the domestic courts based his conviction had been insufficient. He relied on Article 6 §§ 1 and 3(d) of the Convention. With regard to the second complaint, there is no need to reiterate that the admissibility of evidence is governed primarily by the rules of domestic law and that it is in principle for the national courts to assess the evidence before them, the Court's role being confined to ascertaining whether the proceedings considered as a whole were fair. As regards the first and main complaint, the two questions which arise, as we see it, are as follows: (i) first, whether a four-year-old girl can or should be questioned or give evidence, especially in relation to serious sexual abuse issues and (ii) second, whether the same child, who was never questioned, can be regarded as a *witness against* the accused within the meaning of Article 6 § 3(d) of the Convention and the autonomous concept of “witness” established by the Court.

(i) Our reply to the first question is in the negative. We consider that the Polish judicial authorities acted with extreme caution – in line with the recommendations of a psychologist – in order to protect a vulnerable victim and spare her further damage. As age is an important factor in assessing this issue, it should be pointed out that in the case of *S.N. v. Sweden* the child concerned was ten years old, in *P.S. v. Germany* the girl was eight years old and in *Bocos-Cuesta v. the Netherlands*, where the circumstances were serious but less traumatic, the victims were aged ten, six, nine and eleven. The situation is clearly different in the present case.

(ii) In the three cases cited above, all the children were questioned by specially trained police officers (see paragraph 60 of the judgment) and their statements constituted the evidence on which the accused were convicted. The victims therefore acted as witnesses for the prosecution. In the present case, the child was examined by a psychologist and by doctors but was never questioned by anyone else; the evidence against the accused consisted of expert reports rather than statements, the latter not having been taken. That being the case, we consider that the victim herself cannot be considered as a *witness against* the accused, either for the purposes of Article 6 § 3(d) of the Convention or within the autonomous meaning of the Court's case-law (see, conversely, among other authorities, *S.N. v. Sweden*, no. 34209/96, § 45, ECHR 2002-V).

5. Admittedly, there is room for doubt or speculation as to whether it might not have been useful for the parties (the defence as much as the prosecution, and also the courts) to have had an audiovisual recording of the conversations between the psychologist and the child. However, the fact that

this was not available does not in any sense mean that the victim should be regarded as a *prosecution witness*. As the criminal case file was made up in particular of psychologists' and doctors' reports and opinions, the prosecution and the defence had the same evidence available to them and the same resources for performing their respective tasks; hence, no issue arises with regard to the principle of equality of arms. The applicant had every opportunity to challenge the psychologists' and doctors' reports and opinions, to question the authors and, if appropriate, to request a second opinion. Hence, all the evidence was produced at a public hearing, in the presence of the accused, enabling adversarial argument to take place as required by our Court's case-law.

6. If the majority consider (as seems to be suggested in paragraph 58 *in fine* and paragraph 59 of the judgment), with regard either to the rights of the defence or the admissibility of the evidence, that there was a real issue as to fairness in this case – and we do not believe that there was –, they should have examined it from the general standpoint of Article 6 § 1. They should not have based their finding of a violation on the specific circumstance that no evidence was heard from a four-year-old child who, moreover, could not be considered as a *witness against* the accused (despite the assertion to the contrary in paragraph 63).