



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

FOURTH SECTION

CASE OF A.L. v. FINLAND

(Application no. 23220/04)

JUDGMENT

STRASBOURG

27 January 2009

FINAL

27/04/2009

This judgment may be subject to editorial revision.

In the case of A.L. v. Finland,

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

Nicolas Bratza, *President*,

Giovanni Bonello,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 6 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 23220/04) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Finnish national, Mr A.L. (“the applicant”), on 23 June 2004.

2. The applicant, who had been granted legal aid, was represented by Mr L. Lehtinen, a lawyer practicing in Parkano. 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, that is, the child complainant, had not been respected.

4. On 17 March 2008 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3). Furthermore, the President of the Fourth Section decided *ex officio* to grant the applicant anonymity under Rule 47 § 3 of the Rules of Court.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. On 13 March 2001 a mother contacted the police on account of a suspicion that her child R., a girl born in December 1986, had some ten days

earlier been sexually abused by a relative, the applicant. On 21 March 2001 the police took a statement from the mother. On 9 July 2001 the police questioned the applicant. R. was interviewed by the police on 30 July 2001 in the presence of a social worker. No other person was present at the interview, nor was it recorded.

6. The applicant was subsequently charged before the Tampere District Court (*käräjäoikeus, tingsrätten*) with having sexually abused R., who was 14 years' old at the time, by touching her sexual organs. The applicant denied the charge. The court received testimony from R.'s mother and the applicant as well as three witnesses who testified on the applicant's behalf. The prosecutor submitted a video recording of two interviews with R. conducted by a medical expert, H., on 17 and 18 April 2001. H. was heard as a witness in this connection. The prosecutor also submitted a medical statement containing an assessment of the interviews in question and another medical certificate containing findings relating to R.'s physical examination. The prosecutor further produced a statement given on 14 March 2001 by a rehabilitation centre for intellectually disabled persons. From the statement it transpired that R. had the intelligence level of a child aged 6 to 8½ years. Written evidence of R.'s need for professional help was submitted on her behalf.

7. On 20 November 2001 the District Court convicted the applicant of sexual abuse of a child and sentenced him to a suspended term of seven months' imprisonment. As evidence, the court relied firstly on the testimony of R.'s mother, which it found more credible than that of the applicant and his witnesses and secondly, on the video recording along with H.'s testimony. The court noted that R. had given similar accounts of the events to her mother and to H. It further noted that during the interviews R. had talked to H. openly and with confidence, but her behaviour had clearly changed when the issue of the alleged abuse had been broached. R. had, nevertheless, been able to give an account of the events in a rather versatile and detailed manner. The recording gave the court no reason to suspect that R. had been repeating some other person's words or that she had imagined the events.

8. The applicant appealed against the judgment to the Turku Court of Appeal (*hovioikeus, hovrätten*), arguing, *inter alia*, that the District Court should not have decided the case without hearing R. in person. He had not been given the opportunity to put questions to R. at any point of the proceedings. Nor had he been given an opportunity to watch the video recording of her interviews before the main hearing, yet the recording had been an essential part of the evidence leading to his conviction. The applicant requested that the Court of Appeal hold an oral hearing and that R. be heard in person.

9. On 9 January 2003 the Court of Appeal refused the applicant's request to hear R. in person as it might be detrimental to her, taking into

account her level of development and the nature of the issue in question. The court relied on the principle contained in section 10(1) of the Act on the Publicity of Court Proceedings (*laki oikeudenkäynnin julkisuudesta, lag om offentlighet vid rättegång*, Act No. 945/1984), which provided that a person below the age of 15 could not attend a hearing if the court found that this could be detrimental to him or her, and to section 15(2) of the Child Custody and Right of Access Act (*laki lapsen huollosta ja tapaamisoikeudesta, lag angående vårdnad om barn och umgängesrätt*, Act No. 361/1983), which provided that a child could be heard in court only if it was clear that this would not be detrimental to him or her. This decision was not subject to separate appeal.

10. In the subsequent oral hearing, the Court of Appeal was presented with the same evidence as had been before the District Court, with the addition of four photographs and the floor plan of the applicant's apartment. On 27 February 2003 the court upheld the lower court's judgment finding no reason to deviate from its assessment of the evidence.

11. The applicant sought leave to appeal to the Supreme Court (*korkein oikeus, högsta domstolen*) maintaining, *inter alia*, that his Convention right to examine witnesses against him had been breached. He requested, *inter alia*, that the court refer the case back to the lower courts for re-examination and that he be granted an opportunity to put questions to R., either in an oral hearing or by using other arrangements. In the alternative, the applicant requested that an oral hearing be held in the Supreme Court and that testimony be obtained from the applicant and the three witnesses on his behalf.

12. On 14 January 2004 the Supreme Court refused leave to appeal.

II. RELEVANT DOMESTIC LAW

A. The pre-trial investigation

13. 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 a 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).

14. The Criminal Investigations Act (*esitutkintalaki, förundersökningslagen*, Act No. 449/1987) provides that 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), Act no. 692/1997). 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. 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 as well (section 34, Act No. 692/1997).

15. As of 1 January 2004, the Criminal Investigations Act provides also that the questioning of a victim or a witness (from now on referred to as 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 witness in person, due to his or her young age or disturbed mental state, without causing him or her harm. The special requirements set by the level of that person's development for the methods used, for the number of participating persons, and for other conditions, must be taken into account. The person in charge of the investigation may also allow other authorities, under supervision of the investigator, to put questions to the witness. The suspect must be provided with an opportunity to put questions to the witness. The suspect may also put the questions through legal counsel or another representative. However, the investigator may order that the questions be put through his or her intermediary (section 39a, Act No. 645/2003).

B. The receipt of evidence in court

16. At the time of the proceedings in question, apart from the leave to appeal proceedings in the Supreme Court, there were no legal provisions concerning the use as evidence of a video recording of testimony given by a child during the pre-trial investigation.

17. The Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*) lays down the applicable rules on receiving testimony. The relevant provisions at the time of the proceedings in question, as regarded the proceedings in the lower courts, provided as follows.

18. A statement included in a pre-trial investigation report or another document, or a statement recorded by other means, may, as a rule, not be admitted as evidence in court. The court may, exceptionally, admit such a statement as evidence, if the witness in question cannot be questioned before the court (Chapter 17, sections 11(1)(2) and 11(3), Act No. 690/1997).

19. If a person called as a witness is less than 15 years old, 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, section 21, Act No. 571/1948).

20. The Code of Judicial Procedure was amended with effect from 1 October 2003.

21. According to the current provisions, the testimony of a person under 15 years old, or a mentally disturbed person, recorded on audio or videotape during the 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, section 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.

22. As to hearing a child under the age of 15, or a mentally disturbed person, Chapter 17, section 21 (Act No. 360/2003) provides that he or she may be heard as a witness, or for the purpose of obtaining evidence, if the court finds it appropriate, and if the hearing in person is of significant relevance for the establishment of the facts of the case, and the hearing is not likely to cause such suffering or other harm as could be detrimental to the person concerned (from now on referred to as the witness) or to his or her development. Where necessary, the court shall designate a support person for the witness. The witness shall be questioned by the court, unless it finds particular reason to entrust the questioning to the parties. The parties shall be provided with an opportunity to put questions to the witness through the intermediary of the court or, if the court finds it appropriate, directly to the witness. Where necessary, the hearing may take place on premises other than the court room.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

23. The applicant complained, under Article 6 § 3 (d) of the Convention, that his right to a fair trial had been breached in that he was denied the opportunity to put questions to R., although her account, recorded on videotape, had been treated as decisive evidence against him.

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, among other authorities, *Asch v. Austria*, 26 April 1991, § 25, Series A no. 203, and *A.H. v. Finland*, no. 46602/99, § 30, 10 May 2007).

Article 6 reads, in so far as relevant:

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

...

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

...

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

...”

24. The Government contested that argument.

A. Admissibility

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

B. Merits

Submissions of the parties

26. The Government submitted that, in the domestic practice, forensic psychiatric interviews of a child recorded on videotape and statements obtained from a child included in the pre-trial investigation reports have been admitted as evidence, especially if hearing the child in person before the court was not possible. As a rule, children under ten years of age were not heard as witnesses.

27. The Government referred to the Supreme Court’s precedent (voting) No. KKO 2006:107 in another case concerning sexual abuse of a child, where the court had taken into account the proceedings as a whole. The general part of the court’s reasons read:

“...

When considering admissibility of the video recording as evidence in the Supreme Court, the court firstly notes that absolute prohibitions on testifying are exceptional in the Finnish legal system. The main rule is the principle of free production of evidence, which largely leaves it up to the parties to decide what circumstances and evidence

they want to invoke in their case. It is at the court's discretion to decide what evidentiary value it attributes to each piece of evidence.

The prohibition on testifying laid down in Chapter 17, section 11(1)(2) of the Code of Judicial Procedure, concerning recorded statements, is ultimately aimed to ensure a fair trial for suspects. Therefore, in interpreting the extent of this prohibition, attention must be paid to the proceedings as a whole. Chapter 17, section 11(3) of the Code of Judicial Procedure, in turn, lays down the principle that, if a witness cannot be heard before the court in person, the court may admit as evidence his or her recorded statement even if it is, according to the main rule, otherwise inadmissible as evidence.

..."

The Government concluded that, if a defendant had not been afforded an opportunity to put questions to a complainant child, a recorded account from the child in question could be assessed by weighing its value as evidence and that the use of such evidence could not be categorically prohibited.

28. The Government also submitted that there was a marked difference between the present case and the case of *F. and M. v. Finland* (no. 22508/02, § 60, 17 July 2007), where the Court found a violation of the applicant's rights of defence. In the said case, not a single interview between the psychologist and the complainant child had been recorded on audio or videotape.

29. The Government maintained that the applicant had not asked for an opportunity to put questions to R. in the District Court. It was only at the appellate stage that the applicant had argued that he had not been given that opportunity and requested that R. be heard in person. Taking into account R.'s level of development, the time elapsed since the alleged offence and the fact that R. had already been interviewed concerning the events, hearing her in person before the court would most likely have caused her suffering. In the Government's view, the Court of Appeal's decision not to hear R. in person was, therefore, justified.

30. The Government further maintained that, in the proceedings before the District Court, the prosecutor had presented the video recording of R.'s interviews as evidence and it had been played back before the court. Medical expert H., who had conducted the interviews, had been heard as a witness in that connection. At that stage it had been open to both parties to submit to the court whatever arguments they wished to make with regard to the video-recorded evidence, that is, to contest it and to comment on it. The Government referred in this connection to the case of *B. v. Finland* (no. 17122/02, § 47, 24 April 2007).

31. The Government emphasised that the applicant's conviction had not been based solely on R.'s account, recorded on video tape, but also on other supporting evidence. It had been up to the District Court to assess the evidentiary value of the recording, which it had done in an appropriate manner. The testimony of H., in particular, had considerably increased the

evidentiary value of the recording. In cases concerning alleged child abuse, in general, the most fruitful period for putting questions to a witness child was lost with time. For the purpose of obtaining the most reliable statement, it was preferable to interview the child shortly after the incident. In the present case R.'s mother had been the first person whom R. had told about the alleged acts. The former was subsequently heard in court for the production of evidence. The interviews with the medical expert had also been arranged very soon after the incident. In the Government's view, the use of that evidence in these circumstances did not disclose any failure by the Finnish authorities to afford the applicant a fair hearing for the purposes of Article 6 §§ 1 and 3 (d) of the Convention.

32. The applicant contested the Government's conclusion and pointed out that the procedural safeguards set out in Article 6 § 3 (d) could not be overruled by domestic law and practice. At no stage of the proceedings had he been afforded the opportunity to put questions to the main witness against him, namely the child complainant.

33. The applicant claimed that it would have been possible, without any difficulty, to arrange for the applicant and his counsel to put questions to R. during the proceedings. It had been the duty of the authorities, under Article 6 § 3 (d) of the Convention, to provide him with that opportunity, if not in the oral hearing before the court, then by some other means. As to the Government's submission that he had not requested an opportunity to put questions to R. in the District Court, the applicant found it irrelevant, as he had made a request to that end in the appellate proceedings.

34. The applicant contended that other witnesses heard during the proceedings had not been able to testify about the alleged events. Their testimonies could only be characterised as supporting evidence, as submitted by the Government. The opportunity to put questions to R. would have been essential to the applicant's defence, as the video recording had, in fact, been treated as the main evidence against him.

The Court's assessment

35. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses 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, *W.S. v. Poland*, no. 21508/02, § 53, 19 June 2007).

36. 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 (see *W.S. v. Poland*, cited above, § 55 with further references).

37. 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, among other authorities, *mutatis mutandis*, *Doorson v. the Netherlands*, 26 March 1996, § 76, *Reports of Judgments and Decisions* 1996-II; *W. v. Finland*, no. 14151/02, § 43, 24 April 2007; *A.H. v. Finland*, cited above, § 40). 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, *inter alia*, *Bricmont v. Belgium*, 7 July 1989, § 89, Series A no. 158; *W. v. Finland*, no. 14151/02, § 43, 24 April 2007; *A.H. v. Finland*, cited above, § 40).

38. 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, among other authorities, *Asch v. Austria*, § 25; *W. v. Finland*, § 44; and *A.H. v. Finland*, § 41; all cited above), because her account given during the interview with the medical expert, as recorded on videotape, was played back in court and used in evidence against the applicant.

39. Criminal proceedings concerning sexual offences are often perceived 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 of 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. 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, *inter alia*, *Baegen v. the Netherlands*, 27 October 1995, § 77, Series A no. 327-B; *P.S. v. Germany*, no. 33900/96, § 23, 20 December 2001; *W. v. Finland*, cited above, § 45; *A.H. v. Finland*, cited above, § 42; and *F. and M. v. Finland*, cited above, § 58).

40. Turning to the present case, the Court observes that the courts based their decisions on the witness testimonies of R.’s mother and medical expert H., who had interviewed R. twice after the alleged incident, and on the video-recording of those interviews. The said two testimonies were, however, only indirect evidence, as neither the mother nor H. had witnessed

the alleged acts. Both of those witnesses were only able to give an account of what R. had told them and of their observation of her behaviour. H. had also testified on the methods used in conducting the interview and the credibility of R.'s account.

41. The Court further observes that by way of viewing the videotape the courts, as well as the applicant, were able to listen to R.'s own account of the alleged events. The recording also enabled them to observe the manner in which the interviews were conducted and to assess for themselves, at least to a certain degree, the credibility of R.'s account. It was open to the applicant to contest and comment on the evidence produced before the trial courts. While the Court acknowledges the significance of such a recording as evidence (see, *mutatis mutandis*, the following judgments: *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 71, 10 November 2005; *W.S. v. Poland*, cited above, § 61 in fine; and *F. and M. v. Finland*, cited above, § 60), it cannot alone be regarded as sufficiently safeguarding the rights of the defence where no opportunity to put questions to a person giving the account has been afforded by the authorities.

42. In the present case, unlike in the cases of *S.N. v. Sweden* (no. 34209/96, § 49-50, ECHR 2002-V) and *B. v. Finland* (no. 17122/02, § 44, 24 April 2007), the applicant was not afforded an opportunity to put questions to R. at any stage of the proceedings. His request to hear R. before the Court of Appeal was refused. His further request to hear R. before a court, or by some other means, was to no avail, as the Supreme Court refused leave to appeal.

43. As to 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 on appeal, the Court notes that under domestic law the Court of Appeal was empowered to consider questions of both fact and law, and it was still open to the applicant to make such a request at that stage. As to the appellate court's refusal to hear R., the Court further notes that apparently no expert opinion was obtained on whether R. could be heard before the court or by other, less intrusive means.

44. The Court notes that the present case is similar to the cases of *W. v. Finland* and *A.H. v. Finland* (both cited above), where the Court found a violation of the applicant's defence rights. In those cases, as in the case at hand, the video recording of the child complainant, played back before the trial courts, constituted the only direct evidence against the applicant (*W. v. Finland*, § 47; and *A.H. v. Finland*, § 44).

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 1,062.41 euros (EUR) for the amount levied in execution following his conviction. He also claimed compensation for non-pecuniary damage due to suffering, without specifying the amount.

48. The Government considered that there was no causal link between the alleged violation and the pecuniary damages claimed. In the event that the Court were to find a violation of Article 6 of the Convention, compensation for non-pecuniary damage should not exceed EUR 3,000.

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 lack of the guarantees of Article 6 has 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 1,252.72 (inclusive of value-added tax). The legal aid granted by the Council of Europe amounting to EUR 850 had not been deducted from that amount.

51. The Government submitted that the applicant had not specified the measures taken and the hourly rate charged by his counsel. In the event that the Court were to consider the documents submitted in support of this claim sufficient, the amount of costs and expenses was reasonable.

52. The Court reiterates that an award under this head may be made only insofar as the costs and expenses were actually and necessarily incurred in order to avoid, or obtain redress for, the violation found (see, among other authorities, *Hertel v. Switzerland*, 25 August 1998, § 63, *Reports of Judgments and Decisions* 1998-VI).

The Court finds that, taking into account the total amount of counsel's fee of EUR 1,000 (without value-added tax), the documents submitted by the applicant in support of his claim are sufficient for the purpose of assessing the amount of the award under this head. Taking into account also all the other circumstances, and having regard to the amount received by way of legal aid from the Council of Europe, the Court awards the applicant EUR 402 (inclusive of value-added tax) in respect of costs and expenses.

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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention taken together with Article 6 § 3 (d) of the Convention;
3. *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 402 (four hundred and two 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President