



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF D. v. FINLAND

(Application no. 30542/04)

JUDGMENT

STRASBOURG

7 July 2009

FINAL

06/11/2009

This judgment may be subject to editorial revision.

In the case of D. 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,

Ledi Bianku,

Nebojša Vučinić, *judges*,

Anne E. Niemi, *ad hoc judge*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 9 June 2009,

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

PROCEDURE

1. The case originated in an application (no. 30542/04) 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 an American national, Mr D. (“the applicant”), on 20 August 2004. 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 was represented by Mr Tero Artimo, 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, that is, the child complainant, had not been respected in the criminal proceedings against him and that he had not been afforded adequate time and facilities for the preparation of his defence.

4. On 29 May 2007 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. Ms P. Hirvelä, the judge elected in respect of Finland, withdrew from sitting in the case (Rule 28 of the Rules of Court). The Government accordingly appointed Ms Anne E. Niemi to sit as an *ad hoc* judge (Rule 29).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. On 19 July 2000 the applicant's daughter E., born in June 1997, was first interviewed at a hospital child psychiatric clinic on a suspicion that she had been sexually abused by the applicant. That suspicion was initially based on E.'s own account of what her father had done to her.

7. Dr S. examined E. at the clinic on 2, 4 and 8 August 2000. The sessions were recorded on videotape. Following those sessions the hospital staff proposed that a meeting be arranged between the applicant and E. to enable the observation of their interaction. Such a meeting was never held, presumably due to the opposition of E.'s mother, the applicant's former wife.

8. On 7 August 2000 the applicant met a social worker and a nurse at the hospital. He denied any sexual abuse, suspecting that the mother had manipulated E. into saying negative things about him in order to prevent his visits with the child. The applicant and E.'s mother had divorced in 1998 and they had not been able to agree on the child's custody and visiting rights. They had subsequently been afforded joint custody of E. by a court. Against this background, the applicant urged that other possible reasons for E.'s behaviour than sexual abuse be taken into consideration.

9. In a feedback discussion held on 14 September 2000 Dr S. informed the applicant about the results of the examinations, which in his opinion supported the suspicion of abuse by the applicant. The applicant was told that a meeting between him and E. was to be arranged and that he would be informed about the date of the meeting later on. The applicant requested copies of E.'s examination reports.

10. No meeting between the applicant and E. was arranged.

11. As copies of E.'s examination reports had not been sent to the applicant, his counsel made fresh requests to that end on 3 and 14 November 2000. She also insisted that the applicant be heard regarding the examinations.

12. On 15 November 2000 E. was examined at the clinic by Dr H. That session was also videotaped. No meeting with the applicant was arranged in respect of the results of that examination.

13. On 28 November 2000 the hospital refused to submit copies of E.'s examination reports to the applicant, finding that their disclosure might be detrimental to her health or treatment and that it might conflict with another very important private interest.

14. In December 2000 the applicant filed a request with the Data Protection Ombudsman (*tietosuojavaltuutettu, dataombudsmannen*) to

obtain access to E.'s medical file. No decision was given by that authority before the beginning of the subsequent trial against the applicant.

15. E.'s therapy at the hospital started in January 2001.

16. On 15 February 2001 the police began a pre-trial investigation of the applicant during which his counsel was given the opportunity to view the video recordings of E.'s examinations by Drs S. and H. Apparently, counsel was also given copies of at least some of the documents pertaining to the case. The investigation was closed on 19 September 2001. In his final statement to the pre-trial investigation, the applicant requested that the investigating authorities acquire the totality of E.'s medical file from the hospital. His request was not complied with as the police and the public prosecutor did not regard E.'s patient records as having any influence in the matter.

17. While the investigation was still pending, in May and June 2001, the applicant's counsel had again asked the hospital authorities for access to those documents in E.'s medical file which were not already in the possession of the defence. The requests were refused. The applicant appealed against the decisions to the Administrative Court (*hallinto-oikeus, förvaltningsdomstolen*).

18. On 24 October 2001 the prosecutor brought a charge against the applicant, alleging aggravated sexual abuse of E. between March and June 2000. On 23 November 2001 the applicant submitted a written request to the District Court (*käräjäoikeus, tingsrätten*) to gain access to E.'s medical file, claiming that it was necessary for his defence.

19. On 19 February 2002 the Administrative Court dismissed the applicant's appeal against the hospital authorities' refusal to grant him access to E.'s medical file (see paragraph 16 above). It stated that the examination reports requested by the applicant were not included in the trial material, and his request thus lacked legal basis. Furthermore, the court held that the applicant was entitled to obtain any medical documents given to or acquired by the District Court in the course of the criminal proceedings. Moreover, he had already been given copies of the video recordings and documents included in the pre-trial investigation material.

20. The District Court held a preparatory hearing on 16 August 2002, in which the applicant repeated his request to obtain all of E.'s examination reports. On that date, having obtained the consent of E.'s mother, the court ordered the hospital to submit to the court the requested documents. In another preparatory hearing, held in September 2002, the applicant was finally afforded the opportunity to acquaint himself with the remainder of E.'s medical file.

21. The main proceedings against the applicant began on 9 December 2002. The court received testimony from the applicant and 17 other persons, including Dr S., Dr H. and other doctors. A number of documents, including medical reports drawn up by the doctors treating E.,

were referred to in evidence. The videotaped examinations of E. were played back before the court.

22. On 20 December 2002 the District Court acquitted the applicant of the charge, finding that there was at least reasonable doubt as to his guilt. The court noted that the examination reports obtained during the pre-trial investigation had been exceptionally important to the outcome thereof. According to the court the examinations seemed to have been based on the presumption that E. had been sexually abused by the applicant. Nevertheless, the applicant had not been afforded an opportunity to acquaint himself with E.'s medical file while the examinations at the hospital were being conducted and had only gained access to the totality of her examination reports shortly before the trial. There had thus been crucial shortcomings in the pre-trial investigation, contrary to the rights of the defence as set out in the Criminal Investigations Act (*esitutkintalaki, förundersökningslag*; 449/1987) and the Convention.

23. The prosecutor and E., represented by her mother, appealed to the Court of Appeal (*hovioikeus, hovrätten*). In his reply to that court, the applicant contended, *inter alia*, that the investigation against him had *de facto* been carried out by the doctors and not by the police. He had not been given an opportunity to put questions to E., even indirectly, when she had been examined at the hospital, or at any later stage of the proceedings. He had only seen the video recordings when the pre-trial investigation was already well underway. It transpired from those recordings that during the examinations E. had claimed sexual abuse not only by her father, but also by several other persons. Further, the applicant had only been given access to E.'s medical file at the beginning of the trial, which meant that he had not had adequate time to prepare his defence.

24. The Court of Appeal held an oral hearing between 19 and 22 May 2003. The evidence presented to the court was in most part the same as had been before the District Court. As to the applicant's involvement in the examinations, Dr S. testified that during the feedback discussion of 14 September 2000 he had asked the applicant whether he had any questions. The applicant had not indicated at that point that he wished to have any further examinations conducted.

25. On 19 June 2003 the appellate court quashed the lower court's judgment and convicted the applicant of aggravated sexual abuse. He was sentenced to three and a half years' imprisonment. The court found that E.'s account, recorded on videotape, was essential evidence, but not the sole evidence, against the applicant. In its conclusions the court emphasised E.'s behaviour, as it transpired from the video recordings, and the statements of Drs S. and H., who had examined her, and of another doctor who had treated her. This evidence was supported by three other witness testimonies regarding E.'s behaviour. The court further stated as follows:

“Given that [E.’s] account is essential evidence supporting the charge, [the applicant] or his counsel should have been given an explicit opportunity (“olisi...selkeästi tullut varata tilaisuus”) to put questions to [E.] through the pre-trial authorities or to request further investigations. However, this opportunity has not been provided within a reasonable time nor at a stage when it would have been useful, namely before the beginning of [E.’s] therapy. The procedure has therefore been deficient in part. [Dr S.] has, however, given [the applicant] an opportunity to request further examinations. Having regard to the fact that also other evidence in addition to [E.’s] account has been presented, the Court of Appeal finds that the above-mentioned procedural error cannot lead to the dismissal of the charge. Taking into account the legal protection of the child and her state of health as well as the fact that she had already been undergoing treatment for a long time, it would not have been reasonable to follow the adversarial procedure at a later stage. Naturally, the child’s account and her behaviour, as they transpire from the video recordings, must be taken with circumspection when assessing the evidence. However, the Court of Appeal considers that the taking of evidence, assessed as a whole, meets the minimum requirements of a fair trial.”

26. The applicant sought leave to appeal to the Supreme Court (*korkein oikeus, högsta domstolen*) contending, *inter alia*, that the proceedings had been unfair in the light of Article 6 of the Convention as he had been denied adversarial proceedings and the timely opportunity to acquaint himself with the totality of the case material. On 25 March 2004 he was refused leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. 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 prior to the trial.

28. The Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*), as in force at the material time, provided that a statement included in a pre-trial investigation report or another document, or a statement recorded by other means, could not, as a rule, be admitted as evidence in court. The court might, exceptionally, admit such a statement as evidence, if the witness in question could not be questioned before the court (Chapter 17, articles 11(1)(2) and 11(3), Act No. 690/1997). It was at the court’s discretion to hear as a witness a person less than 15 years old (Chapter 17, article 21, Act no. 571/1948).

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

30. A more detailed description of the domestic law regarding pre-trial investigation and receipt of evidence in court may be found in the Court's judgment of *A.L. v. Finland* (no. 23220/04, §§ 13-22, 27 January 2009).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

31. The applicant complained, under Article 6 §§ 3 (b) and (d) of the Convention, that he had not been afforded an opportunity to put questions to E. while she was examined at the hospital or at any later stage of the proceedings. Yet, E.'s account had been treated as crucial evidence against him. He had also been deprived of the right to have adequate time and facilities for the preparation of his defence as he had not been given access to E.'s examination material at a stage where it would have been of proper use for his defence.

Article 6 reads, in so far as relevant:

"...

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

...

(b) to have adequate time and facilities for the preparation of his defence;

...

(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;

..."

32. The Government contested those arguments.

A. Admissibility

33. 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

34. The Government submitted that two different lines of action had taken place prior to the court proceedings, namely the medical examination of E. and the pre-trial investigation of the applicant. E. had only been examined and interviewed by the medical authorities. The aim of those examinations, which had been recorded on videotape, had been to establish whether E. had been sexually abused or not. The doctors had concluded that such abuse had taken place. The guarantees of adversarial proceedings and equality of arms had not come into play until the commencement of the pre-trial investigation, which had aimed to establish the suspect. By the time the pre-trial investigation was initiated, E.'s therapy had already begun. Thus, she had not been interviewed anew by the police. Accordingly, neither the police nor the prosecutor had had a better opportunity than the applicant to put questions to E. Moreover, E. had only been 3-4 years old at the time which had justified, in terms of receiving evidence, lending more weight to the medical examinations than to the investigative measures in criminal proceedings. The Government further pointed out that, prior to the pre-trial investigation, Dr S. had given the applicant an opportunity to request additional examinations.

35. The Government also submitted that the trial courts had explicitly taken into account the fact that E. had not been heard during the pre-trial investigation and that the proceedings had been defective in that part. The Court of Appeal had emphasised the fact that a fair amount of other evidence had been produced before it, in addition to E.'s recorded account. Furthermore, in its conclusions the appellate court had had particular regard to E.'s behaviour, as it appeared from the video recordings.

36. As to having access to E.'s examination reports prior to the court proceedings, the Government submitted that the applicant had not been able to provide the medical authorities with a sufficient legal basis for his request taking into account, in particular, the competing interests of the child. The Government pointed out that the applicant had been given access to the totality of E.'s medical file some three months before the main hearing, and had thus been provided with adequate time to prepare his defence, taking into account the fact that the file had not been particularly extensive.

Moreover, he had had ample time to prepare his defence prior to the appellate proceedings. The Government further submitted that the documents in question had not formed a part of the pre-trial investigation material.

37. In conclusion, the Government maintained that the applicant's complaints were manifestly ill-founded or, at any rate, the facts of the case did not disclose any violation of Article 6 of the Convention.

38. The applicant submitted that during E.'s examinations at the hospital he had not been given an adequate opportunity to participate in the procedure, although it had been clear that he was suspected of an offence in that connection. As to E.'s medical reports, the applicant claimed that E.'s interests would not have been compromised even if he had been granted access to her medical file as soon as suspicions against him had arisen, and certainly not after the pre-trial investigation against him had begun. As the hospital staff had promised that a meeting between him and E. would be arranged, he had had no reason to request any further examination of the child at that point. Moreover, he would not have been able to present all the relevant questions due to the lack of access to E.'s medical reports. Nor did he have any knowledge of the fact that E. had referred to several possible suspects until he had seen the video recordings of her medical examinations. When the applicant had finally been given access to E.'s medical file, he had learned that there had been no physical evidence whatsoever in support of the alleged sexual abuse. The fact that neither the police nor the prosecutor had been able to question the child was not relevant, as E.'s account, recorded on videotape, had been used as evidence against him in court. Moreover, equality of arms had been breached in that E.'s mother, who had represented her in the proceedings, had had access to her medical file at all stages of the process.

The Court's assessment

39. The Court reiterates that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1 (see *Edwards v. the United Kingdom*, 16 December 1992, § 33, Series A no. 247-B). In the circumstances of the case it finds it unnecessary to examine the applicant's allegations separately from the standpoint of paragraphs 3 (b) and (d), since they amount to a complaint that he did not receive a fair trial. It will therefore confine its examination to the question of whether the proceedings in their entirety were fair (*ibid.*, § 34, and *V. v. Finland*, no. 40412/98, § 73, 24 April 2007). Article 6 § 1 reads in relevant parts:

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

40. 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).

41. 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). The statement of a witness does not always have to be made in court and in public if it is to be admitted as evidence; in particular, this may prove impossible in certain cases (see *Asch v. Austria*, 26 April 1991, § 27, Series A no. 203). In any event, paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps, in particular to enable the accused to examine or have examined witnesses against him. Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII).

42. 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*, no. 46602/99, § 40, 10 May 2007; and *A.L. v. Finland*, cited above, § 37).

43. 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 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; and *A.L. v. Finland*, § 39, cited above, with further references to other judgments against Finland).

44. Turning to the present case, the Court observes that, in convicting the applicant, the Court of Appeal mainly based its decision on the witness testimonies of three medical experts, who had examined or treated E., and on the video-recordings of E.'s examinations. However, the doctors' testimonies, as well as those given by the three other witnesses relied on by the court, were only indirect evidence, as none of the persons giving testimony had witnessed the alleged acts. Those witnesses were only able to give an account of what E. had told them and of their observations of her behaviour. The three medical experts were also able to testify on the credibility of E.'s account. As to the recordings of E.'s examinations, the court did not only have regard to E.'s behaviour, but also to her account of the alleged events. The Court observes that those recordings formed the only direct evidence in the case.

45. Having regard to the above-mentioned evidence which led to the applicant's conviction, the Court must examine whether the applicant was provided with an adequate opportunity to exercise his defence rights within the meaning of Article 6 of the Convention.

46. The Government argued, as was also stated by the Court of Appeal, that Dr S. had given the applicant an opportunity to request additional examinations. The Court notes that according to the Court of Appeal's summary of Dr S.'s testimony, he had asked during the feedback discussion with the applicant whether the latter had any questions. The applicant had not indicated, at that point, that he wished to have any further examinations conducted (see paragraph 23 above). In response to the Government's argument, the applicant pointed out that the hospital staff had earlier promised that he would be given an opportunity to meet E. in person and he had thus not had any reason to request further examination of E. at that point. Nor would he have been able to present all the relevant questions to E. at that stage, as he had not been given access to any of her medical reports containing information about the alleged events (see paragraph 37 above).

47. In these circumstances the Court considers that the applicant had not been informed adequately, in a clear and precise manner, that he would not be afforded another opportunity to have questions put to the child. This case is thus different from such cases as *S.N. v. Sweden* (no. 34209/96, § 49-50, ECHR 2002-V) and *B. v. Finland* (no. 17122/02, § 44-45, 24 April 2007), where the defence had been afforded, but turned down, a possibility to have questions put to the child complainant. The Court would also stress the fact

that the feedback discussion with Dr S. had taken place outside the sphere of the formal pre-trial investigation and thus without the legal guarantees of respect for the rights of the defence. Nor can the Court disregard the applicant's view in that he would not have been able to exercise his right to put questions to the child in full as he was not, at that point, made fully aware of the findings of the doctors who had examined her, as they transpired from the medical reports. Although the applicant was later given full access to E.'s medical file, and he was able to make use of her medical reports in his defence before the trial courts, this was not done at a stage where it would have proved useful.

48. The Court notes that the applicant did not request that E. be heard by the police or before the trial courts. The Court has accepted in similar cases against Finland that in view of the apparent absence of cases where counsel for the defence has successfully requested the cross-examination of young child complainants, the applicant could not have obtained the appearance of the children in person before the courts (see *W. v. Finland*, § 46, and *A.H. v. Finland*, § 43, both cited above). In this case, the child complainant was even younger than in those cases, in fact, only 3-4 years old at the time of the court proceedings. It must also be taken into account that the pre-trial investigation had not even begun before E. started receiving therapy. It is undisputed that from that point on, questioning E. would not have been useful in terms of receiving evidence. This view was even expressed in the Court of Appeal's reasoning. Indeed, the defect in the proceedings as to the applicant's right to put questions to E. prior to the trial was specifically acknowledged by the courts (see paragraphs 21 and 24 above). It can thus be regarded as understandable that the applicant did not, in those circumstances, ask that E. be heard during the criminal proceedings, as it hardly would have benefited his defence.

49. In view of the above, it must have been clear to the medical authorities that hearing E. again in subsequent, and seemingly evident, criminal proceedings would not have been likely, if even possible. Yet, no measures to facilitate the applicant's attempts to build a proper defence were taken. In the circumstances of this case, the Court cannot subscribe to the Government's view that the guarantees of adversarial proceedings and equality of arms only came into play when the pre-trial investigation against the applicant began, especially having regard to the fact that the most important part of the evidence against the applicant was collected before that stage. As to the Government's contention that the police and the prosecutor were afforded no better opportunity than the applicant to put questions to E., the Court does not consider it sufficient for a finding that the applicant was not put in a disadvantageous position *vis-à-vis* the other party (see *W.S. v. Poland*, cited above, § 63). Regard should also be had, in this connection, to the fact that E.'s mother, as the child's representative,

apparently had access to the totality of E.'s medical file throughout the proceedings.

50. The Court further observes that by way of viewing the videotape the courts, as well as the applicant, were able to listen to E.'s own account of the alleged events. The recording also enabled them to observe the manner in which the examinations were conducted and to assess for themselves, at least to a certain degree, the credibility of E.'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*, no. 22508/02, § 60, 17 July 2007), it cannot alone be regarded as sufficiently safeguarding the rights of the defence where no real opportunity to put questions to a person giving the account has been afforded by the authorities (*A.L. v. Finland*, § 41, cited above). Although the Court is satisfied that, in the present case, the Court of Appeal made a careful assessment of the evidence as a whole, the fact remains that the applicant was never afforded an effective opportunity to contest E.'s account.

51. The Court notes that the present case is similar to the cases of *W.*, *A.H.* and *A.L.* (all 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; *A.H. v. Finland*, § 44; and *A.L. v. Finland*, § 44).

52. The Court appreciates that organising criminal proceedings in such a way as to protect the interests of very young victims, in particular in cases involving sexual offences, is a relevant consideration to be taken into account for the purposes of Article 6 (see *Bocos-Cuesta v. the Netherlands*, cited above, § 72). In the circumstances of this case, however, the use of the child's videotaped account as essential evidence, without an adequate and timely opportunity to put questions to the child on the basis of sufficient background information, 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 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. 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

54. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

55. The Government considered the claim excessive as to quantum. Any award should not exceed EUR 4,000.

56. The Court accepts that the lack of 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 4,000 in respect of non-pecuniary damage.

B. Costs and expenses

57. The applicant also claimed EUR 6,917.40 (inclusive of value-added tax) for the costs and expenses incurred before the Court.

58. The Government considered the hourly rate of EUR 180 charged by the applicant’s counsel too high. Any award under this head should not exceed EUR 4,000 (inclusive of value-added tax).

59. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 6,917 (inclusive of value-added tax) for the proceedings before the Court.

C. Default interest

60. 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* the application admissible unanimously;
2. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* by six votes to one
 - (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 4,000 (four thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 6,917 (six thousand nine hundred and seventeen 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* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Niemi is annexed to this judgment.

N.B.
F.A.

DISSENTING OPINION OF JUDGE NIEMI

I respectfully disagree with the majority's conclusion that there has been a violation of Article 6 § 1.

I find that the present case raises important aspects of a fair trial. I certainly agree with the majority that criminal proceedings concerning sexual offences are often perceived as an ordeal by the victim, and that these features are even more prominent in a case involving a minor (paragraph 42 in the present judgment).

The majority has based the violation of Article 6 § 1 of the Convention on the ground that the use of the child's videotaped account as essential evidence, without an adequate and timely opportunity to put questions to the child on the basis of sufficient background information, involved such limitations on the rights of the defence that the applicant cannot be said to have received a fair trial (paragraph 51).

In the case of *Asch v. Austria*, 26 April 1991, § 26-31, Series A no. 203, only a police officer recounted the facts of the case as the victim had described them to him on the day of the incident. The Court stated that it would clearly have been preferable if it had been possible to hear the victim in person, but the right on which she relied in order to avoid giving evidence cannot be allowed to block the prosecution. Her statements, as related by an officer, did not constitute the only item of evidence on which the first-instance court based its decision. The Court found that the rights of the defence were not violated.

On the other hand, the Court has held in several cases that a conviction should not be based either solely or to a decisive extent on statements which the defence has not been able to challenge (paragraph 41 of the present judgment).

In the present judgment there is a dichotomy of indirect and direct evidence. This aspect has been discussed in recent cases such as the cases of *A.H. v. Finland*, no. 46602/99, 10 May 2008; and *A.L. v. Finland*, no. 23220/04, 27 January 2009. In the case of *B. v. Finland* (no. 17122/02, 24 April 2007) there was a situation where the children's statements as recorded on videotape constituted virtually the sole evidence on which the courts' findings of guilt were based since the witnesses had made no observations on the alleged acts and gave evidence only on the children's reliability. However, in the latter case the applicant and counsel had been afforded an opportunity to have questions put to the children during the pre-trial investigation in 1998 but they did not avail themselves of that possibility.

In the present case the complaint is based on two aspects: Firstly, that the applicant had not been afforded an opportunity to put questions to E. while she was examined at the hospital or at any later stage of the proceedings. Secondly, that the applicant had not been given access to E.'s examination material at a stage where it would have been of proper use for his defence.

Starting with the latter question I find that, although the facts of the case are stated correctly, there is a certain vagueness in respect of the use of terms "examination report", "examination material", "medical report", "medical file" and "patient record". The applicant had at his disposal the expert statements of Drs S. and H. from the University Hospital from the very beginning of the pre-trial investigation. Also the four video recordings, which were to be important for the outcome of the case, were shown to him at an early stage of the pre-trial investigation. He did not, however, have access to E.'s whole medical file earlier than three months before the main proceedings at the District Court began.

In this respect it is crucial to bear in mind the applicant's triple role as the father and guardian of E. but also as the suspect and later accused. Article 6 guarantees his rights as a suspect and an accused and in this relation E. is the victim. I do not see that Article 6 would give an accused, and even less a person who is merely suspected of an offence, unlimited access to the victim's medical file taking into account the victim's right to private life.

The majority's reasoning seems to suggest that the medical file should have been given to the applicant before he was charged with the offence – or even before the pre-trial investigation was opened¹, this implying that a person suspected of a sexual offence should have access to the victim's medical file regardless of whether charges are ultimately brought. If this is the majority's view, I must express my disagreement. All in all, I cannot agree that the lack of early access to E.'s whole medical file would play a role when assessing the applicant's defence rights as a whole. This is so in particular in view of the fact that the applicant had access to the whole medical file some three months before the main hearing and thereby he had sufficient time to prepare any arguments he wished to raise on the basis of that file.

A more difficult aspect of the case is how the questioning of E. was conducted.

In the case *A.H. v. Finland* (cited above) the Court accepted that the applicant A.H. could not have obtained the child's appearance in person before the courts. In the present case it is also clear that there were no possibilities of hearing E. before a court taking into account her young age

¹ The reasoning in para. 46 seems to contain criticism of the fact that by the time of the feedback discussion of 14 September 2000 (see paras. 8 and 23), that is before the beginning of the pre-trial investigation, the applicant did not have full access to E.'s medical reports / medical file.

and the time that had elapsed. However, this answer does not, as such, cover the pre-trial investigation.

It is undisputed that the applicant has not been able to put questions to E. directly or through experts. It is not, however, clear in what manner and when he stated that he wished to do so.

In the present judgment (paragraph 47) it is stated that the applicant did not request that E. be heard by the police or before the trial courts but this is found understandable for several reasons. One of the reasons is that the pre-trial investigation had not even begun before E. started receiving therapy. However, her therapy started in January 2001 and the pre-trial investigation in the middle of February 2001.

It is of course difficult to say afterwards whether an opportunity to question E. could have been arranged during the spring of 2001 as such a request was never made. On the other hand, there does not seem to be any reason why the applicant, who was assisted by a lawyer, should not have made such a request. His repeated requests concerning access to the medical file show that he was able to act actively in the proceedings instead of passively waiting for the authorities to instruct him what to do.

Furthermore, I am unable to see that the lack of access to E.'s whole medical file still in spring 2001 could have prevented the applicant from formulating questions he wanted to be examined in more detail. After all, he had at his disposal the expert statements and video recordings, and the victim and her mother were his family members. The applicant's background information cannot be seen as insufficient for formulating questions to be discussed with E. in a manner suitable for a child not yet four years old.

This case raises the question as to how far the obligations of Article 6 reach. Should the doctors of the University Hospital, later expert witnesses, really have understood that it was their duty "to facilitate the applicant's attempts to build a proper defence" (paragraph 48 of the present judgment)? Or should they have postponed the therapy for a couple of months? I would be reluctant to take these steps. The role of the doctors examining E. was not to take stand on the question of guilt, all the more since otherwise there would have been strong reasons for the applicant to criticize their neutrality towards him.

In my view, the majority's judgment too lightly appears to impose on doctors such obligations that do not normally and naturally belong to their role. It is on this important point that the judgment also takes a new, problematic step as compared to the other Finnish cases, in which the finding of a violation has been based on actions or omissions by authorities in charge of pre-trial investigation or by judicial authorities.

For me the question remains whether the police should, during the pre-trial investigation in the beginning of 2001, have clearly asked the applicant and his counsel about their view on questioning E. Ideally they should, as

the Court of Appeal unequivocally stated. The police should have acted actively in this regard, although I cannot leave without mentioning anew that at the same time the applicant acted very actively in order to obtain E.'s medical file.

When balancing the aforementioned deficiency in the proceedings as a whole I find that this case falls between the cases of *A.L. v. Finland* and *A.H. v. Finland* (violation of Article 6) and *B. v. Finland*, where no violation of Article 6 was found (all cited above).

Firstly, the applicant did not avail himself of the opportunity to ask for supplementary questions to be put to E. at a time when this would still have been possible, that is in early 2001. In this context I must repeat that I do not accept that, at earlier stages, it was incumbent on the doctors of the University Hospital "to facilitate the applicant's attempts to build a proper defence".

Secondly, the Court of Appeal was aware of the requirement to treat indirect evidence very cautiously. Three doctors, who had personally met E., testified about her behaviour and the applicant could cross-examine them. A team leading doctor at the University Hospital was also heard. The applicant had also an expert witness, children's and youth psychiatrist, evaluating the examination methods and the results drawn.

The proceedings were not perfect. E.'s statements were not, however, the only evidence. In the circumstances of the case, the fact that the applicant had not actively been offered an opportunity to have questions put to E. does not, in my view, restrict the rights of the defence to the extent that the applicant would have been deprived of a fair trial, taking into account the proceedings as a whole. Consequently, there has been no breach of Article 6 § 1.