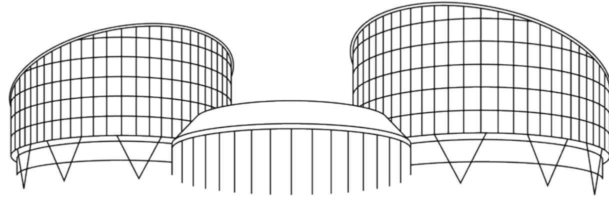

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF A.S. v. FINLAND

(Application no. 40156/07)

JUDGMENT

STRASBOURG

28 September 2010

FINAL

28/12/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

In the case of A.S. v. Finland**,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Mihai Poalelungi, *judges,*
Riitta-Leena Paunio, ad hoc *judge,*
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 8 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 40156/07) 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.S. ("the applicant"), on 7 September 2007. 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 Markku Fredman, a lawyer practising in Helsinki. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen of the Ministry for Foreign Affairs.

3. The applicant, charged with sexual abuse of a child, contended that his defence rights had not been respected in the criminal proceedings against him in that the courts had made use of a video-taped interview with the alleged victim although he had not been afforded an opportunity to put questions to the child.

4. On 1 December 2008 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 Päivi 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 Riitta-Leena Paunio to sit as an *ad hoc* judge (Rule 29).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. On 20 January 2004 a mother contacted the police on account of a suspicion that her child A., a boy born in 1999, had been sexually abused by a family friend, the applicant. On the same date the police took a statement from the mother.

7. On 26 February 2004 A. was interviewed at the children's hospital at the request of the police. The interview was conducted by a psychologist. The investigating police officer, the head psychologist of the hospital, and the deputy head physician Dr S., specialised in child psychiatry, followed the interview behind a mirrored wall. The interview was recorded on video-tape. The applicant was not present when the interview was conducted and apparently he had not even been informed about the investigation at that point.

8. A psychological examination was performed on A. on two occasions, namely 1 and 15 March 2004, by the head psychologist. A physical examination was also performed. The mother was interviewed by a specially trained nurse on 1, 12 and 15 March 2004.

9. On 21 May 2004 Dr S. and the two psychologists gave a written statement of their findings. They concluded that A.'s account seemed reliable, that is, he was recounting events that had very likely taken place. Certain changes in A.'s behaviour were also mentioned which, according to those medical experts, reflected sexual abuse to which he had been subjected. According to Dr S. and the two psychiatrists, no such circumstances had emerged in the examinations, or the previous information produced in the case, which supported some alternative explanation to A.'s account and symptoms. No specific findings of A.'s physical examination were mentioned in the statement.

10. On 30 June 2004 Dr S. gave another statement noting, *inter alia*, that issues regarding the suspected abuse had disturbed A.'s psychological balance and caused him confusion, insecurity and anxiety. In her opinion, subjecting A. to more questions about the matter would be harmful to him and he should not be interviewed again.

11. On 1 July 2004 the police questioned the applicant as a suspect. He denied all allegations of sexual abuse. On 8 July 2004, after having taken another statement from A.'s mother, the police closed the pre-trial investigation.

12. On 12 October 2004 the public prosecutor preferred charges against the applicant with the District Court (*käräjäoikeus, tingsrätt*) accusing him of having sexually abused A.

13. After having been served with the summons, the applicant contacted a lawyer. On 4 February 2005 he submitted a communication to the District Court noting that, apparently, the prosecutor intended to present the video recording of A.'s interview as evidence before the court. The applicant agreed that, in the light of Dr S.'s last statement, A. should not be heard again. He pointed out, however, that he had not been afforded an opportunity to put questions to A. during the pre-trial investigation as required by section 39(a) of the Criminal Investigations Act (*esitutkintalaki, förundersökningslagen*, Act No. 449/1987 with later amendments). Nevertheless, instead of requesting the court to exclude A.'s account due to that procedural error, the applicant wished to submit the video recording as evidence on his behalf. In the applicant's view the recording contained certain absurdities and showed that A. was merely repeating sentences that he had been rehearsed to say.

14. On 10 February 2005 the District Court held its first session. Having heard the prosecutor's opening arguments, the applicant now claimed that the video recording could not be used in evidence, since his legal right to put questions to the witness had not been respected. The prosecutor was of the opinion that the recording should be viewed in order to allow the court to assess A.'s level of maturity and the value of his account as evidence. The complainant, that is A. represented by his mother, joined the prosecutor's pleadings. After a discussion concerning the recording, the applicant consented to its being viewed and the court proceeded with the hearing.

15. The court was presented with the two written statements given by the psychologists and Dr S. During its first session, the court also received testimony from A.'s mother, the applicant and the applicant's former wife. A.'s mother testified on the events leading to her suspicions of sexual abuse and what A. had told her about those events. The applicant's former wife testified to his character. The court held another session on 25 February 2005, during which the video recording of A.'s interview was played back. It appears that Dr S. gave testimony in that connection as a medical expert making also an assessment of the credibility of A.'s account.

16. On 11 March 2005 the District Court delivered its judgment. As to the proceedings, it noted that the law did not allow the use of video-taped testimony of a person under 15 years of age if the accused had not been provided with an opportunity to have questions put to that person. It observed that the applicant had not been afforded such an opportunity. It further observed Dr S.'s statement concerning the negative consequences for A. if interviewed again. The court acknowledged that there had been a procedural error which could not be rectified. However, it noted that the video recording of A.'s interview had been shown to the court with the applicant's consent and Dr S. had given testimony as to the credibility of his account.

17. As to the merits, the court found that neither A.'s account nor the other evidence presented to it supported the charge and acquitted the applicant.

18. The prosecutor and the complainant appealed against the judgment to the Court of Appeal (*hovioikeus, hovrätt*). In his response to their pleadings, the applicant again pointed out the flaw in the proceedings in respect of his right to examine witnesses against him.

19. On 13 June 2006 the Court of Appeal held an oral hearing. It was presented with the same evidence as the District Court, along with some fresh written evidence.

20. The prosecutor named the video recording of A.'s interview as evidence, with no opposition from the complainant party. The applicant, on the other hand, maintained his argument that he had been deprived of his legal right to put questions to A. and that the court should assess whether the video recording could, in those circumstances, be admitted. The applicant further argued that his consent in the District Court was not relevant in that respect and that he had not himself submitted the recording as evidence.

21. The Court of Appeal observed that, in the District Court's hearing of 10 February 2005, the applicant had named the video recording as evidence in its totality. The applicant then argued that he had been left with no other choice, as the District Court had allowed Dr S. to testify to A.'s account, which was merely second-hand evidence. He further stated that if the Court of Appeal were, in turn, also to allow the use of Dr S.'s testimony and her written statement concerning A.s' interview, he would have to name the video recording as evidence again. In response to the court's inquiry as to what questions the applicant had wished to ask A., he mentioned a certain detail about A.'s account of events for which he wanted to have a clarification. He had also wished to ask A. if his mother had told him about the interview beforehand and whether she had asked him to say anything in particular.

22. The court made reference to the relevant legislation and its *travaux préparatoires* concerning the obtaining and use of evidence as well as the particular circumstances of the case at hand. It noted, in particular, that due to the circumstances mentioned in Dr S.'s statement of 30 June 2004, it had not been possible to hear A. again. The court found that A.'s videotaped account was to be considered as a statement given in a pre-trial investigation, within the meaning of Chapter 17, Article 11, of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*). Since the applicant had not been given the opportunity to put questions to A., in a manner described in more detail in the Criminal Investigations Act, the video recording of A.'s interview could not, in principle, be played back before the court and used in evidence. The court found, however, that testimony about A.'s account of the alleged events could be received from

his mother. The statement concerning A.'s interview, and testimony by Dr S. on that matter, were also permissible. The court then noted the applicant's submissions that, under those circumstances, he would invoke the video recording as evidence. Having regard to the fact that he had already done so in the District Court, it found that the recording could also be treated as evidence in the Court of Appeal. Consequently, the video recording was played back in the appellate court's oral hearing.

23. On 22 August 2006 the Court of Appeal delivered its judgment. It found that the accounts given by A., his mother and Dr S., as well as the written statement concerning A.'s psychological examination, showed that the applicant had committed one of the sexual acts specified in the indictment. It convicted him of sexual abuse of a child and sentenced him to one year's suspended term of imprisonment.

24. On 11 May 2007 the Supreme Court (*korkein oikeus, högsta domstolen*) refused the applicant leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The pre-trial investigation

25. 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).

26. The Criminal Investigations Act provides that the investigator may permit a party and his or her counsel to be present during the questioning of another party or witness, provided that 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).

27. The Criminal Investigations Act also provides that the questioning of a victim or a witness (from now on referred to as “the witness”) must be recorded on video-tape, or by using other comparable means of audio-visual 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 mental disturbance, 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 allow also 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 questions through legal counsel or another representative. However, the investigator may order that questions be put through his or her intermediary (section 39(a), Act No. 645/2003).

B. The receipt of evidence in court

28. The applicable rules on receiving testimony are laid down in the Code of Judicial Procedure.

29. A statement in a pre-trial investigation report or another document may, as a rule, not be admitted as evidence in court. The court may admit such a statement as evidence, if the person who had given the statement cannot be heard before the court or outside its oral hearing (Chapter 17, Articles 11(1)(2) and 11(3), Act No. 690/1997).

30. The testimony of a person under 15 years of age, or a mentally disturbed person, recorded on audio or video-tape 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), the above-mentioned 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. The Bill states that a recorded account could be used in evidence even where the defendant has not availed him or herself of the opportunity to put questions to the witness in question, provided that he or she had been afforded such an opportunity. The Bill does not recognise an exception to that rule.

31. As to the hearing of a child under the age of 15 at the trial, Chapter 17, Article 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 (hereafter "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.

C. The Supreme Court's case-law

32. The Supreme Court has in its precedent no. KKO 2006:107 (voting) examined the question of admissibility as evidence of a video recording in a case concerning alleged sexual abuse of a child. In that case the plaintiff child's interview had been recorded on video-tape during the pre-trial investigation. The defendant had not, however, been afforded an opportunity to put questions to the child. In its procedural decision the Supreme Court stated:

"...

The Supreme Court notes that during the pre-trial investigation A. had not been provided with an opportunity to put questions to B., who is a minor. Thus, and having regard to Chapter 17, Article 11(2) of the Code of Judicial Procedure, B.'s account, recorded on video-tape, should not have been used in evidence by the lower courts. Those courts should have brought that issue to the defendant's attention on their own initiative. There would not, however, have been any impediment as to the use of the video recording in evidence had the defendant been given explicit consent to it or if the handicap caused by the lack of opportunity to put questions to the child could have been rectified before the court by, for example, hearing B. in person.

When considering the admissibility of the video recording as evidence in the Supreme Court, the court firstly notes that absolute prohibitions [in that respect] are exceptional in the Finnish legal system. The main rule is the principle of free assessment of evidence. That largely leaves it up to the parties to decide what circumstances and evidence they wish to invoke in their case. It is left to the court's discretion to decide which evidentiary value it attributes to each piece of evidence.

The restriction on the admissibility of recorded statements laid down in Chapter 17, Article 11(1)(2) of the Code of Judicial Procedure is ultimately aimed to ensure a fair trial for the suspect. Therefore, in the interpretation of the extent of that restriction, attention must be paid to the proceedings as a whole. Chapter 17, Article 11(3) of the [Code] 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 Supreme Court went on to note that the child had not been heard before the lower courts, nor could that flaw be rectified by hearing [him] before the Supreme Court, given [his] young age and level of development and the time elapsed since the alleged events. The Supreme Court observed that the defendant had been represented by counsel already at the pre-trial stage. He could thus have requested an additional interview with the child prior to the trial. As he had not done so, nor made any argument concerning

the lack of opportunity to put questions to the child until the Supreme Court drew [his] attention to that issue, it seemed likely that the defendant had not been disadvantaged by that flaw in the proceedings. The court also found that the defendant had apparently considered that submitting the video recording as evidence, even in the Supreme Court, benefited his defence. The Supreme Court concluded that the use of the video recording, already played back before the lower courts, did not compromise the defendant's right to a fair trial. Moreover, he was able to express his opinion on the evidentiary value of that recording in the Supreme Court's oral hearing. The Supreme Court thus admitted the recording as evidence. Having held its oral hearing, the court upheld the defendant's conviction.

33. In another Supreme Court precedent concerning alleged sexual abuse of a child, no. KKO 2008:68, the question at stake was hearsay evidence. The court noted, at the outset, that such evidence was not prohibited by the domestic law and could be taken into account according to the principle of free assessment of evidence. In this case, the complainant child had initially been examined by a psychologist, who had interviewed her on two occasions. These interviews had given rise to a suspicion of sexual abuse and led to a criminal complaint. At the request of the police, the child had been interviewed again, now as a part of the pre-trial investigation. Unlike the previous interviews, the third interview had been recorded on video-tape, but the suspect was not given an opportunity to put questions to the child. In that third interview, the child had retracted her previous statements. Charges were subsequently brought and the defendant was convicted of sexual abuse. The conviction was upheld on appeal. According to the appellate court the main evidence against the defendant had not been the video-taped interview but the child's account as given to the psychologist. That court found it very unlikely that hearing the child again would shed more light on the matter, as the child had retracted her initial account.

The Supreme Court noted that the courts had not been able to assess the child's own original account of events but they had only to rely on the psychologist's testimony and written statement in that respect. This prevented a reliable assessment being made of the child's third, video-taped interview. Furthermore, as the defendant had not been given an opportunity to put questions to the child, the conviction could not be based to a decisive degree on the hearing of the psychologist. In the absence of other substantial evidence in support of the charge, the Supreme Court acquitted the defendant.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

34. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that he was denied a fair hearing in that he was not afforded an opportunity to put questions to the principal witness against him, that is, the complainant child. A.'s account had been the only direct evidence against him. The other persons heard before the courts had not witnessed the alleged acts but were only able to give second-hand information about them or assess the reliability of A.'s account. Nevertheless, the courts had admitted as evidence the video recording of A.'s interview.

Article 6 reads, insofar 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;
>
> ..."

35. The Government contested those arguments.

A. Admissibility

36. 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

1. Submissions of the parties

The Government

37. The Government argued that the applicant's defence rights had not been so limited as to deprive him of a fair trial.

38. The Government submitted that the interview with A. had been arranged very soon after the alleged events, when the child's account had been the most reliable. The authorities had been presented with an expert medical opinion advising that the child, who was only five years old at the time, should not be heard again. Moreover, the applicant had not made a request to that end. The applicant's right to a fair hearing had been limited, without prejudice to the fairness of the proceedings as a whole, on grounds of the best interest of the child. The Government referred in this connection to Article 3 § 1 of the United Nations Convention on the Rights of the Child, which states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

39. The Government contended that the applicant's right to an effective defence had been protected by other means. The trial courts had heard him in person. It had been open to the applicant to put forward any argument concerning the video-taped evidence. The national courts had taken all necessary care in their assessment of A.'s account. The courts had also received testimony from A.'s mother, Dr S. and the applicant's wife, and the applicant had had the opportunity to put questions to all those witnesses.

40. At a more general level, the Government submitted that if a trial concerning suspicion of sexual abuse of a child could not be held in a situation where the rights of the defence could not be limited, the legal protection of the complainant child would be negatively affected.

41. The Government finally argued that A.'s account did not constitute the only or decisive evidence against the applicant. At any rate, the applicant himself had chosen to invoke the video-recording of A.'s interview as evidence, regardless of the fact that it had been produced in violation of the national law. He had thus waived his right to examine that particular witness in person. In that respect, the current case was comparable to the case summarised in the Supreme Court's precedent no. KKO 2006:107 (see paragraph 32 above).

The applicant

42. The applicant, for his part, argued that A.'s account, recorded on video-tape and played back before the trial courts, constituted the only direct evidence against him. The other witnesses heard by the courts had made no observations on the alleged acts. Neither the applicant nor his counsel had at any stage been afforded an opportunity to put questions to the child.

43. The applicant submitted that only strictly necessary measures restricting the rights of the defence were permissible under Article 6. The Court has established in its case-law that criminal proceedings concerning sexual offences are often conceived as an ordeal by the victim. In the view

of the applicant they are, likewise, conceived as an ordeal by the innocent suspect. Where an opportunity to examine a child witness cannot be afforded, prosecution should be waived, excluding such cases where there is other substantial evidence in support of the charge. In this case, the remaining evidence had not been of such nature.

44. The applicant made reference to the Supreme Court's judgment no. KKO 2008:68 (see paragraph 33 above), where the defence had been faced with the problem of hearsay evidence. The same issue arose also in the present case. The defence had been confronted with the question of whether to invoke the primary evidence or to argue that no hearsay evidence was to be admitted. The latter had not been an option, as the domestic law did not prohibit the use of such evidence. Similarly to the above-mentioned case examined by the Supreme Court, it was the account of the complainant child in this case which had led to the finding of guilt. All the other evidence had ultimately stemmed from the child's account.

45. The applicant pointed out that there were no reasons why the applicant or his counsel could not have been afforded the right to observe the interview with A. and to put questions to him either directly or through another person, in compliance with the Criminal Investigations Act. The fact that Dr S. had subsequently advised against the hearing of the child again was irrelevant in that respect.

46. Lastly, the applicant argued that he had at no point waived his right to put questions to A. On the contrary, he had informed the courts of the questions that he had wanted to ask. Having regard to the expert medical opinion of Dr S., it had been obvious to the applicant that any request to hear A. again would have been rejected.

2. The Court's assessment

47. 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).

The right to examine witnesses

48. The Court shall first examine the question of whether the applicant's defence rights were respected when the video recording of A.'s interview was admitted and used in evidence by the trial courts in the criminal proceedings against him, even though he had not been afforded an opportunity to put questions to A.

49. The Court notes, at the outset, that this course of action was not in compliance with the domestic law, as duly acknowledged by the trial courts. However, those courts effectively found that the applicant's consent to the viewing of the video recording constituted a derogation from the procedural

rules concerning admissibility of evidence (see paragraphs 16 and 22 above).

50. The Court reiterates that, in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, § 45, Series A no. 140; *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports* 1998-IV; *Jalloh v. Germany* [GC], no. 54810/00, §§ 94-96, ECHR 2006-IX; and *Bykov v. Russia* [GC], no. 4378/02, § 88, ECHR 2009-...).

51. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found (see, among other authorities, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; *Heglas v. the Czech Republic*, no. 5935/02, §§ 89-92, 1 March 2007; *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX; and *Bykov*, cited above, § 89).

52. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, *mutatis mutandis*, *Khan*, §§ 35 and 37, *Allan*, § 43, and *Bykov*, § 90, all cited above).

53. 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*, cited above, § 27). 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).

54. Furthermore, 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, *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; *A.L. v. Finland*, no. 23220/04, § 37, 27 January 2009; and *D. v. Finland*, no. 30542/04, § 42, 7 July 2009).

55. The Court would add that 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 *D. v. Finland*, cited above, § 43).

56. In acknowledging the need to strike a balance between the rights of the defendant and those of the alleged child victim, the Court finds that the following minimum guarantees must be in place: the suspected person shall be informed of the hearing of the child, he or she shall be given an opportunity to observe that hearing, either as it is being conducted or later from an audiovisual recording, and to have questions put to the child, either directly or indirectly, in the course of the first hearing or on a later occasion.

57. Turning to the present case, the Court notes firstly that 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*, cited above, § 25; and *A.L. v. Finland*, cited above, § 38), because his account given at the interview with the hospital psychologist, as recorded on video-tape, was played back in court and used in evidence in the criminal proceedings against the applicant.

58. The applicant's argument was that A.'s account, or witness testimony as it stood, constituted the only direct evidence against him. He stressed that he had not been given an opportunity to contest effectively that account by putting questions to A.

59. The Court observes that both the District Court and the Court of Appeal based their judgment, at least in part, on A.'s video-taped account. While the lower court found the evidence produced before it insufficient for a conviction, the Court of Appeal came to a different conclusion in its assessment of the evidence. Relying on the accounts given by A., his mother and Dr S., as well as the written statement concerning A.'s psychological examination, it found that the applicant had committed one of the sexual acts specified in the indictment.

60. As pointed out by the applicant, the evidence given by A.'s mother and Dr S. was only indirect evidence, as they had not witnessed the alleged acts. They were only able to report to the courts what A. had told them and their observation of his behaviour. In her capacity of medical expert, Dr S. was also able to make an assessment of the credibility of A.'s account. The written evidence relied upon by the appellate court in convicting the applicant consisted of a report drawn up by medical experts of A.'s psychological examination, conducted after the alleged events.

61. The Court thus finds that A.'s account, recorded on video-tape, formed the only direct evidence incriminating him and must thus have had a decisive influence on his conviction on appeal.

62. The Court must now examine whether the applicant was provided with an adequate opportunity to exercise his defence rights within the meaning of Article 6 § 3 (d) of the Convention as regards the admission and use of that evidence against him.

63. The Court observes that the domestic law allows the use in evidence of an account given prior to the trial by a person under 15 years of age provided that such testimony has been recorded on video-tape, or by using other comparable means of audio-visual recording, and that the defendant has been afforded an opportunity to put questions to that person (see paragraphs 27 and 30 above). In the case at hand, A.'s interview, conducted on 26 February 2004 at the request of the police, had been recorded on video-tape. A number of persons not participating in the interview had been able to follow it behind a mirrored wall. However, the applicant, who was the suspect in the case, had not been present on that occasion or even

informed thereof (compare and contrast, *Accardi and Others v. Italy* (dec.), no. 30598/02, ECHR 2005-II). The documents do not disclose any reason as to why the formalities laid down by the law were not complied with in that respect. The applicant was first questioned by the police as a suspect on 1 July 2004. On the previous day Dr S. had advised against any further questioning of A., so as to protect his well-being. It is to be noted that A. was not interviewed again during the pre-trial investigation.

64. The Court observes that A. was not heard before the trial courts either, and nor did the applicant make a request to that end. In similar cases against Finland the Court has noted the apparent absence of domestic cases where counsel for the defence successfully requested the cross-examination of young child complainants (see *W. v. Finland*, cited above, § 46; and *A.H. v. Finland*, cited above, § 43). In this case, the child complainant, A., was only 6 to 8 years old at the time of the court proceedings. Moreover, the applicant had been informed of Dr S.'s opinion that A. should not be heard again. Both trial courts also referred to that opinion in their reasoning. In those circumstances, abstaining from making a request to hear A. at the trial cannot be held against the applicant.

65. The applicant had at no stage of the proceedings been afforded an opportunity to exercise his defence rights by putting questions to A. This case is thus different from such cases as *S.N. v. Sweden* (no. 34209/96, § 49-50, ECHR 2002-V), *Accardi and Others v. Italy* (dec.), (cited above), and *B. v. Finland* (no. 17122/02, § 44-45, 24 April 2007), where the defence had been afforded, but had turned down, the possibility to have questions put to the child complainant.

66. The Court further observes that by viewing the video recording of A.'s interview the courts, as well as the applicant, were able to listen to A.'s own account of the alleged events. The recording also allowed them to observe the manner in which the interview was conducted and to assess for themselves, at least to some degree, the credibility of A.'s account. It was open to the applicant to contest and comment on the video-taped evidence 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, and *D. v. Finland*, § 50, both cited above). Although the Court is satisfied that, in the present case, the trial courts made a careful assessment of the evidence as a whole, the fact remains that the applicant was never, and this contrary to the specific provisions of the domestic law, afforded an opportunity to contest effectively A.'s account by having questions put to him.

67. The Court reiterates that it has found a violation in comparable Finnish cases where 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; *A.L. v. Finland*, § 44; and *D. v. Finland*, § 51, all cited above). At the time of the trial in those cases, the current law obliging the authorities to provide the defendant with an opportunity to put questions to the witness during the pre-trial investigation in the event that his or her video-taped testimony was to be used in evidence in subsequent court proceedings, was not yet in force. Thus, in the case at hand, the lack of such an opportunity is further highlighted by the non-compliance with the provisions of the domestic law, even though the trial courts, the Court of Appeal in particular, gave detailed reasons for their derogation from those procedural rules.

68. 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 consideration to be taken into account for the purposes of Article 6 (see *Bocos-Cuesta v. the Netherlands*, cited above, § 72). However, it concludes that in this case, as in those cases mentioned in paragraph 66 above, the use of a complainant child's video-taped account as the only direct evidence leading to the applicant's conviction, without giving him any opportunity to put questions to that child, involved such limitations on the rights of the defence that the proceedings could not be said to have complied with the requirement of a fair trial, as set out in Article 6 §§ 1 and 3 (d) of the Convention.

Waiver of the right to examine witnesses

69. The second question to be addressed is whether the applicant had, nevertheless, waived his right to examine A., the principal witness against him.

70. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must not run counter to any important public interest (see *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII, with further references).

71. The Court reiterates that before an accused can be said to have impliedly, through his conduct, waived an important right under Article 6 it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (*Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003).

72. As the Court has observed above, the trial courts readily acknowledged that the proceedings were flawed in that the applicant had not

been afforded an opportunity to put questions to A. It further observes that the applicant did not ask, explicitly, that the video recording be omitted from the evidence. In the District Court, after a discussion with the possibility of adversarial argument, the applicant eventually consented to the viewing of the video recording. While he later explained before the Court of Appeal that he had been left with no other choice than to do so, as the lower court had allowed the use of Dr S.'s testimony concerning A.'s account, he ultimately left the question of admissibility of the evidence, in its totality, to the discretion of the appellate court (see paragraph 21 above).

73. The Court finds no reason to believe that the applicant, assisted by counsel throughout the court proceedings, did not understand that by consenting to the viewing of A.'s video-taped account he also allowed the trial courts to make a full assessment of that piece of evidence, in the context of the evidence produced to the courts in its totality. The applicant thus took an advised decision in favour of the courts' free assessment of evidence, even though it was not in his power to limit the courts' findings to only those observations which were favourable to his defence. As it turned out, the trial courts came to different conclusions based on that same evidence.

74. Having said that, the Court finds, however, that merely by consenting to the viewing of the video-recording in the above-described manner the applicant cannot be understood as having waived of his own free will, either expressly or tacitly, his right to put questions to A. On the contrary, the applicant consistently argued that the proceedings were flawed in that he had not been afforded an opportunity to do so, and he requested the courts to take that into account in assessing the admissibility of evidence. As it was clear that A. could not be heard again, the applicant chose to invoke the video-recording on his behalf in a situation where the remaining evidence produced to the courts was of an indirect nature. The Court cannot conclude that the applicant had, in those circumstances, unequivocally waived his entitlement to the guarantees of a fair trial.

Overall conclusion

75. The Court found above that A.'s account, recorded on video-tape, constituted the only direct evidence leading to the applicant's conviction. It also found that the lack of opportunity to put questions to A. involved such limitations on the applicant's defence rights that he could not be considered to have received a fair trial. Furthermore, the Court found that the applicant did not waive his right to contest A.'s account by putting questions to him. It thus follows that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (d).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. 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

77. The applicant claimed 3,500 euros (EUR) in respect of non-pecuniary damage.

78. The Government considered that claim reasonable, were the Court to find a violation.

79. 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, and awards him the full sum claimed under this head.

B. Costs and expenses

80. The applicant also claimed EUR 3,368.67 (inclusive of value-added tax) for the costs and expenses in the domestic proceedings. That sum corresponds to two thirds of the totality of costs and expenses before the domestic authorities and was necessarily incurred in the attempt to avoid the violation complained of. The applicant further claimed EUR 2,970.10 (inclusive of value-added tax) for the costs and expenses before the Court.

81. The Government considered the total amount claimed for costs and expenses too high. Any award under this head should not exceed EUR 5,500 (inclusive of value-added tax).

82. 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 total sums claimed, that is EUR 3,368.67 as regards the national proceedings and EUR 2,970.10 for the proceedings before the Court (both amounts inclusive of value-added tax).

C. Default interest

83. 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 taken together with Article 6 § 3 (d) 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 3,500 (three thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 6,338.77 (six thousand three hundred and thirty-eight euros and seventy-seven cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 28 September 2010, 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 Mijović is annexed to this judgment.

N.B.
F.A.

DISSENTING OPINION OF JUDGE MIJOVIĆ

1. There are various reasons why I am unable to agree with the majority of the Chamber in this case.

2. The first concerns the facts of the case and their interpretation by the Chamber. I refer in particular to the following circumstances.

3. In January 2004 the mother of A. (at that time a five-year-old boy) contacted the police on account of a suspicion that her child had been sexually abused. One month later A. was interviewed at the children's hospital. The interview was recorded on video-tape and was conducted by a psychologist. The investigating police officer, the head psychologist and Dr S., a specialist in child psychiatry, followed the interview from behind a mirrored wall. The applicant, not being officially suspected of sexual abuse at that stage, was not present. That was the only statement taken from A., since Dr S. noted that issues regarding the suspected abuse had seriously disturbed A.'s psychological balance, causing him confusion, insecurity and anxiety. He recommended that A. should not be interviewed again. After being indicted, the applicant in his communication to the District Court agreed that, in the light of Dr S.'s statement, A. should not be heard again. At this point it could be said (as the Chamber did) that the applicant had not been afforded an opportunity to put questions to A. during the pre-trial investigation (as required by domestic law) and because of that there had been a violation of his procedural rights. However, in my opinion the applicant was at fault. Instead of requesting the trial court to exclude A.'s account in view of the procedural error, he actually insisted on submitting the video recording as evidence on his behalf. In my view, it was at that particular moment that the applicant waived his right to examine the child as a witness by simply consenting to the trial court's use in evidence of his video-taped account. In addition, during the District Court's first hearing and after a discussion concerning the use of the recording, the applicant once again consented to its being viewed, with the result that the District Court proceeded with the hearing (§§13-14 of the judgment).

4. In March 2005 the District Court delivered its judgment and acquitted the applicant. Following the prosecutor's appeal, the applicant argued before the Court of Appeal that he had named the video recording as evidence since he had been left with no other choice. He then stated that if the Court of Appeal were also to allow the use of Dr S.'s testimony, he would once again name the video recording as evidence.

5. To my mind, that was the second occasion on which the applicant waived of his own free will, not even tacitly, but expressly, his Article 6 § 3 (d) right. The consequences were serious for the applicant since the Court of Appeal, as opposed to the District Court, convicted the applicant of sexual abuse of a child and sentenced him to a suspended term of imprisonment of one year.

6. After the Supreme Court refused leave to appeal, the applicant complained to the European Court that he was denied a fair hearing in that he was not afforded an opportunity to put questions to the principal witness against him and that A.'s account had been the only direct evidence against him. In its judgment, the majority of the Chamber accepted the applicant's arguments, confirming in addition that A.'s account, recorded on video-tape, constituted the only direct evidence for the applicant's conviction (see § 74 of the judgment). This led the Chamber to the conclusion that there had been a violation of Article 6 § 1 taken together with Article 6§3 (d).

7. That is my second point of disagreement. It seems to me that the applicant, acquitted by the District Court but convicted by the Court of Appeal, wanted the European Court to decide on the outcome of domestic proceedings. For me, that is what the Chamber actually did by finding that A.'s account constituted the only direct evidence against the applicant and therefore his statement should not have been accepted since it was obtained and used in violation of the applicant's procedural rights. I think that it is not for the Strasbourg Court to establish whether A.'s account did or did not constitute the only or decisive evidence against the applicant. Moreover, by establishing that it did constitute the only evidence against the applicant, the Chamber actually substituted its own assessment for that of the national courts, in defiance of the Court's case-law mantra that it cannot “assume the role” nor “take the place of those authorities”. Generally, up to now, the European Court has deferred to national courts' assessment of “the credibility of witnesses and the relevance of evidence to the issues in the case”[1]. Paragraph 74 of the judgment, to my understanding, changes that principle.

8. The third reason for my disagreement concerns the Chamber's assessment that “the use of a complainant child's video-taped account as the only direct evidence leading to the applicant's conviction, without giving him any opportunity to put questions to that child, involved such limitations on the rights of the defence that the proceedings could not be said to have complied with the requirement of a fair trial, as set out in Article 6 §§ 1 and 3 (d) of the Convention” (see § 67 of the judgment). It is the well established case-law of the European Court that “in the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the alleged victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence” (see *Baegen v. the Netherlands*, judgment of 27 October 1995, Series A no. 327-B, opinion of the Commission, p. 44, § 77). To my understanding, this means that there

[1] *Vidal v. Belgium, Edwards v. United Kingdom*

should be a balance between the victim's and the accused person's rights. In this case, "certain measures taken for the purpose of protecting the victim" were the child's video-taped interview and the expert's opinion that the child should not be interviewed again, which opinion was accepted by the applicant. The real question is whether these measures "could be reconciled with an adequate and effective exercise of the rights of the defence", or, put better, whether the correct balance was struck between the child's and the applicant's rights. The Chamber came to the conclusion that there was no balance, and that the applicant should have been invited to participate in the hearing of the child, to be given an opportunity to observe the child's interview and to have questions put to the child (see § 56 of the judgment). However, to my understanding, this kind of balance was not possible since at the moment when the child was interviewed the applicant was not suspected and there was no reason for him to be either present or given an opportunity to put questions to the child. The balance could have been achieved if the applicant, instead of insisting on submitting the video recording as evidence on his behalf and thereby declining or turning down an opportunity for the effective exercise of his rights, had requested the court to exclude A.'s account.

9. For all these reasons, I am of the opinion that in the present case there has been no violation of Article 6 § 1 taken together with Article 6 § 3 (d) of the Convention.