CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 46602/99
by A.H.
against Finland

The European Court of Human Rights (Fourth Section), sitting on 31 May 2005 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Ms L. MIJOVIĆ, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 30 November 1998,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr A.H., is a Finnish national who was born in 1960. He is represented before the Court by Mr Martti Jantunen, a lawyer practising in Jyväskylä.

A. The circumstances of the case

The facts of the case, as submitted by the parties and as they appear from the documents, may be summarised as follows.

Following a report to the police in February 1997, the applicant was charged with having committed sexual acts with a child, a then six-year old boy, T. He was accused of having touched the boy in an indecent way when working at a day nursery which the boy attended. The alleged offence had taken place repeatedly over a period of several months beginning in the autumn of 1996.

Meanwhile, on 24 February and 13 March 1997 T. was interviewed by a child psychologist, S., during the pre-trial investigation of the case. The interview was recorded on videotape. The applicant was questioned on 26 and 27 March 1997.

The recording was played back in the Jyväskylä District Court (*käräjäoikeus, tingsrätten*) and the Vaasa Court of Appeal (*hovioikeus, hovrätten*). The District Court and the Court of Appeal heard evidence from the applicant, T.'s mother and S., the psychologist who had interviewed the boy. Also H., a doctor in psychology specialising in criminology and forensic psychology, who had not interviewed the boy herself, was heard as a witness. Also several other witnesses, mainly the applicant's colleagues, were heard.

On 29 October 1997 the District Court convicted the applicant as charged and sentenced him to seven months' suspended imprisonment. The District Court reasoned as follows (translation from Finnish):

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

...”

The applicant, among others, appealed to the Court of Appeal, claiming that his right to examine witnesses had been violated as he had not had an opportunity to put questions to T.

On 26 June 1998 the Court of Appeal, having held an oral hearing, upheld the conviction but increased the sentence to fourteen months' imprisonment. It found that the technical quality of the videotape in question was poor as to its picture and sound reproduction and that thus, the contents of T.'s statement could not be reliably assessed merely on the basis of that recording. It, however, showed that S. had carried out the interview without any preconceived idea of its outcome. The Court of Appeal did not mention the applicant's claim that he had not been able to put questions to T.

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

B. Relevant domestic law and practice

The rules of evidence are laid down in Chapter 17 of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*; 571/1948). In criminal proceedings, the forms of submission of evidence are 1) examination of witnesses, 2) hearing of experts, 3) hearing of parties under an oath (in criminal proceedings only the injured party can be heard under oath and only about the establishment of losses suffered by him or her), 4) hearing of parties without an oath, 5) submission of documentary evidence, and 6) inspection.

Chapter 17, section 11 (690/1997) provides that a private written statement drawn up for the purpose of a pending or imminent trial and an oral statement in the record of a criminal investigation or another document cannot be admitted as evidence in a court, unless otherwise provided by an Act. However, the court can for a special reason admit as evidence a statement drawn up for the purpose of a trial. If a witness cannot be questioned in the principal court hearing or outside that hearing, the court may admit as evidence a document or statement referred to above.

Chapter 17, section 21 provides that if a person called as a witness has not attained fifteen years of age, is mentally ill or mentally retarded, or his or her mental capacities have otherwise been impaired, the court shall, taking into consideration the facts, assess whether or not he or she may be heard as a witness.

COMPLAINT

The applicant complained, under Article 6 § 3(d) of the Convention, that he did not have a fair trial in the criminal proceedings against him as he was not given an opportunity to question T.

THE LAW

The applicant complained about a breach of Article 6 § 3(d) of the Convention. The Court will also examine of its own motion whether the application raises an issue under Article 6 § 1 of the Convention.

Article 6 reads in so far as relevant:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"

A. The Government's submissions

The Government submitted that at the time the boy had been only 7 years old and thus, it had not been possible to hear him before the courts. Instead, he had been interviewed by a psychologist. In the circumstances, it had not been possible to afford the applicant an opportunity to put questions directly to the boy. The interview had been recorded on videotape, which had been played back before the courts. Principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify. The organizing of criminal proceedings in such a way as to protect the interests of juvenile witnesses, in particular in trial proceedings involving sexual offences, is a relevant consideration to be taken into account for the purposes of Article 6. Statements made in a pre-trial investigation may be used in criminal proceedings as long as the court does not rely solely on such statements. It should not be precluded from taking into account corroborating evidence.

The Government argued that the applicant had been given an opportunity to challenge the boy's statement and to present his own views on it first in the pre-trial investigation and later before the courts, although there was no possibility for cross-examination. The applicant never requested that he be

given an opportunity to put questions to the boy. The District Court had relied on the videotape only as additional evidence and thus, the conviction was not based solely or to a decisive degree on depositions that had been made by a person whom the applicant had had no opportunity to have examined. The District Court had also elaborated on the fact that the applicant had not had an opportunity to put questions to the boy, which showed its awareness of the fact that the videotape could not be used as evidence in a normal sense. The Court of Appeal, noting that the technical quality of the videotape was so poor that it did not provide reliable evidence on the details of the statement, had not relied on the videotape at all. Thus, the judgment of the Court of Appeal was entirely based on other evidence presented in the hearing and the applicant had been given the opportunity to put questions to all the witnesses. There is no indication that grossly unfair or arbitrary conclusions were drawn from the evidence. The proceedings as a whole were fair, including the way in which evidence was taken.

B. The applicant's submissions

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

The applicant submitted that in his closing argument in the pre-trial investigation he had pointed out that his right under the Convention had not been respected in that the police had failed to afford him an opportunity to put questions to the boy. As the police had also failed to inform him about the planned interviews and subsequently about the existing recording, the applicant had not even in theory had an opportunity to have questions put to the boy. The applicant had maintained these shortcomings before the courts. Affording the applicant an opportunity to have questions put to the boy in the pre-trial investigation would have been vital as it would appear that the chance of children being free to form their own opinion and their ability to reply to questions truthfully is greater in the initial phase of the proceedings than after having already gone through an interview and received therapy.

The applicant argued that it could not be for the defendant to insist that he or she be given an opportunity to have questions put to a witness before the courts, because the defence did not have a duty to contribute in the examination of guilt. That is why the applicant had not requested that the boy be heard before the courts. It would have been for the authorities to ensure that the rights of the defence were respected.

The applicant contested the Government's assertion that the Court of Appeal had not relied on the recording in question. On the contrary, it had based the conviction on it to a decisive extent.

C. The Court's assessment

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President