[TRANSLATION]

...

THE FACTS

The applicants, Mr Salvatore Accardi, Mr Stefano Manzini and Mrs Teresa D'Antonio, are Italian nationals, born in 1943, 1963 and 1960 respectively. The first two applicants are currently in Florence Prison, while the third is in Monza Prison. Mr Accardi was represented before the Court by Mr L. Bisori, a lawyer practising in Florence; Mr Manzini and Mrs D'Antonio were represented by Mr M. Fusi, also a lawyer practising in Florence.

The facts of the case, as submitted by the applicants, may be summarised as follows.

1. The institution of criminal proceedings

The first applicant and the third applicant are the parents of minors X and Y, twins born on 25 December 1991. The parents live apart. The third applicant lives with the second applicant.

Following a complaint lodged by the first applicant alleging that X and Y had been subjected to sexual abuse by their mother and the second applicant, the Florence Criminal Court decided to place the children in State care. In October 1997 the court ordered that the children be returned to the family of their father, who was living with Mrs P at the time. However, in January 1998 X informed his schoolteacher that Y had been subjected to further abuse, this time by the children's father. Proceedings were instituted against the three applicants on charges of sexual abuse of minors.

On 21 September 1998 the Florence investigating judge (*giudice per le indagini preliminari - GIP*) decided to hear evidence from X and Y in camera (*incidente probatorio)*. The hearing took place on 16 October 1998 in the presence of the investigating judge and a psychologist, Mrs B. The applicants, their lawyers and the representative of the Public Prosecutor's Office were in an adjacent room behind a two-way mirror, enabling them to hear what was being said and observe the conduct of the witnesses. During the hearing Mrs B. put some of the questions to the children.

X confirmed having been abused by their mother and the second applicant, and gave details of the sexual abuse to which Y had allegedly been subjected by their father. Y was also questioned by Mrs B. However, when the psychologist asked her to specify what used to happen with her parents, Y replied that she was too ashamed. The investigating judge then decided to leave the hearing room and follow the questioning from behind the two-way mirror. Y subsequently gave some details concerning the abuse

perpetrated by the first and second applicants. When she became very upset, the questioning was discontinued.

2. The trial at first instance

On 25 May 1999 the applicants were committed for trial before the Florence Criminal Court.

The proceedings took place in camera. Three hearings were held, on 10, 16 and 18 November 1999. Numerous witnesses who had been in contact with X and Y at the time of the events were questioned. The court ordered the videotape of the hearing of 16 October 1998 to be produced.

In a judgment of 18 November 1999 the Florence Criminal Court sentenced each of the applicants to twelve years' imprisonment.

The court noted that there were two types of evidence that weighed against the defendants. First, there were the statements made by X and Y at the hearing on 16 October 1998; second, there was the evidence of the persons questioned during the proceedings, who had second-hand knowledge of the events detailed by the victims, having been taken into their confidence. While the victims' statements ranked first in importance, the hearsay evidence had a role to play in checking the consistency of the versions provided by X and Y with the other particular circumstances of the case.

In the view of the court, the details provided by X and Y demonstrated that they had indeed been subjected to abuse, as it would have been difficult for children so young to invent details of sexual practices known only to adults. As the videotape of the hearing of 16 October 1998 showed, X and Y, through their general demeanour and the nature of their replies, displayed signs of profound unease and great distress when confronted with the memory of their painful experiences. Their statements therefore constituted strong evidence in the case against the defendants.

It further emerged from the evidence given during the proceedings that X and Y had recounted details of the abuse to third parties, such as members of their host family, the first applicant's live-in partner, a home teacher and a schoolteacher. According to the schoolteacher and to a social worker, X and Y showed signs of disturbed behaviour, a finding confirmed by memoranda from the social services department. This evidence corroborated the children's statements, with the result that the applicants were found guilty.

3. The appeal proceedings

The applicants appealed.

The first applicant confined himself to challenging the assessment of the evidence and the interpretation of the statements made by X and Y.

The second and third applicants argued that, in the course of the proceedings at first instance, the court had declined to hear evidence from an expert witness instructed by the defence who would, they contended, have been able to shed light on the circumstances surrounding the children's statements, in order to establish whether and to what extent those circumstances might have influenced their version of events. Furthermore, the court should have ordered a psychologist's report on the children to determine whether they showed signs of having been sexually abused. The second and third applicants also requested that the children be questioned again in the presence of child psychology experts, not just about the abuse itself, but also about the existing family relationships.

According to the second and third applicants, it was likely that the children, whose early years had been spent in a difficult and precarious situation, had simply witnessed the sexual practices of the adults and later imagined that they had themselves been involved in the acts in question. This explanation was especially plausible, they argued, given that the questions put by Mrs B. at the hearing of 16 October 1998 had been of a leading nature. They further submitted that the investigating judge had prevented the parties from asking the children questions.

The second and third applicants appended a psychologist's report to their notice of appeal which concluded that, in view of the manner in which they had been obtained, the children's statements should not have been used as the sole basis for convicting the defendants.

By a judgment of 28 September 2000, the Florence Court of Appeal reduced the third applicant's sentence to nine years' imprisonment. It upheld the remainder of the decision at first instance.

The Court of Appeal observed that the versions of X and Y contradicted each other in places. In addition, the children had been vague as to when exactly the abuse had taken place. However, the defence's argument that the children had confused reality and imagination was unfounded, bearing in mind the nature of the details recounted by X and Y and the signs of distress they had manifested during and after the hearing. Furthermore, the children could not have been expected to open up completely to a psychologist they had just met and to a judge – the investigating judge – whom they did not know. Accordingly, the statements made at the hearing of 16 October 1998 needed to be assessed in conjunction with the details confided by the children to people around them, who had been questioned during the proceedings at first instance. That process placed the contradictions in context and proved that the abuse complained of had been perpetrated by the applicants.

The Court of Appeal observed further that there were no grounds for doubting the children's ability to describe their experiences, and that their statements had been, by and large, consistent. In the light of those considerations, there had been no need for a psychologist's report on the

children, who had already been kept under observation for a long time by a psychologist employed by the social services department. A further hearing would have been no more than a re-run of the hearing of 16 October 1998. In that connection the Court of Appeal stressed that the applicants and their lawyers had taken part in the hearing in question and had had the opportunity of asking the children any questions they considered necessary to their defence, through the intermediary of the investigating judge.

As to the manner in which the hearing of 16 October 1998 had been conducted, the Court of Appeal noted that Mrs B. had adapted her approach to the degree of participation and cooperation of the children. The psychologist had thus put more specific questions to X, who appeared to be more open than Y.

4. The applicants' appeal on points of law

The applicants lodged an appeal on points of law.

The first applicant complained first of all that the questioning of X and Y had been invalid, observing that the questions had been put to the children by Mrs B. rather than by the investigating judge, and had been put in a leading manner. The first applicant further submitted that the Court of Appeal had lent excessive weight to the evidence of persons with only second-hand knowledge of the facts, and argued that the reasons given for the judgment of 28 September 2000 had been illogical and contradictory.

The second and third applicants objected that their convictions had been unsafe, on the ground that no decisive proof had been produced. They referred in particular to the decision not to question the victims again or to order a psychologist's report on the children and another one to determine whether X and Y had been fit to give evidence. The second and third applicants also alleged that the reasons given for the judgment of 28 September 2000 had been illogical and contradictory, as their guilt had not been proven beyond any reasonable doubt.

In a judgment of 22 February 2002, deposited with the registry on 24 April 2002, the Court of Cassation dismissed the applicants' appeals, finding that the Court of Appeal had given logical and correct reasons for its findings on all the points at issue.

The Court of Cassation observed that it had been for the trial and appeal courts to decide whether further evidence (such as the expert reports requested by the defendants) was required, and that a further hearing of the children had not been necessary. Moreover, the questioning of X and Y had been conducted by the investigating judge, not by Mrs B.; the fact that some questions had been put directly by the psychologist was irrelevant. In any event, under Italian law, failure to adhere to the methods laid down for questioning did not invalidate the proceedings.

COMPLAINTS

1. The applicants complained under Article 6 §§ 1, 2 and 3 (d) of the Convention that the criminal proceedings brought against them had been unfair, and that the principle of the presumption of innocence had been infringed.

2. The applicants complained under Article 6 § 1 of the Convention that their case had not been heard by an impartial tribunal established by law.

THE LAW

1. The applicants alleged that the proceedings brought against them had been unfair and that the principle of the presumption of innocence had been infringed. They relied on Article 6 §§ 1, 2 and 3 (d) of the Convention, the relevant parts of which provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal established by law.
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> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
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> 3. Everyone charged with a criminal offence has the following minimum rights:
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> ...
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> (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;
>
> ..."

Given that the requirements of paragraphs 2 and 3 represent specific aspects of the right to a fair hearing guaranteed by Article 6 § 1, the Court will examine the applicants' complaints in the light of the two texts taken in combination (see, among many other authorities, *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I, and *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, pp. 31-32, § 62).

(a) The applicants complained that no psychologist's report had been prepared in order to establish whether X and Y were capable of telling the truth in relation to the alleged abuse. They argued that evidence of that nature was vital in the case in question, in view of the young age of the victims, the length of time that had elapsed since the events had occurred and the family circumstances in which X and Y had been living. The crucial importance of an expert report was further underscored by the disparities between the children's versions of events and those of the witnesses

questioned during the proceedings, by the methods used to conduct the hearing of 16 October 1998 and by the fact that the courts had given decisive weight to the conduct of X and Y at the hearing.

The applicants also complained about the decision not to question the defence's expert witness at the hearing. They contended that the expert witness appointed by the investigating judge had, in essence, supported the public prosecutor's arguments; this amounted to an infringement of the principle of equality of arms.

Lastly, the applicants maintained that they had been denied any opportunity of putting questions to X and Y. All the questions had been decided upon by Mrs B. alone without prior consultation of the parties. The applicants considered that, in view of those omissions, the courts should order a further hearing during which the children could be questioned.

The Court reiterates that the admissibility of evidence is governed primarily by the rules of domestic law. The Court's task under the Convention is not to rule as to whether witnesses' statements were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among many other authorities, *Lucà v. Italy,* no. 33354/96, § 38, ECHR 2001-II). It will therefore confine its attention to establishing whether the manner in which the proceedings were brought against the applicants in the domestic courts was compatible with the rights of the defence (see *De Lorenzo v. Italy* (dec.), no. 69264/01, 12 February 2004).

In this connection the Court reiterates that 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 *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 51; *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49; and *S.N. v. Sweden,* no. 34209/96, § 44, ECHR 2002-V). The use as evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with the provisions cited above, provided that the rights of the defence have been respected. The rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or to a decisive extent, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial (see *A.M. v. Italy,* no. 37019/97, § 25, ECHR 1999-IX, and *Saïdi v. France*, judgment of 20 September 1993,

Series A no. 261-C, pp. 56-57, §§ 43-44; see also *Lemasson and Achat v. France* (dec.), no. 49849/99, 14 January 2003).

The Court further emphasises that Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to call a witness (see, among other authorities, *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89).

As to the circumstances in this case, the Court notes that the statements made by X and Y constituted virtually the sole evidence on which the courts' findings of guilt were based. The other persons whose evidence was heard by the Florence Criminal Court had not witnessed the alleged acts, and confined themselves in their statements to describing the changes they had observed subsequently in the children's personalities, and to relating what the children had confided to them. It is therefore necessary to examine whether the applicants had an adequate opportunity to exercise their defence rights, for the purposes of Article 6 of the Convention, with regard to the statements made by X and Y (see, *mutatis mutandis*, *S.N. v. Sweden*, cited above, § 46).

The Court has regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the alleged victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence (see *S.N. v. Sweden*, cited above, § 47, and *Lemasson and Achat*, cited above). 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 *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 471, § 72, and *P.S. v. Germany*, no. 33900/96, § 23, 20 December 2001).

The Court observes that, in the instant case, X and Y were questioned before the Florence investigating judge at the hearing of 16 October 1998. The applicants and their lawyers were able to follow the questioning in a separate room via a two-way mirror. They were thus able to hear the questions and replies and observe the children's demeanour. The applicants contended that they were not permitted to intervene on that occasion and to request that X and Y elucidate specific points. However, this assertion contradicts that made by the Florence Court of Appeal in its judgment of 28 September 2000, stating that the applicants' lawyers had the opportunity

of asking the children any question they felt was necessary to their defence, through the intermediary of the investigating judge.

The Court notes that the applicants and their representatives made no attempt to avail themselves of that opportunity. At the hearing of 16 October 1998, they omitted to raise any objections regarding the procedure adopted by the investigating judge or to say what questions they wished to ask X and Y. In the view of the Court, this could be interpreted as implicit agreement with the way in which the questioning was conducted.

In addition, the authorities made a video recording of this stage in the investigation procedure, which the trial courts were able to study. The courts therefore had the opportunity to observe the conduct of X and Y under questioning, and the defendants were able to submit their comments in that regard. In the light of these considerations, the Court cannot subscribe to the applicants' view that a further hearing of the alleged victims of the offences was necessary in order to safeguard the rights of the defence.

In the circumstances, the Court considers that the steps taken by the domestic authorities were sufficient to allow the applicants an opportunity to challenge the statements and the credibility of X and Y during the criminal proceedings.

As to the decision not to order a psychologist's report or to question the defence's expert witness during the hearing, the Court notes that the domestic courts, on the basis of logical and pertinent arguments, concluded that such investigative measures were of no relevance to the proceedings. The Florence Court of Appeal stressed that X and Y had been under observation for a long time by a psychologist employed by the social services department, and that there were no grounds for doubting the children's ability to recount their experiences. Moreover, the questioning of the children had been conducted with the assistance of Mrs B., an expert in child psychology.

Accordingly, the Court cannot conclude that the rights of the defence were restricted to the extent that there was an infringement of the principles of a fair hearing established by Article 6 of the Convention.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

(b) The applicants challenged the reasoning of the domestic courts whereby any gap or contradiction in the statements made by X and Y could be offset by the statements of the witnesses who had been questioned at the hearing. This procedure, they contended, infringed the presumption of innocence and the fundamental principle according to which the evidence of those who had witnessed the offences should take precedence over the statements of persons with only second-hand knowledge of the facts. They argued that the Italian courts had also been in breach of the rule that it was for the prosecution to prove the guilt of the accused, and that, where there was any doubt, the accused had to be acquitted.

The Court observes at the outset that the applicants' guilt was established in accordance with a procedure prescribed by law and on the basis of evidence produced by the prosecution. There is no evidence that, during the judicial proceedings brought against them, the applicants were regarded as guilty before the court had delivered its verdict. In the Court's view, therefore, there is nothing to suggest that the principle of the presumption of innocence guaranteed under paragraph 2 of Article 6 of the Convention was violated in this case (see *Hermi v. Italy* (dec.), no. 18114/02, 6 November 2003, and, conversely, *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, pp. 16-17, §§ 35-41).

As regards the assessment of the evidence given by X and Y and the other persons questioned during the proceedings, the Court reiterates that it is not its task to take the place of the domestic courts. In particular, it is not for the Court to determine whether an applicant is guilty or not (see, *mutatis mutandis*, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V). It is primarily for the national authorities, notably the courts, to assess the facts (see, among many other authorities, *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, *Reports* 1997-VIII, p. 2955, § 31, and *Edificaciones March Gallego S.A. v Spain*, judgment of 19 February 1998, *Reports* 1998-I, p. 290, § 33).

In the instant case, the Court notes that the applicants were convicted following adversarial proceedings and on the basis of evidence which was examined at the hearing and which the domestic courts deemed sufficient to establish the guilt of the persons concerned. Moreover, in the judicial decisions challenged by the applicants, detailed reasons were provided in respect of all the points at issue, with the result that there was no danger of an arbitrary decision.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. Relying on Article 6 § 1 of the Convention, the applicants submitted that the Florence investigating judge did not constitute an impartial "tribunal" established by law.

The applicants observed that the questioning of X and Y had been conducted by the expert appointed by the court of its own motion, in the person of Mrs B., rather than by the investigating judge himself. The questions to be put to the victims had been chosen by Mrs B., who had also decided at what juncture the hearing should be discontinued. Furthermore, the investigating judge had left the room while Y was being questioned.

The Court notes at the outset that there is room for doubt as to the applicability of Article 6 of the Convention in this case. In that regard it reiterates that, while the above provision may be relevant before a case is sent for trial, its primary purpose, as far as criminal matters are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge" (see *Brennan v. the United Kingdom*, no. 39846/98, § 45, ECHR

2001-X, and *Berliński v. Poland*, nos. 27715/95 and 30209/96, § 75, 20 June 2002). In particular, the guarantees of independence and impartiality inherent in a fair trial relate solely to the courts called upon to decide whether the accused is innocent or guilty (see *Forcellini v. San Marino* (dec.), no. 34657/97, 28 May 2002; *Priebke v. Italy* (dec.), no. 48799/99, 5 April 2001; and *De Lorenzo v. Italy*, cited above, in which the Court held that Article 6 could not apply to the body responsible for committing the applicant for trial).

However, in the particular circumstances of this case, the Court deems it unnecessary to consider the question of whether the conditions of impartiality and conformity with the law should be applied to the investigating judge. Even were this to be the case, this complaint is in any event inadmissible for the following reasons.

The Court reiterates that, under Article 6 § 1, a "tribunal" must always be "established by law". This phrase reflects the principle of the rule of law which is inherent in the entire system of the Convention and its protocols. A body which was not established in accordance with the wishes of the legislature would, by definition, lack the legitimacy required in a democratic society to hear individual cases. The phrase "established by law" covers not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case (see *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002). The "law" referred to in Article 6 § 1, therefore, encompasses not just the legislation concerning the establishment and jurisdiction of the courts, but also any other provisions of domestic law which, if not complied with, would render the participation of one or more judges in the case unlawful. Such provisions relate in particular to the terms of office, disqualification and challenging of judges (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 99, ECHR 2000-VII).

Failure by a tribunal to comply with the above provisions normally gives rise to a violation of Article 6 § 1. The Court therefore has jurisdiction to rule on compliance with the provisions of domestic law on this point. However, in accordance with the general principle that it is primarily for the domestic courts to interpret domestic legislation, the Court takes the view that it should challenge the assessment of the domestic courts only where there has been a flagrant breach of the legislation (see *Lavents*, cited above, ibid., and *Coëme and Others*, cited above, § 98 *in fine*; see also *Paviglianiti, Polimeni, Lucini and 3 Others v. Italy* (dec.), nos. 40994/02, 42097/02 and 42743/02, 12 February 2004).

In the instant case, the applicants did not challenge the jurisdiction of the Florence investigating judge to examine their case and question X and Y at the hearing of 16 October 1998. Their allegations related to the fact that the questions had been put to the children by Mrs B. rather than by the investigating judge himself.

However, the Court cannot accept the applicants' argument that this circumstance rendered the proceedings unlawful and gave rise to problems regarding the jurisdiction of the body responsible for supervising the conduct of the preliminary investigations. As the Court of Cassation rightly pointed out in its judgment of 22 February 2002, the questioning of X and Y was conducted by the investigating judge. The fact that, making use of his right to oversee the performance of the investigative measures, he decided to proceed through the intermediary of a psychologist in order to put certain questions to the children, does nothing to alter that conclusion. As to the fact that the investigating judge left the room while Y was being questioned, the minutes of the hearing of 16 October 1998 show that the move was designed to calm the child and that, in any event, the judge continued to follow the progress of the questioning from behind a two-way mirror.

In the light of the above circumstances, the Court cannot conclude that the Florence investigating judge was not a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention. Neither is there any evidence to suggest that the body in question was not "impartial".

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President