CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 60966/00
by E.H.
against Finland

The European Court of Human Rights (Fourth Section), sitting on 16 March 2004 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges,*
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 21 June 1999,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr E.H., is a Finnish national, who was born in 1954. He is represented before the Court by Mr Sami Heikinheimo, a lawyer practising in Helsinki.

A. The circumstances of the case

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

On 27 August 1996 the applicant was charged with four counts of aggravated sexual abuse of a minor under Chapter 20, section 6 of the Penal Code (*rikoslaki, strafflagen*; 39/1889) and with four counts of indecent behaviour towards a child under Chapter 20, section 3, subsection 3 of the Penal Code. According to the indictment the offences against a 12-year old boy, J., took place from May 1995 to September 1995, including, *inter alia*, touching of genitals and buttocks, masturbating and ejaculating on J.'s abdomen and face and anal penetrations.

J. had alleged that he was raped and abused twice by the applicant during a class excursion (on 24 May and from 26 to 29 May 1995), which the applicant was supervising together with some other parents. J. withdrew his allegations, and at that time there was no contact with the police or medical examination. J. however renewed his allegations later and was interviewed at a child welfare clinic. J.'s parents reported an offence to the police in October 1995. The police also investigated, *inter alia*, two alleged rapes and other indecent conduct which occurred after a class excursion in June - August 1995.

Criminal proceedings were instituted before the District Court of Helsinki (*käräjäoikeus, tingsrätten*) which heard the case in 1997, together with J.'s compensation claim of 15,000 Finnish marks (FIM) for pain and suffering and FIM 70,000 for mental suffering, made under Chapter 5, section 1 of the Tort Liability Act (*vahingonkorvauslaki, skadeståndslag*; 412/1974) which was joined to the trial in accordance with Chapter 14, section 8 of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*; 4/1734), as in force until 1 October 1997.

During the District Court proceedings, the victim, J., then 13 years old, was heard in person regarding each count, as was the applicant. In addition, 17 witnesses and expert witnesses were heard. A report of a child welfare clinic dated 12 February 1996 and signed by psychologist K. and a social worker was admitted as written evidence. K. testified in court that she had treated J. in therapy for about six months starting in autumn 1995 and that the written report, confirming J.'s allegations, was based on her observations during this therapy. Also a psychiatrist gave her opinion that J. had been subjected to sexual abuse. Various witnesses stated that they had heard J.'s

allegations. There was no direct witness evidence of the alleged rapes besides J.'s own statement. According to the decision of the District Court the only piece of corroborating direct evidence was a witness statement of one of J.'s class mates, who testified to have seen the applicant touch J.'s thighs and move his hand towards J.'s groins and caress his genital area. There was also telephone metering information indicating that the applicant had made six phone calls to J. between August – October 1995. The District Court also had regard to some circumstantial evidence concerning the applicant's conduct and relations to J.

No physical/somatic medical examination had been conducted on J. at any stage. No video or audio recording of J.'s interviews by his therapist or of his police examinations had been made.

On 7 March 1997, the District Court convicted the applicant on all counts. It did not, however, consider the sexual abuse of a minor to be aggravated. It sentenced the applicant to two years and three months' imprisonment and ordered him to compensate J. FIM 5,000 for physical pain and FIM 55,000 for mental suffering.

The applicant had meanwhile requested a copy of the notes written by psychologist K., which formed the basis for the child welfare clinic's report of 12 February 1996. The request was rejected on 26 June 1997 by the Social Welfare Board of Helsinki (*sosiaali- ja terveyslautakunta, social- och hälsovårdsnämnden*). The applicant appealed to the County Administrative Court of Helsinki (*lääninoikeus, länsrätten*), which quashed the Social Welfare Board's decision on 14 January 1998 and maintained that the applicant had the right to receive information about the notes. The Social Welfare Board of Helsinki appealed to the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltningsdomstolen*), which upheld the County Administrative Court's decision on 28 October 1998.

In the criminal proceedings the applicant, the public prosecutor and J. appealed to the Court of Appeal of Helsinki (*hovioikeus, hovrätten*). J. requested quashing of the District Court's judgment or secondarily retrial at the District Court, or an oral hearing before the Court of Appeal. The applicant submitted further observations dated 18 June 1997 and 23 July 1997, together with a medical doctor's opinion.

The Court of Appeal held an oral hearing from 10 to 13 February 1998. J. was not heard in the proceedings due to his mental health problems. A medical doctor, who had previously submitted a medical report dated 17 December 1997, was heard. He held that testifying would endanger J.'s health. 29 witnesses and expert witnesses were heard before the Court of Appeal.

The applicant asserts that the Court of Appeal had, during a preparatory hearing, requested the prosecutor to produce psychologist K.'s notes following the applicant's request but did not act on the matter later when the prosecutor had not produced the notes at the principal hearing. According to

the applicant, he requested the court to order production of the information during that hearing and informed them that the County Administrative Court had on 14 January 1998 decided that he had the right to receive copies of the said notes. According to the applicant, the Court of Appeal did not issue any order to produce the notes to the court.

On 30 June 1998 the Court of Appeal rejected one count of sexual abuse of a minor and one count of indecent behaviour towards a child. It did not find it established that the applicant had had intercourse with J. Instead, it found the applicant guilty of the remaining three counts of sexual abuse of a minor based on other kinds of sexual acts which were comparable with intercourse and reduced the applicant's sentence to one year and six months' imprisonment. The Court of Appeal ordered the applicant to compensate J. FIM 55,000 for mental suffering.

The applicant sought leave to appeal from the Supreme Court (*korkein oikeus, högsta domstolen*) on 30 August 1998 requesting quashing of the Court of Appeal's judgment. He claimed, *inter alia*, that he had not had access to material information, namely psychologist K.'s notes of her therapy sessions with J., which formed the basis of the above-mentioned child welfare clinic's report dated 12 February 1996 and that the Court of Appeal had not made a separate decision regarding his request for access to these notes despite his express wish. He also complained that he had not had a chance to examine J. before the Court of Appeal and that he had not had a proper chance to examine J. before the District Court as the presiding judge had allegedly allowed J. to leave the witness stand in the middle of the defence's examination as soon as it became evident that the examination would reveal the untruthfulness of J.'s claims. Nor had the applicant had a chance to examine J. during the criminal investigation.

The applicant also criticized the fact that J.'s interviews or examinations had not been recorded and that he had been convicted purely on hearsay and circumstantial evidence. He also claimed that the Court of Appeal had convicted him of essentially different kinds of acts than those described in the indictment. The applicant invoked Article 6 of the Convention and requested an oral hearing before the Supreme Court and that a new witness be heard.

The Supreme Court refused to grant the applicant leave to appeal on 22 December 1998. The applicant applied for annulment of the Supreme Court's said decision on 31 March 1999 relying on new evidence. Apparently the Supreme Court rejected the application.

B. Relevant domestic law and practice

Chapter 14, section 4 of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*; 4/1734, as in force at the relevant time and until 1 October 1997) provided that the court had to guarantee an

orderly trial and ensure that the case was examined thoroughly. It had been previously generally accepted that the courts bore some inquisitorial responsibility for establishing material facts in criminal cases, although later it had been established in the Supreme Court's case law that the courts did not have a responsibility for approving indictments (see Government Bill 82/1995 p. 83 and 146 and the Supreme Court judgment 1995:44).

The Code on Criminal Procedure (*laki oikeudenkäynnistä rikosasioissa, lag om rättegång i brottmål*; 689/1997) entered into force on 1 October 1997 providing that the criminal court no longer had a duty to guarantee that the case was examined thoroughly. Instead, the courts were obliged to see to it that cases were examined appropriately. The purpose of the new legislation regarding the courts' more passive role in matters of obtaining and presenting evidence was to ensure an impartial trial.

The provisions of the former procedure were applied even after the entry into force of the Code on Criminal Procedure, if the criminal case had become pending before 1 October 1997, as in this case.

According to Chapter 17, section 33, subsection 1 of the Code of Judicial Procedure (as in force at the relevant time) the presiding judge examined witnesses. The court could, however, when appropriate, decide that the parties could question the witnesses. In the latter case the party who had requested the witness examined the witness first, followed by the other party. Subsection 2 of the same section provided that a witness should be encouraged to give an undirected narrative. The presiding judge, and the parties, could put questions after the end of the witness's own account.

Section 7 of the Act on Pre-Trial Investigation (*esitutkintalaki, förundersökningslag*; 449/1987) provides that facts and evidence both against the suspect as well as those in favour of the suspect have to be taken into account and examined in an criminal investigation. The suspect must be treated as innocent in criminal investigation.

Section 11 of the Act on Pre-Trial Investigation provides that a party in criminal investigation has the right to be informed of the results of the investigation as soon as there is no risk of jeopardizing the criminal investigation.

Section 19 of the Act on the Publicity of Official Documents (*laki yleisten asiakirjojen julkisuudesta, lag om allmänna handlingars offentlighet*; 83/1951, as in force at the relevant time) provided that a party had the right to have access to any document, which may have influenced or which might influence the examination of the matter. Access could however be denied in cases where the document was not on the court file and very important public or private interests would be compromised.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention that he could not prepare his defence properly as he did not have access to the psychologist K.'s notes (which would have been necessary in order to assess how J.'s statements originated and to cast doubt upon J.'s and K.'s statements) and that he did not have the opportunity to examine J. as he left in the middle of the defence's examination in the District Court and the presiding judge did not allow further questions. He further complains that the police investigation was not conducted properly as facts favourable to him were not investigated and alleges that the police and the psychologist K. colluded during the criminal investigation, invoking Article 6 § 2 in that respect.

2. The applicant complains under Article 6 of the Convention that he was convicted in the Court of Appeal for an act which was not contained in the prosecutor's indictment and which had no basis in the evidence.

3. The applicant also complains under Article 6 of the Convention that the Supreme Court did not annul the Court of Appeal's judgment despite the applicant identifying a witness who claimed that J. had lied and asked him to give false testimony. He further complains about the police procedure in questioning this new witness.

4. Finally, the applicant complains under Article 13 of the Convention that he has been wrongly convicted and that he has therefore not had an effective remedy.

THE LAW

1. The applicant complains under Article 6 § 1 of the Convention that he was hindered in preparing his defence due to lack of access to the notes of the psychiatrist K. and that he had no proper opportunity to have J. cross-examined. He complains under Article 6 § 2 about an alleged failure to comply with the presumption of innocence.

Article 6, insofar as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...
>
> ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

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

...

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

The Court considers that it cannot, on the basis of the case-file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 2(b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

2. The applicant complains that he was convicted in the Court of Appeal of acts for which he was not charged and for which there was no evidence. The Court finds that this complaint should be examined from the point of view of Article 6 § 1 of the Convention and Article 6 § 3 (a) and (b) (see above), taking these three provisions together (see *Lantto v. Finland*, no. 27665/95, 12 July 1999).

The Court recalls that in *Brozicek v. Italy*, judgment of 19 December 1989, Series A no. 167, § 42 the Court held that there was no violation of Article 6 § 3(a) of the Convention where the accusation was identified by listing the offences of which the applicant was accused, stating the place and the date thereof, referring to the relevant Articles of the Criminal Code and mentioning the name of the victim.

The Court observes that in the present case the indictment against the applicant clearly fulfilled the above requirements. Furthermore, the criminal charges against the applicant were not changed or modified between the different court instances. As regards the three counts on which the applicant was convicted on appeal, the Court of Appeal did not find it established that the applicant had had intercourse (anal penetration) with the victim. Instead, it convicted the applicant on the basis that he was guilty of other kinds of sexual acts which were comparable with sexual intercourse. Two of the three counts of which he was convicted (nos. 2 and 3) contained a factual description which included sexual intercourse but also descriptions of sexual acts which were expressly stated as being comparable to intercourse. The Court of Appeal's decision on these counts therefore clearly corresponded with the indictment. As regards the third count (no. 7), this did not expressly mention or describe a sexual act which was claimed to be comparable with intercourse. However, this count included other sexual elements besides anal penetration. The Court finds in the circumstances that there is no indication that the Court of Appeal's reasoning went beyond the scope or the essential elements of the crimes as described in the indictment.

Consequently, the Court does not find that there has been any appearance of a violation of the applicant's right to be informed of the nature and the cause of the accusations against him or of his right to prepare his defence under Article 6 § 3(b) of the Convention. Furthermore, an examination of the material submitted by the applicant does not disclose any indication that the Court of Appeal evaluated the evidence arbitrarily or in an unfair manner. The Court accordingly rejects these complaints as manifestly ill-founded pursuant to Article 35 § 3 and 4 of the Convention.

3. The applicant complains about the Supreme Court's refusal to annul its previous decision not to grant leave to appeal and about the police procedure in questioning a witness whom he wished to give evidence before the Supreme Court. The Court has examined these complaints under Article 6 of the Convention (see above) and under Article 2 of the Protocol No. 7 to the Convention, the first paragraph of which reads as follows:

> "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

The Court notes that an application for annulment of a final judgment is a form of extraordinary appeal. In such proceedings no criminal charge is determined and an appeal for annulment therefore falls outside the scope of Article 6 of the Convention as well as that of Article 2 of the Protocol No. 7 to the Convention. Insofar as the applicant complains about the police questioning of the alleged new witness, he has not substantiated in what way this impinged on the fairness of the criminal proceedings. This part of the application must therefore be rejected as, respectively, incompatible *ratione materiae* and manifestly ill-founded pursuant to Article 35 § 3 and 4 of the Convention.

4. The applicant complains under Article 13 of the Convention that he did not have an effective remedy as he was allegedly wrongly convicted at every court instance. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court reiterates that Article 13 of the Convention, as a general guarantee, does not normally apply in cases where the more specific guarantees of Article 6 are at issue, Article 6 being *lex specialis* in relation to Article 13 and absorbing its requirements. The Court finds that no separate issue arises under Article 13 of the Convention in the present case. The Court rejects the complaint as manifestly ill-founded pursuant to Article 35 § 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints concerning the hindrances in the preparation of his defence and examination of witnesses and the alleged breach of the presumption of innocence;

Declares the remainder of the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President