AS TO THE ADMISSIBILITY OF

Application No. 22692/93
by Ismo Uolevi VANHATALO
against Finland

The European Commission of Human Rights (First Chamber) sitting in private on 18 October 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 17 August 1993 by Ismo Uolevi Vanhatalo against Finland and registered on 28 September 1993 under file No. 22692/93;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is a Finnish citizen, born in 1950. He is a farmer and resides at Karinainen, Finland.

In May 1989 the applicant's ex-wife, M, reported to the local police that the applicant had abused her minor daughter, R, and that she as her mother had become aware of these incidents about 18 months earlier from a letter her daughter had written her in October 1987. On 15 August 1989 the local public prosecutor (nimismies) in Pöytyä made a decision of non-prosecution on the grounds that the time-limit for prosecution had expired. On the request of M, the Assistant Chancellor of Justice (apulaisoikeuskansleri) demanded a further investigation in the case and subsequently on 17 April 1990 orded the county prosecutor (lääninsyyttäjä) to draw up an indictment against the applicant.

The applicant was thereafter charged with continued sexual offences against a minor child, his step-daughter, contrary to chapter 20 section 3 and chapter 7 section 2 of the Penal Code. The alleged incidents had taken place between spring 1984 and autumn 1987, when R,

who was born in 1975, was between the ages of nine and twelve.

During the preliminary investigations R was interrogated by the police three times, namely on 16 May 1989, 27 October 1989 and 8 March 1990.

The case was heard by the District Court (kihlakunnanoikeus) of Loimaa. The District Court heard altogether eight witnesses, of whom five were summoned by the applicant. The prosecutor had summoned, inter alia, a psychologist at the local family clinic, who had interviewed R immediately after R's mother had shown the psychologist the letter in which R had said that she had been abused by her step-father. In the criminal proceedings instituted against the applicant the victim R was under the Finnish legal system to be considered a party to the case, i.e. a complainant. The District Court heard also R in order to obtain evidence. According to the records, R was questioned in the absence of both the applicant and R's mother, but their respective lawyers were present at the hearing. The District Court also received documentary evidence, inter alia the above-mentioned letter written by R and an article about sexual abuse of children published by the National Board of Social Welfare and National Board of Health, containing inter alia information about the credibility of children's descriptions of sexual abuse.

On 6 March 1991 the District Court dismissed the charge. The District Court noted inter alia that in the evaluation of the evidence it had to weigh the conflicting statements of the accused and the complainant against each other. Taking into consideration the seriousness of the charge, the verdict must not be based solely on the statement of the complainant, in this case an under-age child.

Both the prosecutor and the complainant R appealed to the Court of Appeal (hovioikeus) of Turku, which by its judgment of 2 December 1991 upheld the District Court's judgment without holding an oral hearing in the case.

The complainant R appealed to the Supreme Court. According to Finnish law a complainant has independent standing for prosecution purposes. The Supreme Court granted R leave to appeal on 6 April 1992.

On 17 November 1992 the Supreme Court held an oral hearing, which was recorded with a tape-recorder. The Supreme Court heard altogether four witnesses, of whom three were summoned by the applicant. The fourth witness was the above-mentioned psychologist at the family clinic. In addition, the Supreme Court heard the complainant R in order to obtain evidence. While R was heard for this purpose the judges and R's counsel were present, while other persons, including the prosecutor, were excluded. On the advice of his counsel, the applicant did not oppose this procedure proposed by the Supreme Court. The applicant and the other parties heard an audio recording of R's statement and after this they had an opportunity to put questions to R. The applicant did not avail himself of this opportunity.

By its judgment of 8 July 1993 the Supreme Court, after evaluating the evidence, found the applicant guilty of the charge brought against him and sentenced him to one year and four months' imprisonment and to pay damages to R totalling FIM 50,000. In its judgment the Supreme Court stated inter alia as follows:

(translation)

> "There is no medical evidence in the case.... There were no witnesses, who would have direct evidence of the incidents mentioned in the charge. Because of this the case must be decided on the basis of other evidence, mainly the statements made by the parties. ...

> In academic writings on the subject (Leena Linna and Esko Varilo, "The sexual abuse of children in families", Lakimies 2/1991 pages 137-147) it has been submitted, that according to present research, under 3 percent of children who tell about sexual abuse are lying. ...
>
> In this case there have not appeared circumstances that would show or give reason to suspect that R would lie. ... Having taken into account all the circumstances in the case the Supreme Court finds R's statement reliable."

The Supreme Court referred also to the above-mentioned letter which R had written to her mother just before an appointment in the local family clinic in October 1987 and to the testimony given by the psychologist at the clinic, according to which the psychologist as an expert had not doubted the credibility of R's description. The Supreme Court noted, when considering the amount of damages, that R had stated that she had consulted a psychiatrist twice a week over a period of two years because of the abuse.

The applicant requested the Supreme Court to reopen the case on the grounds that R had been questioned without his presence and that the decision was based on the opinion of experts, who had, however, not been heard during the trial. By judgment of 16 May 1994 the Supreme Court rejected his request. The Supreme Court noted that R had been heard in order to obtain evidence. Because of the nature of the case her evidence had by virtue of chapter 17 section 34 of the Code of Judicial Procedure (oikeudenkäymiskaari) taken place without the presence of the applicant and other parties. The applicant and other parties had been informed about this before the hearing. They had heard R's statement on tape. After this the applicant, who had been assisted by counsel, and other parties had had an opportunity to put questions to R. The Supreme Court also noted that the article about sexual abuse of children did not constitute evidence in the present case, but the findings described in the article were taken into account as comparative material when evaluating the credibility of R's statement in the case.

Chapter 17, section 34 of the Code of Judicial Procedure to which the court referred reads, in so far as relevant, as follows:

(translation)

> "If the court considers that the witness will out of fear or for some other reason not reveal everything he knows about the case in the presence of the party, or if the party disturbs or tries to mislead the witness when he is speaking, the witness shall be questioned without the presence of the party. Then the statement given by the witness shall be read to the party, and he shall have the right to put questions to the witness..."

COMPLAINTS

The applicant complains that he did not have a fair trial. He claims in this respect that his right to examine witnesses against him was violated. He submits that neither he nor his counsel were allowed to be present during the time R gave evidence in the Supreme Court, although its judgment was based solely on the statements made by R. He further submits that R's counsel was, however, present while she gave her evidence. Furthermore, the applicant maintains that he could hear R's statement only on tape and that he did not have a chance to question her. Finally, he contends that the recording of the proceedings means that the procedure cannot be considered as having been direct.

He further complains that his right to examine witnesses against

him was violated also because the Supreme Court based its judgment on an article published in an ordinary magazine without questioning the authors of the article as experts.

The applicant invokes Article 6 of the Convention.

THE LAW

The applicant complains of several infringements of Article 6 (Art. 6) of the Convention in connection with the criminal proceedings instituted against him.

As far as relevant Article 6 (Art. 6) of the Convention reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... 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 applicant submits that because the Supreme Court excluded him as well as his counsel from the courtroom during the evidence of the complainant R, he did not have an opportunity to examine witnesses against him. He also observes that the tape-recording of the hearing was against the principle of directness of proceedings.

The Commission notes firstly that the taking of evidence is governed primarily by the rules of domestic law and that it is in principle for the national courts to assess the evidence before them. The Commission notes further that it has consistently been held that the guarantees contained in paragraph 3 of Article 6 (Art. 6-3) of the Convention are specific aspects of the concept of a fair trial set forth in paragraph 1 (Art. 6-1) (cf., inter alia, Eur. Court H.R., Unterpertinger judgment of 24 November 1986, Series A no. 110, p. 14, para. 29). Accordingly, the Commission will have regard to them when examining the facts under paragraph 1 of Article 6 (Art. 6-1).

The Commission further recalls that it must consider the proceedings as a whole. Its task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (cf. for example Eur. Court. H.R., Stanford judgment of 23 February 1994, Series A no. 282-A, p. 10, para. 24). It follows that the Commission must examine the question of fairness on the basis of the proceedings at all three instances, including the Supreme Court. This also follows from the fact that the guarantees of Article 6 continue to apply to the appeal proceedings where the opportunity to lodge an appeal in regard to the determination of a criminal charge is provided for under domestic law, since those proceedings form part of the whole proceedings which determine the criminal charge at issue (cf. for example Eur. Court. H.R., Monnell and Morris judgment of 2 March 1987, Series A no. 115, p. 21, para. 54).

All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. As a rule the respect of the rights of the defence requires that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings (see, among other authorities, the Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 27).

In the instant case, the complainant R was heard in order to

obtain evidence at the District Court in the presence of the applicant's counsel. At the Supreme Court the applicant and his counsel were excluded while R was heard for the aforementioned purpose. The purpose of obtaining R's evidence at first without the presence of the applicant was to ensure that she could tell everything she knew about the case without fear. After this questioning by the members of the court the applicant and his counsel were, however, given the opportunity to listen to the whole hearing on tape and challenge and question R. The Commission also notes that the Supreme Court had informed the applicant about the planned arrangements and the applicant had not opposed this way of proceeding.

The Commission 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. 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 victim's private life. Therefore, the Commission 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 (Baegen v. the Netherlands, Comm. Report 20.10.94, para. 77).

The Commission recalls that the charge involved a case of very sensitive nature and that the complainant R was still a minor at the time of the hearing at the Supreme Court. The purpose of her hearing was to give the judges an opportunity to evaluate her credibility by observing her demeanour without her being affected by the presence of the applicant in any way and in this way obtain evidence for the case. The Commission finds that the proceedings in the Supreme Court cannot be regarded as arbitrary or unreasonable.

In addition, the statement of R was not the only evidence in the case. In the course of the main proceedings in the District Court eight witnesses and the complainant R were heard. The Supreme Court heard three witnesses summoned by the applicant and a psychologist in the presence of the applicant and his counsel.

The tape-recording was a technical method of recording the hearing instead of using written documents and it did not in any way violate the applicant's right to a fair trial.

Taking into account the particular nature of the offence at issue and the possibilities the applicant had of defending himself against the charges against him, the Commission finds that the applicant was not deprived of the right to examine witnesses against him.

b. The applicant submits further that he and his counsel were excluded from the court-room, yet R's counsel was present while she was questioned.

In the Commission's opinion the fact that only R's counsel was present during the whole hearing at the Supreme Court may raise a separate question of whether the proceedings before the Supreme Court also respected the rights of the defence and the principle of equality of arms, which are features of the wider concept of a fair trial. The Commission notes that it was only R who had brought the case to the Supreme Court. She was, as already mentioned afore, to be concidered not only as a victim but as a party to the case. The Commission recalls that Article 6 para. 1 (Art. 6-1) of the Convention requires "equal treatment" in the proceedings (see Eur. Court H.R., Bönisch judgment of 6 May 1985, Series A no. 92, p. 14, paras. 28 et seq. and Eur. Court H.R., Borgers judgment of 23 October 1991, Series A no. 214-B, p. 31, paras. 24 et seq.), implying a "fair balance" between the parties (see Eur. Court H.R., Feldbrugge judgment of 29 May 1986, Series A no. 99,

p. 17, para. 44).

With regard to the equality between the parties, the Commission, notes, however, that R was still a minor and that she had apparently had psychological problems and was thus more in need of assistance than a complainant in general would have been. Furthermore, since the purpose of R's hearing was solely to obtain evidence, neither she nor his counsel submitted any claims against the applicant during this hearing. Lastly, the Commission notes that the applicant had the opportunity to put questions to R but he did not avail himself of this opportunity.

Having regard to the nature of the case and R's special circumstances, the Commission finds that the principle of equality of arms has not been violated although R's counsel was present during her evidence while at the same time the applicant's counsel had been excluded from the court-room.

c. The applicant also complains that the Supreme Court based its judgment on an article without questioning the authors of the article as experts. The Commission, however, notes that a major part of the trial was focused on evaluating the credibility of children's descriptions of abuse. Over the proceedings as a whole the applicant would have had the opportunity to summon an expert to give evidence about this issue in general. The Commission notes that during the proceedings he did not ask that an expert should be heard. The Commission furthermore notes that the article was about abuse of children in general. It did not contain any factual findings concerning the parties in the present case (cf. No. 10532/83, Dec. 15.12.87, D.R. 54, p. 25).

As regards the article on sexual abuse the Commission finds that the article cannot be considered as equivalent to witness evidence and that because of this there was no need to hear evidence from its authors in the court.

The Commission accordingly finds no appearance of a violation of Article 6 (Art. 6) of the Convention.

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)