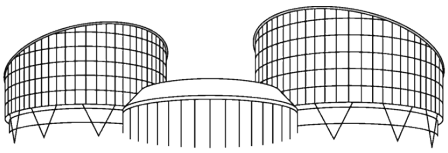

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ROSIN v. ESTONIA

(Application no. 26540/08)

JUDGMENT

STRASBOURG

19 December 2013

FINAL

14/04/2014

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

In the case of Rosin v. Estonia,

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

Isabelle Berro-Lefèvre, *President*,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 26 November 2013,

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

PROCEDURE

1. The case originated in an application (no. 26540/08) against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Estonian national, Mr Jüri Rosin ("the applicant"), on 28 May 2008.

2. The applicant was represented by Mr A. Sirendi, a lawyer practising in Tartu. The Estonian Government ("the Government") were represented by their Agent, Ms M. Kuurberg, of the Ministry of Foreign Affairs.

3. The applicant, charged with a sexual offence in respect of two children, alleged that he had not been given an opportunity to have questions put to one of the alleged victims on whose video-recorded interview conducted during the pre-trial proceedings his conviction had been based.

4. On 3 November 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1953. He is currently detained in prison.

6. On 16 December 2005 a criminal investigation was opened in connection with a sexual offence allegedly committed the previous day by the applicant against V. and K. (boys aged 11 and 17).

7. On the same day, K., V. and V.'s older brother were interviewed by police.

8. K. submitted that he had known the applicant for a long time and had visited him a couple of times with friends. In respect of the events in question he stated that the boys had stayed overnight at the applicant's home, but he had no recollection of what had happened that night as he had been drunk and had fallen asleep. When he woke up the next morning the boys had been naked and their underpants were missing. V. told him that the applicant had undressed them and engaged in oral sex with both of them. The next evening, when the boys returned to the applicant's residence, the applicant accused K. of breaking the windows of his house, damaging his car and stealing blank CDs from his home. There was an argument and a minor scuffle between the applicant and K.

9. V. was interviewed in the presence of a psychologist and the interview was video-recorded. According to him the boys had drunk alcohol with the applicant. The boys had gone to bed dressed but during the night the applicant had undressed them and engaged in oral sex with both of them. The next morning the boys' underpants had been missing. V. had told his brother what had happened. The next evening, when the boys returned to the applicant's residence, the applicant had attacked K. The copy of the report of the interview in the case file contains no mention of a promise made to V. that if he told what had happened he would never be asked questions about it again (see paragraph 22 below).

10. According to V.'s brother V. had told him about the applicant having undressed the boys and engaged in oral sex with them. The next evening V.'s brother had gone with V. and K. to the applicant's home. He submitted that there had been a conflict between the applicant and K.

11. On the same day, 16 December 2005, the applicant was arrested and questioned in respect of a suspicion under Article 142 § 2 (satisfaction of sexual desire in respect of a minor) of the Penal Code (*Karistusseadustik*). He denied having had oral sex with the boys, said that he had had an altercation with them and suggested that they might have wished to take revenge. According to the record of the interview the applicant did not wish defence counsel to be present.

12. On 17 December 2005 the Tartu County Court heard the applicant, who was assisted by counsel, and remanded him in custody.

13. On 29 December 2005 the applicant was again interviewed in respect of the suspicion under Article 142 § 2 of the Penal Code according to which he had had oral sex with the victims. This time the interview took place in the presence of counsel. The applicant submitted that because of a memory blackout due to intoxication he was unable either to confirm or deny whether he had committed the offence he was suspected of. He acknowledged his bisexuality and admitted that the age of his partners was as young as 15-16 years. He had known K. for three years and during the

last year they had engaged in consensual sex a couple of times and had "simply" slept in the same bed more often. The applicant expressed regret that "he [had] sexually abused an 11-year-old boy". He submitted that he could explain his act with nothing else than alcohol intoxication and, if possible, would like to "apologise to both the child and his parents".

14. On 28 February 2006 the applicant was once more interviewed in the presence of counsel. According to the record of the interview he was suspected of having engaged in oral sex with V. and K. (Article 142 § 2 of the Penal Code), keeping on the floor of his home photos depicting a person of less than fourteen years of age in an erotic situation and making thereby these photos available to V. and K. who were minors (Article 178 § 1 of the Penal Code), displaying pornographic videos and magazines to the eleven-year-old V. (Article 179 § 1 of the Penal Code) and inducing eleven-year-old V. and seventeen-year-old K. to consume alcohol (Article 182 of the Penal Code). The applicant partly admitted his guilt and submitted that he stood by his previous statements. He denied having induced minors to consume alcohol in order to abuse them, but admitted that the boys had had an opportunity to drink alcohol. He had not known that possessing the photos in question was illegal and acknowledged that the photos were accessible. The boys could have seen magazines and other photos but not videos, as the video recorder was not working. It was noted in the record of the applicant's interview that the applicant "sincerely regretted [his] act" and promised to drink no more alcohol. The nature of the "act" referred to by the applicant was not specified.

15. On 12 April 2006 the prosecutor drew up a bill of indictment. The applicant was charged under Articles 141 § 2 (1), 178 § 1, 179 § 1 and 182 of the Penal Code. On 25 April 2006 he was committed to trial.

16. On 10 July 2006 the Tartu County Court convicted the applicant as charged. He was sentenced to seven years' imprisonment. V. was present at the start of the court hearing, but the court then granted the prosecutor's request that he be dismissed from the hearing and his testimony given during the preliminary investigation be used instead. The applicant did not object.

17. Both the applicant and his counsel appealed. Counsel complained that the applicant's conviction had been based solely on V.'s pre-trial statements, and argued that V. had been influenced by the police investigator. She also contended that the act imputed to the applicant should have been classified under Article 142 § 2 (satisfaction of sexual desire in respect of a minor) of the Penal Code and not under Article 141 § 2 (1) (rape of a minor). The applicant, as well as making arguments similar to those of counsel, claimed that the charges against him were fabricated.

18. On 9 October 2006 the Tartu Court of Appeal upheld the County Court's judgment.

19. The applicant's counsel lodged an appeal with the Supreme Court, mainly contesting the courts' reliance on V.'s pre-trial statements and the ensuing violation of the applicant's defence rights.

20. On 7 March 2007 the Supreme Court quashed the lower courts' judgments in respect of the applicant's conviction under Article 141 § 2 (1) of the Penal Code. The Supreme Court addressed the issue of the applicability of the framework decision of 15 March 2001 on the standing of victims in criminal proceedings of the Council of the European Union (200/220/JHA) and the *Pupino* judgment of the European Court of Justice (Case C-105/03 *Pupino* [2005] ECR I-5285), referred to by the lower courts. The Supreme Court considered that the courts had drawn incorrect conclusions from the *Pupino* judgment, and held as follows:

> "9. ... The national procedural law is and remains the applicable law which must be if necessary and possible interpreted in the light of the principles emanating from the framework decision. The Criminal Chamber of the Supreme Court emphasises in this context that according to generally acknowledged principles interpretation of a framework decision (a directive) must not lead to an interpretation of the national criminal law which creates criminal liability not based on law or aggravates such liability. If the law of procedure has to be interpreted in the light of a framework decision, that interpretation is limited by the wording of the Act and its compatibility with the will of the legislator; the fundamental and human rights of an accused within the meaning of Article 6 of the Convention must also be kept in mind.
>
> 10. ... A framework decision must thus be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the Convention and interpreted by the European Court of Human Rights, are respected (§ 59). It is the court's task in interpreting the national law to ensure that application of the measures referred to in the framework decision is not likely to make criminal proceedings against a person unfair within the meaning of Article 6 of the Convention, as interpreted by the European Court of Human Rights (§ 60). Thus, it also emerges from the *Pupino* ruling that a framework decision must merely be involved in the interpretation of national law. Interpretation cannot go beyond the boundaries stipulated in the national law, and the proceedings in respect of the accused must not become unfair as a result of the interpretation of national law ...
>
> 13. The appellant rightly points out that on the basis of the judgment of the Criminal Chamber of the Supreme Court in criminal case no. 3-1-1-86-06 ... the fact that a witness and a victim are minors cannot be considered grounds for not summoning them to court or subsequently disclosing their statements given during the preliminary investigation within the meaning of Article 291 of the [Code of Criminal Procedure, hereinafter "the CCrP"]. In that judgment it was explained that certain reservations may be made in respect of the direct examination of evidence, but only if the right of defence of the accused has been sufficiently taken into account at the time. The Chamber agrees with the appellant that not only the interests of the victim but also the right of defence of the accused must be kept in mind. This principle has also been referred to in the *Pupino* ruling, on which the courts have based their argumentation ... [T]he Criminal Chamber notes that according to the case-law of the European Court of Human Rights, in cases where the conviction of an accused has been based solely or decisively on the statements of a person to whom the accused did not have the opportunity to put questions either before or during the trial, the

restriction of the right of defence exceeds the limits permissible under Article 6 of the Convention. In a situation where the only direct evidence against [the accused] was their statements given during the pre-trial proceedings, such a violation of the right of defence has taken place ...

14. The Criminal Chamber also points out that the courts have not considered all avenues in law to enable the protection of the interests of a witness who is a minor during court proceedings. In addition to restriction of public access to the court hearing, which gives ground for the court to hold a hearing or a part thereof in private (see Article 12 § 1 (3) of the CCrP), and the special rules for hearing witnesses who are minors (the same applies to victims), under which a victim who is under fourteen years of age must be heard in the presence of a child protection official, social worker or psychologist (see the first sentence of Article 290 § 2 of the CCrP), under the law it is also possible for a witness who is a minor not to attend court in person. Under Article 287 § 5 of the CCrP the court may allow, at the request of a party or on its own initiative, a remote hearing to be conducted under the procedure provided for in Article 69 of the CCrP (and also to use a screen separating the victim from the accused). Under Article 69 § 1 of the CCrP one of the grounds for conducting a remote hearing is the need to protect the victim. When applying that measure a victim can be heard by means of a technical solution which enables participants in the proceedings to see and hear the witness giving evidence live from outside the courtroom, and may question the witness through the [court] (see Article 69 § 2 (1) of the CCrP). The Criminal Chamber of the Supreme Court considers that by the use of the means provided in the Code of Criminal Procedure victims of crimes can be sufficiently protected against the impact of giving statements at a public hearing ...

15. Regardless of the above, situations cannot be completely ruled out in which a victim or a witness is not able to give statements, in spite of the application of the measures described above, for example because of excessive emotional tension and the resulting potentially negative consequences. It is understandable that, in particular, attacks of a sexual nature have harmful psychological consequences, especially for minors, and that even for purely medical reasons it may be advisable to avoid reminders of such experiences. However, in such a case the assessment of the medical condition cannot be at the discretion of a court or a prosecutor's office; it must be established in each particular case on the basis of, for example, an expert opinion. Only thereafter may disclosure of the victim's statements made during the pre-trial proceedings come into question under Article 291 (5) of the CCrP."

21. The Supreme Court referred the case to the first-instance court for fresh consideration.

22. The Tartu County Court ordered a psychological expert report on V. to establish whether he was able to participate in a court hearing and give statements, either at the hearing or by means of remote questioning. In the opinion given by the experts on 14 June 2007 it was noted that V. did not wish to talk about the events and it could be seen from the video-recorded interview (see paragraph 9 above) that V. had been promised that if he told what had happened he would never be asked questions about it again. The psychological experts considered that V.'s intellectual development was slightly behind the norm for his age. They noted that it was characteristic of a child's memory that after some time (one or two years) a child was no longer able to distinguish whether he remembered a real fact or something

heard from others. Repeated questioning would not necessarily yield a more reliable outcome or statements matching his earlier statements. V. became anxious when communicating with adult strangers and he avoided both listening and responding. The experts considered that for the sake of V.'s emotional development it was not safe for him for the matter to be raised again. The experts considered that V. would definitely not be able to make an adequate statement if questioned directly in the courtroom and that the problems would, to a large extent, persist if remote questioning devices were used. The experts did not think that repeated questioning of V. could further clarify the circumstances of the case, while it could be harmful to the child.

23. Relying on the Supreme Court's judgment of 7 March 2007 and the experts' opinion, the County Court refused the applicant's request for V. to be examined at the hearing.

24. Having regard to the applicant's impulsive behaviour at the court hearing, the County Court also ordered a psychiatric report on him. The experts' opinion in that report indicated that the applicant was not suffering from mental illness. He was found to be suffering from a mixed-type personality disorder expressed in a permanent self-centred attitude, emotional instability, unstable close relationships, impulsiveness, and frequent behaviour deviating from social norms. No need for coercive treatment was discerned.

25. On 3 October 2007 the Tartu County Court convicted the applicant of rape under Article 141 § 2 (1) of the Penal Code. He was sentenced to six years' imprisonment. The court relied on the video recording of the interview with V. carried out by a police investigator in the presence of a psychologist the day after the offence. According to V., he and K. had gone to the applicant's home: they had consumed alcohol and all three had slept in one bed. During the night or early in the morning the applicant had engaged in oral sex with V. and K.

26. According to K.'s statements, given in court, he had been drunk and asleep and had no recollection of what had happened during the night. He confirmed that when he had woken up in the morning he and V. were naked (they had gone to bed clothed) and their boxer shorts were missing. Later he had heard from V. that the applicant had engaged in oral sex with them.

27. The court also heard evidence from V.'s older brother, with whom the boys had gone to the applicant's home seeking the return of their boxer shorts the following evening, and both victims' mothers, whom the boys had told about what had happened, and who also confirmed that the boxer shorts were missing. According to V.'s mother, V. had been reluctant to talk about what had happened and had cried, something that had not happened before.

28. The applicant denied the charges. He asserted that V. and K. had accused him in order to take revenge on him. In response to the prosecutor's

question, he admitted having sexual relations, years ago, with persons of both genders aged sixteen years or more but below the legal age. He denied ever having sexual relations with K. In respect of the night in question, he submitted, *inter alia*, that he had been the first one to fall asleep, and that he had woken up during the night when K. had wet the bed. The defence contested the reliability of V.'s statements, *inter alia*, challenging the quantities of alcohol allegedly consumed as well as arguing that V.'s allegation that the applicant had put white powder into K.'s glass had been disproved by an expert examination of the boys' urine.

29. The court held as follows:

> "The statements of the accused and the victims are similar in that in the late evening of 14 December 2005 all three fell asleep in the residence of the [applicant]. There was only one place to sleep in [his] residence – a sofa bed – and all three slept in the same bed, with the accused sleeping between the victims. The victims' statements fully corroborate each other in that [they] did not undress but when they woke up in the morning they were both naked and the underpants of both were missing. The court has no reason to doubt in the statements of the victims, therefore [it] considers this to be established as fact.
>
> What happened early in the morning of 15 December 2005 in the residence of the accused has been established by the statements of the victim [V.]. Statements made by [V.] during the pre-trial proceedings were disclosed at the court hearing on the basis of Article 291 (5) of the [Code of Criminal Procedure]. During the pre-trial proceedings [V.] was interviewed in the presence of a psychologist. In the expert opinion ... concerning ... the victim given by forensic psychological experts, those experts have, *inter alia*, assessed the circumstances of the interview with the victim and the victim's behaviour during the interview. The experts' opinion is that the manner of questioning used in the victim's interview on 16 December 2005 was generally appropriate from the standpoint of child psychology. The experts stated that it was wholly natural for a child of that age to start crying in such a situation. During the interview the victim had been generally anxious and stressed, but there was a certain difference between his answers to neutral [questions] and questions related to the unpleasant event: in response to the difficult questions the victim was usually silent ... According to the experts' assessment the level of the victim's mental development does not correspond to [his] age. However, he is capable of correctly perceiving and describing in accordance with his level of development his experience of events which have taken place in his vicinity ... In the opinion of the experts it can be concluded from the victim's behaviour during the interview that what had happened had a negative sense for him ... The court, in assessing the statements of the victim, relying on the opinion of the experts and [its own] conviction developed when watching the video recording of the interview, considers that the statements of the victim are sincere and there is no reason to doubt the truthfulness of [his] statements. The court is convinced that [V.] has replied to the questions put to him in accordance with [his] level of mental development described by the experts and his understanding of what happened. Descriptions of events which would be appropriate for an adult cannot be expected of a victim of such an age. It can be seen from the video recording that it was difficult for the victim to explain what had happened. The court finds that the version of the accused, namely that the victims made up the event to get him charged, is clearly self-justificatory, since in such a case also victim [V.] would also have to give his statements in a more fluent and coherent manner. The truthfulness of

[V.'s] statements is indirectly confirmed by the fact that [he] has described the events similarly to [K.] and also to [his older brother and mother]. The latter have given statements to the effect that it was unpleasant for the victim to talk about the events and that they had no reason to doubt what they had been told. [V.'s older brother and his mother] are members of [his] family and they have known [him] for a long time. Therefore their opinion about the truthfulness of the victim's statements also confirms the court's conviction that [V.] gave truthful statements during the interview.

The court considers it proved by [V.'s] statements that early in the morning of 15 December 2005, between 4 a.m. and 6 a.m. at the applicant's home ... [the applicant] engaged in sexual intercourse with minors, 11-year old [V.] and 17-year old [K.], against their will – [he] sucked their penises, having previously induced the minors to [consume] alcohol. He took advantage of their alcohol intoxication, in which state [V.] and [K.] were unable to resist or understand what was happening.

The court considers it necessary to emphasise that the general chronology of the events in question has also been confirmed by the statements of the accused himself. The accused has confirmed that on 14 December 2005 the victims stayed overnight at his home and that they all slept in one bed. Of the events of the night [the applicant] remembers that he woke up because [K.] had wet the bed. The next recollection of the accused is of the morning and the boys leaving. The accused does not remember the actual criminal act.

During the pre-trial investigation the accused admitted sexual abuse of minors and expressed regret for the act, but later retracted those statements. The accused justified changing his statements and the earlier admission of guilt by the influence of his cellmates as well as the later classification of the act as rape under Article 141 § 2 (1) of the [Penal Code] instead of the earlier classification as satisfaction of sexual desire by violence under Article 142 § 2 (1) of the [Penal Code]. The accused has also argued that the charges against him were fabricated and were driven by the victims' desire to take revenge on him. The court is of the opinion that the accused has not convincingly explained the victims' alleged enmity towards him. The accused has not indicated any factors that could have triggered such enmity. Nor is the allegation by the accused of a frame-up by the victims supported by other evidence examined in the case. The court also finds that the explanations of the accused of the reasons for changing his statements are not convincing. [The applicant] has confirmed that when [he was] interviewed as a suspect on 29 December 200[5] [and] confessed to the crime he was guaranteed representation by counsel. The accused has also confirmed that defence counsel had not told him to plead guilty. Therefore the court considers the statements of the accused self-justificatory and unreliable in so far as he denies undressing the victims, the criminal act itself and the disappearance of the victims' underpants. On the basis of the above the court is of the opinion that the charges against [the applicant] are well-founded and that [he] has committed the acts of which he is accused."

30. On 20 February 2008 the Tartu Court of Appeal upheld the County Court's judgment. It endorsed the County Court's reasoning for not summoning V. to the court hearing, and referred in this context to the psychological expert opinion obtained by the County Court and the fact that the written record and video recording of V.'s interview had been disclosed at the court hearing. In respect of the County Court's reliance on V.'s statements the Court of Appeal noted:

"The Court of Appeal considers that defence counsel unfoundedly reproaches the County Court in the appeal for basing [the applicant's] conviction mainly on the statements of the victim [V.]. However, there is nothing strange about this, since the victim [V.] was indeed the direct source of evidence and it is common in cases of sexual offences that the criminal act is experienced by two persons – the victim and the offender. The fact that the victim, who is a minor, told those close to him what he went through confirms and strengthens in the opinion of the Court of Appeal the truthfulness of the victim's statements.

The Court of Appeal disagrees with the grounds of appeal, namely that the County Court should have excluded from evidence the statements given by [K.], [K.'s mother], [V.'s older brother and V.'s mother] once it had taken into account the victim [V.]'s statements when giving judgment. The Court of Appeal agrees with the County Court that no violations of the rules of procedure have been identified in connection with the interview of the victim [V.] during the pre-trial proceedings. Considering the special features of this kind of crime, there is no reason to exclude from evidence statements from individuals who had become aware of the circumstances of the sexual offence from a direct source, namely the victim [V.]."

31. On 14 May 2008 the Supreme Court refused the applicant leave to appeal.

32. Subsequently, the applicant unsuccessfully sought the reopening of the criminal proceedings (*teistmine*).

II. RELEVANT DOMESTIC LAW

33. The relevant provisions of the Penal Code (*Karistusseadustik*), as in force at the material time, read as follows:

Article 141 – Rape

"(1) Sexual intercourse with a person against his or her will by using force or taking advantage of a situation in which the person is not capable of initiating resistance or comprehending the situation is punishable by between one and five years' imprisonment.

(2) The same act, if:

1. committed against a person of less than eighteen years of age ... is punishable by between six and fifteen years' imprisonment."

Article 142 – Satisfaction of sexual desire by violence

"(1) Involving a person against his or her will in satisfaction of sexual desire in a manner other than sexual intercourse by using force or taking advantage of a situation in which the person is not capable of initiating resistance or comprehending the situation is punishable by up to three years' imprisonment.

(2) The same act, if committed against a person of less than eighteen years of age, is punishable by up to five years' imprisonment."

Article 178 – Manufacture of works involving child pornography or making child pornography available

"(1) A person who manufactures, stores, hands over, displays or makes available in any other manner pictures, writings or other works or reproductions of works depicting a person of less than fourteen years of age in a pornographic or erotic situation shall be punished by a pecuniary punishment or up to three years' imprisonment ..."

Article 179 – Sexual enticement of children

"(1) A person who hands over, displays or makes otherwise knowingly available pornographic works or reproductions thereof to a person of less than fourteen years of age, engages in sexual intercourse in the presence of such person or knowingly sexually entices such person in any other manner shall be punished by a pecuniary penalty or up to one year's imprisonment ..."

Article 182 – Inducing a minor to consume alcohol

"An adult person who induces a person of less than eighteen years of age to consume alcohol shall be punished by a pecuniary penalty or up to one year's imprisonment."

34. Pursuant to Article 70 of the Code of Criminal Procedure (CCrP) (*Kriminaalmenetluse seadustik*), as in force at the material time, witnesses under fourteen years of age were heard in the presence of a child protection official, social worker or psychologist.

35. The Code of Criminal Procedure further provided:

Article 290 – Restrictions on hearing of witnesses who are minors

"(1) When a witness is under fourteen years of age, he or she shall not be cross-examined.

(2) A witness who is a minor of less than fourteen years shall be heard in the presence of a child protection official, social worker or psychologist, who may question the witness with the permission of the judge ...

(3) The judge shall encourage a witness who is a minor of less than fourteen years of age to tell the court everything he or she knows concerning the criminal matter.

(4) After a witness who is a minor of less than fourteen years of age has given evidence he or she shall be examined by the parties to the court proceeding in the order determined by the court.

(5) The court shall overrule leading and irrelevant questions.

(6) If the presence of a minor is not necessary after he or she has been heard, the court shall ask him or her to leave the courtroom."

Article 291 – Disclosure in court proceedings of statement given by witness in pre-trial procedure

"At the request of a party to court proceedings, the court may order that a statement given by a witness in pre-trial procedure be disclosed if:

1. the witness is dead;

2. the witness refuses to testify in the course of examination by the court, except upon refusal to testify on the bases provided for in Article 71 of this Code;

3. the witness is suffering from a serious illness and therefore cannot appear in court;

4. the whereabouts of the witness cannot be ascertained;

5. the witness fails to appear in court because of another impediment."

36. Article 366 (7) of the Code of Criminal Procedure provides that criminal proceedings may be reopened if the European Court of Human Rights has found a violation of the European Convention on Human Rights which may have affected the outcome of the criminal proceedings and if it cannot be resolved or if damage caused thereby cannot be compensated in a manner other than by reopening the proceedings.

III. RELEVANT EUROPEAN AND INTERNATIONAL MATERIAL

37. Relevant European and international material has been summarised in the judgment of *Vronchenko v. Estonia* (no. 59632/09, §§ 39-44, 18 July 2013.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 and 3 (d) OF THE CONVENTION

38. The applicant complained that he had not had a fair trial, since he had not been able to put questions to the victim on whose testimony given during the pre-trial proceedings his conviction had mainly been based. He relied on Article 6 §§ 1 and 3 (d) of the Convention, the relevant parts of which read as follows:

"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 ..."

39. The Government contested that argument.

A. Admissibility

40. In the course of the proceedings before the Court the applicant sent a letter to the Government, which was received by them on 25 May 2012. In the letter the applicant made insulting remarks and voiced threats against the domestic authorities and personally against the agent of the Government. The Government called on the Court to declare the application inadmissible as an abuse of the right of petition.

41. The applicant's lawyer, when asked by the Court to comment on the matter, submitted that the letter and its tone could not be approved of. Although the applicant had been living with the knowledge that he had been punished for an act he had not committed, this did not justify his behaviour. However, he requested that the Government's plea for inadmissibility be rejected.

42. The Court reiterates that, in principle, an application may be rejected as abusive under Article 35 §§ 3 and 4 of the Convention if it is knowingly based on untruths (see *Řehák v. the Czech Republic* (dec.), no. 67208/01, 18 May 2004, and *Varbanov v. Bulgaria,* no. 31365/96, § 36, ECHR 2000-X). Furthermore, the persistent use of insulting or provocative language by an applicant may be considered an abuse of the right of application within the meaning of Article 35 § 3 of the Convention (see *Manoussos v. the Czech Republic and Germany* (dec.), no. 46468/99, 9 July 2002; *Duringer and Others v. France* (dec.), nos. 61164/00 and 18589/02; and *Chernitsyn v. Russia*, no. 5964/02, § 25, 6 April 2006).

43. The Court considers, on the one hand, that the insulting and threatening language used by the applicant was unacceptable. On the other hand, it notes that the remarks in question were made in a letter sent to the Government and not formally submitted to the Court. Furthermore, the Court considers that an explanation – although not justification – for the applicant's written remarks could be offered by an expert opinion given in the domestic proceedings, namely that the applicant was suffering from a personality disorder involving, *inter alia*, a self-centred attitude, emotional instability, and frequent behaviour deviating from social norms (see paragraph 24 above). Lastly, the Court notes that the applicant's lawyer substantially retracted his statements.

44. Considering all the circumstances of the case, the Court does not find it appropriate to declare the application inadmissible as abusive within the meaning of Article 35 § 3 of the Convention.

45. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

46. The applicant argued that Article 6 §§ 1 and 3 (d) of the Convention had been breached, as his conviction had mainly been based on the testimony of an alleged victim who had given unrealistic and false statements under the influence of the investigator. The applicant pointed out that during the interview the investigator had promised V. that he would never again be asked questions about what had happened. Indeed, the applicant was never given an opportunity to have questions put to V. In respect of the statements of other witnesses, the applicant noted that they had only testified about what they had heard from V. and that repeating an untruth did not turn it into truth.

47. The Government argued that the fairness of the hearing was to be assessed taking into account the Estonian legal system and the national courts' authority to assess the evidence. The criminal process in Estonia was adversarial in nature, and it was essentially the parties' obligation to present evidence and, if needed, to make pertinent requests in this connection. The applicant, who had been legally represented from when the request for remand in custody was heard, could submit requests and appeals both during the pre-trial proceedings and the court proceedings, and had the opportunity to contest the evidence presented at the court hearing. The applicant had not asked for V. to be further questioned, either during the pre-trial investigation or before the trial. In the Government's view it could not be said that the applicant had never been given an opportunity to have questions put to the victims; he had in effect renounced this right.

48. In the second round of the court proceedings the courts had decided not to summon V. to the court hearing, relying on an expert opinion and the Supreme Court's judgment. They had done so in order to protect the child's right to respect for his private life, guaranteed under Article 8 of the Convention. Nevertheless, the video recording of the interview with V. had been played at the court hearing so that the parties and the court could establish how the interview had been conducted and how the victim had behaved when giving the statements.

49. Lastly, the Government argued that the applicant's conviction had not been based on V.'s testimony alone, but also on statements given by other witnesses, to whom V. had described the events. These witnesses were examined in court and the applicant was able to put questions to them.

2. The Court's assessment

(a) General principles

50. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision, which must be taken into account in any assessment of the fairness of proceedings. For this reason, the Court considers it appropriate to examine the complaints under the two provisions taken together (see, amongst other authorities, *Gani v. Spain*, no. 61800/08, § 36, 19 February 2013; *Aigner v. Austria*, no. 28328/03, § 33, 10 May 2012; and *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011).

51. While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national legislation and the domestic courts (see, amongst others, *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140, and *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). The Court's only concern is to examine whether the proceedings have been conducted fairly (see *Al-Khawaja and Tahery*, loc. cit., and *Gäfgen v. Germany* [GC], no. 22978/05, § 162, ECHR 2010, with further references).

52. 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 the witness makes his statement or at a later stage. The use in evidence of statements obtained at the police inquiry and judicial investigation stages is not in itself inconsistent with the provisions cited above, provided that the rights of the defence have been respected (see *Saïdi v. France*, 20 September 1993, § 43, Series A no. 261-C). Even where such a statement is the sole or decisive evidence against a defendant, its admission in evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. The Court will examine whether there were sufficient counterbalancing factors in place,

including measures permitting a fair and proper assessment of the reliability of that evidence to take place (see *Al-Khawaja and Tahery*, cited above, §§ 118 and 147; *Aigner*, cited above, § 35; and *Gani*, cited above, § 38).

53. The Court must also have 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 such measures can be reconciled with an adequate and effective exercise of the rights of the defence (see, for example, *Aigner*, cited above, § 35; *A.S. v. Finland,* no. 40156/07, § 55, 28 September 2010; and *S.N. v. Sweden*, no. 34209/96, § 47, ECHR 2002-V).

(b) Application of the principles to the present case

54. Following the Court's judgment in *Al-Khawaja and Tahery*, cited above, the Court will consider whether there was a good reason for the refusal of the applicant's request for V. to be heard; whether the evidence given by him was the sole or decisive basis for the applicant's conviction; and whether there were sufficient counterbalancing factors, including the existence of strong procedural safeguards, which permitted a fair and proper assessment of the reliability of that evidence (see *Vronchenko*, cited above, § 57, and *D.T. v. the Netherlands* (dec.), § 46, no. 25307/10, 2 April 2013, with further references, *mutatis mutandis*, to *Salikhov v. Russia*, no. 23880/05, §§ 112-113, 3 May 2012; *McGlynn v. the United Kingdom* (dec.), § 21, no. 40612/11, 16 October 2012; and *Lawless v. the United Kingdom* (dec.), § 25, no. 44324/11, 16 October 2012).

55. Firstly, the Court observes that in the criminal case against the applicant he was charged with a sexual offence (initially under Article 142 § 2 and later under Article 141 § 2 (1) of the Penal Code) against two minors – V. and K. While K. was examined at the court hearing but had no recollection of the offence, V. was not examined in court, but the court rather relied on the video recording of an interview with him carried out by a police investigator the day after the offence. A psychological expert opinion indicated that it was not considered safe for V. for the matter to be raised again; the experts considered that he was unable to testify adequately in the courtroom and that the problems would also persist if remote examination was used (see paragraph 22 above). Considering the need to take specific measures for the purpose of protecting victims in criminal proceedings concerning sexual offences, particularly in cases involving minors, it can be concluded that in the present case there was a good reason

for the non-attendance of V. and for his pre-trial statements to be admitted in evidence (see *Al-Khawaja and Tahery*, cited above, § 120, and *Vronchenko*, cited above, § 58; compare *Aigner*, cited above, §§ 38-39).

56. Secondly, the Court considers that the testimony of V. – according to which the applicant had engaged in oral sex with the boys – constituted decisive evidence on which the applicant's conviction was based. Although K. had been present at the scene of the offence and stood up as a victim, he was unable to testify about the sexual offence itself, as he had been drunk and asleep and had no recollection of what had happened. He was only able to give statements about the general circumstances related to the visit of the boys to the applicant's residence, about the fact that they had slept in one bed and that the boys had been naked in the morning with their boxer shorts missing. The remaining statements by the other witnesses as well as K. mainly concerned what V. had told them or related to general observations about V.'s or the applicant's behaviour.

57. As regards the third consideration, that is whether sufficient counterbalancing measures were taken to safeguard the rights of the defence, the Court has had regard to the following. During the preliminary investigation the 11-year-old V. was interviewed by a police investigator in the presence of a psychologist. The interview was carried out on 16 December 2005 and concerned events that had taken place the day before. V. was promised during the interview that if he told about what had happened, he would never be asked questions about it again. Indeed, although V. was summoned to the County Court hearing in the first round of the proceedings, the court granted the prosecutor's request to dismiss him from the hearing, owing to his young age and the nature of the matter. Subsequently, following the Supreme Court's judgment, V. was examined by psychologists on 14 June 2007, in whose expert opinion attending a court hearing could be harmful to the child. In these circumstances, the Court finds that there is some indication that the investigating authorities had already taken the view that V. was not expected to be examined at a court hearing at the outset of the proceedings (compare *Vronchenko*, cited above, § 60).

58. The Court further notes that the first round of the court proceedings were brought to an end by the Supreme Court ruling in which the issues related to the protection of victims and the rights of the accused were analysed at length in the light of European Union law and the Convention. The Supreme Court held that the examination at a court hearing of a victim of a sexual offence who was a minor was not, as such, indispensable, but his ability or otherwise to give statements was to be established on the basis of an expert assessment (see paragraph 20 above). In the second round of the proceedings, basing its view on the psychological expert opinion, the County Court refused the request by the defence for V. to be called to the

hearing. Instead, the video recording of V.'s testimony given during the pre-trial investigation was played at the hearing.

59. The Court reiterates that 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 *A.S. v. Finland*, cited above, § 53, and *Sadak and Others v. Turkey (no. 1)*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII). The Court acknowledges the Supreme Court's attempt in the present case to remedy the situation and secure the applicant's rights. Nevertheless, although the fact that the courts subsequently obtained an expert opinion on whether it was possible to examine V. at the court hearing can be seen as a safeguard against any ill-considered refusal to summon the witness, the Court considers it insufficient in the circumstances of the present case. Although the Court has no doubt that the judicial authorities made a genuine attempt to secure the applicant's defence rights, it appears that at that stage of the proceedings it was already too late to remedy the investigating authorities' failure to give the applicant an opportunity to put questions to the presumed victim, which would have been possible at an earlier stage of the proceedings. The Court notes in this context that the present case did not concern an unknown perpetrator, as the applicant's identity as the suspect was known to the authorities from the outset of the proceedings.

60. The Court considers that the domestic courts cannot be reproached for refusing to have V. summoned to a hearing on the basis of the expert opinion. This decision was clearly taken in the best interests of the child. Furthermore, it is not the Court's role to place in question the opinion of the experts who found that V.'s attendance at a court hearing could be harmful to him and that questioning him repeatedly was unlikely to further clarify the circumstances of the case. The Court considers, however, that for these very reasons it would have been essential to give the defence an opportunity to have questions put to the victim during the preliminary investigation. The same applies to the experts' opinion that after the passage of some time young children were unable to distinguish whether they remembered real facts or something heard from others – this problem, too, could have been avoided by allowing the defence to put questions to the victim at an earlier stage of the proceedings. The Court also reiterates in this context that one of the purposes of putting questions to a witness is to test the witness testimony in order to reveal any inconsistencies – something the defence was prevented from effectively doing in the present case.

61. The Court considers that although several other witnesses were examined at the court hearing (K., V.'s brother, and both boys' mothers) and the applicant could put questions to them, these statements only

provided indirect support to V.'s testimony (compare *Al-Khawaja and Tahery*, cited above, § 163). As regards the experts, the Court notes that, unlike in the case of *D.T. v. the Netherlands*, in the present case the psychological experts who examined the child did not give an opinion on the truthfulness of his video-recorded testimony, and their opinions were given in writing without them being questioned at the court hearing.

62. In conclusion, the Court has no doubts that the domestic judicial authorities acted in the best interests of the child in declining to summon the presumed victim of the offence to a court hearing. Furthermore, playing the video recording of the victim's statements at the court hearing allowed the trial court as well as the applicant to observe the manner in which the interview had been conducted, to assess V.'s demeanour, and also to assess, at least to a certain degree, the credibility of his account. However, having regard to the importance of V.'s testimony, the Court considers that the above was insufficient to secure the applicant's rights of defence (compare, for example, *A.S. v. Finland*, cited above, §§ 65-66; *A.L. v. Finland*, no. 23220/04, § 41, 27 January 2009; and *F. and M. v. Finland*, no. 22508/02, § 60, 17 July 2007). It remains a fact that the applicant was never given an opportunity to have questions put to the victim (compare and contrast, for example, *Gani*, cited above, § 44; *B. v. Finland*, no. 17122/02, §§ 44-45, 24 April 2007; and *S.N. v. Sweden*, cited above, § 45, where the defence either did not avail itself of the opportunity to have questions put to the witnesses or consented not to be present at the interview conducted during the pre-trial investigation). The Court notes that there was no strong corroborative evidence supporting V.'s statements in the present case (compare *Al-Khawaja and Tahery*, cited above, § 165). It also considers that weighing, on the one hand, the applicant's defence rights – regard also being had to the substantial prison sentence he faced – and, on the other hand, the limited impact there would have been on V. if the applicant's questions had been put to him in addition to the questions that the investigator had put to him anyway during the preliminary investigation, the Court is unable to see that if the investigating authorities had paid due attention to the applicant's defence rights there would have been any significant additional damage to the child. The Court once more emphasises in this context that the above is not to be understood as meaning that the authorities were obliged to carry out a confrontation between the applicant and V. or to ensure V.'s cross-examination at a court hearing. Rather, what is at issue in a case like the present one is whether it was possible to put questions to the witness, for example through the defendant's lawyer, police investigator or psychologist, in an environment under the control of the investigating authorities and in a manner that would not need to substantially differ from the interview which was in any event carried out by those authorities (see also *Vronchenko*, cited above, § 65).

63. The foregoing considerations are sufficient to enable the Court to conclude that there were no such counterbalancing factors present which permitted a fair and proper assessment of the reliability of V.'s evidence. Accordingly, the applicant did not receive a fair trial.

Thus, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

64. Lastly, the applicant complained that the principle of presumption of innocence had been breached. He also complained about the manner in which the evidence had been assessed by the domestic courts, that the length of the criminal proceedings was excessive, and that he had been unable to have the criminal proceedings reopened. He relied on Article 6 §§ 1 and 2 and Article 13 of the Convention.

65. However, having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that there is no appearance of a violation of the provisions cited. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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

67. The applicant claimed 550,000 euros (EUR) in compensation for pecuniary damage (deterioration in the condition of his house while he was deprived of his liberty, value of his stolen and damaged property, loss of income and additional costs) and EUR 4,000,000 in compensation for non-pecuniary damage.

68. The Government considered that there was no causal link between the pecuniary damage claimed by the applicant and the alleged violations; the claims were also unsupported by proof. The Government also asserted that the sums claimed by the applicant were unreasonable, and called on the Court to reject the applicant's claims in respect of both pecuniary and non-pecuniary damage. Should the Court find a violation, the Government

considered that the finding of a violation in itself constituted sufficient just satisfaction, taking into account the applicant's conduct.

69. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it considers that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by a finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 5,200 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

70. The applicant did not make a claim for costs and expenses. Accordingly, the Court considers that there is no call to award him any sum on that account.

C. Default interest

71. The Court considers it appropriate that the default interest rate 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* unanimously the complaint under Article 6 §§ 1 and 3 (d) concerning the applicant's lack of an opportunity to put questions to the witness admissible and the remainder of the application inadmissible;

2. *Holds* by five votes to two that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

3. *Holds* by five votes to two
   (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, EUR 5,200 (five thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 December 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach	Isabelle Berro-Lefèvre
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges M. Lazarova Trajkovska and L.-A. Sicilianos is annexed to this judgment.

I.B.L.
A.M.W.

JOINT DISSENTING OPINION OF JUDGES LAZAROVA TRAJKOVSKA AND SICILIANOS

1. We regret that, with all due respect to the majority, we are unable to share the view that the applicant's rights under Article 6 §§ 1 and 3 (d) were violated in the present case. We are unable to accept this view for the reasons already explained in our dissenting opinion in the case of *Vronchenko v. Estonia* (no. 59632/09, 18 July 2013).

2. In our view the approach of the majority in this case is built on the same legal reasoning as in *Vronchenko*. We are of the opinion that this is contrary to the Court's approach in similar cases (see, for example, *D.T. v. the Netherlands* (dec.), no. 25307/10, 2 April 2013, and *Gani v. Spain*, no. 61800/08, 19 February 2013). Moreover, in the case of *Gani*, the Third Section decided that there were sufficient counterbalancing factors to conclude that the admission in evidence of N.'s written statements without her being questioned did not result in a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention.

3. There are even stronger elements in this case which justify the approach taken by the national courts in Estonia. In our view, although the applicant was unable to put questions to the victim and although the victim's evidence was decisive for the finding of guilt during the pre-trial proceedings, there were sufficient counterbalancing measures present to ensure that the applicant had a fair trial, in line with the situation in *Al-Khawaja and Tahery v. the United Kingdom* (nos. 26766/05 and 22228/06, 15 December 2011), and with *D.T. v. the Netherlands* and *Gani.*

4. The main issue on which we disagree with the majority is this question as to whether sufficient counterbalancing measures were in place to safeguard the rights of the defence. Even though the applicant lacked the possibility to question V. at the second hearing, after the Supreme Court referred the case to the first-instance court for fresh consideration, the interview of V. in the presence of a psychologist had been videotaped and the interview had been made available to the defence. This video recording was shown during the hearings before the Tartu County Court, which enabled the court to obtain a clear impression of V.'s evidence and the defence to bring up any issues regarding the credibility of his statement. The court also used in evidence the statements of V.'s mother and brother, whom he had told what had happened. Equally important was the statement of K., who had been present that evening and had been involved in the events. K. was also interviewed on the same day by the police. In stating that the boys had stayed overnight at the applicant's home, "but [that] he had no recollection of what had happened that night as he had been drunk and had fallen asleep", K. confirmed an essential element of V.'s statement. These witnesses were heard at the trial and the applicant was able to provide his own version of the events. In addition to all these facts, the applicant

twice partly admitted his guilt and expressed regret that "he [had] sexually abused an 11-year-old boy". Moreover, during the investigative and pre-trial proceedings, he and his counsel did not ask permission to put questions to the 11-year-old boy. The boy was present at the start of the court hearing and when, at the request of the prosecutor, the court dismissed the boy from the hearing, again the applicant and his counsel did not object.

5. Given the existence of all these circumstances, the applicant was given the opportunity to question and to cross-examine all the witnesses and experts and to call his own witnesses. In such conditions we do not consider that the Estonian courts breached in any way the requirements of Article 6 §§ 1 and 3 (d) of the Convention.