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

FOURTH SECTION

CASE OF DEMSKI v. POLAND

(Application no. 22695/03)

JUDGMENT

STRASBOURG

4 November 2008

FINAL

04/02/2009

This judgment may be subject to editorial revision.

In the case of Demski v. Poland,

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

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges,*
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 14 October 2008,

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

PROCEDURE

1. The case originated in an application (no. 22695/03) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Arkadiusz Demski ("the applicant"), on 27 June 2003.

2. The applicant, who had been granted legal aid, was represented by Ms B. Słupska-Uczkiewicz, a lawyer practising in Wrocław. The Polish Government were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that his rights under Article 6 §§ 1 and 3 (d) of the Convention were violated as he had had no opportunity to examine the main witness in the criminal proceedings against him.

4. On 8 January 2007 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1971 and lives in Głogów.

6. On 12 June 2000 Ms M.Ł. informed the police that her 17 year-old granddaughter (M.H.) had been raped by the applicant and J.K. Subsequently, the police opened an investigation into the allegations.

7. M.H. was questioned by the police on 12 June and by a prosecutor on 5 July 2000.

8. The police were unsuccessful in their attempts to arrest the applicant as he had gone into hiding.

9. On 6 July 2000 M.H. was heard by the Jelenia Góra District Court, at the request of the prosecutor, pursuant to Article 316 § 1 of the Code of Criminal Procedure. Apparently, the prosecutor had attempted to notify the applicant of the hearing, but he had been absent from his place of residence.

10. On 17 August 2000 the Jelenia Góra District Court ordered that the applicant be detained on remand for a period of seven days from the day of his arrest. On 6 September 2000 the prosecutor issued a warrant for his arrest.

11. On 20 September 2000 the applicant was arrested by the police and placed in pre-trial detention.

12. On 20 December 2000 the co-accused was arrested by the police and detained on remand.

13. On 15 January 2001 the applicant was indicted before the Jelenia Góra Regional Court (*Sąd Okręgowy*).

14. On 26 July 2001 the Jelenia Góra Regional Court gave judgment. The applicant was convicted as charged and sentenced to four years' imprisonment. The court established the following facts. On 10 June 2000 M.H., who was at that time 17 years old, met the applicant, J.K. and another man in a bar called "DIK". The men were aggressive and intimidating, particularly J.K., who wanted to become M.H.'s boyfriend. They told her to come to the same bar the next day at 5 p.m., which she did. On 11 June 2000 the applicant and J.K. again threatened M.H. in the bar. Afterwards, J.K. went with her to a toilet where he harassed her. The applicant then led M.H. out of the bar and together with J.K. they went to the latter's house. The applicant and J.K., taking turns, repeatedly raped M.H. in the basement of the house. They threatened to kill M.H. if she told anybody about it. The following day M.H. spoke about the incident to her grandmother, who informed the police.

15. The applicant and J.K. did not confess. They stated that they had met M.H. in the bar where they arranged a meeting for the next day with the

purpose of having sex. They admitted that they had had sexual intercourse with M.H. but denied having raped her.

16. As regards the grounds for the conviction the trial court stated as follows:

> “The explanations of J.K. and [the applicant] regarding the rape of M.H. were considered untruthful. Their account came down to a statement that on 11 June 2000, in the DIK bar, M.H. had voluntarily agreed to meet the accused the next day to have sex with them, only she did not want to do it with both of them at the same time, but one after the other. From the accused’s explanations it also appears that afterwards she went upstairs with them to J.K.’s apartment where she was given a glass of water by his sister. Then they all returned to the DIK bar.
>
> As the explanations of both accused are contrary to the testimonies of M.H. [they have been considered untruthful].
>
> During the preparatory proceedings, [M.H., who was] questioned three times, described in identical terms the course of events of 10 and 11 June 2000...
>
> Taking into account the age of M.H. and her personality as described in the psychologist’s report, detailed below, it is no surprise that it was out of fear of the accused that she went [back] to the bar on 11 June 2000.
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> ...
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> [After having left the bar] throughout the whole of the journey [the applicant] held [M.H.] firmly by the hand, making it impossible for her to leave, and threatened to kill her if she cried or talked. It is not surprising that, despite the fact that she had been close to a police station, M.H. did not try to call for help.
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> ...
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> [in the basement] M.H., being afraid of the accused and that [the applicant] would carry out the threats he had made, which were fully backed up by J.K. as his behaviour proves, submitted herself to all the demands of the accused and had with [the applicant] and J.K. repeated vaginal, anal, and oral sexual intercourse.
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> One cannot be surprised by the victim’s behaviour given the huge physical advantage of the accused and taking into account the place in which M.H. had found herself, namely a basement. The victim could not have counted on anybody’s help in such a place and she believed that putting up any resistance would have been pointless.
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> ...
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> The truthfulness of M.H.’s testimonies is confirmed by the testimonies of witnesses R.K. [bartender], M.Ł [grandmother], and P.N., D.K. and E.C. [work colleagues]. R.K. could not say much about M.H.’s time in the bar and the accuseds’ behaviour towards her. When questioned in the preparatory proceedings she had stated nevertheless that she had urged J.K. to leave M.H. alone ...

From the testimonies of M.Ł, P.N., R.K. and E.C. it appears that M.H. told them, crying, that she had been raped ...

From the psychologist's report ... it appears that M.H. is a girl of average intelligence, with a normally developed capacity for logical thought, orientation in the world around her, and awareness of norms and moral and social behaviour ... She has a strong feeling of injustice and feels guilty that she was not able to react differently in a threatening situation. Her statements were coherent and logically linked. According to the expert they do not have the characteristics of a lie or confabulation ...

M.H. was only examined by a gynaecologist on 12 June 2000. No injuries were established ... The test excluded the presence of semen ... A lack of abrasions ... cannot prove that sexual intercourse had not taken place, because since M.H. had not put up any resistance such injuries would not necessarily have occurred, [although they] could have occurred ...

The circumstances examined above allowed the court to believe that the accused, acting together and in agreement, threatening to beat M.H. up and using force by holding her arms, had raped her on 11 June 2000."

17. On 18 September 2001 the applicant's lawyer lodged an appeal against the judgment. In particular, he complained that the applicant's right to defence had been breached and that the testimonies taken from the victim at the investigation stage had been used by the trial court.

18. On 13 December 2001 the Wrocław Court of Appeal (*Sąd Apelacyjny*) upheld the first-instance judgment and dismissed the appeal. With regard to the applicant's allegation that M.H. had not been heard in his presence, the court stated:

"In examining whether the above allegation is well-founded, it should be noted that the first-instance court had summoned the victim on several occasions in order to hear her, but she failed to appear [before it]. It appears from the testimonies of M.Ł. - the victim's grandmother - that since November 2000 M.H. had been living in Germany with her mother, who has a permanent place of residence there. A certificate from a psychological clinic in Germany, which has been treating the victim since January 2001, constitutes proof of her continuing and permanent residence in Germany.

The above situation was a ground for the first-instance court's decision, under Article 391 §1 of the Code of Criminal Procedure, not to hear the witness at the hearing and to read out the statements she had made during the investigation."

19. On 14 February 2002 the applicant's lawyer lodged a cassation appeal on his behalf with the Supreme Court (*Sąd Najwyższy*). He complained that the victim has only been summoned to the hearing of 21 May 2000 once and that the summons had been sent to an address in Poland even though the trial court had known her new address in Germany. Moreover, according to M.Ł.'s statements the victim has been returning often to Poland as she did not have a permanent place of residence in Germany. The applicant concluded that he had been deprived of the right to put questions to the witness and to confront her with other evidence, which he had repeatedly requested during the trial.

20. On 11 March 2003 the Supreme Court dismissed the cassation appeal. The Supreme Court stated, in so far as relevant:

> “...[Article 391 § 1] does not mean that in every case when a witness is abroad an automatic application of an exception from the rule of principle of directness (*zasada bezpośredniości*) should apply. On the contrary, if the testimonies of witnesses who are abroad are of significant importance to the outcome of the case, they should be summoned to a hearing using all available means, and when that proves impossible, they should give evidence by means of international judicial assistance (Article 587 of the Code of Criminal Procedure).
>
> In the context of the present case, while not denying that the prerequisite of “a witness being abroad” was met (the victim permanently left for Germany and due to her psychological troubles she was clearly unwilling to come back for the purpose of testifying in court), in the reasoning of the decision taken pursuant to Article 391 §1 it should have been particularly underlined that the non-appearance of M.H. was a result of ‘obstacles that could not be removed’. The victim – according to the certificates issued by psychologists (Polish and German) – as a consequence of her brutal rape by two perpetrators, remained, one year after the events, under intensive psychological and medical care and suffered from depression and anxiety. A limitless effort to fulfil the principle of directness, within legal boundaries, would be in striking collision with the legitimate interest of M.H. [...]. It would strengthen a false conviction within society that the victim of a crime is placed on the margin of the criminal procedure and is interesting to the relevant authorities only in so far as he or she is necessary to convict an accused or acquit him or her. The interpretation of the term ‘obstacles which could not be removed’, as the genuine possibility of a deterioration of the victim’s mental health as a result of having to appear before a court, has already been set out in the jurisprudence under the 1969 Code of Criminal Procedure.
>
> In this connection one cannot but note that the victim was heard in the preparatory proceedings by a court according to the provision of Article 316 § 3 of the Code of Criminal Procedure ... At the time when the court (in the presence of a psychologist) heard the victim, the applicant had been in hiding. Thus, by his own choice he did not participate in this important evidentiary stage of the proceedings and consequently deprived himself of the opportunity to put questions to the witness. The author of the cassation appeal ... failed to indicate what concrete, additional information he would have liked to obtain from M.H ...”

II. RELEVANT DOMESTIC LAW

21. Article 316 § 3 of the 1997 Code of Criminal Procedure reads as follows:

> “If there is a danger that the witness cannot be heard at the hearing, a party or the prosecutor or other body conducting proceedings may submit a request to have the witness heard by a court.”

22. Article 391 of the Code provides as follows:

> “1. If a witness has without good reason refused to testify, or has given testimony different from the previous one, or has stated that he does not remember certain details, or if he is abroad, or a summons cannot be served on him, or if he has not

appeared as a result of obstacles that could not be removed or if the president of the court has declined to summon him pursuant to Article 333§2 [i.e. because upon the lodging of the bill of indictment the prosecution has asked that the records of his testimony be read out at trial], and also when a witness has died, the records of his previous statements may be read out, [regardless of whether they] have been made in the investigation or before the court in the case in question or in another case or in any other procedure provided for by the law.

2. In the circumstances referred to in paragraph 1, and also in the case specified in Article 182 § 3, the records of evidence that a witness has given when heard as an accused may also be read out."

Article 585 of the Code governs the issue of judicial assistance. It provides in so far as relevant:

"The actions necessary in criminal proceedings may be conducted by way of judicial assistance, particularly the following:

1) service of documents on persons staying abroad or on agencies having their headquarters abroad,

2) taking depositions from persons as accused, witnesses, or experts ..."

According to Article 587:

"The official records of inspections, examinations of persons as accused persons, witnesses or experts, or records of other evidentiary actions prepared upon a request from a Polish court or state prosecutor, by the courts or state prosecutors of foreign countries or by agencies performing under their supervision, may be read aloud at the hearing according to the principles prescribed in Articles 389, 391 and 393. This may be done provided that the manner of performing these actions does not conflict with the principles of the legal order in the Republic of Poland."

THE LAW

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

23. The applicant complained that the criminal proceedings against him had been unfair and that he had not been given the opportunity to examine or have examined the main witness against him, Ms M.H., whose statements had been the basis for his conviction. He relied on Article 6 §§ 1 and 3 (d) of the Convention, the relevant parts of which provide:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] tribunal ...

..."

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him ...”

24. The Government contested that argument.

A. Admissibility

25. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 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

26. The applicant submitted that he had not had a fair trial and that he had been deprived of the right to put questions to M.H., whose statements played a decisive role in his conviction, in breach of Article 6 § 3 of the Convention. The applicant argued that his rights of defence had been restricted to an extent incompatible with the requirements of this Article.

27. The applicant submitted that during his trial M.H. had not been living in Germany permanently, and, according to the statements made by her grandmother, she had been returning to Poland often, staying each time for a period exceeding one week. Thus, the trial court could have summoned her to a hearing during her stays in Poland. Moreover, it was open to the Regional Court to use other means of securing the witness's attendance at hearings, notably to impose a fine on her for unjustified absence.

28. The applicant acknowledged that the special features of criminal proceedings concerning sexual offences could justify the use of certain measures for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of his right of defence. However, in the present case the need to protect the witness, invoked by the Government, had been given a disproportionate weight. The applicant was not given the opportunity to confront the witness's statements with his version of the facts, and with other evidence in the case, particularly, the expert opinion of a gynaecologist. Such a confrontation would have been possible if the applicant, or his counsel, had been able to participate in hearing M.H., either during the trial or before it started, and to put questions to her. However, since he was not given any opportunity to put questions to her, the domestic courts had convicted him

on the basis of the witness's statements in breach of the provisions of Article 6 § 3 of the Convention.

29. The Government submitted that the principle of equality of arms had been respected in the instant case and that the fact that M.H. had not been heard by the trial court in the presence of the applicant had not breached his rights under Article 6 §§ 1 and 3. The Government stated that the applicant had been represented by counsel. His case was examined at a public hearing, in an adversarial procedure, during which he had had the opportunity to adduce evidence and request that new witnesses be heard. The applicant had had access to his case file and had been able to challenge the statements made by the principal witness, M.H.

30. The Government further maintained that the principle of producing all evidence in the presence of an accused at a public hearing is not absolute and might be subject to exceptions, particularly when a case concerns a sexual offence. The Government conceded that M.H. "could indeed be regarded as a 'principal' witness in the criminal case against the applicant". For this reason she was questioned twice by the prosecutor, on 12 June and 5 July 2000, and afterwards heard in court on 6 July 2000. The prosecutor sent a summons to the applicant's address to inform him about that hearing, but at that time he had been in hiding in an attempt to avoid prosecution. The Government maintained that the applicant had not participated in the questioning of M.H. on 6 July 2000 by his own choice; therefore, he had deprived himself of the opportunity to put questions to her.

31. Moreover, the Government submitted that the trial court had in fact summoned M.H. to a hearing. This attempt was unsuccessful because she had moved to Germany permanently soon after the event of July 2000. That amounted to "an obstacle that could not be removed" within the meaning of Article 391 § 1 of the Code of Criminal Procedure, and made it possible for the trial court to read out the statements she had made at the investigation stage.

32. The Government also maintained that the authorities had adopted measures to protect M.H., the victim of sexual abuse, and had had regard to her right to respect for her private life. The Government underlined that in a rape case it is particularly important to prevent any unnecessary, additional suffering of the victim. The Government referred to their positive obligations under the Convention to effectively prosecute rape offences (*M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII) and to the case-law regarding the special features of criminal proceedings concerning sexual offences (*S.N. v. Sweden*, no. 34209/96, ECHR 2002-V). They further invoked international principles regarding protection of victims of crimes expressed, *inter alia,* in the Recommendations of the Council of Europe and the United Nations "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power".

33. In sum, the Government maintained that, taking the proceedings as a whole and taking into account the national courts' margin of appreciation in assessing the evidence before them, there had been no breach of the applicant's right to a fair trial.

2. The Court's assessment

34. As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under Article 6 §§ 1 and 3 (d) taken together (see, among many other authorities, *A.M. v. Italy*, no. 37019/97, § 23, ECHR 1999-IX, and *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 49).

35. The Court reiterates that, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. More specifically, Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system; it "does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter". The concept of "equality of arms" does not, however, exhaust the content of paragraph 3 (d) of Article 6, nor that of paragraph 1 of which this phrase represents one application among many others (see, among other authorities, *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, p. 32, § 33, and *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89).

36. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *A.M.*, cited above, § 24; *Van Mechelen and Others*, cited above, p. 711, § 50; *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67; and *Perna v. Italy* [GC], no. 48898/99, § 29, ECHR 2003-V).

37. In addition, all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Saïdi v. France*, judgment of 20 September 1993,

Series A no. 261-C, p. 56, § 43; *Kostovski v. the Netherlands*, judgment of 20 November 1989, Series A no. 166, p. 20, § 41; and *Unterpertinger v. Austria*, judgment of 24 November 1986, Series A no. 110, p. 14, § 31). In particular, the rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial (see *Van Mechelen and Others*, cited above, p. 712, § 55).

38. In appropriate cases, the principles of a fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify, in particular where life, liberty or security of person are at stake, or interests coming generally within the ambit of Article 8 of the Convention (see *P.S. v. Germany*, no. 33900/96, § 22, 20 December 2001, and *Doorson*, cited above, p. 470, § 70).

39. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (*ibid*., p. 471, § 72).

40. In the present case the applicant was convicted of having raped 17-year-old M.H. The applicant argued that he had been unable to question the statements made by M.H. at the pre-trial stage and that the trial court had made no effective attempt to summon the witness to his trial even though he had made requests to that effect on many occasions. The applicant raised his Convention complaints in his appeal and cassation appeal. The appellate court considered that it had been justified in reading out the witness's statements because she had been living abroad, while the Supreme Court referred to the need to protect M.H., a rape victim, from possible deterioration of her mental state as a result of giving evidence in the presence of the defendants.

41. The Court first notes that the statements made by M.H. had been the only direct evidence of the offence in question. This was acknowledged by the Government, which had agreed that M.H. could be regarded as a principal witness as she had been the only person present at the scene (see paragraph 30 above). Other witnesses who were heard by the court – the grandmother, work colleagues and a bartender – had not seen the acts alleged against the applicant and gave evidence only on the basis of the victim's account (see paragraph 16 above). The domestic courts further relied on the expert opinions of a gynaecologist, who had not established any trace of rape or sexual intercourse, and of a psychologist, who had been present when M.H. was heard and had confirmed that her testimony could be considered credible. The Court thus considers that the domestic courts

based their finding of the applicant's guilt to a decisive extent on M.H.'s statements (see *P.S.,* cited above, § 30).

42. The Court observes that the Government submitted that the applicant had waived his right to be present when M.H. was heard at the investigation stage before the District Court on 6 July 2000. However, at that time the applicant was being sought by the police and thus had not yet been charged with the offence. The applicant was only arrested on 20 September 2000 and indicted in January 2001. The Court observes that during the subsequent trial and appeal proceedings M.H. was not heard by the domestic courts and that the statements she had made at the pre-trial stage were read out at the trial. The Court thus considers that at no time could the applicant put questions to her, either directly or indirectly (see *P.S.*, cited above, § 26).

43. It has not been contested by the parties that the trial court had made one unsuccessful attempt to send a summons to M.H. at her Polish address. She failed to appear before the court and her grandmother testified that she had gone to live with her mother in Germany. In addition to this statement the trial court had at its disposal documents indicating that she was under medical care in Germany. It thus appears that M.H.'s address in Germany was either known to the trial court or could have been easily obtained (see, *a contrario*, *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 66, ECHR 2001-X). In spite of this, the authorities did not make any effort to determine the actual address of M.H. which was a precondition for serving a summons on a witness residing abroad (see, *a conrario, Gossa v. Poland*, no. 47986/99, § 58, 9 January 2007). The Court thus considers that the domestic courts did not make every reasonable effort to obtain the attendance of M.H. at the trial (see *Pello v. Estonia*, no. 11423/03, § 34, 12 April 2007).

44. The Court reiterates its case-law regarding rape cases in that there exist requirements inherent in the States' positive obligations to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse (*M.C.*, cited above, § 185). The Court acknowledges that the special features of criminal proceedings concerning rape might require balancing the needs of the defence against those of witnesses or victims called upon to testify. Such proceedings are often conceived of as an ordeal by the victim, in particular as they entail being confronted again with the defendant. However, in the light of the findings above, in the present case it cannot be said that the witness's whereabouts were unknown or that she sought ways to avoid a confrontation with the defendants (see *Scheper v the Netherlands* (dec), 39209/02, 5 April 2005). Had the domestic court made more effort to summon the witness to the proceedings and had she demonstrated that her participation would have had an adverse effect on her mental state, the applicant's complaint that his defence rights had not been respected would have been put in a different perspective. The Court further observes that arrangements could in any event have been made to allow M.H. to give evidence in a manner which spared her the ordeal of an adversarial

procedure while respecting the rights of the defence (see *W.S. v. Poland*, no. 21508/02, § 57, 19 June 2007 and *S.N.*, cited above, § 47).

45. The Court considers that the present case is similar to the cases *A.M.* and *P.S.* referred to above, and differs from previous decisions where the Court was satisfied that criminal proceedings concerning sexual offences, taken as a whole, were fair, as the convictions were either entirely based on evidence other than the statements of the victims (cf. *Dankovsky v. Germany*, (dec) no. 36686/97, 12 January 1999), or not solely based on the statements of the victims (*Verdam v. the Netherlands*, (dec) no. 35253/97, 31 August 1999; and *P.S.,* cited above, §30).

46. In these circumstances, the Court concludes that the applicant's conviction was to a decisive extent based on the depositions of a witness whom he had had no opportunity to examine or to have examined either during the investigation or at the trial and in consequence his rights of defence had been restricted to an extent which was incompatible with the requirements of Article 6.

47. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of paragraph 3 (d), taken in conjunction with paragraph 1 of Article 6 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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

49. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

50. The Government considered the claim excessive. They asked the Court to rule that a finding of a violation constituted in itself sufficient just satisfaction.

51. Having regard to the fact that Polish domestic law provides for a right to have the criminal proceedings reopened following a judgment of the Court finding a violation of the Convention, it considers that the above finding of a violation of Article 6 § 1 taken together with Article 6 § 3 (d) of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

B. Costs and expenses

52. The applicant also claimed EUR 3,360 for the costs and expenses incurred before the Court. This included twenty-eight hours' work by a lawyer at an hourly rate of EUR 120.

53. The Government considered that the sum claimed was disproportionately high and that the applicant and his lawyer had failed to substantiate it with any documents.

54. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum claimed in full less EUR 850 received by way of legal aid from the Council of Europe. It thus awards EUR 2,510 for the proceedings before the Court.

C. Default interest

55. The Court considers it appropriate that the default interest 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 UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (d) of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4. *Holds*
(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 2,510 (two thousand five hundred and ten euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant, to be converted into Polish zlotys at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 4 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Nicolas Bratza
Registrar	President