



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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 1685/10
by Ulla Annikki KARTTUNEN
against Finland

The European Court of Human Rights (Fourth Section), sitting on 10 May 2011 as a Chamber composed of:

Nicolas Bratza, *President*,

Sverre Erik Jebens,

Päivi Hirvelä,

Ledi Bianku,

Zdravka Kalaydjieva,

Nebojša Vučinić,

Vincent A. de Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having regard to the above application lodged on 28 December 2009,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Ulla Annikki Karttunen, is a Finnish national who was born in 1956 and lives in Helsinki.

A. The circumstances of the case

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

3. The applicant is an artist who exhibited her work “the Virgin-Whore Church” in an art gallery in Helsinki. On 14 February 2008 the exhibition was opened for invited guests and on 15 February 2008 it was opened to the public. The work included hundreds of photographs of teenage girls or otherwise very young women in sexual poses and acts. The pictures had been downloaded from free Internet pages and some of them were extremely violent or degrading.

4. On 15 February the police seized the pictures and the exhibition was closed down. On 21 February 2008 the police seized the applicant’s computer.

5. On 14 March 2008 the public prosecutor pressed charges against the applicant on two counts. His decision to press charges was based on the Deputy Prosecutor General’s (*apulaisvaltakunnansyyttäjä, biträdande riksåklagaren*) decision to press charges in the matter. He also requested, *inter alia*, that the seized pictures be confiscated.

6. On 21 May 2008 the Helsinki District Court (*käräjäoikeus, tingsrätten*) convicted the applicant of possessing and distributing sexually obscene pictures depicting children. The court found, by referring, *inter alia*, to Article 10 of the Convention and other Council of Europe conventions, that everybody had the right to freedom of expression as well as to freedom of the arts unless the exercise of these rights constituted a crime. Finding the applicant guilty was justified for the protection of morals. Moreover, the faces of many of the children or young women in the pictures were clearly recognisable and their reputation and right to private life had to be protected. Even though the applicant’s intention had not been to commit a criminal act but, on the contrary, to criticise easy access to child pornography, possessing and distributing sexually obscene pictures depicting children were still criminal acts. Their criminalisation was based on the need to protect children against sexual abuse as well as against violation of their privacy. As to the sanctions, the court noted that the applicant had intended to provoke general discussion about child pornography. Taking into account also the other circumstances, *inter alia*, that the crimes were minor and excusable, the court did not impose any sanctions on the applicant. Instead, the court ordered all the pictures to be confiscated.

7. By letter dated 19 June 2008 the applicant appealed to the Helsinki Court of Appeal (*hovioikeus, hovrätten*), requesting that the charges be dismissed. She claimed that her work as an artist had to be equated with the work of a journalist or a scientist, and that she had therefore had a justification for the possession and distribution of the pictures in question.

8. On 6 March 2009 the Helsinki Court of Appeal upheld the District Court’s judgment. It found, *inter alia*, that the protection of the privacy of children took precedence over the applicant’s right to freedom of expression. The fact that the identity of the children was not known or that

the pictures could be illegally obtained elsewhere did not remove the applicant's criminal liability nor justify her acts.

9. By letter dated 5 May 2009 the applicant appealed to the Supreme Court (*korkein oikeus, högsta domstolen*), reiterating the grounds for appeal already presented before the Court of Appeal.

10. On 29 June 2009 the Supreme Court refused the applicant leave to appeal.

B. Relevant domestic law

11. The Constitution of Finland (*Suomen perustuslaki, Finlands grundlag*, Act no. 731/1999) provides in its section 12 the following:

“Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an Act. Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.”

12. In section 16 of the Constitution the freedom of science, the arts and higher education is guaranteed.

13. According to Chapter 17, section 18, of the Penal Code (*rikoslaki, strafflagen*; Act no. 39/1889, as amended by Act no. 650/2004):

“A person who manufactures, offers for sale or for rent, exports, imports to or through Finland or otherwise distributes sexually obscene pictures or visual recordings depicting

- (1) children,
- (2) violence or
- (3) bestiality

shall be sentenced for *distribution of sexually obscene pictures* to a fine or imprisonment for at most two years.

An attempt is punishable.

The provisions in section 17, subsection 2 apply also to the pictures and visual recordings referred to in this section.

A person under 18 years of age and a person whose age cannot be determined but who can be justifiably assumed to be under 18 years of age is regarded as a child.”

14. Chapter 17, section 19, of the Penal Code provides that a person who unlawfully has in his or her possession a photograph, video tape, film or other realistic visual recording depicting a child referred to in section 18, subsection 4, having sexual intercourse or participating in a comparable sexual act or depicting a child in another obviously obscene manner shall be

sentenced for possession of sexually obscene pictures depicting children to a fine or imprisonment for at most one year.

COMPLAINT

15. The applicant complained under Article 10 of the Convention that her right as an artist to freedom of expression had been violated. She had incorporated the pornographic pictures in her work in an attempt to encourage discussion and raise awareness of how wide-spread and easily accessible child pornography was. Porn actors wanted to have as much publicity as possible, and therefore the need to protect their reputation or private life was of less importance than her right to freedom of expression.

THE LAW

16. The applicant complained that her right to freedom of expression had been violated under Article 10 of the Convention which reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

17. The Court notes that the applicant’s conviction, even if no sanction was imposed on her, constituted an interference with her right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. The Court also notes that this interference was “prescribed by law”, namely by Chapter 17, sections 18 and 19, of the Penal Code, and that it pursued the legitimate aim of protecting morals as well as the reputation or rights of others, within the meaning of Article 10 § 2.

18. As to the necessity, freedom of expression constitutes, according to the Court’s well-established case-law, one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfilment. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to “information” or “ideas” that are

favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no “democratic society”. This freedom is subject to the exceptions set out in Article 10 § 2, which must, however, be strictly construed. The need for any restrictions must be established convincingly (see, for example, *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

19. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the artistic works in question and the context in which they were exhibited. In particular, the test of “necessity in a democratic society” requires the Court to determine whether the “interference” complained of corresponded to a “pressing social need”, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see *Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 62, Series A no. 30; *Lingens v. Austria*, cited above, § 40; *Barfod v. Denmark*, 22 February 1989, § 28, Series A no. 149; *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I; and *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 52, ECHR 2000-I). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298).

20. In assessing whether such a “need” exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III). The Court’s task in exercising its supervision is not to take the place of national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

21. The Court notes that artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, “duties and responsibilities”; their scope will depend on his situation and the means he uses (see, *mutatis mutandis*, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; and *Müller and Others v.*

Switzerland, 24 May 1988, § 34, Series A no. 133; see and compare *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, ECHR 2007-II). When considering whether the interference was “necessary in a democratic society”, the Court cannot overlook these aspects.

22. Turning to the facts of the present case, the Court notes that the applicant’s conviction on the basis of Chapter 17, sections 18 and 19, of the Penal Code was intended to protect morals as well as the reputation or rights of others. The domestic courts found that the artistic work in question included hundreds of photographs of teenage girls or otherwise very young women in sexual poses and acts and that the possession and distribution of these pictures were criminalised. Their criminalisation was mainly based on the need to protect children against sexual abuse as well as violation of their privacy but also on moral considerations.

23. The Court recognises that conceptions of sexual morality have changed in recent years. Nevertheless, the Court does not find the view taken by the Finnish courts unreasonable, especially as the present case concerned minors or persons likely to be minors. The domestic courts, especially the District Court which balanced at length the relationship between freedom of expression, on the one hand, and morals and reputation and rights of others, on the other hand, found that the applicant’s freedom of expression did not justify the possession and public display of child pornography.

24. The applicant claimed that she had included the pictures in her work in an attempt to encourage discussion and raise awareness of how widespread and easily accessible child pornography was. The Court notes that the domestic courts acknowledged the applicant’s good intentions and therefore did not impose any sanctions on her. However, possessing and distributing sexually obscene pictures depicting children was still an act subject to criminal liability. The Court considers that it does not follow from the applicant’s claim that her conviction did not, in all the circumstances of the case, respond to a genuine social need.

25. In conclusion, in the Court’s opinion the reasons relied on by the domestic courts were both relevant and sufficient to show that the interference complained of was “necessary in a democratic society”. Having regard to all the foregoing factors, and the margin of appreciation afforded to the State in this area, the Court considers that the interference was proportionate to the legitimate aim pursued.

26. Accordingly, the applicant’s application is manifestly ill-founded and must thus be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early
Registrar

Nicolas Bratza
President