

Child Pornography and Freedom of Expression

Rónán Ó Fathaigh

In a recent admissibility decision which has received scant attention, the European Court considered for the first time the vexed question of the criminalisation of child pornography and its compatibility with freedom of expression. The issue before the Court was whether the conviction of an artist for including child pornography in an art exhibition violated the right to freedom of expression under Article 10 of the European Convention.

The applicant in [*Karttunen v. Finland*](#) was an artist who had included hundred of photographs of minors engaged in sexual acts in an exhibition entitled the “Virgin-Whore Church”, which was displayed at a gallery in Helsinki. The applicant had downloaded the images freely from the Internet, and the purpose of the exhibition was to encourage discussion on the ease of access to child pornography and its wide-spread existence.

On the opening day of the exhibition Finnish police seized the pictures and the exhibition was closed down. The public prosecutor initiated proceedings against the applicant, and she was subsequently convicted of possession and distribution of sexually obscene pictures depicting minors. However, the domestic courts did not impose any sanction on the applicant, taking into account her intention to provoke a general discussion, and the minor and excusable nature of the crime. The domestic courts did order confiscation of the images.

The applicant made an application to the European Court claiming her conviction was a violation of the right to freedom of expression under Article 10 of the European Convention. The Court firstly considered that notwithstanding the lack of sanction against the applicant, the conviction alone represented an interference with her right to freedom of expression. The crucial question for the Court was whether the interference had been “necessary in a democratic society”.

In determining the necessity of the interference, the Court stated that artists exercising freedom of expression are subject to duties and responsibilities, although the Court will look at the artistic work in question and the context of its exhibition.

The Court accepted that the criminalisation of child pornography was based on the interests of protecting children from sexual abuse, their privacy rights, and also moral considerations. The Court noted that the Finnish courts had acknowledged the applicant’s good intentions by not imposing any sanctions. However, the Court noted that the possession and public display of child pornography was still subject to criminal liability.

The Court considered that the domestic courts had adequately balanced the applicant’s freedom of expression with the countervailing interests, and the conviction responded to a genuine social need. Thus, the Court concluded that the interference with freedom of expression was proportionate to the legitimate aim pursued.

Comment

Firstly, this decision was the first time the European Court had considered the issue of child pornography, and the most striking aspect of the decision was that the Court seemed to hold that the distribution and possession of child pornography was an exercise of freedom of expression, and proceeded on this basis to consider whether an interference with such expression was legitimate. This approach contrasts sharply with the categorical approach of the Supreme Court of the United States, which considers child pornography involving actual minors as unprotected speech outside the protection of the First Amendment (see [Ferber v. New York](#)).

Secondly, the Court may be criticised for not fully considering certain issues, in particular its failure to distinguish between the production, distribution and possession of child pornography. These are fundamental distinctions which many superior courts throughout the world have grappled with, as the rationales for criminalising the production and distribution of child pornography may not apply to the mere possession of such pornography (see [Osborne v. Ohio](#) and the judgment of the Supreme Court of Canada in [R. v. Sharpe](#)).

The failure to even recognise these distinctions may stem from the application being considered as an admissibility decision rather than as a Chamber judgment. *Karttunen* mirrors a recent trend in European Court jurisprudence of admissibility decisions reading similar to Chamber judgments, with fundamental issues being considered at admissibility stage. However, the drawback of such an approach is the lack of fully substantiated submissions from the applicant and government, which deprives the Court of important arguments when reaching its conclusions.

The foregoing point is borne out when one considers that the Court merely approved the rationales accepted by the Finnish courts for criminalising child pornography, with no independent analysis or reasoning of its own under Article 10 principles.

The reluctance of the Court to develop its own principles regarding child pornography has consequences for the related issue of virtual child pornography. The Council of Europe [Convention on Cybercrime](#) places an obligation on member states not only to criminalise child pornography, but also material that depicts a person *appearing* to be a minor, or realistic images *representing* a minor. Indeed many member states have gone further and criminalised cartoon child pornography, including manga and anime.

Such laws raise legitimate concerns in terms of criminalising legitimate artistic expression. In contrast, the Supreme Court of the United States has held that prohibiting depictions of child pornography violated the First Amendment (see [Ashcroft v. Free Speech Coalition](#)). Given such developments, it may soon arise that the European Court will be called upon to fully consider the issues raised surrounding child pornography and freedom of expression. It is unfortunate the judgment in *Karttunen* provides no guiding principles on such issues.