



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

FIFTH SECTION

CASE OF FEXLER v. SWEDEN

(Application no. 36801/06)

JUDGMENT

STRASBOURG

13 October 2011

FINAL

13/01/2012

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

In the case of Fexler v. Sweden,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Isabelle Berro-Lefèvre,

Ann Power,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 20 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 36801/06) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Swedish national, Mrs Monica Fexler (“the applicant”), on 30 August 2006.

2. The applicant was represented by Mr Ulf Jacobson, a lawyer practising in Stockholm. The Swedish Government (“the Government”) were represented by their Agent, Ms Anna Erman from the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that the administrative appellate courts had failed to hold an oral hearing in proceedings relating to her request for disability benefits.

4. On 27 November 2007 the President of the Third Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The application was later transferred to the Fifth Section of the Court, following the re-composition of the Court’s sections on 1 February 2011.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1949 and lives in Hallabro.

7. Since June 2000, the applicant has been on 100% sick leave due to various health problems. She has, *inter alia*, been operated on for cancer as the consequence of which she suffers from recurrent *Erysipelas* (a bacterial infection of the skin, which typically involves the lymphatic system) and lymphatic oedema in both legs.

8. Hence, on 18 June 2001, the applicant applied for disability benefits (*handikappersättning*) retroactively from June 1999. She claimed that, due to her health problems, she had incurred, and still incurred, extra costs for, *inter alia*, medication, doctors' visits, treatment, travel expenses, special clothes and shoes, special soap and creams, and for supplementary vitamins and minerals. She had calculated that these extra costs amounted, in total, to SEK 75,314 (approximately EUR 8,150) per year.

9. On 3 May 2002 the Social Insurance Office (*försäkringskassan* – hereinafter “the Office”) of the County of Blekinge rejected the request. It accepted certain extra costs for medication, medical treatment and support material as well as for certain travel up to a specific amount. However, in the Office's view, the total of the applicant's extra costs per year amounted to no more than SEK 7,300 from September 1999, SEK 8,900 from January 2000 and SEK 6,800 from January 2001. Thus, the Office concluded that the applicant's extra costs did not reach the minimum level established for each year to be granted disability benefits (namely SEK 10,374 for 1999, SEK 10,431 for 2000 and SEK 10,517 for 2001, which was equal to 28.5% of the basic amount in line with the price index [*basbelopp*]). It further noted that the applicant had claimed that she needed help with shopping and some cleaning and driving but that she had not stated that she had a daily need for assistance. In this respect, the Office took into account that the applicant was married and could rely on some help from her husband. Therefore, it considered that she had failed to show that she had a substantial need of assistance in her daily life (minimum two hours per day). Finally, it found that the total need of support was not sufficient for disability benefits to be granted. The decision was based on Sections 5 and 6 of the Act on Disability Benefits and Care Allowance (*Lagen om handikappersättning och vårdbidrag*, Act no. 1998:703) and the Office also had two medical certificates at its disposal from different doctors who had treated the applicant.

10. By letter dated 23 May 2002 the applicant appealed against the decision to the County Administrative Court (*länsrätten*) of the County of Blekinge, requesting that the decision be set aside and that the case be remitted to the Office for further action. In the alternative, she requested that the court declare her entitled to disability benefits as from June 1999. She maintained her claims and developed her reasons for why the various extra costs were essential. She further added that the Office had failed to investigate her actual need for assistance, which she alleged amounted to one hour per day, in order to estimate the total cost of extra needs due to the

disability. Moreover, the applicant stated that she needed manual lymphatic drainage which the County Council of Blekinge lacked resources to provide. Since her need was medically documented, she had to travel to a neighbouring county for treatment at her own expense. In this connection, she alleged that she was unable, due to her illness, to use public transport for which reason her travel expenses were higher than calculated by the Office. All these extra costs should, in her view, be included in the calculation to grant her disability benefits.

11. On 26 February 2003 the County Administrative Court rejected the appeal. As concerned the applicant's need of assistance in her daily life, the court considered that it was the common responsibility of a couple to clean and shop, for which reason the applicant was not found to be in need of assistance from a third person in her daily life. The applicant was not considered to be in need of assistance on a daily basis to such an extent that this alone could constitute a basis for granting disability benefits. Turning to the extra costs, the court shared the Office's conclusions and calculations but added some additional costs for special soap. It also observed that the County Council was responsible for the costs related to the treatment for lymphatic drainage and that these costs thus could not be included in the calculation of disability benefits. Furthermore, it found that the medical certificates invoked before it did not show that the applicant was unable to use public transport. The court concluded, in an overall assessment of the applicant's need of assistance and of her extra costs, that the conditions for granting disability benefits were not fulfilled and, thus, that the applicant was not eligible for a disability allowance.

12. By letter dated 1 March 2003 the applicant appealed to the Administrative Court of Appeal (*kammarrätten*) in Jönköping, maintaining her earlier claims and insisting that she was in need of assistance for one hour per day. She further noted that according to the calculation based on the lower court's judgment, the total amount of extra costs acknowledged by the court was only SEK 41 (approximately EUR 4.50) below the limit to be granted disability benefits for the year 2000. Moreover, the applicant alleged that she had to buy custom-made clothes and special shoes due to her deformities caused by the lymphatic oedema and hip problems. These costs, and the costs for the lymphatic drainage, should be included. She requested that the court order the Office to submit information about how it had calculated her total need for assistance.

13. On 29 March 2004 the Administrative Court of Appeal rejected the applicant's request for further investigation of the case as it considered that the case had been clarified to the extent that was demanded. The applicant was given one month to submit, in writing, any further information that she wished to add.

14. On 8 June 2004 the Administrative Court of Appeal granted leave to appeal and, by letter dated 21 September 2004, the applicant requested that

the court hold an oral hearing because she considered the investigation to be incomplete and, for that reason, points about the matter to be decided remained unclear.

15. In a decision of 27 September 2004, the Administrative Court of Appeal declared its intention to obtain supplementary information from the Office, as it found it necessary to investigate the case further. On 30 September 2004 the Administrative Court of Appeal ordered the Office to submit supplementary information about lymphatic drainage treatment.

16. In a supplementary submission by the applicant, dated 24 November 2004, she stated that she had been in contact with Blekinge hospital to clarify whether it was now possible to carry out manual lymphatic drainage there. She had received various replies but, according to the latest reply, it was not possible although some private therapist within the county apparently could do it. She demanded that an oral hearing be held by telephone to clarify certain unclear points of the case. During the oral hearing, the Administrative Court of Appeal ought to establish that the hospital lacked resources to provide continuous manual lymphatic drainage treatment, that the frequency of the treatments, as stated in the application for disability benefits, was medically motivated and that costs incurred for treatment performed by private providers were extra costs in the present circumstances. Furthermore, the court ought to clarify contradictions in the Office's submission and calculate the time needed for assistance as well as the total need for support.

17. On 21 April 2005 the Administrative Court of Appeal rejected the applicant's request for an oral hearing "per telephone" as it found that it was not necessary. The applicant was given three weeks to finalise her submissions in writing and she was informed that, after that time, the case could be decided on the basis of the case file as it stood.

18. By a judgment of 14 June 2005, the Administrative Court of Appeal upheld the lower court's judgment in full. The court, consisting of five judges including two lay judges, found it established that lymphatic drainage treatment of the kind the applicant needed was to be regarded as medical treatment and that the County Council was responsible for costs of such treatment to the extent that it could be considered medically motivated. Accordingly, when assessing the application for disability benefits, the applicant was not entitled to include extra costs for lymphatic drainage treatment. In the light of this and as the court also shared the County Administrative Court's assessment concerning the remainder of the subject-matter the appeal was to be rejected. The judgment was unanimous.

19. By letter dated 19 July 2005 the applicant made a further appeal to the Supreme Administrative Court (*Regeringsrätten*), requesting that the Administrative Court of Appeal's judgment be repealed and the case returned for renewed examination since it had failed to hold an oral hearing. She referred to Article 6 of the Convention and claimed that an oral hearing

was necessary in order to clarify the case, in particular her need for assistance. In the alternative, the applicant requested that the court grant her disability benefits.

20. On 17 May 2006 the Supreme Administrative Court refused leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Act on Disability Benefits and Care Allowance

21. The 1998 Act on Disability Benefits and Care Allowance (*Lagen om handikappersättning och vårdbidrag*, Act no. 1998:703, as in force at the relevant time), provides that a person who has reached the age of 16 and who, before reaching the age of 65, has become functionally impaired for a considerable time and to such a degree that he or she needs time-consuming assistance from another person on a daily basis or needs continuing assistance from another person in order to be gainfully employed or otherwise has considerable extra expenses, may receive disability benefits (section 5, first paragraph). If the disabled person needs assistance either on a daily basis or in order to be gainfully employed and, in addition to this, has extra expenses, the issue of whether he or she is entitled to disability benefits and the amount of compensation shall be decided on basis of the total need of support (section 5, second paragraph). Thus, when making this assessment, it is necessary to look into the person's whole situation and to add together the need for different types of assistance and the extra expenses incurred.

22. It follows from section 6 of the 1998 Act that disability benefits are granted on a yearly basis at a level of 69%, 53% or 36% of the basic amount for social security purposes (*prisbasbelopp*) depending on the extent to which the person in question is in need of assistance and the amount of extra expenses caused by the disability. The basic amount was SEK 36,400 for 1999, SEK 36,600 for 2000 and SEK 36,900 for 2001.

23. A medical report is required when it comes to the assessment of the functional impairment itself. As to the disabled person's need of support, regard must be had to the fact that support may be provided naturally to a certain extent by the person's husband or wife or another person with whom the person is living. If the support amounts to two hours per day, the need for assistance is considered time-consuming and may, for that reason, constitute a basis for granting disability benefits amounting to 36% of the basic amount, even if there are no extra expenses (see Guidelines of the National Social Insurance Board, *Riksförsäkringsverket*, AR 1998:5, applicable at the time of the Office's decision). As far as the assessment of extra costs is concerned, account has to be taken of whether and to what

extent the disabled person has access to assistance provided by the municipal social services, such as having his or her own personal assistant or having the possibility of using municipal transport services for the disabled. According to the above-mentioned Guidelines, considerable extra expenses incurred as a consequence of the functional impairment may in themselves result in a right to disability benefits amounting to 36% of the basic amount, provided the extra expenses come to at least 28.5% of the basic amount. It is necessary to look at the whole situation of the person in question and to add together the need for different types of assistance and the extra expenses. According to the Guidelines, the total cost of all extra needs due to the disability should attain at least 28.5% of the basic amount in order to make the individual eligible for disability benefit. Thus, if a person needs support for only one hour per day but also extra expenses amounting to 15% of the basic amount, he or she is entitled to 36% of the basic amount in disability benefits (see Guidelines of the National Social Insurance Board, cited above, p. 24).

24. In order to be granted disability benefits, the individual has to file an application with a social insurance office (section 11). The benefits are paid as from the beginning of the month when the entitlement to the benefits arose. Disability benefits may be paid for a certain period of time before the insured person filed the application. Such retroactive payment may refer at most to a period of two years preceding the application (section 13). The purpose of the latter regulation is to avoid situations where the individual would lose his or her right to the benefits owing to lack of information (see Government Bill 1988/89:42, p. 9). Since 1 July 2004, retroactive payment of disability benefits may at most refer to a period of six months preceding the application.

B. Administrative Court Procedure Act

25. Section 9 of the Administrative Court Procedure Act (*Förvaltningsprocesslagen*, Act no. 1971:291, as in force at the relevant time) was worded as follows:

“The procedure shall be in writing.

Where it may be assumed to be advantageous for the investigation or promote the expeditious determination of the case, the processing may include an oral hearing regarding certain issues.

In the Administrative Court of Appeal and the County Administrative Court an oral hearing shall be held if requested by an individual party to the proceedings, unless it is unnecessary or there are particular reasons against holding a hearing.”

26. The *travaux préparatoires* to the Administrative Court Procedure Act emphasise that an oral procedure can be advantageous for the

investigation of a case in two respects in particular. Firstly, such a hearing may be needed in order to examine a witness, expert or party or in cases where a party has difficulty expounding his or her claim in writing. Secondly, an oral hearing may be needed to clarify the positions taken by the parties in the case and perhaps eliminate unnecessary or meaningless points of dispute. In the latter case, the procedure is typically of a preparatory nature. Moreover, the oral form of procedure envisaged in the 1971 Act is not to be seen as an alternative to the written form, but rather as a complement to that form (see the Government Bill 1971:30, p. 535).

27. The possibility of holding an oral hearing in order to promote an expeditious determination of the case, which was first introduced in 1983, was a clarification of a practice that already applied (see the Government Bill 1982/83:134, Parliamentary Committee on Justice JuU 36, Parliamentary Communication 378, SFS 1983:461). The purpose of the legislative amendment was to make it clearer that an oral hearing can and should be used for preparatory purposes in certain cases, to make for speedier and more effective proceedings. The amendment was primarily intended for tax cases associated with tax offence cases before courts of general jurisdiction.

28. Furthermore, the *travaux préparatoires* to the 1971 Act underlined, in connection with the provision in section 9 of the Act concerning the right of a party to an oral hearing in certain cases, that while serious consideration should be given to the wishes of a party for such a hearing, the party could hardly be allowed to have a decisive influence in the matter. The question of whether a hearing is necessary should primarily be assessed in the light of the existing investigation of the case, but it should also be possible to accord significance to other factors, for example, if the case is very important for the party and a hearing would give him a better understanding of the import of the decision to be given in the case. One particular reason not to arrange an oral hearing could be that the case is of a trivial nature or that the costs of the hearing are high compared to the value of the object of dispute (see Government Bill 1971:30, p. 537).

29. In recent years the Supreme Administrative Court has set aside a number of decisions on appeal and referred the case back to the administrative courts of appeal because of the lack of an oral hearing in the lower courts (see, for example, RA 2002 ref. 23, BA 2003 note 68, RA 2004 note 65 and RA 2007 note 171; as more specifically regards work injuries, see RA 2004 note 66 and RA 2006 note 207). In the last mentioned case, an administrative court of appeal had changed the lower court's judgment to the applicant's disadvantage without holding an oral hearing. Furthermore, the applicant had requested that a medical doctor be heard as a witness.

C. Compensation for violations of the Convention

30. In a judgment of 9 June 2005 concerning a claim for damages brought by an individual against the Swedish State, *inter alia*, on the basis of an alleged violation of Article 6 of the Convention on account of the excessive length of the criminal proceedings, the Supreme Court held that the plaintiff's right under Article 6 of the Convention to have the criminal charges against him determined within a reasonable time had been violated. Based on this finding, and with reference, *inter alia*, to Articles 6 and 13 of the Convention and the Court's case-law under these provisions, in particular the case of *Kudła v. Poland* ([GC], no. 30210/96, ECHR 2000-XI), the Supreme Court concluded that the plaintiff was entitled to compensation under Swedish law for both pecuniary and non-pecuniary damages. With respect to the level of compensation for non-pecuniary damage, the Supreme Court took note of the criteria established in the Court's case-law stating that the Court's practice constituted a natural point of departure in this regard.

31. In a decision of 4 May 2007, the Supreme Court held that the principle concerning a right to damages established in the above-mentioned case of 9 June 2005 also applied with regard to the rights contained in Article 5 of the Convention. The Supreme Court stated that the plaintiff's right to damages on account of a violation of Article 5 should be assessed in the first place under the Tort Liability Act (*Skadeståndslagen*, Act no. 1972:207) and the Act on Compensation for Deprivation of Liberty and Other Coercive Measures (*Lagen om ersättning vid frihetsberövanden och andra tvångsåtgärder*, Act no. 1998:714). To the extent necessary, the relevant provisions of domestic law should be interpreted in accordance with the Convention. If Sweden's obligations under Article 5 § 5 could not be met by such an interpretation, the domestic courts should award compensation without the support of specific legal provisions. As concerned the determination of the level of compensation, the Supreme Court repeated that the Court's case-law was a natural point of departure but also noted that account must be taken of the fact that different national conditions may lead to variations from one country to another in what should be regarded as a reasonable level of compensation.

32. In a judgment of 21 September 2007, the Supreme Court held that the plaintiffs' right to respect for their private life under Article 8 had been violated on the basis that a police decision on a medical examination of some of them had not been "in accordance with the law". Having found that compensation for the violation could not be awarded directly on the basis of the Tort Liability Act, the Supreme Court held that there was no reason to limit the scope of application of the principle established in the above-mentioned cases of 9 June 2005 and 21 September 2007 to violations of Articles 5 and 6 of the Convention. In view of this and with reference to,

inter alia, Articles 8 and 13 of the Convention and the Court's case-law under these Articles, the Supreme Court concluded that the plaintiffs should be awarded non-pecuniary damage for the violation of Article 8. With regard to the levels of compensation, the Supreme Court concluded that they should not be too far removed from the levels which applied when awarding damages under the Tort Liability Act. Generally speaking, these levels should, however, be compatible with the case-law of the Court. In the same case, Svea Court of Appeal had also concluded, in a judgment dated 12 January 2006, that there had been a violation of Article 8 and that an award for non-pecuniary damage should be made on the basis of the principle established in the case of 9 June 2005.

33. A further Supreme Court judgment of 28 November 2007 concerned a claim for damages against the Swedish State on the basis of an alleged violation of Article 2 of the Convention relating to the suicide of the plaintiffs' father while in detention. The Supreme Court concluded that the case revealed no violation of Article 2. However, in its reasoning leading to this conclusion, the Supreme Court noted, *inter alia*, that according to the Court's case-law there was a right to an effective remedy under Article 13 connected to the State's duty under the Convention to take measures to protect the lives of individuals in custody or who were otherwise deprived of their liberty, which should, in principle, include a possibility of obtaining compensation for damage. The Supreme Court thus referred in particular to the judgment in *Keenan v. the United Kingdom* (no. 27229/95, § 130, ECHR 2001-III).

34. Finally, in a decision of 11 October 2007 concerning a claim for damages against the Swedish State, the Chancellor of Justice held that the right of one of the plaintiffs under Article 6 of the Convention had been violated on account of the excessive length of the civil proceedings. Based on this finding, and with reference to the above-mentioned Supreme Court judgments of 9 June 2005 and 21 September 2007, the Chancellor of Justice concluded that the individual was entitled to compensation from the State for non-pecuniary damage. With respect to the level of compensation, the Chancellor of Justice took note of the Court's case-law, in particular the case of *Ernestina Zullo v. Italy* ([GC], no. 64897/01, 29 March 2006).

35. In May 2009 the Government decided to set up a working group on tort liability and the Convention to study the current legal situation. In December 2010 the working group submitted its report (*Skadestånd och Europakonventionen*, SOU 2010:87) to the Government. In the report it is proposed that the Tort Liability Act be amended in order to allow natural and legal persons to obtain damages from the State or a municipality for violations of the Convention. Such an action against public authorities would be examined by a general court which would need first to establish that a right provided by the Convention has been violated. The aim of the proposal is to provide a legal basis for granting non-pecuniary damage

arising from disregard of the Convention, and to fulfil, together with the other already existing legal remedies, Sweden's obligations under Article 13 of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

36. The applicant complained that the lack of an oral hearing in her case before the appellate courts, despite her explicit requests, constituted a violation of Article 6 § 1 of the Convention.

37. Article 6 § 1 of the Convention reads, in relevant parts, as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by [a] ... tribunal ...”

38. The Government contested that argument.

A. Admissibility

39. The Government maintained that the application was inadmissible as the applicant had not exhausted the domestic remedies in respect of the lack of an oral hearing. They referred to the Swedish Supreme Court's decisions of 9 June 2005, 4 May 2007 and 21 September 2007 in which the court had awarded individual compensation for pecuniary and non-pecuniary damage concerning the violation of different Articles of the Convention. In the Government's opinion, Swedish law provided a remedy in the form of compensation for both pecuniary and non-pecuniary damage in respect of any violation of the Convention, including violations consisting of the lack of an oral hearing within the meaning of Article 6 § 1 of the Convention. The first of these Supreme Court judgments had been delivered more than a year before the present application was lodged with the Court. Accordingly, the legal position under domestic law had to be considered to have been sufficiently clear at the time when the present application was introduced before the Court. In this connection, the Government pointed out that the existence of mere doubts as to the prospects of success of a particular remedy, which was not obviously futile, was not a valid reason for failing to exhaust domestic remedies. The compensatory remedy which existed at the time of the introduction of the application to the Court had been available to the applicant at that point in time as the limitation period in respect of such a claim was ten years from the point in time when the damage occurred. Thus it had been open to the applicant to take full advantage of that remedy

when she had filed her application with the Court. In any event, the said remedy was currently available to the applicant.

40. The applicant disagreed and maintained that the domestic remedies had been exhausted. When she had requested an oral hearing before the Administrative Court of Appeal, the court's obligation had been to examine her request according to Article 6 of the Convention. However, the court for some reason had failed to do so. Therefore, the applicant had expressly alleged before the Supreme Administrative Court that there had been a breach of Article 6, due to the fact that she had been denied an oral hearing by the lower court. By doing so, the applicant had given the Supreme Administrative Court an opportunity to correct the violation and to refer the case back to the lower court for an oral hearing. Therefore, the applicant had already, during the administrative court proceedings, exhausted the domestic remedies as required by Article 35 § 1 of the Convention. The applicant pointed out that she was only required to try one possible remedy, which she had done by invoking the matter before the Supreme Administrative Court.

41. The Court reiterates that the purpose of the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention is to afford the Contracting States the opportunity to prevent or put right the violations alleged against them before those allegations are submitted to the Court. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V, with further references).

42. In the present case, the applicant relied before the Supreme Administrative Court among other things on the Convention and argued that she had not had a fair trial due to the lack of an oral hearing. She thus did what was required of her in order to afford the national authorities the opportunity to remedy the violation alleged by her.

43. The Government claimed, however, that the applicant had failed to avail herself of available remedies capable of affording her sufficient redress in the form of compensation for the alleged violation. In this respect, the Court notes that, of the final domestic judgments and the decision referred to by the Government, only one was delivered before the

introduction of the present application, namely the Supreme Court's judgment of 9 June 2005. That case concerned excessive length of criminal proceedings whereas the present case concerns the lack of an oral hearing. In these circumstances, in the Court's view, it has not been shown that, at the time of the applicant's lodging the present application, there existed a remedy which was able to afford redress in respect of the violation alleged by the applicant (see also *Bladh v. Sweden* (dec.), no. 46125/06, 10 November 2009, §§ 23-27).

44. The Government further claimed that the existence of such a remedy had, in any event, become certain through several decisions and judgments issued by the Supreme Court in 2007 and that, consequently, the applicant had had the opportunity to claim compensation before the Swedish courts after the introduction of the present application. Leaving open the question of whether the applicant could have been obliged to institute domestic compensation proceedings after the date of introduction, the Court notes, again, that the underlying issues in the cases mentioned by the Government were different to those raised in the present case. While the Court welcomes the development in Swedish law concerning the possibility to claim compensation on the basis of alleged violations of the Convention, it must be kept in mind that this development is a rather recent one. Consequently, it cannot generally be required of an individual applicant to pursue a compensation claim in respect of Convention issues that have not been determined by the domestic courts or are not closely related to issues that have been so determined. The reason for this is that, in many of these cases, the existence of the remedy cannot yet be considered as sufficiently certain. This consideration is even more important in a situation where the decisions allegedly establishing the remedy were issued after the introduction of the application before the Court.

45. The Court finds that, in the instant case, it could not be required of the applicant to pursue the remedy invoked by the Government. The Government's objection as to the exhaustion of domestic remedies must therefore be dismissed.

46. The Court therefore notes that the application 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

(a) The applicant

47. The applicant maintained that the lack of an oral hearing before the Administrative Court of Appeal had violated her rights under Article 6 § 1 of the Convention. It was true that she had not requested an oral hearing before the County Administrative Court but that was simply because she had expected the court to examine fully whether her need for assistance amounted to one hour per day as she had maintained. However, the court had not made such an examination.

48. The applicant had found the lack of such examination by the Office and the County Administrative Court very surprising. For this reason she had requested that the Administrative Court of Appeal order the Office to submit information about how it had calculated her total need of assistance. After the Administrative Court of Appeal had rejected her request for further investigation, she had found no other way to clarify the issue than requesting an oral hearing. For this reason she had requested that the Administrative Court of Appeal hold an oral hearing in order to complete the investigation and have the matters clarified.

49. It was clear that her case had not been limited only to matters of law but that it had been extended also to factual issues. The main issue in the case had been to know whether her need for assistance and her additional costs had attained the level required for a disability benefit to be granted. Thus, the outcome of the case had depended on an assessment of which needs and costs could be considered as deriving from her handicap and, subsequently, on an estimation of the total amount of the various items.

50. Thus, her case had been such that it could not have been decided only on the basis of the available medical certificates but it had also required an assessment of her personal situation. It had therefore been indispensable to hold an oral hearing in which she would have had an opportunity to complete the case file by giving an account of her medical situation and its effects on her everyday life, including her need for assistance and the burden of extra expenses. Furthermore, in an oral hearing she would have had the opportunity to confront the Office directly with questions concerning the calculation of her total need for assistance. In these circumstances, it was obvious that an oral hearing would have provided information of relevance to the assessment of the case.

(b) The Government

51. The Government maintained that the lack of an oral hearing before the administrative courts did not violate the applicant's right to a fair and

public hearing within the meaning of Article 6 § 1 of the Convention. The right to an oral hearing was not absolute. Social security disputes were generally rather technical, their outcome usually being dependent on written opinions given by medical doctors, and many such disputes were better dealt with in writing than in oral argument. The administrative courts had to have regard also to the demands of efficiency and economy: systematic holding of oral hearings could be an obstacle to the particular diligence required in social security cases.

52. The Government maintained that the applicant had waived her right to an oral hearing before the County Administrative Court as she had not requested an oral hearing to be held before that court. As to the proceedings in the Supreme Administrative Court, in the Government's view the applicant had not made a request for an oral hearing before that court either. The applicant had only requested that the Administrative Court of Appeal's judgment be annulled and that the case be remitted to that court for further proceedings as her request for an oral hearing had been rejected and an oral hearing was considered necessary to clarify the matter to be decided upon. Therefore, the Government considered that the applicant had waived her right to an oral hearing also before that court. In any event, the Supreme Administrative Court had only determined whether or not leave to appeal should be granted and, as a consequence of its refusal to grant leave to appeal, had not made a full examination of the applicant's case. The Government contended that the case could be adequately resolved on the basis of the case file and written submissions and, accordingly, that the absence of an oral hearing before the Supreme Administrative Court had been justified.

53. As to the lack of an oral hearing before the Administrative Court of Appeal, the Government maintained that a less strict standard should apply as an oral hearing had been waived at first instance and requested only on appeal. In the present case it had been acceptable to reject the applicant's request for an oral hearing. It was normally more expedient that a hearing be held at first instance rather than before the appellate court. Moreover, the reason for requesting an oral hearing had been that the applicant had wished "to clarify certain unclear points of the case". It did not appear from her submissions that the purpose of the oral hearing requested would have been to put forward any further medical evidence of relevance to the Administrative Court of Appeal's assessment or that the applicant would have wished to be heard in person, for example, about circumstances related to her personal situation. Furthermore, the applicant had not requested that any witnesses be heard, nor that any other oral evidence be put forward. There had been no divergences in the written medical opinions concerning the applicant's medical condition, and thus there had been no need for further clarifications during an oral hearing. The main reason for the Administrative Court of Appeal to grant leave to appeal and to make a full

examination of the applicant's case had been the need to clarify whether lymphatic drainage treatment of the kind the applicant needed was to be regarded as medical treatment for which the County Council might be responsible for costs and, accordingly, whether the applicant had been entitled to include extra costs for such treatment. This issue, in the Government's view, had merely been a matter of law that had not necessitated an oral hearing.

54. The Government maintained that the applicant's request for an oral hearing had not included any issues that could not have been decided on the basis of the case file and the parties' written submissions. The judgment of the Administrative Court of Appeal had been unanimous. As the applicant had been represented by counsel throughout the entire proceedings, her interests had been properly presented and protected and it had not been difficult for her to argue her case in writing.

2. The Court's assessment

55. It has not been argued, nor is there anything to suggest, that this case relating to the applicant's claim for benefits under the national social security scheme did not concern a dispute (*contestation*) over a "right" which could be said, on arguable grounds, to be recognised under domestic law. In particular, it could not be said that the applicant's claim was frivolous or vexatious or otherwise lacking in foundation (see *Rolf Gustafson v. Sweden*, 1 July 1997, § 39 *in fine*, *Reports of Judgments and Decisions* 1997-IV). Nor is it disputed, and the Court is satisfied, that the right in question was "civil" in character in the autonomous sense of Article 6 § 1 of the Convention (see, for example, *Duclos v. France*, 17 December 1996, § 53, *Reports of Judgments and Decisions* 1996-VI). This provision is accordingly applicable; the only issue is whether there was a failure to comply with it on account of the refusal to hold an oral hearing in the case.

56. The Court reiterates that in proceedings before a court of first and only instance the right to a "public hearing" under Article 6 § 1 entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing (see, for instance, *Fredin v. Sweden* (no. 2), 23 February 1994, §§ 21–22, Series A no. 283-A; *Fischer v. Austria*, 26 April 1995, § 44, Series A no. 312; *Allan Jacobsson v. Sweden* (no. 2), 19 February 1998, § 46, *Reports of Judgments and Decisions* 1998-I; *Salomonsson v. Sweden*, no. 38978/97, § 34, 12 November 2002; *Lundevall v. Sweden*, no. 38629/97, § 34, 12 November 2002; *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002; *Göç v. Turkey* [GC], no. 36590/97, §§ 47–52, ECHR 2002-V; and *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 73, ECHR 2007-IV).

57. The exceptional character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations. It does not mean that refusing to hold an oral hearing may be justified only in rare cases. For example, the Court has recognised that disputes concerning benefits under social-security schemes are generally rather technical, often involving numerous figures, and their outcome usually depends on the written opinions given by medical doctors. Many such disputes may accordingly be better dealt with in writing than in oral argument. Moreover, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy. Systematically holding hearings could be an obstacle to the particular diligence required in social-security cases (see *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 58, Series A no. 263; *Salomonsson v. Sweden*, cited above, § 38; *Lundevall v. Sweden*, cited above, § 38; and *Döry v. Sweden*, cited above, § 41).

58. The Court further reiterates that, provided a public hearing has been held at first instance, a less strict standard applies to the appellate level, at which the absence of such a hearing may be justified by the special features of the proceedings at issue. Thus, leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, although the appellant was not given the opportunity to be heard in person by the appeal or cassation court. Regard must be had to the nature of the national appeal system, to the scope of the appellate court's powers and to the manner in which the applicant's interests are actually presented and protected in the appeal, particularly in the light of the nature of the issues to be decided by it, and whether these raise any questions of fact or questions of law which cannot be adequately resolved on the basis of the case file (see for instance *Helmers v. Sweden*, 29 October 1991, § 36, Series A no. 212-A).

59. The Court considers that this less strict standard should also apply if an oral hearing has been waived at first instance and requested only on appeal. In the interests of the proper administration of justice, it is normally more expedient that a hearing be held at first instance rather than only before the appellate court (see the above-mentioned *Döry* judgment).

60. Turning to the particular circumstances of the present case, the Court observes from the outset that no oral hearing was held at any stage of the proceedings. The Court notes that the applicant did not request an oral hearing before the County Administrative Court. As Section 9 of the 1971 Act provided that the proceedings before the administrative courts were normally in writing, the applicant could have been expected to request an oral hearing before that court if she attached importance to it. She did not do so, however, and the Court therefore finds that she can reasonably be

considered to have waived her right to an oral hearing before the County Administrative Court.

61. The Court notes that the applicant did equally not request an oral hearing before the Supreme Administrative Court. In any event, the Supreme Administrative Court only determined whether or not leave to appeal should be granted and, as a consequence of its refusal to grant leave, did not make a full examination of the applicant's case. The Court therefore finds that the applicant's case could be adequately resolved on the basis of the case file and the written submissions and that, accordingly, the absence of an oral hearing before the Supreme Administrative Court did not entail an infringement of Article 6 § 1 of the Convention.

62. As concerns the proceedings before the Administrative Court of Appeal, it has not been alleged that the applicant waived her right to a hearing under Article 6 § 1 of the Convention (cf, *Håkansson and Sturesson v. Sweden*, 21 February 1990, §§ 64 and 66, Series A no. 171-A; and *Schuler-Zgraggen v. Switzerland*, cited above, § 58). On the contrary, the applicant expressly requested an oral hearing on 21 September 2004 and the court rejected that request on 21 April 2005. Therefore the only issue to be determined is whether the court's refusal to hold an oral hearing was justified or not.

63. In this regard the Court notes, by way of general observation, that proceedings before the Swedish administrative courts were in principle in writing. Pursuant to section 9 of the 1971 Administrative Court Procedure Act, before the Administrative Court of Appeal and the County Administrative Court, an oral hearing should be held if so requested by a party and if the competent court found that a hearing would neither be unnecessary nor dispensable for other particular reasons (see paragraph 25 above).

64. It should also be emphasised that the Administrative Court of Appeal had full jurisdiction to examine the issue raised in the applicant's appeal, namely whether she was eligible for disability benefits retroactively from June 1999 under sections 5 and 6 of the 1998 Act on Disability Benefits and Care Allowance. According to these provisions, it needed to be established that a person had become functionally impaired for a considerable time and to such a degree that he or she needed time-consuming assistance from another person on a daily basis or otherwise had considerable extra expenses. If the disabled person needed assistance on a daily basis and, in addition to this, had extra expenses, the issue of whether he or she was entitled to disability benefits and the amount of compensation was to be decided on basis of the total need of support.

65. It is true that the written medical evidence was of considerable importance to the determination of this issue. However, this evidence, being clearly in the applicant's favour, was not a matter of dispute in the case. Instead, the outcome depended on an assessment of which needs and costs

could be considered as deriving from the applicant's disability and on an estimation of the total amount of the various items (see paragraph 53 above).

66. In requesting an oral hearing, the applicant stated that she wished "to clarify certain unclear points of the case". The Court notes that it did not appear from her submissions that the purpose of the oral hearing would have been to put forward any further evidence of relevance to the Administrative Court of Appeal's assessment or that the applicant would have wished to be heard in person, for example, about circumstances related to her personal situation (compare *Lundevall v. Sweden*, cited above, § 39). Furthermore, the applicant did not request that any witnesses be heard, nor that any other oral evidence be put forward. In these circumstances, it appears that an oral hearing would not have provided any new information of relevance to the determination of the case.

67. Moreover, the Court considers that the issues raised by the applicant's judicial appeal were technical in nature. The applicant's request for an oral hearing did not include any issues that could not have been decided on the basis of the case file and the parties' written submissions. Moreover, the judgment of the Administrative Court of Appeal was unanimous. As the applicant was represented by counsel throughout the entire proceedings, her interests were properly presented and protected and it was not difficult for her to argue her case in writing. The Court finds that the administration of justice did not require in the applicant's case that she be afforded a right to explain, on her own behalf or through her representative, her personal situation, taken as a whole at the relevant time, in a hearing before the Administrative Court of Appeal (see, *e contrario*, *Andersson v. Sweden*, no. 17202/04, 7 December 2010).

68. Having regard to the foregoing, and to the fact that an oral hearing had not been requested for at first instance and requested only on appeal, the Court finds that there were circumstances which justified dispensing with a hearing. The refusal by the Administrative Court of Appeal to hold an oral hearing did not therefore amount to a violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 13 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President