



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

COURT (PLENARY)

CASE OF EKBATANI v. SWEDEN

(Application no. 10563/83)

JUDGMENT

STRASBOURG

26 May 1988

In the Ekbatani case*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. A. SPIELMANN,
Mr. J. DE MEYER,
Mr. N. VALTICOS,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 29 January and on 28 April 1988,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was brought before the Court on 5 December 1986 by the Government of the Kingdom of Sweden ("the Government") and seven days later by the European Commission of Human Rights ("the Commission"), within the period of three months laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 10563/83) against the Kingdom of Sweden lodged

* Note by the Registrar: The case is numbered 23/1986/121/170. The second figure indicates the year in which the case was referred to the Court, and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

with the Commission on 20 June 1983 by Mr. John Ekbatani, a citizen of the United States of America, under Article 25 (art. 25).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Kingdom of Sweden recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the Government's application and of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 (art. 6) of the Convention.

2. In response to the inquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that he wished to participate in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber of seven judges to be constituted included, as *ex officio* members, Mr. G. Lagergren, the elected judge of Swedish nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 3 February 1987, the President of the Court drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. J. Cremona, Mr. F. Matscher, Mr. J. Pinheiro Farinha, Mr. R. Bernhardt and Mr. J. Gersing (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently, Mrs. D. Bindschedler-Robert and Mr. B. Walsh replaced Mr. Cremona and Mr. Gersing, who were prevented from taking part in the consideration of the case (Rules 22 § 1 and 24 § 1).

4. Mr. Ryssdal assumed the office of President of the Chamber (Rule 21 § 5). He ascertained, through the Registrar, the views of the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant regarding the need for a written procedure (Rule 37 § 1). Thereafter, in accordance with the Orders and directions of the President of the Chamber, the following documents were lodged at the registry:

- on 23 June 1987, the Government's memorial;
- on 21 October and 7 December 1987, various documents requested from the Government;
- on 3 November 1987, the applicant's claims under Article 50 (art. 50) of the Convention.

5. On 7 August 1987, after consulting, through the Registrar, the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant, the President directed that the oral proceedings should open on 23 November 1987 (Rule 38).

6. On 6 November 1987, the Government submitted a document of its own motion. On 16 and 23 November respectively, the applicant and the Government lodged a number of documents in reply to provisional questions put to them by the President of the Court.

7. The hearing was held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately prior to its opening, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr. H. CORELL, Ambassador,

Under-Secretary for Legal and Consular Affairs, Ministry
for Foreign Affairs, *Agent,*

Ms. L. MOORE, Legal Adviser,

Ministry of Justice, *Counsel;*

- for the Commission

Mr. F. ERMACORA,

Delegate;

- for the applicant

Mr. C. ARNEWID, advokat,

Counsel.

The Court heard addresses by Mr. Corell for the Government, by Mr. Ermacora for the Commission and by Mr. Arnewid for the applicant, as well as their replies to its questions.

8. Following deliberations held on 26 November 1987, the Chamber, by unanimous decision, relinquished jurisdiction in favour of the plenary Court (Rule 50 of the Rules of Court).

9. On the President's instructions, the Registrar requested the Commission to produce a number of documents, and these were supplied on 7 December 1987. On 9 December, the Registrar received further observations on Article 50 (art. 50) from the applicant.

10. Having taken note of the agreement of the Agent of the Government and the concurring opinions of the Delegate of the Commission and of the applicant, the Court decided on 29 January 1988 that the consideration of the case should continue without resumption of the oral proceedings (Rule 26).

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

11. The applicant, Mr. John Ekbatani, was born in 1930. He is a citizen of the United States of America and, at the time of the domestic proceedings in question, he resided at Gothenburg.

12. The applicant came to Sweden in 1978 to do certain research work at the University of Gothenburg. However, his initial plans did not come to fruition and his financial situation forced him to look for other work. In March 1981 he found a job at the Gothenburg Tramway Company

(Göteborgs Spårvägar). He was, however, obliged to pass a Swedish driving test, since he only had an American driver's licence. On 14 April 1981 he took the test but failed. This led to an angry exchange of views on 7 May 1981 between the applicant and the traffic assistant who had been in charge of the test; subsequently the traffic assistant reported the incident to the police.

13. In August 1981 the applicant was questioned by the police about the matter, and on 7 October 1981, he was charged with threatening a civil servant in breach of Chapter 17, section 1 of the Penal Code (brottsbalken).

14. During the trial hearing (huvudförhandling) before the City Court of Gothenburg (Göteborgs tingsrätt) on 9 February 1982, both the applicant and the traffic assistant were heard. On this testimony the City Court in a judgment on the same day found the applicant guilty of the charge brought against him and sentenced him to a fine of 600 Swedish Crowns (SEK). The costs of the proceedings were to be borne by the State. At the City Court the applicant was assisted by two public defence lawyers.

15. On 17 February 1982, the applicant appealed against this judgment to the Court of Appeal for Western Sweden (hovrätten för Västra Sverige) requesting acquittal as he claimed he had not committed the criminal act of which he was accused. Before the Court of Appeal, he was represented, first by a public defence lawyer and later by a private counsel.

In his first written statement of evidence to the Court of Appeal on 18 June 1982, the applicant took it for granted that a hearing would be held and requested that the traffic assistant appear in person before the Court of Appeal.

On 20 July 1982, the public prosecutor declared that he did not wish to adduce any new evidence. At the same time he applied for the case to be dealt with without a hearing in the Court of Appeal. In the event of a hearing he requested a rehearing of the testimony of both the applicant and the traffic assistant.

In a new statement of evidence of 20 August 1982, the applicant's counsel requested that a witness be heard. The witness was to inform the Court about "the applicant as a person and his credibility". In his reply of 16 September 1982, the public prosecutor did not oppose the calling of this new witness if a hearing were to be held. However, he asked that, in that event, three other new witnesses should be heard to prove inter alia "Mr. Ekbatani's lack of credibility and that the [traffic assistant's] statement of the course of events on 7 May 1981 was correct".

The applicant's defence counsel, on 27 September 1982, objected to the calling of these three new witnesses.

On 4 October 1982, the Court of Appeal informed the parties by means of a written notice that, as the case might be determined without a hearing, they were invited to file their final submissions in writing.

On 6 October 1982, the public prosecutor declared that he had no objection to the Court of Appeal's giving judgment without a hearing. He added that, if there was a hearing, he would insist on the examination of the three new witnesses. On 19 October 1982, the applicant's counsel stated his objection to the case being determined on the basis of the case-file, on the ground that a hearing was necessary for a thorough examination of the case. He also reiterated his objections to the calling of the witnesses called for by the prosecution. He added that, if the Court of Appeal should reach a decision on the basis of the case-file and acquit the applicant, he claimed reimbursement of his costs and expenses.

16. The Court of Appeal held no hearing and in its judgment of 12 November 1982 simply stated: "The Court of Appeal confirms the City Court's judgment."

17. On 7 December 1982, the applicant appealed to the Supreme Court (högsta domstolen). He asked the Supreme Court either to quash the Court of Appeal's decision and send the case back for a hearing, or to acquit him, or to remit the sentence imposed.

In support of his claims he stated:

"The case concerns the credibility of Mr. Ekbatani and of the aggrieved party. In support of his credibility, Mr. Ekbatani has requested the hearing of a person who was not heard by the City Court. The prosecutor has not objected to the hearing of the new witness by the Court of Appeal. Since the case concerns new evidence of decisive importance for the outcome of the case, the second sub-paragraph of section 21 in Chapter 51 of the Code of Judicial Procedure (rättegångsbalken) ought not to be applied. The preparatory work also indicates that great consideration should be given to the wishes of the parties even in the case of a fine and in particular to those of the accused (Nytt Juridiskt Arkiv II 1943, pp. 670 et seq.). Also the prosecutor requested the hearing of new evidence before the Court of Appeal. For Mr. Ekbatani it is of great importance that he is not sentenced without having received an opportunity to have the evidence adduced by him tested. The Court of Appeal ought to make its own assessment of Mr. Ekbatani. In addition, the holding of a hearing would not lead to any major increase in the costs of the proceedings."

On 3 May 1983, the Supreme Court held:

"The Supreme Court finds no reason to grant leave to appeal, for which reason the Court of Appeal's judgment shall stand."

18. Under the rules on public access to official documents, contained in the Freedom of the Press Act (tryckfrihetsförordningen) and the Secrecy Act (sekretesslagen, 1980:100), the case-files from the courts involved were all available to the public.

II. RELEVANT DOMESTIC LAW

19. According to Chapter 21 of the Code of Judicial Procedure, lower courts shall as a rule render judgment in criminal cases only after the accused has been able to defend himself at an oral hearing. Exceptions to

this rule do however exist, particularly at appellate level. Thus Chapter 51, section 21 of the Code of Judicial Procedure, as applicable at the relevant time, stated that:

"the Court of Appeal may decide the case without a hearing if the prosecutor appeals only for the benefit of the accused or if an appeal lodged by the accused is supported by the opposing party.

The case may be decided without a hearing if the lower court has acquitted the accused or discharged the offender or found him to be exempted from punishment by virtue of mental abnormality or if it has sentenced him to a fine or ordered him to pay a money penalty (vite) and there is no reason to impose a more severe sanction than those mentioned above or to impose any other sanction ..."

As of 1 July 1984 - and therefore after the facts of the present case - this provision has been amended to read as follows in the relevant parts (Svensk Författningssamling 1984:131):

"The Court of Appeal may dispose of an appeal on the merits without a hearing,

1. if the prosecutor appeals only for the benefit of the accused,
2. if an appeal brought by the accused is supported by the opposing party,
3. if the appeal is plainly unfounded, or
4. if no cause exists to hold the accused legally liable, or to impose a sanction upon him, or to impose a sanction other than a fine or conditional sentence, or a combination of such sanctions.

...

If, in a case referred to [above], a party has requested a hearing, this shall take place unless manifestly unnecessary.

...

For a ruling not relating to the merits a hearing need not take place."

20. The Court of Appeal has the power to review both questions of law and of fact. However, there are certain limitations to the Court of Appeal's full jurisdiction. Chapter 51, section 25 of the Code of Judicial Procedure (as amended by Laws 1981: 22 and 228) contains a rule proscribing *reformatio in pejus* in certain cases:

"In an appeal lodged by the accused, or by the prosecutor for the benefit of the accused, the Court of Appeal may not sentence the accused to a criminal sanction more severe than the one imposed by the lower court. If the accused was sentenced by the lower court to imprisonment, the Court of Appeal may order suspension of sentence, probation or placing under special care; in addition to suspension of sentence and to probation or placing under care within the social service, the Court of Appeal may impose a fine or probation coupled with imprisonment pursuant to Chapter 28, section 3, of the Penal Code. When the lower court has ordered a sanction

of the kind referred to above, the Court of Appeal may impose a different kind of sanction."

PROCEEDINGS BEFORE THE COMMISSION

21. In his application lodged with the Commission on 20 June 1983 (no. 10563/83) the applicant made a number of complaints regarding both his treatment by the Swedish authorities and the proceedings before the Swedish courts at issue in the present case (see paragraphs 11-17 above). He invoked Articles 2, 3, 6, 7, 13 and 14 (art. 2, art. 3, art. 6, art. 7, art. 13, art. 14) of the Convention.

22. On 5 July 1985, the Commission declared admissible "the complaint that the applicant did not get a public hearing before the Court of Appeal" and rejected the remainder of the complaints as inadmissible. In its report of 7 October 1986 (made under Article 31) (art. 31) the Commission expressed the opinion that there had been a violation of Article 6 § 1 (art. 6-1) of the Convention (eleven votes to one).

The full text of the Commission's opinion contained in the report is reproduced as an annex to the present judgment.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 (art. 6-1)

23. The applicant complained that the Court of Appeal had decided his case without a hearing. He alleged that this had constituted a breach of Article 6 § 1 (art. 6-1) of the Convention, the relevant parts of which read as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ..."

24. This provision was clearly applicable to the proceedings brought against the applicant including those before the Court of Appeal and this was not disputed. Criminal proceedings form an entity and the protection afforded by Article 6 (art. 6) does not cease with the decision at first instance; indeed, according to the Court's consistent case-law a State which institutes courts of appeal or cassation "is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in [this] Article" (art. 6) (as the most recent authority,

see the Monnell and Morris judgment of 2 March 1987, Series A no. 115, p. 21, § 54).

25. With regard to proceedings at first instance it flows from the notion of a fair trial that a person charged with a criminal offence should, as a general principle, be entitled to be present at the trial hearing (see the Colozza judgment of 12 February 1985, Series A no. 89, pp. 14-15, §§ 27 and 29; see also the above-mentioned Monnell and Morris judgment, Series A no. 115, p. 22, § 58). In the present case this requirement was satisfied since the City Court determined the criminal charges brought against the applicant only after it had held a public hearing at which the applicant appeared, gave evidence and argued his case (see paragraph 14 above). However, he did not receive such a hearing before the Court of Appeal.

26. The Government maintained that only the fundamental guarantees of Article 6 (art. 6) applied in the appeal proceedings and that these did not include further oral hearings before courts of second instance. In support of this view they invoked in particular Article 2 of Protocol No. 7 (P7-2) and the statement in the Explanatory Report to the said Protocol (P7) that the "modalities for the exercise of the right [of appeal] and the grounds on which it may be exercised [are] to be determined by domestic law" (H (84) 5 rev., p. 9, § 18).

Leaving aside the question of the authority of this Protocol (P7) which has not yet entered into force, the Court recalls Article 7 (P7-7) thereof. According to this provision, Article 2 (P7-2) is to be regarded as an addition to the Convention and all the provisions of the Convention, including Article 60 (art. 60), are to apply accordingly. Thus, the Explanatory Report states that "among those provisions, attention is drawn in particular to Article 60 (art. 60) under the terms of which 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party' The Protocol (P7) cannot be interpreted as prejudicing the rights guaranteed in the Convention ..." (ibid., p. 13, § 43). Taking both Articles (P7-7, art. 60) into account, the Court can find no warrant for the view that the addition of this Protocol (P7) was intended to limit, at the appellate level, the scope of the guarantees contained in Article 6 (art. 6) of the Convention.

27. The manner of application of Article 6 (art. 6) to proceedings before courts of appeal does, however, depend on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see, as the most recent authority, the above-mentioned Monnell and Morris judgment, Series A no. 115, p. 22, § 56).

28. The question before the Court is therefore whether a departure from the principle that there should be a public hearing at which the accused has

the right to be present and argue his case, could, in regard to the proceedings before the Court of Appeal, be justified in the circumstances of the present case by the special features of the domestic proceedings viewed as a whole (see, *mutatis mutandis*, the Axen judgment of 8 December 1983, Series A no. 72, p. 12, § 28).

In deciding this question, the Court must have regard to the nature of the Swedish appeal system, the scope of the Court of Appeal's powers and the manner in which the applicant's interests were actually presented and protected before the Court of Appeal (see, *mutatis mutandis*, the above-mentioned Monnell and Morris judgment, Series A no. 115, p. 22, § 56).

29. The Government claimed that, as the applicant had already received a full and fair hearing within the meaning of Article 6 (art. 6) before the City Court, it was not necessary that he be granted a complete second chance at the appellate level including the right to appear in person at a hearing to argue his case. The conclusive argument was, in their view, that the Court of Appeal could not increase the sentence imposed because of the application in the applicant's case of the provision prohibiting *reformatio in pejus* (see paragraph 20 above). The requirement of fairness and the object and purpose of Article 6 (art. 6) were said to be satisfied by the manner in which the Court of Appeal had conducted its examination of the case; in particular, there was equality of arms as between the applicant and the prosecution, the Court of Appeal had before it all relevant papers for determining the case, and, as regards publicity, the full case-file was available to the public (see paragraph 18 above).

30. It is true that the Court of Appeal observed the principle of "equality of arms". In particular, neither Mr. Ekbatani nor the prosecutor was allowed to appear in person before it and both were given equal opportunities to present their cases in writing. However, the Court would recall that this principle is "only one feature of the wider concept of a fair trial in criminal proceedings" (see, *inter alia*, the above-mentioned Monnell and Morris judgment, Series A no. 115, p. 94, § 62). The observance of this principle is therefore not decisive in the Court's examination of the applicant's complaint.

31. The Court has on a number of occasions held that, provided that there has been a public hearing at first instance, the absence of "public hearings" before a second or third instance 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 (art. 6), although the appellant was not given an opportunity of being heard in person by the appeal or cassation court (see, *inter alia*, the above-mentioned Monnell and Morris judgment, Series A no. 115, p. 22, § 58 (leave to appeal) and the Sutter judgment of 22 February 1984, Series A no. 74, p. 13, § 30 (court of cassation)). However, in the latter case, the underlying reason was that the

courts concerned did not have the task of establishing the facts of the case, but only of interpreting the legal rules involved.

32. Here, the Court of Appeal was called upon to examine the case as to the facts and the law. In particular, it had to make a full assessment of the question of the applicant's guilt or innocence (see paragraph 20 above). The only limitation on its jurisdiction was that it did not have the power to increase the sentence imposed by the City Court.

However, the above-mentioned question was the main issue for determination also before the Court of Appeal. In the circumstances of the present case that question could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant - who claimed that he had not committed the act alleged to constitute the criminal offence (see paragraph 15 above) - and by the complainant. Accordingly, the Court of Appeal's re-examination of Mr. Ekbatani's conviction at first instance ought to have comprised a full rehearing of the applicant and the complainant.

The limitations on the Court of Appeal's powers as a result of the prohibition of *reformatio in pejus* related only to sentencing. They cannot be considered to be relevant to the principal issue before the Court of Appeal, namely the question of guilt or innocence. Neither can the fact that the case-file was available to the public.

33. Having regard to the entirety of the proceedings before the Swedish courts, to the role of the Court of Appeal, and to the nature of the issue submitted to it, the Court reaches the conclusion that there were no special features to justify a denial of a public hearing and of the applicant's right to be heard in person. Accordingly, there has been a violation of Article 6 § 1 (art. 6-1).

II. APPLICATION OF ARTICLE 50 (art. 50)

34. Article 50 (art. 50) of the Convention provides:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant sought financial compensation for pecuniary damage allegedly suffered and reimbursement of costs and expenses. He made no claim for non-pecuniary damage and this is not a matter which the Court has to examine *ex officio* (see, *inter alia*, the Bouamar judgment of 29 February 1988, Series A no. 129, p. 26, § 68).

A. Damage

35. The applicant originally claimed damages of 3.6 million SEK. At the hearing his representative explained that the claim was based on the applicant's strong feelings that the judgment of the Court of Appeal had disrupted both his academic work and working life. After the hearing the applicant withdrew this claim and proposed instead "a liveable monthly pension ... with free access to doctors and health insurance". The applicant also claimed reimbursement of the fine of 600 SEK imposed on him.

The Government contested both claims and indicated that they considered that a finding of a violation would afford just satisfaction to the applicant. The Commission's Delegate did not express any opinion and stated that it was for the Court to take a decision in the light of its case-law.

The Court cannot speculate on the outcome of the proceedings before the Court of Appeal had that Court decided to allow the applicant to take part in a public hearing. No causal link has thus been established between the breach of the Convention found and the various pecuniary losses alleged. The applicant's claims under this head must therefore be rejected.

B. Costs and expenses

36. At the hearing, the applicant claimed in respect of costs and expenses:

- (a) 2,000 SEK for his private defence counsel in the proceedings before the Court of Appeal;
- (b) 500 SEK for his own personal expenses;
- (c) 110,000 SEK for his representation before the Commission and the Court.

The Government accepted only the third claim. The Commission did not express any opinion.

37. Regarding the first claim, it seems that the assistance of this private defence counsel was of importance for the applicant's endeavours to be granted the right to be present at a hearing before the Court of Appeal. Accordingly, these costs were necessarily incurred with a view to preventing the breach of Article 6 § 1 (art. 6-1) of the Convention. The applicant's second claim being intimately linked with the first, the Court concludes that the applicant is entitled to recover the entirety of both claims.

38. The third claim was, with reference to the special circumstances of the applicant's representation, accepted by the Government. As a result the Court does not consider it necessary to seek to assess the reasonableness thereof. The sum claimed, after deduction of the 24,216.57 French francs (FF) already received from the Council of Europe in respect of legal aid, is thus accepted.

FOR THESE REASONS, THE COURT

1. Holds by ten votes to six that Article 6 § 1 (art. 6-1) has been violated;
2. Holds unanimously that the respondent State is to pay to the applicant in respects of costs and expenses 112,500 SEK (one hundred and twelve thousand five hundred Swedish crowns) less 24,216.57 FF (twenty-four thousand, two hundred and sixteen French francs and fifty-seven centimes), to be converted into Swedish crowns at the rate applicable on the date of delivery of the present judgment;
3. Rejects the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 May 1988.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

A declaration by Mr. Lagergren and, in accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- dissenting opinion of Mr. Thór Vilhjálmsson;
- dissenting opinion of Mr. Matscher joined by Mrs. Bindschedler-Robert and Mr. Gölcüklü;
- dissenting opinion of Mr. Pinheiro Farinha;
- dissenting opinion of Mr. Bernhardt.

R.R.
M.-A.E.

DECLARATION BY JUDGE LAGERGREN

It is to be assumed that under the new Swedish legislation (see paragraph 19 of the judgment) breaches of the Convention of the kind found in the present case will not occur again.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

To my regret, I am unable to agree with the majority of the Court in this case. I have come to the conclusion that it concerns a minor offence and that Article 6 (art. 6) of the Convention does not require a full rehearing of an applicant and a complainant in such circumstances.

There is no reason to go into the facts of the case in order to show that the offence with which the applicant was charged was indeed a minor one. A reference to the judgment suffices.

Article 6 (art. 6) of the Convention sets out the right to a fair trial "within a reasonable time". Justice without delay is an important human right in all cases, big and small. This is so not only for the parties concerned but also for society as a whole, because it contributes to the successful operation of the court system. Experience shows that measures are often needed to facilitate the work of the courts. Some States have accordingly enacted special procedural rules for minor cases. To me it seems important to keep in mind that this is in accordance with, and not in contravention of, the purpose of Article 6 (art. 6) of the European Convention on Human Rights, which is to guarantee a fair trial by a tribunal.

In accordance with the relevant Swedish rules of procedure applicable in the case of Mr. Ekbatani, he was given a hearing by a court of first instance. It is clear and undisputed that this hearing fulfilled the requirements of Article 6 (art. 6). The Appeal Court applied a procedural rule permitting it to dispense with a full rehearing of the defendant and the complainant. This Court decided the case on the basis of the documents transmitted from the court of first instance and the written submissions presented to it on behalf of the prosecuting authorities and the defendant.

In my opinion, it is not in the interest of justice to deny to appellate courts the possibility of dispensing with a full rehearing of a case concerning a minor offence, even when they are called upon to decide both questions of fact and of law. As to the circumstances of the present case, the procedural guarantees enjoyed by the applicant can only be properly assessed if the domestic proceedings are viewed as a whole. Having done this, I find that the applicant was given a fair trial by the Swedish courts. The fact that the case-file was at all times available to the public and that the relevant procedural rules precluded *reformatio in pejus* strengthens this conclusion.

Accordingly, I find no violation of Article 6 (art. 6) in this case.

DISSENTING OPINION OF JUDGE MATSCHER, JOINED
BY JUDGES BINDSCHEDLER-ROBERT AND GÖLCÜKLÜ

(Translation)

To my regret, I am unable to agree either with the reasoning or with the conclusions of the majority of the Court regarding the alleged violation of Article 6 § 1 (art. 6-1) of the Convention in this case. My reasons are as follows.

1. The applicant had the benefit of proceedings before the court of first instance that satisfied all the requirements of Article 6 (art. 6): he had every opportunity to put forward his defence; the proceedings were oral and public; the court took its decision after having made the inquiries into the facts that it considered necessary; no objection was raised as regards the independence and impartiality of the court, which was established by law. Furthermore, the defendant was assisted by a lawyer and the costs of the proceedings were borne by the State.

The defendant did, of course, protest his innocence, but the assessment of the evidence and the proper application of national law is not subject to review by the Convention institutions in so far as the proceedings whereby the criminal charge was determined satisfied the requirements of Article 6 (art. 6).

2. Swedish law gives a defendant a limited right of appeal, and this goes beyond what is required by Article 6 (art. 6); furthermore, not even Article 2 of Protocol No. 7 (P7-2) will require that an appeal to a higher tribunal should be available, since in this instance the offence was "of a minor character".

The limitation on the appeal procedure is that the appellate court can decide the case without a hearing where it does not consider one to be necessary, that is to say where the appeal court, in its unfettered assessment of the evidence and after studying the written pleadings submitted by the defendant and the prosecution, accepts the facts as established by the court below and shares that court's view of the law.

In addition to all this there is the prohibition of *reformatio in pejus* where the appeal has been lodged only by the defendant; in other words, in these circumstances the appellate court can only confirm the sentence passed by the trial court or vary it in the defendant's favour.

In my view, all this accords with the requirements of Article 6 (art. 6). Where the law of the State in question affords a right of appeal (which goes beyond the requirements of Article 6) (art. 6), there is no obligation for the appeal procedure to be designed in such a way as to give the defendant the maximum opportunity of having the sentence that has been passed on him by the trial court varied in his favour.

Nor do I consider it necessary, for the purposes of the instant case, to examine in more detail the criteria which must in general be satisfied by an appeal procedure provided for in national law if it is to meet the requirements of Article 6 (art. 6).

3. Perhaps I may be allowed to add an argument based on legal policy. In the instant case, the conviction was for an offence which would be described as being "of a minor character" under the second paragraph of Article 2 of Protocol No. 7 (P7-2) and one for which that provision does not even require that there should be an appeal to a higher tribunal.

It is in the interests of sound administration of justice that in a case of this kind, where an appeal procedure is nonetheless afforded by national law, it should be limited to a review of the sentence passed by the trial court in order to ascertain that there was no serious error of fact or of substantive law or any procedural impropriety. There must therefore be a number of restrictions on such an appeal procedure (leave to appeal, decision on the basis of written evidence alone, limiting of the appeal to points of law and grounds of nullity), as it would otherwise not serve the needs of rapid, economic administration of justice in general. Moreover, in the second sentence of its first paragraph Protocol No. 7 (P7) allows for restrictions on appeals, even in respect of offences not described as being of a minor character.

DECLARATION BY JUDGE PINHEIRO FARINHA

(Translation)

I concur with Judge Matscher's dissenting opinion, set out above, with the exception of paragraph 3.

DISSENTING OPINION OF JUDGE BERNHARDT

1. It is undisputed that in the present case the criminal proceedings before the court of first instance (the City Court) satisfied all the requirements of Article 6 § 1 (art. 6-1) of the Convention.

2. The States Parties to the Convention have a very broad discretion in providing or excluding appeals against criminal decisions, especially in minor cases like the present one, where only a fine of 600 Swedish crowns was imposed by the City Court. (This is confirmed by Protocol No. 7, which is not yet in force) (P7).

This discretion of States allows of several alternatives. They can exclude any form of appeal; they can confine appeals to questions of law; or they can provide a special procedure and special conditions for the admission of an appeal. I do not see any basic difference between these alternatives and the system adopted by Sweden in the present case: if the Appeal Court is satisfied, having regard to the files and the written submissions of the parties, that the decision of the court of first instance is correct - and if it does not propose to increase the sentence -, it can reject the appeal without a further hearing. This can, at least to a certain extent, be compared with a procedure whereby an appeal requires special leave; in any event, it does not afford fewer guarantees or less protection than the other alternatives mentioned earlier. The present decision of the European Court could even have adverse effects. States may restrict appeals in order to avoid difficulties of the kind which arose in this case.

3. There is no doubt that other guarantees of a fair trial must be fulfilled in all appeal procedures, whether there is an oral hearing or not: equality of arms, the right to submit arguments in the written procedure, etc. In this respect, no defects are apparent in the present case.