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

COURT (PLENARY)

CASE OF JAN-AKE ANDERSSON v. SWEDEN

(Application no. 11274/84)

JUDGMENT

STRASBOURG

29 October 1991

In the case of Jan-Åke Andersson v. Sweden*,

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 51 of the Rules of Court** and composed of the following judges:

Mr J. CREMONA, *President*,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Mr F. BIGI,

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

Having deliberated in private on 25 April and on 26 September 1991,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Kingdom of Sweden ("the Government") on 8 and 28 June 1990 respectively, within

* The case is numbered 35/1990/226/290. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 11274/84) against Sweden lodged with the Commission under Article 25 (art. 25) by Mr Jan-Åke Andersson, a Swedish national, on 16 October 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Sweden recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and of the Government's application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. On 30 June 1990 the President of the Court decided under Rule 21 para. 6 and in the interest of sound administration of justice, that a single Chamber should be constituted to consider both the instant case and the Fejde case[1].

The Chamber to be constituted included ex officio Mrs E. Palm, the elected judge of Swedish nationality (Article 43 of the Convention)[2] (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On the same day, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr J. Pinheiro Farinha, Mr R. Bernhardt, Mr J. De Meyer, Mr S.K. Martens and Mr J.M. Morenilla (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 para. 1). Thereafter, in accordance with the President's orders, the Registrar received on 8 October 1990 the Government's memorial, on 8 and 22 April 1991 the applicant's claims under Article 50 (art. 50) and on 15 March and 22 April 1991 certain documents from the files of the Commission. In a letter of 12 November 1990 the Secretary to the Commission informed the Registrar that the Delegate would submit her observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 15 November 1990 that the oral proceedings should open on 22 April 1991 (Rule 38).

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[1] Case no. 36/1990/227/291.

[2] As amended by Article 11 of Protocol No. 8 (P8-11) to the Convention, which entered into force on 1 January 1990.

6. On 23 November 1990 the Chamber decided unanimously, under Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

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 A.-S. BROQVIST, Legal Adviser,
Ministry of Justice,

Ms E. JAGANDER, Legal Adviser,
Ministry for Foreign Affairs, Advisers;

- for the Commission

Mrs G.H. THUNE, *Delegate*;

- for the applicant

Mr C. ARNEWID, advokat, *Counsel*,

Mr L. HÖK, advokat, *Adviser*.

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

8. At the final deliberations Mr Cremona, the Vice-President of the Court, replaced Mr Ryssdal as President, the latter being unable to take part in the further consideration of the case (Rule 9).

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

9. Mr Jan-Åke Andersson, a Swedish citizen, is an engineer by profession and resides in Torsås in the South-West of Sweden.

10. On 26 February 1983 the applicant was stopped by police inspector B. while driving a tractor on a highway (motortrafikled), on which this was prohibited under the Traffic Ordinance of 1972 (vägtrafikkungörelsen 1972:603 - "the 1972 Ordinance"). He refused to pay a fine, maintaining that he had not seen any road sign indicating the category of the road or the prohibition in question.

11. On 17 May 1983 Mr Andersson was summoned to appear before the District Court (tingsrätten) of Ronneby, charged with having contravened sections 139 and 144 of the 1972 Ordinance.

In a letter to the District Court he stated that he expected the public prosecutor to call certain police officers, including police inspector B., as witnesses, as he could not afford to call any himself. Moreover, the public prosecutor should, he said, produce the relevant official meteorological records (see the extracts from the District Court's judgment in paragraph 12 below). In addition, he requested the District Court to appoint an official defence counsel.

On 8 June 1983 this request was refused by the District Court, which considered that the case was simple and that the applicant was able to defend himself. His appeal against this decision was dismissed by the Court of Appeal (hovrätten) of Skåne and Blekinge on 15 June 1983, with no possibility of further appeal.

12. On 21 September 1983 the District Court held a hearing (huvudförhandling) during which both the applicant and police inspector B. were heard. It did not, however, order the production of the relevant meteorological records. On the same day it found the applicant guilty of the charge brought against him and sentenced him to a fine of 400 Swedish kronor. In its judgment the District Court stated:

> "[The applicant] has contested criminal liability and has made the following statement: He was on his way from Hässleholm to Torsås driving a tractor that he had just bought. He had travelled with his father to Hässleholm that morning and they had then, inter alia, travelled the same road but in the opposite direction. The mist had been very dense already in the morning and [the applicant] had observed nothing special as regards the road during the trip. He does not know what the concept 'motortrafikled' means. When he arrived on the 'motortrafikled' west of Karlshamn it was so misty that he saw no road signs that attracted his attention. He was therefore unaware of the character of the road he was driving on and even if he had noticed a road sign indicating 'motortrafikled' he would not have known what restrictions this would imply as regards driving certain vehicles.
>
> Police inspector B. has been heard as a witness but has not given any information other than that the weather was normal in the area of Ronneby without any signs of mist.
>
> [The applicant] - who was driving as alleged by the public prosecutor - drove a long distance by tractor and should therefore have paid particular attention to the rules applicable as regards the driving of such a vehicle. The fact that the weather was misty does not relieve him from his obligations as a driver. He shall therefore be convicted in accordance with the charge against him."

13. On 4 October 1983 the applicant appealed to the Court of Appeal of Skåne and Blekinge. He claimed that the proceedings before the District Court had been "unbalanced" and that numerous "interruptions" by the judge had prevented him from following the arguments and from presenting his case in a satisfactory manner; that the fine imposed was far too high; and furthermore, that the District Court had overlooked the fact that certain road signs had been missing.

In his reply of 31 October 1983, the public prosecutor, referring to the evidence submitted before the District Court, maintained that the applicant was guilty and expressed the opinion that it was not necessary to hold a new hearing. On 2 November the Court of Appeal sent a copy of this reply to the applicant, advising him that since the case could be adjudicated without a new hearing, he was entitled to submit final written observations within two weeks.

In his final observations of 9 November 1983, Mr Andersson asked the Court of Appeal to take the absence of certain road signs into account and to consider the weather situation and the fact that he was overtaken by an unmarked police car which failed to warn him.

He also applied for a public hearing to be held in Karlskrona, for police inspector B. to be heard as a witness and for the relevant meteorological records to be examined. In addition, he requested free legal assistance since he needed defence counsel and did not have sufficient means to pay for one.

14. The Court of Appeal rejected the applicant's requests and decided the case on the basis of the case-file. In its judgment of 10 February 1984, upholding the findings of the District Court, it stated:

> "From the photos which have been referred to, it appears that the fact that the road in question was a 'motortrafikled' did appear from appropriate and visible road signs at Stensnäs. For this reason and since [the applicant] nevertheless drove the tractor on [the road] from Stensnäs to Sörby, he committed the offence with which he has been charged by the prosecution."

15. Mr Andersson applied for leave to appeal to the Supreme Court (högsta domstolen), claiming that the appeal proceedings had been very "unbalanced" and had not complied with human-rights standards. The Supreme Court refused the application on 26 April 1984.

16. Under the rules on public access to official documents, contained in the Freedom of the Press Act 1949 (tryckfrihetsförordningen) and the Secrecy Act (sekretesslagen, 1980:100), the case-files from the courts involved were all accessible to the public.

II. THE CODE OF JUDICIAL PROCEDURE

17. According to Chapter 21 of the Code of Judicial Procedure, lower courts must not as a rule give judgment in criminal cases until 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, as worded at the relevant time (it was subsequently amended with effect from 1 July 1984), provided:

> "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 ..."

18. The Court of Appeal has the power to review questions both of law and of fact. However, there are some limits to its jurisdiction. Section 23 of Chapter 51, for instance, lays down that the Court of Appeal may not normally change the lower court’s assessment of the evidence to the disadvantage of the accused without the evidence in question being produced afresh before the Court of Appeal; Chapter 51, section 25 (as amended by Laws 1981:22 and 228) also contains a rule prohibiting the appellate court, in cases where the appeal is lodged by the accused or by the prosecutor for the benefit of the accused, from imposing a sentence which can be considered more severe than that imposed at first instance.

PROCEEDINGS BEFORE THE COMMISSION

19. In his application lodged with the Commission on 16 October 1984 (no. 11274/84), the applicant, invoking Article 6 para. 1 (art. 6-1) of the Convention, complained that he had not received a fair trial before the Swedish courts (see paragraphs 12-15 above). He further asserted that he had been the victim of discriminatory treatment. In addition, he contended, it had not been proven that he had deliberately committed the offence in question.

20. On 10 July 1989 the Commission declared admissible the complaint that the applicant "did not get a ‘fair and public hearing’ within the meaning of Article 6 (art. 6) of the Convention" and rejected the remainder of the application as inadmissible.

In its report of 15 March 1990 (made under Article 31) (art. 31), the Commission expressed the opinion, by seventeen votes to two, that there had been a violation of Article 6 para. 1 (art. 6-1) of the Convention. The full text of the Commission’s opinion and of the separate opinion contained in the report is reproduced as an annex to this judgment1[*].

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[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 212-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

21. The applicant alleged that the Court of Appeal's decision to examine his appeal without a public hearing, despite his request for one, violated Article 6 para. 1 (art. 6-1) of the Convention, which reads:

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

22. The manner of application of Article 6 (art. 6) to proceedings before courts of appeal depends 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 Ekbatani judgment of 26 May 1988, Series A no. 134, p. 13, para. 27).

23. The Court notes at the outset that a public hearing was held at first instance. As in several earlier cases, the question before the Court is whether a departure from the principle that there should be such a hearing could, in the circumstances of the case, be justified at the appeal stage by the special features of the domestic proceedings viewed as a whole (see, inter alia, the same judgment, p. 13, para. 28).

In order to decide this question, regard must be had to the nature of the Swedish appeal system, to the scope of the Court of Appeal's powers and to the manner in which the applicant's interests were actually presented and protected before the Court of Appeal particularly in the light of the nature of the issues to be decided by it (ibid., p. 14, para. 33).

There was, however, disagreement between those appearing before the Court as to how this test should be applied in the circumstances of the present case.

24. The Commission observed that the Court of Appeal was called upon to examine the case as to the facts and the law and to make a full assessment of the applicant's guilt or innocence. Furthermore, the Court of Appeal did not base its examination exclusively on the District Court's file since both parties were given the opportunity to submit further observations and indeed did so. The Commission concluded that Article 6 para. 1 (art. 6-1) required that Mr Andersson should be allowed a hearing before the Court of Appeal and to be present at such a hearing if he so requested.

In support of this opinion the Commission observed that the accused's right to a public hearing was not only an additional guarantee that an endeavour would be made to establish the truth but also helped to ensure that he was satisfied that his case was being determined by a tribunal, the independence and impartiality of which he could verify. Furthermore, the Commission considered that this right followed from the object and purpose of Article 6 (art. 6) taken as a whole; in particular, the rights contained in sub-paragraphs (c) and (d) of paragraph 3 of Article 6 (art. 6-3-c, art. 6-3-d)

to defend oneself in person and to examine or have examined witnesses could not be exercised without the accused being present. In this context it also recalled that the guarantee of a fair and public hearing in Article 6 para. 1 (art. 6-1) of the Convention was one of the fundamental principles of any democratic society and that by rendering the administration of justice visible publicity contributed to the maintenance of confidence in the administration of justice; in addition, the public nature of the hearings, where issues of guilt and innocence were determined, ensured that the public was duly informed and that the legal process was publicly observable.

25. The Government argued that the scope of the superior court’s jurisdiction was not decisive in the way maintained by the Commission. In their submission, even when the court’s jurisdiction extended to both questions of law and questions of fact, Article 6 para. 1 (art. 6-1) did not guarantee a right to an oral hearing in appeal proceedings in a case such as the present where the offence at issue was only a minor one, where there was no dispute over facts which were significant with respect to the issue of guilt and consequently no need to assess the credibility of the persons involved, and where the appeal court could not increase the sentence imposed at first instance. In such a case the effective control of the impartial administration of justice was ensured, inter alia, by compliance with the principle of equality of arms and through the public character of the proceedings, in this instance by virtue of the principle of public access to the case-file. The Government did not find that sub-paragraphs (c) and (d) of Article 6 para. 3 (art. 6-3-c, art. 6-3-d)) required a stricter interpretation of the right to a "fair and public" hearing.

26. The applicant subscribed to the reasoning of the majority of the Commission and added that the oral hearing had a special goal: to enable the judges to form their own idea about the accused’s behaviour and personality, thereby helping them to do justice and maybe to adjust the sentence.

27. The Court fully recognises the value attaching to the publicity of legal proceedings for reasons such as those indicated by the Commission (see, inter alia, the Axen judgment of 8 December 1983, Series A no. 72, p. 12, para. 25). However, even where the court of appeal has jurisdiction to review the case both as to facts and as to law, the Court cannot find that Article 6 (art. 6) always requires a right to a public hearing irrespective of the nature of the issues to be decided. The publicity requirement is certainly one of the means whereby confidence in the courts is maintained. However, there are other considerations, including the right to trial within a reasonable time and the related need for expeditious handling of the courts’ case-load, which must be taken into account in determining the need for a public hearing at stages in the proceedings subsequent to the trial at first instance.

Provided a public hearing has been held at first instance, the absence of such a hearing before a second or third instance may accordingly 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 Ekbatani judgment, Series A no. 134, p. 14, para. 31).

28. In the above-mentioned Ekbatani case the Court was called upon to examine how the "public hearing" requirement should apply in appeal proceedings before a court with jurisdiction as to both the facts and the law. Mr Ekbatani denied the facts upon which the charge against him was based. However, he was convicted by the District Court on the basis of the evidence given by the complainant. For the Court of Appeal the crucial question therefore concerned the credibility of the two persons involved. Nevertheless, the Court of Appeal decided, without a public hearing, to confirm the District Court's conviction. After an examination of the particular circumstances of that case, the Court found that the question of Mr Ekbatani's guilt or innocence "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 ... and by the complainant". Accordingly, the Court considered that "the appeal court's re-examination of the conviction at first instance ought to have comprised a full rehearing of the applicant and the complainant" (Series A no. 134, p. 14, para. 32).

29. The Court of Appeal called upon to examine Mr Andersson's appeal also exercised jurisdiction as to both facts and law. However, the present case is different from the above-mentioned Ekbatani case because of the nature of the issues to be decided on appeal.

Mr Andersson had conceded committing the proscribed act, i.e. driving a tractor on a highway. In his appeal he claimed only that this act should not be punished having regard to the circumstances prevailing at the time of the offence (see paragraph 13 above). He referred first to the alleged absence of certain road signs, but this argument was rejected by the Court of Appeal on the basis of photographs contained in the case-file. He also invoked the poor weather conditions and this again was a matter on which the District Court had heard evidence but which it had found could not relieve him from his duty as a driver. As to Mr Andersson's complaint about his sentence (see paragraph 13 above), the Court notes that he received only a small fine of a fixed amount.

Mr Andersson's appeal thus did not raise any questions of fact or questions of law which could not be adequately resolved on the basis of the case-file. Considering also the minor character of the offence with which he was charged and the prohibition against increasing his sentence on appeal (see paragraph 18 above), the Court of Appeal could, as a matter of fair trial, properly decide to examine the appeal without Mr Andersson having a right to present his arguments at a public hearing.

30. Having regard to the entirety of the proceedings before the Swedish courts and to the nature of the issues submitted to the Court of Appeal, the Court reaches the conclusion that there were special features to justify the decision not to hold a public hearing. There has accordingly been no violation of Article 6 para. 1 (art. 6-1) of the Convention.

FOR THESE REASONS, THE COURT

Holds by thirteen votes to seven that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 October 1991.

John CREMONA
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Cremona;

(b) joint dissenting opinion of Mr Walsh, Mr Russo, Mr Spielmann, Mr De Meyer, Mr Loizou and Mr Bigi.

J. C.
M.-A. E.

DISSENTING OPINION OF JUDGE CREMONA

I am unable to agree with the majority of my colleagues in this case.

To be brief, I would say that here the domestic Court of Appeal was called upon to examine the case as to the facts and the law, making a full assessment of the applicant's guilt or innocence. Both the facts and the application of the law to those facts were to my mind, with varying degrees of clarity, in dispute.

In the circumstances, the appellate court's re-examination of the applicant's conviction required a public hearing in order to comply with article 6 para. 1 (art. 6-1) of the Convention. As this was not allowed, there was in my view a violation of that provision.

I would add that I also find it difficult, in the context of a fair trial, to distinguish, as the majority do in this case, between the minor and major character of an offence. For the persons concerned, whom this provision of the Convention seeks to protect, all cases have their importance.

JOINT DISSENTING OPINION OF JUDGES WALSH, RUSSO, SPIELMANN, DE MEYER, LOIZOU AND BIGI

For the reasons stated in paragraphs 47 to 50 of the Commission's report and summarised in paragraph 24 of the judgment, we believe that, in the present case, the appeal court's re-examination of Mr Andersson's conviction required a public hearing.