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

COURT (PLENARY)

CASE OF FEJDE v. SWEDEN

(Application no. 12631/87)

JUDGMENT

STRASBOURG

29 October 1991

In the case of Fejde 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 June and 31 August 1990 respectively,

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* The case is numbered 36/1990/227/291. 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.

within 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. 12631/87) against the Kingdom of Sweden lodged with the Commission under Article 25 (art. 25) by Mr Hans Fejde, a Swedish national, on 28 July 1986.

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 Jan-Åke Andersson case[1].

The Chamber thus 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. 35/1990/226/290.

[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. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. Mr Hans Fejde, a Swedish citizen, is a businessman residing at Västra Frölunda in the South-West of Sweden.

10. In connection with the bankruptcy of the applicant's removal firm in 1984, a rifle was found among the goods stored on its business premises. Following a police investigation during which it was recorded that the rifle lacked a breech-block, the applicant was charged, on 2 March 1984, with illegal possession of a weapon (olaga vapeninnehav) contrary to the Weapons Act 1973 (vapenlagen 1973:1176; "the 1973 Act"). Section 1, sub-section 2, of the 1973 Act expressly included within the definition of weapons unusable items which, if made usable, would count as weapons.

11. The applicant was subsequently summoned to appear before the City Court (tingsrätten) of Göteborg for a hearing of his case (huvudförhandling) on 27 August 1984. In its judgment of the same date the court stated:

> "[The applicant] has contested criminal liability, on the following grounds: the weapon in question was owned by R.T., who was married to his mother. R.T. is dead. When [the applicant's] mother moved house some ten years ago the weapon went to [the applicant's] storage room together with furniture for which there was no room in his mother's new home. The weapon was found in the storage room in connection with [the applicant's] bankruptcy. He was aware of the weapon being there all the time but he did not think of it as a weapon. The rifle lacks a breech-block and there was never any ammunition. [The applicant] does not consider himself to be the owner of the rifle since it is his mother, now 82 years old, who is the formal owner of it.
>
> The court finds that [the applicant] cannot avoid being held responsible for the possession of the weapon, but that the violation of the Weapons Act is of a minor character."

The court sentenced him to 30 day-fines (dagsböter) of 10 kronor each, i.e. 300 Swedish kronor in total. The daily amount of the fines was fixed on the basis of Mr Fejde's financial situation. The court also upheld the earlier decision taken by the police to seize the rifle.

12. On 4 September 1984 the applicant appealed to the Court of Appeal for Western Sweden, alleging that:

(a) the police investigations had not been sufficiently thorough;

(b) although he admitted that he was aware that the weapon was in his removal company's care, he questioned whether this company really had a duty to check that the weapon had a valid licence;

(c) new facts had come to light, namely that the actual owner of the rifle was not the applicant's mother, but the son of his now deceased stepfather;

(d) the sentence imposed by the City Court was much too severe in that it had been entered on the criminal records and would have detrimental effects on his future life, in particular as far as his chances of employment were concerned;

(e) the 1973 Act had not been correctly applied in his case because the rifle in question had no breech-block, something which could be proven by his mother and half-brother, and hence could not be considered a weapon within the meaning of the Act.

13. By letter of 23 October 1984 the Court of Appeal notified the applicant that, according to Chapter 51, section 21, of the Code of Judicial Procedure, his case could be dealt with without a hearing and invited him to express his views within fourteen days as to the necessity for a hearing. Alternatively, he could submit his final written observations within the same time-limit. He was asked to indicate in his reply any evidence on which he would rely.

14. By letter of 24 October 1984 the applicant informed the Court of Appeal that he considered a hearing to be necessary in his case and

requested the appointment of a defence lawyer under the free legal aid scheme. In a letter of 15 February 1985 he also advised the Court of Appeal that the lower court's judgment had caused him damage because it had on a number of occasions led prospective employers to turn down his applications for work.

15. According to a note dated 4 March 1985, written by an official of the court following a telephone conversation with the applicant, the latter stated that he would not insist on calling witnesses because it was no longer disputed that the breech-block was missing.

16. On 6 March 1985 the Court of Appeal refused the applicant's request for a defence lawyer. On the same day he was also informed that, since the case could be decided without a hearing, he should submit his final written observations within ten days.

17. In a letter of 11 March 1985 the applicant reiterated his argument that the rifle could not be considered a weapon within the meaning of the 1973 Act and again offered his half-brother's testimony on this point. Furthermore, the applicant contested the Court of Appeal's refusal to appoint a defence lawyer. The Court of Appeal, taking the latter submission to be an application for leave to appeal, referred the matter to the Supreme Court (högsta domstolen), which refused him such leave on 19 June 1985.

18. The Court of Appeal examined the case on 22 August 1985 and, in accordance with Chapter 51, section 21, of the Code of Judicial Procedure, first sub-paragraph, point 4, and third sub-paragraph, dismissed the applicant's request for a trial hearing as this was found to be manifestly unnecessary (see paragraph 21 below). This decision was made public on 2 October 1985 when judgment was delivered. The court's judgment stated, inter alia:

> "[The applicant] has submitted to the Court of Appeal the same information as was mentioned in the judgment of the City Court and added: when [his stepfather] and his mother separated, his stepfather left the rifle at the mother's place of residence at Furuby. Because [the stepfather] has died it is his son ... who is the owner of the rifle.
>
> It is undisputed that [the applicant] has been in possession of the rifle without a permit. Regardless of how it came into his possession and who owns it, he shall therefore be convicted of having violated the Weapons Act. The sentence should be [the one determined by] the City Court.
>
> The Court of Appeal, which accepts [the applicant's] explanations as to how the rifle came into his possession, finds that he is not the owner of it. Accordingly, the question of confiscation of the rifle concerns a person who is not accused in the present case. An action for confiscation should be directed against the owner of the rifle in accordance with Section 17 of the Act of 1946 on promulgation of the new Code of Judicial Procedure. No such action has been taken in this case. The request for confiscation is therefore rejected."

19. On 12 October 1985 the applicant sought leave to appeal to the Supreme Court. He maintained, inter alia, that vital evidence, namely that

the rifle had no breech-block and accordingly could not be a weapon within the meaning of the 1973 Act, had been disregarded by both the City Court and the Court of Appeal. He asserted that this could easily have been proved had the Court of Appeal granted his request for a hearing and heard witnesses. The Supreme Court refused leave to appeal on 3 March 1986.

20. On 15 April 1986 the Supreme Court refused an application by Mr Fejde to have his case re-opened.

II. THE CODE OF JUDICIAL PROCEDURE

21. 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, of the Code of Judicial Procedure (as amended as of 1 July 1984 by Law 1984:131) provides:

> "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."

22. The Court of Appeal has the power to review questions both of law and of fact. However, there are some limits on 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

23. In his application lodged with the Commission on 28 July 1986 (no. 12631/87), the applicant complained that his conviction amounted to degrading treatment and punishment and that he had not received a fair trial in the proceedings before the Swedish courts (see paragraphs 11-20 above). He invoked Articles 3, 6 paras. 1, 2, 3 (c) and (d) and 13 (art. 3, art. 6-1, art. 6-2, art. 6-3-c, art. 6-3-d, art. 13) of the Convention.

24. On 4 October 1989 the Commission declared admissible "the applicant's complaint that he did not get a 'fair and public' hearing within the meaning of Article 6 (art. 6) of the Convention before the Court of Appeal" and rejected the remainder of the application as inadmissible.

In its report of 8 May 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 judgment*.

AS TO THE LAW

25. 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 ... ."

26. 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).

27. 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).

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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-C of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

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.

28. 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 City Court's file since both parties were given the opportunity to submit further written observations and the applicant did so. The Commission concluded that Article 6 para. 1 (art. 6-1) required that Mr Fejde should be allowed a public 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.

29. 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.

30. 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.

31. 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 issue 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 hearing before a second or third instance may accordingly be justified by the special features of the proceedings at issue. Thus, leave-to-appeal proceeedings 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).

32. 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 Court of Appeal'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).

33. The Court of Appeal called upon to examine Mr Fejde'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.

It was undisputed on appeal that Mr Fejde had been in possession of the rifle without the required licence. The main points raised by him were the fact that he was not the owner of the gun, the absence of a breech- block and the severity of the sentence imposed (see paragraph 12 above). The Court of Appeal found the first point to be irrelevant as a matter of law since it could not relieve the applicant of responsibility under the Weapons Act (see paragraph 18 above). The same was true of the argument regarding the missing breech-block since this matter was clearly dealt with in the definition of weapons in the 1973 Act (see paragraph 10 above). As to Mr Fejde's complaint concerning his sentence, the Court notes that he only received a small fine assessed on the basis of his financial situation (see paragraph 11 above).

Mr Fejde'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 22 above), the Court of Appeal could, as a matter of fair trial, properly decide, as it did on 22 August 1985 pursuant to Chapter 51, section 21, of the Code of Judicial Procedure, that a public hearing was manifestly unnecessary in Mr Fejde's case (see paragraphs 18 and 21 above).

34. 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 refusal to hold a public hearing. There has accordingly been no violation of Article 6 para. 1 (art. 6-1).

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 49 to 52 of the Commission's report and summarised in paragraph 28 of the judgment, we believe that, in the present case, the appeal court's re-examination of Mr Fejde's conviction required a public hearing.