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

COURT (PLENARY)

CASE OF HELMERS v. SWEDEN

(Application no. 11826/85)

JUDGMENT

STRASBOURG

29 October 1991

In the case of Helmers v. Sweden*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of 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 23 November 1990, 25 April 1991 and 26 September 1991,

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

PROCEDURE

1. The case was brought before the Court on 6 April 1990 by the European Commission of Human Rights ("the Commission") and on 16

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* The case is numbered 22/1990/213/275. 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.

May 1990 by the Government of the Kingdom of Sweden ("the Government"), 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. 11826/85) against Sweden lodged with the Commission under Article 25 (art. 25) by Mr Reinhard Helmers, a German citizen, on 6 February 1985.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) ion whereby Sweden recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and of the 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 sought leave to present his case himself with the assistance of a lawyer (Rule 30 para. 1 in fine). On 19 June 1990 the President granted his request as far as the written procedure was concerned, and on 10 October 1990, in respect of the public hearing also.

3. The Chamber to be constituted included ex officio Mrs E. Palm, the elected judge of Swedish nationality (Article 43 of the Convention)[1] (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 April 1990 the President of the Court drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr Thór Vilhjálmsson, Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr J. Pinheiro Farinha, Mr R. Bernhardt, Mr A. Spielmann and Mr S.K. Martens (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. The German Government, having been informed by the Registrar of their right to intervene in the proceedings (Article 48, sub-paragraph (b), of the Convention and Rule 33 para. 3 (b)) (art. 48-b), indicated in a letter of 30 April 1990 that they did not intend to do so.

5. 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 applicant on the need for a written procedure (Rule 37 para. 1). Thereafter, in accordance with the President's orders, the Registrar received the applicant's memorial on 20 August 1990, the Government's memorial on 3 September 1990, the appendices to the applicant's memorial on 5 October 1990 and certain documents from the Commission's file on 16 October 1990. In a letter of 12 October 1990 the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

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

6. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 11 October 1990 that the oral proceedings should open on 22 November 1990 (Rule 38). On 26 October he also granted a request from the applicant for legal aid (Rule 4 of the Addendum to the Rules of 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*;
- for the Commission
  Mr J.A. FROWEIN, *Delegate*;
- the applicant and his counsel,
  Mr B. MALMLÖF, advokat.

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

8. On 23 November 1990 the Chamber decided unanimously, under Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court. Having taken note of the Government's agreement and the opinions of the Commission and the applicant, the Court decided on 20 February 1991 to proceed to judgment without holding a further hearing (Rule 26).

9. On 15 March 1991 the Commission filed a number of documents which the Registrar had sought from it on the President's instructions. On 8 April 1991 the applicant filed certain additional documents with the President's authorisation (Rule 37 para. 1, second sub-paragraph).

10. 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

11. The applicant, Mr Reinhard Helmers, is a German citizen. He is a university lecturer and resides in Lund in Sweden.

12. In 1979 Mr Helmers was not selected for appointment to an academic post at the University of Lund. As he considered that the decision was

discriminatory and that the recruitment board had been biased, he appealed to the National Board of Universities and Colleges (universitets- och högskoleämbetet, "UHÄ"), which requested a specially established university committee to submit a written opinion. In this opinion, which was dated 2 October 1980, the committee stated, inter alia, that in his appeal Mr Helmers had accused the person eventually selected for the post, Mr L., of having obtained it by means of secret pressure exercised on one of the members of the recruitment board by a Professor E. (who had also taken part in the recruitment procedure) as a reward for Mr L.'s assistance in a campaign led by Professor E. against Mr Helmers.

On 10 December 1981 the Government, at last instance, rejected the applicant's appeal against the appointment decision.

13. Meanwhile, the applicant, who considered that the university committee's statement amounted to defamation, had reported the matter to the police. However, the Chief District Prosecutor of Lund chose not to pursue the investigation and his decision was upheld on appeal, ultimately by the Prosecutor General.

14. The applicant then decided to use his entitlement under Chapter 20, section 8, of the Code of Judicial Procedure (rättegångsbalken) to bring a private prosecution for defamation or, alternatively, aggravated defamation (förtal or grovt förtal, Chapter 5, sections 1 and 2, of the Criminal Code, brottsbalken) and for making false statements (osant intygande, Chapter 15, section 11, of the Criminal Code), against one of the members of the special university committee, Mr F., and against its secretary, Ms E. Ms E. was also accused of having incited Mr F. to commit the offences (Chapter 23, section 4, of the Criminal Code). The maximum sentence prescribed by law for aggravated defamation was two years' imprisonment.

Mr Helmers also availed himself of the possibility under Chapter 22, section 1, of the Code of Judicial Procedure of joining an action for damages to the private prosecution, and he sought compensation in the amount of one Swedish krona from each of the accused.

15. The Lund District Court (tingsrätten) held a public hearing on 9 September 1981, at which the applicant and the defendants had the opportunity to address the court.

On 19 November 1981 the court delivered its judgment. It noted that the special committee's summary of Mr Helmers' appeal satisfied the objective criteria of defamation in that it was likely to discredit the applicant in the eyes of others. However, the court found that neither Ms E. nor Mr F. had incurred any criminal liability: Ms E. could not be held responsible for the committee's statements as she had only been the rapporteur and not a decision-taking member; it was true that Mr F. had not been under any duty to make a statement as he had not been present when the committee examined Mr Helmers' appeal, but it had to be considered justifiable for

him, as a member of the committee, to join its opinion. After examining the correctness of the summary, the District Court concluded:

> "It was not an easy task for the committee to summarise Mr Helmers' long submissions which, in the opinion of the court, were also difficult to interpret. The summary made must therefore, as Mr F. and Ms E. have maintained, be considered as a reasonable interpretation of what Mr Helmers has put forward. In any event, it has not been established that Mr F. knowingly made any untrue statements."

The District Court furthermore found no evidence to support the allegation that Ms E. had made a false statement or incited Mr F. to commit a criminal offence. The applicant's private prosecution was accordingly dismissed and the claim for compensation was also rejected.

16. On 9 December 1981 Mr Helmers appealed to the Court of Appeal (Hovrätten) of Skåne and Blekinge. He submitted, inter alia, the following.

The District Court had, contrary to well-established case-law, excluded criminal liability on the part of Ms E. on the ground that she had only been rapporteur and not a decision-taking member of the committee.

The summary made by the special committee was untrue as a matter of fact. The fact that one of the professors involved in the recruitment procedure, Professor E., had for a long time led a campaign against Mr Helmers had become a matter of public knowledge throughout the whole of Europe, as could be seen from legal textbooks, parliamentary documents, newspaper articles and radio and television programmes. It was also well-known that Professor E. had sought to have abolished the subject for the teaching of which the impugned appointment procedure took place and this was evidenced by, amongst other things, a complaint to the Chancellor of Justice (justitiekanslern) and an appeal by the students to UHÄ. Mr Helmers claimed that in view of the above facts, his appeal submissions to the UHÄ (see paragraph 12 above) could not possibly be construed as anything more than a challenge, on account of bias, of Professor E.'s involvement in the appointment decision. He stated that this must have been clear both to Ms E. and Mr F. and that they were thus both guilty of defamation because of their libellous statement in the committee's opinion.

He added that, even if the District Court had not found it to be an easy task to summarise his submissions, the same could not hold true for the defendants, who had been in possession of all the documents in the appointment case for four months. In this connection, he also pointed out that his appeal submissions had referred to all the relevant facts and these were well-known to those concerned at the university department in question.

Finally, he requested the Court of Appeal to hold an oral hearing.

17. On 11 March 1982 the Court of Appeal received Ms E.'s and Mr F.'s reply to Mr Helmers' appeal. This reply was sent to Mr Helmers the next day, together with a note indicating that the case could be decided without an oral hearing and that he had 14 days to file his pleadings with the court.

Mr Helmers submitted these on 16 April and they were forwarded to the accused the same day, together with a note similar to the one sent to Mr Helmers.

Between April and November 1982 the parties lodged a number of further written observations with the court. Mr Helmers claimed that some of the material submitted by the defendants was irrelevant as it was a mere appeal to political prejudices and he asked the court to refuse it. He referred in particular to four newspaper articles written by others and a press release issued by the Secretary to the European Commission of Human Rights on 15 March 1982, all of which material related to a previous application by Mr Helmers to the Commission (no. 8637/79), which had been declared inadmissible on 10 March 1982 (see paragraphs 24-25 below).

18. In a judgment of 28 November 1983 the Court of Appeal decided the case on the basis of the written evidence, without having held any public hearing. It rejected the applicant's plea that some of the material submitted by the defendants should be ruled inadmissible. As to the merits, the court found both Mr F. and Ms E. responsible for the committee's opinion of 2 October 1980, which it considered was likely to discredit the applicant in the eyes of others. The judgment went on to state:

> "The scope of criminal liability for defamation is limited by the provision contained in Chapter 5, section 1, second sub-paragraph, of the Criminal Code. A person who has uttered a defamatory statement is thus free from liability, inter alia, if he was under a duty to make a statement and the information given was true or had a reasonable foundation. The legislature has included appointment cases among those in which there may be a conflict between opposing interests.
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> The circumstances were such that both Mr F. and Ms E. were under a duty to make a statement. The fact that Mr F. gave his opinion only later is of no relevance in this context. The summary must furthermore, just as the District Court found, be considered as a reasonable précis of what Mr Helmers put forward in his memorial supporting his appeal. Mr F. and Ms E. therefore had a reasonable foundation for the information they provided. Accordingly they cannot be convicted of defamation. Nor can the Court uphold the prosecution brought against them on the charge of having made false statements or that brought against Ms E. on the charge of having incited these offences.
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> As a result of this conclusion in respect of the defendants' criminal liability, Mr Helmers' claim for damages must be dismissed - just as the District Court found."

19. The applicant appealed to the Supreme Court (högsta domstolen), claiming that a number of serious breaches of procedural law had occurred at first instance and that although he had pointed out these irregularities to the Court of Appeal, it had given a judgment on the merits based on new evidence without having held an oral hearing. In support of his complaints Mr Helmers also invoked Article 6 (art. 6) of the Convention and the serious and far-reaching consequences the outcome of the proceedings would have for him.

On 21 December 1984 the Supreme Court refused the applicant leave to appeal.

II. THE CODE OF JUDICIAL PROCEDURE

20. 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 ... "

21. 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

22. In his application (no. 11826/85) lodged with the Commission on 6 February 1985 Mr Helmers alleged breaches of Articles 6, 9, 10, 13, 14, 17 and 25 (art. 6, art. 9, art. 10, art. 13, art. 14, art. 17, art. 25) of the Convention.

On 14 March 1986 and on 5 May 1989 the Commission declared all his complaints inadmissible except that under Article 6 (art. 6) concerning the failure to hold a public hearing before the Court of Appeal, which it accepted on the latter date. In its report of 6 February 1990 (made under Article 31) (art. 31), the Commission expressed the unanimous opinion that

there had been a violation of this provision. The full text of its opinion is reproduced as an annex to this judgment*.

AS TO THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 para. 1 (art. 6-1)

23. Before the Court the applicant alleged a number of different violations of his rights under Article 6 para. 1 (art. 6-1) of the Convention, which reads:

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

A. Scope of the case

24. Mr Helmers first requested the Court to reopen his earlier application (no. 8637/79, see paragraph 17 above). This concerned, inter alia, certain restrictions on his right of access to court, in particular regarding the possibility of bringing a private prosecution against high level officials in connection with a decision taken in 1974 not to appoint him to a post at the University of Lund.

Mr Helmers maintained that the present application, no. 11826/85, was a continuation and repetition of the earlier one. The discrimination which he had allegedly suffered in the appointment procedure in 1973-1974 was still effective. Furthermore, the Commission had made a "grave judicial" error in declaring part of the earlier application inadmissible for non-exhaustion of domestic remedies because he had not brought any private prosecution for defamation against the officials concerned; in Mr Helmers' opinion these officials had been protected by law from such prosecutions.

25. The Court recalls that, under the Convention, the compass of the case before it is delimited by the Commission's decision on admissibility (see, inter alia, the Powell and Rayner judgment of 21 February 1990, Series A no. 172, pp. 13-14, para. 29).

None of the above complaints was declared admissible by, or indeed appears to have been raised before, the Commission in the present case. Consequently, the Court does not have jurisdiction to deal with them.

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

Furthermore, a decision by the Commission that an application is inadmissible is final and not open to appeal.

26. As regards application no. 11826/85, the only complaint declared admissible by the Commission concerned an alleged breach of Article 6 (art. 6) of the Convention as a result of the Court of Appeal's decision not to hold a public hearing.

B. Applicability of Article 6 para. 1 (art. 6-1)

27. The "civil" character of the right to enjoy a good reputation was not disputed before the Court and follows also from established case-law (see the Golder judgment of 21 February 1975, Series A no. 18, p. 13, para. 27).

28. Nevertheless, the Government claimed that Article 6 para. 1 (art. 6-1) did not apply to the proceedings at issue for the following reasons.

Firstly, Article 6 para. 1 (art. 6-1) did not enshrine any right to bring a criminal prosecution against another person and it was accordingly inapplicable to the private prosecution instituted by Mr Helmers.

Secondly, although the provision applied, in principle, to a civil suit for damages, the applicant had himself chosen to have his civil action joined to the criminal proceedings and dealt with in the manner prescribed for such proceedings: he had thereby voluntarily accepted that Article 6 para. 1 (art. 6-1) would not be applicable.

In any event, the civil action had to be considered as purely symbolic having regard to the fact that the applicant only claimed 1 krona in damages from each of the accused. Moreover, no civil right was at issue since there was no dispute regarding this sum as such.

29. The Court notes first, like the Commission, that although Article 6 para. 1 (art. 6-1) does not guarantee a right for the individual to institute a criminal prosecution himself, such a right was conferred on the applicant by the Swedish legal system in order to allow him to protect his reputation. Indeed, this remedy was referred to by the Government, in the context of application no. 8637/79, as an effective one for this purpose (see paragraph 24 above).

As to the effect of the symbolic nature of the claim for damages, the existence of a dispute ("contestation") concerning a "civil right" does not necessarily depend on whether or not monetary damages are claimed; what is important is whether the outcome of the proceedings is decisive for the "civil right" at issue (see, inter alia, the Moreira de Azevedo judgment of 23 October 1990, Series A no. 189, p. 17, para. 66). This was certainly so in the present case as the outcome of both the private prosecution and the claim for damages depended on an assessment of the merits of Mr Helmers' complaint that the accused had unjustifiedly attacked and harmed his good reputation.

Article 6 para. 1 (art. 6-1) was accordingly applicable to the joined proceedings.

30. Those appearing before the Court agreed that there was such a close link between the outcome of the private prosecution and the civil claim for damages that the former was decisive for the latter. There is thus no reason to distinguish between the two actions for the purposes of examining the merits of the applicant's complaint.

C. Compliance with Article 6 para. 1 (art. 6-1)

31. 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).

32. The Court notes at the outset that a public hearing was held at first instance. As in several earlier cases, the main question 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 above-mentioned Ekbatani 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.

33. The Commission observed that in the determination of the applicant's civil rights in the present case the Court of Appeal was called upon to examine the case as to both the facts and the law. 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 new evidence which it later accepted. The Commission concluded that Article 6 para. 1 (art. 6-1) required that Mr Helmers 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 conclusion the Commission recalled that the public character of proceedings before the judicial bodies referred to in Article 6 para. 1 (art. 6-1) protects litigants against the administration of justice in secret with no public scrutiny and is also one of the means whereby confidence in the courts, superior and inferior, can be maintained; by rendering the administration of justice visible, publicity contributes to the

achievement of the aim of Article 6 para. 1 (art. 6-1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention. The Delegate stated that an oral hearing was not only an additional guarantee that an endeavour would be made to establish the truth, but also helped to ensure that the accused, or the person conducting, like Mr Helmers, a private prosecution to defend his reputation, was satisfied that his case was being determined by a tribunal, the independence and impartiality of which he could verify.

34. The Government argued that the scope of the superior court's jurisdiction was not decisive in the way maintained by the Commission. Thus, 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 on appeal where - as here - the issues to be decided were of an essentially legal character and there were no relevant issues of fact in dispute requiring the participation of the parties in person. This was especially so where the offence at issue was only a minor one. In such cases 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 public access to the case-file.

35. In the applicant's opinion, an oral hearing was clearly required in his case: the Court of Appeal based its judgment on new evidence and also reached its decision on grounds different from those adopted by the District Court. Recalling the prejudice he had suffered and the fact that the accused risked a sentence of two years' imprisonment, he also objected to the Government's description of the case as a minor one.

Furthermore, public scrutiny of the Court of Appeal's handling of the case was especially important as the Government had, so he claimed, sought to influence the appeal proceedings by taking their final decision in the appointment procedure just after he had lodged his appeal (see paragraphs 12 and 16 above).

36. 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 a 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 necessity of 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).

37. 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 founded. 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 Mr Ekbatani's 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).

38. In the present case, as in the Ekbatani case, the Court of Appeal was called upon to examine both questions of fact and questions of law (see paragraphs 16 and 21 above). In particular, it had to make a full assessment of the defendants' guilt or innocence.

In his notice of appeal, the applicant challenged a number of the District Court's findings with respect to this question (see paragraph 16 above). Thus, he maintained that the rapporteur was also responsible under the law for the special committee's allegedly defamatory statement. Furthermore, relying on a number of facts not explicitly mentioned in his appeal submissions in the appointment case, but which were said to be generally known, at least in the circles concerned, Mr Helmers disputed the District Court's view that the committee's summary of his appeal was factually correct. He also claimed that, having regard to their knowledge of the situation obtaining at the University, the accused must have wilfully sought to damage his reputation. He concluded that there could not have been any "reasonable foundation" for the libellous statement contained in the summary.

The points relied on by Mr Helmers went to the merits of the case and, with the exception of the first, raised serious questions as to which facts

were relevant, which facts had been proved and how the "reasonable foundation" test should be applied. Furthermore, these points were determined by the Court of Appeal at first instance in the case of Ms E.: the lower court had found her not to be responsible as a matter of law since she had not been a decision-taking member of the committee.

In the light of these considerations and taking into account the seriousness of what was at stake for the applicant, namely his professional reputation and career, the Court finds that the question of the defendants' guilt could not, as a matter of fair trial, have been properly determined by the Court of Appeal without a direct assessment of the evidence given in person by Mr Helmers and by the defendants, who claimed that they were innocent of the accusations brought against them.

39. 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 issues submitted to it, the Court reaches the conclusion that there were no special features to justify the Court of Appeal's 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 para. 1 (art. 6-1).

II. APPLICATION OF ARTICLE 50 (art. 50)

40. According to Article 50 (art. 50) of the Convention,

> "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."

41. The applicant sought under this provision:

(a) 576,000 kronor as compensation for the salary loss said to have resulted from a discriminatory refusal on the part of the Government to apply to his case an "income guarantee contract" ("inkomstrygghetsavtalet") which the Government had entered into with the unions in order, as the applicant put it, to "guarantee degraded employees their old salary";

(b) compensation for the pension benefits corresponding to his correct salary, together with interest;

(c) 300,000 kronor as compensation for the damage caused to his reputation;

(d) 40,002 kronor, being the two kronor he had claimed from Mr F. and Ms E. in the proceedings at issue and 40,000 kronor claimed on identical grounds from the Chairman of the special university committee in another set of proceedings for having "depicted [the applicant] as a semi-criminal";

(e) 8,554 kronor, with interest, for his costs in the private prosecution instituted against Ms E. and Mr F.;

(f) 6,280 kronor, with interest, for his costs in the private prosecution against the Chairman of the special university committee.

The applicant, who received legal aid before the Court, made no claim for costs and expenses incurred in the Strasbourg proceedings.

42. The Court agrees with the Government that the above claims are based on facts and assumptions related to the applicant's allegations of having been defamed and discriminated against, whereas the violation found in the present case concerns only the procedure followed before the Court of Appeal. As the Court cannot speculate on whether the Court of Appeal would have ruled in the applicant's favour had a public hearing been held at the appeal stage, these claims must be rejected except in so far as they cover the non-pecuniary damage he suffered because of the refusal to allow him such a hearing. The Court understands that the applicant's claims under item (c) in the preceding paragraph cover also such non-pecuniary damage. Making an assessment on an equitable basis as is required by Article 50 (art. 50) of the Convention, the Court awards him 25,000 kronor under this head.

FOR THESE REASONS, THE COURT

1. Holds unanimously that it does not have jurisdiction to examine the complaints in Mr Helmers' application no. 8637/79;

2. Holds by eleven votes to nine that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention as a result of the Court of Appeal's refusal to grant the applicant's request for an oral hearing;

3. Holds unanimously that Sweden is to pay to the applicant, within three months, 25,000 (twenty-five thousand) Swedish kronor in respect of non-pecuniary damage;

4. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.

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 Matscher, joined by Mrs Bindschedler-Robert and Mr Gölcüklü;

(b) concurring opinion of Mr Walsh, Mr Russo, Mr Spielmann, Mr De Meyer, Mr Loizou and Mr Bigi;

(c) dissenting opinion of Mrs Palm, joined by Mr. Thór Vilhjálmsson, Mr Bernhardt, Mr Martens and Mr Pekkanen;

(d) dissenting opinion of Mr Morenilla.

J. C.
M.-A. E.

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

(Translation)

1. On the general problem of the need for a public hearing on appeal, I confirm entirely what I said in my dissenting opinion in the Ekbatani case (Series A no. 134, p. 19).

2. As regards the specific aspects of the present case, I agree with the position taken by Mrs Palm in her dissenting opinion.

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

The reasons stated in paragraphs 57 to 60 of the Commission's report and summarised in paragraph 33 of the judgment suffice, in our view, to conclude that, in the present case, the appeal court's examination of Mr Helmers' appeal required a public hearing of the parties concerned.

JOINT DISSENTING OPINION OF JUDGE PALM, JOINED BY JUDGES THOR VILHJALMSSON, BERNHARDT, MARTENS AND PEKKANEN

Taking as a starting point that Mr Helmers' private criminal prosecution for defamation and his action for damages (see paragraph 14 of the judgment) may, as far as his position under Article 6 (art. 6) is concerned, be put on a par with and considered equivalent to "civil" proceedings in which he was the plaintiff seeking damages for defamation (see paragraphs 29 and 30 of the judgment), I cannot share the conclusions which the majority of the members of the Court has drawn from the requirement of a "fair and public hearing".

Firstly, I consider that the majority's reasoning, which is built on a precedent in a "criminal" case (the Ekbatani judgment), does not sufficiently take into account that in principle there exists a marked difference between "civil" cases and "criminal" cases in respect of the importance to be attached to a party being given the opportunity to be heard in person. That is because, generally speaking, in "civil" cases there is no need to assess a party's credibility and only seldom any other reason why the court should hear a party in person, while in "criminal" cases this may be of great importance. Thus, I find that the specific objectives underlying the institution of criminal proceedings for the purpose of establishing a person's guilt or innocence justify that such a person should enjoy greater possibilities of appearing in person than a party to "civil" proceedings. However, for present purposes the proceedings instituted by Mr Helmers before the Swedish courts have to be examined in the light of the requirements of "fairness" applicable to "civil" proceedings.

In addition, I do not share the majority's opinion that his appeal "raised serious questions as to which facts were relevant, which facts had been proved and how the 'reasonable foundation' test should be applied" (see paragraph 38 of the judgment). To my mind, the relevant facts, i.e. the contents of Mr Helmers' appeal submissions to the "UHÄ", the special university committee's summary thereof and the "notorious" facts regarding the animosities at the University (see paragraphs 16 and 17 of the judgment), were all unchallenged. Furthermore, Mr Helmers had been given the opportunity to argue his case in written submissions to the Court of Appeal as elaborately as he wished and his request for an oral hearing could have had no other relevant purpose than to be allowed to plead his case in person. Moreover, it must be taken into account that although the proceedings brought before the Court of Appeal were undoubtedly of importance for Mr Helmers, they were equally important for the defendants, who apparently did not desire an oral hearing. In these circumstances and taking into account that for the present purposes the proceedings brought by

Mr Helmers have to be put on a par with "civil" proceedings and the fact that there had been a full hearing at first instance, as well as the proper margin of appreciation for the Court of Appeal, I find that this court did not violate the requirements implied in the notion of a "fair and public hearing" when it refused Mr Helmers' request for an oral hearing.

Accordingly, I find no violation of Article 6 para. 1 (art. 6-1) of the Convention in the present case.

DISSENTING OPINION OF JUDGE MORENILLA

1. To my regret I cannot agree with the reasoning which has led the majority to conclude that the applicant's right to a "fair and public hearing", as guaranteed by Article 6 para. 1 (art. 6-1) of the Convention, was violated as a result of the refusal of the Court of Appeal of Skåne and Blekinge to grant his request for an oral hearing in the determination of his appeal. In my opinion, the particular circumstances of the case made such a hearing unnecessary and, consequently, I find no breach of Article 6 para. 1 (art. 6-1).

2. I agree with the majority that the applicant was defending his reputation when he instituted a prosecution for defamation and false statements against one of the members and the secretary of the university committee and claimed symbolic compensation. That committee had been responsible for issuing a certificate containing a summary of his previous appeal to the Swedish central university authority and Mr Helmers considered that that summary attributed to him an accusation of corruption against another candidate for the post which he had been holding for six years and to which the authorities had refused to re-nominate him.

The proceedings therefore concerned a "civil right" of the applicant who was acting as an alleged "injured" party in order to defend himself against what he regarded as an attack on his reputation; they thus fell within the scope of Article 6 para. 1 (art. 6-1) of the Convention (paragraph 29 of the judgment).

3. There is, however, a special feature in this case that has to be considered when deciding whether Article 6 para. 1 (art. 6-1) has been violated, namely that Mr Helmers chose to institute criminal proceedings in order to protect a civil right. The consequence is that Article 6 para. 1 (art. 6-1) also applies to the two defendants. The applicant's decision to bring a private prosecution coupled with a claim for symbolic compensation, instead of bringing a civil action against the committee for issuing what he considered to be a defamatory summary of his allegations, could neither change the criminal nature of the proceedings he instituted nor extinguish or limit the rights of the defendants under Article 6 (art. 6) as a whole. In particular, they were entitled to a prompt determination by the Court of Appeal of the accusation which was still pending against them as a result of the applicant's appeal against their acquittal by the District Court of Lund.

In this respect, since the Swedish Code of Judicial Procedure (Chapter 51, section 21) empowers the Court of Appeal to decide the case without a hearing "if the lower court has acquitted the accused" (see paragraph 20 of the judgment), Mr Helmers' claim of breach of Article 6 (art. 6) as a result of the Court of Appeal's decision not to hold a public hearing seems inconsistent with his choice and constitutes a "venire contra actum proprium".

4. On the necessity of an oral hearing in appeal or cassation proceedings the Court has laid down a consistent case-law based on a well-established distinction between "publicity" and "direct assessment of the evidence" by the superior judges: "The public character of proceedings before the judicial bodies referred to in Article 6 para. 1 (art. 6-1) protects litigants against an administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained" (see, inter alia, the Sutter judgment of 22 February 1984, Series A no. 74, p. 12, para. 26). The direct assessment of the evidence by the deciding judge is, however, a guarantee which is related to the "immediacy principle" rather than to the public character of the hearing and, as such, is a matter that goes to the fairness of the procedure, inherent in the concept of "procès équitable".

Accordingly, a public hearing is an essential requirement in the trial court - subject to the exceptions contemplated in Article 6 para. 1 (art. 6-1) - but in appeal and cassation proceedings its importance depends on the system of appeal under national law, on the scope of the appellate court's powers, on the nature of the issue to be decided and on the manner in which the applicant's interests were actually presented and protected before the appeal court. In this respect, the European Court has held in a number of cases that "provided that there has been a public hearing in the first instance, the absence of a public hearing before a second or third instance may be justified by the special features of the proceedings at issue" (see the Ekbatani judgment of 26 May 1988, Series A no. 134, p. 14, para. 31).

5. Thus, the Court has seen no necessity for an oral hearing, at the appellate or cassation level, when the superior court "determines solely issues of law" (see the Axen judgment of 8 December 1983, Series A no. 72, pp. 12-13, para. 28); in cassation proceedings, when "oral argument during a public hearing ... would not have provided any further guarantee of the fundamental principles underlying Article 6 (art. 6) [of the Convention]" (see the above-mentioned Sutter judgment, p. 13, para. 30); or when "the limited nature of the subsequent issue did not in itself call for oral argument at the public hearing or the personal appearance of the two men" (see the Monnell and Morris judgment of 2 March 1987, Series A no. 115, p. 22, para. 58).

In the Ekbatani case, which has some similarities with the present case and on which the majority has relied in arriving at its conclusion of violation (paragraphs 36-38 of the judgment), the Court found that such an oral hearing was required before a Swedish appeal court when deciding on the guilt or innocence of the defendant, but after declaring that:

> "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 ... - 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 re-hearing of the applicant and the complainant" (ibid., para. 32).

6. I understand the Court's decision in that case as establishing that an oral hearing is required in criminal appeals when, in order to determine properly the guilt or innocence of the person charged with a criminal offence, "a direct assessment of the evidence given in person by the plaintiff and by the complainant" is necessary. Accordingly, in my opinion, an oral hearing is not required when the case may be properly decided on evidence which is available in the case-file and is not contradicted by the parties, when the presence of the appellant and the respondent is not relevant for the outcome of the case, and when a substitute for oral argument by the parties is provided by written observations submitted in a procedure that complies fully with the rights of the defence and the principle of equality of arms. In these circumstances, a decision by an appeal court, taken in conformity with the law, not to hold an oral hearing does not infringe the rights of the parties under Article 6 para. 1 (art. 6-1) of the Convention.

All these conditions were satisfied in the present case. The points at issue before the Court of Appeal were: whether or not the summary of the applicant's appeal to the central university authority reflected his allegations; whether or not that summary was defamatory; the composition of the committee responsible for issuing that document; and the actual criminal responsibility of the two defendants, having regard to their prescribed functions in that committee. Although they went to the merits of the case, all these points had to be determined by the appellate judges solely by reference to the written evidence available in the case-file (the committee's certificate, the text of Mr Helmers' appeal, the composition of the committee) and the law applicable, and in the light of the written observations of the parties. An oral hearing was not necessary under the Ekbatani ruling and to grant the applicant's request for one would only have resulted in a delay in the final determination of the defendants' case and of other cases pending in the Court of Appeal.

7. In the above-mentioned circumstances the national authorities enjoy a margin of appreciation when regulating, or deciding to dispense with, oral hearings in appeal proceedings. After all, Article 6 para. 1 (art. 6-1) of the Convention does not enshrine a right to have a case reviewed by a higher tribunal. Thus, it would be somewhat paradoxical if a State that affords such a right were held to be in violation of that Article (art. 6) if it empowered its courts of appeal to dispense with a hearing when they considered that it was not necessary for a fair disposal of the case, whilst another State, which does not allow appeals or allows only limited appeals (such as cassation proceedings), were to be seen as acting in accordance with the Convention.

In this connection, it should also be mentioned that Protocol No. 7 (P7) - which has been in force since 1 November 1990 and has now been ratified by Sweden -, when amplifying the list of rights defined in the Convention,

confers, in Article 2 (P7-2), a right of appeal on everyone convicted of a criminal offence. However, it specifies that "the exercise of this right, including the grounds on which it may be exercised, shall be governed by law" and establishes exceptions, particularly "in regard to offences of minor character, as prescribed by law".

Consideration should also be given to the legal policy of the State concerned and to the need to dispose of appeals without undue delay. Many European States are facing very serious problems relating to an overburdening of their courts and a backlog in the system of justice particularly in criminal appeals. They are taking steps to simplify procedures in such a way that, while respecting the fundamental guarantees of Article 6 (art. 6) concerning a fair trial, the administration of criminal (and also civil) justice will be more expeditious and more able to play its deterrent role. This is the aim of Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe on "The Simplification of Criminal Justice", which was made - as is said in its preamble - "having regard to the increase in the number of criminal cases referred to the courts and particularly those carrying minor penalties and the problems caused by the length of criminal proceedings".

8. Finally, in determining whether the decision of the Swedish Court of Appeal of Skåne and Blekinge to dispense with an oral hearing in the appeal in question was justified under Article 6 para. 1 (art. 6-1) of the Convention, the following further circumstances should be taken into consideration:

(a) The public character of the hearing at first instance has not been disputed. Nor was it disputed that under Swedish law all official documents are public and that everyone has in principle a right of access to the case-files in the Court of Appeal. Nor were the questions of protecting the applicant from a secret administration of justice or of the confidence of the citizens in their courts ever raised.

(b) Under the aforementioned Chapter 51, section 21, of the Swedish Code of Judicial Procedure, the Court of Appeal may, without a public hearing, determine the criminal charges against a person who has been acquitted by the District Court. In the present case the two accused did not request a hearing and did not object to the decision of the superior court to replace the hearing by written observations, the scope of which was unlimited.

(c) The fairness of the appeal proceedings, particularly the rights of the defence and the principle of equality of arms before an impartial court established by law, was ensured because the parties could - and in fact did - submit to the appellate court written observations on the facts and on the legal issues arising in the decision under appeal.

(d) Considering the nature of the issues to be decided by the appeal court (which did not require the presence of the appellant or that of the respondents in order to determine the guilt or innocence of the accused,

since neither their credibility nor their personality had to be assessed), the absence of an oral hearing therefore did not adversely affect the interests of the applicant or the interests - which are equally protected by Article 6 (art. 6) of the Convention - of the accused.