



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

FIRST SECTION
[In its composition prior to 1 November 2001]

CASE OF S.N. v. SWEDEN

(Application no. 34209/96)

JUDGMENT

STRASBOURG

2 July 2002

FINAL

02/10/2002

In the case of S.N. v. Sweden,

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

Mrs W. THOMASSEN, *President*,

Mrs E. PALM,

Mr GAUKUR JÖRUNDSSON,

Mr R. TÜRMEŒ,

Mr C. BİRSAN,

Mr J. CASADEVALL,

Mr R. MARUSTE, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 20 November 2001 and 10 June 2002,

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

PROCEDURE

1. The case originated in an application (no. 34209/96) against the Kingdom of Sweden lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swedish national, S.N. ("the applicant"), on 28 August 1996.

2. The applicant alleged that he had not had a fair trial under Article 6 §§ 1 and 3 (d) of the Convention in criminal proceedings against him.

3. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 16 January 2001 the Chamber declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former First Section.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 20 November 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Ms E. JAGANDER, Ministry for Foreign Affairs,	<i>Agent,</i>
Ms C. RENFORS, Ministry of Justice,	
Mr J. SANGBORN, Ministry of Justice,	
Ms C. HELLNER, Ministry for Foreign Affairs,	<i>Advisers.</i>

(b) *for the applicant*

Mr P.E. SAMUELSSON,	<i>Counsel.</i>
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The Court heard addresses by Mr Samuelsson and Ms Jagander.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. In February 1995 the Social Council (*socialnämnden*) of Borgholm was contacted by a schoolteacher on account of a suspicion that one of her pupils, M., a boy born in June 1984 and thus at the time aged 10, had been sexually abused by the applicant. On 29 March 1995, having carried out an investigation, the Council reported the matter to the police authority in Kalmar.

10. On 7 April 1995, between 10.09 a.m. and 10.51 a.m., M. was interviewed by the police. The interview was recorded on videotape. M.'s parents and representatives of the Social Council were present in the adjoining room. At that time, the applicant had not been informed of the suspicions against him and no defence counsel had been appointed for him.

The interview was conducted by a detective inspector with twenty-six years of service in the police force. Since 1989 he had been working exclusively on investigations concerning ill-treatment and sexual abuse of children.

11. On 10 May 1995 the applicant was questioned by the police and the public prosecutor. Before the questioning the applicant was notified, in accordance with Chapter 23, section 18, of the Code of Judicial Procedure (*Rättegångsbalken*), of the suspicions against him.

12. In June 1995 the applicant received a copy of the report of the preliminary investigation and on 3 July defence counsel was appointed for him. The applicant was given an opportunity to submit observations and request additional interviews and other investigative measures. Finding that further information was necessary with regard to, *inter alia*, the dates and the number of occasions when the alleged acts had been committed and the

sites at which they were supposed to have occurred, the applicant's counsel requested that M. be interviewed again.

13. In accordance with counsel's request, a second interview with M. was conducted on 20 September 1995, between 12.50 p.m. and 1.14 p.m. at the boy's home, by the same detective inspector. During the interview, which was recorded on audiotape only, M.'s parents were present but not the applicant's counsel. It appears that M.'s counsel, who had not been served notice of the interview, was opposed to counsel for only one of the parties being present at an interview. Finding that it would be unreasonable to cancel the interview, as the police officer was present and M. had taken time off from school, the applicant's counsel agreed that it could be conducted without his being present. The police officer and the applicant's counsel discussed what aspects of the case needed to be addressed during the interview. In general, counsel for the applicant wished to have a more detailed account of what was alleged to have happened. However, no written list of questions was drawn up. Counsel for the applicant later listened to the audiotape of the interview and was given a transcript of the tape. Finding that the issues raised in his request had been covered, he did not call for a further interview to be held.

14. On 29 September 1995 the applicant was indicted for sexual acts with a child (*sexuellt umgänge med barn*).

15. The Kalmar District Court (*tingsrätten*) heard the case on 31 October 1995. The applicant denied the charges. The videotaped police interview with M. was shown during the hearing. The record of the second interview was read out. The court also heard evidence from M.'s mother and his schoolteacher as witnesses. No request for M. to be heard in person was made.

16. In a judgment of 14 November 1995 the District Court convicted the applicant and sentenced him to eight months' imprisonment. The court, noting that the outcome of the case was entirely dependent on the credibility of M.'s statements, found no reason to call into question their veracity. Thus, basing itself on those statements, the court found that the applicant, on a large number of occasions in 1994, had touched M.'s penis or masturbated him and induced M. to touch the applicant's penis or masturbate him.

17. The applicant appealed to the Göta Court of Appeal (*Göta hovrätt*). Subsequently, at the applicant's request, his defence counsel was replaced. The appellate court held a hearing on 22 April 1996, during which it heard the applicant and his new counsel. M.'s mother and his schoolteacher gave evidence. The videotape of the first police interview with M. and the audiotape of the second interview were played back. Again, the applicant did not request that M. give evidence during the hearing.

18. In a judgment of 6 May 1996 the Court of Appeal upheld the applicant's conviction but reduced the sentence to three months'

imprisonment. It considered that, as there was no technical evidence in the case and nobody had witnessed the alleged acts, the credibility of M.'s statements was of decisive importance in determining the applicant's guilt. It went on to state the following:

“For reasons of legal certainty, the questioning of children during pre-trial investigations must – as explained in detail by the Supreme Court [*Högsta domstolen*] in NJA 1993 p. 616 – meet high standards with regard to both methods and content.

The information given by [M.] is, in some parts, vague and uncertain. He has not been able to give details of any specific incident covered by the prosecution and he has been able to describe only in more general terms what kind of sexual contact has occurred. It should further be noted that some of the questions put to him have been of a leading nature. Even if these circumstances are taken into account, the Court of Appeal finds that [M.'s] statements cannot be disregarded.

A fact which strongly indicates that [M.] has been subjected to homosexual abuse is his expressed concern that he would become 'gay'. The Court of Appeal has had further regard to the following circumstances. The general impression of the video-recording is that [M.] has talked about something he has indeed experienced and that it has been embarrassing and painful for him to give this information. This may explain his unwillingness to go into detail about specific incidents. [M.] has not shown any tendency to exaggerate his statements and has corrected the interrogator on several occasions. Furthermore, in some respects his statements can be said to contain more personal observations, for example, 'Of course, I did not want to touch his but sometimes I did it without gloves' and 'First I asked if I would get any (refers to pastilles). He did not have any and then I did it voluntarily but I do not know why'. It should further be noted that no information has come to hand which could reasonably explain why [M.] would make untrue statements about events which he obviously considers to be shameful. Also of importance is the information given by [M.'s] mother and teacher which describes how [M.'s] personality has changed since the alleged injustice. The fact that it was a long time before [M.] spoke about what he experienced is easily explained by the feelings of guilt he has had and by the fact that thinking about the incidents is distasteful to him. [M.'s] accounts do not contain any improbable elements, neither is the information given by him contradicted by other statements. In view of what has now been said, the Court of Appeal finds that [M.] is credible and that his statements should form the basis for the Court of Appeal's assessment of whether [the applicant] has behaved towards him in the manner indicated by the public prosecutor in his statement on the charges.”

The Court of Appeal found that the information given by M. showed that the applicant had induced M. to touch the applicant's penis or masturbate him. However, the statements that the applicant had touched M.'s penis or masturbated him were too uncertain and vague and thus did not constitute sufficient evidence.

19. The applicant appealed to the Supreme Court. Relying on Article 6 §§ 1 and 3 (d) of the Convention, he complained that his counsel had not been able to put questions to M. He noted that there was no technical or other evidence in the case to support M.'s statements. He further criticised the manner in which M. had been interviewed and stated that M.'s statements were vague and contradictory. In these circumstances, the

applicant claimed that he had a right to cross-examine M. He maintained that the Supreme Court's case-law, which allegedly permitted the procedure followed in his case, had to be changed in order either to give counsel for the defence a right to examine the minor or to require clear supporting evidence.

20. On 26 June 1996 the Supreme Court refused the applicant leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. Domestic provisions of relevance in the present case are found in the Code of Judicial Procedure (“the Code”) and in the Ordinance on Preliminary Investigations (*Förundersökningskungörelsen*, 1947:948 – “the Ordinance”). There is also some national case-law of interest.

A. Legislation

22. A preliminary investigation takes place whenever there is reason to believe that a crime has been committed. Chapter 23, section 10, of the Code includes provisions pertaining to the categories of persons allowed to attend an interview during a preliminary investigation. The suspect and his defence counsel are always entitled to attend an interview which takes place following a request made by the suspect himself. This right, however, does not manifest itself until a person has been informed of the suspicions against him in accordance with Chapter 23, section 18, of the Code. As far as other interviews are concerned, counsel for the defence may attend if his attendance will not harm the investigation. It is for the person who heads the preliminary investigation – a police officer or a public prosecutor – to decide who may attend a specific interview during the preliminary investigation. In cases where the suspect or his defence counsel are present during an interview, questions may only be asked in the order determined by the person in charge of the preliminary investigation (Chapter 23, section 11, of the Code).

23. When a preliminary investigation has reached the point at which a person can be reasonably suspected of having committed a crime, the person in question must be notified of the suspicions against him, pursuant to Chapter 23, section 18, of the Code. Under the second paragraph of that provision, an interview or other form of investigation may be undertaken at the request of the suspect or his defence counsel if the measure is deemed to be of importance to the preliminary investigation as such. If a request for such an investigative measure is not granted, the reasons for the decision must be given. If the suspect makes a complaint, the issue is settled by the court (Chapter 23, section 19, of the Code).

24. Interviews with children conducted in the course of a preliminary investigation are subject to special regulations. Thus, according to Chapter 23, section 10, of the Code, a child's custodian should be present whenever a child under the age of 15 is questioned if this can be done without any harmful effects on the investigation.

25. Further and more detailed provisions concerning the questioning of children are found in the Ordinance, section 17 of which provides that interviews with, *inter alia*, an injured party under the age of 18 must be conducted in such a manner that there is no danger that the interviewed person might be harmed. It is also stipulated in that section that particular care is to be exercised when the questioning concerns sexual matters. Furthermore, particular care has to be taken in order to ensure that the interview does not create a stir and that it does not become more intimate than the circumstances require. Questioning should, moreover, according to section 17 of the Ordinance, occur on only one occasion unless it is more appropriate to conduct several interviews out of consideration for the child who is being questioned.

26. Section 18 of the Ordinance provides that interviews with children must be conducted by persons who are particularly apt to perform the task. In addition, section 19 provides that a person with special expertise in the field of child psychology or interview psychology may assist at the questioning or comment on the value of the child's testimony.

27. Whenever the evidence of a witness below the age of 15 is used in a criminal case, the court must determine, taking account of all relevant circumstances, whether the child should testify (Chapter 36, section 4, of the Code). There is no corresponding provision applicable to children who are in the position of being the injured party. In practice, however, such evidence is normally presented to the court in the form of a video-recording of the police interview, which is played back during the court's main hearing. In allowing this to take place, the court applies Chapter 35, section 14, of the Code, by which a statement made to the police or to the prosecutor or otherwise out of court may be used in evidence in a trial only if this is specifically prescribed, if the person who has submitted the statement cannot be heard before the court or if there are particular reasons for the statement to be relied on, regard being had to the costs or inconveniences that a hearing before the court may entail on the one hand and the advantages of a hearing before the court, the importance of the statement and all other relevant circumstances on the other hand.

B. Case-law

28. As already mentioned, children below the age of 15 do not normally give evidence in person before a court. There are, however, examples where children have been heard in court. Thus, in two recent cases before the Svea

Court of Appeal (*Svea hovrätt*) concerning sexual offences against children (case no. B 1129-98, judgment of 28 September 1998, and case no. B 1635-99, judgment of 7 June 1999), the injured parties, two girls aged 10 and 11, gave evidence in person. Their statements were made before the members of the court, the public prosecutor, the defence counsel and their own counsel but in the absence of the accused, who were able to listen to the statements in an adjoining room. In both cases, the girls were heard at the request of the prosecutor following the acquittal of the accused at first instance. In another case before the same appellate court concerning a sexual offence (case no. B 4488-01, judgment of 25 October 2001), the defence, upon appeal against the conviction of the accused at first instance, requested that the injured party, a 13-year-old girl, give evidence in person. The prosecutor and the girl's counsel opposed the request which was subsequently rejected by the Court of Appeal on account of her age. Instead, the court allowed recordings of her statements during the preliminary investigation to be played back. However, the Court of Appeal reversed the judgment of the District Court and acquitted the accused, finding that the evidence presented did not sufficiently show that he had committed the alleged offence.

29. The application of Chapter 35, section 14, of the Code in relation to Article 6 of the Convention has been examined by the Supreme Court on one occasion. In the case in question, published in *Nytt juridiskt arkiv* ((NJA) 1992, pp. 532 et seq.), the court quashed a judgment by a court of appeal and referred the case back to the latter court for re-examination. The reason for this was that the appellate court, as well as the first-instance court, had allowed the prosecutor to use in evidence written records of a police interview with the injured party in a case concerning indictment for robbery. It had not been possible to serve a summons on the injured party to attend the main hearing. The court of appeal had been of the opinion that the information submitted by the injured party to the police had to be given credit and convicted the defendant of robbery. The Supreme Court, on the other hand, emphasised that Article 6 of the Convention and its application and interpretation was of major importance in respect of the application of Chapter 35, section 14, of the Code. In the light of the fact that the European Court of Human Rights had come to the conclusion that there was a breach of Article 6 when a court relied on statements in support of a conviction by a person who had not been heard by the court and whom the defendant had not had the opportunity to question in some other context, the Supreme Court in its turn came to the conclusion that that provision of the Code should be applied more restrictively than was called for by its wording and what appeared to be the original intentions behind the provision. According to the Supreme Court, the lower courts had applied the provision in such a way that the defendant had not been afforded a fair trial in accordance with the Convention.

30. Issues concerning the quality and evaluation of evidence have been examined by the Supreme Court in two published cases (NJA 1993, pp. 68 et seq., and 1993, pp. 616 et seq.), which are of relevance in this context. The first-mentioned case concerned the alleged sexual abuse of a minor, aged 14, who could not give evidence in court on account of mental problems. The evidence consisted mainly of information supplied by the injured party to the police. The police interview had been recorded on videotape. The Supreme Court came to the conclusion that it was inevitable that the value of such statements as evidence was not the same as the value of statements made during the main hearing. Even so, the evidence in that case, that is the injured party's testimony together with other evidence, was deemed to be strong enough for a conviction.

31. In the second case, the injured parties were born in 1981 and 1983, respectively. The essential evidence consisted of videotaped interviews with them. The interviews had taken place in the absence of the suspect and his defence counsel. They were given the opportunity to examine the information and to request that additional information be provided prior to indictment. However, defence counsel was of the opinion that further questioning would prove pointless since, in his view, the injured parties would only repeat from memory what they had submitted previously. The Supreme Court stated that, bearing in mind that the accused had chosen not to request a further examination, his right to a fair trial could not be seen as having been breached on account of the fact that the videotapes had been used as evidence against him. As far as the evaluation of the evidence was concerned, the Supreme Court stressed the fact that the injured parties had only been questioned out of court and that it could not therefore assess their credibility and the trustworthiness of their information by means of impressions conveyed through a direct examination in court. It followed, according to the Supreme Court, that the information submitted by the injured parties should be assessed with particular care. The fact that the accused had been prevented from putting questions to the injured parties through his defence counsel and that the court itself had also been prevented from doing so pointed in the same direction. According to the Supreme Court this did not mean, however, that the videotaped interviews could not be sufficient to prove the guilt of the accused beyond reasonable doubt. The injured parties' submissions, combined with other evidence, led the Supreme Court to the conclusion that the judgment should be based on, *inter alia*, the submissions in question.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

32. The applicant complained that he had not had a fair trial, as he had not been given the opportunity to question M. He relied on Article 6 §§ 1 and 3 (d) of the Convention, the relevant parts of which provide:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;”

A. Submissions of the parties

1. *The Government*

33. The Government submitted that in criminal proceedings regard had to be had not only to the rights of the defence but also to the situation of the injured party, especially if it was a child. They stated that M. had been harmed to a much lesser extent by the two interviews during the preliminary investigation than if he had had to endure being questioned in a court setting. Maintaining that these circumstances could not be allowed to prevent prosecution, the Government asserted that it had to be considered proportionate to safeguard the interests of the injured party by sparing him one or more appearances in court in view of the fact that the applicant had been given the opportunity to discuss M.'s version of events and to give his own version, first to the police and later to the courts. Furthermore, the practice whereby only a police officer put questions to a child during a police interview was intended for the protection of the child; in the Government's view, Article 6 could not be interpreted as giving defence counsel the right to put questions directly to the child.

34. The Government further pointed out that the applicant had not requested that M. be heard before the courts. Although aware of the general reluctance of courts to allow children to give testimony, the Government

referred to the above-mentioned cases heard by the Svea Court of Appeal, where children aged 10 and 11 had given evidence in person (see paragraph 28 above) and noted that M. had reached the age of 12 when the Supreme Court had decided not to grant the applicant leave to appeal. Moreover, the applicant's counsel had agreed that the second police interview with M. could take place without his being present and had not asked for that interview to be rescheduled.

35. The Government also argued that M.'s statements had been submitted to the domestic courts in the form of video- and audio-recordings which had given the courts a much better opportunity to assess the value of the statements as evidence than if, for instance, the statements had been related to the courts by a police officer or been written down and read out to the courts. In their submission, the filming technique in particular had enabled the courts to assess the value of M.'s statements by, for instance, paying attention to the way he reacted to certain questions.

36. Furthermore, it was allegedly clear from the Court of Appeal's judgment that it had been aware of the flaws attached to the police interviews with M. For example, the court had taken note of the fact that "some of the questions put to him [had] been of a leading nature". The court's reasoning showed that it had applied special diligence in assessing the value of the evidence provided by the video- and audio-recordings. Moreover, the Court of Appeal's analysis of M.'s account had actually led to the applicant's partial acquittal.

37. The Government also stated that the video and audiotapes of the police interviews had not been the only evidence relied on by the prosecutor against the applicant. Both M.'s mother and his teacher had testified before the District Court and the Court of Appeal about the change in personality which M. had undergone since he had suffered the alleged injustice. His submissions had thus been corroborated by other evidence.

38. In sum, the Government asserted that the Swedish courts had struck a fair balance in the applicant's case, taking into account the victim's rights as well as the rights of the defence.

2. The applicant

39. The applicant submitted that the fact that his defence counsel, in accordance with Swedish law and practice, had been prevented from putting questions directly to M. had violated his rights under Article 6 § 3 (d) of the Convention. Even if the applicant's counsel had attended the second interview with M., he would not have been allowed to put one single question to M.

40. Moreover, it would have been meaningless for the applicant to request that M. be heard before the courts because for more than thirty years this had not been allowed according to court practice. If such a request had been made in spite of this, it would certainly have been rejected and counsel

would have risked being criticised for relying on evidence against his better judgment. The applicant stated that he knew of no case in which a defence counsel's request for a minor to give evidence to a court had been granted.

41. The applicant claimed that defence counsel was not allowed to question a child because the child could be harmed if the questions were too critical. The system whereby the police replaced counsel for the accused was unreasonable. In his submission, since the object of the system was to prevent the examination from being too critical, the thinking behind the system had to be that the police were not as critical as counsel for the defence. That was probably correct, a fact that was devastating for the legal certainty of the accused. He maintained that the police interviews with M. had been flawed, in particular as they had contained leading questions and no questions on the issues indicated by counsel for the defence had been asked during the second interview.

42. The applicant further submitted that, although his counsel had not been allowed to cross-examine M., he had been convicted solely on the basis of M.'s statements. The applicant thus disputed the Government's opinion that there had been supplementary evidence against him. He asserted that, if there was a desire to protect victims of crime from being harmed by hearings, defence counsel and cross-examinations, the accused would have to be acquitted in such cases. Under the prevailing circumstances, people were convicted anyway, which in practice meant that the burden of proof in cases regarding sex crimes against children was very low.

B. The Court's assessment

43. The Court first notes that the guarantees in Article 6 § 3 (d) of the Convention are specific aspects of the right to a fair trial set forth in the first paragraph of this Article. Consequently, the complaint will be examined under the two provisions taken together (see, among other authorities, *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 10, § 25).

44. The Court reiterates that the admissibility of evidence is primarily governed by the rules of domestic law, and that, as a rule, it is for the national courts to assess the evidence before them. The task of the Convention organs is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (*ibid.*, p. 10, § 26). All evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 1 and 3 (d) of Article 6, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against

him either when he was making his statements or at a later stage of the proceedings (see *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, p. 56, § 43, and *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX). The Court further draws attention to the fact that Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness (see, among other authorities, *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89).

45. As to the notion of “witness”, the Court notes that although M. did not testify at a court hearing, he should, for the purposes of Article 6 § 3 (d), be regarded as a witness – a term to be given its autonomous interpretation – because his statements, as recorded by the police, were used in evidence by the domestic courts (see, among other authorities, *Asch*, cited above, p. 10, § 25).

46. In regard to the circumstances of the present case, the Court observes that the statements made by M. were virtually the sole evidence on which the courts' findings of guilt were based. The witnesses heard by the courts – M.'s mother and his schoolteacher – had not seen the alleged acts and gave evidence only on the perceived subsequent changes in M.'s personality. The District Court stated that the outcome of the case was entirely dependent on the credibility of M.'s statements and the Court of Appeal considered that this was of decisive importance in determining the applicant's guilt. It must therefore be examined whether the applicant was provided with an adequate opportunity to exercise his defence rights within the meaning of Article 6 of the Convention in respect of the evidence given by M.

47. The Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence (see *Baegen v. the Netherlands*, judgment of 27 October 1995, Series A no. 327-B, opinion of the Commission, p. 44, § 77). In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours (see *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 471, § 72, and *P.S. v. Germany*, no. 33900/96, § 23, 20 December 2001).

48. The Court reiterates that M. never appeared before the courts. The applicant stated that he had refrained from requesting that M. give evidence in person during the hearings as, in line with long-standing practice, such a request would have been refused. While accepting that the courts were generally hesitant in letting children give evidence in person, the Government referred to a few cases where minors had actually appeared before the courts. The Court notes that these cases, decided after the applicant's conviction, concerned requests made by the public prosecutor. In view of the apparent absence of cases where counsel for the defence has successfully requested the cross-examination of a minor and noting that the parties have expressed similar opinions on the general practice followed by the Swedish courts in this matter, the Court accepts the applicant's view that, in the circumstances of the case, he could not have obtained the appearance of M. in person before the courts.

49. However, the second police interview with M. during the pre-trial investigation was held at the request of the applicant's counsel who considered that further information was necessary. On account of the absence of M.'s legal counsel (see paragraph 13 above), the applicant's counsel was not present during the interview, nor was he able to follow it with the help of technical devices in an adjacent room. However, he consented not to be present, notwithstanding the resulting handicap to the defence, and he also accepted the manner in which the interview was to be conducted. It was open to the applicant's counsel to ask for a postponement of the interview until such time as M.'s counsel was free to attend. However, he chose not to do so. It was also open to him to request that the second interview be videotaped, which would have enabled him to satisfy himself that the interview had been conducted fairly. However, he did not avail himself of that possibility either.

50. Furthermore, it is clear from the facts submitted by the parties that the applicant's counsel was able to have questions put to M. by the police officer conducting the interview. Having subsequently listened to the audiotape and read the transcript of the interview, counsel for the applicant was apparently satisfied that the questions he had indicated to the police officer had actually been put to M.

51. Accordingly, there has been no violation of the applicant's rights under Article 6 § 3 (d) of the Convention on the ground that his counsel was absent during the second police interview.

52. Nor can it be said that the applicant was denied his rights under Article 6 § 3 (d) on the ground that he was unable to examine or have examined the evidence given by M. during the trial and appeal proceedings. Having regard to the special features of criminal proceedings concerning sexual offences (see paragraph 47 above), this provision cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by

other means. The Court notes that the videotape of the first police interview was shown during the trial and appeal hearings and that the record of the second interview was read out before the District Court and the audiotape of that interview was played back before the Court of Appeal. In the circumstances of the case, these measures must be considered sufficient to have enabled the applicant to challenge M.'s statements and his credibility in the course of the criminal proceedings. Indeed, that challenge resulted in the Court of Appeal reducing the applicant's sentence because it considered that part of the charges against him had not been proved.

53. The Court reiterates, however, that evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care (see *Doorson*, cited above, p. 472, § 76). In its judgment of 6 May 1996 the Court of Appeal noted that the questioning of children during pre-trial investigations must meet high standards with regard to procedure and content. The court took into account the fact that some of the information given by M. had been vague and uncertain and lacking in detail. The court also had regard to the leading nature of some of the questions put to him during the police interviews. In these circumstances, the Court is satisfied that the necessary care was applied in the evaluation of M.'s statements.

54. Having regard to the foregoing, the Court considers that the criminal proceedings against the applicant, taken as a whole, cannot be regarded as unfair.

There has accordingly been no breach of Article 6 §§ 1 and 3 (d) of the Convention.

FOR THESE REASONS, THE COURT

Holds by five votes to two that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 2 July 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Wilhelmina THOMASSEN
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mrs Thomassen joined by Mr Casadevall;
- (b) dissenting opinion of Mr Türmen and Mr Maruste.

W.T.
M.O'B.

CONCURRING OPINION OF JUDGE THOMASSEN
JOINED BY JUDGE CASADEVALL

Although I do share the opinion of the majority that there has been no violation of Article 6, I nevertheless have certain reservations of a more general character about the procedure followed in the present case.

I certainly agree with the majority that proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant, and that these features are even more prominent in a case involving a minor. In the present case it was therefore, in my view, fully justified that the Swedish judicial authorities took measures to protect the child.

The Court has already held that Contracting States should organise their criminal proceedings in such a way that the interests of witnesses, and in particular victims, are not unjustifiably imperilled (see *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 470, § 70).

However, it can be concluded from the case-law of the Court on the use of evidence obtained from anonymous witnesses that, where the defence – because of measures taken to protect vulnerable witnesses – is confronted with difficulties which criminal proceedings normally should not involve, the resulting handicaps for the defence should be sufficiently counterbalanced by the proceedings followed by the judicial authorities (see *Doorson*, cited above, p. 471, § 72; *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 712, § 54; and *Kok v. the Netherlands* (dec.), no. 43149/98, ECHR 2000-VI).

Furthermore the Court has held in these cases and in *Lucà v. Italy* (no. 33354/96, § 40, ECHR 2001-II), where the defence could not examine or have examined a witness at any stage of the proceedings, that, when a conviction is based solely or to a decisive degree on statements by that witness, the rights of the defence have been restricted to an extent incompatible with the guarantees provided by Article 6.

It is true that the present case does not concern an anonymous witness, nor can it be said that the defence was not able to have the child questioned at all. However, the similarity with the above-mentioned cases is that the defence in the present case was handicapped in its possibilities of questioning or having questioned the child and that the child's statement was the decisive evidence (see, *mutatis mutandis*, *P.S. v. Germany*, no. 33900/96, 20 December 2001).

In cases of sexual abuse the testimony of a victim will often be the decisive evidence for a conviction. Where the defence in such cases cannot, even for very good reasons, question the victim, in my view and following the line of reasoning adopted by the Court in the case-law cited above, the

defence is handicapped in such a way that sufficient measures should be taken in the proceedings to counterbalance this handicap.

The procedure followed in the present case, in my opinion, can be said to reveal a certain inherent weakness in the sense that after the first and most important statement of the child had been taken by a police officer without the defence being present, the second interview was again conducted by the police, and indeed by the same police officer, with the result that at no stage in the proceedings was the child heard – or could have been heard – by someone independent of the prosecution. These circumstances raise the question whether the proceedings as such can be regarded as sufficiently counterbalancing the fact that the child, being below the age of 15, could not be questioned in open court.

I nevertheless share the conclusion of the majority that the applicant was not deprived of a fair hearing for the following reasons.

The applicant's lawyer voluntarily chose not to avail himself of the possibility of attending the second interview of the child. He thus deprived himself of the opportunity to watch the child's demeanour under questioning. Nor did he ask for this interview to be recorded on tape in order to be able to obtain insight into how the interview was conducted, and into the manner in which the child answered the questions put to him.

Consequently, the applicant's lawyer deprived himself of a full opportunity to challenge, on the basis of direct observations by the defence, the credibility of the child's statements and to comment on the child's testimony during the trial with a view to persuading the courts to decide in his client's favour.

In these circumstances I cannot but conclude that, although the procedure at issue might be considered flawed, there has been no violation of Article 6 of the Convention.

DISSENTING OPINION OF JUDGES TÜRMEK AND MARUSTE

To our regret we are not in agreement with the majority in finding that the criminal proceedings against the applicant as a whole were not unfair, and we would like point out that the authorities did not do everything they could in this case.

It is true that criminal proceedings concerning sexual abuse of minors are very delicate and that clear measures should be taken to protect the victim and avoid causing more harm to him or her. Therefore, the decision of the police and the courts not to allow cross-examination in these circumstances is understandable. As a consequence of that decision, the victim, M., never appeared before the courts and the applicant was convicted on the basis of recorded statements made by the victim. M.'s mother and teacher were heard by the court, but they had no direct knowledge of the events. No medical examination was carried out, no investigation of the sites in question took place and no psychologist commented on the evidence given by M. or examined him.

Furthermore, it was known that some of the questions put by the police had been of a leading nature and that some of the information given by M. was vague and uncertain. The Court of Appeal rightly noted that the questioning of children during pre-trial investigations had to meet high standards with regard to procedure and content. Also, the Court has reiterated that evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care. Having regard to all these special circumstances and requirements, every possible step should be taken to support the interests of diligence and a fair trial. This means that some other counterbalancing procedures should be used or further evidence should be obtained; otherwise, the applicant should be acquitted.

One possible step in such cases is to call for forensic-psychology experts, who have special training in and knowledge of the matter. They would protect the child against deliberate or involuntary harm caused by the proceedings and help the police and courts in the assessment of the victim's behaviour and testimony. We think that the involvement of forensic experts would serve as a "counterbalancing procedure" to compensate sufficiently the handicaps under which the defence labours (see *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II). There is no evidence in the file that any steps were taken to call on expert assistance.

We understand that the interests of minors must be duly taken into account and that even the principle of cross-examination can be left aside for that reason, but this should be possible only in cases where there is other

neutral corroborating evidence. Otherwise, the protection of the rights of one person (the victim) will disproportionately jeopardise the accused's right to a fair trial. As was stated in *Doorson* (ibid., p. 470, § 70):

“... Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake ... [I]nterests of ... victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.”

We believe that the principle also applies *vice versa*.