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

THIRD SECTION

DECISION

Application no. 32814/11
Raja ARLEWIN
against Sweden

The European Court of Human Rights (Third Section), sitting on 2 February 2016 as a Chamber composed of:

Luis López Guerra, *President,*
Helena Jäderblom,
George Nicolaou,
Helen Keller,
Johannes Silvis,
Dmitry Dedov,
Branko Lubarda, *judges,*

and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 4 April 2011,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Raja Arlewin, is a Swedish national, who was born in 1970 and lives in Stockholm. He was represented before the Court by Mr K. Lewis and Mr J. Södergren, two lawyers practising in Stockholm.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. In April 2004 TV3, a major commercial television channel, broadcast a television programme in which the applicant appeared in pictures and was mentioned by name. He was singled out as the central figure of organised

crime within media and advertising and as being guilty of several fraud offences and other economic offences. The programme was re-broadcast a few days later as well as in September 2004. At this time, no preliminary investigation had been initiated against the applicant.

4. In July 2006 the applicant was indicted for aggravated fraud (*grovt bedrägeri*), an aggravated tax offence (*grovt skattebrott*), an aggravated bookkeeping offence (*bokföringsbrott, grovt brott*), a bookkeeping offence (*bokföringsbrott*), obstruction of tax control (*försvårande av skattekontroll*) and violations of the Swedish Companies Act (*brott mot aktiebolagslagen*). According to the indictment, the offences had been committed within 15 named companies, for which the applicant allegedly had been the actual representative (*faktisk ställföreträdare*). The prosecutor relied on extensive written evidence and requested that over twenty witnesses be heard and a recording of the above-mentioned television programme be shown during the trial.

5. The applicant protested his innocence and submitted that he had been neither the formal nor the actual representative of the relevant companies. Thus he had had no right to decide over the companies, nor had he been responsible for their bookkeeping or reporting their turnover to the tax authority. He had done some consultancy for the companies and assisted with some administrative tasks. However, he had not financed the companies and could not be considered as their principal.

6. The applicant further requested the District Court (*tingsrätten*) in Stockholm to dismiss the use of the television programme as evidence. He argued, *inter alia,* that it violated his rights under Article 6 of the Convention as it was a strongly edited journalistic product aimed at creating sensational television and which amounted to defamation of him. Thus it would have a strong negative effect on the objectivity of the court. Moreover, since a number of persons in the programme were anonymous, they were unknown both to the defence and the court and the applicant would not be able to cross-examine them as witnesses.

7. On 3 February 2009 the District Court rejected the request. This decision could only be appealed against together with the court's final judgment.

8. On 20 March 2009 the District Court convicted the applicant of aggravated fraud and sentenced him to five years' imprisonment. He was acquitted of the other offences. The court held an oral hearing where the above-mentioned television programme was presented by the prosecutor during the opening procedures and relied on as evidence. At the request of one or both of the parties, 25 witnesses were heard, and the applicant was also heard. Moreover, substantial written evidence was invoked by both parties. The court, in a judgment comprising 69 pages, found it proved beyond reasonable doubt that the principal activity concerned by the indictment was fraudulent advertising sales in a number of companies,

causing loss for the customers and gain for the companies. While it considered it a flaw that none of the customers had been heard in the case, it still found it established on the basis of other evidence that the customers had suffered the losses claimed by the prosecutor.

9. The court further found it proved that the applicant had been the actual representative of the companies and thus responsible for the fraudulent activities. He had been active in all of the companies and the driving force behind them and large amounts of money had been transferred from the companies to his personal company. Moreover, the court noted that none of the formal representatives of the companies had any corporate experience or knowledge of organising and running an advertising sales company. Some of them had extensive criminal records. The court also had regard to the fact that several of the companies shared office space, employees moved between the companies and the applicant had kept detailed information relating to, *inter alia*, taxes, yearly results, bookkeeping, billing and contacts with banks and authorities for all of the companies in his personal computer.

10. The television programme was mentioned in the District Court's judgment under the heading "Statement of facts" (*Sakframställningar*) where it was simply noted that the television programme had been broadcast for the first time during the spring of 2004 and that the case against the applicant had been initiated by the Swedish Economic Crime Authority (*Ekobrottsmyndigheten*) in January or February 2006, more than one year and six months after the broadcast. The court did not mention the television programme in its reasoning.

11. Both the applicant and the prosecutor appealed against the judgment. The applicant also appealed against the decision to allow the television programme as evidence.

12. On 28 October 2009 the Svea Court of Appeal (*hovrätten*) rejected the applicant's appeal in relation to the television programme as it found no reason to dismiss it as evidence. This decision could only be appealed against in connection with the Court of Appeal's final judgment.

13. On 23 February 2010 the Court of Appeal, after having held an oral hearing, upheld the lower court's conviction but also found the applicant guilty of an aggravated bookkeeping offence and an aggravated tax offence. The sentence was upheld. In addition to the witnesses heard before the District Court, whose testimonies were played to the court, supplementary questions were put to the applicant and eight new witnesses were heard on the applicant's request. Substantial written evidence was also presented to the appellate court. As regards the television programme, it was stated in the judgment that it had been presented to the court. It was not mentioned by the Court of Appeal in its reasoning.

14. The Court of Appeal, like the lower court, found it proved beyond reasonable doubt that the applicant had been the actual representative of the companies. In addition to the findings of the District Court, the appellate court noted in particular that the applicant had explained his involvement and the large amount of money received from the companies as fees for consulting, with focus on training the sellers in the various companies. However, the court observed that this was not supported by the witness statements and, moreover, the applicant had not been able to give a credible account of the training he alleged to have provided. His explanations had been vague and diffuse and he had no documented qualifications as a trainer. Moreover, before the District Court, he had claimed not to have signed any contracts with the companies and when confronted by the prosecutor before the appellate court with such contracts, signed by him, he claimed not to have any memory of having signed them. That the applicant would have forgot such important acts were not plausible to the court and affected his credibility negatively. The contracts also revealed the applicant's ability to control the companies. The Court of Appeal further noted that the companies had been inter-connected in various ways, even sharing offices and employees, which was remarkable considering that they were supposedly competitors in the same market. In view of this, the Court of Appeal fully agreed with the lower court's reasoning and conclusion concerning the aggravated fraud and also found that he had committed an aggravated bookkeeping offence and an aggravated tax offence.

15. The applicant appealed to the Supreme Court (*Högsta domstolen*) against the judgment as well as the decision not to dismiss the television programme as evidence. He claimed, *inter alia*, that it was in violation of his right to fair trial under the Convention to allow the television programme as evidence

16. On 4 October 2010, the Supreme Court refused leave to appeal.

17. In the meantime, in October 2006, the applicant initiated defamation proceedings against the anchor man of the television programme. These proceedings were terminated in 2009 and an application regarding this matter, under Articles 6, 8 and 13 of the Convention, was lodged with the Court on 18 March 2010 (application no. 22302/10).

B. Relevant domestic law and practice

18. Chapter 35, section 1 of the Swedish Code of Judicial Procedure (*Rättegångsbalken*, 1942:740), reads as follows:

> "After conscientious assessment of everything that has occurred, the court shall determine what has been proved in the case.
>
> As to the effect of certain kinds of evidence, the specific provisions thereon shall govern."

19. This provision reflects the principle of free submission and evaluation of evidence (*principen om fri bevisföring och bevisvärdering*) which prevails in Swedish procedural law. It means that, as a main rule, there are no restrictions in law on the submission and evaluation of evidence. Thus, anything that may be of value as evidence in a case may, in principle, be presented during the main hearing. However, the circumstances under which evidence has been collected or given will have an influence on the way in which it is evaluated. The "principle of best evidence" (*principen om bästa bevismedlet*) is applied; consequently, witnesses and injured parties should normally give evidence during a court hearing, rather than the court reading the statements made during the preliminary investigation, to enable the parties to pose questions and scrutinise the statements more closely.

20. Moreover, according to Chapter 35, section 7 of the Code of Judicial Procedure, a court may dismiss evidence, *inter alia*, if the circumstance that a party wants to prove is without importance in the case, if the evidence is unnecessary or if it evidently would be of no effect.

COMPLAINTS

21. The applicant complained that the presentation of the television programme during the oral hearings violated his right to a fair trial under Article 6 §§ 1 and 3 (d) since it affected the courts' objectivity and the statements voiced in the video constituted "witnesses", whom he did not have the possibility to cross-examine. He further claimed that the fact that the courts made a global assessment regarding his involvement in the companies, instead of examining his involvement in each company separately, meant that the burden of proof was shifted from the prosecution to the defence in violation of his right under Article 6 § 2. Relying on Article 7 of the Convention, the applicant also complained that since no plaintiff was either named or heard before the courts, the necessary prerequisites of the crime of "fraud" were not fulfilled as it is a requirement of fraud that someone suffers an injury as a result of the act. He further complained that the fact that he was found to be the actual representative of the companies, even though he was not registered as a board member and had not acted as a representative towards customers or authorities, was an unacceptable expansion of the notion of "actual representative" which he could not have foreseen and which thus constituted a violation of Article 7.

THE LAW

A. The applicant's complaints under Article 6 §§ 1 and 3 (d) of the Convention

22. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that the presentation of the television programme during the oral hearings in the District Court and the Court of Appeal violated his right to a fair trial, since it affected the courts' objectivity, and his right to cross-examine witnesses. In its relevant parts, this provision reads:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...
>
> 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; ..."

23. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision, which must be taken into account in any assessment of the fairness of proceedings. For this reason, the Court considers it appropriate to examine the complaints under the two provisions taken together (see, among many other authorities, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011; further developed in *Schatschaschwili v. Germany* [GC], no. 9154/10, § 100, ECHR 2015).

24. Moreover, as the Court has consistently underlined, the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, *Al-Khawaja and Tahery v. the United Kingdom*, cited above, § 118, and *Gäfgen v. Germany* [GC], no. 22978/05, § 162, ECHR 2010).

25. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined, in particular, whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use (*Mulosmani v. Albania*, no. 29864/03, § 125, 8 October 2013).

26. The Court further reiterates that Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of the proceedings (see *Lucà v. Italy*, no. 33354/96, §§ 39-40, ECHR 2001-II).

27. Moreover, having regard to the Court's case-law, firstly, there must be a good reason for the non-attendance of a witness at the trial and, secondly, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Schatschaschwili v. Germany*, cited above, §§ 110-118).

28. Turning to the present case, the Court first notes that the applicant claimed that the anonymous persons who were interviewed in the television programme constituted "witnesses" within the meaning of Article 6 § 3 (d) of the Convention and that this provision had been violated since he was not given the opportunity to cross-examine them. In this respect, the Court observes that the term "witness" in the said provision indeed has an autonomous Convention meaning and is not limited to persons who give evidence at the trial (*Kostovski v. the Netherlands*, 20 November 1989, § 40, Series A no. 166). Thus, in the present case, while the prosecutor did not call any of the anonymous persons interviewed in the programme to be heard as witnesses, he did request that the programme be shown during the trial. The request was granted and the programme was played to the court during the trial for the judges to evaluate as evidence. It does not appear from the case-file, and the applicant has not claimed, that the prosecutor during the trial specifically referred to or invoked any of the statements made by these individuals in the programme. In these circumstances, it is questionable whether the anonymous persons may be considered sufficiently connected to the proceedings to be regarded as "witnesses" within the meaning of Article 6 § 3 (d). However, for the purposes of the present case, the Court will proceed on the assumption that they can be considered as such.

29. As concerns the domestic courts' decision to admit the television programme as evidence, the Court notes that the principle of free submission and evaluation of evidence prevails in Swedish procedural law and it is not for the Court to question this or to express a view as to whether the programme was correctly admitted and assessed. As noted above, the Court's task is to ascertain whether the criminal proceedings against the

applicant as a whole were fair which includes the way in which evidence was taken and ensuring that the rights of the defence were respected.

30. On this point, the Court observes that the applicant had the opportunity to oppose the use of the programme as evidence and indeed did so, submitting a request to the District Court in which he detailed why he considered that the programme should be refused as evidence. He also appealed against the District Court's decision to allow the programme as evidence to the Court of Appeal, together with his appeal against the lower court's judgment, setting out the reasons for his request. Thus from his submissions and appeals (see paragraphs 6 and 11 above), it appears that he pointed out that the television programme was a strongly edited journalistic product, that it was aimed at creating sensational television and that it amounted to defamation of him. He further stressed that the persons making statements in the programme were anonymous and thus unknown both to the defence and the courts. The applicant also had the possibility to challenge the evidence during the trials before both instances. Consequently, the national courts were aware of the applicant's opposition to the evidence being used as well as his grounds for why the programme and the statements made therein should be given very little, if any, value as evidence.

31. The Court further notes that the statements made by the persons in the programme were given to a journalist in 2004, before the criminal investigation was initiated against the applicant, and thus not obtained during police interviews or in the course of the preliminary investigation against the applicant. In fact, their identities appear to have been secret not only in relation to the applicant but also in relation to the prosecution and the courts, on the basis of the journalistic protection of sources, which could explain why the individuals were not called as witnesses during the trial. Moreover, while the prosecution relied on the programme as evidence, it was neither the sole evidence nor the decisive evidence against the applicant. The prosecutor also relied on extensive written evidence, which the applicant was given the opportunity to challenge, and during the trial over twenty witnesses were heard, whom the applicant examined and cross-examined.

32. Furthermore, the Court notes that both the District Court and the Court of Appeal stated in their judgments that the television programme had been presented to the court but neither of them made any reference to it in their reasoning. Instead both courts gave detailed grounds for their verdicts, referring to the written evidence and the witness statements made during the trials in support of their findings. Indeed, the Court finds nothing to indicate that the television programme, or the statements made therein, was used by the courts to support their conclusion that the applicant had committed aggravated fraud, and in respect of the appellate court, also an aggravated bookkeeping offence and an aggravated tax offence. There is also no

indication that the publicity of the television programme affected their objectivity (cf. *Abdulla Ali v. the United Kingdom*, no. 30971/12, §§ 87-91, 30 June 2015).

33. Lastly, the Court observes that the television programme had been broadcast by TV3 on three different occasions in 2004 and thus was in the public domain, for which reason it may be considered more transparent and open to allow the programme as evidence so that the applicant could comment on it than to refuse it and deprive him of that opportunity.

34. In light of all of the above considerations, the Court concludes that the criminal proceedings against the applicant as a whole were fair and the fact that he was not able to cross-examine the anonymous persons in the television programme did not restrict his defence rights to an extent incompatible with the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention.

35. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. The applicant's other complaints

36. The applicant further complained under Article 6 § 2 of the Convention about the global assessment regarding his involvement in the companies which he claimed shifted the burden of proof from the prosecution to the defence. Moreover, under Article 7 of the Convention, he claimed that since no plaintiff was either named or heard before the courts, the necessary prerequisites of the crime of "fraud" were not fulfilled. Under the same Article, he further alleged that the fact that he was found to be the actual representative of the companies even though he was not registered as a board member and had not acted as a representative towards customers or authorities was an unacceptable expansion of the notion of "actual representative" which he could not have foreseen.

37. The Court has given careful consideration to the applicant's complaints as they have been submitted. However, in the light of all the material in its possession, and in so far as the criteria set out in Article 35 § 1 of the Convention have been complied with and the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

38. It follows that these complaints must also be declared inadmissible as being manifestly ill-founded in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Done in English and notified in writing on 1 March 2016.

Stephen Phillips
Registrar

Luis López Guerra
President