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

FIRST SECTION

DECISION

Application no. 46544/19
Sven ARNESKANS
against Sweden

The European Court of Human Rights (First Section), sitting on 23 November 2021 as a Committee composed of:

Krzysztof Wojtyczek, *President,*
Erik Wennerström,
Ioannis Ktistakis, *judges,*
and Liv Tigerstedt, *Deputy Section Registrar,*

Having regard to the above application lodged on 28 August 2019,

Having regard to the decision of 17 April 2020 to give notice to the Swedish Government ("the Government") of the complaints under Article 6 § 1 and Article 13 of the Convention and to declare inadmissible the remainder of the application,

Having regard to the observations submitted by the Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Sven Arneskans, was a Swedish national who was born in 1929 and lived in Stockholm. The applicant died on 27 September 2020. However, his widow Kristina Birgitta Spjut Arneskans and his children Sverker Nicolaus Arneskans, Niclas Patrik Arneskans and Jesper Andreas Arneskans expressed their wish to pursue the application. They were represented before the Court by Mr J.V. Palm, a lawyer practising in Stockholm. For practical reasons Mr Sven Arneskans will continue to be called "the applicant" in this decision.

2. The Government were represented by their Agents, Mr C.M. Nesser and Mr A. Engman, of the Ministry for Foreign Affairs.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Background

4. The applicant was born out of wedlock. Since his mother, who took sole care of him, did not have the financial means to care for him, the applicant was taken into public care at the age of one, in 1930, and he lived in turn with his mother, grandmother and aunt. In 1933, at the age of four, the applicant was placed by the municipality with a family who had offered to take care of him at the lowest cost. His placement in this foster home lasted until 1944, when the public care was terminated. While in public care, the applicant was allegedly subjected to repeated physical and mental ill-treatment and sexual abuse by the foster family and to bullying at school.

2. Compensation proceedings

5. On 28 January 2013 the applicant applied for *ex gratia* compensation within the framework of the Compensation Act for violations committed in certain situations of public care of children and young people (*lag om ersättning på grund av övergrepp eller försummelser i samhällsvården av barn och unga i vissa fall*, 2012:663 – "the Compensation Act") for the abuse he had endured while in foster care from 1933 to 1942.

6. On 6 May 2014 the Compensation Board (*Ersättningsnämnden* – "the Board") refused his application. It found that, although there was evidence in the archives that the applicant had stayed with the foster family in question and that the child welfare authorities had even directed maintenance payments from his father to the family, there had been no official decision on taking the applicant into public care. Since the applicant could not show that he had indeed been taken into public care, he had no right to compensation. The Board also rejected a request by the applicant for an oral hearing, as there was no apparent need for such a hearing to be held. The applicant had not requested the holding of an oral hearing in order to hear any witnesses or to provide further evidence, but only to confirm in person the evidence submitted by him in writing.

7. No appeal lay against the Board's decision.

3. Proceedings concerning the applicant's Convention complaints

8. On 22 December 2014 the applicant instituted proceedings against the State before the Supreme Court (*Högsta domstolen*) for alleged breaches of Article 6 § 1 and Article 13 of the Convention and requested compensation of 100,000 Swedish kronor (approximately 9,100 euros). The Supreme Court referred the case to the Stockholm District Court (*tingsrätten*).

9. On 27 September 2017 the District Court dismissed the applicant's compensation claim and found that there had been no breach of the Convention. The court noted that the parties had agreed that the right to compensation fell within the scope of the civil rights guaranteed by Article 6 § 1 of the Convention, and that there was a genuine, serious dispute. They had also agreed that there was an arguable claim under Article 13. The court considered that the Board was a court or tribunal which fulfilled the requirements of independence and impartiality and that, under the Convention, States did not need to guarantee a right of appeal in civil matters. Moreover, the applicant had not shown that the Board's decision not to hold an oral hearing was incompatible with the Convention. The burden of proof required in the matter had been the normal burden of proof required in civil matters and there was no indication that it had been incompatible with the requirements of the Convention. The applicant had been given an opportunity to produce evidence of his having been taken into public care, once it had become apparent that no such decision was to be found in the archives. As to Article 13, the court held that the applicant had had several effective ways of seeking compensation for the alleged violations of the Convention.

10. On 11 October 2017 the applicant appealed against the District Court's judgment, requesting that compensation be paid also under Articles 3 and 8 of the Convention because of his ill-treatment in the past.

11. On 23 November 2018 the Svea Court of Appeal (*hovrätten*) dismissed the applicant's claims under Articles 3 and 8 without examining the merits, and upheld the District Court's judgment. As to his compensation claim under Articles 3 and 8, the court held that that claim had been raised for the first time before the Court of Appeal, which could not take a stand on it as a first-instance court.

12. On 21 December 2018 the applicant appealed against the Court of Appeal's judgment.

13. On 25 March 2019 the Supreme Court refused the applicant leave to appeal.

B. Relevant domestic law

14. The Compensation Act (see paragraph 5 above) entered into force on 1 January 2013 and was in force until 31 December 2014. Under section 1 of the Compensation Act, individuals could be entitled to compensation from the State if, at some point during the period of 1 January 1920 to 31 December 1980, they had been taken into public care pursuant to certain specified Acts. The prerequisite for an award of compensation was that it could be assumed that the claimants had been subjected to abuse or neglect of a serious nature during their time in care. The Compensation Act was adopted as a result of a political agreement. The possibility of obtaining *ex*

gratia compensation on the basis of the Act represented a significant departure from the principles of compensation law normally applicable to public authorities.

15. A special board, the Compensation Board, was established to examine matters under the Compensation Act. Matters could only be referred to it until 31 December 2014. The chair and the members of the Board were thus appointed for a limited time only. A decision on compensation was taken by a department within the Board, and the chair of a department had to be, or had to have been, a permanent judge (section 6 of the Compensation Act). According to section 3 of the Ordinance on instructions for the Compensation Board (*förordning med instruktion för Ersättningsnämnden*, 2012:666), the Compensation Board was led by a board which was to comprise a maximum of 16 members and alternate members if needed. The Board constituted a quorum when the chair or the deputy chair and at least half of the other members were present. Within a department a quorum was constituted when the chair and two members of the Board were present (section 8 of the Ordinance). No more than the chair and three other members could be included when a department took a decision. At least one of the other members had to be legally trained. The preparatory works to the Compensation Act (Government Bill 2011/12:160, p. 32) noted that the Board's independence was guaranteed by Chapter 1, Article 9, and Chapter 12, Article 2, of the Instrument of Government (*Regeringsformen*), according to which the Board should pay regard to the equality of all before the law and should observe objectivity and impartiality and, further, neither the Government nor Parliament were permitted to intervene or influence the manner in which the Board dealt with an individual case. The Board was required to hold an oral hearing if the applicant requested one and if it was not manifestly unnecessary (section 9 of the Compensation Act). Hearings were to be public but could also be held behind closed doors if necessary. In general, the Administrative Procedure Act (*förvaltningslagen*, 1986:223, now replaced by *förvaltningslagen*, 2017:900) applied to the proceedings before the Board (Government Bill 2011/12:160, p. 37).

COMPLAINTS

16. The applicant complained under Article 6 § 1 and Article 13 of the Convention that the composition of the Compensation Board, together with the prohibition against appealing, had not allowed for a fair hearing or an effective remedy. He also argued that the comparatively low rate of compensation that could be obtained on account of unreasonably strict evidentiary requirements, together with the denial of his request for an oral hearing, had made the right to compensation illusory.

THE LAW

A. *Locus Standi*

17. The applicant died on 27 September 2020, after having lodged his application under Article 34 of the Convention. On 26 February and 14 April 2021 respectively, the applicant's counsel informed the Court that the applicant's widow and children wished to pursue the application.

18. The Government left it to the Court's discretion to consider the implications of the applicant's death.

19. The Court points out that in various cases in which an applicant has died during the course of Convention proceedings, it has taken into account the statements of an applicant's heirs or of close members of his or her family expressing their wish to pursue the application (see, *inter alia*, *Kalló v. Hungary*, no. 30081/02, § 24, 11 April 2006). The Court considers that the applicant's heirs, who have stated their intention to continue the proceedings, have a legitimate interest in obtaining a finding as to whether a breach of the applicant's rights guaranteed by Article 6 § 1 and Article 13 of the Convention has taken place (see, *mutatis mutandis, Dalban v. Romania* [GC], no. 28114/95, §§ 1 and 39, ECHR 1999-VI, and *Hannu Lehtinen v. Finland*, no. 32993/02, §§ 1 and 27-28, 22 July 2008).

20. Accordingly, the Court finds that the applicant's heirs have standing to continue the present proceedings.

B. Complaints under Article 6 § 1 and Article 13 of the Convention

21. The applicant complained under Article 6 § 1 and Article 13 of the Convention of a lack of a fair hearing and a lack of an effective remedy.

22. The relevant parts of these provisions read as follows:

Article 6

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

1. The parties' submissions

(a) The applicant

23. The applicant argued that he had not had an opportunity to comment on the proposal for a decision before it had been adopted by the Board. His case had concerned a civil right and he should have been able to appeal

against the Board's decision to a court. The domestic law had been applied in a contradictory manner in the compensation cases decided by the Board.

24. The applicant noted that he had been formally placed in a foster home, the child welfare authorities had been aware of this placement and had supervised it, and they had also remunerated the foster parents. The fact that the Board had rejected his compensation claim because no formal decision had been taken to take him into public care proved that the evidentiary requirements were excessively strict. The Board had required a formal decision on his placement, even though the legislation at the time had not required any formal decision to be taken when a child was taken into public care. Even if he had fulfilled that formal requirement, he most likely would not have been able to prove the abuse in order to obtain compensation. Also, the majority of the abuses against him had been committed by persons whose acts had not been covered by the compensation scheme. This remedy had thus been ineffective in both the formal and the substantive sense.

25. The applicant maintained that the Board's independence and impartiality could be questioned, as it had arbitrarily decided which witnesses and expert witnesses could be heard in the case. He had therefore not had an independent right to invoke oral evidence that he considered necessary in his case. There had thus been a violation of the Convention.

(b) The Government

26. The Government noted that the present case concerned a civil right under Article 6 § 1 of the Convention. They argued that the evidentiary requirement was of no relevance in the present case, since the applicant's application for compensation had been rejected on account of the fact that he had been unable to show that he had been taken into public care. Whether he had been subjected to any abuse or neglect had therefore never been assessed by the Board. This part of the application should thus be rejected. Moreover, the standard of proof used in determining whether the applicant had been taken into public care had been the normal standard of proof used in civil cases in Sweden. Questions regarding evidentiary requirements and the burden of proof were primarily matters for regulation by national law and the national courts. It had not been possible to find a decision on the applicant's being taken into public care pursuant to any law, nor had this been shown during the proceedings. The standard of proof had been adequately applied in the applicant's case.

27. The Government further submitted that the Board could be considered an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. The Board's decisions had been binding and could not be overturned by a non-judicial authority. The fact that the judges had been appointed only for a limited period of time had not created

any risk of dependence, since the Board had only existed for the same limited period of time.

28. The Government observed that the issue at stake had been of a legal and technical nature, and that all questions of fact and law could have been adequately resolved on the basis of the case file and the applicant's written submissions. No pertinent additional information could have been gathered by hearing the applicant in person. The proceedings had not required the hearing of witnesses or the taking of other oral evidence, nor had they raised any issue of credibility. Once the Board had presented sufficient reasons for rejecting the request for an oral hearing, the applicant had been provided with an opportunity to submit any additional written observations. The Board could thus refrain from holding an oral hearing and there had been no violation of Article 6 in this respect.

29. As to the complaint under Article 13, the Government noted that the alleged violation of the Convention had taken place in the context of judicial proceedings. Since Article 6 was *lex specialis* in relation to Article 13, the assessment under the latter should be limited in nature. The applicant had had access to an effective remedy *vis-à-vis* both his compensation claim and his Convention complaints. Accordingly, there had been no violation of Article 13 of the Convention.

2. The Court's assessment

30. The Court notes at the outset that the parties do not contest the applicability of the civil limb of Article 6 of the Convention to the present case and it sees no reason to hold otherwise. This provision is thus applicable in the present case under its civil head.

31. The Court further reiterates that for the purposes of Article 6 § 1, a tribunal need not be a court of law integrated within the standard judicial machinery. It may, like the Board at issue in the present case, be set up to deal with a specific subject matter which can be appropriately administered outside the ordinary court system. What is important to ensure compliance with Article 6 § 1 of the Convention are the guarantees, both substantive and procedural, which are in place (see *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 201, Series A no. 102, and *Rolf Gustafson v. Sweden*, 1 July 1997, § 45, *Reports of Judgments and Decisions* 1997-IV).

32. The Court is satisfied that the Board's composition and its operation satisfied the requirements of independence and impartiality. In the present case, the department within the Board which took the decision on compensation, was composed of four members of which at least two had to have legal training and the chair of the department was, or had been, a permanent judge. They were appointed for the entire duration of the Board's existence and were independent both from the Government and Parliament (see paragraph 15 above). The Board had jurisdiction to examine and decide

with binding effect on all questions of fact and law relevant to the applicant's compensation claim and its decisions could not be overturned by a non-judicial authority (see, among many other authorities, *Belilos v. Switzerland*, 29 April 1988, § 64, Series A no. 132, and *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 219, 1 December 2020). Moreover, the Court has already accepted in the case of *Rolf Gustafson* that another Board with a similar composition to the one in the present case met the requirements of an independent tribunal within the meaning of the Convention (see *Rolf Gustafson*, cited above, §§ 45-47).

33. As to the impossibility of appealing against the Board's decisions, the Court notes that Article 6 § 1 does not guarantee a right of appeal in civil matters (see *Platakou v. Greece*, no. 38460/97, § 38, ECHR 2001-I).

34. The Court further finds that the decision-making procedure before the Board was fair. The legislation provided that the Board was required to hold an oral hearing if an applicant requested one and if it was not manifestly unnecessary. The hearings were public unless there were particular reasons to hold them behind closed doors. The procedure before the Board was governed in general by the Administrative Procedure Act (see paragraph 15 above).

35. According to the Court's case-law, in proceedings before a court of first and only instance the right to a "public hearing" under Article 6 § 1 entails an entitlement to an "oral hearing" (see *Fredin v. Sweden (no. 2)*, no. 18928/91, §§ 21-22, 23 February 1994; *Allan Jacobsson v. Sweden (no. 2)*, no. 16970/90, § 46, 19 February 1998; and *Göç v. Turkey* [GC], no. 36590/97, § 47, 11 July 2002) unless there are exceptional circumstances that justify dispensing with such a hearing (see *Hesse-Anger and Anger v. Germany* (dec.), no. 45835/99, 16 May 2002, and *Mirovni Inštitut v. Slovenia*, no. 32303/13, § 36, 13 March 2018). The exceptional character of such circumstances stems essentially from the nature of the questions at issue, for example in cases where the proceedings concern exclusively legal or highly technical questions (see *Koottummel v. Austria*, no. 49616/06, § 19, 10 December 2009).

36. In the present case, the proceedings took place at only one level of jurisdiction and did not include an oral hearing. The Board decided that there was no apparent need for such a hearing to be held, since the applicant had not requested the holding of an oral hearing in order to hear any witnesses or to provide further evidence, but only to confirm in person the evidence submitted by him in writing. The Court accepts that all questions of fact and law could be adequately resolved on the basis of the case file and the applicant's written submissions and that no pertinent additional information could have been gathered by hearing the applicant in person. Since no issue of credibility was raised, there was no need to hear witnesses or other oral evidence. The Board was therefore entitled to decide not to hold an oral hearing in the present case.

37. Moreover, once the Board had rejected the applicant's request for an oral hearing, he was provided with an opportunity to submit any additional written observations (see paragraph 28 above). Although the applicant did not have the possibility of commenting on the proposal for a decision before it was adopted by the Board – in line with common practice in all judicial proceedings – he was provided with several opportunities to comment on the case during the proceedings.

38. The Court reiterates that it is primarily for the national authorities, in particular the courts, to interpret, and assess compliance with, domestic law (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 186, 6 November 2018, and *Guðmundur Andri Ástráðsson*, cited above, § 251). However, it is ultimately for the Court to determine whether the way in which that law is interpreted and applied produces consequences that are consistent with the principles of the Convention in its capacity as the ultimate authority on the application and interpretation of the Convention (see, for example, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 191, ECHR 2006-V, and *Guðmundur Andri Ástráðsson*, cited above, § 286).

39. In the present case, the Board concluded that the applicant could not show that he had been taken into public care during the relevant period of time (see paragraph 6 above). Since he did not fulfil the prerequisites for obtaining compensation, the issue whether he had been subjected to any abuse or neglect during that time was therefore never assessed by the Board. Therefore, the allegedly high required standard of proof for obtaining compensation was of no relevance in the present case since the Board's assessment never went that far.

40. Moreover, there is no indication that the standard of proof used for deciding whether the applicant had been taken into public care was too strict. The Board used the same standard of proof which is used in civil cases in Sweden. Once it had become apparent that no formal decision on the applicant's placement in public care was to be found in the archives, he was given an opportunity to produce evidence of his having been taken into public care.

41. Lastly, as there is no right to appeal in civil matters under Article 6 § 1 of the Convention (see paragraph 35 above) – which is a *lex specialis* – Article 13 does not enter into play.

42. Accordingly, the complaints under Article 6 § 1 and Article 13 of the Convention must be rejected as being manifestly ill-founded and be declared inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Holds that the applicant's heirs have standing to pursue the proceedings in his stead;

Declares the application inadmissible.

Done in English and notified in writing on 16 December 2021.

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Liv Tigerstedt Deputy Registrar	Krzysztof Wojtyczek President