AS TO THE ADMISSIBILITY OF

Application No. 20959/92
by C.P. H.
against Sweden

The European Commission of Human Rights (Second Chamber) sitting in private on 2 September 1994, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 17 June 1992 by C.P. H. against Sweden and registered on 18 November 1992 under file No. 20959/92;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

a. The particular circumstances of the case

The applicant is a Swedish citizen born in 1943 and residing in Malmö. He is the founder of a political party, the Skåne Party (Skånepartiet), aimed at establishing independence for the region of Skåne. Before the Commission he is represented by Mr. Bertil Malmlöf, a lawyer practising in Stockholm.

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

On 15 December 1990, the applicant and his cohabitee travelled by ferry to Copenhagen. While driving home upon return to Malmö, they were stopped by the police and the applicant was taken to hospital where a blood-test was taken. The test showed a 2.19 permillage of alcohol in the applicant's blood. The applicant was, therefore, later charged with aggravated drunken driving. He claimed, however, that his cohabitee had been driving the car on the occasion.

On 27 May 1991 the District Court (Tingsrätten of Malmö) found the applicant guilty as charged and sentenced him to one month's imprisonment. The Court consisted of one judge and three lay judges (nämndemän). The lay judges are appointed through political elections and the lay judges sitting on the occasion were all members of

political parties different from the applicant's. During the trial the applicant wanted to examine the witnesses for the prosecution himself, but the judge directed him to put all questions through his public defence counsel.

The applicant appealed to the Court of Appeal (Hovrätten of Skåne and Blekinge), requesting 1) that the District Court judgment should be quashed and the case be referred back to that Court for re-examination, or 2) that the Court of Appeal should acquit him. The applicant supported his first request by claiming that a grave procedural error had been made in the District Court when he was refused to examine the witnesses himself, thereby denying him his right under Swedish law to plead his own case.

On 9 August 1991 the Court of Appeal rejected the applicant's request for the case to be referred back to the District Court. The Court of Appeal stated that if the decision not to allow the applicant to examine the witnesses himself was to be considered a procedural error, it could nevertheless be rectified in the proceedings in the Court of Appeal.

On 4 November 1991 the Court of Appeal upheld the judgment of the District Court. In the hearing before the Court of Appeal the applicant was allowed to put questions to the witnesses himself.

The applicant then appealed to the Supreme Court (Högsta domstolen), maintaining that the case should be referred back to the lower courts or that he should be acquitted.

On 3 February 1992 the Supreme Court refused leave to appeal.

b. Relevant domestic law

In criminal cases the District Court is composed of one judge, who is legally trained and qualified, and three or five lay judges, who usually have no legal training. The Court of Appeal is, in these cases, composed of three professional judges and two lay judges. The lay judges are appointed through elections held by, respectively, the Municipal Assembly and the County Council. The political affiliation of the elected lay judges normally reflects the political situation in the Assembly or the Council. However, according to Chapter 4, Section 7, subsection 4 of the Code of Judicial Procedure (rättegångsbalken), the aim should be a diversified composition as regards age, sex and profession.

Chapter 4, Sections 13-15 of the Code of Judicial Procedure read, in so far as relevant, as follows:

(translation)

Section 13:

"A judge's right to hear a case may be challenged:

...

9. if otherwise there are special circumstances likely to undermine confidence in his impartiality in the case."

Section 14, subsections 2 and 3:

"If a party wishes to challenge a judge's impartiality, he shall state his objections when he pleads for the first time in the case, after he has been informed that the judge is on the bench or otherwise deals with the case, or, if the particular fact on which the challenge is based was then unknown to the party, after he has been informed thereof. If the party fails in this respect,

his right to so challenge is forfeited.

Such a challenge in respect of a lower court judge may not be heard by a superior court, unless the challenge in the superior court is lodged by a party entitled under subsection 2 or is an appeal against a decision to reject the challenge."

Chapter 4, Section 15, subsection 2:

"If a party has lodged, in time, a challenge to a judge's impartiality, the court shall, as soon as possible, deliver a separate decision on the matter."

Chapter 49, Section 3 of the Code provides for the following appeal procedure:

(translation)

"If the District Court in the course of the proceedings has decided to reject a challenge to a judge's impartiality ... , the party who wishes to appeal against the decision shall give notice of exception. Such notice shall be given immediately, if the decision has been pronounced at a hearing, or, otherwise, within a week from the date on which the party was informed of the decision. If the party fails in this respect, he may no longer appeal against the decision. ..."

The above provisions concern legally trained and qualified judges and lay judges alike.

COMPLAINTS

1. The applicant claims that he has been deprived of a fair hearing by an independent and impartial tribunal contrary to Article 6 para. 1 of the Convention. He alleges that the three lay judges in the District Court were known to be antagonistic to, disrespectful of and prejudiced against the applicant's party. Furthermore, the District Court trial having been preceded by adverse publicity in the media, he felt that the judges were prejudiced against him from the outset. The applicant submits that the Swedish criminal justice system does not recognise the right to challenge the impartiality of a lay judge on political grounds.

2. The applicant also submits that in the District Court he was denied the opportunity to examine on his own the witnesses for the prosecution. For this reason, significant information which would have influenced the outcome of the case did not come forth. He invokes Article 6 paras. 1 and 3 (d) of the Convention.

3. The applicant further complains that, because of the unfairness of the proceedings in the District Court and the Court of Appeal's failure to refer the case back to the District Court for a new trial, he has been denied his right to a review by a higher tribunal. He maintains that the Supreme Court grants leave to appeal only in exceptional circumstances. In this respect, he invokes Article 2 of Protocol No. 7 to the Convention.

THE LAW

1. The applicant claims that, since his case was heard by the three politically elected lay judges in the District Court, he has been deprived of a fair hearing by an independent and impartial tribunal contrary to Article 6 para. 1 (Art. 6-1) of the Convention. He alleges that the three lay judges were known to be antagonistic to, disrespectful of and prejudiced against the applicant's party.

However, the Commission is not required to decide whether or not

the facts submitted by the applicant in this respect disclose any appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted.

In his appeals to the Court of Appeal and the Supreme Court the applicant did not challenge the impartiality of the lay judges or make any other statements that would cast doubt on the District Court's independence or impartiality. He claims that he could not lodge a successful challenge since Swedish courts would not recognise a challenge on political grounds.

The Commission recalls that, in the examination of an individual application under Article 25 (Art. 25) of the Convention, it must confine itself to the facts of that particular application (cf. No. 10941/83, Dec. 3.12.86, D.R. 51 p. 41). Thus, it will not make a general review of, for instance, the compatibility with the Convention of the system of political elections of lay judges. For the purpose of determining whether the applicant in the present case has exhausted domestic remedies it is sufficient to determine whether he could have challenged in Swedish courts the impartiality of the lay judges sitting on his case on the grounds he has invoked in his application to the Commission.

The Commission considers that it was possible for the applicant, under Chapter 4, Section 13, subsection 9 of the Code of Judicial Procedure to challenge the impartiality of the three lay judges in the District Court by claiming that they were known to have hostile views on the applicant's party. Provided that he complied with the procedural rules, he would have been able to appeal to the Court of Appeal. Furthermore, according to the Commission's consistent case-law, the mere existence of a doubt as to the effectiveness of a particular remedy does not itself excuse an applicant from the requirement to exhaust it (cf. No. 9586/82, Dec. 14.5.87, D.R. 52 p. 38). In this respect, the Commission concludes that the applicant has not shown that a challenge in Swedish courts was bound to fail. The Commission, therefore, further concludes that no special circumstances existed which might have absolved the applicant from exhausting the domestic remedies at his disposal.

It follows that in this respect the applicant has not satisfied the requirement as to exhaustion of domestic remedies contained in Article 26 (Art. 26) of the Convention. This part of the application is, therefore, inadmissible by virtue of Article 27 para. 3 (Art. 27-3) of the Convention.

2. The applicant submits that in the District Court he was denied the opportunity to examine on his own the witnesses for the prosecution. He invokes Article 6 paras. 1 and 3 d) (Art. 6-1, 6-3-d) of the Convention, which, in so far as relevant, read as follows:

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

The guarantees contained in para. 3 d) of Article 6 (Art. 6-3-d) are specific aspects of the general concept of a fair hearing set forth

in para. 1 of the same Article (cf. Eur. Court H.R., Bönisch judgment of 6 May 1985, Series A no. 92, p. 14 et seq., para. 29). Furthermore, the question whether a trial conforms to the standards laid down in para. 1 must be decided on the basis of an evaluation of the trial in its entirety (cf., e.g., No. 11058/84, Dec. 13.5.86, D.R. 47 p. 230). The Commission will, accordingly, examine whether the applicant's trial as a whole was fair under the general rule of para. 1.

The Commission recalls that the applicant was allowed to question the witnesses himself in the hearing before the Court of Appeal. Furthermore, he was not denied the right to put questions to the witnesses in the District Court trial, but was merely directed to put them through his public defence lawyer.

The Commission, therefore, concludes that the facts submitted do not disclose any appearance of a violation of the applicant's right to examine witnesses under Article 6 para. 3 (d) (Art. 6-3-d) or his general right to a fair hearing under para. 1 (Art. 6-1) of the same Article.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant finally complains that he has been deprived of his right under Article 2 of Protocol No. 7 (P7-2) to the Convention to have his conviction reviewed by a higher tribunal.

Article 2 para. 1 of Protocol No. 7 (P7-2-1) reads as follows:

> "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

In respect of this particular complaint the Commission recalls that the applicant's case was heard by both the District Court and the Court of Appeal. In addition, the applicant appealed to the Supreme Court for leave to appeal.

The Commission notes that in a previous case (No. 18066/91, Dec. 6.4.94, not yet published) it held that the procedure on the right to apply to the Supreme Court in itself was to be regarded as a review within the meaning of Article 2 of Protocol No. 7 (P7-2). The Commission finds no reason to take a different view in the present case. Thus, notwithstanding the applicant's allegations that the hearing in the District Court was unfair and that the Supreme Court only grants leave to appeal in special circumstances, the Commission concludes that the applicant's case has been heard by courts at three levels of jurisdiction, and, consequently, that his rights under Article 2 of Protocol No. 7 (P7-2) have not been violated.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)