AS TO THE ADMISSIBILITY OF

Application No. 18484/91
by K.Å.
against Sweden

The European Commission of Human Rights (Second Chamber) sitting in private on 30 June 1993, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO

Mr. K. ROGGE, Secretary to the Second 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 8 May 1991 by K.Å. against Sweden and registered on 9 July 1991 under file No. 18484/91;

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

The applicant is a Swedish citizen born in 1955 and residing in L. Before the Commission he is represented by Hanserik Romelind, a lawyer practising in Ängelholm.

The particular circumstances of the case

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

On 28 June 1989 the District Court (tingsrätt) of Klippan convicted the applicant of, inter alia, grand larceny (grov stöld) and sentenced him, after having considered his personal history, to probation combined with a special undertaking to undergo treatment. The Court stated in its judgment that if the applicant had not agreed to undergo treatment, it would instead have imposed a one year prison sentence.

However, the applicant left the institution where he received treatment, allegedly in breach of the contract, and the public prosecutor applied to the District Court to have the sentence reviewed as the applicant had not lived up to his undertaking to undergo treatment. The applicant denied having broken his undertaking.

By final decision of 14 June 1990 the District Court quashed its earlier judgment as far as the sentence was concerned and sentenced the

applicant to eight months imprisonment considering the fact that he had undergone part of the treatment agreed to in the first judgment.

The applicant appealed against this decision to the Court of Appeal (hovrätten) of Skåne and Blekinge, requesting an oral hearing and the hearing of a witness.

By final decision of 18 September 1990 the Court of Appeal rejected the requests for an oral hearing and for the hearing of a witness and confirmed the decision of the District Court.

The applicant applied to the Supreme Court (Högsta domstolen) for leave to appeal (prövningstillstånd) maintaining inter alia that the absence of an oral hearing before the Court of Appeal constituted a grave procedural error and was also in violation of Article 6 of the Convention. By decision of 9 November 1990 the Supreme Court refused leave to appeal.

Relevant domestic law and practice

According to Chapter 30, section 9, of the Criminal Code (brottsbalken) the court may choose to sentence the convicted person to probation if it believes that the origin of the criminal activity is abuse of drugs or some other special circumstance and if the person in question declares himself willing to undergo treatment in accordance with a previously established plan.

According to Chapter 28, section 6 a, of the Code, the court shall, if the undertaking to undergo treatment is essential for its sentence to probation, indicate in its judgment the length of the prison sentence which would have been imposed if that sanction had been chosen.

If the convicted person seriously breaches his undertaking to undergo treatment, the prosecutor may, according to Chapter 28, section 8, request the court to set aside the probation. Under section 9 of the same Chapter, the court shall then impose some other sanction for the offence. In so doing the court shall take into account the sentence already served and any indication which may have been given under Chapter 28, section 6 a, as to what prison sentence was envisaged as an alternative. Section 9 also prescribes that, if imprisonment is imposed, the court may fix a shorter sentence than the one otherwise prescribed for the offence in question.

COMPLAINTS

The applicant maintains that the Court of Appeal's refusal to hold an oral hearing and to hear the witness invoked, violated his right to a fair trial as guaranteed in Article 6 paras. 1 and 3 (d) of the Convention.

THE LAW

The applicant maintains that the Court of Appeal's refusal to hold an oral hearing and to hear the witness invoked, violated his right to a fair trial as guaranteed in Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention. The relevant parts of these provisions read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] 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 Commission recalls that the determination of a criminal charge comprises not only conviction, but also sentencing (see, Eur. Court H.R. Eckle judgment of 28 June 1989, Series A No. 51, p. 35, para. 77).

In the present case the District Court convicted and sentenced the applicant for the offence at issue by its judgment of 28 June 1989 and subsequently fixed a term of imprisonment when the applicant was found to have breached his undertaking.

The question is thus whether the prison sentence subsequently imposed was covered by the earlier judgment.

The Commission notes that the District Court in its judgment of 28 June 1989 made a full examination of the question of sentencing: after having examined the reasons underlying the applicant's criminal activity and obtained the applicant's consent to undergo certain treatment, the District Court sentenced him to probation combined with an undertaking to undergo the treatment agreed to. In addition, the District Court indicated the length of the prison sentence which it would have imposed had the applicant not accepted the treatment plan, i.e. imprisonment of one year. The probation was eventually set aside as the applicant was found to have broken his undertaking to undergo treatment, but there is no indication that the sentence thereafter imposed went beyond what had been envisaged in the first judgment. In fact the prison term was reduced to eight months taking into account the length of the treatment undergone by the applicant. In view hereof, the Commission does not find that the impugned decisions constituted a new determination of the criminal charge and, accordingly, Article 6 para. 1 (Art. 6-1) of the Convention does not apply to them.

It follows that the present application is 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)