CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 39470/98
by Leif LINDGREN
against Sweden

The European Court of Human Rights (Fourth Section), sitting on 8 April 2003 as a Chamber composed of

Sir Nicolas BRATZA, *President*,
Mrs E. PALM,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr R. MARUSTE,
Mr L. GARLICKI, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 10 October 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

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

Having deliberated, decides as follows:

THE FACTS

The applicant, Leif Lindgren, is a Swedish national, who was born in 1962 and lives in Färjestaden. He was represented before the Court by Mr S. Larsson, a lawyer practising in Eksjö. The respondent Government were represented by Ms E. Jagander, Ministry for Foreign Affairs.

A. The circumstances of the case

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

On 7 February 1997 S. was attacked several times outside his home by a person using a knife or a bayonet.

S. was heard by the police on at least three occasions in February and early March 1997. Thereafter, on 6 March, defence counsel was appointed for the applicant. A further police interview with S. was held on 18 March. According to the applicant, he and his counsel were not informed of this interview or invited to attend it.

The applicant was subsequently charged with attempted murder of S. The applicant and S. knew each other, having served time together at the same prison and having met thereafter on a couple of occasions at the home of S.

On 26 March 1997 the applicant received a copy of the records of the preliminary investigation. Those records state that the applicant had no objection or comments to the documentation of the investigation.

On 8 April, 27 May and 2 June 1997 the District Court (*tingsrätten*) of Kalmar heard the case. On 8 April S. came to the court's waiting room but then left. The prosecutor stated at the hearing that he had talked to S. in the waiting room who had said that he had nothing to add but that he stood by the information he had given to the police. The court ordered that S. be fetched by the police, proceeded with the hearing but later discontinued it as S. had not been found. On 27 May the District Court adjourned the case, noting that the police had not been able to enforce the court's order that S. be brought to the hearing. On 2 June S. again came to the waiting room but left before the hearing started. The District Court then decided to continue the hearing of the case in the absence of S. It allowed that his statements made during the preliminary investigation be read out.

By a judgment of 6 June 1997 the District Court convicted the applicant of aggravated assault of S. and attempted murder of another person who had been attacked on a different occasion. The applicant was sentenced to five years in prison.

Both the applicant and the public prosecutor appealed to the Göta Court of Appeal (*Göta hovrätt*). The prosecutor requested that S. be heard in person before the appellate court or, alternatively – in the event that he would not appear –, that his statements to the police be admitted as

evidence. The applicant objected to the alternative request, stating, *inter alia*, that it would violate the applicant's rights under the Convention.

On 22 July 1997 the Court of Appeal decided to refuse the prosecutor's alternative request.

The Court of Appeal heard the case on 31 July, 1 August and 7 August 1997. Following S.'s non-appearance on the first day, the court ordered that he be brought to the court by the police. The police were not able to enforce the order in time for the second day. However, on 7 August S., serving a prison sentence at the time, was taken to the court by the transportation service of the National Prison and Probation Administration (*Kriminalvårdsstyrelsen*). At the hearing S. refused to give evidence except for stating that it was not the applicant who had attacked him and that he had not previously named the applicant as the perpetrator. The court then decided to allow as evidence the statements made by S. during the police investigation.

By a judgment of 22 August 1997 the Court of Appeal convicted the applicant of attempted murder also in regard to the attack on S. and sentenced him to imprisonment for a total of eight years for the two crimes. With respect to the statements made in the case by S. the court stated, *inter alia*, the following:

> "During the police investigation [S.] first stated that he was attacked by a man, who was accompanied by another man, and then that the attacker came in the company of a woman. ... During the preliminary investigation it also occurred, according to the testimony made by police officer [D.], that [S.] was asked whether the right person was detained in the case, and then nodded affirmatively and said 'you know that, of course'.
>
> [S.] was summoned twice to the District Court's main hearing. On both occasions he came to the court's waiting room but disappeared before the hearing started. During the hearing before the Court of Appeal, [S.] showed signs of being deeply upset. He acted as could be expected from a person, who is afraid of reprisals. ...
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> The fact that [S.] has not been heard by the District Court and mostly refused to give evidence before the Court of Appeal raises the question of the application of Article 6 of [the Convention] – the right to a fair trial and the right to examine or have examined witnesses ... . The European Court of Human Rights has in a number of judgments dealt with this issue (see, *inter alia*, Unterpertinger ..., where the Convention was found to have been violated, and Asch ..., where no such violation was found). Chapter 36, section 16, subsection 2 of the Code of Judicial Procedure (*Rättegångsbalken*) shall be interpreted restrictively in the light of Article 6 and the European Court's application thereof ... .
>
> The Court of Appeal notes at the outset that the presentation of material from the preliminary investigation in itself cannot be considered as a violation of Article 6. According to the above-mentioned judgments, it seems that the decisive point as to whether there has been a violation is whether the conviction has been based primarily on this material. In order for the Court of Appeal to be able to draw a conclusion on this point, it is first necessary to examine the evidence in the case.

There is no doubt that [S.] has sustained the injuries alleged by the prosecutor, nor as to how this happened. As to the identity of the perpetrator, [S.] has avoided to directly identify [the applicant]. Therefore, a conviction cannot be based on [S.'s] statements alone. The prosecutor has invoked certain supplementary evidence. In addition to this evidence, it is of importance that [the applicant] has not invoked any form of alibi evidence. The Court of Appeal is of the opinion therefore that the statements made by [S.] during the preliminary investigation are not the primary evidence in the sense laid down by the European Court. Article 6 of the Convention cannot therefore be considered as prohibiting this evidence from being considered by the Court of Appeal.

On the basis of the available material, the Court of Appeal makes the following assessment. According to what [S.] has stated, the perpetrator visited him on 5 February 1997. This information should be considered in conjunction with the statement of [witness 1] that [witness 1] the same day met [S.] together with a person whom [witness 1] has identified as [the applicant], and then lends support to the conclusion that [the applicant] is the perpetrator. Although the identification of [S.] made by [witness 2] at a photo line-up does not have any real value as evidence, her observation of a man outside the home of [the applicant] on 7 February 1997 confirms what [S.] has stated regarding his visit to the home of the perpetrator. The observations made by [witness 3] concerning the perpetrator's looks do also, to some extent, support the conclusion that [the applicant] is the perpetrator. The statements made by [S.] during the preliminary investigation have thus been verified on various points. This fact together with what has otherwise been revealed in the case is highly compromising for [the applicant]. It is apparent to the Court of Appeal that [S.] throughout the investigation and the hearing of the case has been afraid of [the applicant]. The fact that [S.] during the oral hearing before the Court of Appeal denied that [the applicant] was the perpetrator can therefore be disregarded. The Court of Appeal finds it proven beyond reasonable doubt, as did the District Court, that [the applicant] is identical with the perpetrator."

On 29 September 1997 the Supreme Court (*Högsta domstolen*) refused the applicant leave to appeal.

B. Relevant domestic law

Chapter 35, section 4 of the Code of Judicial Procedure provides:

"A statement made in writing on the occasion of already opened or imminent legal proceedings or a written record of a statement made on the occasion of such proceedings to the prosecutor or the police or otherwise out of court may be invoked as evidence in the proceedings only

1. if this is specifically prescribed,

2. if the person who made the statement cannot be examined at or outside the main hearing in the case or otherwise before the court, or

3. if there are particular reasons, taking into account the costs and inconvenience that an examination at or outside the main hearing may entail, the possible gain of such an examination, the significance of the statement and other circumstances.

> The rules on statements in writing or in written records in the first paragraph apply also in regard to a phonetic or similar record of a statement."

Chapter 36, section 16, subsection 2 reads:

> "During the hearing of a witness, the witness's prior statement before a court or before a prosecutor or the police may be presented only when the witness's testimony differs from what he has previously stated or when the witness declares that he cannot or will not speak."

The latter provision applies also to a hearing of an injured party, according to chapter 37, section 3, subsection 1.

COMPLAINT

The applicant complained under Article 6 of the Convention that he had not had a fair trial as he had not been given the opportunity to question S.

THE LAW

The applicant complained that he had not had a fair trial as he had not been given the opportunity to question S. He relied on Article 6 of the Convention which, in relevant parts, provides as follows:

> "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"

The respondent Government submitted that the application was manifestly ill-founded. They claimed that the applicant had not asked to be represented at the police questioning of S. on 18 March 1997, although defence counsel had been appointed almost two weeks earlier. Furthermore, he had not made any comments to the records of the preliminary investigation. They also pointed out that the District Court had made several attempts to have S. give evidence during the trial. When that had proved to be impossible, there was no indication that the applicant had objected to the court's decision to conclude the hearing of the case without S. having been heard in person. Moreover, it was not until the District Court had issued its judgment that the applicant had started to argue on points concerning the rights of the defence.

With regard to the proceedings before the Court of Appeal, the Government stated the following. The appellate court had allowed the pre-trial statements of S. to be read out in court but this had not been done in order to substitute his submissions in person by his previous submissions – a procedure which had been rejected by the court in its decision of 22 July 1997 – but to assess the veracity of his account before the court and his credibility in view of the contradictions between his statements. In its judgment, the appellate court had discussed at some length whether it would be compatible with Article 6 of the Convention to consider S.'s pre-trial statements. In answering this question the court had reviewed all the evidence in the case and concluded that his statements had not been "the main evidence". In this connection, the Government pointed out that the information submitted to the police by S. had been corroborated by at least three witnesses and other pieces of evidence. Moreover, the appellate court had had the opportunity to observe S.'s demeanour when he had appeared before the court and had concluded that he showed signs of fear, which in itself had justified the court's decision to admit pre-trial evidence.

The Government contended that the applicant had been convicted by the Court of Appeal as a result of its overall assessment of the evidence and not as a consequence of the fact that he had not been in a position to question S. at the pre-trial stage and had only had a limited opportunity to question him in court.

The applicant maintained his application. He submitted that neither he nor his defence counsel had been informed of the questioning of S. on 18 March 1997. When he later had received a copy of the records of the preliminary investigation, there had been no reason to request a further police interview of S. as he had already been heard by the police on several occasions and as it could be expected that the public prosecutor would request that S. be heard in court and there had been no indication that he would fail to attend the hearing. Furthermore, the applicant had not expressed objections to the courts' allowing S.'s pre-trial statements to be read out in court as that procedure had been in accordance with domestic law and the reading out of the statements had not as such violated Article 6 of the Convention. Rather, the violation of Article 6 had occurred when the courts had based the conviction of the applicant on those statements. The applicant had objected to that evaluation of evidence both before the District Court and the Court of Appeal and in his appeal to the Supreme Court. The reason why there was no indication of those objections was that the contents of the parties' pleadings were not recorded in the minutes of Swedish court hearings.

In respect of the proceedings before the Court of Appeal, the applicant claimed that he had not been given an opportunity to cross-examine S. as S. had clearly stated that he would not answer any questions posed by counsel for the defence. The applicant further contended that not only had the

statements made by S. to the police contradicted his testimony before the appellate court but the police-interview statements had also been mutually incompatible. In these circumstances, the cross-examination of S. before the courts had been of particular importance. Furthermore, the other evidence presented in the case – including oral and written evidence and S.'s conduct at the appellate court's hearing – had allegedly been of such peripheral nature that the statements made by S. to the police had constituted the main evidence in the case. The applicant maintained that the courts' reliance on that evidence in convicting him although he had not had the opportunity to question S. constituted a violation of his rights under Article 6.

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).

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 Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Asch v. Austria*, cited above, p. 10, § 26, and *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 470, § 67).

All evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, as the Court has stated on a number of occasions, it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular, where a witness refuses to repeat his deposition in public owing to fears for his safety). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where 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 are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Lucà v. Italy*, no. 33354/96, 27 February 2002, § 40, to be reported in ECHR 2001-II, with further references).

In that regard, the fact that the depositions were, as here, made by the injured party rather than by a witness is of no relevance. In that connection, the Court reiterates that the term "witness" has an "autonomous" meaning in the Convention system. Thus, where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was

made by a witness in the strict sense or by the injured party, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (ibid., § 41).

In the present case, the Court notes that several attempts were made by the District Court to secure S.'s attendance at its hearing of the case. On two occasions he was present in the court's waiting room but absconded before he could be questioned. Also the Court of Appeal made an unsuccessful attempt to have S. brought before it. Eventually, on 7 August 1997, he was taken to the appellate court's hearing by force. There he refused to give evidence except for stating that it was not the applicant who had attacked him and that he had not previously named the applicant as the perpetrator. In this situation, the Court of Appeal decided to allow as evidence S.'s pre-trial statements to the police and went on to examine those statements in the light of all the evidence available to it.

As mentioned above, the Court's task is not to give a ruling as to whether statements of witnesses were properly admitted as evidence; this is for the domestic courts. The Court cannot hold in the abstract that evidence given by a person in open court should always be relied on in preference to other statements made by the same person in the course of criminal proceedings, not even when the two are in conflict. Furthermore, as it was not possible to have S. testify fully before the Court of Appeal, it was open to the court to have regard to the statements obtained by the police, especially since it could consider those statements to be corroborated by other evidence before it (see, *mutatis mutandis*, *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242, p. 10, § 22, and *Doorson v. the Netherlands*, cited above, p. 472-73, §§ 77-80).

The other evidence available to the Court of Appeal consisted of at least three witnesses and some written evidence. It also took into account the behaviour of S. during the proceedings, including his demeanour when he appeared before it. On the basis of the available material, the court found that the other evidence corroborated S.'s pre-trial statements.

Of importance is also the fact that the Court of Appeal was clearly aware of the right to examine or have examined witnesses under Article 6 of the Convention and carefully evaluated the evidence in the light of the principles developed on this subject. Although the statements made by S. during the preliminary investigation clearly played a part in the establishment of the facts of the case, it should be noted in this connection that the appellate court concluded that those statements were not the primary evidence.

The Court further takes into account that the applicant was able to challenge S.'s depositions before the courts and also had the opportunity to comment on his appearance during the appellate court hearing.

Accordingly, the fact that it was not possible to fully examine S. before the courts did not, in the circumstances of the case, infringe the rights of the

defence to such an extent that it constituted a breach of paragraphs 1 and 3 (d) of Article 6, taken together.

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

For these reasons, the Court by a majority

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President