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. 48518/99
by Tommy LUNDKVIST
against Sweden

The European Court of Human Rights (Fourth Section), sitting on 13 November 2003 as a Chamber composed of:

Mr M. PELLONPÄÄ, *President*,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI,
Mr J. BORREGO BORREGO,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 2 March 1999,

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, Mr Tommy Lundkvist, is a Swedish national, who was born in 1949 and lives in Kvicksund. He is represented before the Court by Mr J. Södergren, a lawyer practising in Stockholm. The respondent Government were represented by Mrs I. Kalmerborn of the Ministry for Foreign Affairs, as Agent.

A. The circumstances of the case

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

In the evening of 24 June 1994, the so-called "midsummer night", a row broke out between the applicant and his wife in the couple's home. Later, on 25 June, at around 2 a.m., a fire ravaged the home, a wooden house owned by the applicant, which burned down to the foundation walls.

The applicant was subsequently charged under Chapter 3, Article 5 of the Penal Code, with ill-treating his wife, and under Chapter 13, Article 1 with arson for setting his house on fire.

In August 1994 the Västerås District Court convicted the applicant on the first count and sentenced him to one month's imprisonment. On the second count, it acquitted him, finding that, notwithstanding the existence of strong arguments supporting the prosecution's case, it had not been shown beyond reasonable doubt that the applicant was guilty of the offence.

On 14 December 1994 the Svea Court of Appeal upheld the judgment. As regards the arson charge, it observed:

> "As found by the District Court, there are strong reasons for believing that [the applicant] started the fire in his villa. However, there is nothing in the investigation that directly links him to this act. Nor does the investigation exclude the possibility that the fire was caused by an accident or had been started by another person. Since it cannot therefore be regarded as established beyond reasonable doubt that [the applicant] started the fire, the charge must be rejected."

Subsequently, the applicant instituted civil proceedings against his insurance company, *Länsförsäkringar* Bergslagen, requesting a declaratory judgment to the effect that the latter was obliged under the insurance contract to pay him compensation for the damage caused by the fire to his house and personal belongings.

The Västerås District Court, sitting with a different bench from the one in the criminal case, held an oral hearing during which evidence was heard from the applicant, the witnesses who had given evidence during the criminal trial and a number of new witnesses. The written evidence adduced by the parties was to a large extent the same as had been submitted in the criminal proceedings.

In its judgment of 24 January 1997, the District Court found for the insurance company and against the applicant. The judgment contained an introductory section entitled "Background", in which the District Court quoted the Court of Appeal's above-cited conclusion, and a summary of the parties' submissions ("*Yrkande mm*"). This was followed by the District Court's reasoning ("*Domskäl*"), which gave an itemised description of the written and oral evidence, reiterated the contents of some of the new oral evidence, and set out the District Court's assessment. It first reiterated the standards of proof applicable to cases of insurance compensation, noting that it was not disputed here that an insured event had occurred, but only whether the matter fell within the exception clause in H 4.3 of the insurance policy, cf. section 32 of the Consumer Insurance Act (*konsumentförsäkringslagen*), which it was for the insurance company to prove. In this connection the District Court emphasised that a factor that was significant for distinguishing the assessment of evidence in the civil case from that of the criminal case was the applicant's silence.

The District Court then examined, at quite some length, the evidence, including that from experts, as to the possible natural causes of the fire, notably the house's electrical installations and heating system, in particular a combined wood-and-oil burner and the chimney. It concluded that such causes could be excluded and that there were therefore weighty reasons for considering that the cause must lie somewhere else. It went on:

> "As already stated, [the applicant] for his part has not been able to contribute with any explanation as to the origin of the fire. He had good opportunities to start the fire. According to the investigation, shortly before the fire, he went in and out of the house several times.
>
> The District Court considers that no person other than [the applicant] can be suspected of having started the fire. The information provided by [his wife] to the police during the first interview makes the suspicion against him particularly strong. During the police interview she had stated *inter alia* that [the applicant] threatened to burn the house down if she and her son were to move. The evidence obtained at the police interviews must be given particular evidential value. Subsequently she has provided new and different information in a curious manner. Her new statement does not seem credible. She has strong personal reasons for trying to save the family's financial situation. The new information could be explained, or at least seen, in the light of the fact that, as she admits, she talked with [the applicant] about the circumstances relating to the origin of the fire before the Court of Appeal hearing. Even during the hearing in the previous case Mrs Lundkvist gave barely credible explanations for departing from the information that she had spontaneously provided during the first police interview and has not convincingly presented her new version, *inter alia* that she should have been inside the house immediately before the fire and seen smoke in the house, amongst other things. She has been further examined on these points and has stated that she did 'not know how she should reply'.
>
> What first and foremost indicated that [the applicant] started the fire is that, in connection with a row with his wife, he expressed a threat to burn the house down, plus the fact that his state of mind was clearly such that, in a fit of desperation, he

could very well be believed to have started the fire by using the inflammable liquids that were in the house. His disposition for taking dramatic steps is confirmed by the suicidal thoughts that he expressed immediately after the fire. The assumption that [the applicant] himself started the fire with the help of inflammable liquids is supported by the development of the fire as witnessed by several eye witnesses and, with the exception of Mr Andersson, by the evidence heard from technical experts on fire incidents. One of the apparent factors which likewise suggests that [the applicant] started the fire is that, as pointed out by the District Court in its judgment of 5 August 1994, immediately before the fire [the applicant] carried his son from his room in the house out to the lorry and the fact that [the applicant] was in the house, in the cellar, at the precise moments that the smoke became apparent. Furthermore, it should be taken into consideration that [the applicant] himself, voluntarily, raised the question of arson with Mr Mats Eriksson [police officer] when the police intervened against him after the fire.

The District Court finds that the circumstances adduced in support of the submission that [the applicant] intentionally started the fire outweigh other possible causes of the fire to such a high degree that insurance compensation should not be paid. The appeal shall therefore be rejected."

The applicant appealed to the Svea Court of Appeal. That court, too, sat in a different composition from that in the criminal case. The applicant relied mainly on the same evidence as before the District Court. The Court of Appeal heard evidence from the applicant at his own request and from several expert witnesses and heard tape recordings of a number of witness statements taken by the District Court, including those of the applicant's wife and mother, at their request.

In its judgment of 17 March 1998 the Court of Appeal upheld the District Court's judgment.

Like the District Court, the Court of Appeal first considered the various possible technical causes of the fire and endorsed the District Court's findings that such causes had to be excluded.

"[The applicant]'s behaviour during the midsummer night and the disquiet and anxiety that he aroused in Mrs Lundkvist and his mother indicate that he was mentally highly imbalanced. The information that Mrs Lundkvist finally provided in order to protect him appears, as the District Court held, not to be credible. Furthermore regard should be had to the fact that the statements initially made by [the applicant] about the fire during the police interviews – the first time, when he had not yet been informed that he was under suspicion of having committed an offence – are not supported by the remainder of the investigation. Thereafter he has not been able to contribute any explanation. The Court of Appeal draws the same conclusion as the District Court from the fact that after the initial police interview [the applicant] has given hardly any information about the event. Against this background and having regard to the case as a whole, there is no possibility of considering that the fire was started by any person other than [the applicant].

In view of these considerations the insurance company must be considered to have shown – in accordance with the standard of proof applicable to civil cases of this kind – that [the applicant] started the fire. His request for a declaratory judgement shall therefore be rejected and the District Court's judgment shall stand."

The applicant sought leave to appeal against the Court of Appeal's judgment. On 11 November 1998 the Supreme Court refused leave.

B. Relevant domestic law and practice

Chapter 13, section 1, of the Penal Code (*brottsbalken*) provides:

> "If a person starts a fire, which entails a danger to another person's life or health or extensive damage to another person's property, he or she shall be convicted of incendiarism and be sentenced to imprisonment of between two and eight years.
>
> Where the offence is less serious, the person shall be sentenced to imprisonment of between one and three years."

Chapter 1, section 2, first sub-paragraph of the Penal Code reads:

> "Unless otherwise specifically provided, an act shall be considered a criminal offence only if it has been committed with intent."

Clause H 4.3 of the relevant insurance policy reads:

> "If you have caused the insured event by intent you shall not receive any compensation for your part. The same applies if another person acted with your consent or if the person has significant financial interests in common with you (for example your spouse) and there are no particular reasons to the contrary.
>
> This is also the case - except where it concerns a third party insurance - if the insured event has been caused by gross negligence and there are no particular reasons to the contrary."

It is not claimed that the above-cited policy clause conflicted with the relevant provisions of the Consumer Insurance Act, section 32 of which provides that no insurance cover will be provided in favour of an insured person who has intentionally caused the insured event and that the cover may on certain conditions be reduced if an insured event has been caused by gross negligence or negligence which is not insignificant.

Different standards of proof apply to criminal and civil cases. In a criminal case the burden of proof is entirely on the prosecutor, who must establish beyond any reasonable doubt that the defendant has committed the act in question and that he did so with the necessary intent or negligence. In a civil case, the burden of proof is normally on the plaintiff. The standard of proof in a civil case differs according to the type of case and the circumstances that have to be proved, but is less strict than in a criminal case.

According to examples of Supreme Court case law submitted by the Government (see, e.g., *NJA 1984 p. 501, NJA 1986 p. 3, NJA* 1986 p. 358, *NJA* 1986 p. 470 and *NJA* 1990 p. 93), in cases concerning insurance compensation to consumers it is for the policyholder to show that, having regard to the circumstances as a whole, it is more likely than not that an

insured event has occurred. The policyholder's burden of proof is viewed as somewhat more lenient than the ordinary civil burden of proof. If the insurance company responds that no compensation shall be granted because the policyholder has intentionally caused the insured event, the burden shifts onto the company, which has to prove this in accordance with the ordinary civil standard.

COMPLAINTS

The applicant complained under Article 6 § 2 of the Convention essentially that by rejecting his claim for insurance compensation, the Swedish courts had disregarded his right to the presumption of innocence as guaranteed by that provision.

THE LAW

The applicant complained that he had been the victim of a violation of Article 6 § 2 of the Convention, which reads:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. The scope of the case

In his initial application to the Court the applicant argued that the Court' of Appeal's reasoning in its judgment of 14 December 1994 acquitting him gave rise to certain misgivings, notably the following observation: "As found by the District Court, there are strong reasons for believing that [the applicant] started the fire". The applicant submitted that his acquittal was not respected either by the courts in the criminal case or by the courts in the civil case. In any event the courts' reasoning in the civil cases pointed to him as the one who had started the fire and thereby violated his right to be presumed innocent after an acquittal.

In his statement of the object of the application (under Section V of the application form) the applicant's lawyer affirmed on his client's behalf that he "ask[ed] the Court to find that the Government of Sweden ha[d] violated the Applicant's right to be presumed innocent *after* having been acquitted in a criminal procedure from a charge of incendiarism" (emphasis added).

The Government's comments on the application in their observations on its admissibility and merits, were based on the assumption that the applicant was complaining about both the criminal and the civil proceedings.

However, the Court notes that it is clear from the applicant's initial application that he intended to complain about the failure to observe his Article 6 § 2 right in the civil compensation proceedings against the insurance company. An argument that seems central to his complaint is that the alleged failure was generated by shortcomings in the Court of Appeal's reasoning in the criminal proceedings. However, it is not clear from the applicant's initial application to the Court that he intended to lodge a separate complaint about those proceedings. The Court will therefore not entertain the matter, which was in any event raised more than six months after the Court of Appeal's judgment (Article 35 § 1 of the Convention).

In addition, the Court observes that, in his comments on the Government's submissions, the applicant relied on certain arguments from the Court's case-law relating to the requirement of independence and impartiality under Article 6 § 1. However, he has not introduced a separate complaint under this provision.

In the light of the above, the Court will confine its examination to the applicant's complaint that in the compensation case the national courts failed to respect the presumption of innocence under Article 6 § 2.

B. Whether the applicant has exhausted domestic remedies

The Government submitted that the applicant had failed to raise the substance of his complaint under Article 6 § 2 in the relevant compensation proceedings and had therefore not exhausted domestic remedies as required by Article 35 § 1 of the Convention.

The applicant maintained that he had fulfilled this requirement, arguing that both before the District Court and the Court of Appeal he had specifically referred to the previous judgments acquitting him of the arson charges, which had gained legal force, as evidence in support of his claim that he "he did not initiate the fire by intent or gross negligence."

The Court observes, however, that in his appeal to the Supreme Court the applicant had relied on all his arguments before the lower courts and, further, emphasised that the respondent, the insurance company, had failed to discharge its burden of proof. It was moreover unclear what standard of proof should apply. At no stage in the proceedings at issue did the applicant *expressly* rely on the presumption of innocence. The Court has serious doubts as to whether he could be deemed to have done so even in *substance* merely by praying in aid his acquittal as evidence in rebuttal of the insurance company's claim. In any event, while seriously doubting that the applicant can be said to have satisfied the requirement of exhaustion of domestic remedies, the Court finds that his application must be declared inadmissible as being manifestly ill-founded, for the reasons set out below.

C. The complaint under Article 6 § 2 of the Convention

1. The applicant's submissions

The applicant argued that a decisive consideration for regarding Article 6 § 2 as applicable and as having been violated in this case was the fact that the judgment acquitting him contained statements casting suspicion against him which were completely unnecessary and which had been repeated in the courts' reasoning in the subsequent civil case. Contrary to the Government's submissions, it was irrelevant that the civil case was between two private parties and concerned the application of a contractual clause. The case had been determined by the courts and the disputed clause was the reflection of statutory requirements, so the State's responsibility was engaged in respect of the acts of both the judiciary and the legislator in this case.

The applicant further submitted that, although there were no formal links between the criminal and the civil proceedings in issue, it should be emphasised that the outcome in the criminal case had not been without implications for the civil case. It would have been pointless for the applicant to seek compensation unless and until he was acquitted of the arson charge by a final judgment. Otherwise, his civil claim would have been rejected in the civil proceedings or those proceedings would have been stayed. It was clear from the Swedish courts' case-law that, had he been convicted, that finding would have had a near-binding effect on the civil court. It was established practice in Swedish law that the outcome in a criminal case, be it a conviction or an acquittal, had substantial evidential value for any civil proceedings that might follow. This was not limited to the trial court's conclusion but applied also to its reasoning. In the applicant's case, the casting of suspicion in the acquitting judgment had clearly influenced the findings made by the civil court. The fact that it was mentioned by the District Court under the heading of "Background" did not mean that it had not formed part of its reasoning. Every provision in a judgment was meant to serve an object and make sense to the parties and the public at large.

The applicant made further detailed submissions going to the assessment of the evidence in the criminal case and the civil case. In his view, in the civil case the courts had proceeded from the preconceived view that the applicant had caused the fire. The civil courts had found for the insurance company, not because it was established that the applicant had caused the fire but because they had deemed less convincing the alternative causes of the fire suggested by the applicant. In short, in the civil case, the courts had shifted the burden of proof to the applicant, who had had to establish alternative causes of the fire. The outcome of the civil proceedings did not make sense unless one took into account the impugned statements before the criminal courts. As a matter of fact those statements had influenced the

civil proceedings in the sense that the courts had based their reasoning on a preconceived opinion that was detrimental to the applicant.

Thus, the applicant submitted, there was a connection between the two sets of proceedings attracting the application of Article 6 § 2 of the Convention, which provision had been violated in the present case.

2. The Government's submissions

The Government disputed the applicability of Article 6 § 2 of the Convention to the compensation case between the applicant and the insurance company and, in any event, the submission that there had been any failure to comply with that provision in the instant case.

The Government submitted that the relevant proceedings did not concern any claim against a public authority but only involved two private parties and related to a private-law dispute concerning the application of the terms of a contract, namely an insurance policy. Under the relevant clause, compensation could be excluded, *inter alia*, if the insured person had caused the insured event by intent or gross negligence. It was not a prerequisite for applying this clause that the insured person had been convicted. The terms of the insurance policy were not in any way linked to the establishment of criminal liability. When bringing the civil action against the insurance company, the applicant, who was represented by a lawyer, must have been aware that the courts would have to consider whether he had started the fire.

Moreover, the issues determined in the two sets of proceedings differed in essential respects. Although in both the criminal case and the civil case the respective courts were obliged to consider whether the applicant had set fire to his house, the legal basis (the Penal Code in the former, section H 4.3 of the insurance policy and section 32 of the Consumer Insurance Act in the latter) and the applicable criteria differed. Neither the subjective nor the objective constitutive elements were the same. The evidentiary standards differed, as did the evidence submitted. In the civil case, the courts had assessed the evidence adduced during the hearing totally independently of the evidence and findings in the criminal case and were actually not empowered to take into account any such evidence unless it was referred to by the parties. The latter had not chosen to adduce all the evidence from the criminal case and had requested the courts to consider new oral and written evidence.

Also, the procedural rules applicable to the two sets of proceedings differed considerably, including the composition of the courts.

Furthermore, the Government stressed that, while it was necessary for the courts to express their opinion as to whether the insurance company had shown, in accordance with the applicable standard of proof, that the applicant had started the fire, neither the District Court nor the Court of Appeal had discussed the applicant's criminal responsibility or voiced any suspicion as to his criminal liability. Nor had they questioned the

correctness of his acquittal or made any reference to the criminal courts' judgments in their reasoning.

In the light of the above considerations, the Government requested the Court to declare that the applicant's complaint under Article 6 § 2 of the Convention was manifestly ill-founded.

3. The Court's assessment

The Court will examine the applicant's complaint in the light of the principles enunciated in its recent judgments in *Ringvold v. Norway* (no. 34964/97, judgment of 11 February 2003) and *Y v. Norway* (cited above) and its application of those principles in those cases (see respectively at paragraphs 36-42 and 39-47 of the judgments). It will examine whether the compensation proceedings in his case gave rise to a "criminal charge" against him and, if not, whether the compensation case was nevertheless linked to the criminal trial in such a way as to fall within the scope of Article 6 § 2.

Turning to the first of the criteria for establishing whether there was a "criminal charge", namely the classification of the proceedings under national law, the Court notes that the subject-matter in question related to the application of a contractual clause in an insurance policy, binding upon two private parties. Under this clause it was for the insurance company to establish, in accordance with the burden of proof applicable under the civil law of tort, that the applicant, or other person having a significant financial interest in the property, had started the fire by intent or gross negligence. The issue was dealt with according to the rules governing the conduct of civil proceedings. Thus, the rejection of the applicant's claim for insurance compensation was clearly not viewed as a "criminal charge" under the relevant national law.

As regards the second and third criteria, the nature of the proceedings and the type and severity of the "penalty", the Court notes from the outset that it is not submitted that either the purpose of the relevant policy clause or the size of the amounts which the applicant was refused in compensation with reference to this clause, conferred on the measure the character of a penal sanction for the purposes of Article 6 § 2.

Moreover, the Court observes that, while the conditions for applying the impugned insurance policy clause could in certain respects overlap, depending on the circumstances, with those for establishing criminal liability, the insurance company's submission that the applicant, on account of his conduct, was liable for the damage to his house and had thereby forfeited his right to insurance compensation, was nevertheless to be determined on the basis of the principles that were proper to the civil law of tort. The Court is not persuaded by the applicant's argument, which seems founded on speculation, that the courts' reasoning in the criminal case clearly influenced the courts' findings in the civil case. In any event, the

outcome of the criminal proceedings was not decisive for the compensation case. The insurance company had a right to rely on the exemption clause, regardless of whether the defendant was convicted or, as here, acquitted, and the compensation issue was to be the subject of a separate legal assessment based on criteria and evidentiary standards which differed in several important respects from those applicable to criminal liability. This is borne out by the circumstances of the present case, where the question of insurance compensation was the sole issue to be determined in the disputed proceedings, involving private parties only, and was heard in civil proceedings with new evidence being taken. Moreover, this took place several years after the close of the criminal proceedings, before the District Court and the Court of Appeal, both sitting in a different composition from that in the criminal case, and giving detailed reasoning on the relevant law and facts in the civil case.

The Court further considers that, although formulated with particular regard to the situation of a compensation claim by an individual victim, the following considerations relied on in its *Ringvold* judgment (§ 38, see also the *Y* judgment at § 41) are relevant to the insurance company's claim in this case:

> "[T]he fact that an act that may give rise to a civil compensation claim under the law of tort is also covered by the objective constitutive elements of a criminal offence could not, notwithstanding its gravity, provide a sufficient ground for regarding the person allegedly responsible for the act in the context of a tort case as being 'charged with a criminal offence'. Nor could the fact that evidence from the criminal trial is used to determine the civil law consequences of the act warrant such a characterisation. Otherwise, as rightly pointed out by the Government, Article 6 § 2 would give a criminal acquittal the undesirable effect of pre-empting the victim's possibilities of claiming compensation under the civil law of tort, entailing an arbitrary and disproportionate limitation on his or her right of access to court under Article 6 § 1 of the Convention. This again could give an acquitted perpetrator, who would be deemed responsible according to the civil burden of proof, the undue advantage of avoiding any responsibility for his or her actions. Such an extensive interpretation would not be supported either by the wording of Article 6 § 2 or any common ground in the national legal systems within the Convention community. On the contrary, in a significant number of Contracting States, an acquittal does not preclude establishing civil liability in relation to the same facts.
>
> Thus, the Court considers that, while the acquittal from criminal liability ought to be maintained in the compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof (see, *mutatis mutandis*, *X v. Austria*, no. 9295/81, Commission decision of 6 October 1992, Decisions and Reports (D.R.) 30, p. 227; *M.C. v. the United Kingdom*, no. 11882/85, decision of 7 October 1987, D.R. 54, p. 162). If the national decision on compensation were to contain a statement imputing the criminal liability of the respondent party, this would raise an issue falling within the ambit of Article 6 § 2 of the Convention."

In the instant case, the impugned national rulings on insurance compensation, appearing in separate judgments from the acquittal, did not state, either expressly or in substance, that all the conditions were fulfilled for holding the applicant criminally liable with respect to the charges of which he had been acquitted. The ensuing civil proceedings were not incompatible with, and did not "set aside", that acquittal.

Against this background, the Court does not find that the compensation claim amounted to the bringing of another "criminal charge" against the applicant.

As to the further question of whether there were links between the criminal case and the ensuing compensation case such as to justify extending the scope of the application of Article 6 § 2 to the latter, the Court reiterates that the outcome of the criminal proceedings was not decisive for the compensation issue. In this particular case, the situation was reversed: despite the applicant's acquittal it was legally feasible to deny him insurance compensation for the destroyed house. Regardless of the conclusion reached in the criminal trial against the applicant, the compensation case was therefore not a direct sequel to the former or a consequence and concomitant of it.

In sum, the Court concludes that Article 6 § 2 was inapplicable to the proceedings relating to insurance compensation and that this provision has therefore not been violated in the instant case.

It follows that the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Commented [Note1]: If there was a partial decision where part of the complaints were already declared inadmissible.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President