AS TO THE ADMISSIBILITY OF

Application No. 20837/92
by M.S.
against Sweden

The European Commission of Human Rights sitting in private on 22 May 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 23 September 1992 by M.S. against Sweden and registered on 23 October 1992 under file No. 20837/92;

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

Having regard to the observations submitted by the respondent Government on 30 August 1994 and the observations in reply submitted by the applicant on 25 October 1994;

Having deliberated;

Decides as follows:

THE FACTS

a. The particular circumstances of the case

The applicant, a Swedish citizen born in 1951, resides at O., Sweden. Before the Commission she is represented by her lawyer, Mrs. Siv Westerberg.

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

On 9 October 1981 the applicant allegedly injured her back while working at a day care centre. She was at the time pregnant and contacted the same day the women's clinic at the hospital in O. She was on sick leave until 4 April 1982. Later, she could no longer manage her job and upon medical advice she eventually stopped working due to her back problems. In 1992, she requested compensation under the Industrial Injury Insurance Act (Lagen om arbetsskadeförsäkring, 1976:380) from the Social Insurance Office (Försäkringskassan).

Upon request the applicant thereafter received a copy of the file which had been compiled by the Social Insurance Office for the purpose of examining her claim. From the documents in the file she learned that, on 25 March 1992, the Social Insurance Office had requested the above women's clinic to submit copies of her medical records from the time of the alleged injury. She further learned that, on 30 March 1992, the head of the clinic in reply had submitted copies of her medical records covering the period October 1981 - February 1986. The records contained, inter alia, information on an abortion she had had in October 1985, partly due to previous back problems. The applicant had not in any way been involved in, or consented to, the disclosure of the information.

On 19 May 1992 the Social Insurance Office rejected the applicant's request for compensation under the Industrial Injury Insurance Act, finding that the applicant had not, as alleged, injured herself at work. Following the applicant's request for a review, the Social Insurance Board (Socialförsäkringsnämnden), on 5 August 1992, upheld the decision of the Social Insurance Office. The applicant's appeal to the County Administrative Court (Länsrätten) of the County of O. was rejected on 21 December 1992. The Court found that the applicant had suffered from a disease affecting her back since the age of 14 and that she had changed her initial account of the alleged injury. After a further appeal, the case is apparently pending before the Administrative Court of Appeal (Kammarrätten) in Jönköping.

b. Relevant domestic law

Under Sections 1 and 2 of Chapter 2 of the Freedom of the Press Act (Tryckfrihetsförordningen), which is part of the Swedish Constitution, everyone is entitled to have access to public documents unless, within defined areas, access is limited by law. The Secrecy Act (Sekretesslagen, 1980:100) contains such limitations.

The main provision on the confidentiality of information in the field of health and medical care is found in Chapter 7, Section 1 of the Secrecy Act, the relevant parts of which read as follows:

(translation)

> "Secrecy applies ... in the field of health and medical care to information on the individual's state of health or otherwise concerning his or her private life, unless it is clear that the information can be disclosed without any harm to the individual or persons closely related to him or her. ..."

As appears from this provision, there is a presumption of confidentiality. It is applicable not only in relation to the public, but also in relation to other public authorities. There are, however, legal provisions to the effect that health and medical care authorities shall submit information to another public authority. Thus, Chapter 14, Section 1 of the Secrecy Act provides the following:

(translation)

> "Secrecy does not prevent ... the disclosure of information to another public authority, if an obligation to disclose the information is laid down in an act of law or a Government ordinance."

Such an obligation is laid down in Chapter 8, Section 7 of the Industrial Injury Insurance Act which, in relevant parts, reads as follows:

(translation)

> "A public authority ... [is] obliged to submit, on request, to the courts, the National Social Insurance Board [or] the Social Insurance Office ... information on a named person concerning circumstances of importance to the application of this Act. ..."

In this context, a physician employed by a municipal hospital, as in the present case, is regarded as a representative of a public authority. A corresponding duty of the Social Insurance Office to request information is found in the Ordinance on Industrial Injury Insurance and State Injury Compensation Guarantee (Förordning om arbetsskadeförsäkring och statligt personskadeskydd, 1977:284), Section 13 of which provides, in so far as relevant, the following:

(translation)

> "The Social Insurance Office shall obtain a physician's opinion on a reported industrial injury. ..."

Furthermore, the person applying for compensation under the Industrial Injury Insurance Act is, according to Chapter 8, Section 6 of the Act, obliged to provide the Social Insurance Office with information of importance.

If information is submitted to the Social Insurance Office, the confidentiality of that information is regulated by Chapter 7, Section 7 of the Secrecy Act which, in so far as relevant, provides the following:

(translation)

> "Secrecy applies at the Social Insurance Office, the National Social Insurance Board and the courts in matters arising under the legislation on ... industrial injury insurance ... in respect of information on an individual's state of health or otherwise concerning his or her private life, if it can be assumed that the individual concerned or persons closely related to him or her will be harmed if the information is disclosed. ..."

Thus, whereas a presumption of confidentiality applies within the field of health and medical care to information concerning an individual's private life, there is no such presumption in respect of information kept at the Social Insurance Office.

Under the Freedom of the Press Act and the Secrecy Act, there is a right to appeal against a decision not to grant access to public documents. There is, however, no such right in regard to decisions to grant access to information contained in public documents. Furthermore, there is no right for the individual concerned to be consulted before such information is disclosed.

Under Chapter 20, Section 3 of the Penal Code (Brottsbalken), a physician who discloses information which should be kept confidential according to law is guilty of breach of professional secrecy.

Proceedings may be brought by the public prosecutor or the aggrieved individual. A breach of professional secrecy may also constitute a basis for claiming damages under the Tort Liability Act (Skadeståndslagen, 1972:207).

Public authorities and their employees are, furthermore, subject to the supervision of the Chancellor of Justice (Justitiekanslern) and the Parliamentary Ombudsman (Justitieombudsmannen). The Chancellor and the Ombudsman investigate whether those exercising public powers abide by laws and follow applicable instructions and may prosecute a certain individual or refer the matter to disciplinary action by the relevant authority.

COMPLAINTS

1. The applicant maintains that the women's clinic's submission of copies of her medical records to the Social Insurance Office without her knowledge or consent interfered with her right to respect for her private life within the meaning of Article 8 para. 1 of the Convention. She furthermore maintains that this particular interference was not justified by any of the reasons set out in para. 2 of that provision.

2. The applicant also contends that she had no remedy to complain about the clinic's disclosure of information, which allegedly violated not only Article 8 of the Convention but also Swedish law. She invokes in this respect Articles 6 and 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 23 September 1992 and registered on 23 October 1992.

On 6 April 1994 the Commission (Second Chamber) decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 30 August 1994, after an extension of the time-limit fixed for that purpose. The applicant replied on 25 October 1994.

THE LAW

1. The applicant maintains that the women's clinic's submission of copies of her medical records to the Social Insurance Office without her knowledge or consent violated Article 8 (Art. 8) of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."

The Government submit in the first place that Article 8 (Art. 8) of the Convention is not applicable and that this complaint should thus be declared incompatible with the Convention ratione materiae, as the applicant, when requesting compensation under the Industrial Injury Insurance Act, must be regarded as having waived her right to protection of confidential information in relation to the Social Insurance Office. In this respect, the Government contend that the obligation of the Office to request information from a physician

and the corresponding duty of a physician employed by a municipal hospital to submit such information were easily accessible elements of Swedish law, for which reason the applicant was able to anticipate that the information in question would be obtained by the Office. It was furthermore not surprising that the clinic submitted information on the gynaecological treatment performed in 1985 as the treatment was related to her back condition. The Government further submit that it should be taken into account that the information in question has not been made public and will, due to its highly personal nature, remain confidential at the Social Insurance Office.

For the same reasons, the Government submit, in the second place, that the applicant cannot claim to be a victim, within the meaning of Article 25 (Art. 25) of the Convention, of a violation of Article 8 (Art. 8), for which reason the complaint is incompatible with the Convention ratione personae.

The applicant submits that she could hardly foresee, when she requested compensation from the Social Insurance Office, that information on gynaecological treatment performed several years after the alleged industrial injury would be submitted by the women's clinic to that Office. In this connection, the applicant also refers to the fact that the information submitted is not protected by the same level of confidentiality at the Social Insurance Office as at the clinic.

The Commission recalls that a waiver of a right guaranteed by the Convention, in so far as it is permissible, must be established in an unequivocal manner (Eur. Court H.R., Pfeifer and Plankl judgment of 25 February 1992, Series A no. 227, p. 16, para. 37). The Commission, noting that the applicant's alleged waiver of a domestic right to protection of confidential information concerns her right to respect for private life under Article 8 (Art. 8) of the Convention, finds that no express waiver was made by the applicant in the present case nor can an unequivocal waiver be inferred from the fact that the applicant made a request for compensation under the Industrial Injury Insurance Act.

With respect to the Government's submission that the information in question has not been made public and will, due to its highly personal nature, remain confidential at the Social Insurance Office, the Commission considers that this issue falls to be examined together with the merits of the case.

The Commission thus concludes that Article 8 (Art. 8) of the Convention applies to this complaint.

As regards the substance of the complaint, the Government contend that the complaint should be declared inadmissible for being manifestly ill-founded. The Government maintain that, for the reasons submitted in relation to its claims concerning incompatibility, there has been no interference with the applicant's rights under Article 8 (Art. 8). Should, however, the Commission find that there has been such an interference, the Government contend that it has been justified, as it was in accordance with the law, in particular the provisions of the Industrial Injury Insurance Act, pursued the legitimate aims of protecting the economic well-being of the country and the rights of others and was proportionate to the aims pursued and thus necessary in a democratic society. As regards the conformity with domestic law, the Government submit that the rationale behind the provision obliging the Social Insurance Office to request information is that the Office should acquire all information relevant to a particular compensation request. The Government share the clinic's apparent opinion that the information on the gynaecological treatment was of relevance to the applicant's request, for which reason the information was submitted in accordance with the law although the Office's request explicitly referred to the time when the alleged injury occurred.

The applicant submits that the disclosure of information to the

Social Insurance Office was not justified in the present case, as it was not necessary for the Office to have access to medical records on her gynaecological treatment. Instead, the Office could have obtained information by requesting the applicant to submit a doctor's certificate on the alleged back injury. In this way, the applicant could have decided herself whether she wanted information on the gynaecological treatment to be disclosed to the Office and, if such information was necessary for the Office's determination of her compensation request, whether she wanted to pursue the request. The applicant further submits that the clinic's submission of information on the gynaecological treatment was not in accordance with domestic law, as it went beyond the Social Insurance Office's request.

The Commission considers, after a preliminary examination of the complaint under Article 8 (Art. 8) of the Convention in the light of the parties' submissions, that it raises questions of fact and law which require an examination of the merits. This part of the application cannot, therefore, be declared inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

2. The applicant also contends that she had no remedy which she could use to complain about the women's clinic's disclosure of information. She invokes in this respect Articles 6 and 13 (Art. 6, 13) of the Convention.

Article 6 para. 1 (Art. 6-1) of the Convention reads, in its relevant parts, as follows:

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

Article 13 (Art. 13) of the Convention reads as follows:

> "Everyone whose rights and freedoms as set forth in this 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."

The Government submit that Article 6 (Art. 6) is not applicable to the present case and that this complaint should thus be declared incompatible with the Convention ratione materiae. The Government maintain that the applicant had no standing under Swedish law in procedures concerning the granting of access to official documents. Thus, she could not appeal against a decision to grant access to confidential information concerning her, nor was her consent to the disclosure of information required. Furthermore, there was an obligation under the legislation concerning industrial injury insurance to forward the information to the Social Insurance Office. For these reasons, the Government contend that the applicant cannot claim, on arguable grounds, that she was entitled under Swedish law to protection of the information in question in relation to the Social Insurance Office. Thus, there was in the present case no "right" at stake.

The Government further submit that, in the light of their observations on the admissibility of the complaints under Articles 6 and 8 (Art. 6, 8) of the Convention, Article 13 (Art. 13) is not applicable and this complaint should thus be declared incompatible with the Convention ratione materiae. Should the Commission not accept this argument, the Government contend that the complaint is manifestly ill-founded. In this respect, the Government maintain that, in the absence of a right to appeal against a decision to submit certain information to the Social Insurance Office, the aggregate of remedies provided for under Swedish law satisfies the conditions of Article 13 (Art. 13). The

Government refer to the possibility for the applicant to bring criminal or civil action against the physician or to lodge complaints with the Chancellor of Justice or the Parliamentary Ombudsman.

The applicant submits that, in cases like the present one, there should be a possibility for the individual concerned to appeal to a court before a physician's decision to disclose information is executed.

The Commission considers, after a preliminary examination of the complaints under Articles 6 and 13 (Art. 6, 13) of the Convention in the light of the parties' submissions, that they raise questions of fact and law which require an examination of the merits. This part of the application cannot, therefore, be declared inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C. A. NØRGAARD)