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. 53972/00
by Gunilla MAGNUSSON
against Sweden

The European Court of Human Rights (Fourth Section), sitting on 16 December 2003 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
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 23 November 1999,

Having deliberated, decides as follows:

THE FACTS

The applicant, Gunilla Magnusson, is a Swedish national, who was born in 1950. She was represented before the Court by Mr J. Thörnhammar, a lawyer practising in Stockholm.

A. The circumstances of the case

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

The applicant is the step-grandmother of two boys, T and L (born respectively in August 1989 and June 1992) and is married to their paternal grandfather. Since the boys' parents separated in 1995, they have been living with their mother C. Until May 1996 she and the boys only had sporadic contacts with the applicant and their grandfather. Thereafter the boys, mostly L., visited them from time to time during weekends, normally one at the time. During the weekend of 27 February to 1 March 1998 T. visited them by himself. The same night, he, together with his brother, told his mother and her co-habitant about sexual touching committed by the applicant.

On 4 March 1998 C reported the matter to the police. The next day the police carried out interviews of the boys, which were video recorded. On 26 March 1998, the boys underwent forensic examinations at the Ward for Forensic Medicine in Stockholm. The relevant reports are dated 26 March 1997 but, on an enquiry by the registry, the applicant's lawyer stated that the correct year was 1998. As regards T the report concluded in the main that the boy seemed normal and that the observations made neither confirmed nor contradicted the information available. Similar observations were made in the report concerning L, except for certain particular observations made regarding his posterior parts and the somewhat reduced capacity of muscular contraction of his anus. In this respect it was stated that the precise cause could not be established with absolute certainty; but it could not be excluded that repeated intrusion of an object was a factor, though, according to scientific data, this phenomenon occurred in a little less than half of the children who had not been subjected to sexual abuse. The report concluded that the observations made neither contradicted nor with absolute certainty confirmed the information available.

On 23 April 1998 the applicant was interrogated. On 14 May 1998 the applicant and her defence counsel watched the video recordings at the police station and requested that T be interviewed once more. They did not request that any concrete questions be put to him but asked that he be questioned about his relationship with his brother, mother and father and, also, his attitude to physical contact generally. On 3 June 1998 T was again interviewed, with a video recording. The interviews of the boys were carried

out by a police officer, without the presence of the applicant or her counsel or a psychologist.

According to the applicant's lawyer, on 14 May 1998 the police acknowledged that the questioning had not been carried out by a specially trained police officer and that several leading questions had been put. Therefore, according to his letter of 14 August 2003 to the registry, on 14 May 1998 he requested the police to carry out a new investigation, with the participation of an expert in child psychology. The lawyer has not provided any documentary evidence in support of the aforementioned submissions. A memorandum by a police officer dated 14 May 1998, supplied to the Court by the applicant, stated:

> "On the above-mentioned date the two video interviews of [T] and [L] have been shown to [the applicant] and her defence counsel, Mr Jan Thörnhammar.
>
> After having seen both video interviews the counsel ... and [the applicant] wished that one further interview should be held with [T]. They did not indicate any concrete questions that they wished be put to [T]. On the other hand, they wished that [T] should be questioned about his relations with his brother [L] and with his mother [C] and with his father [R], as well as about any attitude he might have with regard to physical contact in general.
>
> Another matter of concern to the defence was that [T] had stated something during the interview to the effect that he had recounted what had happened to him because he was anxious that someone at school should hear him talk about the incident for himself and ... that someone could hear him and believe that he had done something."

The applicant's counsel further submitted a summons of 10 November 1998 to a meeting at the local police station on 30 November 1998, at which she was to be notified of the conclusions of the investigation (Chapter 23, Article 18, of the Code on Judicial Procedure). The applicant's counsel stated to the Court (in letter of 14 August 2003 mentioned above) that at that meeting "the defence demanded that the prosecutor should complete the investigation with statements from experts."

On 8 March 1999 the relevant local District Court - after hearing the applicant, her husband and her employer, the boys' mother and her co-habitant, but not the boys themselves (who were represented by a lawyer), and L's primary school teacher, - convicted the applicant of having committed sexual abuse of T on one occasion and of L on at least one occasion, sentenced her to 3 months' imprisonment and ordered her to pay certain sums in compensation to the boys. The video recorded police interviews of the boys, which constituted the main evidence against the applicant, were shown during the hearing and complete transcripts thereof were included in the written evidence.

As it appears from the District Court's judgment, a starting point for its examination was its observation that the prosecution case was essentially based on the information provided by children, submitted in the form of video recordings or recounted before the court by other witnesses. There was no evidence that directly support the indictment and no observable physical consequences could be established. Thus, what was decisive for the question of guilt was whether one could rely on the children's accounts in the light of what had otherwise emerged in the case. The District Court then went on to assess in detail the contents of the video recorded interviews, the credibility of the boys' statements and their evidentiary value, against the background of other evidence in the case.

On 18 June 1999 the competent Court of Appeal upheld the District Court's judgment, after taking oral evidence from the same persons and viewing the video recordings and after having rejected (by a separate decision of 27 May 1999, not appealed against) a request by the applicant for an expert in child psychology to comment on the police interviews of the boys.

On 16 September 1999 the Supreme Court refused leave to appeal.

Subsequently, on 30 November 1999, the applicant obtained an opinion by a Psychologist, Dr Egil Ruuth, whom her lawyer had requested to make a witness psychological assessment of the evidence gathered in the pre-trial investigation in the case. On the basis of the written case material, the video tapes and the District Court's and the Court of Appeal's judgments, the expert concluded:

> "In the light of what has been stated above concerning the circumstances in which [T]'s and [L]'s statements to the effect that they had been subjected to sexual abuse by [the applicant] had originated, these are deemed to be unreliable, i.e. not based on self-experienced events."

B. Relevant domestic law and practice

Domestic provisions of relevance in the present case are found in the Code of Judicial Procedure (hereinafter "the Code") and in the Ordinance on Preliminary Investigations (*Förundersökningskungörelsen*, 1947:948; hereinafter "the Ordinance").

A preliminary investigation takes place whenever there is reason to believe that a crime has been committed. Chapter 23, Article 10 of the Code includes provisions pertaining to the categories of persons allowed to attend an interview during a preliminary investigation. The suspect and his defence counsel are always entitled to attend an interview which takes place following a request made by the suspect himself. This right, however, does not arise until a person has been informed of the suspicions against him in accordance with Chapter 23, Article 18, of the Code. As far as other interviews are concerned, counsel for the defence may attend if his

attendance will not harm the investigation. It is for the person who heads the preliminary investigation – a police officer or a public prosecutor – to decide who may attend a specific interview during the preliminary investigation. In cases where the suspect or his defence counsel is present during an interview, questions may only be asked in the order determined by the person in charge of the preliminary investigation (Chapter 23, Article 11, of the Code).

When a preliminary investigation has reached the point at which a person can be reasonably suspected of having committed a crime, the person in question must be notified of the suspicions against him, pursuant to Chapter 23, Article 18, of the Code. Under the second paragraph of that provision, an interview or other form of investigation may be undertaken at the request of the suspect or his defence counsel if the measure is deemed to be of importance to the preliminary investigation as such. If a request for such an investigative measure is not granted, the reasons for the decision must be given. If the suspect makes a complaint, the issue is settled by the court (Chapter 23, Article 19, of the Code).

Interviews with children conducted in the course of a preliminary investigation are subject to special regulations. Thus, according to Chapter 23, Article 10, of the Code, a child's custodian should be present whenever a child under the age of fifteen is questioned if this can be done without any harmful effects on the investigation.

Further and more detailed provisions concerning the questioning of children are found in the Ordinance, section 17 of which provides that interviews with, *inter alia*, an injured party under the age of eighteen must be conducted in such a manner that there is no danger that the interviewed person might be harmed. Moreover, particular caution is to be observed when the questioning concerns sexual matters. Particular care should be taken in order to ensure that the interview does not cause distress and does not become more intimate than the circumstances require. Questioning should not occur more often than necessary having regard to the nature of the investigation and the best interests of the child.

Under section 18 interviews with children should ("*bör*") be conducted by a person who is particularly suited to perform the task. In addition, section 19 provides that a person with special expertise in the field of child psychology or interview psychology may assist at the questioning or comment on the value of the child's testimony.

Whenever the evidence of a witness below the age of 15 is used in a criminal case, the court must determine, taking account of all relevant circumstances, whether the child should testify (Chapter 36, Article 4, of the Code). There is no corresponding provision applicable to children who are in the position of an injured party. In practice, however, such evidence is normally presented to the court in the form of a video recording of the police interview, which is played back during the court's main hearing. In

allowing this to take place, the court applies Chapter 35, Article 14, of the Code, by which a statement made to the police or to the prosecutor or otherwise made out of court may be used in evidence in a trial only if this is specifically prescribed, if the person who has submitted the statement cannot be heard before the court or if there are particular reasons for the statement to be relied on, regard being had to the costs or inconvenience that a hearing before the court may entail on the one hand and, on the other, the advantages of a hearing before the court, the importance of the statement and all other relevant circumstances.

COMPLAINT

The applicant complains under Article 6 of the Convention that she was denied "equality of arms" due to the manner in which evidence was obtained from the boys and due to the national courts' reliance on that evidence in convicting her.

THE LAW

Article 6 §§ 1 and 3 (d) of the Convention, in so far as relevant, provides:

> "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 applicant argued that L's statement was unclear, made it impossible to conclude whether the information he gave was based on his own experience, and hence had no evidential value. The main evidence in the case had been the information provided by T. The first interview with him on 5 March 1998 was full of leading questions and was of such poor quality that it was deemed necessary to carry out another interview. According to the applicant's lawyer, on 14 May 1998 the police acknowledged that the questioning had not been carried out by a specially trained police officer and that several leading questions had been put. Therefore, on that date he requested the police to carry out a new investigation, with the participation of an expert in child psychology.

At the second interview, held on 3 June 1998, the defence was offered the opportunity to put questions to T, which it did. Nevertheless this interview was not carried out satisfactorily either. The questions were not asked in sequence. The main questions about T's relationships to the persons surrounding him, which could have contributed to an explanation of the information he had given, were not followed up in the required manner. For this reason it could not be ascertained whether T's statement was based on his own experience or emanated from his conversations with his mother. His statement was uncorroborated by other evidence; the forensic examination of him did not support the allegation of sexual abuse. The applicant's lawyer submitted that on 20 November 1998 he had requested that the prosecution should carry out a supplementary investigation to include statements from experts.

On the whole, the applicant maintained, the police interviews were exceptionally poor and, when seen together, did not have any evidentiary value. The person conducting the interviews failed to put the questions in sequence and to put appropriate follow-up questions. The interview with T was characterised by a basic conviction that sexual abuse had occurred. Despite the shortness of the interview T got physically tired, for which reason the defendant wondered whether he had been given sedatives. Neither the applicant nor her counsel was given an opportunity to be present during those interviews.

The applicant argued that the boys were presumably influenced by their mother. She and the father had a conflictual relationship with the grandfather and the applicant. In addition, the boys had also grown up in a home with turbulence and parental conflict.

In these circumstances the Court of Appeal should not have refused her request for an opinion by an expert on child and interrogation psychology.

The applicant claimed that, despite her innocence, she was convicted because she did not have a fair chance to defend herself and because the children's statements were never called into question.

The Court observes from the outset that the present case has a number of features in common with the case of *S.N. v. Sweden* (no. 34209/96, 2 July 2002), in which it concluded that there had been no violation of Article 6 §§ 1 and 3 (d) of the Convention. It will examine the particular circumstances of the present case in the light of the principles enunciated and its application of those principles in that case (see paragraphs 43-54 of the afore-mentioned judgment).

In the present case the defence was apparently well aware of the position under Swedish law that the boys, who were respectively 5 and 9 years' old at the time, were unlikely to be summoned to give evidence before the trial court and that their evidence would normally be presented to the court in the form of video recordings of the police interviews. During the preliminary investigation the defence used the opportunity given to it to appraise itself

of all the video recordings of the police interviews with the boys and also to request supplementary investigative measures. In accordance with the wishes expressed by the defence, T was interviewed a second time on 3 June 1998 and the defence's request that certain general questions be put to him on that occasion seems to have been complied with, albeit the quality of the second interview was not to the defence's satisfaction. The applicant's lawyer's submission that he had requested first that a new, then that a complementary, preliminary investigation be carried out with the participation of an expert in child psychology, is not substantiated by documentary evidence.

It is further to be observed that, although the applicant had the possibility under national law to ask that she be present, either in person or through her defence counsel, or to put specific questions, directly or indirectly, to T on 3 June 1998, she waived that possibility.

Against this background, it cannot be said that the applicant was denied an opportunity to challenge and question the boys' witness statements during the investigation (see §§ 22-23, 49-51 of the *S.N.* judgment; see also *Lindqvist v. Sweden*, no. 26304/95, inadmissible on 22.10.1997).

The Court further finds it significant that the manner in which the boys' witness evidence was taken was to some extent counterbalanced by a forensic expert examination of the boys carried out at the prosecution's request on 26 March 1998 (see *S.N.* § 47, last sentence and the separate opinions). The relevant reports must be presumed to have been included in the prosecution file submitted to the courts. On examining the relevant reports the Court finds the lawyer's observation that these contained nothing that supported the allegation of sexual abuse was not entirely accurate. While this may be true with regard to T, as regards L, however, the report drew special attention to certain physical characteristics, the precise cause of which could not be established with absolute certainty, but from which it could not be excluded that the phenomenon stemmed from sexual abuse. Thus it would appear that the boys' testimony was not the only primary evidence against the applicant in the trial. For the District Court what was decisive was whether one could rely on the children's accounts in the light of what had otherwise emerged in the case. In the view of the Court, these circumstances make the present case appear to be somewhat weaker than that of *S.N.*

Even assuming that, during the preliminary investigation, the defence had, as stated by the applicant's lawyer, been protesting against the manner in which it was conducted and had requested a further investigation, it could reasonably be expected that the defence would have pursued the matter before the District Court. It had every opportunity to make whatever submissions it wished to make against the videotapes and transcripts of the police interviews of the children. However, it does not appear that the defence made any request to the District Court to take additional evidence,

such as oral evidence directly from the children, additional police interviews of the children or forensic expert evidence, or that it made any procedural objection before the District Court. Although requested to provide complementary information on this part of the proceedings, the applicant's lawyer has failed to do so. In these circumstances, the Court is unable to accept the applicant's submissions that the District Court failed to evaluate the evidence in question with the requisite care and that the Court of Appeal should have granted her request to obtain an opinion from an expert in child and interrogation psychology about the police interviews of the boys. In this connection, the Court notes that the evidence was carefully assessed in the District Court's judgment and that the Court of Appeal found no reason for departing from that assessment. It should be recalled 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 task of the Court is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair. Neither the arguments nor the material submitted by the applicant suggest that this was not the case.

Against this background, and having particular regard to the special features of proceedings relating to sexual abuse, especially where it involves minors, the applicant's opportunity to challenge the children's evidence must be considered sufficient in the circumstances (see *S.N.* § 52). The Court is further satisfied that the national courts evaluated the evidence in question with the requisite care (see *S.N.* § 53).

It follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 34 § 4.

For these reasons, the Court by a majority

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President