AS TO THE ADMISSIBILITY OF

Application No. 37604/97
by Bertil SJÖÖ
against Sweden

The European Commission of Human Rights (Second Chamber) sitting in private on 21 October 1998, the following members being present:

MM J.-C. GEUS, President
M.A. NOWICKI
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
I. CABRAL BARRETO
D. ŠVÁBY
P. LORENZEN
E. BIELIŪNAS
E.A. ALKEMA
A. ARABADJIEV

Ms M.-T. SCHOEPFER, Secretary to the Chamber

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

Having regard to the application introduced on 25 June 1997 by Bertil SJÖÖ against Sweden and registered on 2 September 1997 under file No. 37604/97;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Swedish citizen born in 1958, resides in Stockholm. Before the Commission he is represented by Mr Jan Thörnhammar, a lawyer practising in Stockholm.

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

By judgment of the District Court (tingsrätten) of Eksjö of 25 May 1994, the applicant was convicted of false accounting (bokföringsbrott) and sentenced to six months' imprisonment. He appealed against the judgment to the Göta Court of Appeal (Göta hovrätt) in Jönköping.

On 2 November 1994 the applicant was summoned to appear in person at the appellate hearing, scheduled for 23 and 24 November. However, the day before the hearing the applicant's defence counsel notified the court that the applicant was unable to attend due to illness. A district medical officer had put the applicant on the sick-list for the period 22-30 November. As a consequence, the hearing was cancelled.

On 19 January 1995 the applicant received a summons to the rescheduled hearing on 23 and 24 February. On 22 February the applicant submitted to the court a medical certificate issued by Dr. Nordhus, a specialist in surgery, according to which the applicant was again unable to attend the hearing. On account of this certificate, also the rescheduled hearing was cancelled.

The case was later delayed by the applicant's request to have his officially appointed defence counsel replaced. On 8 January 1996 the applicant was summoned to appear in person at a hearing scheduled for 22 and 23 February.

On 21 February 1996 the applicant contacted Dr. Nordhus. In a medical certificate issued that day, the doctor stated that the applicant suffered from chronic back problems, that he had contacted the clinic due to acute back pains which made it difficult for him to sit down and that he had been given injections with pain-killers. The applicant was put on the sick list and the doctor found it inadvisable that he travel outside his place of residence. The medical certificate was sent to the court with a request for postponement of the hearing. A further certificate was submitted to the court on 22 February, an hour before the hearing.

Immediately before the hearing, the applicant contacted the court by telephone. He was told that, at the beginning of the hearing, the court would decide whether he had a lawful excuse (laga förfall) for his non-appearance.

By decision of 22 February 1996, the Court of Appeal, in the presence of the applicant's counsel but not the applicant himself, found that the evidence submitted did not show that the applicant had a lawful excuse for not appearing at the hearing.

Furthermore, finding that the case could not be determined in the applicant's absence, the court declared his appeal forfeited in accordance with Chapter 51, Section 21 of the Code of Judicial Procedure (Rättegångsbalken). The court stated, however, that the case could be reopened if the applicant would show that he had a lawful excuse. A petition to that effect should be filed with the court no later than 14 March.

The applicant later asked the Court of Appeal to reopen the case. He submitted a further medical certificate, issued by Dr. Nordhus on 10 April 1996, according to which the applicant, at the time of the hearing, had been under the influence of narcotic medicine and, thus, had not been able to attend the hearing.

On 16 April 1996 the Court of Appeal rejected the applicant's reopening request. The court found that he had not shown that he had had a lawful excuse of which he had not been able to give notice in time.

The applicant appealed to the Supreme Court (Högsta domstolen) which, by decision of 22 April 1997, refused him leave to appeal against the Court of Appeal's decision.

On 31 October 1997 the applicant petitioned the Government for pardon (nåd). Alternatively, he requested that the enforcement of the prison sentence be postponed. He stated that, on account of illness, he had had a lawful excuse not to appear at the Court of Appeal's hearings. He further referred to the present application and claimed that the proceedings pending before the Commission constituted an impediment to the enforcement of the sentence.

On 15 January 1998 the Government rejected the applicant's petition.

Again referring to the present application, the applicant later requested the National Prisons and Probation Administration (Kriminalvårdsstyrelsen) to postpone the enforcement of his sentence. On 24 February 1998 his request was rejected. The applicant appealed against the decision to the County Administrative Court (länsrätten) of the County of Stockholm where, apparently, the case is still pending.

By decision of 5 March 1998, the Government rejected the applicant's renewed petition for pardon.

COMPLAINTS

1. Contending that he had a lawful excuse for not appearing at the Court of Appeal's hearings, the applicant claims that he did not have a fair hearing and that he was refused a review by a higher tribunal. He invokes Article 6 of the Convention and Article 2 of Protocol No. 7 to the Convention.

2. Invoking the same Articles, the applicant further complains of the decisions not to postpone the enforcement of his prison sentence pending the outcome of the present application.

3. Under Article 6 of the Convention, the applicant also claims that the Court of Appeal failed to give sufficient reasons for its decisions of 22 February and 16 April 1996.

4. Finally, without referring to any particular decision or part of the proceedings in the case, the applicant alleges violations of Articles 13 and 14 of the Convention, the latter in conjunction with Article 6 of the Convention.

THE LAW

1. The applicant claims that he did not have a fair hearing and that he was refused a review by a higher tribunal. He invokes Article 6 of the Convention and Article 2 of Protocol No. 7 to the Convention.

In so far as relevant, Article 6 of the Convention provides the following:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Article 2 of Protocol No. 7 to the Convention reads as follows:

"1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

The Commission recalls that the applicant's appeal against the District Court's judgment was not examined on the merits, as the Court of Appeal first declared the appeal forfeited and later refused to reopen the case. Thus, it has to be examined whether the decisions of the appellate court denied the applicant his right to a fair hearing under Article 6 of the Convention. Furthermore, the question arises whether the applicant was refused a "review by a higher tribunal" in violation of Article 2 of Protocol No. 7 to the Convention.

The Commission notes that the reference to the exercise of the right of review to be governed by law gives the Contracting States a discretion as to the modalities for the exercise. The States may thus regulate the review in various ways provided that such regulation is for the good administration of justice. In this respect, they enjoy a margin of appreciation. However, the means employed must not restrict or reduce the right of

review in such a way or to such an extent that the very essence of the right is impaired (cf. Olsson v. Sweden, No. 37553/97, Dec. 1.7.98, not published).

In the present case, the applicant could appeal to the Court of Appeal and in fact did so. The court subsequently summoned him to attend hearings in the case. On two occasions the court cancelled the scheduled hearings as the applicant, on the days before the hearings were about to start, declared that he was unable to attend due to illness. By the decisions of 22 February and 16 April 1996, however, the court refused to examine his appeal on the merits, as he had failed to appear at the third set of hearings. The court did not find the medical certificates submitted by the applicant to show that he had been unable to appear before the court and thus had had a lawful excuse for his non-appearance. Before taking the latter decision, the court had given the applicant the opportunity to submit the evidence he wished to invoke on this question. Furthermore, the applicant's lawyer
was present at the hearing on 22 February and pleaded for the applicant. The court's decisions were based on the relevant provisions of the Code of Judicial Procedure.

The Commission finds that the Court of Appeal's decisions had a basis in domestic law and that the provisions applied served the good administration of justice in that they clearly aimed at securing the applicant's presence in court and the prompt and thorough examination of the case. Furthermore, the appellate court reached its decisions after an evaluation of the medical evidence invoked and the submissions made by the applicant's lawyer. In this respect, it is recalled that the evaluation of evidence is primarily a matter for the national courts. The Commission's task is to ascertain that this evaluation was not arbitrary or unreasonable. Notwithstanding the serious consequences for the applicant in the present case, the Commission cannot find that the Court of Appeal's evaluation was arbitrary or that the decisions taken were unreasonable.

Thus concluding that the Court of Appeal, in declaring the applicant's appeal forfeited, did not exceed its margin of appreciation, the Commission finds that the applicant's complaint does not disclose any appearance of a violation of Article 6 of the Convention or Article 2 of Protocol No. 7 to the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The applicant further complains of the decisions not to postpone the enforcement of his prison sentence pending the outcome of the present application. Also in this respect he invokes Article 6 of the Convention and Article 2 of Protocol No. 7 to the Convention.

The Commission finds, however, that the decisions on the enforcement of the applicant's prison sentence concerned neither the determination of his civil rights and obligations nor any criminal charge against him. Accordingly, Article 6 of the Convention is not applicable to the present complaint (cf. A.B. v. Switzerland, No. 20872/92, Dec. 23.2.95, D.R. 80, p. 66). As the decisions in question did not relate to a

criminal charge against the applicant, Article 2 of Protocol No. 7 to the Convention is also not applicable to the present complaint (cf. Borelli v. Switzerland, No. 17571/90, Dec. 2.9.93, D.R. 75, p. 139).

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 of the Convention.

3. Under Article 6 of the Convention, the applicant also claims that the Court of Appeal failed to give sufficient reasons for its decisions of 22 February and 16 April 1996.

The Commission recalls that Article 6 obliges courts to give reasons for their decisions. The extent to which this duty applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (cf., e.g., Eur. Court HR, Higgins and Others v. France judgment of 19 February 1998, para. 42, to be published in Reports of Judgments and Decisions 1998).

On 22 February 1996 the Court of Appeal declared the applicant's appeal forfeited and on 16 April 1996 it rejected his request to have the case reopened. On both occasions the court found that the applicant had not had a lawful excuse for not appearing at the court's hearing as, in the court's opinion, the medical evidence submitted failed to show that he had not been able to attend. Having regard to the limited nature of the decisions taken, the Commission considers that the reasons given were sufficient and that, thus, the decisions met the requirements under Article 6.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

4. Finally, without referring to any particular decision or part of the proceedings in the case, the applicant alleges violations of Articles 13 and 14 of the Convention, the latter in conjunction with Article 6 of the Convention.

The Commission finds, however, that the applicant's submissions fail to substantiate the present complaints.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER Secretary to the Second Chamber	J.-C. GEUS President of the Second Chamber