AS TO THE ADMISSIBILITY OF

Application No. 31074/96
by Håkan WESTER
against Sweden

The European Commission of Human Rights (Second Chamber) sitting in private on 14 January 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 I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
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 28 February 1996 by Håkan WESTER against Sweden and registered on 19 April 1996 under file No. 31074/96;

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 1963, is presently serving a prison sentence in Sweden. Before the Commission he is represented by Mr Per Stadig, a lawyer practising in Stockholm.

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

a. The particular circumstances of the case

On or about 21 May 1994 a quantity of 0.2 kilogrammes of cocaine was smuggled from Brazil to Sweden and subsequently sold to a drug dealer.

In respect of the drug-smuggling operation and the following transaction with the dealer, police suspicions centred on three persons: a woman, A, her brother, B, and the applicant. A and B were arrested and remanded in custody in June and July 1994, respectively. The applicant, wanted also for aggravated fraud, was arrested in the United Kingdom in November 1994 and extradited to Sweden in April 1995.

The case against A and B came on for trial before the District Court (tingsrätten) of Stockholm in October 1994. By judgment of 21 October 1994, both A and B were convicted of illegally possessing the said quantity of cocaine. Furthermore, B was found guilty of conspiracy (stämpling) to smuggle the drugs from Brazil to Sweden. On the same occasion, they were also convicted of other drug-related crimes which are, however, not relevant in the present case. On 15 December 1994 the convictions were upheld on appeal by the Svea Court of Appeal (Svea hovrätt).

Before the courts, as indeed during the preliminary criminal investigation, A made a full confession and gave a detailed account of the circumstances under which she had come into possession of the relevant quantity of cocaine. This account incriminated not only B, but also the applicant. B, for his part, pleaded not guilty, contending that the applicant alone had smuggled the drugs and subsequently handed them over to A. In their respective judgments, having found the information provided by A to be credible, both the District Court and the Court of Appeal concluded that this account should form the basis for the assessment whether A and B were guilty of the offences charged. Thus, both A and B were convicted on the strength of these statements.

Following his extradition to Sweden, the applicant's case was heard by the District Court of Jakobsberg in June 1995. By judgment of 3 July 1995, that court convicted the applicant of, so far as relevant, illegally possessing the quantity of cocaine mentioned above and also of smuggling that quantity into Sweden. He was sentenced to eight years' imprisonment, a sentence calculated to include also several counts of aggravated fraud.

The persons to be heard in the District Court included both A and B, who had been called by the prosecution to give evidence as former co-accused. Although duly summoned, however, A did not attend the trial. According to the minutes of the hearing, in which reference was made to a doctor's certificate submitted on A's behalf, she had fallen ill and could not be expected to recover in the foreseeable future. For this reason, so the court stated, she was legally excused (laga förfall) from giving evidence. On being told of A's absence, the Public Prosecutor requested that the accounts previously given by A in the case against her and B, and as recorded in the judgments of the District Court of Stockholm and the Svea Court of Appeal, be read out. He also requested the reading out of a statement made by A when interviewed by the police on 7 July 1994. Contrary to a defence submission - and relying on Chapter 35, Section 14 of the Code of Judicial Procedure (Rättegångsbalken) - the court granted the Prosecutor's requests. The following statements and summaries of statements were therefore read out.

A's account according to the District Court judgment of 21 October 1994:

(Translation)

> "[O]n 20 May [B] called and invited her on a cruise between Gothenburg and Harwich. She was told to bring [B's wife], who was staying with her temporarily. Next day she borrowed a car from her mother and went, together with [B's wife], to [the harbour] in Gothenburg. There they met [B] and [the applicant]. [B] suggested that they drive into town. She stopped the car in [an avenue] and [B] and [the applicant] left the car for some thirty minutes. Following their return, they all drove back to the harbour. While still in the car [the applicant] said 'this is how we have figured it out', but was interrupted by [B] who said that this was not to be discussed now. She realised that it all had to do with cocaine. They had a good time during the boat trip. [The applicant] said that cocaine had been hidden under the

back seat of the car, back in Gothenburg. They all slept in the same cabin. In the morning, on their arrival at Harwich, [B] told her to bring the cocaine to her flat and keep it there. [The applicant] suggested that she bury it in her parents' garden. She was to be contacted by telephone by someone interested in acquiring the cocaine. She does not remember if a name was mentioned in this context. She thinks that [B] and [the applicant] told her to charge 500 or 600 crowns per gramme. The person making the phone call would know the price. The money was to be handed over to her and [B's] parents. She does not know which of [B] and [the applicant] carried the cocaine into Sweden. They said that it was wrapped in condoms and plastic film and told her to redistribute it into smaller plastic bags. - [B] and [the applicant] disembarked at Harwich. She and [B's wife] returned to Gothenburg and went on to Stockholm. She removed the cocaine from the car and put it in a cupboard. Next day she was alone in the flat. She tried to weigh the cocaine and redistribute it. She was not successful. The cocaine fell apart and she spilt it on to the floor. [B] called almost every day and asked about money. On 31 May, a Tuesday, she called [a drug dealer] and told him that she had cocaine in her flat. Since April she knew that he was [B's] contact. She wanted to get rid of the cocaine as soon as possible. ..."

The Court of Appeal judgment of 15 December 1994, which summarised A's statements before that court only to the extent that they were in any way inconsistent with or complementary to her account before the District Court:
(Translation)

"In the Court of Appeal [A] has stated that she cannot recall which of [the applicant] and [B] made what remarks when, on their arrival at Harwich, they discussed what she should do with the drugs. However, she has also stated that both of them kept speaking at the same time and that she had a clear impression that [the applicant] and [B] had conspired in respect of the drugs. ..."

The police interview of 7 July 1994:

(Translation)

"Now, she also recalls that when [B] and [the applicant] returned to the car - and while sitting in the car, which was still parked in [the avenue] - they discussed where to hide the cocaine. They agreed to hide it in the car, but they never said in what part of the car. She recalls that they also discussed the fact that, if the car were to be stolen while they were on the boat, it would be a bargain for a car thief who was also a drug addict, considering the amount of cocaine hidden in the car."

Unlike A, B presented himself at the hearing. When heard by the court he confirmed that the accounts previously given by him before the District Court of Stockholm and the Svea Court of Appeal - to the effect that the applicant alone had smuggled the drugs and subsequently handed them over to A - had been correctly recorded in the judgments of 21 October 1994 and 15 December 1994. He added, however, that they were not true. On the contrary, he now stated, the drug-smuggling operation had been entirely his own doing, thus in no way involving the applicant. In order to explain the fact that he now provided new information, B stated that, by previously accusing the applicant of being involved in the operation, he had hoped to receive a somewhat lighter sentence.

In its judgment of 3 July 1995 the District Court of Jakobsberg noted that the applicant denied the charges but admitted to have travelled with B from Brazil to Sweden in April 1994, allegedly fully aware of the fact that B was smuggling drugs. Observing - at the outset - that such a journey must have exposed also the applicant to risks and that this would be rather a remarkable behaviour for a person in his position, the court found reason to question the veracity of the applicant's statements. The court went on to state the following:

(Translation)

> "As regards the other statements, the District Court would first like to point out that the information provided by [A] must be assessed with great caution, considering that [the applicant] has had no opportunity to examine her during the trial. For this reason, it is also out of the question to base a conviction solely on the information provided by her. However, the District Court is of the opinion that, to some extent, it should be taken into account that [A's] statements have been made not only during police interviews but also before courts at two levels, seized with the question of her and [B's] involvement in the operation. The information given by [A] is, to a substantial extent, corroborated by the statements made by [B] under identical circumstances. Their accounts are very much mutually consistent when it comes to [the applicant's] involvement in the operation. The explanation with which [B] has provided the court today, as to why he allegedly falsely accused [the applicant] of being involved in the operation, does not appear to be plausible."

The statements made by A and B during the 1994 trials thus satisfied the District Court that the applicant was guilty of the offences charged.

The applicant appealed to the Svea Court of Appeal, which held a hearing in the case in August 1995. Since A was deemed still to be legally excused from giving evidence, the prosecution requested that the statements previously read out in the District Court be read out also in the appellate court. The request was granted under Chapter 35, Section 14 of the Code of Judicial Procedure. Again, this was contrary to a defence submission. B attended the trial but now refused to give evidence, contending that he had been beaten by fellow prisoners. At the request of the prosecution, however, B's account as recorded in the District Court judgment of 21 October 1994 - to the effect that the drugs had been smuggled by the applicant and subsequently handed over to A - was read out.

By judgment of 8 September 1995, the Court of Appeal upheld the whole of the District Court's judgment. Invoking the reasons already stated by the lower court, and referring to Swedish case-law as well as to the case-law of the European Court of Human Rights, the appellate court first found that a conviction could not be based solely on the statements made by A. Turning to B's statements, however, the court found the situation to be somewhat different. The court stated the following:

(Translation)

> "It has been possible to examine [B] in both the District Court and the Court of Appeal. In the District Court proceedings against [the applicant] he has confirmed that the statements previously made by him concerning [the applicant's] involvement in the operation have been correctly recorded, but has stated that they are not true. However, he has been unwilling to explain why the statements are incorrect. As previously noted, he has

refused to give evidence in the Court of Appeal. ...

In the case now before the court, no reasonable ground has appeared as to why [B] would want to incorrectly accuse [the applicant] of being involved in the operation. On the contrary, the fact that [the applicant] has been named also by [A] strongly corroborates [B's] statements concerning [the applicant's] involvement. ..."

Considering B's original statements concerning the applicant's involvement to be credible, the appellate court found, on balance, that the latter was guilty of illegally possessing the relevant quantity of cocaine and also of smuggling it into Sweden.

Leave to appeal against the Court of Appeal's judgment was refused by the Supreme Court (Högsta domstolen) on 26 October 1995.

b. Relevant domestic law

Chapter 36, Section 1 of the Code of Judicial Procedure provides that, in criminal cases, a person charged with any form of complicity in the offence with which the defendant is charged must not be heard as a witness. However, there is nothing to prevent that such a person is heard as a co-accused.

Provisions concerning the use as evidence of statements made by witnesses, victims of crime or co-accused at an earlier stage of the proceedings - preceding the trial - are found in Chapter 35, Section 14 of the Code of Judicial Procedure. Section 14 provides, so far as relevant, the following:

(Translation)

"An account, given by someone in writing for the purpose of a trial that has already commenced or is about to commence, or a record of an account, given by someone before a public prosecutor or a police authority or otherwise out of court for the purpose of such a trial, may be submitted as evidence only

...

2. if the person who gave the account cannot be heard at a main hearing or out of court or otherwise before the court ..."

COMPLAINT

Invoking Article 6 of the Convention, the applicant claims that he was convicted by the District Court and the Court of Appeal on the basis of statements made by a person - A - whom neither he nor his counsel ever had an opportunity to examine.

THE LAW

The applicant complains of a violation of his rights under Article 6 (Art. 6) of the Convention. The Commission considers that the essence of the applicant's complaint must be said to be that he did not have a fair trial. That being so, the Commission has examined the complaint under Article 6 paras. 1 and 3 (d) (Art. 6-1+6-3) taken together, the guarantees in paragraph 3 being specific aspects of the right to a fair trial set forth in paragraph 1 (see, e.g., Eur. Court H.R., Kostovski v. the Netherlands judgment of 20 November 1989, Series A no. 166, p. 19, para. 39). The respective paragraphs read - so far as relevant - as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ...

...

3. Everyone charged with a criminal offence has the following minimum rights: ...

(d) to examine or have examined witnesses against him ..."

The applicant contends that the statements made by A - as read out in the District Court and the Court of Appeal - were used by the courts not only as corroborative evidence when assessing the veracity of the statements originally made by B, but also as independent incriminating evidence. In both respects, so he claims, decisive importance was attached to these statements.

In view of the autonomous interpretation to be given to the term "witness", the Commission first finds that A should be so regarded for the purposes of paragraph 3 (d) of Article 6 (Art. 6-3-d) of the Convention. This is so since her statements - although not made at the trials against the applicant and although, under Swedish law, not made by her as a "witness" in the strict sense of the word - were in fact before the courts and were taken into account by them (see, e.g., Eur. Court H.R., Windisch v. Austria judgment of 27 September 1990, Series A no. 186, p. 9, para. 23).

The Commission points out that the admissibility of evidence is primarily a matter for regulation by national law and that, as a general rule, it is for the national courts to assess the evidence before them (see the above-mentioned Kostovski judgment, p. 19, para. 39). Thus, in the instant case, the Commission's task under the Convention is not to determine whether A's statements were correctly admitted and assessed by the courts but rather to ascertain whether the proceedings considered as a whole - including the way in which evidence was taken - were fair (ibid.).

In principle, the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, as regards the reading out at a trial of statements made by witnesses at the investigating stage of criminal proceedings, the European Court of Human Rights has already held that such a practice is not in itself inconsistent with Article 6 paras. 1 and 3 (d) (Art. 6-3-d) of the Convention, provided that the use of such statements as evidence complies with the rights of the defence, which it is one of the purposes of Article 6 (Art. 6) to protect. Admittedly, this would, prima facie, create particular problems where the person "charged with a criminal offence", who has the right under Article 6 para. 3 (d) (Art. 6-3-d) to "examine or have examined" witnesses against him, has not had an opportunity at any stage of the earlier proceedings to question the person whose statements are read out at the hearing (see, e.g., Eur. Court H.R., Unterpertinger v. Austria judgment of 24 November 1986, Series A no. 110, p. 14, para. 31).

Since it is clear that the applicant never had an opportunity to challenge and question A before the courts or, for that matter, at the pre-trial stage, the Commission must thus examine whether there are any such problems in the present case.

The Commission recalls at the outset that, at the time of the trial against the applicant, A had fallen ill and could not be expected to recover in the foreseeable future. Consequently, she was deemed to be legally excused from giving evidence in both the District Court and the Court of Appeal. The Commission is of the opinion that A's illness could not be allowed to block the prosecution. That being so, the Commission finds that the prosecution had reason to produce as evidence

the statements submitted by A in connection with the trial against her and B.

The Commission further recalls that the statements made by A were not the only evidence in the case. On the contrary, the District Court and - in particular - the Court of Appeal attached decisive importance to the information provided by B, who, unlike A, attended the trial against the applicant at both levels. It is true that B, when heard in the District Court, retracted the allegations previously made by him against the applicant. It is also true that B refused to give evidence in the Court of Appeal, contending that he had been beaten by fellow prisoners. In this respect, however, the Commission notes that the District Court was able to observe B's demeanour during questioning and to form its own impression of the nature of his retraction. Furthermore, having regard to B's subsequent refusal to give evidence, the Court of Appeal had reason to take into account the circumstances under which B had given evidence in the District Court. Thus, having found that there existed no reasonable ground as to why B would want to incorrectly accuse the applicant of being involved in the drug-smuggling operation, the Court of Appeal concluded that B's original statements concerning the applicant's involvement were credible. Noting that they were also corroborated by the statements made by A, the Court of Appeal found the applicant guilty of the offences charged.

Finally, the Commission observes that both the District Court and the Court of Appeal were aware of the secondary nature of A's statements. Also, both courts could rely on the applicant's own version of the events leading up to his arrest, to the effect that he had not been involved in the operation.

In sum, and having regard to all the circumstances in the case, the Commission cannot find that the applicant's conviction was based solely on A's statements. Nor did the limitation, which derived from her absence at the hearings, restrict the possibilities of the defence to a degree that was irreconcilable with the Convention. Consequently, the Commission does not find that the applicant's trial was unfair due to the fact that A's statements were used as indirect evidence.

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

J.-C. GEUS
President
of the Second Chamber