COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 10563/83

John EKBATANI
against
SWEDEN

Report of the Commission

(Adopted on 7 October 1986)

STRASBOURG

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I INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant, Mr. John Ekbatani, is a citizen of the United States of America. He was born in 1930 and resides at Gothenburg. He is a teacher by profession. Before the Commission the applicant is represented by Mr. Christer Arnewid, a lawyer practising in Gothenburg.

The Government of Sweden are represented by their Agent, Mr. Hans Corell, Ambassador, Under-Secretary for Legal and Consular Affairs at the Ministry of Foreign Affairs.

3. The case concerns the appeal proceedings in the Court of Appeal for Western Sweden (Hovrätten för Västra Sverige) in which the applicant's appeal against his conviction in a criminal case brought against him was dealt with without a public oral hearing in accordance with Chapter 51, Section 21 of the Swedish Code of Judicial Procedure (rättegångsbalken). The applicant considers that this procedure violated his right to a public hearing as guaranteed by Article 6 para. 1 of the Convention.

B. The proceedings

4. The application was introduced on 20 June 1983 and registered on 19 September 1983. On 2 October 1984 the Commission decided in accordance with Rule 42 para. 2 (b) of its Rules of Procedure to give notice of the application to the respondent Government and to invite them to present before 21 December 1984 their observations in writing on the admissibility and merits of the application.

The Government's observations were dated 17 December 1984 and the applicant's observations in reply were dated 18 April 1985.

5. Legal aid under the Addendum to the Commission's Rules of Procedure was granted to the applicant on 21 December 1984.

6. On 5 July 1985 the Commission decided to declare admissible the applicant's complaint under Article 6 para. 1 of the Convention concerning the lack of a public oral hearing in the Court of Appeal. The remainder of the applicant's complaints was declared inadmissible.

7. After declaring the case admissible, the parties were invited to submit any additional observations on the merits of the issue under Article 6 para. 1 of the Convention which they wished to make.

The Government submitted additional observations on 14 October 1985, a copy of which was transmitted to the applicant. No further submissions were received from the applicant.

8. On 12 October 1985 the Commission decided to invite the parties to appear before it at a hearing on the merits of the case.

9. The hearing took place on 14 April 1986. The applicant, who was present himself, was represented by his representative, Mr. Christer Arnewid. The Government were represented by Mr. Hans Corell as Agent and Mr. Lars Eklycke, Assistant Under-Secretary in the Ministry of Justice, as Adviser.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. Following consultations with the parties between 24 July and 11 September 1985 and in the light of their reactions, the Commission now finds that there is no basis upon which such a settlement can be effected.

C. The present Report

11. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C. A. NØRGAARD, President
F. ERMACORA
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
A. S. GÖZÜBÜYÜK
A. WEITZEL
J. C. SOYER
H. DANELIUS
H. VANDENBERGHE
Mrs G. H. THUNE
Sir Basil HALL

The text of this Report was adopted on 7 October 1986 and is now transmitted to the Committee of Ministers of the Council of Europe in accordance with Article 31 para. 2 of the Convention.

12. The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

13. A schedule setting out the history of the proceedings before the Commission is attached hereto as APPENDIX I and the Commission's decision on admissibility of the application as APPENDIX II.

14. The full text of the pleadings of the parties, together with the documents lodged as exhibits are held in the archives of the Commission.

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II. ESTABLISHMENT OF THE FACTS

A. Relevant domestic law

15. Chapter 51, Section 21 of the Code of Judicial Procedure (rättegångsbalken) concerning the proceedings before the Court of Appeal reads:*

> "Hovrätten äge utan huvudförhandling företaga mål till avgörande, om talan av åklagaren föres allenast till den tilltalades förmån eller talan, som föres av den tilltalade, biträtts av motparten.
>
> Har underrätten frikänt den tilltalade eller eftergivit påföljd för brottet eller funnit honom vara på grund av själslig abnormitet fri från påföljd eller dömt honom till böter eller fällt honom till vite och förekommer ej anledning till ådömande av svårare straff än nu sagts eller att ådöma annan påföljd, må målet avgöras utan huvudförhandling ..."
>
> (translation)
>
> "The Court of Appeal may determine the case without a main hearing if the public prosecutor has appealed only to the benefit of the accused or the appeal, if submitted by the accused, has been acceded to by the other party.
>
> The case may be determined without a main hearing if the lower court has acquitted the accused or remitted the sentence imposed or found him to be exempted from punishment by virtue of mental abnormality or sentenced him to a fine or ordered him to pay a penalty (vite) and there is no reason to impose a more severe sentence than what has just been said or to impose any other sanction ..."

Chapter 51, Section 25 concerning reformatio in pejus reads:

> "Ej må hovrätten i anledning av den tilltalades talan eller talan, som av åklagare föres till hans förmån, döma till brottspåföljd, som är att anse såsom svårare än den, vartill underrätten dömt. Har den tilltalade av underrätten dömts till fängelse, äge hovrätten förordna om villkorlig dom, skyddstillsyn eller överlämnande till särskild vård, så ock jämte villkorlig dom, skyddstillsyn eller överlämnande till vård inom socialtjänsten döma till böter ävensom jämte skyddstillsyn döma till fängelse enligt 28 kap. 3 paragrafen brottsbalken. Har underrätten meddelat förordnande som nu sagts, äge hovrätten döma till annan påföljd."

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* This Section has subsequently been amended as from 1 July 1984. The amendment is, however, not relevant to the present case.

(translation)

"Upon an appeal lodged by the accused, or by the prosecutor to the benefit of the accused, the Court of Appeal may not sentence the accused to a criminal sanction more severe than the one imposed by the lower court. If the accused was sentenced by the lower court to imprisonment, the Court of Appeal may order suspension of sentence, probation or surrender for special care; in addition to suspension of sentence and to probation or surrender for care within the social service, the Court of Appeal may impose a fine or probation coupled with imprisonment, pursuant to Chapter 28, Section 3 of the Penal Code. When the lower court has ordered a sanction of the kind now referred to, the Court of Appeal may impose a different sanction."

B. The particular facts of the case

16. The applicant came to Sweden in 1978 where he intended to do certain research work at the University of Gothenburg. However, his initial plans did not come true and his financial situation forced him to look for other jobs. This led to contacts with various Swedish authorities, in particular in December 1980. His experience with the authorities was, however, rather unsuccessful but in March 1981 the applicant managed to find a job as a tram driver. He was, however, obliged to pass a Swedish driving test, since he only had an American driver's licence.

17. On 14 April 1981 he tried to pass the test but the traffic assistant decided that he had failed it. This eventually led to an angry exchange of views on 7 May 1981 between the applicant and the traffic assistant, who reported the incident to the police.

18. In August 1981 the applicant was questioned by the police about the matter and, by indictment of 7 October 1981, he was charged with threatening a civil servant contrary to Chapter 17, Section 1 of the Penal Code (brottsbalken).

19. During the trial before the District Court of Gothenburg (Göteborgs tingsrätt) on 9 February 1982, where he was represented by an officially appointed lawyer, the applicant, as well as the civil servant in question, were heard. Based on their testimony the Court found the applicant guilty of the charge brought against him and sentenced him to 30 day-fines of 20 Swedish crowns each. The costs of the proceedings were borne by the State.

20. The applicant appealed against this judgment to the Court of Appeal for Western Sweden (Hovrätten för Västra Sverige). Before the Court of Appeal, the applicant requested that a character witness be heard by the Court. Specifically, this witness was to be heard regarding the applicant's person in order to prove that his version of

the incident of 7 May 1981 had been the correct one. The witness had not been present at this incident. In response, the prosecutor requested that three witnesses be heard, all of them to testify as to the applicant's behaviour on various previous occasions in the premises of the Road Safety Office (trafiksäkerhetsverket) i.e. the authority with whom applications for driver's licences are lodged.

21. On 27 September 1982 the applicant's lawyer asked the Court of Appeal to refuse to hear the witnesses proposed by the prosecution since they would not be able to provide any relevant information. Furthermore, the applicant referred to the fact that the case only involved a fine and ought not to be burdened with unnecessary evidence. The prosecutor submitted in reply that he did not object to the case being adjudicated without a hearing. Counsel for the applicant, however, requested a hearing on the ground that the credibility of the applicant, as well as that of the injured party, needed thorough examination by the Court of Appeal.

22. The Court of Appeal decided to reject both the applicant's and the prosecution's request to hear further witnesses. In its decision of 12 November 1982 the Court of Appeal wrote:

> "Claims before the Court of Appeal.
>
> [The applicant] has requested that the charges against him be rejected.
>
> The prosecutor objects to a change.
>
> [The applicant] has in case of acquittal requested compensation for legal costs.
>
> The Court of Appeal judgment
>
> The Court of Appeal upholds the District Court judgment."

23. The judgment of the Court of Appeal was based on the written material submitted by the parties and the District Court. Before the Court of Appeal there was no public hearing and neither the applicant or his representative nor the prosecutor were present. This procedure was in accordance with Chapter 51, Section 21 of the Code of Judicial Procedure (cf. para. 15 above).

24. On 7 December 1982 the applicant appealed against the judgment of the Court of Appeal and against the proceedings before this Court to the Supreme Court (Högsta Domstolen). He asked the Supreme Court either to quash the Court of Appeal's decision and send the case back for a new hearing, or to acquit the applicant, or to remit the sentence imposed. The applicant argued that his credibility was at stake and that not only he but also the prosecution had requested the hearing of further witnesses who had not been heard in the District Court. In his opinion it was therefore important for the Court of

Appeal to examine these witnesses and make its own assessment of the applicant. In these circumstances where new evidence of importance was to be examined, it ought not to be possible to apply Chapter 51, Section 21 of the Code of Judicial Procedure and deal with the case without a public hearing.

In its decision of 3 May 1983 refusing leave to appeal the Supreme Court wrote:

> "The Supreme Court finds no reason to grant leave to appeal for which reason the Court of Appeal judgment shall stand."

III. SUBMISSIONS OF THE PARTIES

25. The following is a summary of the parties' main arguments submitted on the merits at the admissibility stage and during the examination of the merits.

A. The applicant

26. The Swedish Code of Judicial Procedure is governed by the principle that the judge listens and judges while the prosecutor and the accused have equal rights in an accusatory process, which has the character of spontaneity and oral presentation.

27. In principle there are three court instances in Sweden. Review by the Supreme Court, however, presupposes that the case has a precedential value far in excess of its intrinsic importance. Approximately 98% of all requests for leave to appeal to the Supreme Court are rejected by the Supreme Court and the Court of Appeal is therefore de facto the last instance.

28. The principal rule for all criminal cases is that the accused must be present at the trial and must be given the opportunity to plead his case. The judgment shall only be based on the facts which emerged during the trial. The courts have certain means by which they can proceed with a case in the absence of the accused, but these rules are not relevant for the present case. However, in these cases as well as in the present one it is important to note that in a criminal case the Court has the exclusive right to decide on how a case should proceed.

29. In Sweden the courts permit the "free evaluation of evidence". This means that, when the accused pleads not guilty, the conviction is based on everything that has been stated during the trial and on any other evidence produced. It is, however, important to note that the statement of the accused is not taped or recorded by shorthand, but that this is done with the evidence of the injured party and the statements of the witnesses.

30. Approximately 78% of the criminal cases brought before a Court of Appeal are referred to the Court by the accused. There are no statistics on the percentage of judgments changed in cases decided upon without a hearing in the Court of Appeal. However, experience shows that the convicted person usually remains convicted in such cases.

31. Article 6 of the Convention stipulates among other things that every accused shall be entitled to an impartial and public trial. He shall also be entitled to defend himself personally and has the right to examine, or allow to be examined, witnesses called to testify against him. According to the established case-law of the Commission

and the Court of Human Rights Article 6 applies to appeal court procedures and the rights secured by Article 6 ought therefore to be respected in such procedures as well. Consequently, on a party's request, a public hearing should be granted on appeal.

32. The present case is not concerned with the question of equality of arms or the punishment as such but with the question whether a person appealing against a conviction pronounced by a District Court is entitled to a public hearing in the Court of Appeal when this Court considers the question of innocence or guilt. A restrictive interpretation of Article 6 allowing such a question to be decided upon in the absence of the accused would not correspond to the aim and the purpose of that provision.

B. The Government

33. In the case-law of the Commission and the Court of Human Rights which has accumulated over the years with regard to Article 6 of the Convention, some guidelines as to the construction of the right to "a fair and public hearing" may be found.

34. In the Monnell and Morris case (Comm. Report 11.3.85 para. 141) the Commission stated that, although the applicants had been refused leave to be present at a certain hearing, equality of arms had been formally respected, since the prosecution had not been present either.

35. Similar views have been expressed in other cases and from this it can be deduced that the right to a fair hearing does not always require that the defendant shall be present at the hearing, provided that he has the facilities for arguing his case on an equal footing with the opposing party. The equality of arms requirement is met. Thus, when neither party is allowed to submit pleadings at an oral hearing there is, on this point, no violation of Article 6.

36. The question is whether in criminal proceedings a Court of Appeal which adjudicates not only points of law, but also substantive issues, must always hold oral hearings for the purpose of Article 6. In No. 5474/72, Dec. 11.12.73, Collection 45 p. 14 the Commission stated that an "oral hearing is not necessarily an essential element of a fair hearing before a court of second and third instance". In the Adler case (Comm. Report 15.3.85 para. 51) the Commission referred to the European Court of Human Rights in holding that the principle of publicity must be fully respected at least in one instance.

37. These cases would suggest that Article 6 does not require, mandatorily, oral hearings before a court of higher instance where an oral hearing has been held in the first instance. It must be observed, however, that both these cases concerned civil actions. On the other hand, as regards the second case, no mention was made of that part of the case-law which makes a distinction between courts of higher instances which may only decide on points of law and those which may examine also the merits of the case. It may be concluded that the Commission, had the principle of mandatory oral hearings been put forth in the constant case-law, would have referred to such a

principle. Thus, no such precedent exists as yet. There is accordingly nothing in the present case-law to warrant mandatory oral hearings in all cases before courts of higher instance, whether they may adjudicate the merits of a case or not.

38. The Court of Human Rights arrived early in its history at a basic principle concerning the right to an oral hearing in appeal proceedings (Eur. Court H.R., Delcourt judgment of 17 January 1970, Series A, No. 11). In that judgment the following reasoning was laid down: The Convention does not compel Contracting States to set up courts of appeal or of cassation but, in so doing, the States are required to ensure that individuals shall enjoy before these courts the fundamental guarantees of Article 6. Thus, it was made clear that Article 6 applies also to those tribunals which do not examine the merits of a case.

39. However, the manner of the application of Article 6 depends on the circumstances of the case. Thus, where the reviewing body is not empowered to examine the merits of the case, the right to an oral hearing is not required (cf. Eur. Court H.R., Axen judgment of 8 December 1983, Series A, No. 72 and Sutter judgment of 22 February 1984, Series A, No. 74). From these cases, however, no specific conclusion may be drawn as to the requirement incumbent upon a court of appeal which also examines the merits of a case.

40. A basic element in ensuring the right to a fair hearing is the holding of oral and public hearings. This protects litigants against administration of justice in secret with no public scrutiny. As for Swedish law, this is guaranteed by the requirement of oral hearings in courts of first instance.

41. It should also be pointed out that the Swedish principle of general access to official documents makes public control possible. According to this principle - which is laid down in the Freedom of the Press Act forming part of the Swedish Constitution - anybody has the right to have access to the written submissions to the courts. This means that there is full publicity about the proceedings even if there is no hearing.

42. The Swedish Code of Judicial Procedure has been in force for nearly forty years. In choosing a system of courts of appeal rather than courts of cassation, it was believed that the right to review of the merits of the case would be more in the interest of the accused. From the beginning, however, it was recognised that for a good and efficient functioning of the administration of justice some limitations of the right to have oral hearings in minor cases in the higher courts must be made.

43. The rule prohibiting reformatio in pejus and the rule restricting the court's possibilities to abstain from oral hearings strike a fair balance between the right of the individual and the needs not to make the judicial procedure more complex and cumbersome than necessary. These basic rules for the procedure in appeal cases have never been questioned.

44. Through Article 2 of Protocol No. 7 to the Convention, which is not yet in force, the right to judicial review in criminal cases by at least one instance has been introduced. Article 2 of Protocol No. 7 reads as follows:

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have 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."

45. However, the Article does not require a review of the merits of the case by such a second instance. Reviews limited to questions of law, or even to applications for leave to appeal, are regarded as meeting the requirements of Article 2. Furthermore, paragraph 2 of Article 2 permits exceptions to the right to review, inter alia for offences of a minor character, as prescribed by law. In deciding the character of an offence, an important criterion is whether the offence is punishable by imprisonment or not.

46. In the light of Article 2 of Protocol No. 7 it must be concluded that a restrictive construction of Article 6, if and when applied to courts of second instance, is appropriate. While it is true that provisions for oral hearings before courts of second instance undoubtedly would be in the spirit of the Convention, they are not required explicitly.

47. To sum up, an oral hearing had taken place before the District Court, whereas the Court of Appeal decided the case on written submissions from both parties. At the oral hearing before the District Court, the applicant and the injured party were heard. No witness material to the case existed. The right of the defendant to appear and be heard as a witness for himself is not guaranteed by the Convention. The requirements of equality of arms and publicity have been met. Thus, the procedure used in the Court of Appeal, having regard to the circumstances of the case and the entirety of the proceedings in both instances, must be said to comply with the Convention.

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IV. OPINION OF THE COMMISSION

A. Point at issue

48. The issue to be determined in the present case is whether the fact that there was no public oral hearing in the proceedings before the Court of Appeal when it examined the applicant's appeal against the judgment of the District Court violates his right to a public hearing as guaranteed by Article 6 para. 1 of the Convention.

B. Applicability of Article 6 of the Convention

49. The applicant claims that the absence of a public oral hearing in the proceedings before the Court of Appeal, which ended with a judgment upholding the judgment of the District Court, violated Article 6 para. 1 of the Convention.

This provision reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

50. The Government have submitted that Article 6 does not apply to appeal proceedings as the present one. They point out that it has been deemed necessary to add Article 2 of Protocol No. 7 to the provisions of the Convention. Article 6 should therefore be construed in such a way that it is not meant to address the question of appeal and, in particular, not meant to address the requirements of an appeal.

51. The Commission cannot agree to the Government's above point of view. According to the established case-law of the European Court of Human Rights it is clear that, although Article 6 para. 1 of the Convention does not compel the contracting States to set up courts of appeal or of cassation, a contracting State, which does institute such courts, is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (see notably Eur. Court H.R., Delcourt judgment of 17 January 1970, Series A no. 11, p. 13, para. 25, and Eur. Court H.R., Sutter judgment of 22 January 1984, Series A no. 74, p. 13, para. 28 with further references). It follows that, although Article 6 does not guarantee an appeal in criminal proceedings, the guarantees of Article 6 continue to apply to the appeal proceedings where the opportunity to lodge an appeal in regard to the determination of a

criminal charge is provided for under domestic law, since those proceedings form part of the whole proceedings which determine the criminal charge at issue (cf. Monnell and Morris v. the United Kingdom, Comm. Report 11.3.85, para. 127).

52. Accordingly Article 6 para. 1 of the Convention was applicable to the proceedings before the Court of Appeal when it examined the applicant's appeal against the judgment of the District Court and Protocol No. 7 to the Convention does not affect that position.

C. The application of Article 6 to the proceedings in question

53. When deciding in the Delcourt case that Article 6 para. 1 of the Convention was applicable to appeal proceedings the Court of Human Rights took care to add that "the way in which it applies must, however, clearly depend on the special features of such proceedings " (ibid. p. 15, para. 26). The Commission must therefore examine whether there were any special features in the appeal proceedings in the present case which could lead to the conclusion that the requirements of Article 6 para. 1 of the Convention were secured although no public oral hearing was held before the Court of Appeal.

54. Before examining the factual circumstances of the present case the Commission finds it necessary first to consider the general implications of the requirement "public hearing".

55. The public nature of the proceedings helps to ensure a fair trial by protecting, in this case the accused, against arbitrary decisions and enabling society to keep a check on the administration of justice. This possibility of supervision by the public, even if sometimes merely theoretical or potential, is a guarantee to the accused that a real endeavour will be made to establish the truth through hearings conducted by a tribunal the independence and impartiality of which can be verified by the way in which it conducts the hearing, summons and questions witnesses and experts, considers the relevance of proposed evidence and respects the right to be heard. The public nature of the hearings thus serves to ensure that the public is duly informed and that the legal process is publicly observable. It consequently helps to maintain confidence in the administration of justice.

56. The Commission recalls that the Convention is not explicit as to the written or oral nature of the procedure or as to the place to be reserved generally for each of these procedural forms in the presentation of a case (cf. Sutter v. Switzerland, Comm. Report 10.10.81, para. 30). However, in recognising the principle that a hearing must be public, subject only to the exceptions specified in Article 6 para. 1, second sentence, that provision guarantees, generally, to parties before a court the right to present their case at a public hearing, thereby protecting them from possible injustice dispensed in secret or in private, and to have its essential aspects examined publicly.

57. In particular regarding criminal proceedings the Commission recalls that the Court of Human Rights has stated that

> "Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to 'everyone charged with a criminal offence' the right 'to defend himself in person', 'to examine or have examined witnesses' and 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court', and it is difficult to see how he could exercise these rights without being present."
>
> (Eur. Court H.R., Colozza and Rubinat judgment of 12 February 1985, Series A no. 89, p. 14, para. 27).

58. Having regard to these considerations the Commission finds that an accused under Article 6 para. 1 of the Convention in principle enjoys the right to a public hearing in which he is present and able to bring forward his views.

59. In accordance with the above general considerations the Court of Human Rights has stated that by rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 para. 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (cf. Eur. Court H.R., Axen judgment of 8 December 1983, Series A no. 72, p. 12, para. 25 and the Sutter judgment of 22 February 1984, Series A, No. 74, p. 12, para. 26). In both cases, however, the Court found no breach of Article 6. In the Axen case since the first instance court and the appeal court had heard the case in public and since the Federal Court of Justice, which determined solely issues of law, could - short of holding hearings - only dismiss the appeal on points of law. In the Sutter case since the Court of Cassation had not ruled on the merits of the case and had dismissed Mr. Sutter's appeal in a judgment devoted solely to the interpretation of the legal provisions concerned.

60. The Commission has acknowledged, in view of the technical nature of the questions examined in supreme courts and of the "depersonalisation" of the legal elements of disputes referred to them, that the absence of oral procedure before such courts does not constitute a violation of Article 6 para. 1. For example, it decided so in the case of the dismissal of appeals on points of law in criminal proceedings by the German Federal Court (Bundesgerichtshof) (No. 599/59, Dec. 14.12.61, Collection 8 p. 12), and by the Court of Appeal (Kammergericht) in Berlin (No. 1169/61, Dec. 24.9.63, Yearbook 6 p. 520), and of the dismissal by the Swiss Federal Court of an appeal (recours en réforme) (No. 7211/75, Dec. 6.10.76, D.R. 7 p. 104).

61. The Commission also recalls its partial decision on the admissibility of Application No. 9315/81 (Dec. 15.7.83, D.R. 34 p. 96), where it recognised that there was no overriding right for an appellant to be present before an appeal court in a criminal case

where there was no power for this court to increase the appellant's sentence. In that case, in the absence of an appeal by the prosecution, and in accordance with Art. 294 (2) of the Austrian Code of Criminal Procedure, the appeal court was not empowered to impose a more severe sentence on the accused than that imposed by the court of first instance. The Commission nevertheless considered whether, even in such circumstances, the applicant's presence, which he had requested at the determination of his appeal, was not required by the provisions of Article 6. The Commission concluded that the reasons given for the appeal court's rejection of the applicant's appeal were based on objective conclusions, which were derived from an examination of the case-file which was before them, and did not involve a direct assessment of the applicant's personality. In these circumstances, and having regard to the fact that he was represented in the proceedings by counsel, the applicant's right to a fair determination of the criminal charge against him was not prejudiced by his absence from the proceedings before the appeal court.

62. Turning to the facts of the present case the Commission recalls that in the proceedings before the District Court of Gothenburg the judgment was pronounced publicly after a public hearing at which the applicant was present and given the opportunity of being heard in person. In these proceedings the District Court dealt with questions both of fact and law. The appeal to the Court of Appeal was on the other hand examined in camera on the basis of the file transmitted by the lower court and the written statements submitted by the parties neither of whom were present. The judgment of the Court of Appeal had no other consequence for the applicant than had the judgment of the District Court.

63. As far as the powers of the Court of Appeal are concerned these are set out in Chapter 51, Section 21 of the Code of Judicial Procedure (see para. 15 above). It follows from this provision that if a person has been acquitted by a District Court, or has been sentenced by such a Court to a fine, and there appears to be no reason for the Court of Appeal to sentence this person to a more severe sentence than a fine, the Court of Appeal is not obliged to hold a public oral hearing regarding the appeal but can base its judgment exclusively on the case-file and the written submissions of the parties. It is an optional procedure and the Court of Appeal is not supposed to resort to it if a hearing can be expected to give the Court a better basis for deciding on the appeal.

64. The Commission notes that under Chapter 51, Section 21 the Court of Appeal may, without a public hearing, convict a person who has been acquitted by the District Court and may, without a public hearing, impose a higher fine on the sentenced person than that which was imposed by the District Court. However, in the present case no such question of a possible worsening of the applicant's situation arose, or could arise, since only the applicant appealed against the judgment of the District Court, and in view of the prohibition in Chapter 51, Section 25, of the Code of Judicial Procedure against reformatio in pejus, the Court of Appeal could not, in the absence of an appeal by the public prosecutor, increase the sentence imposed on the applicant by the District Court.

65. The situation in the present case was accordingly that the Court of Appeal could decide to uphold the judgment pronounced by the District Court, or decide in the applicant's favour either by reducing the fine or by acquitting him.

66. The Government have pointed out that according to the Freedom of the Press Act anybody has the right to have access to the written submissions to the courts. Thus, there is full publicity about the proceedings even if there would be no hearing and the requirement of a "public" hearing is therefore satisfied in all instances. Furthermore the Government have submitted that since neither of the parties were present in the Court of Appeal the requirement of equality of arms was fulfilled.

67. The European Court of Human Rights has pointed out that whilst all member States of the Council of Europe subscribe to the principle of publicity, their legislative systems and judicial practice reveal some diversity as to its scope and manner of implementation (cf. Eur. Court H.R., Axen judgment of 8 December 1983, Series A No. 72, p. 12, para. 26). The Commission recognises the importance of the system of publicity of documents adopted by Sweden as set out in the Freedom of the Press Act. However, the fact that the documents submitted to the Court of Appeal were public documents open to scrutiny by the parties and the public cannot fulfil the requirement of a "public hearing" within the meaning of Article 6 para. 1 of the Convention.

68. It is true that one of the principles of a fair hearing is that of the equality of arms. It is also true that neither the applicant nor a representative for the prosecution were present in the Court of Appeal and thus, as between the prosecution and the applicant, equality of arms was formally respected. However, this particular principle referred to by the Government is not, in this case, relevant to the question as to whether the applicant was entitled to a public oral hearing in the Court of Appeal.

69. The gist of the matter is the powers of the Court of Appeal compared with the applicant's possibilities of presenting his case to this Court. The Court of Appeal could not in the present case impose a more severe sentence on the accused than that imposed by the District Court. However, despite their limitations, the proceedings before the Court of Appeal involved a full review of the case. The nature of the appeal examination was to review and to determine the applicant's guilt as well as the sentence imposed upon him. Furthermore, the powers of the Court of Appeal were not only to uphold the judgment of the lower court. Under the applicable law the Court of Appeal also had the power to reduce the fine imposed and even to acquit the applicant of the charges brought against him. In exercising its functions and considering these possibilities the Court of Appeal was called upon to take into consideration both points of fact and law. It cannot be said, therefore, that the Court's judgment upholding the judgment of the District Court was based solely on objective conclusions which did not involve a direct assessment of the applicant's personality (cf. paras. 61 to 63 above).

70. Where a power of this kind is exercised, in proceedings which form part of the determination of the criminal charge against the applicant, the Commission finds that Article 6 para. 1 of the

Convention requires that he should be allowed a public hearing and to be present at these proceedings if he so requests. Since he could not, however, obtain such a hearing Article 6 para. 1 has been violated.

Conclusion

71. The Commission concludes, by eleven votes to one, that there has been a violation of Article 6 para. 1 of the Convention.

Secretary to the Commission

(H. C. KRÜGER)

President of the Commission

(C. A. NØRGAARD)

DISSENTING OPINION OF MR. DANELIUS

1. In the Delcourt case (judgment of 17 January 1970, Series A no. 11, p. 14, para. 25), the European Court of Human Rights pointed out that, although Article 6 para. 1 of the Convention does not compel the Contracting States to set up courts of appeal or courts of cassation, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6. However, the Court also noted that the way in which Article 6 para. 1 applies must clearly depend on the special features of the proceedings concerned (the same judgment, p. 15, para. 26).

2. In the Sutter case, the Court again pointed out that the manner of application of Article 6 depends on the particular circumstances of the case and that account must be taken of the entirety of the proceedings conducted in the domestic legal order (judgment of 22 February 1984, Series A no. 74, p. 13, para. 28). In that case, the Court found that the absence of public hearings at the cassation stage, when the examination was limited to the interpretation of the law, did not infringe Article 6 para. 1.

3. The principle laid down in the Delcourt case, namely that Article 6 also applies to the proceedings before courts of appeal and courts of cassation, must therefore be seen as a general principle whose scope and precise contents should be further developed and elaborated, having regard to the nature of the proceedings concerned and the particular aspect of Article 6 which is at issue.

4. In the Delcourt case, the issue was one of "equality of arms" in proceedings before the Belgian Court of Cassation. It is natural that such equality, being an essential element in the fairness of the proceedings, should be observed at all stages of the proceedings. In particular, proceedings cannot be regarded as fair if equality of arms, although having been observed before the court of first instance, is subsequently disregarded in the appeal proceedings.

5. In the present case, however, we are concerned with a different aspect of Article 6, namely the requirement that a criminal charge should be examined at a hearing before a court. In this respect, it is not obvious that a new hearing must always be held at all stages of the proceedings.

6. Reference has already been made to the Sutter case, where the Court found that a hearing at the cassation stage was not necessary. Indeed, the question whether a new hearing must be held before a court of appeal or before another higher court will depend on the character of the case and on the nature of the issues to be considered by the court.

7. In a number of cases, the Commission has considered whether an appellant's personal presence at an appeal hearing was necessary in order to ensure a fair hearing within the meaning of Article 6 para. 1

(see applications Nos. 9562/81 and 9818/82, Monnell and Morris v. United Kingdom, Comm. Report of 11 March 1985, 8289/78, Peschke v. Austria, D.R. 18 p. 160 and D.R. 25 p. 182; 8639/79, D. v. United Kingdom, unpublished, 9315/81, J. v. Austria, D.R. 34 p. 96, 9728/82, M. v. United Kingdom, unpublished). A study of those cases shows that the Commission, in considering whether an appellant could derive from Article 6 para. 1 a right to be present and to be heard in the examination of his appeal, has found it to be of particular importance whether there was a possibility that the appellant's sentence would be increased or that his situation would otherwise become worse as a result of the appeal proceedings.

8. In my view, similar considerations should apply in the present case. It should then be noted that Chapter 51, Section 21 of the Swedish Code of Judicial Procedure does not exclude that the Court of Appeal increases a sentence without a hearing, and in cases where this is done, a serious problem could arise as regards the conformity with Article 6 para. 1 of the Convention. In the present case, however, only the applicant had appealed, and it follows that an increase of his sentence was excluded as a result of the prohibition against reformatio in pejus, as reflected in Chapter 51, Section 25 of the Code of Judicial Procedure. In my further reasoning I therefore leave the possibility of an increase of sentence out of account.

9. There are some other elements which are also relevant when considering whether a hearing was required in the present case. It is important to note, for instance, that the case concerned a minor offence punished by a fine only. It is natural, and generally speaking acceptable, that for such cases the Contracting States - many of which have to struggle with serious problems of arrears and delays in judicial proceedings - have taken measures to simplify and shorten the proceedings. Such measures may legitimately include restrictions of the right to appeal or the introduction of special, simplified procedures, particularly at the appeal stage.

10. In many countries, the right of appeal is restricted in certain cases by a requirement of leave to appeal. Such leave is granted or refused after a summary examination of the grounds of appeal and without a hearing. It can hardly be doubted that such a system is in conformity with Article 6 para. 1 of the Convention, even where the grounds of appeal relate to the credibility of persons who were heard by the lower court.

11. It is true that Chapter 51, Section 21 of the Swedish Code of Judicial Procedure does not establish a requirement of leave to appeal before the appeal can be examined in full, but it provides for a procedure under which the appeal itself can, in certain circumstances, be examined by the Court of Appeal without a hearing. However, the decision to reject an appeal without a hearing can be compared with, and is somewhat similar to, a decision not to grant leave to appeal. In comparison with a system of leave to appeal, the Swedish system can even be said to be more favourable to the person convicted by the court of first instance, since it gives him the additional chance of being acquitted and of having his sentence reduced without a hearing.

12. For these reasons, I conclude that the procedure before the Court of Appeal, in the circumstances of the present case, did not violate the applicant's right to a hearing according to Article 6 para. 1 of the Convention.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
20 June 1983	Introduction of the application
19 September 1983	Registration of the application
Examination of admissibility	
2 October 1984	Commission's deliberations and decision to invite the Government to submit observations on the admissibility and merits of the application
17 December 1984	Submission of Government's observations
18 April 1985	Submission of applicant's observations
5 July 1985	Commission's deliberations and decision to declare the application partly admissible and partly inadmissible
Examination of the merits	
12 October 1985	Commission's deliberations and decision to hold a hearing on the merits of the application
14 October 1985	Submission of Government's additional observations on the merits
14 April 1986	Hearing on the merits of the application and the Commission's deliberations The applicant Mr. Arnewid The Government MM. Corell Eklycke

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Date	Item
12 July 1986	Consideration of the state of proceedings
7 October 1986	Commission's deliberations on the merits, final votes and adoption of the Report