CENTRUM FÖR RÄTTVISA

25 April 2024

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application no. 37988/21

GRINNEMO AND OTHERS

("**Applicants**")

v.

SWEDEN

("**Government**")

THE APPLICANTS' REPLY TO THE GOVERNMENT'S OBSERVATIONS ON THE ADMISSIBILITY AND MERITS, AND THE APPLICANTS' CLAIMS FOR JUST SATISFACTION

INTRODUCTION

1. This case raises important issues of the rule of law and whistle-blower protection in academic medicine. The Applicants blew the whistle on malpractices and fraud at Karolinska Institutet ("KI") – one of the world's foremost medical research institutes. Acting both as prosecutor and judge in its own case, KI then retaliated by holding the Applicants responsible for research misconduct. In an apparent attempt to dodge its own responsibility, KI overplayed the Applicants' involvement and insight into Paolo Macchiarini's research fraud and accused them of being complicit by failing to blow the whistle earlier. This was done in a public law decision, which could not be appealed, was reached without regard for the Applicants' due process rights and had far-reaching consequences for their careers and professional reputations. The Applicants submit that Sweden violated their right of access to court under Article 6 § 1 of the Convention because they were not entitled to challenge KI's unfounded misconduct allegations before an independent tribunal.

2. The Government, on the other hand, argues that the misconduct decision was so inconsequential that Article 6 does not apply. Sweden may therefore deny researchers access to court and allow its public institutions to wield their decision-making power with unfettered discretion. The Applicants respectfully submit that this position is untenable and out of step with reality.

3. In reality, it was precisely because of the far-reaching consequences of a misconduct decision that the Swedish parliament decided to close the lacuna in the law, which ruled out judicial review in these matters. In 2020, an independent body was established to assess misconduct allegations and a right to appeal to the administrative courts was introduced (see Government's observations, paras 32–38) These amendments were adopted as a direct result of the research scandals exposed by the Applicants. But they do not apply retroactively to their case.

4. In reality, KI's misconduct decision was not inconsequential, but inflicted irreparable harm to the Applicants' careers. It prejudiced the outcome of grant applications; prompted some of the most important funding bodies in Sweden to impose bans on the right to apply for new grants; and put their current funding at risk of retraction. The disruption of the funding base for the Applicants' research persisted for years. This prevented them from publishing articles at a competitive pace, stifled the growth of their merits portfolio, and delayed their advancement to higher academic positions.

5. At least initially, the reputational damage was even worse still. It cannot be overlooked that the Applicants were branded as accomplices to the infamous Paolo Macchiarini and held responsible for the biggest medical scandal in Swedish history. Further exacerbating this character assassination, the misconduct decision was then publicised at KI's request in both Biomaterials and The Lancet – the latter being one of the world's highest-impact academic journals. Today, six years and several documentaries, news stories and public inquiries later, the responsibility for the scandal has been rightly placed with Macchiarini and KI. So, the Applicants have been largely vindicated in the court of public opinion. But they remain to be exonerated in a court of law.

6. In reality, Sweden's failure to uphold the Applicants' right of access to court risk having a chilling effect on whistle-blowing in academic medicine, thereby jeopardising the safety of the patients (a concern raised *inter alia* by the Swedish Medical Association, which have submitted a statement in support of the Applicants in the present case, see enclosure 55). Inevitably, the lack of legal protection against false misconduct allegations, risk making future whistle-blowers more reluctant to put their reputations and careers on the line. And even though the new legislation has introduced independent examination and the right to appeal, the concerns raised by the Swedish Medical Association remain. Deviations from good research practice, which do not constitute fabrication, falsification or plagiarism are still handled by the institutions themselves, without any right to appeal.

7. At bottom, the Applicants maintain that the exclusion of the application of Article 6 in their case would be incompatible with the rule of law and render the right of access to court illusory. This case presents a pressing opportunity for the Court to clarify the standards under Article 6 and reinforce the importance of the right of access to court as a safeguard against arbitrariness and abuse of power.

8. The President of the Section has invited the Applicants to make written observations in reply to the Government's observations of 8 March 2024. The Applicants have also been invited to submit their respective claims for just satisfaction under Article 41 of the Convention. Accordingly, they respectfully submit the following observations and claims. As instructed, they also submit a separate document, containing the Applicants' position on the Government's version of the facts.

ON THE ADMISSIBILITY

I. THE APPLICABLE TEST

9. Article 6 § 1 of the Convention is applicable if the following criteria are met (see *inter alia*, *Denisov v. Ukraine* [GC], no. 76639/11, § 44, 25 September 2018):

   i. There is a genuine and serious dispute regarding the existence, scope, or exercise of a civil right (or obligation);

   ii. that right can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention; and

   iii. the result of the proceedings is directly decisive for the right in question (mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play).

10. The Government has not contested that the application give rise to a genuine and serious dispute about the existence, scope and exercise of a civil right that can be said to be recognised under Swedish law (the first and second criteria above). The core issue in dispute is therefore the third criteria: whether the result of the proceedings was directly decisive for the Applicants' right to exercise their profession, professional reputation, or freedom of expression. In that connection, the Applicants wish to make three points of clarification.

11. First, the "proceedings" in question are not the internal proceedings at KI leading up to the misconduct decision – which the Government seems to assume in its observations (see *inter alia* Government's observations, para 63). The Applicants rather submit that it was the misconduct decision itself that gave rise to a dispute between them and KI, which they were entitled to bring before an independent tribunal. Accordingly, the "result of the proceedings" refers to the result of the proceedings before the Swedish administrative courts, had they taken place, not to the misconduct investigations at KI. This is significant because, in the Applicants' submission, other considerations may arise when extending the Article 6 guarantees to non-judicial proceedings, than when the right of access to court is at issue. Notably, the complete lack of access to court raises more pressing rule of law concerns, than procedural flaws in non-judicial proceedings before a public authority.

12. Second, this third threshold criteria has been couched in several different terms in the context of the right of access to court. No matter how the test is framed, however, it all boils down to an assessment of the potential consequences for the enjoyment of the civil right in question. The Court has *inter alia* examined whether the "result of the proceedings was decisive"; whether a decision "affected" or "adversely affected" a civil right, whether a decision had a "decisive impact on the applicant's personal situation"; whether the "link" between the decision and the consequences was "more than tenuous or remote"; and whether a decision "amounted to an

interference" with the exercise of a civil right (see for instance *Regner v. the Czech Republic* [GC], no. 35289/11, §§ 118–119, 19 September 2017, where a decision to revoke the applicant's security clearance "made it impossible for him to perform his duties in full", and the "link" between the revocation of the clearance and the adverse effects on his exercise of his profession was more than tenuous or remote; see on similar facts *Miryana Petrova v. Bulgaria*, no. 57148/08, § 31, 21 July 2016, where the decision had a "decisive impact on the applicant's personal situation", see *Pocius v. Lithuania*, no. 35601/04, § 40, 6 July 2010, where the Court held that the revocation of the applicant's license to carry arms and his inclusion in a database with potentially dangerous persons had affected his reputation, private life and job prospects; see also *Le Compte, Van Leuven and De Meyere v. Belgium,* 23 June 1981, § 44, Series A no. 43, where the Court held that Article 6 may be "relied on by anyone who considers that an interference with the exercise of one of his civil rights is unlawful").

13. Third, it is not the concrete outcome of the proceedings that is essential to judge the applicability of Article 6, but the possible measures or consequences at stake (see for instance *Peleki v. Greece*, no. 69291/12, § 39, 5 March 2020, where the Court emphasised that it was not the concrete outcome that was determinative, but the mere fact that a suspension of the right to exercise the profession was one of the possible consequences; see also *L'Erablière A.S.B.L. v. Belgium*, no. 49230/07, §§ 28–30, ECHR 2009 (extracts), where it was the likely consequences and risks involved that led to the conclusions that the applicants' were directly affect by plans to expand a landfill site, and therefore enjoyed a right of access to court). To that end, the assessment of the adverse impact is an objective, not a subjective one.

14. The applicability of Article 6 in this case therefore depends on an objective assessment of the potential consequences of a misconduct decision, not the concrete consequences suffered by the Applicants. What the Court is required to determine is in essence whether a misconduct decision typically interferes

with, or has adverse effects on, implicated researchers' enjoyment of their right to exercise their profession, professional reputation, and freedom of expression. If so, the Applicants were entitled to challenge KI's misconduct decision before a court meeting the requirements of Article 6.

II. THE MISCONDUCT DECISION INTERFERED WITH THE APPLICANTS' EXERCISE OF THEIR PROFESSION

15. In the Applicants' submission, both the typical consequences of a misconduct decision, and the consequences in their individual case, meet the threshold criteria under Article 6 § 1 of the Convention by a good margin. The consequences suffered by the Applicants, and in particular by the fourth applicant, are illustrative of how a misconduct decision may adversely impact a researcher's personal situation and preclude even the application for new research grants (see Applicants' observations on the facts, paras 27–54).

16. In the following, the Applicants' will set out their position in more detail and reply to the Government's submissions on the misconduct decision's effect on the exercise of the right to exercise the research profession.

A. Funding bodies and publishers that decide on sanctions base their decisions directly on the misconduct decision

17. A misconduct decision directly interferes with implicated researchers' exercise of their profession, notably, the Applicants submit, because none of the bodies that decide on sanctions make a new and independent assessment of the misconduct allegations: When the university itself decides on whether to issue a reprimand, suspension, dismissal, or other labour law sanctions, it does so on the basis of the misconduct decision. When funding bodies decide to reject a grant application, impose a ban on the right to apply for grants, retract grants or to withdraw, freeze or recover payments of already granted funds, they do so on the basis of the misconduct decision. When publishers decide to reject submitted articles or retract published articles, they do so on the basis of the misconduct decision. (See SOU 2017:10, p. 224, enclosure 76,

where a public inquiry underlined this very fact, see also, for instance, the decision of the Swedish Cancer Society and the Childhood Cancer Fund to impose a three year ban on the fourth applicant's right to apply for grants, which are based directly on KI's decision; enclosures 69 and 71; and the publishers' decision to retract the impugned articles, enclosures 52 and 53, see also the policies of the relevant funding bodies, enclosures 44, 46, 70 and 72 and enclosure 77)

B. It is established by the Government and public inquiries that a misconduct decision can have far-reaching consequences

18. The Government's contention that "the potential consequences to the applicants' right to exercise their profession appear speculative" is, furthermore, not only wrong, but incompatible with previous statements by the Government and public inquiries on this issue. For instance, in the *travaux préparatoires* to the new legislation on research misconduct, the Government held that:

> "[…] decisions on research misconduct can have far-reaching consequences for the researcher concerned and can affect them in an exceedingly restrictive manner. A decision that a researcher is guilty of research misconduct can for instance lead to retracted funding, difficulties in securing funding in the future, retracted scientific articles and labour law sanctions" (see prop. 2018/19:58 p. 85, enclosure 78, our translation).

19. The public inquiry which drafted this new legislation further proposed that the new Misconduct Board's decisions be subject to appeal to a court precisely because a misconduct decision can "have serious consequences […] even if the decision in itself does not contain any sanctions" (see SOU 2017:10, p. 224, enclosure 76, our translation). But these findings are not new. Already 25 years ago, another public inquiry noted that "a finding that a researcher has acted fraudulently can have devastating consequences, even if there are no disciplinary sanctions" and that even "being investigated for

research fraud may have consequences for one's continued career" (see SOU 1999:4, p. 91, enclosure 79, our translation). So, the fact that a misconduct decision adversely affects researchers' exercise of their profession has been long known and has previously been acknowledged by the Government.

C. It is not decisive for the applicability of Article 6 § 1 of the Convention that the Applicants could not be removed from their positions

20. The Government argues that because KI could not "initiate proceedings expressly aimed at removing the applicants from their relevant positions", Article 6 § 1 of the Convention does not apply (see Government's observations, para 50). This argument fails for three reasons.

21. First, the applicability of Article 6 is to be determined on the basis of the typical consequences of a misconduct decision, not the factual consequences incurred in the Applicants' case. And as KI itself held in its press release on the day of delivery of the decision in the Applicants' case: "research misconduct is unacceptable and should normally lead to labour law sanctions, in the form of disciplinary sanctions, dismissal or removal" (see enclosure 75, our translation). Removal from one's position is therefore normally at stake.

22. The reason that KI could not remove the Applicants from their positions was because the first two applicants were no longer employed at KI at the time of the decision and because the "offence" had occurred more than 2 years prior to the misconduct decision, which rendered any labour law sanctions time-barred (see the Public Employment Act, *lagen om offentlig anställning;* 1994:260, Section 17).

23. Second, Article 6 does not only apply to disputes over the existence of a civil right. Contrary to the Government's submission, it is sufficient that the scope and manner of exercise of a civil right is at stake (see for instance Le *Compte, Van Leuven and De Meyere,* cited above, § 49, where the potential consequences for the applicants' right to exercise their profession only involved a temporary suspension). The Applicants therefore submit that the

misconduct decision's adverse impact on the ability to secure grants and publish articles are enough to attract the application of Article 6.

24. Third, it is precisely because labour law sanctions could not be applied in the Applicants' case, that they require a right of access to court. When labour law sanctions are applied as a consequence of an adverse finding of research misconduct, it is possible to, at least indirectly, challenge the misconduct allegations before the Swedish Labour court (see for instance case AD 2020 no. 22, enclosure 80). The risk of arbitrariness and abuse of power is thereby curtailed by the Labour court's judicial review. In these cases, no separate review of the misconduct decision is required to mitigate the other adverse effects, such as bans on the right to apply for grants. It is when labour law sanctions cannot be applied that the lack of judicial review of the misconduct decision is indissociable from a danger of arbitrary power.

D. The Applicants' current academic positions are not decisive for the applicability of Article 6 § 1 of the Convention

25. On a related point, the Applicants agree with the Government that it is not decisive for the applicability of Article 6 § 1 of the Convention that they have continued to hold important positions in their respective fields and that they eventually managed, at great personal cost no less, to mitigate some of the worst effects of the misconduct decision (see and compare Government's observations, paras 65–66 and 70). To reiterate, the applicability of Article 6 in this case depends on an objective assessment of the potential consequences of a misconduct decision, not the concrete consequences suffered by the Applicants (see paras 13–14 above).

26. Having said that, the Applicants maintain that the concrete consequences in their case illustrate the adverse effects a misconduct decision may have and how it can impair the effective exercise of the research profession. These consequences are, in the Applicants' submission, undoubtedly sufficient to bring Article 6 into play.

E. The Applicants suffered more serious consequences than Marušić, and unlike Marušić did not enjoy access to the administrative courts

27. The Government further relies on *Marušić v. Croatia* and holds that the relevant criteria from *Marušić* are not met (see Government's observations, para 48). *Marušić* is, however, distinguishable from the present case. In *Marušić,* the dean of the School of Medicine at the University of Zagreb, instituted proceedings against the applicant in the faculty's Integrity Court alleging that she had plagiarised parts of a student textbook (see *Marušić v. Croatia*, dec., no. 79821/12, § 17, 23 May 2017). The question was whether Article 6 § 1 of the Convention applied to the proceedings before the Integrity Court, and if the fair trial standards under Article 6 had been complied with. The case did not concern the applicant's right of access to court. *Marušić* already enjoyed access to the administrative courts to assert her rights and challenge the findings of the Integrity Court (see *Marušić,* cited above, § 26). In the Applicants' submission, this distinction is significant.

28. Even if the Court in *Marušić* would have found that Article 6 was applicable and that the Article 6 guarantees should be extended to the non-judicial disciplinary proceedings before the Integrity Court, it is not certain that there would have been a violation of the Convention. In that case, it is likely that the subsequent judicial proceedings before the administrative courts, which provided the guarantees of Article 6, could remedy any procedural shortcomings found in the proceedings before the Integrity court (see *inter alia Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 132, 6 November 2018, where the Court reaffirmed that subsequent judicial review can remedy procedural flaws before an administrative authority).

29. In comparing the present case to *Marušić*, one must not lose sight of the fact that if the Applicants are not allowed to challenge the findings of KI, there is no judicial review of their case at all. KI is therefore granted unfettered discretion in misconduct matters. Under these circumstances, the rule of law

ideals underpinning Article 6 and the importance of subjecting the exercise of power to independent external review become much more prominent than in *Marušić* (see by comparison *Golder v. the United Kingdom*, 21 February 1975, § 34, Series A no. 18, where the Court held that "one can scarcely conceive of the rule of law without there being a possibility of having access to the courts").

30. In any event, the Applicants suffered more serious consequences than Marušić. As a result of the public reprimand for plagiarism, Marušić claimed that she had been denied a Fulbright scholarship and had had difficulty in being reappointed to the position of tenured professor at Zagreb University (see *Marušić,* cited above, § 70). The consequences for the Applicants' exercise of their profession were significantly more serious, and so are the typical consequences of a misconduct decision in Sweden.

31. In the Applicants' case, the misconduct decision disrupted the funding base for their research, slashed their chances of being published, stifled the growth of their merits portfolio, delayed advancement to higher academic positions. Notably, the first and fourth applicants were even forced to dissolve their current research groups. The two main funding bodies in the fourth applicant's field imposed a three-year ban on her right to even apply for new grants (and under the policy of the Swedish Childhood Cancer Fund, even a lifetime ban was at stake, see enclosure 72). She was further forced to resign or take time-out from all of her engagements in renowned national and international committees, including the Nobel Assembly at KI. The second applicant was thwarted in his efforts to qualify as a senior researcher. And the third applicant abandoned his research career altogether and moved to Denmark. (See for further details, Applicants' observations on the facts, paras 27–54.) There is therefore no question that the misconduct decision impaired their effective exercise of their profession.

F. The Applicants suffered more serious consequences than Angerjärv and Greinoman, and their case involve different considerations

32. The Government briefly refers to *Angerjärv and Greinoman v. Estonia*, which the Court included in its question to the parties. In this connection, the Government concludes that irrespective of how the proceedings in question are categorised, the consequences of the misconduct decision were not sufficient to bring Article 6 § 1 of the Convention into play (see Government's observations, paras 53 and 54). The Applicants for their part, submit that *Angerjärv and Greinoman* is distinguishable.

33. The applicants in that case were lawyers who had been removed from specific court proceedings. They could still represent their clients outside the ongoing court hearings, and they could still advise any other client before any other court, or even the same court in other proceedings. In finding that Article 6 was not applicable, the Court could not overlook that the impact of their removal on the right to practise their profession had been limited. (See *Angerjärv and Greinoman v. Estonia,* nos. 16358/18 and 34964/18, § 100, 4 October 2022.) The consequences for the Applicants' exercise of their profession were significantly more serious, and so are the typical consequences of a misconduct decision (see paras 18–19 above, and paras 27–54 in the Applicants' observations on the facts).

34. The exclusion of the applicability of Article 6 in *Angerjärv and Greinoman v. Estonia* was furthermore based on the exceptional circumstances of that case. The Court attached particular weight to the fact that the removal of the applicants served the precise aim of ensuring the proper and expeditious administration of justice and to the fact that rules enabling a court to react to disorderly conduct are a common feature of legal systems of the Contracting States (see *Angerjärv and Greinoman,* cited above, § 101 with reference to § 90). The Court's ruling that Article 6 was not applicable was in other words based on the specific context of that case and considerations that do not arise in the present case. Again, the rule of law ideals underpinning Article 6 and

the importance of subjecting the exercise of power to independent external review are more prominent here, where the impugned decision was taken not by a judge, but by a public authority under the Government.

35. In sum, *Angerjärv and Greinoman* is distinguishable and the misconduct decision's interference with the right to exercise the research profession is sufficient to bring Article 6 § 1 into play.

III. THE MISCONDUCT DECISION INTERFERED WITH THE APPLICANTS' ENJOYMENT OF THEIR REPUTATION

36. The Applicants submit that a misconduct decision typically damages the researcher's professional reputation to such a degree that Article 6 § 1 of the Convention is engaged. The Government "does not contest that consequences to an applicant's reputation may put Article 6 under its civil limb into play" (see Government's observations, para 57). In the Government's submission, however, the damage to the Applicants' professional reputations in this case is not sufficient. The Government is wrong for the following reasons.

37. First, the Government relies on *Fayed v. the United Kingdom*. The Government suggests that Article 6 was not engaged in that case because the investigators in charge of a public inquiry into the Fayed brothers' acquisition of a chain of department stores had merely had investigative duties (see Government's observations, para 59). The Government has, however, failed to address the full ruling in *Fayed.* The Government omits that the Court in *Fayed* went on to find that the applicants did in fact have a right of access to court to challenge the findings and conclusions in the Inspectors' report – which was published to the world at large and contained statements damaging to the applicants' reputation. To reach this conclusion, the Court proceeded on the basis that Article 6 was applicable, because the underlying facts in any event arose to the level of interfering with the right to private life under Article 8 of the Convention. (See *Fayed v. the United Kingdom*, 21 September 1994, §§ 64 and 68, Series A no. 294-B.)

38. Similarly, while Article 6 does not apply to the internal proceedings at KI leading up to the misconduct decision, the Applicants are entitled to challenge the findings and conclusions of KI before a court. If the Court, as in *Fayed*, were to assess the facts underlying the complaint under Article 8 rather than Article 6, as it has jurisdiction to do, the damage to the Applicants' reputation would indeed amount to an interference with their private life. The Applicants submit that the reputational damage that they suffered are equivalent or worse than the damage in *Fayed* – and at least equivalent to the damage suffered in *Jishkariani v. Georgia* (no. 18925/09, § 47, 20 September 2018), where the requisite level of seriousness for an interference was attained in relation to public accusations that the applicant had issued incorrect medical reports concerning prisoners' health for money, which affected her reputation as a medical professional. Like in *Fayed*, the Court can therefore proceed on the basis that Article 6 is applicable already on the basis of the interference with Article 8.

39. Second, the Government relies on *Marušić* in holding that Article 6 does not apply because the Applicants' professional reputation in itself was not the subject-matter of the proceedings leading up to KI's decision (see Government's observations, para 63). The subject-matter of the proceedings, or other qualifications in domestic law, can, however, not be decisive for the applicability of Article 6. In order for the right of access to court to be effective, the Court must look "beyond the appearances and the language used and concentrate on the realities of the situation" (see *mutatis mutandis Boulois v. Luxembourg* [GC], no. 37575/04, § 92, ECHR 2012, where the Court made that point in relation to the assessment of the "existence of a right" under Article 6).

40. Nevertheless, if one were to examine the subject-matter of the misconduct decision, the Applicants respectfully submit that an assessment of "misconduct" or "blameworthiness" for breaches of professional ethics is hardly distinguishable from an assessment of professional reputation. That is

not to say, however, that the Court necessarily made an incorrect assessment in *Marušić* that the proceedings before the faculty bodies were not sufficiently related to her reputation.

41. In this connection, the Applicants wish to reiterate that they have not claimed that Article 6 is applicable to the proceedings leading up to KI's decision. Marušić by contrast claimed an extension of Article 6 to the proceedings at the university. The Applicants submit that it is reasonable that Article 6 is not extended to all non-judicial proceedings, merely because the outcome of those proceedings may damage the individual's reputation. It is, however, essential that decisions by a public authority, which damages an individual's reputation is subject to review by an independent tribunal. One cannot overlook that unlike the Applicants, Marušić did have access to a court to challenge the findings of the faculty bodies before the administrative courts (see *Marušić*, cited above, § 26).

42. Third, the Government relies on *Marušić* in support of its position that the consequences for the Applicants' professional reputation are not sufficient to bring Article 6 into play. Also in this respect, it is relevant that *Marušić* did not concern access to court, but the application of Article 6 to non-judicial proceedings. As the Court observed in *Fayed*, if reputational damage would attract the application of Article 6 to proceedings and investigations carried out by public authorities, these would always need to be subject to the guarantees of judicial procedure. This would in practice unduly hamper effective regulation in different areas (see *Fayed*, cited above, § 62). The threshold for applying Article 6 to non-judicial proceedings on account of reputational damage may therefore be higher than the threshold for the right to challenge a public authority's condemnatory findings of fact or conclusions before a tribunal (compare *Fayed*, cited above, § 64).

43. Fourth, the Government is, in any event, incorrect in its assessment that the consequences of the finding of plagiarism in *Marušić* are more damaging than the finding of research misconduct in their case. Plagiarism is using other

people's work or ideas without giving proper credit to the original source. It constitutes the least serious form of research misconduct. Marušić was also merely charged with having plagiarised parts of her book on anatomy used as course material at undergraduate level at Split University. The Applicants, by contrast, were charged with the most serious forms of research misconduct – fabrication and falsification – in collusion with the infamous Paolo Macchiarini (see the definitions in the European Code of Conduct for Research Integrity, p. 10, enclosure 81). They were held co-responsible for the biggest medical scandal in Swedish history; and charged with defrauding not only students at one university, but the entire medical research profession in some of the foremost medical journals, concerned with world leading cutting-edge medical research.

44. To be clear, the Applicants do not assert that they should be granted an exceptional right of access to court because of the connection with Paolo Macchiarini or because of their roles as whistle-blowers. In the Applicants' submission, a misconduct decision should always be subject to review by an independent tribunal on account of its reputational damage. A finding that a researcher has committed research misconduct calls into question their professional integrity and is liable to invalidate years of research. As set out in the European Code of Conduct, it also "damages the research process, degrades relationships among researchers, undermines trust in and the credibility of research" (see enclosure 81). It almost goes without saying that a finding of research misconduct undermines your credibility, and researchers without credibility can easily be dismissed as unreliable and unimportant.

45. In sum, the Applicants submit that the reputational damage of KI's decision alone is sufficient to grant them a right of access to court under Article 6.

IV. THE MISCONDUCT DECISION INTERFERED WITH THE APPLICANTS' FREEDOM OF EXPRESSION

46. The Applicants further submit that the misconduct decision interferes with their freedom of expression, primarily because the decision constituted a reprisal against them for blowing the whistle and damaging KI's reputation (see for instance *Halet v. Luxembourg* [GC], no. 21884/18, § 149, 14 February 2023, where the Court held that sanctions against whistle-blowers may take different forms, whether professional, disciplinary, or criminal). This aspect of the case is, however, not essential for the applicability of Article 6 § 1 of the Convention, but rather underscores the importance that KI's decision be subject to independent judicial review.

47. Here, the Applicants also wish to emphasise that the allegations against them are manifestly unfounded. KI exaggerates their involvement – holding for instance that the first applicant was a main author (even though he sits at number 9 of 28 on the list of co-authors) and that the fourth applicant was responsible for the stem cell production, which enabled the research (even though her only involvement consisted in drawing a bone marrow sample during the operation of the first patient). And KI overstates their insight into the post operative health status of the patients – holding for instance that the first applicant had direct insight into the discrepancy between the health status of the first patient and the condition described in the article (even though he was not a treating physician and would have breached patient confidentiality under Chapter 4, Sections 1 and 2 of the Patient Data Act, *patientdatalagen*; 2008:355, had he sought to acquired information about the patient through "backchannels", *underhandskontakter*, as KI assumes he did). (See and compare KI's misconduct decision, enclosure 82).

48. In essence, KI blames them for blowing the whistle too late. In the Applicants' submission, however, the misconduct decision cannot be viewed as anything but an attempt from KI to shift its own responsibility on to the Applicants and divert attention from the fact that KI recruited, housed,

propped up and defended Macchiarini for years and would indeed have been best placed to see through his deception and halt his advancement.

V. THE APPLICANTS HAVE A RIGHT UNDER ARTICLE 6 § 1 TO CHALLENGE KI'S FINDINGS BEFORE A COURT

49. In conclusion, the interference of the misconduct decision with the Applicants' civil rights is sufficient to grant them a right of access to court under Article 6 § 1 of the Convention. Finding otherwise would undermine the object and purpose of that provision.

50. Article 6, like all substance provisions of the Convention, is intended to guarantee rights that are not theoretical or illusory, but practical and effective (see *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32). Indeed, the principle of effectiveness is particularly relevant with regard to Article 6, "in view of the prominent place held in a democratic society by the right to a fair trial" (see *Andrejeva v. Latvia* [GC], no. 55707/00, § 98, ECHR 2009 and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 45, ECHR 2001-VIII). And as the Court held in *Delcourt v. Belgium*, the "right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 would not correspond to the aim and the purpose of that provision" (see *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11). Indeed, any exclusion of the application of Article 6 has to be compatible with the rule of law (see *mutatis mutandis Grzęda v. Poland* [GC], no. 43572/18, § 299, 15 March 2022, where the Court underlined this position of principle in relation to the exclusion of judges' access to court in disputes about their status and career).

51. The Applicants submit that where a public authority has acted against whistle-blowers in a public law decision, which cannot be appealed to an independent tribunal, it would be incompatible with the aim and purpose of the right of access to court to deny them that right. This would, however, indeed be the case even if they were not whistle-blowers, in view of the potentially far-

reaching consequences of any misconduct decision and the associated risk of arbitrariness and abuse of power. For this reason, and for the reasons advanced above, the Court is invited to find that Article 6 is applicable to the present case and that the Applicants were entitled to challenge KI's findings before an independent tribunal.

ON THE MERITS

52. On the merits, the Court has invited the parties to deal with the following question: "did the applicants have access to a court for the determination of their civil rights and obligations, in accordance with Article 6 § 1 of the Convention?". The short answer is no. Under Chapter 12, Section 4 of the Higher Education Ordinance (*högskoleförordningen*; 1993:100), KI's misconduct decision is not subject to appeal. The administrative courts dismissed the Applicants' request that the prohibition on appeal be set aside to avoid a violation of their right of access to court. As a consequence, the misconduct decision was not open to review by either the administrative courts, the ordinary courts, or by any other body which could be considered to be a "tribunal" for the purposes of Article 6.

53. Still, the Government has left it to the Court to decide whether the Applicants had access to court (see the Government's observations, para 45). It would befit the Government to acknowledge that if Article 6 is engaged, there has inevitably been a violation of the Applicants' right of access to court.

54. In close to a dozen other cases against Sweden, the Court has already found a violation of Article 6 § 1 where a public law decision concerning an applicant's civil rights was subject to a prohibition on appeal (see *Sporrong and Lönnroth v. Sweden,* 23 September 1982, Series A no. 52, §§ 80 och 87, *Pudas v. Sweden*, 27 October 1987, §§ 40-41, Series A no. 125-A, *Bodén v. Sweden*, 27 October 1987, Series A. no. 125-B, §§ 35–37 and 41, *Tre Traktörer Aktiebolag v. Sweden*, 7 July 1989, Series A. no. 159, §§ 47–50, *Allan Jacobsson v. Sweden, No. 1*, 25 October 1989, Series A no. 163, §§ 76–

77, *Håkansson and Sturesson v. Sweden*, 21 February 1990, Series A no. 171-A, §§ 62–63, *Mats Jacobsson v. Sweden*, 28 June 1990, Series A no. 180-A, §§ 36–37, *Skärby v. Sweden*, 28 June 1990, Series A no. 180-B, §§ 31–32, *Fredin v. Sweden, No. 1*, 18 February 1991, Series A no. 192, § 63, *Zander v. Sweden*, 26 November 1993, Series A no. 279-B, § 29 and *Karin Andersson and Others v. Sweden*, no. 29878/09, § 70, 26 June 2014). There is no ground to find otherwise here.

55. The only possible action for the Applicants to overturn KI's decision and cancel its effects was through an appeal to the administrative courts. The administrative courts' enforcement of the prohibition on appeal, and their refusal to examine the Applicants' case on the merits, thus impaired the very essence of their right of access to court.

56. If the Court, nevertheless, were to assess legitimate aim and proportionality, the Government would be hard-pressed to mount a defence for the lack of judicial review for the following reasons.

57. First, the consequences of an adverse finding of misconduct are potentially devastating for the individual researcher. The handling of cases of misconduct should, therefore, not be left to the sole discretion of public institutions under the Government, acting both as judge and prosecutor. In this situation, and to again borrow the words of this Court in *Golder*, "one can scarcely conceive of the rule of law without there being a possibility of having access to the courts" (see *Golder*, cited above, § 34).

58. Second, KI was biased and should not itself have handled the misconduct investigation in the first place. KI appointed, housed, and lent credibility to Paolo Macchiarini's research by virtue of the institution's strong ranking and reputation in the medical research community. KI then defended Paolo Macchiarini and even rejected the first three applicants' allegations against Macchiarini as unfounded – until the TV documentary made this position untenable (see the Applicants' observations on the facts, para 15). At the time of the impugned misconduct decision in 2018, all four Applicants had

unveiled malpractices and fraud, which had damaged KI's reputation. KI, therefore, had incentive to retaliate against the Applicants and hold them responsible. Under these circumstances, the risk of arbitrariness and abuse and the need for independent judicial review are indisputable.

59. Third, the Applicants were denied their due process right under the Swedish Administrative Act to access all relevant documents and data (see Section 25 of the Administrative Act, *förvaltningslagen;* 2017:900); and they were not given a fair opportunity to answer to the allegations levelled against them prior to the delivery of the decision (see by contrast *Fayed*, cited above, § 39, where the investigators were under a duty to act fairly and to give anyone subject to criticism in their report a fair opportunity to answer the allegations). To make matters worse, the rapporteur in charge of advising the Vice-chancellor on the medical and ethical issues was biased. Indeed, he himself had previously admitted that his involvement in the ethical approvals prior to the transplants would disqualify him from handling the case in the future (see Sections 16 and 18 of the Administrative Act, and email correspondence where the rapporteur expresses his bias, enclosure 83 and where a lawyer at KI concedes that the rapporteur was appointed, despite having notified KI of his bias, enclosure 84).

60. Fourth, the lack of independent judicial review in this particular context discourages potential whistle-blowers in the medical profession, which leads to serious patient safety risks (see statement submitted by the Swedish Medical Association, enclosure 55).

61. In conclusion, the Applicants were held complicit in the biggest medical scandal in Swedish history, in a public law decision, which could not be appealed, was reached without regard for the Applicants' due process rights, had far reaching consequences for the Applicants' research careers and constituted a reprisal against them for blowing the whistle on malpractice and fraud. The lack of judicial review cannot therefore be justified as proportionate under Article 6. There is no room or margin to find otherwise.

JUST SATISFACTION CLAIMS

I. NON-PECUNIARY DAMAGES

62. Sweden has impaired the very essence of the Applicants' right of access to court under Article 6 § 1 of the Convention. Having regard to the seriousness of the violation and the negative feelings of frustration, uncertainty, and anxiety caused by the violation, the Court is respectfully asked to award, on an equitable basis, EUR 5,000 to each of the Applicants in respect of non-pecuniary damages.

II. COSTS AND EXPENSES

63. Upon finding a violation, the Court is also asked to order the Government to reimburse the Applicants for costs and expenses incurred in the case, with an interest rate applied as the Court considers appropriate.

64. At this stage, the Applicants claim compensation for their legal costs amounting to EUR 36,150 for a total of 241 hours at an hourly rate of EUR 150 with respect to: preparing and drafting the application to the Chancellor of Justice: 100 hours, preparing and drafting the application to the Court: 60 hours, written submission on friendly settlement: 1 hour, written observations on the admissibility and merits, claims for just satisfaction and observations on the Government's statement of facts: 80 hours.

65. These legal costs have not yet been paid to undersigned counsel, but the Applicants are under a contractual obligation to do so if the Court finds a violation and awards compensation for legal costs (see Centrum för rättvisa's terms of engagement, enclosures 85–88).

66. The first and fourth applicant were represented by another law firm before the first instance administrative court. They jointly claim compensation for the legal fees incurred there, amounting to SEK 185,282 (see enclosures 89 and 90).

67. The Applicants wish that any award for non-pecuniary damage and costs and expenses be made jointly into the bank account of their representative:

Name of representative: Fredrik Bergman Evans

[redacted]

Address: Box 2215, 103 15 Stockholm, Sweden

THE CHAMBER IS INVITED TO CONSIDER RELINQUISHING JURISDICTION IN FAVOUR OF THE GRAND CHAMBER

68. Article 6 § 1 of the Convention applies in the present case and the Applicants were therefore entitled to challenge the findings and conclusions of KI before an independent tribunal. The Court need not depart from its established case-law to make a finding to that effect.

69. Yet, both *Marušić, Angerjärv and Greinoman,* and the reasoning of the domestic courts and the Government in this case show that there is a need to clarify the standards under Article 6 § 1. The right of access to court is an indispensable safeguard against arbitrariness and abuse of power. It is the very bedplate on which the rule of law rests. It is therefore essential that the threshold criteria under Article 6 are unambiguous, easy to apply and in line with the rule of law ideals underpinning the aim and the purpose of Article 6 and indeed the Convention as a whole. Unfortunately, they are not today.

70. For these reasons, the Applicants submit that their case raises serious questions affecting the interpretation of the Convention. Their case presents a pressing opportunity for the Court to clarify the standards under Article 6 and reinforce the importance of the right of access to court as a safeguard against arbitrariness and abuse. The First Section Chamber is therefore respectfully invited to consider relinquishing jurisdiction in favour of the Grand Chamber under Article 30 of the Convention.

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ELMER JONSTOIJ BERG
Advisor