Government Offices of Sweden

Ministry for Foreign Affairs
Department for International Law and Human Rights

Stockholm, 8 March 2024
UDFMR2023/24/ED

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application no. 37988/21

Grinnemo and Others

v.

Sweden

OBSERVATIONS OF THE SWEDISH GOVERNMENT ON THE ADMISSIBILITY AND MERITS

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1. Introduction

1. These observations are submitted on behalf of the Swedish Government in response to the letter of the European Court of Human Rights ('the Court') dated 15 December 2023, inviting the Government to submit a statement of facts and written observations on the admissibility and merits of the application introduced by Mr Karl-Henrik Grinnemo ('the first applicant'), Mr Oscar Simonson ('the second applicant'), Mr Matthias Corbascio ('the third applicant') and Ms Katarina Le Blanc ('the fourth applicant').

2. The Government's statement of facts

2.1 The Court's description of the case

2. The description of the subject matter of the case prepared by the Registry appears to be essentially correct. The Government would, however, like to make some minor clarifications.

3. In the Court's description, it is stated that several co-authors, including the first and fourth applicants, were found guilty of research misconduct. However, the word guilty (*skyldig*) cannot be found in the operative part of the decision from Karolinska Institutet ('KI'). Instead, under the heading "Decision", KI states that Karl-Henrik Grinnemo and Katarina Le Blanc, among others, are responsible (*ansvariga*) for research misconduct.

4. In the Court's description it is also stated that KI issued a decision "related to" the six articles in question. While it may be perceived as a minor semantic question, the Government holds that it is of importance to clarify that the decision is not merely "related" to the articles in question; rather, it is based entirely on the research presented in the six articles.

2.2 The circumstances of the case

5. In 2016 the management of KI decided to reopen an investigation on suspicions of research misconduct regarding research presented in six published articles. Paolo Macchiarini was the main author of the six articles reporting new scientific findings on transplantation of a synthetic prosthesis in the trachea in three patients.

6. In June 2016, KI requested the Expert Group for Misconduct in Research at the Central Ethical Review Board to comment on the relevant circumstances. In its observations of 20 October 2017, the Expert Group concluded that all six articles contain information that constitutes research misconduct and that all authors were responsible for scientific misconduct.

7. In a decision of 25 June 2018, KI found that the research presented in the six reviewed articles constituted research misconduct.

8. Among other things, KI found that descriptions of patient's health condition and data had been fabricated. In several cases, the relevant patients had died before the articles in question were published, without this being mentioned. In two articles, there was no ethical approval and incorrect information in the articles stated that such approval had been obtained.

9. Under the heading "Author's responsibility", KI identifies three levels of responsibility: namely, "responsible for research misconduct", "blameworthy" and "not responsible for research misconduct or blameworthy".

10. KI holds that the assessment of the responsibility of an individual author depends on the extent to which they have contributed to the work. If the researcher has contributed a small part of the work, this can be considered blameworthy, but does not in itself constitute misconduct if the data reported by the researcher is correct. Furthermore, it can be blameworthy if the researcher has not evaluated the data contributed by other co-authors.

11. In the decision, the first and the fourth applicant, among others, are considered responsible for research misconduct. The second and the third applicant, among others, are considered blameworthy but not to such a degree that they are responsible for research misconduct. Finally, KI decides that the journals concerned must be notified with a request for the articles to be retracted immediately.

12. The decision from KI also describes the University's procedure for handling suspicions of misconduct. According to this procedure, suspicions of misconduct should be reported to the Vice-Chancellor who is responsible for having the matter investigated. The investigation is to be carried out by a specially appointed administrator at the University Administration. If appropriate, the investigation

should be conducted in consultation with the Head of Department and/or a lawyer. The Vice-Chancellor decides the matter either by dismissing it without action or, if misconduct is found to have occurred, by deciding on appropriate action.

13. The applicants appealed the decision of 25 June 2018 to the Administrative Court in Stockholm. In its transmission to the court, KI stated that the relevant decision could not be subject to appeal in accordance with Chapter 12, Section 4 of the Higher Education Ordinance (1993:100).

14. On 6 November 2018, the Administrative Court decided to dismiss the appeals.

15. The Administrative Court referred, inter alia, to the case of *Fayed v. the United Kingdom* (21 September 1994, Series A no. 294-B) in the European Court of Human Rights. The Administrative Court further noted that a decision on research misconduct had not been considered a civil right or obligation under Article 6 of the European Convention on Human Rights ('the Convention') in Swedish case law.

16. In conclusion, the Administrative Court found that KI's decision did not mean that the University determined the applicants civil rights according to Article 6. The Administrative Court therefore considered that the prohibition on appeal in Chapter 12, Section 4 of the Higher Education Ordinance did not conflict with Article 6 of the Convention.

17. The applicants appealed to the Administrative Court of Appeal and subsequently to the Supreme Administrative Court. However, neither court granted leave to appeal.

18. Thereafter, the applicants turned to the Chancellor of Justice with a request for compensation. The applicants claimed that the prohibition on appeal in the Higher Education Ordinance was in violation of their right to access to court under Article 6 of the Convention.

19. On 24 February 2021, the Chancellor of Justice rejected the application. In her ruling, the Chancellor of Justice noted, inter alia, that the Administrative Court

had presented in-depth reasons for its decision on whether the decision could be appealed.

2.3 Relevant domestic law

20. The Swedish Higher Education Act (1992:1434) contains provisions relating to higher education institutions for which the accountable authority is the Government, where 'higher education institution' refers to universities and university colleges unless otherwise specified. KI is a university for which the accountable authority is the Government.

21. The Higher Education Act stipulates that higher education institutions shall uphold academic credibility and good research practice (Chapter 1, Section 3 a). This provision has remained the same since its introduction in 2001.

2.3.1 Relevant legal framework on research misconduct

2.3.1.1 Before 1 January 2020

22. The articles relevant to the present case were published in 2011 and 2013 respectively. The first reports of suspected research misconduct were submitted in 2014, and KI delivered its decision in 2018.

23. At the time of the publication of the relevant articles and the subsequent investigation, Chapter 1, Section 16 of the Higher Education Ordinance stipulated that the relevant higher education institution is responsible for handling suspected research misconduct.

24. The relevant provision was worded as follows until 1 January 2019.

> "A higher education institution that receives a complaint or becomes aware in some other way of suspected misconduct in research, artistic research or development work at the higher education institution shall investigate the suspicions.
>
> During its investigation the higher education institution may request an opinion from the expert

> panel on research misconduct at the Central Ethical Review Board.
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> If requested by the individual submitting a complaint about suspicion of misconduct or the subject of the complaint, the higher education institution shall request an opinion of this kind. No opinion need be requested, however, if the higher education institution considers it manifestly unnecessary."

25. On 1 January 2019 the second paragraph of the provision was amended in such a way that the Central Ethical Review Board was replaced by the Ethics Review Appeals Board. The provision remained in place until 1 January 2020.

26. According to Chapter 12, Section 4 of the Higher Education Ordinance, appeals against decisions by a higher education institution on matters other than those stated in this chapter may only be made if this is permitted by a statute other than the Administrative Procedure Act (2017:900). A decision by a higher education institution on research misconduct was covered by the prohibition on appeal in the Higher Education Ordinance at the time of the relevant decision.

27. Furthermore, prior to 1 January 2020 there was no legal definition of research misconduct in Swedish legislation. Higher education institutions either did not define the concept or used different definitions that could be equated with the concept of deviations from good research practice.

28. At the time when the work on the published articles was carried out, KI did not have an established definition of the concept of research misconduct. In the decision of 2018, KI referred primarily to two international guidelines on professional ethics: the Vancouver Rules and the European Code of Conduct for Research Integrity, published by All European Academies (ALLEA).

29. The Vancouver Rules, published by the International Committee of Medical Journal Editors, that were valid and effective in 2011 were published in 2008 and include criteria for authorship.

30. The European Code of Conduct for Research Integrity was first published in March 2011. In particular, the Code highlights three forms of deviation from good research practice: fabrication (making up results and documenting them as

correct), falsification (manipulating the research process or altering or excluding data) and plagiarism (using other people's work or ideas without properly citing the original source). Furthermore, ALLEA states in the Code that other forms of deviations from good research practice include shortcomings in meeting clear ethical and legal requirements.

31. In addition, the Government wishes to emphasise that the authors of the articles in question signed the declarations of the relevant journals, which among other things concerned the authors' responsibility for the content of the articles.

2.3.1.2 Since 1 January 2020

32. On 1 January 2020 the Act (2019:504) on Responsibility for Good Research Practice and the Examination of Research Misconduct entered into force. In the Act, 'research misconduct' is defined as a serious deviation from good research practice in the form of fabrication, falsification or plagiarism that is committed intentionally or through gross negligence when planning, conducting or reporting research.

33. If there is a suspicion of research misconduct in the activities of the entity responsible for research, the entity must submit the case documents for examination by the Swedish National Board for Assessment of Research Misconduct ('the Board'). The subsequent examination by the Board must be presented in a decision (Section 9).

34. A decision by the Board in accordance with Section 9 may be appealed to an Administrative Court. Other decisions under the Act cannot be appealed. Leave to appeal is required for appeals to the Administrative Court of Appeal (Section 21).

35. The Board does not decide on any disciplinary sanctions directed towards a researcher. It only assesses whether research misconduct has occurred. If the Board has decided that research misconduct has occurred, or a decision from the Board states that there has been a serious deviation from good research practice in the form of fabrication, falsification or plagiarism without being able to determine intent or gross negligence, the entity responsible for research must, within six months of the decision coming into force, submit a report to the Board on the measures it has taken or intends to take due to the decision (Section 13).

36. The entity responsible for research must also, as soon as the decision has been made, inform the relevant research financiers, public agencies, scholarly journals and other stakeholders about the decision. Moreover, the entity responsible for research must inform them that the decision may be appealed (Section 14).

37. When the Act on Responsibility for Good Research Practice and the Examination of Research Misconduct entered into force, some changes were made to the Higher Education Ordinance. According to the relevant provision in the Ordinance, higher education institutions must examine suspected deviations from good research practice in addition to those to be examined under the Act. Higher education institutions must also draw up guidelines for the examination of suspected deviations from good research practice.

38. Finally, the Government wishes to emphasise that, in the relevant Government Bill (prop. 2018/19:58), it was never put forward that allowing appeal of a decision on research misconduct was required in light of Article 6 of the Convention.

3. The scope of the Government's observations

39. The Government has been asked to deal with the following question in its observations:

"1. Was Article 6 § 1 of the Convention under its civil head applicable to the proceedings in the present case (see, for example, Marušić v. Croatia (dec.), no. 79821/12, §§ 71-78, 23 May 2017; Angerjärv and Greinoman v. Estonia, nos. 16358/18 and 34964/18, §§ 95-102, 4 October 2022; and Fayed v. the United Kingdom, 21 September 1994, § 60-63, Series A no. 294-B)?"

If so, 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?"

40. The Government notes that the remainder of the application, i.e. the complaint under Articles 8, 10 and 13, has been declared inadmissible by the Court as the conditions of admissibility provided for in Articles 34 and 35 of the Convention were not fulfilled.

41. Moreover, the Government interprets the application and the Court's description of the case as mainly focused on the question of whether KI's decision

had such directly decisive consequences for the applicants' right to exercise their profession, their professional reputation or their freedom of expression that Article 6 § 1 under its civil limb becomes applicable. This division is also consistent with the structure of the Court's judgment in the similar case of *Marušić v. Croatia* ([dec.]no. 79821/12, 23 May 2017).

42. Accordingly, the Government will divide its observations into three sections dealing with alleged consequences to the applicants' right to exercise their profession (Section 4.2), the applicants' professional reputation (Section 4.3), and their freedom of expression (Section 4.4).

4. On the admissibility and merits

4.1 The Government's position

43. The Government contends that Article 6 § 1 of the Convention was not applicable to the proceedings in the present case and that the applicants' complaint should therefore be declared inadmissible as being incompatible *ratione materiae* with the provisions of the Convention. The reason for this contention will be elaborated below.

44. In line with the above, the Government holds that there is no reason for the Court to proceed with an examination of the second part of the question to the Parties.

45. However, should the Court conclude that Article 6 § 1 was applicable to the proceedings, the Government leaves it to the Court to decide whether the applicants had access to a court for the determination of their civil rights and obligations.

4.2 The applicants' right to exercise their profession

46. The Court has repeatedly held that disciplinary proceedings that do not directly interfere with the right to continue to practise a profession, since such an outcome requires the institution of separate proceedings, are not "decisive" for the purposes of Article 6 (*Marušić v. Croatia*, §§ 74-75). What is important in the assessment is the sanctions which an individual risked incurring in the disciplinary proceedings.

47. In the Marušić case, the Court noted that the possible sanctions that could be imposed by the Integrity Court were reprimand, public reprimand, proposal for the institution of proceedings for the adoption of a disciplinary sanction for serious breaches of work duties, and an ancillary sanction of suggesting the institution of proceedings for removal of a teacher from the position which he or she occupied in the faculty. The Court further noted that dismissal as one of the possible sanctions was only remotely put into the prospect with further proceedings being necessary in order for dismissal to be even potentially applied (§ 74). The Court finally noted that such a prospect of dismissal cannot be equated to the situation where the possibility of suspension of the right to continue with a professional activity is a sanction which may be applied directly in the context of disciplinary proceedings (§ 75).

48. The Government holds that the relevant criteria from the Marušić case are not fulfilled in the present case.

49. Firstly, it is unquestionable that the decision from KI did not have any direct disciplinary effect on the applicants' right to practice their profession. As was the case in *Marušić v. Croatia*, this would require separate disciplinary proceedings.

50. Furthermore, it has not even been alleged that KI could initiate proceedings expressly aimed at removing the applicants from their relevant positions. Accordingly, the applicants did not even risk any sanctions with directly decisive consequences to their right to exercise their profession in the proceedings before KI. This is entirely logical as the decision is primarily aimed at the research that is reported in the relevant articles and whether it constitutes research misconduct.

51. Consequently, as regards the applicants' right to exercise their profession, the Government holds that the proceedings in the present case are even further from bringing Article 6 into play than the Marušić case.

52. In addition to *Marušić v. Croatia*, the Court refers to the case of *Angerjärv and Greinoman v. Estonia* (nos. 16358/18 and 34964/18, 4 October 2022*)* in its question to the Parties.

53. In the latter case, the Court found that Article 6 was not applicable to a decision whereby two lawyers had been removed from civil proceedings for obstructing the proceedings and for inappropriate behaviour. The Government

notes that the Court took into consideration not only whether the proceedings as such had been disciplinary, but also the impact of the measure on the right to practise their profession (§ 100).

54. Turning to the present case, the Government holds that irrespective of how the proceedings were categorised, any claims as regards the potential consequences to the applicants' right to exercise their profession appear speculative and not directly decisive enough to bring Article 6 into play.

55. Accordingly, the Government contends that the determination of the applicants' civil right to exercise their profession was neither the primary purpose of the decision-making process nor were the proceedings directly decisive for the right in question.

56. In line with the above, the Government concludes that the applicants have failed to show that the claimed restrictions on their right to exercise their profession rendered Article 6 under its civil limb applicable.

4.3 The applicants' reputation

57. The Government does not contest that consequences to an applicant's reputation may put Article 6 under its civil limb into play. This has, inter alia, been the case when the outcome of the domestic proceedings depends on an assessment of an unjustified attack and harm to good reputation (*Helmers v. Sweden*, no. 11826/85, § 29, 29 October 1991).

58. However, the Government holds that the circumstances of the present case clearly differ from the cases where Article 6 has been considered applicable with regard to the applicant's reputation.

59. First of all, the right to a good name and reputation does not mean that Article 6 applies to all proceedings in which a person is subject to negative judgment. In *Fayed v. the United Kingdom*, which concerned a public inquiry into the Fayed brothers and their acquisition of a chain of department stores, the Court found that the investigators had only investigative duties and that it was not for them to establish, as referred to in Article 6, the civil rights of the Fayed brothers. Therefore, Article 6 did not apply to the investigation procedure in question.

60. Furthermore, in *Marušić v. Croatia*, proceedings instituted against the author of a book for alleged plagiarism were not considered directly decisive, from an Article 6 standpoint, for the author's civil right to enjoy a good reputation (§§ 72 and 73).

61. In the Marušić case, the Court stated that it was not the applicant's professional reputation in itself which was the subject matter of the proceedings, but rather the question of whether she had plagiarised parts of her book.

62. The question of good reputation was only remotely related to the proceedings in question as one of the possible consequences of the findings of plagiarism. Furthermore, the Court took into consideration that the applicant continued exercising her profession as a university teacher and researcher by assuming functions in the University of Split School of Medicine.

63. Turning to the present case, the Government notes that, similarly to *Marušić v. Croatia*, the applicants' professional reputation in itself was not the subject matter of the proceedings leading to KI's decision. Instead, it was the question of whether the research presented in the relevant articles should be considered research misconduct. The question of good reputation was only remotely related to the proceedings in question as one of the possible consequences of the findings of misconduct.

64. The Government further notes that the Court, when assessing the consequences to the applicant's professional reputation in the Marušić case, took into consideration potential consequences in relation to her employability.

65. In this regard, the Government limits itself to refer the Court to the applicants' *curriculum vitae* attached to the application.

66. Although the Government does not consider this issue to be of decisive importance for the applicability of Article 6, it is clear that even after the decision from KI, the applicants have held important positions in their respective fields. The claim that the applicants have been "ostracised by large parts of the research community" appears speculative and insufficient to bring Article 6 into play.

67. The Government holds that the abovementioned is sufficient to conclude that Article 6 was not applicable with regard to the claimed consequences to the applicants' professional reputation.

68. Notwithstanding this, the Government wishes to respond to some of the additional claims made by the counsel in connection with the fourth applicant's professional reputation in particular.

69. In the application, it is stated that a subsequent decision on a reminder addressed to the fourth applicant takes into consideration the consequences of the misconduct procedure as one of several reasons for settling for a reminder.

70. In this regard, the Government wishes to clarify that it has never claimed that the decision on research misconduct did not have any consequences. However, the Government notes that according to the application to the Court, the fourth applicant is still in a high-ranking position as a professor.

71. Again, the Government wishes to refer to the judgment in *Marušić v. Croatia*, where the Court noted that the damage to the applicant's reputation had certain consequences, such as the loss of a scholarship and difficulties in regaining her position at the University in Zagreb, which is why she subsequently taught in Split. However, this was not in itself considered enough to make Article 6 applicable.

72. The Government sees no reason why the circumstances of the present case warrant a different conclusion from the one from *Marušić v. Croatia* with regard to the fourth applicant.

73. In summary, the Government holds that the proceedings in question did not affect the applicant's professional reputation sufficiently seriously for Article 6 to apply.

4.4 The applicants' freedom of expression

74. Initially, the Government notes that the application as regards the applicants' freedom of expression according to Article 10 has been declared inadmissible by the Court.

75. Furthermore, any potential connection between the decision from KI and the applicants' freedom of expression appears speculative and far from sufficient to make Article 6 applicable.

76. There is obviously no right to be published in certain reputable scientific journals. Notwithstanding this, there is no evidence that the applicants have been stopped in any way from having articles published. As can be seen from the *curriculum vitae* submitted by the applicants, they have had a large number of articles published both nationally and internationally after KI's decision.

77. In summary, the Government holds that there is no support for the assertion that the applicants' freedom of expression was affected by the decision from KI in such a way that they had a right of access to court in accordance with Article 6.

4.5 Summary

78. In the above, the Government has examined the relevant aspects previously taken into account by the Court in order to assess the applicability of Article 6 in similar cases.

79. The Government's conclusion is that the relevant criteria have not been fulfilled in this respect, as the decision from KI did not have such directly decisive consequences for the applicants' right to exercise their profession, their professional reputation or their freedom of expression that Article 6 under its civil limb becomes applicable.

5. Conclusion

80. In conclusion, the position of the Government is that the applicants' complaint is incompatible *ratione materiae* with the provisions of the Convention. The complaint should therefore be rejected in accordance with Article 35 § 4 of the Convention.