Government Offices of Sweden

Ministry for Foreign Affairs
Director-General for Legal Affairs

Stockholm, 16 April 2024
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IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application nos. 12908/23 and 24544/23

Paic and Wernersson

v.

Sweden

FURTHER OBSERVATIONS OF THE SWEDISH GOVERNMENT

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1. Introduction

1. These further observations are submitted on behalf of the Swedish Government in response to letters of the European Court of Human Rights ('the Court') dated 19 March 2024, inviting the Government to submit its comments concerning the claims for just satisfaction and any further observations it wishes to make regarding the applications lodged by Mr Zdravco Paic and Mr Bengt Wernersson respectively.

2. The Government maintains its position on the admissibility and merits, as submitted in its observations of 8 January 2024, and wishes to make a few clarifications and additions in response to the applicants' observations of 27 February 2024. The Government would also like to clarify that if there are aspects of the applicants' observations that are not addressed in the paragraphs below, this should not be interpreted as an acceptance of those assertions.

2. Further comments on the facts

3. Initially, the Government wishes to submit the following with regard to the facts of the cases. While fully respecting the difficult situation in which the applicants find themselves, the Government has formulated the facts with certain caution, having regard to the lack of documentation as to the course of events in their cases. This should not be interpreted as an attempt to cast suspicion on the applicants' statements.

4. Moreover, regarding the applicants' submission relating to a complaint to the Health and Social Care Inspectorate (para. 5 of the applicants' observations on the facts), the Government holds that this does not affect the question of whether domestic remedies have been exhausted. The Health and Social Care Inspectorate cannot examine whether there has been a violation of the of the European Convention on Human Rights ('the Convention'), nor decide on monetary compensation. It is undisputed that the applicants have not exhausted any domestic remedies (para. 35 of the Government's initial observations).

5. As to the applicants' submission that it is not possible to consent to a procedure without being aware of it, the Government has not questioned their view on this point. The Government nonetheless refers, also in this respect, to the lack of documentation in their cases. The material available to the Government is the applicants' own account for the events, and the Government has formulated

the facts accordingly. It may be reiterated that Region Halland's internal and external investigations were conducted at a system level, and cannot be considered to constitute documentation on individual cases.

3. Further comments on the admissibility

6. Regarding the admissibility of the applications, the Government would initially like to clarify that the remedy which it considers effective and available in the applicants' cases is a lawsuit before a general court to seek compensation for alleged breaches of the Convention. The Government has not claimed that a complaint with the Chancellor of Justice was an effective remedy in their cases.

7. Moreover, insofar as the applicants raise arguments as to the potential costs of domestic proceedings (para. 26 of the applicants' observations), the Government holds that this should not impact the question of whether they were required to exhaust domestic remedies (*D. v. Ireland* (dec.), no. 26499/02, § 100, 27 June 2006).

8. As to the fact that the relevant acts occurred before the Convention was incorporated into Swedish law, the Government does not share the applicants' view that the Supreme Court's case-law is based on the assumption that the Convention constitutes Swedish law. It is true that the Supreme Court in case NJA 2005 p. 462 noted that Article 13, and the remaining parts of the Convention, constitute Swedish law (para. 22 of the applicants' observations). However, the Government holds that this circumstance was not decisive for the conclusion on the right to damages. In fact, in several of the cases relied on by the Government in this part (para. 24 of the Government's initial observations), the acts constituting a violation of the Convention occurred before the Convention was incorporated into Swedish law and the Supreme Court considered that damages were to be awarded.

9. For instance, case NJA 2007 p. 584 concerned children who had been medically examined based on a decision by the Police Authority. Since the Police Authority's decision had been taken without legal basis, the medical examination was considered to constitute a violation of Article 8 of the Convention, and the State was ordered to pay damages to the children and their parents. The impugned decision by the Police Authority had been taken in 1993, i.e. two years before the incorporation. That this circumstance was taken into consideration in the case follows from the lower instances' rulings, where the Court of Appeal explicitly

stated that the fact that the Convention acquired the status of Swedish law only in 1995 did not alter its assessment that there was a right to damages based on the Convention. It is thus clear that damages can be awarded for Convention violations having occurred before the Convention was incorporated into Swedish law.

10. In this context, the Government wishes to comment on the applicants' claim that the Supreme Court had expressly stated that domestic courts apply the Convention as Swedish law and not as an international treaty (para. 24 of the applicants' observations). The applicants refer to case NJA 2012 p. 1038. The Government wishes to draw attention to the fact that the statement is taken out of its context and not correctly reproduced. The relevant parts of the judgment state the following (paras. 13–15 of the judgment).

> In addition to the fact that Sweden is bound by the Convention as a matter of constitutional law (*statsrättsligt bunden*), the Convention constitutes Swedish law pursuant to the Incorporation Act (*lagen 1994:1219 om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*). The Convention can thus, in legal practise, have significance in two different respects.
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> The Convention as an instrument of constitutional law is of importance for the courts primarily when it is questioned whether Swedish law or case-law means that Sweden is responsible for a Convention violation. If this is the case, it may lead to the Swedish order having to be set aside or modified through case-law so as to conform to the Convention. [...]
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> In a case before Swedish courts regarding the question of whether the State has respected the individual's rights under the Convention, it is primarily the status of the Convention as Swedish law that is of importance. [...]

11. It follows that the Swedish courts' application of the Convention is not limited to its status as Swedish law. The statements in the above case must also be seen in the light of the fact that the Convention today, and at the time of the Supreme Court's judgment, constitutes Swedish law through the Incorporation Act.

12. Turning to the question of limitation period, the applicants submit that there is no indication that the Region would waive its right to rely on the limitation

period (para. 18 of the applicants' observations). The Government notes that the applicants have not raised any claims before the Swedish courts, and that there is not, either, any expressed intention by the defendant to object that such claims would be statute-barred if proceedings were initiated. In any event, the applicants' prospects of having a claim examined in substance by a Swedish court are sufficient to conclude that they were required to exhaust that remedy, even if the issue of limitation were to be raised.

13. Concerning the applicants' observations on cases NJA 2018 p. 103 and T 2760-23 (paras. 12–17 of the applicants' observations), the Government wishes to clarify the following. Firstly, the reason for mentioning these cases was to show that there is room for bringing an action before the courts and succeeding with an argument that the limitation period does not start to run until the individual has had a real possibility to raise his or her claim. The Government cited NJA 2018 p. 103 also to illustrate the considerations that may lead to an exception from the general rule on the starting point of the limitation period (paras. 31 and 47 of the Government's initial observations). Secondly, it does not follow from doctrine that the exception in NJA 2018 p. 103 cannot be applied in any other circumstances (cf. para. 12 of the applicants' observations).

14. Domestic case-law develops on the basis that legal principles should be applied in a relatively similar way in similar circumstances. It is thus not unreasonable to consider that the position taken on limitation periods regarding rights and freedoms in the Instrument of Government also bears a role for the rights and freedoms in the Convention.

15. The Government therefore maintains that, having regard to legislative history and case-law, there is room for considering that the applicants' claims are not statute barred. It is not unreasonable to consider that a Swedish court, if given the possibility to examine the matter, would reach such a conclusion.

16. In sum, neither the circumstance that the acts occurred before the Convention was incorporated into Swedish law, nor the domestic provisions on statutory limitation, can dispense the applicants from the obligation to exhaust domestic remedies. It is clear from the elements presented by the Government that the remedy indicated is effective and available to the applicants in the present cases. Moreover, even if the applicants would doubt the effectiveness of the remedy because a certain issue has not yet been explicitly dealt with by domestic case-law, the Government holds that this is not a reason to exempt them from the

requirement to use the remedy. On the contrary, the applicants should bring the matter before the courts and give them the possibility to examine whether, by interpreting Swedish law in conformity with the Convention, the State can fulfil its Convention obligations (cf. *Ciupercescu v. Romania*, no. 35555/03, § 169, 15 June 2010 and *D. v. Ireland* (dec.), cited above, § 85).

17. Finally, the Government emphasises the subsidiary nature of the protective mechanism of the Convention and reiterates the rationale for the rule on exhaustion of domestic remedies, namely, to afford the national authorities, primarily the courts, the opportunity to prevent or put right alleged violations of the Convention (*Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 115, 9 July 2015). The Court is not a court of first instance, and States should not have to answer before an international body for their acts before they have had an opportunity to put matters right through their own legal system (*Demopoulos and Others v. Turkey* (dec.) [GC], no. 46113/99 and others, § 69, 1 March 2010). In the present cases, the applicants have not taken appropriate steps to enable the national authorities to fulfil their role in the Convention protection system.

4. Comments on the claims for just satisfaction

18. The applicants each claim compensation for non-pecuniary damage of EUR 10 000. Should the Court examine the cases on the merits and arrive at the conclusion that there has been a violation of the Convention, the Government does not object to this claim in the circumstances of their cases.

19. The applicants also jointly claim compensation for legal costs of EUR 18 300 for a total of 122 hours' work. Should the Court examine the cases on the merits and find a violation of the Convention, the Government holds that any sum awarded under this head should not, for both cases jointly, exceed compensation for 60 hours' work at the Swedish hourly legal aid rate (*rättshjälpstaxa*), which for 2024 is SEK 1 531 (see, concerning the relevance of the rates applied in the respondent State, *Iatridis v. Greece (Just Satisfaction)* [GC], no. 31107/96, § 57, 19 October 2000).