

# The Swedish Parliamentary Ombudsmen

Report for the period  
1 July 2011 to 30 June 2012

**SUMMARY IN ENGLISH**

BILAGA 10

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#### 1. General information and statistics

Ms. Cecilia Nordenfelt retired from her post as Chief Parliamentary Ombudsman on 30 May 2012. The Riksdag appointed Ms. Elisabet Fura to be Chief Parliamentary Ombudsman from 1 June 2012.

During the period covered by the report, the following have held office as Parliamentary Ombudsmen: Ms. Cecilia Nordenfelt (Chief Parliamentary Ombudsman up until 30 May 2011), Ms. Elisabet Fura (Chief Parliamentary Ombudsman from 1 June 2012), Mr. Hans-Gunnar Axberger, Ms. Lilian Wiklund, Mr. Lars Lindström. For a number of shorter periods the Deputy Ombudsmen Mr. Jan Pennlöv and Mr. Hans Ragnemalm have dealt with and adjudicated on supervisory cases.

During the working year, 7,013 new cases were registered with the Ombudsmen; 6,817 of them were complaints (previous working year: 6,816) and 98 were cases initiated by the Ombudsmen themselves on the basis of observations made during inspections, newspaper reports or on other grounds. Another 98 cases concerned new legislation, where the Parliamentary Ombudsmen were given the opportunity to express their opinion on government bills etc.

6,908 cases were concluded during the period, a reduction of 153 (-2.2%); of which 6,749 involved complaints, 58 were cases initiated by the Ombudsmen themselves and 101 cases concerned new legislation. It should be noted that the schedules overleaf show cases concluded during the period, not all cases lodged.

This summary also comprises the full reports of two of the cases dealt with by the Ombudsmen during the period.

*Schedule of cases initiated by the Ombudsmen and concluded during the period 1 July 2011–30 June 2012*

Activity concerned	Closed without final criticism (whereof NPM)	Admonitions or other criticism	Prosecutions	Total
Courts of law	1 (0)	1	0	2
Administrative courts	0 (0)	4	0	4
Police authorities	7 (7)	1	0	8
Prison administration	12 (9)	7	0	19
Chief guardians	0 (0)	1	0	1
Social welfare	3 (2)	9	0	12
Medical care	1 (0)	2	0	3
Social insurance	1 (0)	3	0	4
Planning and building	0 (0)	1	0	1
Communications	0 (0)	1	0	1
The school system	1 (0)	0	0	1
Immigration, integration of immigrants	0 (0)	1	0	1
Freedom of expression, access to official documents	0 (0)	1	0	1
<b>Total</b>	<b>26 (18)</b>	<b>32</b>	<b>0</b>	<b>58</b>

*Schedule of complaint cases during the period 1 Juli 2011–30 June 2012*

Activity concerned	Dis- missed without investi- gation	Referred to other agencies or state organs	No criti- cism after investi- gation	Ad- moni- tions or other criti- cism	Prose- cutions or discipli- nary pro- ceed- ings	Prelimi- nary criminal investi- gation. No pro- secution	Guide- lines for good admini- stration	Correc- tions during the investi- gation	Total
Courts of law	109	2	237	24					372
Administrative courts	25		70	23					118
Public prosecutors	139	3	55	15					212
Police authorities	489	18	229	36					772
Custom services	11		6	2					19
Armed forces	8		6	2					16
Prison administration	524	1	416	145			3	1	1,090
Social welfare	475	1	496	53					1,025
Medical care	192	1	76	15					284
Social insurance	265		130	84					479
Labour market auth.	92		71	5					168
Planning and building	104		79	22					205
Enforcement	63		64	7					134
Municipal self- government	65		19	6					90
Communications	129		76	13					218
Taxation	81		39	4					124
Education	106	9	68	11					194
Culture	20		3	2					25
Chief guardians	25		33	7					65
Agriculture, environ- ment, protection of animals	128		94	19					241
Immigration	102		93	7					202
County administrative boards, control of lotteries, serving of alcohol	18	1	4	2					25
Housing	2		1						3
Employment of civil servants etc.	81		6	3					90
Freedom of expres- sion, access to public documents	101		125	100					326
Administration of parliamentary and foreign affairs; general elections	21		8	3					32
Miscellaneous	58		24	12					94
Complaints outside jurisdiction, com- plaints of obscure meaning	126								126
<b>Total</b>	<b>3,559</b>	<b>36</b>	<b>2,528</b>	<b>622</b>	<b>0</b>	<b>0</b>	<b>3</b>	<b>1</b>	<b>6,749</b>

## The use of unconventional investigatory methods to induce a suspect to supply information about his own criminal actions

(Adjudication by the Parliamentary Ombudsman Hans-Gunnar Axberger 28 November 2011, reg. no. 731-2010)

*Summary of the adjudication: During the investigation of a case of arson suspicion fell on R. The usual investigatory approaches, such as interrogation etc. were considered not to be practicable. Instead a special operation was launched, which involved grooming R for a considerable period in different ways and finally subjecting him to a fake employment interview. During the interview he supplied information about his role in the arson. R was sentenced to ten years imprisonment for aggravated arson on the basis of this information.*

*This procedure involved serious encroachment of R's rights as a suspect. Furthermore, the measures adopted constitute in their entirety infringement of the right to respect for private life pursuant to Article 8 of the European Convention. Infringement of this kind requires, according to the Convention, authorisation in law that complies with fundamental aspects of the rule of law. No such authorisation existed.*

*If the method adopted is to be used in the future, legally secure legislation is required to clarify the legal situation.*

### Background

One night in May 2005 the Central Hotel in Gävle was set on fire. There were no casualties but a large number of people had to be evacuated urgently. Most of the block in which the hotel was situated was destroyed. The cost to the insurers for the damage was estimated to be at least SEK 160 million. During the investigation that followed R came under suspicion. This was the result of information and pictures from surveillance cameras which showed R arriving at Gävle Central Station five hours before the fire and returning there shortly after the fire had broken out. Certain features in the video recording – like R's disposal of a rucksack after the fire, etc. – were compatible with the assumption that he was the perpetrator of the crime. The investigation also disclosed that there were individuals involved in the restaurant business with grounds for attacking the activities taking place in the hotel to whom R could be linked.

The prosecutor in charge of the investigation, Mikael Hammarstrand, at that time Deputy Chief District Prosecutor, has described how at that stage of the investigation, in other words relatively soon after the event, he was faced with two alternatives. He could either have R interrogated and at the same time a search made of his premises or he could bide his time. One argument against any intervention was that R could refuse to say anything. There was not enough evidence to secure a conviction. He chose to "wait and lull the suspect or suspects into believing incorrectly that their identities were unknown to the police". In a statement to the Parliamentary Ombudsman he has provided more details about the grounds for his decision.

The investigation continued with surveillance of R. During the autumn of 2005 the District Court issued an order allowing interception of R's telephone. In March 2007 the Police Authority in the County of Gävleborg requested the assistance of the National Criminal Investigation Department (NCID) in its investigation. The documents in the NCID's file on the case reveal the following. Entries on the operation start in April 2007 and finish in September 2009. The case was initiated immediately and work started on producing a profile of R. This went on for around eighteen months before the operation took official form. The records show for instance that R has previously served a prison sentence but had since repudiated his previous way of life and was now leading an orderly existence. In August 2008 Deputy Police Commissioner Arne Andersson at the NCID made an official decision on the conduct of the operation in accordance with an operational plan drawn up at the same time. In its description of the background the plan stated that:

For just over a year information to enable this operation has been gathered through telephone transcriptions, physical surveillance and special methods. The best information has been procured through a source that has cultivated the targeted individual with a false story, as they previously had an established relationship. A psychological profile has been made by the psychologist [...] to enable the targeted individual to be approached and cultivated in the best way as well as the use of operators whose profiles offer the best matches.

The operational plan also went on to describe the objective was to "infiltrate the targeted individual for a substantial period" to procure information that could strengthen suspicions about the crime or mean that they could be rejected and thus provide valuable evidence for the preliminary investigation.

The actual operation lasted for about one year. Before the adoption of the plan in July 2008, R had been persuaded to take part in a fictitious market survey. By participating R "won" a trip, which was intended to establish a contact between R and the NCID's operator (in this context an operator means a police officer who adopts a fictitious identity to gain entry to environments in which the police are interested). The trip was a pleasure trip and involved R travelling together with a number of other "winners" to London for a weekend during which, for instance, they watched a football match between the English league teams Arsenal and Manchester United. One of the operators struck up a special friendship with R and intimated in the meetings that followed their return to Sweden that there might be a demand for his services. Among these tasks mention can be made of a trip to Germany, during which R was to be given a trial assignment of driving a boat from Germany to Sweden. The trip took place but the boat turned out to be faulty so R had to return without it. He did, however, receive the payment he had been offered (about SEK 5,000 "under the table" and his out-of-pocket expenses). These and other activities were preparatory phases leading up to the final objective of the operation, which was to offer R employment in a fake Netherlands company, when he was to be induced to provide information of interest to the investigation of the arson in Gävle.

The final phase took place during May and June 2009 when R met operators who claimed to be representatives of the Netherlands company at a hotel in Stockholm, where he filled in application forms before travelling with them to the Netherlands to be interviewed by another operator, who was acting as the representative of the Netherlands company. During this phase the District Court issued orders on two occasions allowing interception of R's telephone (25 May–1 June and 22 June–20 July). The employment interview took place on 29 June.

During the operation R had gradually been groomed so that he would be attracted by the potential earnings and at the same time understand that the job in question presumed that he was no stranger to the idea of acting illegally and required unswerving loyalty to his employer. In this respect the records describe the objective for instance as: "Intensifying the relationship and cultivating [R] to implant gradually a discreet but more criminal element and the value of loyalty", and elsewhere: "to arouse [R's] avarice in concrete terms". This was summarised in the final report (Memorandum 2 July 2009) in the statement that R at the final employment interview was to have "formed an impression of the company that aroused his avarice and which would help to induce him to confess to previous offences and criminal behaviour".

According to the report on the interview, R was asked about the fire by the operators saying "that they had heard something about a fire he had started on someone's behalf". R then stated that he had started the fire, described how and who had given him the assignment and that he had been paid SEK 20,000 for doing so.

R was prosecuted in Gävle District Court. The circumstances presented above are also described in the judgment (B 2119-09, annex 4). The court did not consider that what had occurred was unlawful. R was convicted of aggravated arson and sentenced to ten years imprisonment for arson.

An appeal was lodged against the judgment of the District Court. In its ruling issued on 27 August 2010 (B 644-10, RH 2010:62) the Court of Appeal for Southern Norrland dealt with an objection made by R that the fake employment interview should be considered an interrogation that had not been conducted in compliance with the provisions of the Swedish Code of Judicial Procedure (CJP). After a thorough discussion of this point, the Court of Appeal found that, with reference to the principle of unrestricted appraisal of evidence, in its assessment of the charge it was not prevented from including what had come to light. This applied even though the investigatory methods used by the police during the fake employment interview did not comply with the regulations in the CJP on how a judicial investigation should be conducted. On the other hand, no appraisal of whether what had occurred was against the law was made. However, an assessment was made of whether the legal proceedings in their entirety involved encroachment of R's right to a fair trial according to the European Convention. After accounting for the contents of the Convention and the practice of the European Court of Human Rights (ECHR) the Court of Appeal went on to state the following:

In this case the individuals who took part in the employment interview and the rest of the stay in the Netherlands ... have given more or less the same picture of what took place. In view of this information and against the background of the praxis of the European Court of Human Rights, the Court of Appeal has made the following considerations on the issue of whether Article 6 has been violated.

To begin with the Court of Appeal is able to determine that the employment interview was faked and R had therefore travelled to the Netherlands in misleading circumstances to take part in the interview in the belief that he might possibly be given a well-paid job. His participation in this spurious procedure was, however, voluntary and he was under no pressure or coercion to provide any information about the fire during the interview. It has also been made clear that for the police the intention of this provocation was not primarily to induce R to confess to starting the fire but instead to seek more open-mindedly for information that could either link him with or free him from suspicion that he may have been involved. The interview took place in the lobby of a hotel and, according to those who have testified, in a calm and pleasant atmosphere. When the police asked R if he had had anything to do with a fire, nothing specific was said about this applying to the fire at the Central Hotel in Gävle. It was R himself who linked the police officers' questions to the fire in Gävle and who then gave information about his own participation. The police then asked a number of follow-up questions relating to the fire that R also answered. Information has also been given in the case that both R and [those charged with him] had been informed in detail before the hearing in the District Court about how the entrapment had been arranged. The accused have therefore subsequently had complete insight where the entrapment methods are concerned and have not been deprived through inadequate information of the possibility of questioning the authenticity, reliability or other aspects of the evidence. The prosecutor has also adduced additional evidence in this case to show that R started the fire that has been assessed by the District Court as supporting the charge. This applies for instance to testimony, the technical investigation into the causes of the fire and its development as well as the enquiry into R's presence and behaviour at Gävle Central Station on the night of the fire.

As the Court of Appeal has already pointed out, appraisal of whether the rights of an accused pursuant to Article 6 of the European Convention have been violated is not only restricted to the issue of whether the misrepresentation that took place can be considered lawful or not. Instead an appraisal pursuant to Article 6 takes the entire trial procedure into account and requires an overall assessment of whether suspects have had the possibilities to defend themselves against the charges brought against them. In such an appraisal, it is clear that both R and [those charged with him] had ample opportunity to question the evidence acquired through misrepresentation and that the psychological impact this involved for R must be considered relatively restricted. R's confession in connection with the misrepresentation does admittedly constitute an important proportion of the prosecution's evidence but the prosecutor also cites other significant evidence to support the charge. What has been disclosed about the misrepresentation does not therefore, in the opinion of the Court of Appeal, provide grounds for the allegation that it irrevocably undermined R's possibilities of a fair trial and an overall assessment of the circumstances in the trial procedure gives the Court of Appeal no cause to find that the hearing was in breach of Article 6 of the European Convention. [...]

The entrapment to which R was subjected means that at a stage when he was suspected for good reason of involvement in arson he was not guaranteed the legal rights that a police interrogation according to the CJP would have provided. This has meant that his possibilities of defending himself against the suspicion of criminal activity were impaired, which could at least mean



that reduction of the penalty could be considered. The same is true of the circumstance that R's account and the questions asked by the police in connection with the fake employment interview in the Netherlands were not documented in the way they would have been in a regular police interrogation. This means that there is no way for a court of law or other judicial authority to check how the entrapment took place. There are, for instance, no recordings of what was said during the employment interview that can clearly demonstrate that the questions and follow-up questions asked by the police officers were not leading questions or unwarranted in some other respect. On the other hand, the police officers who participated in the employment interview and who have given evidence during the trial have stated that before the interview it had already been decided to allow R to speak freely and that they would not put any pressure on him or try to influence him to make statements pointing in any one direction. According to the police officers, the employment interview also took place according to these guidelines. Nor in the hearings has R himself raised the objection that the police officers' questions or follow-up questions were unreasonable.

After considering these points the Court of Appeal has reached the conclusion that the possibilities of R and [those charged with him] of exercising their rights in the respects cited were not impaired to such an extent that there are sufficient grounds for reducing the sentence. This means that the penalty awarded to both of them is ten years imprisonment.

The judgment of the Court of Appeal gained *lagel* force.

### **Complaint to the National Unit for Police Prosecutions**

Gunnar Falk, the attorney-at-law appointed as R's public defence counsel, complained about the measures adopted in R's case to the National Unit for Police Prosecutions at the Public Prosecution Office. In December 2009 its Chief Prosecutor, Per Lind, decided not to launch a preliminary enquiry. Some of the reasons given were that what had taken place was permissible misrepresentation. Per Lind pointed out in this connection that there is very little scope for penalties for official misconduct in cases where judgement is involved. This decision was reviewed in February 2010 by the Director of the Public Prosecution Office, Jörgen Lindberg, who did not amend it. He considered that the actions of the police officers before and during the interview had not taken place during the exercise of their official powers.

### **Complaint to the Parliamentary Ombudsmen**

Gunnar Falk then submitted a complaint on the matter to the Parliamentary Ombudsmen. The Chief Parliamentary Ombudsman decided on 23 June 2010 after reviewing what had hitherto been disclosed that no preliminary enquiry should be launched. He referred, among other things, to the major lack of any given directives about what forms of action are lawful when undertaken by an official in connection with the implementation of infiltration and entrapment operations. He found no grounds for assuming that any punishable misuse of their powers had been committed by officials subject to the supervision of the Parliamentary Ombudsmen. He did decide, on the other hand, to scrutinise the actions of the prosecutor and police officers in connection with the employ-

ment interview in the Netherlands within the framework of a routine inspection case.

Statements were requested from the National Police Board and the Regional Public Prosecution Office. The first was submitted on 21 September 2010 and the second on 23 September 2010. Mats Melin retired from his post as Chief Parliamentary Ombudsman at the end of 2010. The case was subsequently referred to me for adjudication.

### **The enquiry**

The complaint of Gunnar Falk, the defence counsel, to the Parliamentary Ombudsman is that the fake employment interview was an interrogation. His grounds are that it was undertaken by the police in the course of a preliminary investigation and R was subjected to it because he was reasonably suspected of the criminal offence under investigation. He was not notified during this interrogation in the way laid down in the CJP that he was a suspect and did not have any possibility of being assisted by a defence counsel or make use of his right not to answer questions. The complainant alleged that this procedure violated R's rights according to Article 6 of the European Convention.

The acting head of the NCID, Tommy Hydfors, submitted a response on behalf of the National Police Board, which included the following. By virtue of long-standing practice, typically speaking, the stipulations on interrogation in the CJP are not intended to apply to conversations that occur while the police are involved in covert surveillance. The opposite state of affairs would have an impact on a great many of the surveillance operations undertaken by the police. The NCID also pointed out that organising fake employment interviews in which it is up to the individuals themselves to decide whether they will take part is one type of measure that is used internationally in "cold-case" contexts. The method was developed in Canada and officers at the NCID received training in the method from their Canadian counterparts. The NCID summed up its opinion as follows.

The fake employment interview was undertaken during a preliminary investigation into a serious crime. The misrepresentation that the employment interview could be considered to involve was, per se, lawful. The employment interview formed one stage of an infiltration operation. Infiltration is a nationally and internationally accepted method in crime prevention. Hitherto there have been no specific legal provisions on the use of the method. The employment interview was, however, conducted in a way that conforms to accepted practice in covert surveillance operations in which conversations take place between police officers and suspects in situations that cannot be viewed as interrogations during preliminary investigations. – The NCID considers that the measures conformed in every respect to current legal provisions. – The NCID would welcome specific legal provisions in this area.

The response of the Public Prosecution Office was submitted by the Prosecutor-General, Anders Perklev, who did not consider that the prosecutor in charge of the investigation had acted wrongly or inappropriately. According to the Prosecutor-General the infiltration measures did not constitute interrogation in the meaning of the CJP. It asserts for instance that "An interrogation

is nothing other than a situation of the kind provided for in Chapter 23 of the CJP and Ordinance on Preliminary Investigations (OPI), in which the power of the state is balanced by the provisions that protect the suspect, and others". It also contains the following:

My opinion is that the regulations on interrogation cannot at all be considered to apply when the police during an infiltration operation are acting "under cover" and speak to suspected individuals. This means that it is not the applicability of the regulations on interrogation that should set the limits for what kind of "entrapment" operations are permissible.

The prosecutor in charge of the investigation, Mikael Hammarstrand, has submitted his own statement in which he gives a detailed account of his considerations, assessments and the measures he adopted. He points out for instance that it is unsatisfactory that the legislators have not laid down in more detail what is admissible and inadmissible in this context and continues:

The legal situation is not explicit and leaves no little scope for interpretation. It is a delicate matter for the legislators to balance the interests of the investigators, the principle of the unrestricted admissibility of evidence and the rights of individuals to their integrity. In addition, it is less than satisfactory from a working environment perspective that law enforcers are not always provided by the legislators with information about what is admissible or inadmissible. I, on my part, have carefully considered each stage of this operation and have, to the best of my abilities, endeavoured to guarantee the quality of the results of the entrapment to guarantee the fairness of the process and the best interests of the investigation.

Finally I would like to make it clear that in my capacity as leader of the investigation I was obviously responsible for the exercise of official powers involved in the entrapment operation to acquire evidence.

### **Legal provisions etc.**

#### *Respect for private life: Article 8 in the European Convention*

The European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) has the force of law in Sweden. In interpreting the Convention the praxis that has developed at the European Court of Human Rights (ECHR) is of central importance.

Article 8 in the European Convention, which is headed *Right to respect for private and family life* has the following wording:

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The limits of the area that is protected are difficult to define. The right to respect for private life has many aspects (see Danelius, *Mänskliga rättigheter i europeisk praxis* [Human rights in European praxis], 3rd. ed. pp. 301 f.). These include for instance "the physical and psychological integrity of a per-

son” (see Moreham, *The right to respect for private life in the European Convention on Human Rights: A re-examination*, EHRLR 2008, p. 49, with references to the praxis of the European Court of Human Rights).

In legislative contexts the Government has stated that the protection offered by the Convention for private life cannot be considered to prevent the police from using infiltration to become acquainted with individuals in order to gather information than can lead to the elucidation of a crime. The Government did, on the other hand, share the opinion presented by the Committee on the Development of the Judicial System that there was a more general risk of violation of respect for private life if an authority monitored and noted the personal activities of individuals to provide more systematic documentation of their lives. (See Govt. Bill 2005/06:149 and SOU 2003:74 p. 137.)

Article 8.2 lays down that a state signatory to the Convention has the possibility of restricting the protection of private life. The fundamental provision is that this is “in accordance with the law”. According to the practice of the ECHR this involves two requirements: one is that there is clear support for the measure in national legislation, the other that this support includes the necessary guarantees for the rule of law. This is made clear for instance in *Bykov v. Russia* (judgment issued by the Grand Chamber 10 March 2009, application no. 4378/02), in which the court stated:

The Court reiterates that the phrase “in accordance with the law” not only requires compliance with domestic law but also relates to the quality of that law, requiring it to be compatible with the rule of law. In the context of covert surveillance by public authorities, in this instance the police, domestic law must provide protection against arbitrary interference with an individual’s right under Article 8. Moreover, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to such covert measures. (§ 76)

In the case of *Bykov* the Court found that the requirement of legal support was not fulfilled. The Court was therefore able to determine that Article 8 had been violated without having to delve into the issue of whether what had occurred had been “necessary in a democratic society”.

#### *The protection afforded by the Instrument of Government against surveillance and monitoring*

Individuals are protected against significant invasion of their personal integrity if this occurs without their consent and involves the surveillance or systematic monitoring of their personal circumstances through the second paragraph of Article 6 of Chapter 2 of the Instrument of Government (IoG). This provision came into effect in 2011: it did not therefore apply when the investigation under review here was undertaken.

This protection may be restricted by law and on the conditions laid down in Article 20 of Chapter 2 of the IoG, which only permits limitations to satisfy a purpose acceptable in a democratic society and stipulates that no limitation may go beyond what is necessary for the purpose which occasioned it.

The preparatory work, Govt. Bill 2009/10:80, include the following. The protection is general and not restricted to any technical system (p. 181). Measures adopted against an individual and which for reasons of secrecy may not be divulged are, typically speaking, particularly sensitive from the point of view of infringement of integrity, mainly because in such circumstances individuals lack any possibility of taking steps to safeguard their integrity themselves (p. 178). What is decisive in assessing whether a measure is to be considered surveillance or monitoring is its effect, not the prime purpose of the measure (p. 181). The protection only applies to invasion which because of its intensity, extent, the sensitivity of the information from the point of view of integrity or other circumstances involves a significant encroachment of an individual's private sphere (p. 250). What is to be considered surveillance and what regarded as monitoring has to be assessed on the basis of what these concepts mean in normal language (op. cit.).

*Fair trial: Article 6 of the European Convention etc.*

The sections of Article 6 of the European Convention, which is headed *Right to a fair trial* that are germane here are worded as follows:

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.

— — —

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Everyone charged with a criminal offence has the following minimum rights: [— — —]

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

A provision on a fair trial has also been included since 2011 in the stipulations of the IoG on fundamental freedoms and rights (second paragraph of 2:11). This is based on the fundamental regulation in Article 6.1 (see SOU 2008:125 p. 426 and Govt. Bill 2009/10:80 p. 156 ff.).

According to Article 6 the concept of fair trial covers the entire legal process: it is not restricted to the court hearing. According to the praxis that has been established by the ECHR the protection offered by the Convention includes a number of rights and principles.

The overall right to a fair trial pursuant to Article 6 must, according to the praxis of the ECHR, be assessed on the basis of the legal process in its entirety, which means that a shortcoming in one section can in certain conditions be remedied in another. Violation of the right of suspects to respect for their private lives as laid down in Article 8 during the legal process does not per se mean that the process is to be considered unfair according to Article 6. This is made clear by *Khan v. the United Kingdom* (judgment issued 12 May 2000, application no. 35394/97) as well as in *Allan* (see below) and *Bykov*.

One of the principles included in the concept of fair trial is that a suspect may not be required to contribute to an investigation by making admissions or

providing incriminating material (Danelius, op. cit. p. 247). The ECHR sets great store on this right, which, according to the Court, lies at the heart of the right to a fair trial (*John Murray v. the United Kingdom*, judgment issued 8 February 1996, application no. 18731/91, § 45). This right has been linked to the right to legal counsel: in the Court's opinion one of the tasks of a defending lawyer is to ensure that the rights of suspects not to incriminate themselves are respected (*Salduz v. Turkey*, judgment issued 27 November 2008, application no. 36391/02, § 54). If the suspect makes incriminating statements while being questioned by the police without access to a lawyer and this is used to procure a conviction, the Court considers that the rights of the suspect have in principle been irrevocably undermined (*Salduz*, § 55).

In *Allan v. the United Kingdom* (judgment issued 5 November 2002, application no. 48539/99) an individual named Allan had been deprived of his liberty on suspicion of involvement in the robbery of a shop in which the owner had been shot and killed. Allan made use of his right to remain silent. An informer, who had been arrested for other crimes, was placed by the police in the same cell as Allan and given the task of inducing him to talk about the crime he was suspected of. The informer later testified that Allan had admitted that he was at the scene of the crime. There was no evidence other than this statement to bind Allan to the fatality. He was charged and sentenced to life imprisonment for murder. – The ECHR included the following statement of principle in its judgment.

The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seeks to prove the case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. (§ 44) [– – –]

While the right to silence and the privilege against self-incrimination are primarily designed to protect against improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused, the scope of the right is not confined to cases where duress has been brought to bear on the accused or where the will of the accused has been directly overborne in some way. The right, which the Court has previously observed is at the heart of the notion of a fair procedure, serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial. (§ 50)

In Allan's case the ECHR found that the informer had directed his conversation with Allan about the fatal shooting in a way that could be considered to be the functional equivalent of interrogation, without the guaranteed protection that would have resulted from an official police interrogation, including the presence of a lawyer and information about his right to remain silent (*Allan*, § 52). The Court considered that Allan's right to a fair trial pursuant to Article 6 had been violated by the way that the information procured by the informer had been obtained against Allan's will and presented at the hearing,

where it was the main evidence, and that therefore Allan's right to remain silent and not to incriminate himself had been transgressed.

In a later case, *Bykov v. Russia* (cited above), the background was the following. A man, V, reported to the police that he had been asked by a businessman, Bykov, to murder one of his former partners. V showed them the weapon Bykov was alleged to have given him. The police "rigged" a scenario in which the media were misled into reporting that two bodies had been found in the partner's home. V was then instructed to visit Bykov, wired with a microphone and under police surveillance, report and return the weapon. This led to Bykov's arrest. The recording from this visit together with the information provided by V were used to charge Bykov with instigating murder. When the trial was held, V had submitted a written retraction of the information he had given and disappeared. Bykov was sentenced to six years imprisonment, but released conditionally immediately after the trial, which took place just over eighteen months after his arrest. Bykov complained to the ECHR that among other things his right to a fair trial had been violated.

In its appraisal of Bykov's right to a fair trial the majority of the ECHR noted that the evidence recorded during V's visit was not decisive but that the key evidence consisted of the information initially provided by V and the weapon he had displayed (§ 98). The Court also considered whether what had occurred meant that Bykov's right to remain silent and not to incriminate himself had been violated. In what would appear to be the decisive sections of the grounds for its decision the Court observed:

The Court notes that in the present case the applicant had not been under any pressure to receive V. at his "guest house", to speak to him, or to make any specific comments on the matter raised by V. Unlike the applicant in the Allan case – – –, the applicant was not detained on remand but was at liberty on his own premises attended by security and other personnel. The nature of his relations with V. – subordination of the latter to the applicant – did not impose any particular form of behaviour on him. In other words, the applicant was free to see V. and to talk to him, or to refuse to do so. It appears that he was willing to continue the conversation started by V. because its subject matter was of personal interest to him. Thus, the Court is not convinced that the obtaining of evidence was tainted with the element of coercion or oppression which in the Allan case the Court found to amount to a breach of the applicant's right to remain silent. (§ 102)

Here the Court was not unanimous. A minority considered that Bykov's right to a fair trial had been violated. One of the judges, who was supported by four others, adopted a somewhat different perspective on the operation that had been undertaken and considered whether its subject had de facto been under the control of the authorities.

This was so in the present case; the applicant was an unwitting protagonist in a set-up entirely orchestrated by the authorities. I would draw attention here to the very particular circumstances of the covert operation, which began with the staged discovery of two bodies and the announcement in the media that S. and I. had been shot dead. By the time V. arrived at the applicant's "guest house", the applicant was already under the influence of the erroneous information that a serious crime had been committed, and his belief was reinforced by V.'s admission that he had been the perpetrator. The applicant's conduct

was therefore not solely, or mainly, guided by events which would have taken place under normal circumstances, but above all by the appearances created by the investigating authorities. To that extent, seeing that he was the victim of a ruse, his statements and reaction cannot reasonably be said to have been voluntary or spontaneous

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In the present case the purpose of the staged events was to make the applicant talk. The covert operation undermined the voluntary nature of the disclosures to such an extent that the right to remain silent and not to incriminate oneself was rendered devoid of all substance. As in the Ramanauskas case, the applicant was entrapped by a person controlled from a distance by the authorities, who staged a set-up using a private individual as an undercover agent. I thus consider that the information thereby obtained was disclosed through entrapment, against the applicant's will. (Judge Spielmann's dissenting opinion, §§ 35 & 37.)

*Regulations governing interrogation: the rights of the suspect*

The regulations on interrogations during preliminary investigations can be found in Chapter 23 of the CJP. These stipulate the general requirement to submit to interrogation by the police (Section 6). There is no requirement to contribute to the investigation. That someone suspected of a crime may decline to say anything is made clear in the CJP, but only indirectly, however, in that there is no requirement to do so, either during the investigation or in the court hearing. Nor is there any other Swedish statute that contains a provision on the right to remain silent during interrogation. The principle that a suspect does not have to contribute to an investigation by making admissions or providing incriminating material is included, however, as has been shown above, in the right to a fair trial.

Section 23 of Chapter 21 of the CJP stipulates that someone suspected of a crime is entitled to the assistance of a defence counsel that he or she selects. In certain circumstances a public defence counsel is to be appointed, CJP 21:3a. According to Section 18 of Chapter 23 of the CJP anyone reasonably suspected of an offence is to be notified of the suspicion when questioned. Section 12 of the OPI stipulated that anyone notified that they are reasonably suspected of a criminal offence shall at the same time be informed of their right to the assistance of a defence counsel during the investigation and the rules that apply for the appointment of a public defence counsel. It is the official in charge of the investigation who decides who may be present during an interrogation, CJP 23:10, but where defence counsel are concerned in practice there is a generally accepted opinion that they have an unrestricted right to be present when suspects are questioned.

Certain general regulations on how questioning is to be carried out can be found in Section 12 of Chapter 23 of the CJP. According to this provision the use of unwarranted measures in order to extract a confession or a certain statement is not permissible. The examples given of unwarranted measures include the use of knowingly false information, promises or hints of special treatment, threats, coercion and driving the suspect to the point of exhaustion.



Nor may the individual being questioned be deprived of customary meals or the necessary rest.

#### *Records during a preliminary investigation*

Section 21 of Chapter 23 of the CJP lays down that records must be kept of matters of importance to the investigation. More detailed regulations on the contents of these records can be found in Sections 20–23 of the OPI. Section 20 stipulates a number of details that must be noted in the records, among them when and where different measures took place during the investigation. The first paragraph of Section 22 lays down that records are to be kept so that they provide a faithful picture of what has occurred during the preliminary investigation that is significant in the case.

In assessing what information is significant, the principle of objectivity laid down in Section 3 of Chapter 23 of the CJP must be taken into account. Previous adjudications by the Parliamentary Ombudsmen have made it clear that the official in charge of an investigation must therefore vigilantly ensure that information that may be significant for the defence is not removed from the records (see for instance Parliamentary Ombudsmen’s Annual Report 1964, p. 212 and 2007/08 p. 87).

Documentation that is not included in the records of a preliminary investigation must be made available (see SOU 2011:45 p. 255 for this kind of ancillary material).

#### *Covert investigations*

While investigating crimes it is not uncommon for detectives to work in civilian clothes without revealing that they are police officers, and this is generally accepted. There are no specific regulations about this but the legal support may be found in the general regulations on the duties of police officers in, for instance, the Police Act. Here Section 8 lays down in this respect that a police officer shall in the course of his duties comply with current legislation and with the principles of “necessity” and “proportionality”. Interventions that restrict any of the freedoms and rights enshrined in Chapter 2 of the IoG may not however be undertaken on these grounds alone: they require specific legal authorisation. This must also be considered to include the freedoms and rights that derive from the European Convention.

Certain forms of covert police operations have attracted specific legal interest. Attempts by the police to influence individuals actively are sometimes referred to as entrapment operations, see the Prosecutor-General’s guidelines on the conduct of entrapment measures, RÅR 2007:1, which deal with operations that could result in someone committing an offence, “sting” operations. Otherwise there are no specific regulations on methods of this kind. This means that they are permissible within the general parameters referred to above but not if they encroach on the protected freedoms and rights of individuals.

“Infiltration” can be viewed as a special form of covert police operation. The concept has not been defined in Swedish law: in principle there are no

regulations governing this method. In its final report the Enquiry into Police Methods uses the “concept of infiltration operation to describe a covert investigation in which interaction with the targeted individuals is undertaken with the help of active misrepresentation and where this misrepresentation has a certain continuity for some period” (SOU 2010:103 p. 102). In the opinion of the enquiry, infiltration can be used to acquire information that could help to elucidate otherwise unsolved “cold cases”. The enquiry could see no objection to this (op. cit. p. 120 f.).

Legislation on assumed protective identities was enacted in 2006 (see Govt. Bill 2005/06:149). This meant that under certain circumstances police officers could be given constructed (fictitious) identities. The reason behind this statute is that the police cannot always act openly (cf. p. 16 of the Bill). It contains no regulations, however, on the operational methods in which protective identities could be used.

In 2010 the National Police Board inspected the units that have been set up to take responsibility for the use of assumed protective identities (Inspection of Police Undercover Operations, report 2010-08-26). The summary of the report describes the regulations as follows:

No guidelines have been laid down for these operations. The existence of a manual that the heads of all the units at the major city police forces and the NCID have agreed on and which is being revised does not fulfil the requirement for guidelines to be laid down for Swedish police officers. It is very important that there are carefully considered and documented guidelines for operations that are not regulated by law and where there is otherwise little guidance from doctrinal and practical experience.

*Judgment issued by the Supreme Court on 20 October 2011*

The Swedish Supreme Court has recently issued an opinion in a case that has some points of contact with the issue under appraisal here (Supreme Court judgment issued on 20 October 2011, B 2150-11; the question of the significance of the fact that in the course of an entrapment that was judged to involve threatening features the accused supplied information that was negative for his case). The circumstances were the following.

After the disappearance of a woman, C was suspected of having killed her. He was taken into custody and questioned on a number of occasions but five years after the disappearance the case was still unsolved. A special investigation operation was then undertaken. An operator called “Mike” made friends with C. The operator pretended to be a criminal and told C that there was some interest in the woman’s life insurance. Before it could be paid out her body had to be found. The operator tempted C with money if he would reveal what he knew. The operator also threatened the involvement of “Russians and Chechens” etc. This produced no results. In an attempt to “increase the pressure” on C, another operator, pretending to be “a Russian” with yet another operator approached C outside his home. They told C to get in touch with “Mike”. At the ensuing meeting C pointed out where the woman’s body was hidden and said he was responsible for her death. The case records show that C was under the influence of drugs when he did so.

The Supreme Court pointed out that when prosecution has been preceded by entrapment to acquire evidence it is not per se the primary task of a court to determine how the measure complies with the regulations in force. On the other hand the entrapment can influence appraisal of the charge indirectly. Ultimately it is a question of respecting the right to a fair trial according to the European Convention which includes appraisal of how the evidence was obtained. (Supreme Court judgment, p. 15.)

According to the Supreme Court, the pressure C was subjected to had to be “considered unwarranted”. That he supplied the information in circumstances that “did not meet the customary requirements of legal security” was taken into account in the court’s appraisal in that it was given very little weight as evidence. The Supreme Court pointed out, however, that the prosecution was based to a large extent on other evidence, for instance the forensic medical examination carried out when C had indicated where the body was. The fact that this evidence had been established as a consequence of the entrapment of C did not, according to the Court, have any impact on its value as evidence. C had been able to study the evidence and counter it with his own. The courts had been given ample opportunity to assess the value of the investigation in its entirety. (Supreme Court judgment, pp. 27–29.)

C was convicted of murder. The penalty awarded corresponded to ten years imprisonment. In assessing the penalty the unwarranted features of the entrapment were taken into account. The threatening situation that had arisen because of the entrapment could not however “be classified as a very serious one”. The Supreme Court continued:

At the same time it must be considered that the right to remain silent and not to provide information to incriminate oneself has been viewed as offering central protection in trial proceedings. For this reason there are special grounds for sentencing C to a more lenient penalty than that prescribed for the crime by virtue of item 8 in the first paragraph and the second paragraph of Section 5 of Chapter 29 of the Criminal Code. This reduction should be considered to correspond to two years imprisonment. (Supreme Court judgment, p. 32.)

In the lower court C’s penalty had been reduced by three years and as no appeal against the judgment had been made by the prosecutor, the sentence awarded was seven years imprisonment.

## **Appraisal**

### *Premises*

The decision of the Parliamentary Ombudsman not to initiate a preliminary enquiry into official misconduct in this case was based among other things on the absence of definite statutory provisions on what actions are lawful in connection with the implementation of infiltration operations and entrapments. The question of whether the officials involved can be criticised on legal grounds for measures adopted in respect of R may be considered to have been settled by this decision. The aim of the subsequent enquiry was to study and as far as possible clarify the legal situation to make it easier to apply the law on future occasions.

The starting point for the appraisal is the principle of legality laid down in the IoG that requires public authorities to have a legal basis for their operations. When these involve measures that infringe upon the freedoms and rights of individuals, this support must be laid down in law and be worded in a legally secure manner. It is the task of the Parliamentary Ombudsmen to ensure that these freedoms and rights in particular are upheld (Section 3 of The Act with Instructions for the Parliamentary Ombudsmen).

The question of whether the legal proceedings in their entirety were in breach of the overall right to a fair trial pursuant to Article 6 in the European Convention has, as described above, been appraised by the Court of Appeal and its judgment has gained the force of law. This should not be the subject of any further review in this context. The rest of this adjudication will focus instead on the measures adopted with regard to R that have not been the subject of any corresponding opinion.

*The significance of the fact that infiltration is in principle an accepted investigatory method, etc.*

As infiltration is a method that has been used for a long time, to some extent at least, it could be maintained that other principles and rights have been set aside with the consent of the legislators when it is adopted.

Against this it can be pointed out that there are no legal regulations that deal with infiltration. The concept is not defined in the statutes, preliminary work, practice or doctrine (cf. on this subject the Report of the Enquiry into Police Methods, SOU 2010:103, pp. 100 ff.). It is revealing that the kind of investigatory method adopted in this case, questionable as it is from many points of view, has not become the subject of one single regulation in the otherwise strictly controlled operations conducted by the police (cf. the report of the inspection by the National Police Board cited above).

If fundamental freedoms and rights are to be set aside to benefit the investigation of a crime, what must be required is that the reasons for doing so have found legal expression in some concrete form. In my opinion there can be no grounds for using the passivity of the legislators to justify deviating from the legal principles that otherwise apply.

The circumstance that there is an Act on Assumed Protective Identities has also been cited in support of the view that infiltration is generally permissible. Here the argument is that as the act is based on the needs of the police to be able to use covert operational methods, methods of this kind must be legal. But no question has been raised about the necessity for the police to be able to operate covertly. What is at issue is how measures that can then be adopted are to be viewed when they encroach upon the freedoms and rights of individuals. The Act on Assumed Protective Identities, which in no way regulates the operational methods in which these identities may be used, provides no answers to this and evidently its very existence cannot be cited as legal support for all forms of police action that could be envisaged with the use of protective identities.

*The rights of suspects to respect for their private lives pursuant to Article 8 of the European Convention*

Article 8 of the European Convention stipulates that individuals have the right to respect for their private lives. This right may not be limited unless it is authorised by law and is necessary in a democratic society in the view of a number of purposes listed in the article. The delimitations of this protected area are, as has been seen, not distinct.

The method used in this preliminary investigation was described in the plan for the police operation as “infiltration of the target individual”, i.e. R. The way in which this was undertaken has been described above. The extent to which each single one of the measures adopted against R – the initial survey, establishing a personal profile, the numerous manoeuvres to induce R to take part in one activity or another, the carefully managed actions intended to rekindle his interest in criminal behaviour and arouse his “avarice”, etc. – violated his right to respect for his private life can be discussed. But there can be no doubt that taken in their entirety this is how they must be assessed, particularly if one takes into account the very long period concerned and that they were cumulative phases of deepening intrusion into R’s life. The investigatory measures in their entirety therefore constituted an encroachment of R’s rights as laid down in Article 8.

The Convention permits restrictions of the rights of individuals to respect for their private lives, in connection with criminal investigations, for instance, but then first and foremost imposes the requirement that the investigating authority has support for doing so in its domestic legislation, which must moreover meet fundamental principles of the rule of law. As has been shown in the account of the legal provisions, this means among other things that the legislation must state clearly when measures may be adopted and that there is protection against arbitrary actions or abuse.

Swedish law contains no regulations at all about “infiltration of individuals” and in principle none about infiltration in general either. It has not been possible on the basis of the legislation to predict that the investigating authorities had the authority to intervene in R’s private life in the manner adopted, nor was there any protection against arbitrary actions or abuse. Neither of the two features of the legal support required in the European Convention were, in other words, fulfilled. Article 8 of the Convention has therefore been violated, irrespective of whether it would have been possible in different legal circumstances for the operation to have been covered by the restrictions permitted by the Convention.

*The fake employment interview*

Those suspected of crimes have the right during investigations to remain silent and not to incriminate themselves and also the right to the assistance of a defence counsel. When someone suspected on reasonable grounds is questioned, they are to be notified of the suspicion and their right to a defence counsel. This is laid down jointly by the European Convention, the CJP and the OPI. The praxis of the ECHR can also be understood to mean that those

suspected of crimes should be informed of their right to remain silent and not to incriminate themselves.

These regulations are based, however, on normal criminal investigations in which the authority investigating the crime questions suspects or subjects them to the open and official exercise of its powers in some other way. It is not self-evident that this applies in the same way to investigatory procedures that are not disclosed to the suspect and where the authority investigating a crime adopts more informal working methods. In my opinion it would, at any rate, be going too far to require police officers involved in an investigation to have to assess all the time whether an individual who can provide information of specific interest is suspected of a crime on reasonable grounds or not. What occurred in this case did not, however, involve the acquisition of information of this kind.

The background to the operation against R was that the prosecutor in charge of the investigation wanted to avoid notifying R that he was a suspect and was also afraid that R would not say anything, in other words avail himself of his right to remain silent and not to incriminate himself. The investigating authority therefore created – with no basis in law – a situation in which R could be questioned by police officers without being aware of it. The aim was to seek evidence that could be adduced in a court of law. The procedure involved, in other words, circumvention of the rights of a suspect.

In this context there are grounds for recalling the opinion expressed by the ECHR on the right not to incriminate oneself:

The right, which the Court has previously observed is at the heart of the notion of a fair procedure, serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial. (*Allan*, § 50, also cited above.)

What is stated here must, in my opinion, apply not only when suspects have been given the opportunity to exercise their rights but also when, as was the case here, they have deliberately been denied the chance to do so.

#### *Section 12 of Chapter 23 of the Code of Judicial Procedure*

Section 12 of Chapter 23 of the CJP stipulates that it is not permitted during questioning to use unwarranted measures in order to elicit a confession or a statement of particular implication. Examples of such unwarranted methods are the use of knowingly false information, promises or hints of special treatment, threats, force or driving the suspect to the point of exhaustion. The wording of the provision applies to questioning but can be considered to express a more widely applicable principle (cf. SOU 1982:63 p. 139). It should, in my opinion, be taken into account in investigatory procedures intended to induce individuals to supply information to the police in situations which are

– to use the phrasing of the ECHR – “the functional equivalent of interrogation” (Allan, § 52).

The expression unwarranted measures is a general one and elastic. In earlier legal texts the expression has been taken to mean that “all unfair methods are forbidden” (Olivecrona, *Rättegången i brottmål enligt RB [Criminal trials pursuant to the Code of Judicial Procedure]*, 3rd. ed., p. 198). Even though this may seem imprecise, the provision embodies a value judgement that few are likely to oppose, which is that information may not be elicited from individuals through threats or coercion, nor by inducing them unduly to make statements that they would not otherwise have made.

The investigating authorities have claimed that when R supplied the incriminating information during the interview, he was under no coercion, the setting was relaxed and that the question of the hotel fire in Gävle had not been suggested to him. When the question was posed to R, which according to the information was worded more or less as “we have heard something about a fire and that you started it for someone ...?” he had, however, for over a year been subject to systematic grooming intended to induce him to answer exactly as he did.

This grooming, planned on the basis of the personal profile of R produced by a psychologist, included arousing R’s “avarice”, to use the wording of the document, in the form of desire for the life of luxury that the individuals who had wormed their way into R’s life were pretending to live. The instructions followed by the police officers/operators also included making sure that R felt that loyalty and frankness were important, while at the same time he was to understand that the information he supplied could be checked, in other words that he would be taking a risk if he lied. Finally it was made clear to R that the job he was being offered presumed that he was willing and able to commit unlawful acts.

In view of this, no appraisal of whether what R was exposed to was unwarranted or not can be restricted to the circumstances in which the employment interview took place and the way in which the questions were worded. The entire procedure, from the initial survey to the final interview must be taken into account. As has been shown, this means that for a long time R was subjected to carefully tailored, penetrating psychological and social influence. To subject a suspect to something like this is, in my opinion, not compatible with the value judgement that finds expression in Section 12 of Chapter 23 of the CJP.

### *Records*

The operation undertaken by the NCID that was a central feature of the preliminary investigation was not fully documented in the files on the preliminary investigation nor was it included in the rest of the investigatory material. These records can be found in the NCID’s files. They should have been included in the dossier on the preliminary investigation.

*To sum up*

- Collectively the measures adopted constituted encroachment of the right to respect for private life laid down in Article 8 of the European Convention. According to the Convention, encroachment of this kind requires a basis in law that fulfils the fundamental demands of legal security. No such basis exists.
- The procedure meant that R's rights as a suspect were deliberately circumvented.
- The method adopted is incompatible with the value judgement enshrined in Section 12 of Chapter 23 of the CJP.
- The principles that apply to the maintenance of records during preliminary investigations were not fully complied with.

*Conclusion*

In the absence of statutory provisions on the kinds of measures adopted in respect of R, the legal situation may have been viewed as unclear. Generally speaking, however, this cannot be taken as a justification for a public authority to extend its powers. Where encroachment of the freedoms and rights of individuals is concerned, the rule is that what is not allowed is forbidden. Even though I am refraining, for the reasons stated initially, from assessing the actions of the individual officials involved, I am critical of the standpoints adopted by the authorities in this respect.

**Legislation needed**

The criminal investigation into this case was undertaken, other than from the legal viewpoint, in a professional manner. The records on file at the NCID make it easy to trace what was done and why. The decision to undertake the operation was made at a senior level. The prosecutor in charge of the investigation was continually informed of its progress and has subsequently assumed full responsibility for it. These are all indispensable requirements if advanced criminal investigation procedures are to be adopted. But they are not enough. In addition, the investigatory procedure is required to comply with the regulations laid down by law. These regulations must be formulated on the basis of generally defensible principles.

If methods of the kind used in this case are to be adopted, the questions they give rise should in other words be regulated by law. Only in this way can their principles be scrutinised in a democratic legislative process and the conclusions enshrined in the form of regulations that both public authorities and individuals can relate to.

The records show that the police assumed that R could be innocent. The measures adopted in such circumstances must seem acceptable, if it turns out that there are no grounds for suspicion. Legislation governing such measures should take this as its point of departure. This is also the import of the requirements "in accordance with the law" or "prescribed by law" in several



places in the European Convention, which refer not only to official statutes but also the rule of law.

The question of legal regulations to govern special investigatory procedures is the subject of a current enquiry. A copy of this adjudication is therefore being submitted to the Parliamentary Committee on Justice and the Ministry of Justice for their perusal. On the basis of the experience gained in my enquiry, there are reasons for the following to be taken into account during the legislative process.

The investigatory procedure dealt with here differs from infiltration in its usual meaning, which generally focuses on infiltration of factions or criminal groups. It involved instead approaching a suspect – in this context the word infiltration is misleading – and grooming him in order to acquire information that could be valuable for the investigation. Furthermore, police infiltration usually focuses on thwarting criminality that is taking place or on criminal intelligence intended to prevent crime. In this case it involved the prosecution of offences that had already been committed. These differences need to be taken into account when the need of investigatory procedures of this kind is considered. Generally speaking, interest in prosecuting for offences that have already been committed should probably not justify such far-reaching intervention as the prevention of criminal acts that are taking place or are imminent.

The appraisal made here means that currently it is not possible to use the investigatory measures adopted in this case lawfully. Today as well, the provision that came into force about the significant invasion of personal privacy that takes place without consent and involve surveillance of the individual's personal circumstances, second paragraph of IoG 2:6, raises obstacles to any survey of the kind undertaken of R. A related investigatory method is described in the case of the disappearance of the woman, which the Supreme Court found, as has been noted, included an unwarranted element and can be understood to state that central protective regulations on the conduct of criminal hearings had been set aside. What occurred in that case was not lawful either. There are reasons to assume that similar methods have been used in other cases as well, including those that have led to prosecution (cf. the report of the National Police Board inspection referred to above). Further light has to be shed on this to provide a broader basis for an assessment of whether and, if so, how this “investigatory concept” can be included in the regulations on criminal procedure.

Nevertheless, methods of this kind should not, in my opinion, be considered unless they are exceptionally important for investigations of very serious crimes. An additional requirement should be that they are only used when suspicion is very well grounded: there should be very little risk that the individual is innocent. Customary investigatory measures should have been tested without result and it must be likely that decisive information for the investigation will be acquired, in other words a needs analysis is required. In order to guarantee the rights of the suspect, methods of this kind should only be invoked within the framework of a preliminary investigation, with the maintenance of records and insight that this implies. This means that the

prosecutor in charge of the investigation will be responsible for decisions and their implementation. This responsibility will also include careful consideration of the legal issues that can arise in each individual case before decisions are made, so that what takes place complies with current procedural regulations and does not encroach on the freedoms and rights of individuals to any greater extent than provided by law.

Criticism of a prosecutor responsible for the questioning of a juvenile suspect who did not have a defence counsel and of a police authority and the police officer in charge of the interrogation for errors in connection with the way it was conducted. Fair trial?

(Adjudication of *the Parliamentary Ombudsman Hans-Gunnar Axberger*, 28 October 2011, reg. no. 4608-2010)

*Summary of the adjudication: In this adjudication, which dealt with a seventeen year-old youth who together with some friends was suspected of having defamed a large number of girls of the same age, the main issue was entitlement to a defence counsel when being questioned by the police.*

*A number of circumstances – among them the age of the suspect, the nature of the evidence and the fact that statements made during questioning could be adduced as evidence, mean that all the questioning should have been undertaken in the presence of a defence counsel. A suspect is entitled to waive the presence of a defending lawyer, but if so this has to be stated unequivocally in a legally correct manner and proper records must be kept. The adjudication points out that, generally speaking, information obtained from questioning when no defence counsel has been present is given less weight as evidence.*

*Access to a defence counsel when being questioned by the police is one of the criteria for a fair trial laid down in the European Convention. The adjudication assesses whether this entitlement had been infringed. As some of the evidence consisting of information from the police interrogation was in practice rejected at the final court hearing, it is not considered that such infringement occurred.*

### **Background and complaint**

J.R., who will be referred to as J below and who was seventeen years old at the time, was charged together with five other youths for gross defamation as well as other offences. They were accused of having produced films of a kind that had been circulated on the Internet. Their contents consisted of pictures of a large number of girls of their own age together with captions that described them in grossly abusive sexual terms. J was sentenced by the district court on two charges of gross defamation to 45 hours of juvenile community service and ordered to pay a large amount in damages to the complainants. He appealed to the court of appeal, which rejected one of the charges of gross defamation. In the end he was sentenced to 20 hours of juvenile community service. In addition J was subject to an order for joint and several damages for a sum that according to the appeal court amounted to around SEK 200,000. The grounds given for this decision make it clear that the convictions were to a large extent based on information given when the accused were questioned by the police while they were in detention and which they had denied during the court hearings on the grounds that they had felt they were under pressure and that they wanted to be released.

During the court proceedings – after the verdict of the district court – J submitted a complaint about the Police Authority in the County of Halland to the Parliamentary Ombudsmen which included the following claim. He had agreed with a police officer named Klas Löfgren to go to the police station to answer some questions that Löfgren wanted to ask about his moped, which had been confiscated because it had been tuned. When he arrived at the police station he was placed instead in an interrogation room where another police officer, Ann-Charlotte Wiklund, began to question him about the films. He denied any involvement but was subjected to a great deal of pressure and then admitted that he did indeed know something about them. He was informed that he was suspected of a crime and was asked if he wanted a lawyer. He said he did and gave the name of the lawyer he would like. He was then locked into a cell for the night. On the following day he was questioned on two occasions by Klas Löfgren and again subjected to a great deal of pressure. There was no defence counsel present. He felt that the situation was threatening because he had been locked up with no contact with his parents and no access to a lawyer.

### **The enquiry**

After an initial review of the documents in the case, the police authority was asked to submit a statement. The response of the authority was submitted by the acting Chief Commissioner, Klas Johansson, and included information from the officer in charge of the interrogation, Inspector Ann-Charlotte Wiklund, and Sergeant Klas Löfgren. With regard to the circumstances surrounding J's arrival for questioning the police authority stated the following:

Both a memorandum drawn up by Police Sergeant Löfgren and J's own statement show that on the morning of 28 September 2009 J telephoned Löfgren and wanted to talk about his confiscated moped. It was then decided that J would come to the police station in Falkenberg after lunch.

After Löfgren had spoken to J he then remembered that J's name had been mentioned by other suspects in the investigation. Löfgren therefore contacted his superior, Detective Chief Inspector Ingvar Johansson, and then the prosecutor, upon which the prosecutor said that J was to be questioned as there were reasonable grounds for regarding him as a suspect. When J arrived at the police station he was placed in an interrogation room. After a while, Inspector Ann-Charlotte Wiklund entered the room and began to question J and that was when he was told that he was suspected of gross defamation.

Questioning is normally preceded by a summons unless there are grounds for detaining someone for interrogation. In the case in question, the information suggests that no summons to attend for questioning was issued at any time before J arrived at the police station to talk about his confiscated moped. When the prosecutor made the decision that J was to be questioned and informed that he was for good reason suspected of a crime, in a normal case J would have been summoned to attend, his legal guardians would have been informed and also summoned to attend and, if prompted by the circumstances, the guardians and the suspect would also be informed of the possibility of requesting the assistance of a public defence counsel from the very first interrogation. The police authority is unable to assess the correctness of the prosecutor's decision that on this occasion J was to be questioned and told that he was suspected of gross defamation.

The police authority considers that it is very important for suspects to be given every opportunity to exercise their rights. When someone who it is believed can provide information in a preliminary investigation is summoned to attend for questioning, misleading information may not be given to persuade them to come to the police station. In this case there is nothing to show that misleading information was used during J's telephone conversation with Löfgren to persuade J to come to the police station. Only after being contacted by Löfgren did the prosecutor decide that J should be questioned and informed that he was suspected of gross defamation.

On the basis of the information available, therefore, the police authority does not consider that J was deceived into coming to the police station to be questioned on suspicion of gross defamation. It is unfortunate that J has been given this impression.

According to the police authority there are no records to show when J's legal guardians were informed. Information provided by the authority shows, however, that his mother was present at the police station during or after the first interrogation and that she was then present at the police station from time to time. The police authority considered that Section 5 of the Act with Special Provisions on Young Offenders (AYO) had been complied with.

Nor, according to the police authority, were there any records to show what contacts had been made with the social services. The authority had been informed by the social services in Falkenberg that there was nothing to show that they had been involved in connection with the measures dealt with here concerning J.

In its summing up, the police authority pointed out that there were shortcomings in the records. The authority intended therefore to make sure that officers in charge of and involved in enquiries were informed in some appropriate manner of the importance of complying with the current provisions in the AYO as well as the requirement pursuant to Section 21 b of the Ordinance on Preliminary Investigations (OPI) to keep records of notification/summons to attend for questioning. It was also stated that the authority had decided on specific internal monitoring of investigations in which juveniles were suspects.

With regard to the appointment of a public defence counsel the police authority submitted the following:

On 28 September 2009 the prosecutor submitted a faxed request to Varberg District Court for the appointment of a public defence counsel for J. This request stated that J had been detained at 2.05 p.m. on 28 September 2009 and that he was to be questioned without delay. In addition, the prosecutor stated in the request that the public defence counsel should contact the investigating officer [...] as soon as possible and gave a telephone number to use. Varberg District Court approved the request and appointed the lawyer Lennart Johansson from Falkenberg to act as J's public defence counsel. According to information provided by Varberg District Court, the letter of appointment and the prosecutor's request were posted to Johansson on the same day, i.e. 28 September 2009. The police authority assumes that the district court had been in contact with Johansson before he was appointed to act as J's public defence counsel.

A memorandum written by the officer conducting the questioning during the first interrogation, Ann-Charlotte Wiklund, included the following:

When J came into the room on 9 September 2009, I informed him of the suspicion of gross defamation through circulating pictures of girls accompanied by derogatory captions. I told him that he was entitled to a defence counsel during the questioning. – I asked if we could get in touch with his mother as I felt she should be present while J was questioned. J did not think his mother needed to be there while he was being questioned. Nor did he feel that he needed any defence counsel. – He asked what the whole thing was about. I explained that it concerned Top Hoe's films about the girls that had been made on the Internet and then circulated. He knew which films I was talking about but denied having anything to do with them. I then told him that a lot of the girls had identified him as one of those who had made the films. – J now wanted his mother to come. He also wanted a defence counsel to be present, upon which I telephoned the Chief Inspector who helped me to ring to arrange for one. – We then sat waiting for J's mother and the defence counsel and during that time I made some entries concerning other cases on my computer. – After a while J began to talk about the matter. He said what I wrote down in the interrogation. Before I wrote anything down I asked him, however, "Is it OK for me to write down what you are saying as an interrogation?" This was not a problem. Yes I could, was his answer. He was calm but looked anxious and despondent. – He said that he knew who had made the films but that he had not himself been involved. – *The only thing* I asked J about when he had finished his account was which computer had been used when they made the films and which young men he mixed with most. – All the rest that was recorded is what he said of his own accord with no interruption and without any questions from me at all.

The factual content of the record of the first interrogation is of limited extent and reads:

[J] says that he knows who made the four films and that he was not himself involved. For instance it was [an identified individual] who made number four. He was one and there were four other lads.

The films were made on a computer stolen from Tånga school. The lads said that it had been stolen. This is what they said when J told them they would get caught for making the films, as the police can trace the IP-number of the computer used.

The people J sees most of are [three identified individuals].

In a memorandum the officer who conducted the second and third interrogation, Klas Löfgren, says that he made a number of attempts to contact the defence council who had been appointed for J. On the morning of the day following J's detention, Löfgren contacted the prosecutor who was in charge of the preliminary investigation. The memorandum continues:

I gave the prosecutor the information I had been given about the defence counsel and the prosecutor said that we should question J. – As I have stated above, the information I had received earlier still applied, regarding the failure to make contact with the defence counsel and his failure to contact me. I told J about this on the way up from the police cells and also in my office before the questioning took place. – J said that the questioning could take place without the presence of a defence counsel. – He was not subjected to any pressure from me [...].

Before the third interrogation, which according to Klas Löfgren took place on J's initiative, he again contacted the prosecutor responsible for the investigation. According to Löfgren, she decided that J should be questioned again and

J agreed to be interviewed without the presence of a defence counsel. This was also accepted by J's mother, according to Löfgren.

In view of what had been disclosed, the Public Prosecution Office were asked to submit a statement on the directives issued by the prosecutor responsible for the investigation to the police when she was informed that J was coming to the police station and what consideration the prosecutor had taken of J's need of a defence counsel and the measures she had therefore adopted. The response of the Public Prosecution Office was submitted by the Deputy Prosecutor-General, Kerstin Skarp, and it was accompanied by information from the prosecutor responsible for the investigation, District Prosecutor Gisela Sjövall, as well as from the on-call prosecutor Marie-Louise Eskilstrorp, a district prosecutor, and the head of the local prosecution office in Halmstad, Chief District Prosecutor Anders Johansson.

When it came to the preparations for the interrogation with J, in substance the Public Prosecution Office endorsed Gisela Sjövall's assessment and the measure she adopted (see below). With regard to the need for a defence counsel for J, the response of the Public Prosecution Office included the following:

In the case in question the risk of collusion meant that it was not possible to ensure that a public defence counsel was appointed before the suspect J was questioned as investigation of the matter could have been jeopardised if the suspect and the suspect's guardian were given an opportunity to express a view on the question of defence and any possible desire as to who was to be appointed as a public defence counsel.

It was, in other words, necessary to delay raising the question of defence with the suspect and the suspect's guardian until the interrogation began. The crime (gross defamation) of which J was suspected was admittedly not a minor one but nor was the offence of as grave a nature as rape or robbery, for instance (cf. the Parliamentary Ombudsmen's Annual Report for 2008/09, p. 92 and the Parliamentary Ombudsmen's adjudication in case number 5493-2008). In my opinion, taken by and large, the circumstances meant that the prosecutor was justified in considering that it was possible to hold a brief introductory interrogation with the suspect without the presence of a defence counsel and therefore that there were no grounds for the appointment *ex officio* of a public defence counsel in that situation. This provided, of course, that the guardian or the suspect during the questioning did not request the appointment of a public defence counsel who was to be present during the interrogation. I cannot see that any circumstances have been disclosed that should have prompted the prosecutor to remind an experienced Detective Chief Inspector that contact should be taken with the prosecutor if the guardian of a young suspect or the juvenile himself requests the presence of a defence counsel while being questioned.

When during the interrogation resulting from the directive the suspect requested the presence of a defence counsel, the interrogation should, therefore, have been interrupted by the officer in charge and the prosecutor contacted. According to the records, no real interrogation of J took place. When questioned, the suspect J merely denied his own involvement and gave some brief information about what others had done. After the interrogation the prosecutor more or less immediately submitted a request to the court for the appointment of a public defence counsel.

One of the documents provided by Gisela Sjövall contained supplementary information. It read as follows.

On the basis of information disclosed by another perpetrator when questioned, it became clear that there were good grounds for suspecting J of gross defamation through his participation in films 3 and 4. My assessment was there was a great risk of collusion as several other individuals could also be suspected of participating in one or more of the films. My recollection today is that through contact with the investigating officer I was informed that J was going to come to the police station voluntarily at lunch time. I do not know whether or not any summons had been sent to J before this. Instead of ordering that J should be brought to the police station for questioning I decided that he should be notified that he was suspected of gross defamation and questioned briefly. This instruction was an oral one. As Chief Inspector Ingvar Johansson was in charge of the investigation and has long and thorough experience that includes dealing with juvenile offences I saw no reason to place any particular emphasis on the provisions of Section 5–7 of the Act with Special Provisions on Young Offenders. My assessment when it came to J's need of a public defence counsel was that it was not evident that he had no need of a defence counsel. I considered, however, that there was a great risk of collusion as there were other individuals who could be suspected of involvement in one or more of the four films. In my opinion, it was important to enable them to be questioned before they had any chance of influencing the investigation by talking to each other. In this situation I considered that it would be prejudicial for the investigation to submit an application for a public defence counsel before J had come to the police station and notified that he was suspected of a criminal offence. There would then have been a major risk that he would not only have failed to attend but also could have contacted others who were involved. I therefore came to the conclusion that the application for a public defence counsel should not be submitted until J had been informed that he was a suspect and had been questioned briefly. As far as I can recollect, I first had contact with Klas Löfgren when I was informed that J was coming to the police station and that I then had several contacts with Ingvar Johansson in which I informed him about my assessment. At lunch time I then handed the case over to the duty prosecutor for the day.

Anders Johansson notes among other things that “the introductory questioning when notification of the suspicion took place” lasted for more than an hour and that this had obviously not been the prosecutor's intention but she had merely wanted J to be informed that he was a suspect and then asked some initial questions in the presence of a defence counsel. Anders Johansson also stated that in view of what had transpired in this and other cases, the police authority in the County of Halland and the Public Prosecution Office in Halmstad had jointly agreed to review the routines for dealing with juvenile offenders so that the rights of suspects to defence counsel and the implementation and documentation of prosecutors' directives could be dealt with appropriately by both the police and prosecutors.

J was offered an opportunity to submit a rejoinder to the statements submitted by the authorities.

#### **Legal provisions, etc.**

*Obligation to submit to questioning by the police etc.*

It is a civic duty to submit to being questioned by the police (see Section 6 of Chapter 23 of the Swedish Code of Judicial Procedure – CJP). There is no



requirement to contribute to an investigation. An individual is, in other words, required to attend in order to be asked questions but not to answer them.

There is no provision that explicitly states that individuals suspected of crimes are entitled to remain silent and do not have to provide information that could incriminate them. But that such a right exists is, however, one entailment of the European Convention, about which more below.

Apart from the provision in the first paragraph of Section 5 of the OPI, which lays down that summons to attend for questioning shall normally be issued in good time, there are no special regulations on how summonses should be issued. They can therefore be either oral or written. Section 7 of Chapter 23 of the CJP states that those who fail to obey a summons without a valid excuse may be taken into custody for questioning. The same provision stipulates that those deemed able to impede an investigation by removing evidence etc. may, on certain conditions, be taken into custody for questioning without prior summons. In addition, there is a possibility of making individuals accompany a police officer to assist in an investigation, CJP 23:8.

Those questioned are not required to stay for longer than six hours, provided that they cannot be suspected of a criminal offence, when the period may be extended to twelve hours, provided that this is of extraordinary necessity, CJP 23:9.

Section 17 of the OPI lays down that particular pains shall be devoted to planning an interrogation, if the individual to be questioned is under eighteen years of age and suspected of a criminal offence, so that no risk of harming the juvenile may arise. Special care should be taken to ensure that the interrogation does not attract attention, nor may it probe more deeply than the circumstances require.

Section 12 of Chapter 23 of the CJP stipulates that it is not admissible to use unwarranted measures in order to extract a confession or a specific statement. The examples of unwarranted measures include the use of knowingly false information, promises or hints of special treatment, threats, coercion or questioning to the point of fatigue.

#### *Notifying guardians, custodians, etc.*

When someone under the age of eighteen is suspected of a crime their parent or guardian or anyone responsible for their care and upbringing as well as any individual who plays a formative role in relation to the juvenile must be informed immediately. They must also be summoned to attend any interrogation of the young person. However neither the information nor the summons is required if it can be prejudicial for the investigation or there are any other grounds to the contrary. (See Section 5 of the AYO.) The intention is that those who have relationships of this kind to the suspects will be informed when an investigation is taking place and therefore better able to discharge their responsibilities as caregivers. (cf. Thunved, Clevesköld & Thunved, *Samhället och de unga lagöverträdarna [Society and young offenders]*, 4<sup>th</sup> ed., p. 110). This provision does not mean that the caregiver needs or is entitled to be present in the interrogation room when the young person is ques-

tioned (op. cit.). Compliance is also required with the second paragraph of Section 3 of Chapter 1 of the CJP, which stipulates that defence counsel for those under the age of eighteen are appointed by the individuals who have custody of them, see below.

A record should be kept of notifications and summonses. This adheres to the general principles that apply to the requirement of public authorities to keep records and is also, in the case of Section 5 of the AYO, stipulated in Section 21 b of the OPI (see also Section 20 in the same statute that lays down when and where measures adopted during the investigation are to be recorded).

*Informing boards of social welfare etc.*

When someone who has not yet reached the age of eighteen is reasonably suspected of a criminal offence for which a prison sentence can be awarded, the board of social welfare has to be informed without delay, AYO 6. When the young person is being questioned a representative of the social services must be present if possible and if not prejudicial to the investigation, AYO 6. In principle the intention here is the same as in the case of parents or guardians, i.e. that the board of social welfare should be informed when an investigation is taking place and will therefore be better able to discharge its responsibilities (for further details see the work by Thunved, Clevesköld & Thunved cited above, p. 112 ff.)

Section 6 of the AYO stipulates that a record must be kept of the measures adopted by the police authority (see also Section 20 of the OPI).

*The right to defence counsel*

Section 3 of Chapter 21 of the CJP stipulates that a suspect is entitled to the assistance of a defence counsel that he or she appoints. If the suspect is under the age of eighteen, the defence counsel is appointed by the person who has custody of him or her. This means that the parent or guardian has to be involved in matters concerning the right of a juvenile to a defence counsel (cf. the Prosecutor General's guidelines 2006:3, p. 23).

In certain circumstances a public defence counsel must be appointed, see Section 3a of Chapter 21 of the CJP. In such circumstances the individual responsible for the investigation has to inform the court to which the case pertains of this fact and the court then has to deal with the appointment, CJP 23:5 & 21:4, second paragraph. If the suspect is under eighteen, a defence counsel has to be appointed unless it is evident that he or she has no need of one, AYO 24. It is the court that decides who is to be appointed: if the suspect has proposed someone who is eligible for appointment this person shall be appointed unless there are special grounds for not doing so, CJP 21:5 second paragraph.

Section 12 of the OPI states that anyone notified that he or she is reasonably suspected of a crime is to be informed of their right to the assistance of a defence counsel during the preliminary investigation and that in certain circumstances a public defence counsel can be appointed.

If the suspect requests the provision of a public defence counsel, this request must be submitted to a court for appraisal according to the provisions referred to above, irrespective of what assessment the person in charge of the investigation makes of whether this is necessary. The request has to be submitted immediately (see the Prosecutor General's guidelines 2006:3, p. 23 and the references there).

In a number of cases in recent years the Parliamentary Ombudsmen have expressed criticism of interrogations concerning juveniles without a defence counsel being present. The Parliamentary Ombudsman's adjudication of 9 April 2010 (reg. no. 3741-2008) concerned a seventeen-year-old youth who had been arrested for assault. During the preliminary questioning the suspect stated that he wanted a certain lawyer but agreed to continue the interrogation without this lawyer being present. The Parliamentary Ombudsman made the following general observation:

Even if a suspect says that questioning can take place without a defence counsel, the person in charge of the investigation must make an assessment on objective grounds that this is the case. This assessment cannot therefore be left to the suspect [...].

The Parliamentary Ombudsman expressed severe criticism of the fact that no defence counsel was present during the preliminary questioning and grave criticism of the fact that this was also the case during the following interrogations.

The Parliamentary Ombudsman's adjudication of 17 December 2010 (reg. no. 5493-2008) concerned a sixteen-year-old youth suspected of the aggravated rape of children. When he had been notified of the crime of which he was suspected, the youth said that questioning could take place without a defence counsel but that he wanted one if the case came to trial. The Parliamentary Ombudsman pointed out that this assessment cannot be left to the suspect or parent or guardian and included the following observation:

It is the responsibility of the individual in charge of the preliminary investigation to consider and to issue directives about what is required with regard to the need of a public defence counsel. It is of course important for anyone in charge of an investigation to take pains to be explicit when directives are given before an impending interrogation. Records should be kept of such directives. [...]

In view of the fact that the investigation was dealing with a very serious crime it was, in my opinion, wrong to question A.K. thoroughly without a public defence counsel being present. Instead when this interrogation took place, A.K. should, in the way that the [leader of the investigation] states was intended, merely have been notified that he was suspected of a crime and asked whether or not he admitted it and also about a defence counsel. More detailed questioning would then have had to wait until the following day, when a public defence counsel could attend.

#### *Fair trial*

The *European Convention on Human Rights and Fundamental Freedoms* (the European Convention) has the force of law in Sweden. According to Article 6 everyone accused of a criminal offence is entitled to a fair trial. As a result of

the praxis that has developed in the European Court of Human Rights (ECHR), this concept comprises a number of entitlements and principles. Since 2011 a provision on fair trial is also included in the stipulations in the Instrument of Government on fundamental freedoms and rights (Article 2:11 second paragraph).

One of the principles that the concept of fair trial comprises is that the suspect need not contribute to an investigation by making admissions or providing incriminating material (Danelius, *Mänskliga rättigheter i europeisk praxis* [*Human rights in European praxis*] , 3<sup>rd</sup> ed., p. 247). The right to a defence counsel is laid down specifically in Article 6 (6.3 c), which says that everyone has the right to defend himself through legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

The right to a fair trial applies through the entire procedure, from the preliminary investigation to the court hearing and the verdict. Appraisals of whether there has been infringement of the right to a fair trial should, according to the praxis of the ECHR, be based on the judicial process in its entirety, which means that a shortcoming at one stage can be compensated in another. The right to a defence counsel is therefore one among many elements in the concept of a fair trial. This assertion is borne out by *Imbrioscia v. Switzerland* (judgment issued on 24 November 1993, application number 13972/88, §§ 36–38).

There are a number of cases from the ECHR in which the complaints have involved interrogations undertaken without access to a defence counsel. Their outcomes show that if a subsequent conviction is based on statements made in such circumstances, this may, depending on the circumstances in other respects, constitute an encroachment of the right to a fair trial. One case of particular interest is *Salduz v. Turkey* (judgment issued 27 November 2008, application number 36391/02).

At the time Salduz was a seventeen-year-old youth arrested by the Turkish police on suspicion of having participated in an unlawful demonstration in support of an organisation that was forbidden in Turkey and of having hung an illegal banner from a bridge. He was initially apprised of his right to remain silent and at the same time it was made clear that he would later have the possibility of being assisted by a lawyer. In the police interrogations that followed, Salduz, who lacked the assistance of a defence counsel, made a number of admissions which he withdrew when he came before the examining judge. He was later sentenced by a court to a prison sentence of two and half years. A substantial proportion of the evidence consisted of the statements he had withdrawn. In its first ruling the ECHR found that Turkey was not in breach of Article 6.3 c. At the request of Salduz the case was taken up again in a larger court, the Grand Chamber. In its new judgment the court described the general principles that should be applied. It was pointed out, among other things, that a suspect is often in a particularly vulnerable position in the initial stages of a criminal investigation. In most cases this can only be compensated for by the assistance of a lawyer whose task includes helping “to ensure respect for the right of an accused not to incriminate him-

self (§ 54). The court went on to state that “Early access to a lawyer is one of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination” (§ 54). Its reasoning led to the following conclusion:

Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective” [...] Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 [...]. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (§ 55).

In this case the judgment of the ECHR can be summarised as follows. Salduz had been denied the assistance of a defence counsel when he made the statements that were used in evidence against him. This could not be justified. The statements were admittedly evidence against him. His situation had undoubtedly been affected negatively by the restriction of his access to a defence counsel while being questioned. These shortcomings could not be remedied during the later stages of the proceedings. The court concluded by taking note of Salduz’s age and emphasised the fundamental importance of providing juvenile detainees with access to a lawyer. To sum up, “the absence of a lawyer while he was in police custody irretrievably affected his defence rights (§ 62).

In its praxis the ECHR shows that it considers that a suspect can waive his rights according to the Convention and will then have to face the consequences. In this context the court has pointed out that neither the letter nor the spirit of Article 6 prevents individuals from waiving their rights, but has emphasised at the same time that such a waiver *must not run counter to any important public interest, must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to the waiver’s importance.* (*Panovits v. Cyprus*, judgment issued 11 December 2008, application number 4268/04, § 68).

This case also concerned statements made by the suspect after he had been informed of his right to remain silent but had no access to a defence counsel. Like Salduz, Panovits was seventeen years old when he was questioned by the police. Here the ECHR gave a more detailed account of the particular considerations required when a juvenile is accused of a crime, one of them that being particular stringency is needed if a waiver of the rights afforded by the Convention is to be accepted:

The Court considers that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or

she is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct. (§ 68, see also § 67)

### **Appraisal**

#### *Notifications and summonses*

The documents in this case do not reveal when J's parents were informed. It is, however, clear that this had taken place when the questioning began. There is nothing to suggest that the social services were involved in the prescribed manner. The current regulations on notifications and summonses to the parents or guardians and to the social authorities were not therefore complied with.

The prosecutor, whose role was to direct the investigation, had issued instructions that a young person was to be questioned and notified that he was suspected of gross defamation. It is the police force, ultimately its senior officers, who are responsible for ensuring that the prosecutor's instructions result in appropriate measures and that these are carried out in a correct manner and by qualified personnel (cf. the Parliamentary Ombudsman's adjudication of 24 August 2011, reg. no. 4217-2010). This responsibility also includes – without detailed instructions from the prosecutor in charge of the investigation – making sure that routine measures take place such as notifications and summonses as laid down in Sections 5–7 of the AYO. It is, in other words, the police authority in Halland that merits criticism for the fundamental shortcomings that arose in this respect.

#### *The initial measures*

The actions of the investigating officers in relation to J were initiated when J contacted the police to ask for information about his moped. He then agreed with a police officer that he would come to the police station to discuss this. According to the statement from the police authority, the police officer subsequently remembered that J figured in a preliminary investigation concerning gross defamation. The district prosecutor in charge of this investigation, Gisela Sjövall, was therefore informed that J was going to come to the police station. Gisela Sjövall issued instructions that J should be informed that he was suspected of the crime of gross defamation and should be questioned briefly.

As Gisela Sjövall points out in her statement to the Parliamentary Ombudsman, there were grounds for taking J to the station in custody without any preceding notification. This could have caused J more distress and I cannot, therefore, consider that the circumstances surrounding his appearance at the police station impaired his legal rights. From the perspectives that the police have to take into account – among them Section 17 of the OPI, which requires them to ensure that an interrogation does not attract attention – I can even have some understanding of the way in which they took time by the forelock, as it were. Nor can I see anything to indicate that the police attempted to catch J “off guard”. The fact that the police never informed J of

the planned interrogation means, however, that he was left with the belief that the subject to be discussed was his moped. From this point of view it was predictable that J was going to feel that he had been deceived.

Now, after the event, I consider that this procedure was inappropriate. Partly because a public authority must always take great pains to behave in a straightforward and trustworthy manner, partly because it was probably one of the reasons why things went wrong. The normal procedure, as indicated by the police authority in its statement to the Parliamentary Ombudsman, would have been to plan the interrogation and notify or fetch the suspect while at the same time considering what information was to be disclosed and preparing for the appointment of a public defence counsel. This is not how things worked out here and it is difficult to rid oneself of the suspicion that, to some extent at least, this stemmed from the improvised actions of the police.

#### *The first interrogation*

The prosecutor in charge of the investigation has stated that she issued a directive that initially J was merely to “questioned briefly”. Afterwards a request for the appointment of a public defence counsel was to be submitted. The head of the District Prosecution Office described this as a “notification interrogation”, i.e. when notification is given about the suspected offence and the suspect offered an opportunity to express a standpoint and whether or not they want a defence counsel. However, according to the records, the interrogation lasted for more than one hour. The statement of the officer conducting the interrogation makes it clear that she was well aware of J’s right to a defence counsel. She also interrupted the interrogation when J, once he realised what the subject was, wanted his mother to be informed and the presence of a lawyer. According to the officer’s own account, the two of them then remained sitting in the room where the questioning was taking place waiting for J’s mother and the lawyer, upon which J began spontaneously to relate everything he knew about the crime that was being investigated. She entered this information in the record of the interrogation after first having asked J if she was allowed to do so.

In view of this, I would first like to stress that an interrogation should have formal limits. If it has been interrupted, it should naturally not then continue in the form of an unstructured conversation. If the suspect discloses information outside the interrogation, this must not be entered into the records. If the information is of interest for the investigation, a separate record should be made, in for instance the case notes that form part of the investigation dossier – irrespective of whether the suspect agrees or not.

Secondly, I note that the contents of the record of the interrogation deal predominantly with the only matters that the officer involved, according to the statement she submitted as part of the Parliamentary Ombudsman’s enquiry, asked specific questions about after the official part of the interrogation had been interrupted (“which computer had been used, when the films were made and which youths he mixed with”). The information contained in the

record of the interrogation does not appear, in other words, to be only or perhaps even mainly the kind of thing that J stated spontaneously.

In view of this, the officer conducting the interrogation, Ann-Charlotte Wiklund, merits criticism for her continuation of the interrogation in point of fact after it had been interrupted and her lack of respect for J's right to the assistance of a defence counsel. The prosecutor in charge of the investigation, who gave instructions that the interrogation should be brief and that a defence counsel should be appointed, cannot in my opinion be criticised for what in all essential respects seems to have been a blunder by the officer carrying out the interrogation.

*The right to defence counsel: certain general conditions*

Anyone who while being questioned is told that he or she is reasonably suspected of a criminal offence must at the same time be informed of their right to the assistance of a defence counsel during the investigation. Even if a suspect states that questioning can be carried out without the presence of a defence counsel, the official in charge of the investigation has to assess on objective grounds whether or not this is the case (see the adjudications of the Parliamentary Ombudsmen cited above).

The primary intention of entitling a suspect to a defence counsel at an early stage in a criminal investigation is to make sure that lack of knowledge of the investigatory procedure or the legal provisions will not leave them at the mercy of the police or prosecutors but that they will be provided with access to the kind of information that will enable them to take full advantage of their rights. This means that the suspect must have access to a defence counsel. On the other hand, it does not automatically mean that a defence counsel has to be present when the suspect is questioned.

During the criminal investigation and trial, however, the defence counsel plays a more extensive monitoring role. Compliance with the rules of procedure that guarantee the legal rights of suspects is normally enhanced if it is scrutinised from their perspective. It is therefore in the interest of justice for defence counsel not only to assist suspects with information and advice but also to be present when they are questioned and evidence is gathered in other ways.

*J's right to a defence counsel*

A public defence counsel must be appointed for a suspect under the age of eighteen, unless it is obvious that there is no need for one. The accusations levelled against J were serious ones. He ran the risk not only of a penalty but also of being ordered to pay a large amount in damages. The criminal investigation was relatively extensive with a number of suspects and a large number of aggrieved parties. In view of this, the circumstances left no scope at all for the view that no defence counsel was needed. On the contrary, it was clear that the legal provisions required the appointment of a defence counsel for J. This is also the assessment made by the prosecutor in charge of the investigation. In principle, therefore, in this situation the appointment of a defence



counsel was required, irrespective of how the suspect was going to react to the accusation. This is also what was arranged after the first interrogation.

When, before a preliminary interrogation, a suspect is already considered to need a defence counsel, it will also normally be necessary for the lawyer to be present at this interrogation (provided it is not restricted to notifying the suspect of the charge and a few brief questions, see above). In this case the suspect was a juvenile, which in itself enhances the need for a defence counsel. The nature of the evidence was in many ways complicated and included for instance appraisal of whether the suspects acted “jointly and in concert”, which means that the information given by the suspects early in the investigation before they have any awareness of what the other suspects have said, is of great importance. When, as here, it can be foreseen that the statements made under questioning may be adduced as evidence in a court of law, it is particularly important – even from a general point of view – for them to be made in ways which are legally secure. As pointed out in the commentary on the CJP, the need of a defence counsel is not smaller during the first interrogation with a suspect but rather the opposite (Fitger, *Rättegångsbalken [The Swedish Code of Judicial Procedure]*, [www.nj.se/zeteo](http://www.nj.se/zeteo), Chapter 23, Section 5). In my opinion, given these circumstances, there can be no doubt that the attendance of a defence counsel was required at all of the sessions when J was questioned.

The circumstances of the first interrogation have been assessed above. When it comes to the second and third interrogations, neither the Prosecution Agency nor the prosecutor in charge of the investigation have commented in the course of the Parliamentary Ombudsman’s enquiry on why they took place without a defence counsel. On the other hand, the police officer who carried out the questioning, Klas Löfgren, has submitted a memorandum accounting for the measures adopted and his considerations. In it he states that J and, prior to the third interrogation, also his mother agreed that questioning could take place without a defence counsel. Before the second interrogation the police, according to Löfgren, tried to contact the defence counsel without success. His description also reveals that nevertheless it was decided to carry out the interrogation. Löfgren therefore went to the police cells to fetch J. On their way to the interrogation room he explained to J that it had not been possible to contact his defence counsel and then J is said to have agreed to be questioned all the same. Before both interrogations Löfgren contacted the prosecutor in charge of the investigation, who, according to him, said that they could take place without a defence counsel, in the second instance subject to J’s agreement.

The reason for continuing the interrogations without a defence lawyers seems therefore to have been that it was considered appropriate and that J and, at the third interrogation, his mother had agreed to this. One requirement for it to be acceptable to carry out an interrogation without a defence counsel in a case of this kind is that the suspect and his or her parent or guardian has waived the right unambiguously and in a legally secure and well documented manner (see also the Prosecutor General’s guidelines 2006: 3, p. 23, which stress how important it is for the prosecutor to ascertain that the suspect has

understood the significance of the provision of Section 12 of the OPI). The discussions with J and his mother described by Klas Löfgren do not meet these requirements.

My enquiry also discloses that already when J was informed of the suspicion he declared that he wanted a lawyer to be present. Nothing, not even the note in the record of the third interrogation (“J states that it is OK to hold the interrogation without the presence of a defence counsel”) suggests that he had changed this basic standpoint. What has been revealed in these respects is not incompatible with J’s assertion that he felt he was under pressure to do what the police told him to. It would appear to be impossible to rule out that J and his mother felt that they had no other choice than to go along with the interrogation that the police wanted to conduct.

It is difficult to draw any other conclusion than that the investigating officers – who do not seem to have considered that the presence of a defence counsel would have served any useful purpose – underestimated the importance of a defence counsel for the legal proceedings in their entirety. There are therefore grounds for maintaining that it was not in the best interests of the investigation to conduct this interrogation without a defence counsel, as, generally speaking, the outcome is that anything disclosed is given less weight as evidence, which was in this case confirmed in the court hearings.

The interrogations should not, therefore, have been conducted in the way they were. According to Klas Löfgren, the prosecutor in charge of the investigation agreed to their taking place without a defence counsel. However that may be, as she was in charge of the investigation Gisela Sjövall was responsible for ensuring that J’s rights were respected and that the investigation was conducted in a legally secure manner (cf. the second paragraph of Section 1a of the OPI). When her intentions regarding the first interrogation had had no impact, she should have made sure that J – in accordance with the legal assessment she herself had made – was assisted during the following interrogations in the way he wanted and was entitled to. It is therefore Gisela Sjövall who merits criticism for the grave errors made when J, while deprived of his liberty, was questioned repeatedly without the assistance of a defence counsel.

#### *The right to a defence counsel according to the European Convention*

The principles laid down in the Swedish procedural regulations about the rights of a suspect to a defence counsel were not therefore complied with. As can be seen from the account of the legal provisions the right to a defence counsel when being questioned by the police is a fundamental element in the right to a fair trial according to the European Convention. Appraisal of J’s complaint about the criminal investigation also comprises, therefore, assessment of whether his rights according to the Convention were infringed by the errors that were committed.

In certain earlier judgments the ECHR has ascribed a somewhat restrictive content to the right to a defence counsel. Here the stipulations of the Convention seem to have been limited to the suspect not being refused the right to a

lawyer (see *Imbrioscia* [cited above] and *Brennan v. United Kingdom* [judgment issued 16 October 2001, application no. 39846/98]). In more recent judgments the construction given to the requirement is that the accused must have access to a lawyer. In *Salduz* [see above] the main rule is construed as meaning that “access to a lawyer should be provided as from the first interrogation of a suspect by the police”. The far-reaching demands laid down by the court for accepting that a suspect has waived this right also mean in practice that the authorities investigating crimes must ensure that a suspect has access to a lawyer, unless they can show that he or she pursuant to the prescribed requirements has relinquished this right. One of the basic principles of the Convention is, moreover, that the rights guaranteed must be practical and effective. For those deprived of their liberty who are to be subject to judicial questioning the right to a defence counsel can have no practical significance, if the authority investigating the crime does not act to ensure that this right may be exercised.

According to the European Convention, therefore, the rights of someone suspected of a criminal offence mean that the authority investigating a crime is required to ensure that the suspect has access to a defence counsel. This is also how the Convention has been interpreted in the proposal on the right to a lawyer in criminal proceedings which is currently being dealt with in the EU (see Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, 8 June 2011 COM(2011) 326 final, Article 3).

This requirement does not mean that a defence council must be present during questioning: what is decisive is whether the authority investigating a crime has ensured before the interrogation that the suspect has been provided with legal assistance, provided that he or she has not waived this right in the manner described above. As has been shown by the praxis of the ECHR, in addition waivers by juveniles can only be accepted if the authorities have previously taken all reasonable measures to ensure that these juveniles are fully aware of their rights and can as far as possible assess the consequences of what they are doing (*Panovits*, § 68, cited above). In practice this can probably be taken to mean that a juvenile suspect must have had access to some form of legal assistance before he or she can be interrogated without a defence counsel.

It has been established that during the time he was in police detention, in which three interrogations took place, J was never provided with access to a lawyer. The information submitted by the authority investigating the crime does not show that J waived his right to a defence counsel as required by the European Convention. His rights in this respect were not therefore respected.

#### *Fair trial?*

In the interpretation of the Convention espoused by the ECHR, the defence counsel has the important task of ensuring respect for the rights of suspects to remain silent and not to incriminate themselves. In this case J was neither provided with access to a defence counsel nor, as far as has been revealed,

informed of his right to remain silent. The fact that as a detained juvenile he was in a particularly vulnerable position when he was subjected to interrogation is, from the point of view of the Convention, aggravating. There are other circumstances as well that indicate that the infringement of the Convention that occurred was so fundamental that it also encroached on J's right to a fair trial.

The praxis of the ECHR also makes it clear that appraisal of encroachment on the right to a fair trial is to be based on the legal proceedings in their entirety, which means that shortcomings at one stage can be remedied in another. In other words, the entire legal process has to be taken into account.

The preliminary investigation resulted in six youths being charged for involvement in the production and circulation of one or more of the films concerned. The evidence consisted of statements made by the youths when questioned. According to the judgment issued by Varberg District Court on 6 April 2010 (case no. B 2580-09), only one of these interrogations took place in the presence of a defence counsel. The court considered, as is made clear in the grounds given for its judgment, that this did not meet the desired requirements, but nevertheless found reasons for relying on the statements made during the interrogations.

J was convicted, despite his plea of not guilty, of one charge. The grounds cited were that he had given the police a detailed account of his involvement and his words were confirmed by statements by two of the other accused. He was also found guilty on one of the other charges. Here, however, J admitted that he had been present and that he had also written a text that was later included in the film in question. The police interrogation was not cited specifically concerning this charge.

J appealed to the Court of Appeal for Western Sweden, which, under the heading *Premises for the Court of Appeal's deliberations*, included the following in its judgment (issued 1 October 2010 in case B 2111-10):

As [...] revealed in the judgment of the District Court questioning was conducted by the police in several cases without the presence of any defence counsel. Basing a conviction on statements made by the suspect when questioned by the police could involve infringement of the right to a fair trial pursuant to Article 6.1 of the European Convention if his or her rights pursuant to the Convention have not been respected. According to the article cited, the right to a fair trial is considered for instance to include the right of the suspect to remain silent, refuse to make a confession or provide any incriminating information (see for the instance the judgment of the ECHR [...] in the case of *Panovits v. Cyprus*).

In addition, the Court of Appeal is able to determine that it has not been made clear if the officer conducting the questioning ensured that each of the accused, who were all under the age of eighteen, understood that they were entitled to remain silent. There are therefore grounds for considering whether the interrogations with them were conducted in a manner that is compatible with Article 6 of the European Convention. On these premises alone, the Court of Appeal considers that the statements made during questioning by the police should be afforded less weight than concluded by the District Court.

The Court of Appeal acquitted J on one of the two charges in which the evidence was based in essence on the police interrogations. The court considered

the value as evidence of the admissions he had then made was low and referred, for instance, to the fact J had made these admissions in interrogations where he had no defence counsel. The statements which the court did take into consideration included J's information that he felt under pressure to confess and also that he did so in order to be released and at the urging of his mother, who said that the other youths had been released. He was, on the other hand, also found guilty by the Court of Appeal of the other charge. Here the evidence was the admission he had made to the court.

The infringement of J's defence rights that occurred during the police investigation seem, therefore, to have been remedied during the closing stages of the proceedings, in the appraisal of the evidence made by the Court of Appeal. On the basis of all that has been revealed in my enquiry I therefore consider that there has been no infringement of the right to a fair trial pursuant to Article 6 of the European Convention.

#### *To sum up*

The current regulations on *notifications* and *summonses* to parents or guardians and to boards of social welfare were not complied with. The police authority is responsible for ensuring that routine measures of this kind are executed correctly. The police authority in the County of Halland is therefore criticised for the fundamental shortcomings that occurred in these respects.

*The initial measures.* It was inappropriate but not unlawful to allow J to come to the police station in the belief that he was going to be informed about his moped, when the intention was to question him about a crime.

*The first interrogation* was terminated once J had requested a defence counsel. The officer conducting the interrogation, Ann-Charlotte Wiklund, continued to discuss the investigation with him and to ask questions about it. Ann-Charlotte Wiklund is criticised for her de facto continuation of the interrogation and her lack of respect for J's right to the assistance of a defence counsel.

*The right to a defence counsel – some general conditions.* Even if a suspect says that questioning may take place without a defence counsel, those in charge of investigations must assess on objective grounds whether this is the case. The main intention of entitling a suspect to a defence counsel at an early stage of a criminal investigation is to ensure that he or she is not placed at a disadvantage in having less information than the police or prosecutor. The defence counsel also has a more extensive role in monitoring the investigation and the court hearings. Typically this means that the defence counsel should be present during interrogations. A suspect can waive this right. This should be declared unequivocally and in a legally secure manner: a record should also be made.

*J's right to a defence counsel.* Defence counsel do not always have to be present when the suspect is questioned. J was, however, a juvenile. The nature of the evidence was complicated and it could be foreseen that statements made during questioning could be adduced as evidence before a court of law. Neither J nor his parents had waived the right to legal assistance in an accept-

able manner. These are some of the reasons why all the interrogations of J should have taken place in the presence of a defence counsel. Nor was it in the best interests of justice to undertake the questioning without a defence counsel, as the statements then made could only be ascribed limited value as evidence. The prosecutor in charge of the investigation is criticised for the grave errors that were made.

The *European Convention* lays down that *the right to a defence counsel* at a police interrogation is a fundamental element in the right to a fair trial. This comprises a de facto requirement that a suspect is given access to legal assistance. This requirement was not met when J was questioned. An individual may waive a right laid down in the Convention but then special conditions apply, which were not fulfilled in this case.

A number of circumstances indicate that J's *right to a fair trial* was infringed. The assessment of whether or not this is what happened has to be made, however, on the basis of the judicial proceedings in their entirety. The Court of Appeal acquitted J on the two charges where the evidence was based in essence on the police interrogations. The court considered that the statements made during questioning had little value as evidence and one of the reasons given was that they were made during interrogations where no defence counsel was present. The infringement of J's defence rights that seems to have taken place was therefore remedied in the final stages of the proceedings. For this reason there was no breach of the right to a fair trial pursuant to Article 6 of the European Convention.