JO RIKSDAGENS OMBUDSMÄN

The Swedish Parliamentary Ombudsmen

Report for the period
1 July 2010 to 30 June 2011

SUMMARY IN ENGLISH

BILAGA 10

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1. General information and statistics

Mr. Mats Melin resigned from his post as Chief Parliamentary Ombudsman on 2 January 2011 to take up the position of President of the Supreme Administrative Court. The Riksdag appointed Ms. Cecilia Nordenfelt to be Chief Parliamentary Ombudsman from 3 January 2011.

Ms. Kerstin André retired from her post as Parliamentary Ombudsman from 1 January 2011. The Riksdag has appointed Mr. Lars Lindström to the post of Parliamentary Ombudsman from 1 June 2011.

During the period covered by the report, the following have held office as Parliamentary Ombudsmen: Mr. Mats Melin (Chief Parliamentary Ombudsman up until 2 January 2011), Ms. Kerstin André (up until 31 December 2010), Ms. Cecilia Nordenfelt (Chief Parliamentary Ombudsman from 3 January 2011, 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, 6,954 new cases were registered with the Ombudsmen; 6,816 of them were complaints (a reduction of 494 (–6.76%) compared to the number during the previous working year) and 36 were cases initiated by the Ombudsmen themselves on the basis of observations made during inspections, newspaper reports or on other grounds. 102 cases concerned new legislation, where the Parliamentary Ombudsmen were given the opportunity to express their opinion on government bills etc.

7,061 cases were concluded during the period, a reduction of 666 (–8.62%); of which 6,911 involved complaints, 50 were cases initiated by the Ombudsmen themselves and 100 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 three of the cases dealt with by the Ombudsmen during the period, one summary of an initiative case and one lecture on access to official documents held by Mr. Hans-Gunnar Axberger, 3 May 2011 in Brussels.

Schedule of cases initiated by the Ombudsmen and concluded during the period 1 July 2010–30 June 2011

Activity concerned	Closed without final criticism	Admonitions or other criticism	Prosecutions	Total
Courts of law	0	4	1	5
Administrative courts	0	4	0	4
Public prosecutors	0	5	0	5
Police authorities	0	1	0	1
Prison administration	5	6	0	11
Social welfare	1	8	0	9
Medical care	0	3	0	3
Social insurance	0	3	0	3
Municipal administration not covered by special regulations	0	1	0	1
Communications	0	1	0	1
The school system	0	1	0	1
Consumer protection	0	1	0	1
Immigration, integration of immigrants	0	2	0	2
Chief guardians	2	1	0	3
Total	**8**	**41**	**1**	**50**

Schedule of complaint cases concluded during the period 1 July 2010–30 June 2011

Activity concerned	Dismissed without investigation	Referred to other agencies or state organs	No criticism after investigation	Admonitions or other criticism	Prosecutions or disciplinary proceedings	Preliminary crimnal investig. No prosecution	Guidelines for good administration	Correction during the investigation	Total
Courts of law	108	0	222	21	2	1	1	1	356
Administrative courts	49	0	52	13	0	0	0	0	114
Public prosecutors	67	4	151	23	0	1	0	0	246
Police authorities	275	5	359	50	0	0	1	1	691
Customs services	4	0	4	0	0	0	0	0	8
Armed forces	13	0	4	0	0	0	0	0	17
Prison administration	609	0	447	146	0	0	1	0	1203
Social welfare	496	6	407	59	0	0	0	0	968
Medical care	169	1	60	24	0	0	0	0	254
Social insurance	372	1	136	75	0	0	0	0	584
Labour market auth.	134	0	48	8	0	0	0	1	191
Planning and building	115	0	50	16	0	0	0	0	181
Enforcement	82	0	69	7	0	0	0	0	158
Municipal self-government	67	0	10	3	0	0	0	0	80
Communications	220	0	75	24*	0	0	0	0	319
Taxation	83	0	42	9	0	0	0	0	134
Education	139	12	75	6	0	0	0	1	233
Culture	18	0	5	2	0	0	0	0	25
Chief guardians	40	0	30	10	0	0	0	0	80
Agriculture, environment, protection of animals	113	0	58	13	0	0	0	0	184
Immigration	104	0	63	7	0	0	0	0	174
County administrative boards, control of lotteries, serving of alcohol	18	0	7	1	0	0	0	0	26
Housing	5	0	3	2	0	0	0	0	10
Employment of civil servants etc.	81	0	2	2	0	0	0	0	85
Freedom of expression; access to official documents	120	1	104	90	0	0	0	0	315
Administration of parliamentary and foreign affairs; general elections	24	0	1	0	0	0	0	0	25
Miscellaneous	98	0	33	18	0	0	0	0	149
Complaints outside jurisdiction, complaints of obscure meaning	100	0	1	0	0	0	0	0	101
Total	**3,723**	**30**	**2,518**	**629**	**2**	**2**	**3**	**4**	**6,911**

*) In addition, there were a large number of complaint cases which were dismissed with reference to the initiative case no. 1708-2010 about the transfer of matters relating to driving licenses etc. to the Swedish Transport Agency.

2. Reports of four individual cases

Criticism of the Swedish Armed Forces for serious shortcomings in the exercise of public authority

(Reg. no. 4747-2009)

Summary of the Parliamentary Ombudsmen's criticism

In this case the Chief Parliamentary Ombudsman Mrs. Nordenfelt found grounds for expressing particularly grave criticism of the Swedish Armed Forces on two points. One of them involved an unlawful search of an apartment occupied by Major General Tony Stigsson, who was employed by the armed forces. The other concerned the way in which the Swedish Armed Forces dealt with a request from Tony Stigsson for access to four public documents.

Background

Tony Stigsson was a Major General and commander of the Swedish Armed Forces Operative Measures Command (OPIL). Because of suspicion of an offence against his ex-wife, Tony Stigsson was arrested on 7 March 2005 in his office in Uppsala. At the time of the arrest Tony Stigsson's permanent residence was in Bällefors in Västergötland and he also had an apartment in which he could stay overnight in Uppsala. In view of the suspicions that had given rise to his arrest, the criminal investigation department of the police authority in Skövde undertook a search of Tony Stigsson's home in Bällefors and his apartment in Uppsala. A number of military documents were found in Bällefors. Because of the contents of these documents the charges of which Tony Stigsson was suspected were extended to include negligent handling of classified information as well. On 14 March 2005 the security police conducted a search of Tony Stigsson's apartment in Uppsala. More documents were found there which were later to be included in the charge against Tony Stigsson of aggravated unlawful possession of classified information.

On 14 March 2006 Tony Stigsson was sentenced to three months imprisonment by the Göta Court of Appeal for the assault of his ex-wife. On 19 June 2006 the Supreme Court decided not to grant leave to appeal.

Subsequently Tony Stigsson was prosecuted in December 2007 for aggravated unlawful possession of classified information. The main hearing was held in Stockholm City Court 19–28 May 2008. The City Court dismissed the charge in its judgment of 2 July 2008 (case no. B 4482-2007). This judgment gained the force of law.

On 28 April 2008 the Government Disciplinary Board for Higher Officials decided to dismiss Tony Stigsson from his position in the Swedish Armed Forces.

The complaint

In an extensive complaint submitted to the Parliamentary Ombudsmen on 27 August 2009, Tony Stigsson alleged that the Swedish Armed Forces had, in several respects, failed in the exercise of power in relation to his case. He listed his criticism of the Swedish Armed Forces under ten headings. The sections of the complaint that have been investigated in this case comprised, for instance, the following allegations.

At the main hearing in Stockholm City Court in 2008 testimony was given by an employee of the Swedish Armed Forces who was given the code name MUA 100. He stated on oath that he had been inside Tony Stigsson's apartment without Tony Stigsson's consent, that this entry had been made without the knowledge of the prosecutor and without the support of a search warrant, that he had removed some of Tony Stigsson's belongings and that no list had been made of what he had removed. MUA 100 was unable to state at what time he had entered the apartment as no records had been kept.

Tony Stigsson also alleged that he knew that his apartment had been bugged for a few weeks before his arrest. He also has strong indications that his telephones were tapped during a long period even after his release and that his e-mails and post were being read. Until otherwise shown, he assumes that the bugging and surveillance etc. is being undertaken by the Swedish Armed Forces. He wonders whether the Swedish Armed Forces have the necessary authorisations for these measures.

During the main hearing in the City Court in May 2008, Tony Stigsson submitted a handwritten request for copies of certain documents he considered that he needed to defend himself against the charge. During one of the breaks he handed his request to MUA 100, who in his turn submitted it to the head of the intelligence section (MUST), John Daniels. The latter refused, however, to deal with Tony Stigsson's written request. When John Daniels was informed of his obligation as a public official to treat a request for documents in compliance with the principle of public access to official documents he responded that "the principle of public access does not apply to you". Tony Stigsson needed the documents within the course of one or two days as the hearing was already being held. Not until he wrote a reminder on 3 February 2009 did he receive acknowledgement on 18 February 2009 that his request had been received but not yet dealt with. On 27 February 2009 he received one of the requested documents with an apologetic letter which asked him to excuse the delay and explained that more documents were to follow. More documents arrived a few weeks later but not, however, those he had requested. He has still not received the rest. He alleges that the Swedish Armed Forces deliberately delayed and denied him the material he had requested in evident conflict with the principle of public access to official documents in order to deprive him of the possibility of offering a reasonable defence during the trial.

After completing a comprehensive enquiry, the Chief Parliamentary Ombudsman Cecilia Nordenfelt included the following observations in her adjudication of the case on 3 May 2011.

Appraisal

The search of Stigsson's apartment

Article 6 of Chapter 2 of the Instrument of Government lays down that every citizen is to be protected in their relations with the public institutions against house searches, for instance. The term house search is to be understood, according to the travaux préliminaires of the constitutional legislation, to mean any search of a building, room or enclosed storage space made by a public authority. The protection stipulated here against house searches is not, however, absolute. Article 12 of Chapter 2 of the Instrument of Government states that this protection may be limited in law.[15] This has taken place through the regulations in Chapter 28 of the Procedural Code. The first paragraph of Section 1 of Chapter 28 of the Procedural Code stipulates that searches may be made of the premises of those who are reasonably suspected of a crime punishable by imprisonment to look for objects that are subject to seizure or to investigate circumstances that may be of significance for the investigation of the crime.

It is worth pointing out here that, according to the third paragraph of the same section, the consent of the suspect is not enough to justify the search unless the measure has been requested personally. A decision on a search of premises pursuant to the provision referred to here is issued according to the main regulation in Section 4 of Chapter 28 of the Procedural Code by the leader of the investigation, the prosecutor or the court. The Swedish Armed Forces do not have the power to decide on the search of premises according to these regulations.

The response submitted by the Swedish Armed Forces on 25 February 2010 states among other things that Tony Stigsson's adjutant had her own keys to his apartment and that she gave MUST permission to search it. In addition, it is stated that the two officers who conducted the search were to enter the apartment to look for operational military documents and a cryptophone that had been issued to Tony Stigsson. In his written submission to the Parliamentary Ombudsmen in May 2010, MUA 100 stated that he gave two officers the task of asking Tony Stigsson's adjutant, who had access to the apartment, whether her mandate from Tony Stigsson would allow her to admit them to the apartment to collect military equipment/information that had been left there. According to MUA 100, he gave explicit instructions that it was to be the adjutant who decided whether a visit could be made to the apartment. The response of the Swedish Armed Forces of 3 June 2010 claims that MUA 100 later stated that the decision to remove the property from the apartment had probably been made by him after consultation with the adjutant.

It has been claimed by the Swedish Armed Forces that in the prevailing circumstances it was important to ensure recovery of any military documents

[15] From 1 January 2011 this regulation can be found in Article 20 of Chapter 2 of the Instrument of Government.

and the cryptophone. However matters stood in this respect, Tony Stigsson's apartment was his private dwelling while it was at his disposal. Tony Stigsson had not himself given his consent to the recovery by the Swedish Armed Forces of military property from the apartment and had by no means requested its removal. Nothing has come to light in this case that in itself gives reason to question the information that the adjutant let the two officers into the apartment without being ordered to do so. As stated by the Swedish Armed Forces, however, the fact that the adjutant had access to the keys cannot be considered to mean that the apartment was at her disposal in the sense that she was able to consent to an examination of what it contained. There are also grounds for pointing out that to view the cooperation of the adjutant as *voluntary* in the situation could well have been self-delusion.

In my opinion, the search of Tony Stigsson's apartment made by the Swedish Armed Forces can undoubtedly be considered a house search in the sense used in the Instrument of Government. No decision authorising it had been issued. Irrespective of the reasons for undertaking the search, there was no statutory justification for it. The alleged consent of the adjutant does not mean that the measure was permissible. I share the opinion of the Swedish Armed Forces that the apartment should not have been searched in the way it was. Nor should property of any kind have been removed from it. When, nevertheless, this did occur, a record should have been made of the property removed. I am highly critical of what happened.

Tony Stigsson has claimed that the supreme command of the Swedish Armed Forces had been briefed and made the decision to search his apartment. This has however been refuted by the Swedish Armed Forces. It is word against word. I can see no grounds for enquiring into this matter any further.

The authority has also rejected the statement by MUA 100 that he briefed the head of the security section about his intention to recover Swedish Armed Forces property from the apartment and that the latter had no objection to MUA 100's proposal. I do not consider that any further enquiry into this matter would be useful.

Provision of documents

Initially, with regard to the request made by Tony Stigsson in a letter to the Swedish Armed Forces' Chief Legal Officer on 16 March 2010, the response of the Swedish Armed Forces was that the documents requested were sent to Tony Stigsson on 23 and 24 March 2010. To explain why Tony Stigsson had not received these documents it is pointed out that they were sent to a postal address that although incorrect was the one that Tony Stigsson had supplied. What occurred with respect to these documents does not provide sufficient grounds for criticism.

Secondly, when it comes to the treatment by the Swedish Armed Forces of the request for documents submitted by Tony Stigsson in connection with the main hearing in the City Court on 19–28 May 2008, three accounts have been presented by the Swedish Armed Forces to the Parliamentary Ombudsmen

which do not completely agree with each other, a fact that in itself is apt to arouse surprise.

It is stated by the Swedish Armed Forces that the routines accounted for by the authority in its response broke down in an unacceptable manner when the request for the provision of documents in 2008 was being dealt with and also during the subsequent search that is said to have taken place in 2009. I for my part would like to go further than that and assert that the way in which this was dealt with by the Swedish Armed Forces was completely unacceptable. In my opinion the Swedish Armed Forces have not been able to provide any clear explanation of the measures adopted initially as a result of Tony Stigsson's request for the provision of public documents. Furthermore, the claims of the Swedish Armed Forces that the documents were difficult to identify and that Tony Stigsson had supplied no contact details seem almost to be excuses, not least in view of the fact that subsequently the documents turned out not to be particularly difficult to identify and that until only a few weeks before the request Tony Stigsson had been employed by the Swedish Armed Forces. In addition, a trial was taking place in Stockholm City Court in which representatives of the Swedish Armed Forces testified or, as far as can be seen, were attending as members of the public. In view of this, the Swedish Armed Forces should reasonably have been able to understand that the documents could, at least in Tony Stigsson's opinion, be important for his defence and that his request should, for this reason, have been given the highest priority. Tony Stigsson's request was not registered until February 2009 and there is a great deal to suggest that this is when it began to be dealt with seriously. Even then, as admitted by the Swedish Armed Forces, objections could be raised to the way in which it was processed. To sum up, I am highly critical of what took place.

I do not find grounds for commenting on the statement that the head of the intelligence section, John Daniels, is alleged to have made, according to both Tony Stigsson and MUA 100, in connection with Tony Stigsson's request for documents. The head of the intelligence section has denied making a statement of this kind. Here again it is word against word. Investigation of the matter would require extensive endeavours, which I do not consider necessary.

Grave criticism of the Stockholm County Police Authority for refusing entry clearance to foreigners on the grounds that they were vagrants and spent their time begging

(Decision of the Parliamentary Ombudsman Mr. Axberger, reg. no. 6340-2010)

Summary of the adjudication

The Stockholm County Police Authority refused entry clearance to Sweden to 26 Roma from Romania with the justification that they were "spending their time as vagrants/beggars". According to the regulation invoked, foreigners may be refused entry clearance if it can be assumed that during their stay in Sweden they will not be able to support themselves by honest means.

This regulation cannot, however, be interpreted as it was by the police authority. In the adjudication it is pointed out that the development of freedoms and rights has led to increasing stringency in the demands for legality and the rule of law. The regulation in question should not be applied today to means of earning a living that are not legally prohibited. Begging is not forbidden by law in Sweden, even less so vagrancy. The refusal of entry therefore lacked any basis in the Aliens Act. Criticism is expressed of the Stockholm County Police Authority. As the measures involved far-reaching infringements of the legal rights of individuals, this criticism is grave.

There is nothing in the material to show that the police intervention was based on the fact that those deported were all Roma and that they were therefore subject to negative discrimination. The manner in which the refusal of entry clearance was enforced was nevertheless likely to disturb confidence in the police.

The outcome of the adjudication means that there has been no reason to go into the question of whether the deportation was compatible with the special regulations that apply to citizens of the EU. In view of the debate that has been taking place about foreign beggars, it is, however, pointed out that it would probably be difficult to devise legislation about foreigners in Sweden that would enable EU citizens who devote themselves to begging of the kind demonstrated in this case to be refused entry to Sweden.

Background and enquiry

The initiative

In the summer of 2010 it was reported in the mass media that the police had deported Roma who had spent their time begging. Information requested by the Parliamentary Ombudsmen made it clear that during 2010 the Stockholm County Police Authority had invoked item 2 in the first paragraph of Section 2 of Chapter 8 of the Aliens Act to refuse entry to Sweden to foreigners because they had supported themselves by begging. In one case, a decision to refuse entry clearance concerning 26 Romanian citizens had been enforced on 18 February 2010. I then decided to initiate an enquiry to examine what had happened more closely.

The circumstances made clear by the actions of the police authority

In the course of police surveillance of beggars in Stockholm at the beginning of 2010 suspicions arose that these were the victims of organised trafficking. These suspicions were based on the circumstance that it had been possible to trace a large number of foreign beggars to an apartment in Vårberg in southern Stockholm. When a police patrol visited the apartment 38 individuals were found there, all of them Romanians. Two men, one of them the tenant of the apartment concerned, were suspected of exploiting the people there as beggars. A judicial enquiry was launched on 2 February 2010. At the beginning of the month several of those living in the apartment were questioned. The suspicion of trafficking was later withdrawn and the judicial enquiry then terminated.

On 18 February 2010 the police authority made a raid which involved detaining the individuals staying in the apartment in Vårberg for questioning by virtue of Section 9 of Chapter 9 of the Aliens Act. In the case of many of these a decision to refuse entry clearance had been made on 16 February 2010 pursuant in item 2 of the first paragraph of Section 2 of Chapter 8 of the Aliens Act. A memorandum drawn up by one of the officers in command of this raid, Sergeant Jan-Eric Ericsson, stated that individuals linked to the apartment were staying in Sweden illegally and devoted their time to begging and also that certain of them were known in connection with earlier crimes. According to the memorandum, the begging was undertaken in an organised manner. The raid involved 21 police officers and an interpreter. There were 36 people in the apartment. They were taken to the police station in Norrmalm, where they were each questioned briefly. An additional decision to refuse entry clearance was issued. The justification for this and the previous order used the same template:

> NN who arrived in Sweden [with the date where relevant] is to be repatriated to Romania by virtue of item 2 of Section 2 of Chapter 8 of the Aliens Act, as NN has devoted his time to vagrancy/begging, see Govt. Bill 1979/80 96 p. 119 and the decision of the Chancellor of Justice, reg. no. 2516-08-41 p. 4.
>
> [The Govt. Bill referred should correctly be Govt. Bill 1954:41 p. 93: in a few cases the reference has subsequently been corrected. Parliamentary Ombudsman's note.]

Most of the decisions had been made by Superintendent Sven-Åke Eriksson, the remainder by Chief Inspector Ingemo Melin-Olsson.

The records of the individual cases show that seventeen of those refused entry clearance supported themselves either completely or partly by begging. Of these, eleven had been observed begging by the police on one or several occasions and the other six stated themselves that they had earned their livelihood by begging. In eight cases those refused entry clearance claimed that they had supported themselves by playing music in public places. There is no information about one person. The records support the conclusion that seventeen of the foreigners supported themselves by begging and eight as street musicians.

On the same day as the raid, the police authority decided that 23 of those who were to be refused entry clearance were to be detained in custody and three subject to surveillance. The decision to refuse entry clearance was enforced later the same evening when those concerned were driven by bus to Romania.

The response of the Police Authority

The Stockholm County Police Authority was asked to make an enquiry and account for its opinion on the management of the refusals of entry clearance. The authority was asked, for instance, to clarify the background against which the measures were adopted, the conditions on which refusal of entry decisions could be made because foreigners were supporting themselves by begging, as well as questions concerning records and the ground on which decisions were based.

In its response, which was signed by the Deputy Chief Commissioner of the County Police Authority Lennart Enocsson, the authority gave the following description of the background for its actions.

With experience from previous cases of convictions for trafficking in human beings for the purpose of begging (e.g. 0201-K229186-08 and 0201-K271295-09) and the circumstance that on this occasion there were many beggars in central areas of Stockholm, the Border Police Unit initiated a surveillance investigation focusing on trafficking in human beings for other than sexual purposes. This investigation was given the code name G-Tiggeri [G-Begging].

The aim of this surveillance was to gather information to confirm or refute the crime of trafficking in human beings. Surveillance in this case was undertaken from 14 January 2010 until 18 February 2010. While the surveillance was taking place a survey was made of the individuals who spent their time in central Stockholm begging. This survey enabled the surveillance team to identify specific individuals at the various places where begging was going on, as well as the patterns of movement of the individuals concerned.

It did not take long before the surveillance team was able to determine that there was a link between most of the individuals begging for money in the central areas of Stockholm as, for instance, they gathered after having begged for money during the day to travel home together by car. They met at the City Terminal and places close by. Continued surveillance revealed that the individuals were all living at the same address, in the same apartment, in Vårberg in southern Stockholm.

When the Rescue Services were summoned to the apartment in question in connection with an alarm on 29 January 2010, 38 individuals were encountered, all of whom seemed to be living in the apartment. The social authorities were informed because of the environment and conditions in the apartment, with for instance vermin, as there were underage children in it. The underage children were placed, together with their mothers, in alternative accommodation by the social authorities.

On 2 February 2010 it was considered that there was sufficient evidence to start a judicial enquiry into suspected trafficking in human beings (0201-K32481-10). The investigative measures adopted consisted of questioning individuals who had been observed begging and individuals who could be linked to the apartment in Vårberg. This enquiry revealed that the individual whose name was on the lease of the apartment in question was also the registered owner of a car that had been observed by the surveillance team in connection with transport of the individuals seen begging.

Continuation of the enquiry did not disclose enough information to corroborate the crime of trafficking in human beings but it could be shown that begging was being undertaken with some degree of organisation. Altogether the surveillance has involved 60 individuals.

Surveillance revealed a repeated pattern in which individuals left the apartment concerned and were transported, in some cases together, to central Stockholm to beg. They were positioned in fixed spots in the city, but the individuals shifted from one position to another from day to day. The surveillance team observed what were perceived to be placement meetings before the individuals left to be positioned in central Stockholm.

A decision was made to change the focus of the enquiry and to concentrate on control of aliens and possible refusal of entry clearance pursuant to the Aliens Act.

After presenting the provisions of the Aliens Act, the police authority described the directions that had been issued by the National Police Board. It was pointed out for instance that:

One of the reasons for the issue of CM [a circular, Parliamentary Ombudsman's note] 7/10 in August 2010 is that information had been received that police authorities were applying the provisions in item 2 of the first paragraph of Section 1 of Chapter 8 of the Aliens Act differently with regard to the possibility it provided of refusing entry to EU citizens involved in begging in organised forms.

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CM 7/10 shows that the National Police Board considers that there is scope to invoke item 2 of the first paragraph of Section 2 of Chapter 8 of the Aliens Act to deport EU citizens involved in begging in organised forms. Refusal of entry based on this provision does not require any crime to have been committed. The provision does not require this form of livelihood as such but conduct and a way of earning a living that is undesirable. In cases of this nature police authorities often encounter several factors in addition to the begging that have to be taken into account. If there are other reprehensible circumstances, then these together can mean that entry may be refused. These circumstances include how the begging is undertaken, for instance if it is organised, has links to criminal activities, involves the exploitation of underage children or other vulnerable individuals, has taken the form of con tricks, involved threats or disturbance or if untrue information has been given in connection with the begging. An overall assessment of the prevailing circumstances has to be made. In circumstances like these, the assessment of the National Police Board is that it is possible to refuse entry clearance to EU citizens who devote themselves to begging.

The police authority then went on to account for the regulations in EU law in this area and for certain provisions that are significant in determining whether begging is permissible according to Swedish law, etc. With regard to the assessments of individual cases the authority included the following.

This case concerns the decision by the police authority on 16 and 18 February 2010 to refuse entry clearance to 26 Romanian citizens. All of the Romanian citizens concerned had been in Sweden for less than three months and came to Sweden in order to support themselves by begging. None of them have any links with Sweden. The decisions to refuse entry clearance have – pursuant to the instructions issued by the National Police Board – been carried out by virtue of item 2 of the first paragraph of Section 2 of Chapter 8 of the Aliens Act, as it can be assumed that the individuals are not going to support themselves by honest means during their stay in Sweden. The begging has been carried out to some extent in an organised form. The decision has been taken

in each specific case after an individual appraisal of its particular circumstances. These decisions have been based on information in each individual case but, as is stated below, there are some shortcomings with regard to the records maintained on the individual cases. The question that remains is whether EC law offers any obstacle to the implementation of this provision in the Aliens Act in the manner proposed in the instructions of the National Police Board in cases when a citizen of the EU is involved in begging in an organised form. Neither Swedish courts nor the European Court of Justice have enquired into the circumstances in Sweden with regard to begging, for instance the structure of the social services. There exists, therefore, a great need for opinions that can shed light on the application of the provisions of the legislation on aliens.

The judgement of the police authority is that, against the background of the conditions in the individual cases, the circumstance that the begging was undertaken in an organised manner, the wording of the Aliens Act, the travaux préliminaires preceding the incorporation of the movement directive into Swedish legislation and, most importantly, the approach accounted for by the central administrative authority for the Swedish police force – which later found expression in CM 7/10 – the interpretation of item 2 of the first paragraph of Section 2 of Chapter 8 of the Aliens Act on which the decisions of the police authority of 16 and 18 February 2010 were based, was a reasonable one.

With regard to the records maintained, the reasons given for the decisions etc. the police authority stated the following.

For all of the cases involved in the enquiry initiated by the Parliamentary Ombudsmen there are transcripts of the interrogations, working notes and the decisions on the measures adopted in connection with the refusal of entry.

It can be determined that several of those found in the apartment in Vårberg were involved in begging which included some degree of "simulation of a handicap" that did not really exist. All of those refused entry were, however, involved in begging in the loosely organised form revealed by the surveillance records and other documentation in these cases. Two of those refused entry clearance were the underage children of individuals who had been begging. Both children took part in the begging. In each specific case it can be seen that the individual concerned has been questioned about begging and the form in which it was undertaken. In one of the cases the interrogation transcript is lacking and has been replaced by the interrogating officer's working notes (AA 630-954/10).

The organisation of the begging would have been more effectively documented if relevant sections of the surveillance records and investigation records had been attached in each case. This has not been done, which is a shortcoming in these records.

Information from the officers responsible for decisions who were on duty on 18 February show that they were informed about the background, focus, purpose and the operational tactics for the planned raid. In this connection these officers also heard the recorded surveillance material etc. in the ongoing judicial enquiry about suspected trafficking in human beings (K 32481-10). The information deriving from this judicial enquiry has not been recorded or referred to in the refusal of entry cases themselves, which the police authority considers a shortcoming in the records. The Border Police Unit have stated that they have taken measures to ensure that the requisite documentation is provided in refusal of entry cases and the authority will take no further action on this account.

The law

Item 2 of the first paragraph of Section 2 of Chapter 8 of the Aliens Act

The decisions to refuse entry have been made by the police authority by virtue of Item 2 of the first paragraph of Section 2 of Chapter 8 of the Aliens Act. This provision lays down that foreigners may be refused entry if it can be assumed that during their stay in Sweden or some other Nordic country they will not support themselves by honest means. In view of the way in which this provision was applied here, a retrospective review is required in order to decide how it should be construed today.

The earlier Aliens Acts etc.

The Aliens Act of 1945 stipulated that an alien arriving in the realm could be refused entry "if he is a gypsy or manifestly intends to seek his livelihood through seeking alms [begging, Parliamentary Ombudsman's note] or through travelling from place to place to earn his living by performing music, displaying animals or other similar occupations" (Item 1 of the first paragraph of Section 19 of Chapter 4). Entry could also be refused if it could be reasonably assumed that the foreigner did not intend or was unable to "earn his daily bread" (Same Section, Item 2).

A new Aliens Act was proposed in 1951. The previous stipulations about gypsies and beggars, street musicians etc. (Item 1) were removed while the general regulation requiring a foreigner to be able to support himself honestly (Item 2) was retained. In the travaux préliminaires it is stated that no "special regulations … were to apply to gypsies but they were to be treated in the same way as other aliens". If there were reasonable grounds for assuming that they would not support themselves through honest labour "but by fortune telling, for instance, necromancy or the like" they could be refused entry pursuant to the general regulation. Nor was it to be possible to refuse entry to those who "through travelling from place to place earn their living by performing music, displaying animals or other similar occupations" provided that it could not be assumed that their occupation was a cover for some form of asocial activity or that they would be unable to support themselves from doing so. On the other hand anyone who "manifestly intended to support himself by begging" could be refused entry pursuant to the general regulation. (SOU 1951:42 p. 191.)

When the draft legislation was circulated for comment, the Detective Superintendent in Stockholm stated that the provision should be applied to enable undesirable impecunious foreigners to be prevented from entering the country so that they could devote themselves to vagrancy. This gave rise to the following statement in the Government Bill (Govt. Bill 1954:41 p. 93).

Like the Detective Superintendent in Stockholm, I consider it important to prevent, as far as possible, undesirable impecunious foreigners from entering the country so that they can devote themselves to vagrancy. The proposal therefore stipulates that foreigners who do not intend to earn their living in this country may be refused entry if it cannot be reasonably assumed that they

will support themselves here honestly. Cases in which foreigners manifestly intend to support themselves through crime are also covered by this stipulation.

The statements from the travaux préliminaires cited here cannot be seen in isolation from other legislation of the same period. When the 1954 Aliens Act was enacted, for instance, the 1885 Vagrancy Act was still in force. Concepts such as "do not support themselves honestly" probably derive from that legislation (cf. SOU 1979:64 p. 81). The Vagrancy Act defined a vagrant as someone who lacks work and wanders around from one place to another without the means of support and anyone who lacking the means of support fails to attempt to earn a livelihood honestly to the best of his abilities and at the same time lives in a way that imperils the public security, order and morality. In practice this law covered tramps and also other "asocial elements" such as bootleggers, con men, professional gamblers, pimps and prostituted women (see Govt. Bill 1964:128 p.10). Vagrancy was not a criminal offence but vagrants could be subjected to administrative coercion, in which they could be sentenced to up to three years forced labour. – The Vagrancy Act was replaced in 1965 by the Act on Measures against Socially Harmful Asocial Behaviour, which did not allow action to be taken against "harmless beggars". The Act on Measures against Socially Harmful Asocial Behaviour was rescinded in 1982.

In 1958 new grounds for refusing entry were introduced which laid down that a foreigner could be refused entry "if it can be assumed that he will lack adequate funds for the stay in Sweden or in some other Nordic country that he intends to visit or for the journey home" (Item 1 of the first paragraph of Section 2 of Chapter 8 in the current Aliens Act).This means that impecunious foreigners could be refused entry for this reason, rendering the question of whether it could be assumed that they intended to spend their time begging during their visit to Sweden unimportant.

In the context of a later review of the legislation on foreigners, the 1975 Committee on the Aliens Act looked into how the assessment of whether a foreigner intended to support himself by honest means was applied as a ground for refusing entry clearance. It turned out that it was invoked extremely rarely: when it was used it seems to have referred to activities other than begging. (See SOU 1979:64 p. 97 f. and 134.) The committee therefore discussed whether this meant that this ground for refusing entry could be abolished. It decided, however, with reference to the necessity of being able to refuse entry to foreigners who prostituted themselves professionally, that the regulation should remain (op. cit. p. 134.) The same conclusion was reached in the Government Bill (Govt. Bill 1979/80:96 p. 56). According to the wording proposed even those who could be assumed likely to work without a labour permit could be covered by the same regulation. The Council on Legislation took the view, however, that working for money without the stipulated labour permit was not the same as "not supporting oneself by honest means". This latter concept referred, in the view of the Council on Legislation, to those who devoted themselves to "dealings that were themselves criminal or reprehensible or based on criminal or reprehensible activities".

The provision was therefore supplemented with a reference to working without a permit. (See the same Govt. Bill. p. 118 f. and 134.)

Since 2006 the ground for refusal of entry laid down in the item 2 of the first paragraph of Section 2 of Chapter 8 of the Aliens Act has only applied to a limited extent to EU citizens and members of their families, about which more below.

The Free Movement of Persons Directive and its incorporation into Swedish law

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, The Free Movement of Persons Directive, lays down the conditions on which citizens of the EU and their family members may exercise the right to move freely within the union. The directive stipulates a minimum level and does not affect national provisions that are more favourable for foreigners than those enshrined in the directive. EU directives are not, in principle, directly applicable in Sweden but presume incorporation, i.e. that corresponding regulations either exist or will be introduced into Swedish legislation. An EU directive may, however, also have direct effect, when it applies in Sweden irrespective of the contents of Swedish legislation. Parts of the Free Movement Directive contain regulations of this type.

Chapter 3 of the Freedom of Movement Directive contains provisions on "right of residence" which means the right for a citizen of the union to reside in the territory of another Member State. The directive distinguishes between the right of residence for up to three months (Article 6) and the right of residence for more than three months (Article 7). Article 6 provides the right of residence for up to three months without any other conditions or formalities than the requirement of holding a valid passport or identity card. One condition that does apply, however, according to Article 14 is that the union citizen does not become a burden on the social assistance system of the host Member State. Article 7 lays down the right of residence for longer than three months on certain specified conditions, for instance that the union citizen has a job in the country in which he or she is residing.

According to the Free Movement Directive, the right of residence can only be restricted on the grounds of threat to public order, public security or public health. The provisions about this can be found in Article 27, which lays down the following. Measures taken on the grounds of public policy or security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual, which must represent a sufficiently serious threat to fundamental interests of society. Previous criminal convictions shall not in themselves constitute grounds for restricting the right of residence. Justifications that are isolated from the particulars of a case or that rely on considerations of general prevention shall not be accepted. An additional limitation is provided by the provision that restrictions of the right of residence may not be discriminatory. In this context the European Court of Justice has ruled that "a Member State may not take measures against a citizen of another Member State by virtue of the derogations provided for public

policy […] on the grounds of conduct that the Member State does not attempt to prevent in the case of its own citizens by adopting repressive or other actual and effective measures" (Case C-100/01, Ministre de l'Intérieur v. Aitor Oteiza Olazabal, REG 2002 I-10981).

As a result of the Free Movement Directive certain amendments were made to the Swedish legislation on foreigners.

The regulations on right of residence pursuant to Article 6 gave rise to no amendments of the law (SOU 2005:49 p. 95 ff. and Govt. Bill 2005/06:77 p. 68 ff.). Right of residence pursuant to Article 7 was on the other hand regulated in a new chapter of the Aliens Act (Govt. Bill cit. p. 70 ff. and p. 183). In this connection a more restricted right of residence comparable with the Freedom of Movement Directive was introduced into Swedish legislation. This means that right of residence in the Aliens Act refers to the kind of right of residence laid down in Article 7, i.e. right of residence for a longer period than three months but not to the immediate right of residence pursuant to Article 6.

A new regulation was included in the second paragraph of Section 3 of Chapter 8 of the Aliens Act stipulating that those who have right of residence may not be refused entry. This provision refers to right of residence in the meaning of the Aliens Act. In addition EU citizens were exempted from application of Item 1 in the first paragraph of Section 2 of Chapter 8 of the Aliens Act (i.e. that an individual lacks adequate funds for a stay in Sweden etc.) provided that after entry he or she does not prove to be a burden to the social assistance system under the Social Services Act (third paragraph of Section 2 of Chapter 8). With regard to the remaining grounds for refusal of entry in the first paragraph of Section 2 of Chapter 8 of the Aliens Act, it was said in connection with the implementation of the Free Movement Directive that it is the foreigner's own conduct and not considerations of general prevention on which decisions to refuse entry are to be based. This was considered compatible with Article 27 in the Free Movement Directive and therefore no legislative amendments were felt to be necessary (Govt. Bill 2005/06:77 p. 77 f. and SOU 2005:49 p. 148 ff.).

Appraisal

Distinctions

There are a number of elements in the police measures under review that could be questioned. My adjudication concentrates, however, on the main issue, which is the legality of the decisions to refuse entry clearance. All the other events are overshadowed by this issue or are consequences of these decisions.

General provisions

If a foreigner is to be refused entry to Sweden the general provisions in the Aliens Act on refusal of entry must provide support for the measure. In addition it is necessary for the specific regulations in the Aliens Act, which apply

for instance to EU citizens, not to bar application of the general provisions. Finally, the measure must be compatible with the kinds of EU regulations that otherwise have to be taken into account, for instance within the framework of interpretation of Swedish legislation or because they have what is called direct effect.

The question of whether the decisions to refuse entry clearance in this case were lawful must, in the first hand, be determined according to the general provisions in the Aliens Act on refusal of entry. The police authority has justified its decision to refuse entry clearance by saying that those involved had "devoted their time to vagrancy/begging" and the statute invoked was Item 2 of the first paragraph of Section 2 of Chapter 8 of the Aliens Act, which provides, among other things, that entry may be refused if it can be assumed that during a stay in Sweden a foreigner will not support himself or herself by honest means.

The requirement of being able to "support himself of herself by honest means"

If a foreigner is to be refused entry into Sweden, some legal basis is required. For someone already in the country in particular, refusal of entry clearance involves far-reaching coercive intervention. Measures of this kind should not be allowed to take place unless justified by reasons that are clearly expressed in the wording of the legislation. It is against this background that the grounds for refusing entry clearance in Item 2 of the first paragraph of Section 2 of Chapter 8 of the Aliens Act invoked by the police authority are to be interpreted.

As my account of the legal regulations shows, since 1954 there have been no legal grounds in Sweden for refusing entry to what were then called gypsies, nor street musicians. At this time begging also disappeared as an explicit ground for refusal of entry, upon which the travaux préliminaires left scope, however, to refuse entry to those who manifestly intended to earn their livelihood through seeking alms, i.e. begging. In addition to this there were the regulations described on vagrancy, which meant that in practice vagrancy was placed on the same footing as criminality.

The description of the legal regulations also shows that when the issue was studied in the 1970s, the ground for refusing entry cited had been used extremely rarely and then seldom or never with reference to foreigners who could take up begging. In connection with the ensuing deliberations on whether the provision was needed, it was for other reasons, as has been shown, that it was allowed to remain. As far as has been seen, since 1954 there have been no legal sources to indicate that the regulation was meant to apply to those who could be assumed likely to take up begging during their stay in Sweden.

To this it should be added that the legal point of view that found expression in legislation on vagrancy and the provisions of earlier laws on begging has for a long time been obsolete. Subsequent developments in the area of freedoms and rights have given rise to increasingly stringent requirements of

legality and the rule of law. Nowadays it must be considered out of the question to base infringements of freedoms and rights on judicial interpretations that require public authorities and courts of law to make discretionary moral judgements. To the extent that earlier laws sometimes nevertheless provide such scope, they must for the sake of legality be interpreted restrictively. The wording of the statute invoked here should therefore not be applied today to any other means of earning a living than those forbidden by law. If it is the intention of the legislators that other forms of earning a living are to provide grounds for refusing entry, it is incumbent on them to stipulate in the statutes what in that case is to apply.

Begging – asking for financial support without offering anything in return – is not punishable or even forbidden by Swedish law. This applies even when it is undertaken in forms that could be described as organised, if that is taken to mean that individuals who beg coordinate their activities and also live and travel together.

In combination with other circumstances, on the other hand, begging can be punishable. This is the case, for instance, when a beggar invokes threats or physical contact, which constitutes molestation according to Section 7 of Chapter 4 of the Penal Code. Another example is if begging involves deception of those approached, for instance simulating a supposed handicap etc., which in certain other circumstances may involve the crime of fraud according to Chapter 9 of the Penal Code. To provide a ground for refusing entry clearance pursuant to the Aliens Act, what is required in addition is that the begging undertaken in a criminal manner is undertaken or can be assumed to be undertaken to such an extent that it forms a means of livelihood.

Adjudication in this case

In none of the decisions to refuse entry clearance is there information to suggest that the individuals concerned supported themselves in a way that was criminal. It was admittedly observed that some of the beggars simulated handicaps. This information is, however, vague and not linked directly to any of the individuals refused entry clearance, and even less cited as ground for the decision. In addition, despite the relatively extensive surveillance and questioning, there is nothing to support the claim that those refused entry clearance were organised in the kind of way that would enable the entire operation to be described as deceptive or unlawful.

The investigation undertaken by the police authority can be summed up as revealing no more than that some of those refused entry clearance had spent time begging and it could be assumed they would continue to do so. In the case of several of them, however, not even this has been proved: they state that they have supported themselves as street musicians.

Therefore what has come to light in the police investigation is not what is required to allow refusal of entry pursuant to the provision invoked. The investigation lacks material to show that there could have been any other lawful ground for refusing entry. For this reason, the refusal of entry clearance to the group of Roma living in the apartment in Vårberg does not have the necessary

support in law. The Stockholm County Police Authority therefore merits criticism. As the actions of the police authority involved far-reaching infringements of the legal rights of individuals, this criticism is grave.

There is nothing in the material to show that the decisions to refuse entry clearance were based on the fact that all those involved were Roma and that they were therefore negatively discriminated. Nevertheless, several elements in the way in which the case was dealt with are remarkable. This applies to the inadequate analysis of current law and the shortcomings in the records, as well as the collective reason given for the decision – vagrancy/begging – that recalls an obsolete view of the law and of humanity. Even though what occurred cannot be described as the outcome of discrimination, the unlawful decisions to refuse entry clearance and the way in which the operation was conducted were liable to shake confidence in the ability of the police to live up to the constitutional requirement that in their work they shall pay regard to the equality of all before the law and shall observe objectivity and impartiality (Article 9 of Chapter 1 of the Instrument of Government).

Miscellaneous

One conclusion from the enquiry that has been made is that the general regulations in the Aliens Act do not permit refusal of entry solely on the ground of an assumption that a foreigner will beg in Sweden. The question of whether the refusal of entry clearance was compatible with the special regulations that apply to EU citizens was therefore never raised in this case. In view of the debate that has taken place about foreign beggars I would still like to point out that EU law – as can be discerned from the account of the legal provisions – poses obstacles to the refusal of entry clearance to an EU citizen solely on the ground that it can be assumed that he or she will beg in Sweden. This obstacle would remain, even if Sweden's national legislation were to be amended, for instance by laying down that begging is an explicit ground for refusing entry. In other words, it would probably be difficult to formulate Sweden's legislation on foreigners to enable EU citizens who devote themselves to begging of the kind demonstrated in this case to be refused entry to the country.

Criticism of the Living History Forum and its exhibition *Middag med Pol Pot [Dinner with Pol Pot]*

(Decision of the Parliamentary Ombudsman Mr. Axberger, reg. nos. 5127-2009 and 21-2010)

Summary of the adjudication

The Living History Forum, which is a public authority with the task of providing information about crimes against humanity, wanted to use exhibition material to show how ideological opinions could prevent people from perceiving reality correctly.

Here one element was the production of a film to advertise the exhibition. It uses four individuals who are easy to identify because of the contexts as warning examples. This presentation held them up to ridicule.

In the exhibition individuals were also used as warning examples. One of them has complained about this to the Parliamentary Ombudsmen. The adjudication lays down that the exhibition was intended to expose the complainant to the scorn of other people. This was not justifiable.

In support of its actions the Living History Forum has referred to its mission and offered arguments that invoke the freedom of journalists and researchers. For this reason it is pointed out in the adjudication that government agencies must comply with constitutional provisions and do not have the same freedom of expression as individuals.

The Living History Forum is criticised for both the film and for the violation of integrity the complainant was subjected to. The Forum lacked understanding of the legal restrictions that apply to a public authority. Information about the adjudication was therefore forwarded to the government agency to which the authority is accountable.

Background

The Living History Forum is a public authority that was founded on 1 June 2003. Its mission is to function as a national forum to promote democracy, tolerance and human rights using the Holocaust as its point of departure.

At the behest of the Government, in December 2006 the authority launched a project on the crimes against humanity of communist regimes. This task included surveying and compiling the research in this area and, if necessary, initiating additional research. This was to be an outreach project with seminars, educational initiatives and exhibitions all over Sweden. Within the framework of the project the authority organised an exhibition *Middag med Pol Pot – En utställning om ideologiska skygglappar och selektivt seende [Dinner with Pol Pot – An exhibition on ideological blinkers and selective vision]*. The exhibition opened on 9 September 2009.

In the exhibition the question is posed of how it happened that Swedes who supported Pol Pot and the Red Khmers were unable to see the mass murders that were being committed. A visit to Kampuchea (today Cambodia) made by a delegation from the Sweden-Kampuchea Friendship Association in

1978 was featured. *Dinner with Pol Pot* alludes to an event that the delegation was purportedly invited to attend.

In connection with the exhibition a film was produced which is described on the Living History Forum's web-site as a commercial, *Mao-glasögonen [Mao spectacles]*. This film was intended by the authority to "illustrate how our expectations alter what we see". It contains references to the 1978 visit and two Swedish participants are identified by name.

The exhibition was presented not only on the web-site but also in a printed folder, of which the front page was mainly occupied by thirty or so pictures of inmates in a notorious prison, S-21. The folder contains a group photograph of the participants of the delegation referred to with all their names.

The complaints

Complaints about the Living History Forum were submitted to the Parliamentary Ombudsmen, first by Stefan Lindgren and then by Hedvig Ekerwald.

Stefan Lindgren, who as far as it can be seen, did not himself figure in the exhibition or the film, asked the Parliamentary Ombudsmen to investigate whether the way in which the Living History Forum had in its film attacked named individuals for purported support for genocidal actions was compatible with current legislation and good public administrative practice. He also requested appraisal of whether the agency's way of dealing with historical records could be considered to comply with the impartiality and objectivity normally required of government agencies. He referred here to the erroneous information given by the Living History Forum about the provenance of the images used in the agency's publications.

Hedvig Ekerwald, who took part in the visit to Cambodia in 1978, submitted a complaint about the exhibition which consisted, on the whole, of the following.

She figured in the exhibition in two photographs and a posed image in which she was mocked. She was quoted twice and named in several places. In the exhibition she was linked in words and images to mass murder. Links of this kind may be made in discussions between citizens but are indefensible in the case of a public authority in the exercise of its powers. The exhibition has been organised is such a way that for her it could only result in the contempt of her fellow-beings.

Hedvig Ekerwald also submitted the following information. The exhibition took place in central Stockholm and admission was free. It was then intended to "tour" the country. Information about the exhibition had been circulated widely through the agency's website, the film, a folder and advertisements in newspapers.

She also stated that in a conversation with representatives of the Living History Forum she had consented to the exhibition's use of a photograph she had taken and also of a quotation of her words. This consent had, however, been given before the context in which she was to be presented had been made clear to her. It was not, therefore, informed consent.

Hedvig Ekerwald declared that she had given a number of lectures about her visit and written several articles about it. After citing a number of fundamental provisions about freedom of the press and of expression she wrote:

I consider that the authority Living History Forum has violated my freedom of expression and freedom of the press in arranging the exhibition "Dinner with Pol Pot". The entire exhibition functions as a punishment for what I have said and written on the subject of the Red Khmers in Cambodia.

The enquiry

The Living History Forum was requested to express its opinion of the substance of the complaints. Through its superintendent, Eskil Franck, the authority submitted the following on the subject of Stefan Lindgren's complaint.

The authority Living History Forum had a film made to advertise its exhibition "Dinner with Pol Pot". A complaint has been made about this film to the Parliamentary Ombudsmen by the author/graduate student Stefan Lindgren. The arguments below follow the order in which they can be found in Lindgren's document.

The question of identification of individuals by name

The exhibition deals with "ideological blinkers and selective vision". As the film is intended to reflect the exhibition as a whole, it also focuses on "ideological blinkers and selective vision". These characteristics are not criminal. Nowhere in the film or in the exhibition is it claimed that this is the case. The reason for identifying individuals is to provide concrete examples of these blinkers and selective vision on the basis of a visit made by a delegation to what was then Kampuchea, a visit that had been made public in various ways through the media and the delegation's own efforts in the form of films, articles etc.

The two identified are not anonymous private individuals. One is Jan Myrdal, for decades one of the most widely known participants in public debate in Sweden. Time and again, in books, articles and debates, Jan Myrdal has expressed his opinions on Kampuchea/Cambodia. He has publicly supported Pol Pot and the Red Khmers, even though they are responsible for the loss of an estimated total of at least 1.5 million lives in Cambodia in the 1970s. Today no serious researcher or historian would deny what took place in Cambodia at this time.

Not to allow an institution like the Living History Forum – within the framework of the instructions given to it by the Government to provide information about the crimes against humanity committed by communist regimes – to refer to Myrdal's public assertions and actions would be remarkable. What instead characterises a democracy is that those involved in public debate also have to allow their statements to be subjected to critical review. Review of this kind falls within the framework of the task of the Living History Forum to "provide information" and to "promote democracy, tolerance, and human rights".

Gunnar Bergström is included in the exhibition, which deals largely with him, at his own explicit request. Today he has a diametrically opposed view of his propaganda visit to Kampuchea in 1978. His work now focuses on asking the people of Cambodia's pardon and illustrating the problem of ideological blinkers.

Conclusion: both Jan Myrdal and Gunnar Bergström are public figures who have actively chosen to debate Cambodia in public. Neither of them is

accused of criminality in the Living History Forum's film. Insofar as Bergström or Myrdal are accused of anything reprehensible, it must be considered justifiable to supply the information in question in view of past and current public interest in the issue. We therefore see no justification for restricting the right of museums and other state cultural institutions to exhibit history, even if this results in the discomfiture of specific individuals.

The question of how the historical records were dealt with

All museums and other organisations that work with history have to contend with the problem that certain data may, however scrupulously controlled, sometimes be erroneous. The claim that errors of this kind constitute shortcomings in the "impartiality and objectivity" that can be required of public authorities is an unreasonable one in view of the nature of the material and the task of casting light on disputed and controversial subjects. In practice it is impossible in undertaking tasks of this kind to completely exclude the possibility of erroneous or dubious information.

The important question is, instead, how the discovery of such errors is dealt with. What is fundamental is that they should be acknowledged. Then they have to be rectified. The Living History Forum draws attention to errors in its lists of errata and these are corrected in subsequent editions.

The fact sheet

With regard to the errors in the fact sheet "Crimes against humanity under communist regimes" commented on by the complainant, it is correct that the work contained a few errors. These were removed from the revised version printed at the beginning of 2009. Information about these errors was also provided in a list of errata linked to the material on our web-site.

The film

Just as the complainant alleges, in the film advertising the exhibition *Dinner with Pol Pot*, we used an incorrect picture. The image depicts undernourished children in Cambodia in the 1970s but was taken after the invasion by Vietnam. When this error was disclosed we immediately added the following information to our web-site:

> Error in the film
> We have used an incorrect archive picture in the film. The picture depicting two starving children was taken after Vietnam had invaded the country. The children's hunger cannot therefore be traced to the reign of terror of the Red Khmers.

The authority also accounted for further corrections and other measures resulting from errors or obscurities in its material.

With regard to Hedvig Ekerwald's complaint the following was included.

The exhibition

Ekerwald figures in the exhibition with two quotations and in two photographs. The two quotations have previously been published in two separate books. The first photograph was taken when the delegation was grouped in front of a palace and figured on the back cover of the book published by the delegation after its journey. The second photograph depicts three of the four Swedes together with four other individuals, one of them a member of Cambodia's Ministry for Foreign Affairs. The pictures come from the Documentation Center of Cambodia.

What is described by Ekerwald in her complaint as "a posed image in which she is mocked" is a recent arranged photograph of actors taken in pre-

sent-day Cambodia by a collective of international artists as a comment on the visit made by the Swedes during the Pol Pot regime. The picture therefore reflects the historical fact of the journey and that the Swedes dined with Pol Pot and his closest associates but it is not possible to determine which of the women in the picture is intended to represent Ekerwald.

Ekerwald claims in her complaint that "In the exhibition my name is linked in words and images to mass murder". This is correct only in the sense that Ekerwald was one of the four participants in the visit to Cambodia in 1978 at the personal invitation of Pol Pot, and therefore figures in the exhibition. There is no link to mass murder but to the visit to Pol Pot's Cambodia. Ekerwald's name is used only with the quotation and under the picture in which she is depicted.

Although the authority does not consider that it has any legal obligation to seek anybody's permission before quoting them, it did contact Ekerwald in advance in a spirit of transparency and dialogue. Here the authority would like to add the following comment. The exhibition opened in September 2009 and in May of the same year contact had already been made with Hedvig Ekerwald by the project manager for the exhibition. A meeting was booked for 10 June, but was, however, cancelled by Ekerwald. It was decided that Ekerwald would then get in touch, which she never did. The intention of this early contact was to enable Ekerwald to add a comment or a repudiation concerning the visit to Cambodia in 1978.

The Living History Forum rejected the complainant's opinion that the exhibition violated her freedom of expression. The authority stated, for instance:

Moreover, freedom of the press and of opinion never constitutes a right to unchallenged expression. It is rather a fact that the right to discuss and argue against opinions openly is a fundamental aspect of freedom of the press and of opinion. The exhibition does not form part of the exercise of power against individuals in the sense in which it used in the Administrative Procedure Act.

Nor could the exhibition be viewed as constituting slander or an affront to her. The authority concluded its statement as follows:

Finally, it can be said that the exhibition is a natural undertaking within the framework of the task given by the Government to the Living History Forum: *"The special task of the authority is to provide information about the Holocaust and the crimes of Communism against humanity. The authority is to strive to enhance human endeavours to act for the equal value of all individuals"* as it is worded for instance in the instructions included in its mandate from the Government for 2009.

Stefan Lindgren and Hedvig Ekerwald each submitted their rejoinder to the statements made about their complaints by the Living History Forum. Hedvig Ekerwald also attached letters that had been exchanged. These show, for instance, that she was contacted on 1 May 2009 by a representative of the authority who wanted to present the exhibition to her and later shown some of the manuscripts for the exhibition but that she subsequently wrote to the authority on 7 September 2009 requesting the removal of her name from the exhibition. The project manager, Erika Aronowitsch, rejected her request in an e-mail dated 8 August 2008, in which, among other things, she answered that "unfortunately it is impossible to make changes in the exhibition now".

The law

Public authority shall be exercised with respect for the freedom and dignity of the individual (first paragraph of Article 2 of Chapter 1 of the Instrument of Government). The public administration shall protect the private life of the individual (fourth paragraph of Article 2 of Chapter 1 of the Instrument of Government). Those who discharge duties in the public administration shall observe in their work the equality of all persons before the law and shall maintain objectivity and impartiality (Article 9 of Chapter 1 of the Instrument of Government).

Article 8 of the European Convention on Human Rights stipulates that the individual has the right to respect for his private life. This includes the right to protection from slander or defamatory information (Danelius, *Mänskliga rättigheter i europeisk praxis [Human rights in European praxis]*, 3rd ed. 2007, p. 308).

Chapter 5 of the Criminal Code contains provisions on defamation. The penalties for slander protect the individual against the presentation of information by others that is intended to expose her or him to the disrespect of other people. This protection does not apply when there is an obligation to make a statement or when it is otherwise justifiable to provide the information on the matter and the one making the statement can show that the information was true or there were reasonable grounds for making it.

The regulations on freedom of the press and of expression can be found in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. These lay down that those who express themselves in a presentation that is covered by these constitutional enactments may not be subjected to punishment or other sanctions by the public administration unless the constitution provides support for this (what is known as the prohibition of reprisals). The Instrument of Government contains a general provision that guarantees every individual freedom of expression (clause 1 of Article 1 of Chapter 2 of the Instrument of Government). This provision means, for instance, that the prohibition of reprisals must be considered to apply even when an individual has made use of her or his freedom of expression in forms other than those covered by the special constitutional enactments (for more details see the adjudication of the Parliamentary Ombudsmen in case no. 149-2009 in the Annual Report for 2010/2011 p. 605).

According to the Ordinance with Instructions for the Living History Forum (2007:1197) the following applies in principle.

The task of the authority is to be a national forum to promote activities for democracy, tolerance and human rights using the Holocaust as its point of departure. Its task in particular is to provide information about the Holocaust and the crimes of Communism against humanity and it is to endeavour to enhance the desire of individuals to work actively for the equal rights of all individuals.

The authority is to work proactively with a focus on knowledge, culture and education. Its operations are to be conducted in close contact with current research, other cultural and educational institutions, as well as public authori-

ties, organisations and associations whose activities involve similar issues. The authority is to promote increased knowledge based on research and collaboration with others, such as higher education institutions, and to communicate knowledge with the area in which it operates.

Appraisal

Erroneous information

Stefan Lindgren has pointed out that the presentations from the Living History Forum contain erroneous factual information.

The information provided by a public authority must be correct. This is laid down, if nowhere else, by the requirement in the Instrument of Government that in their operations authorities shall maintain objectivity. It must therefore be ensured that information provided by the public administration is trustworthy and carefully checked. Deviation from this can be criticised on legal grounds, particularly if the information is detrimental for individuals (see the adjudication of the Parliamentary Ombudsmen dated 16 February 2010, case no. 4935-2009, Annual Report 2010/11 p. 616).

It has been made clear that there was erroneous information about historical documents. In activities of the kind the Living History Forum is to undertake, errors of fact can be made even though high standards of accuracy have been stringently observed. When this comes to light, the errors discovered must, as the authority points out in its submission to the Parliamentary Ombudsmen, be dealt with.

The Living History Forum is reminded of the requirements that apply. It is obviously of the greatest importance that the public is not given grounds to doubt that a document used by the authority to provide information is authentic. In the light of the remedial action reported by the authority in its submission to the Parliamentary Ombudsmen there are, however, no adequate grounds for any other criticism of the authority on this point, apart from this observation.

The film

The "commercial" is about two minutes long. It consists of the presentation by an actor of a monologue on the purported benefits of Mao spectacles:

Are you also tired of mass-murder, torture, dictators who persecute, oppress and annihilate? Then you should try 1978's major innovation – *Mao spectacles*.

Be like Gunnar Bergström and Jan Myrdal, visit a country called Democratic Kampuchea. A country where 1.7 million people are dying as a result of famine and torture and outright executions. All you can see is happiness, the happiness of the people, all thanks to *Mao spectacles*.

Look at these people, the regime has forced them to leave their homes and their jobs to work in the rice paddies. No, they do not look particularly happy, but with *Mao spectacles* they will seem happy to you! Volunteers working together on equal terms, all for the revolution.

Child labour? No, no, no! This is education. Yes, indeed the clay is easiest to shape when it is soft, as Pol Pot and the Red Khmers often say. Yes, look at the diligent small children. How happy they are to learn.

These are the spectacles that help you to correct your vision. And if you look after them carefully they will go on working for more than 30 years!

So why wait? Be like the Swedish delegation – see what you want to see. Order your *Mao spectacles* today!

[inaudible conclusion]

The monologue is illustrated by pictures depicting mass graves, victims of torture, historically famous dictators and individuals wearing "Mao spectacles".

As can be seen, the message of the film is ironic. The genre to which it belongs can best be classified as satire. Neither the basic constitutional provisions on the requirement of objectivity in the actions of the public administration nor any other general principles prohibit, in my opinion, the use of different stylistic devices by a public authority in providing information. There is however a difference between using satire to deride a phenomenon and deriding an identifiable individual (Cf. JO 1990/91 p. 144, in which the Parliamentary Ombudsmen accepted the inclusion in official information on tobacco of a number of statements that could be considered one-sided and tinged with subjectivity but criticised the omission of important facts and the depiction of an individual in a way that offered a negative conception of his personality and character.)

The contents of the film are linked to the group of four individuals who visited Kampuchea ("Be like the Swedish delegation – see what you want to see"). Two of the participants are mentioned in the film itself. The exhibition material of which it formed part named all of them. Even if the film is intended to illustrate a phenomenon it nevertheless singles out four easily identifiable individuals.

It is obvious that the state may not use identified individuals in some way as warning examples in an otherwise praiseworthy information measure. This stems from the obligation incumbent on public authorities to both respect the freedom and dignity of individuals and to safeguard the name and reputation of each and every one person. The provisions on defamation only offer the state extremely limited scope to include disparaging information about individuals in its provision of information or guidance to the general public. The scope that exists probably applies to those who have particular historical or contemporary significance because of the positions they hold or in some other way. If this scope is to be made use of, however, it has to be done in a justifiable manner. In addition, the provisions on objectivity and impartiality apply. Providing facts about well-known historical or contemporary figures may, in other words, be acceptable even when these facts are to their discredit, but not – as was the case here – in ways that are intended to ridicule them.

The rest of the exhibition

It has been made clear that the exhibition had the 1978 visit as its starting point and that it dealt with the way in which people's ability to perceive reality can be obstructed by ideological blinkers: both these elements can already be seen in the name of the exhibition. It has also been shown that Hedvig Ekerwald is identified as one of the individuals used to illustrate the exhibi-

tion's argument. Its claim is that because of ideological convictions she failed or was unable to react to the crimes against humanity that were taking place when she visited what was then Kampuchea. This is intended to expose Ekerwald to the contempt of others.

As has already been said, it is not acceptable for the state to use identified individuals as warning examples for information purposes. The Living History Forum has not claimed that Hedvig Ekerwald is a "public figure". Nor has anything else come to light to show that there could otherwise have been scope for the public administration to provide derogatory information about her in a context like this. For this reason there are no grounds for going any more closely into the manner in which the information was presented.

In her complaint to the Parliamentary Ombudsmen Hedvig Ekerwald has stated that she regards the exhibition as a punishment for the opinions she expressed. On this point I would agree with her to some extent. As has been shown, the exhibition focused on her actions and statements on political issues and used them as warning examples. The prohibition against reprisals in the Freedom of the Press Act has, for instance, been cited in practice as a ground for criticism of public authorities that have admonished members of their staff for taking advantage of their freedom of expression. What occurred here is not totally unlike a reprisal of this kind.

It has become clear that the Living History Forum was in contact with Hedvig Ekerwald during its work with the exhibition. Ekerwald has said that she first consented to the use of a photograph and a quotation but that at that time she was unaware of what she was consenting to and that when she later became aware of this she requested the removal of what applied to her.

The authority has stated in its response to the Parliamentary Ombudsmen that it does not consider it is obliged to ask the permission of anyone before quoting them but that nevertheless it contacted Hedvig Ekerwald in advance in a spirit of transparency and dialogue. According to its response the "intention was to enable Ekerwald to add a comment or a repudiation concerning the visit to Cambodia in 1978".

What has been stated by the Living History Forum in this respect can only be interpreted to mean that it was intended to use Hedvig Ekerwald in its exhibition irrespective of whether she consented or not and that the intention of trying to contact her was limited to offering her an opportunity to comment on or repudiate her own actions. The conclusion is that her consent was not requested.

The Living History Forum's arguments

A public authority has to act within the parameters laid down by legislation for its operations (the principle of legality). In this context the response from the Living History Forum can be understood to claim that what has been challenged by the complainants forms part of the authority's task.

The task entrusted to it is worded in general terms and there are, in my opinion, grounds for doubting that the intention was to give the authority the kind of freedom that it has adopted in this context. But irrespective of the

circumstances in this respect, the authority's instructions are also set down in an ordinance issued by the Government. Ordinances of this kind are subordinate to what has been enacted by the Riksdag as legislation and constitutional provisions. Its task must therefore be undertaken within the parameters of the constitutional provisions accounted for above, which the authority is obliged to comply with of its own accord.

In its defence, the Living History Forum has also used arguments that invoke the concept of the freedom of journalists and researchers. This kind of freedom does not apply, however, to statements made by an agency on behalf of the public administration and with the authority that this includes. More concretely, the Living History Forum has argued as if it enjoyed a right similar to the freedom of expression of citizens to appraise and criticise individuals. This is not the case. A public authority may not derive powers from provisions made to guarantee citizens freedom of expression vis-à-vis the public administration. Instead, for instance, the requirements of objectivity and impartiality apply and these manifestly restrict the possibilities of what can be expressed on behalf of the public administration. Public agencies do not, in other words, have freedom of expression in the way that it is enjoyed by individuals. (Cf. Parliamentary Ombudsmen adjudication 2010-02-16, reg. no. 4935-2009, Parliamentary Ombudsmen *Annual Report* 2010/11 p. 616.)

What has been said here does not, of course, prevent an agency with a task of the kind entrusted to the Living History Forum from providing scope for individual participants in the course of its operations to express opinions etc. and giving them great freedom to do so. Provided that it is made clear that what is expressed is not the statement of any stance adopted by the agency, the requirements of objectivity and impartiality impose no restrictions on this freedom apart from the agency's overall responsibility for ensuring balance and validity.

To avoid misunderstanding it should also be added that what is said here applies to the Living History Forum as a public authority. As citizens, the individual members of its staff have freedom of expression and can of course take advantage of their right to provide information unhindered by the restrictions that apply to statements made on behalf of the public administration. Nothing of this kind has, however, been involved here.

Conclusions

The Living History Forum merits criticism for the use of identified individuals as warning examples in its film. The Living History Forum is also to be criticised for the violation of the integrity of Hedvig Ekerwald inflicted by the exhibition as a whole.

The film was deliberately designed in a way that was intended to ridicule the four individuals who took part in the visit to Kampuchea. This is therefore incompatible with the requirement that the public administration is to protect the freedom and dignity of individuals, even if one or more of those identified were to declare that they have no objection to the way in which they are de-

picted. For the same reason their position in contemporary history is of no significance.

Hedvig Ekerwald complained to the Parliamentary Ombudsmen about the exhibition in its entirety. As has been shown, its basic message contained derogatory information about her. Ekerwald's integrity has been violated in this way. With some justification she has in addition experienced the exhibition as a punishment for what she has said and written, i.e. infringement of her freedom of expression. She did not participate voluntarily nor did the Living History Forum request her consent. She cannot be considered a public figure by virtue of her position or on any other grounds but must be regarded as a private individual. Nothing else has otherwise been disclosed that can justify the authority's treatment of Ekerwald.

The events themselves as well as the arguments presented by the Living History Forum in its defence to the Parliamentary Ombudsmen show that the authority lacks insight about the legal restrictions that apply to the provision of information by a public agency. This is serious – not least when, as here, the individual bears the brunt. This adjudication is therefore being sent as information to the authority to which the Living History Forum is accountable.

An enquiry initiated by the Parliamentary Ombudsmen: Inspection of the Swedish Migration Board's removal centres

Summary of the adjudication

Background

Foreigners who are not allowed to stay in Sweden or whose entitlement to remain in the country is not clear may be detained. They must as a rule live in special removal centres for which the Swedish Migration Board is responsible. An inspection of these facilities was initiated by the Parliamentary Ombudsman Hans-Gunnar Axberger. The outcome is presented in this adjudication.

General impression

The general impression formed in the enquiry undertaken is that the work of the removal centres functions well. The enquiry also reveals, however, a number of problems and shortcomings that are in some respects serious.

Overall observations

The treatment of detainees at the different removal centres is not uniform. This is probably due to the lack of central direction and the variation in routines at the different centres. It is important that the Swedish Migration Board assumes greater responsibility for the work of the removal centres.

The Swedish Migration Board is unable to provide reliable statistics. This makes it difficult to evaluate the work of the removal centres. The exceptional nature of their activities cannot excuse the shortcomings that exist.

Periods of detention etc.

The length of detention in cases dealt with by the Swedish Migration Board lie within acceptable parameters according to current legislation. The adjudication nevertheless points out that deprivation of liberty is the most stringent measure to which an individual may be subjected by a public authority. Coercion of this kind must be employed with great caution and only when it is entirely necessary.

The Swedish Migration Board bears the overriding responsibility for ensuring that all cases involving detention are dealt with effectively. This includes making sure that any deprivation of liberty is as brief as possible. Some efforts are being made at removal centres to influence the length of detention periods. If these are to be successful, they must be undertaken in a well-thought out and organised manner. This is not always the case.

"Security" placements in remand detention centres

The Swedish Aliens Act provides a number of ways of dealing with a detainee who constitutes a safety risk. The enquiry shows that the Swedish Mi-

gration Board uses only the most stringent alternative which involves placing the detainee in a remand detention centre.

It is wrong in principle to place a detainee together with individuals who are suspected of some crime. Placement in a remand detention centre also involves a much more palpable restriction of liberty than placement in a removal centre. While the removal centres are characterised by a manifest ambition to remain as open as possible and their activities and the expertise of their staff adapted to this aim, conditions in remand detention centres are in many respects the opposite. Detainees are obliged to spend most of each day in a cell. The risk that placement in a remand detention centre will lead to or exacerbate psychological problems is obvious.

Criticism of the Swedish Migration Board is expressed for the introduction of routines which mean that the legislation on placement in criminal custodial facilities is applied erroneously. As this is considered to lead to the exposure of individual foreigners to more manifest restriction of their liberty than would have been the case if the law had been applied correctly, this criticism is grave.

Placement in remand detention centres because detainees are a danger to themselves

The Swedish Migration Board regularly places detainees considered to constitute a danger to themselves in remand detention centres. The removal centres do not feel that they have the expertise and resources required to look after these individuals. Placement in a remand detention centre must, however, be viewed as particularly unsuitable for those whose state of mind means that they cannot be placed in a removal centre. There appears to be nobody who feels that the routine adopted is appropriate. That it is still used is no less regrettable than it is to be deplored.

The procedure is considered to lack the necessary basis in law. On humanitarian grounds and as a matter of principle it is manifestly unacceptable for sick individuals who are a danger to nobody but themselves to be placed alongside criminal suspects solely because they cannot be offered appropriate treatment in the Swedish Migration Board's own facilities. Every time this occurs the human rights of the detainees have been violated. As the accountable authority, the Swedish Migration Board merits very grave criticism for its continuation of this unsatisfactory situation.

"Transportation" placements in criminal custodial facilities

The legislation enables the Swedish Migration Board to make placements in custodial facilities if there are "exceptional grounds" for doing so. This provision is invoked in connection with transportation. Such extensive application is not compatible with the wording of the statute. There are signs that the provision is applied too often. The main reason for this extensive application appears however to be that the need of transportation placements is considerably greater than predicted by the legislators. The legislation should be reviewed.

It has come to light that the duration of interventions is, on the whole, too long. In the *travaux préliminaires* to the act there is reference to "a few hours or one night": in practice placements are often for several days and sometimes almost one week. It is indefensible for someone who has neither committed nor is suspected of a crime to be deprived of liberty in this way. The Swedish Migration Board merits criticism for the shortcomings that exist.

Authority to decide on placements in custodial facilities

Placement in a custodial facility is the most far-reaching decision that can be made in the operations of the removal centres. For reasons of legal security they should be made by specific officials. At a number of removal centres, however, case officers or in some cases even hourly paid employees may make decisions of this kind. Authority has been delegated far too extensively. The routine adopted merits criticism.

Review of decisions on placement in correctional facilities

Individuals placed in criminal custodial facilities are visited by the staff of removal centres. The aim is to establish whether the detainee may be returned to a removal centre. The enquiry reveals that this procedure has a number of shortcomings. It is viewed as informal and unable to guarantee the legal rights of the individual. The obligation to review decisions on placement in correctional facilities should be laid down in law. Until this has been done, the Swedish Migration Board should ensure that the necessary routines exist and are complied with. During the inspections it was noticed that a number of individuals have remained in remand detention centres even though the decision to place them in a criminal custodial facility has been revoked or for good reasons should have been. The Swedish Migration Board merits criticism for this state of affairs.

Searches

A relatively large number of searches are made at removal centres. The routines adopted are not compatible with the legislation or with the guidelines in the Swedish Migration Board's manual on foreigners. The Swedish Migration Board cannot escape criticism for this. This criticism should, however, be assessed from the point of view that these security searches are superficial and involve no particular violation of integrity. The legislation should be reviewed.

Confiscation of personal property

The removal centres apply the provision on the confiscation of personal property in different ways. The Swedish Migration Board cannot escape criticism for this.

Records

During the inspections it could be seen that many written records of both decisions and working notes were missing. In a number of cases documents had been filed incorrectly. At no centre were there written records of the material on which decisions had been based. It was often difficult to trace the different stages of a case on the basis of the written records. The overall picture is so disturbing that the Swedish Migration Board must be criticised for the lack of orderliness.

Other areas

In the area of health care a number of problems could be observed that can partly be attributed to the fact that the county councils are the accountable authorities while the responsibility for treatment and supervision of detainees lies with the Swedish Migration Board.

Nothing has come to light in the enquiry to show that the operations of the removal centres fail to comply with the current legislation in other areas.

Legislation needed

Review of the legislation is needed in several respects. This adjudication is therefore being forwarded to the Ministry of Justice in the Government Offices for its information.

Summary

To sum up, the enquiry has led to a number of observations of shortcomings and potential improvements. Criticism is expressed of the Swedish Migration Board on the following points.

The Swedish Migration Board merits *extremely grave criticism*

– for the placement of detainees who are a danger to nobody but themselves in remand detention centres.

The Swedish Migration Board merits *grave criticism*

– for the erroneous application of the regulations concerning the placement of detainees who constitute a safety risk in criminal custodial facilities.

The Swedish Migration Board merits *criticism*

– for the routine placement in police cells or remand detention centres for longer periods than intended by the legislators on grounds related to transport arrangements,
– for the delegation of the authority to make decisions about the placement of detainees in criminal custodial facilities to far too low a level,
– for the continued placement of detainees in remand detention centres even though the legal grounds for doing so no longer apply, and
– for the lack of systematic written records.

The Swedish Migration Board *cannot escape criticism*

- for the lack of the requisite legal basis for the search routines applied at removal centres, and
- for discrepancies in the application of the regulations on confiscation of personal property of detainees.

3. Access to public documents

Lecture held by Parliamentary Ombudsman *Hans-Gunnar Axberger* on 3 May 2011 in Brussels at a conference arranged by the Council of Europe Commissioner for Human Rights.

Initial remarks

Freedom of information

It is not always clear what freedom of information means. It seems to me as if it has changed its content over the years. In the old sense, it was more or less a consequence of free speech – if there was a right to speak, there was also a right to listen. At one time freedom of information was used as a wider concept than freedom of speech (or expression). It was then somewhat tarnished with efforts to redefine the traditional meaning of free speech. Later on, freedom of information got some content of its own. It could for example protect the right to possess technical devices for receiving radio and television transmissions (radio sets, television sets, antennas etcetera).

In the modern FOI-sense, it means much more than that. The abbreviation FOI is normally used in connection with laws that give citizens a certain right to see public documents. One of the aims of FOI-laws is to make it clear that public administration is public, and should therefore be accessible for everyone. This is sometimes expressed in terms of ownership: public documents cannot be regarded as something that belongs to the administration; they belong to the citizens. In my opinion, it is misleading to speak about ownership in this context.

The latest step in developing – or changing – the meaning of freedom of information is concepts questioning the whole idea that information can be owned (Pirate Bay, Wikileaks). Freedom of information then means that you have the right to information that is held by someone else and to do what you like with it. From a civil rights point of view that is a rather complicated concept, to say the least.

I think it would be preferable if we – when discussing these matters – could move away from the sometimes a bit fluffy human rights doctrine and instead just ask ourselves: what is it that we want and how can it be achieved?

The need for access

In a democracy the need for access to public documents is self-evident. Its basis – one man, one vote, in general elections – requires citizens that are well informed about public affairs or, at least, a possibility for those who wish to inform themselves to do that.

The arguments for open government can easily be elaborated. They are well summarized in the preamble of the Council of Europe's Convention on Access to Official Documents. It states, inter alia, that exercise of a right to access to official documents helps the public to form an opinion on the state of society and on public authorities. According to the preamble it also fosters

the integrity, efficiency, effectiveness and accountability of public authorities, and it thereby helps to affirm their legitimacy.

In this sense access to public documents is a tool for accountability and trust. Its purpose is to strengthen public opinion as a guardian of all forms of public authority. It has more to do with fair and effective governance, than with human rights. It is of curse a human right-matter, as is for example the Rule of Law and the principle of Due Process; it supports human rights, and is an indispensible prerequisite for their protection, but it is not a human right in itself, at least not in the natural law-sense.

With this instrumental view the argument of "ownership" also becomes less relevant. Citizens should definitely have the right to look into public records, but not because they "own" the information.

A governmental task?

How can a society with informed citizens be achieved? Is it a governmental task? Or should it be left to the market?

Over the centuries, a certain division of labour has developed between the State and the civil society in this field. Its meaning is that government shall take little or no part in the distribution of ideas and information – this is left to the civil society, including the market. It can be discussed whether this derives from a well contemplated constitutional ideology or if it is just a result of a coincidental democratic evolution. In any case, this division of tasks is a fact. It is clearly reflected in the Montesquieu-inspired metaphor where the press was called the fourth estate. It can also be traced back to the first amendment to the US constitution, which laconically states that Congress shall make no law abridging the freedom of speech, or of the press.

The role of the fourth estate has in practice been carried out by what we nowadays call the media. That has in turn led to the misconception that the media is the fourth estate. In my mind, it isn't. In a constitutional sense, the fourth estate is freedom of speech in itself, including freedom of information. And one of the consequences of the constitutional fourth estate-doctrine is that governments shall – as a matter of principle – refrain from interfering with freedom of information. In other words, it should not be a governmental task to safeguard that everybody gets informed about public affairs.

However, the State has a responsibility to monitor the constitutional balance. If the system does not function the way it's supposed to do, measures have to be taken. I will return to that in my final remarks.

Perspectives

The development of FOI-laws

Friends of transparency often sound disappointed. Coming from a country where a legal right providing access to public documents was first granted already in 1766, I can share that feeling. Worldwide, the development towards transparency can seem tardy.

But there are encouraging facts. 25 years ago very few countries had any legislation about freedom on information at all. It was a small and distinguished group: the Nordic countries, the US, France, the Netherlands, New Zealand, Australia, Canada and maybe one or two more. Today, the picture has changed. In a study from 2008 the OSCE concluded that 45 out of its 56 member states by then had some kind of FOI-law.

And two years ago the Council of Europe presented its Convention on access to official documents. It is a rather ambitious and promising international legal instrument. Of course, it remains to be seen what effects it will have. So far it has only been ratified by three member states, two of them being Norway and Sweden, and the third being Hungary.

But on the whole, these examples show that in recent decades there has been a fast development. The need for openness is nowadays more or less generally recognized. That is a great step ahead.

Experiences from an old-fashioned model

When discussing issues concerning access to public documents Swedish law can serve as a frame of reference. There can be no doubt that the Swedish experience with open government is of interest for those who contemplates FOI-legislation.

The Swedish law on access to public documents is very old, much older than the modern FOI-concept. Among its advantages is of course that centuries of practice and experience offer stability. On the downside it should be recognized that at the age of two hundred, you face the risk of geriatric problems. The ability to keep an open mind towards alternative solutions and to adapt to changes might be affected.

I want to have it said once and for all that there are definitely other ways of organizing open government than the Swedish model. In other words, the purpose of using Swedish law as reference is not to impose it on others, but to offer perspectives and food for thought.

History

Sweden's first press law was passed in 1766. Most of its provisions dealt with the right to access and print documents from the government and the courts. After political turmoil the law was some years later abolished, but in 1809, some two hundred years ago, a pre-democratic revolution took place and the principles of 1766 were reinstated.

Since then Sweden's law on access to public documents is included in our Freedom of the Press Act, which is a part of the constitution. Why did we get this FOI-lookalike legislation so early in history? The short answer is that in the early days of press freedom, printed matter to a large extent consisted of content from public documents. It was common, for example, that parties in legal disputes had arguments and decisions from court proceedings printed and circulated. At the time, press freedom, at least in Sweden, seemed more or less pointless if you were not allowed to copy content from public documents. And to do that you had to have access to these documents.

(The somewhat lengthier answer is related to the fact that the law in 1766 was adopted in a period when the country was in practice governed in a parliamentarian way. The two political parties that where competing for power found a common interest in keeping government files open.)

The publicity principle

The heart of Swedish FOI-law is a principle, very well known to most citizens – in Swedish it's called *offentlighetsprincipen*. The publicity principle would be a straight but not very idiomatic translation. On the other hand, it's more or less hopeless to find a proper word in English, since the principle is both complex and unique and in that sense not translatable. So let's call it the publicity principle, even though it might sound a bit awkward.

I'll try to explain what it means. Above all it's a general idea, an ideology with the same influence on the legal system as the right to free speech. More concretely, it states a presumption that all documents held by public authorities are available to the general public. This applies to every public institution, except to the royal family (which, by the way, reflects that the Swedish king has no power). Access can only be denied according to secrecy provisions specified in law. And when I say specified I mean specified. The rule of law is here applied with the same scrutiny as in criminal cases.

Therefore a person who asks for a document has nothing to prove, it is always the government or the agencies that have to show legal grounds for withholding information. Had this principle been a part of ancient Roman law, there would no doubt have been a Latin proverb expressing it. I have, to my satisfaction, noticed that the European Convention on Access to Public Documents in its preamble recognizes a principle of the same kind, whereas – less satisfying – the EU-regulation on these matters lacks such a principle.

Legislation and supervision

The publicity principle is supported by very detailed legislation and by judicial institutions. As I have already mentioned, it is expressed in the constitution, where a comprehensive chapter is devoted to it. In basic law there is a Publicity and Secrecy Law, with provisions regarding practicalities as how to answer requests, duties to inform an applicant of the right to appeal etc. The law also contains the very important regulation on how public documents must be registered.

To avoid misunderstanding it should be stressed that the Publicity and Secrecy Law includes a good number of security rules, and that new ones are added regularly. In other words, the publicity principle does not mean absolute transparency, far from it.

The regulation is formalistic and sharp. It gives government and agencies very little discretion. A person whose application is denied can appeal in court; it's free of charge and you don't need a lawyer to do it. Appeals are common and often granted. In practice, it can be enough to declare an intention to appeal. When agencies are faced with the risk and nuisance of court proceedings, they now and then choose to release the document. It is a sig-

nificant fact, that while it is common that agencies and officials are held accountable because they have not respected the publicity principle, it almost never happens that anyone is brought to justice for giving out too much information. So, if you are a public official and want to stay on the safe side, it's often better to release a document than to try withholding it. It can be added, that Swedish officials have a constitutional right to communicate anonymously with journalists; in many cases this right includes revealing matters that are withheld from the general public according to secrecy legislation.

Another important institution, alongside with the courts, to supervise the publicity principle is the Justice Ombudsman, the JO. I'm one of four JOs, and I spend quite a lot of time with questions regarding access to public information. Mostly people are complaining about agencies who are not answering requests immediately; normally you have a right to see the document or get a refusal within 24 hours. More serious cases can concern government officials asking questions about the applicant's identity, making queries on the purpose of the request or even trying to reveal media sources. Many of my "clients" are journalists, complaining about secrecy or bureaucracy in central or local government.

We also make inspections. One of the things we carefully supervise is that documents are properly registered. It can't be said often enough, that registration is the key to open files. When an agency fails to adhere to registration-rules, there are reasons to suspect that the there might be something rotten in its administration. There is a well known example, when the minister of Justice had to resign after it was discovered that she had omitted to register a letter. The content of the letter was embarrassing for her, but the fact that it hadn't been registered strongly contributed to her fall; it was regarded as a fingerprint, proving that she had tried to hide her actions from public scrutiny.

Recommendations

The need for control

Sweden has practiced the principle of open government files for some two hundred years by now. One could think that after such a long time it ought to function by itself, without supervision.

As a Justice Ombudsman I can tell you – it does not. I am quite convinced that if we were to take away the courts and the ombudsmen, open government would soon be choked with bureaucratic weeds. I would like to elaborate a little on this.

What did the public officials back in the early days think about the "publicity principle"? Well, they didn't like it. Being forced by law to hand out what they regarded as "their" documents to members of the public who were then free to print and publish them was perceived as a sign of distrust. They saw themselves as accountable only to the king and found it more or less appalling to be scrutinized by public opinion. In that respect, they do not differ all that much from some of their colleagues of today.

I'm rather convinced that most people are in favour of open government. If we apply John Rawls' metaphor and put ourselves under the veil of ignorance, all of us would like to live in a society with free speech and freedom of information. The problem is that in reality people have different lives, histories, occupations and interests. If public officials do not love FOI-laws, it is not because they are a special kind of people; it is because there is something in the role of the public official that makes this kind of transparency uncomfortable.

Personally, I have had many occupations and assignments, some on the public side, some on the private side and some inside the media. I have noticed that when I change position my attitudes tend to change as well. Not my values, not my views, but my attitudes. That way I have come to understand public officials who cannot express any warmer feelings on FOI. The publicity principle is something they have to live with. But from time to time it is a formalistic nuisance that interfere with their work. It can now and then seem quite irrational, and it happens that odd people use it just to annoy an agency they do not like for very personal reasons. In the daily life of a public official, the principle is basically bad news, incisively put.

The most important reason why Swedish public officials adapted to the publicity principle, despite their more or less negative attitude, is that they had to. If they obstructed they were brought to court by the Justice Ombudsman, convicted and fired.

Conclusions

It is natural that those who work in public agencies are somewhat reluctant to the idea that they have to perform their duties in public. It would be naive to trust that officials would invite people to look in their files if they were left to choose for themselves. Therefore, FOI-legislation needs to be supported by firm and rather formalistic control that does not give the bureaucracy any discretion.

This does not mean that education and other softer ways of influencing attitudes are useless. Obviously, there are more modern ways of implementing legal norms today than in the early nineteenth century when JO regularly prosecuted public officials. But basic principles in FOI-laws still need protection by courts and ombudsmen.

Another conclusion is that there is need for non-governmental control. For example, transparency organizations fill a very important function. Most important of all is probably supervision by the media. This can be fulfilled both by reporting on how government and public officials live up to their FOI-obligations in general and by journalists using citizen's right to demand access to documents in their work.

The need to be reasonable

The publicity principle has given rise to some discussion as to whether it might cause side effects that are not beneficial. I'll give an example to illustrate what I mean.

In Sweden the EU used to be regarded as a bad example when it came to transparency. One of the most common arguments against entering the union, which we did fifteen years ago, was that its administration was so secretive. However, in the late nineties the director-general of the Swedish National Audit Agency was participating in a committee that investigated the affairs of the European Commission at that time. After the publication of the committees report Jacques Santer and all the other commissioners resigned. When the Swedish member of the investigative committee came home she expressed surprise, but also admiration, over the fact that the files and documentation of what the commission had been up to, was so comprehensive. This, she concluded, would not necessarily have been the case in Sweden. I believe that to be true; I have served in several investigative committees, and my impression is that the closer you come to the heart of central government, the less documentation is there to be found.

In other words, there is a risk that FOI-requirements lead to less documentation. Personally I think that this risk has been underestimated in Sweden.

In a wider perspective it must be considered that the attitudes of public officials will be affected if they find themselves more or less forced to refrain from putting important information on paper because of the risk that it may become public according to FOI-laws. On the one hand they want to document what they are doing and on the other hand they cannot do that because if they do they would jeopardize the aim of the work that they are engaged in.

Conclusions

Many public officials, at least in Sweden, attach importance to the fact that they serve the common good. That sense of professional pride should be encouraged. When officials from the old days felt distrusted by the publicity principle this was to some extent understandable. It is important that FOI-laws are perceived as legitimate by the public officials who shall apply and observe them.

Therefore FOI-laws must be reasonable, also in the eyes of the government. They must give room for the administration to do its job. Otherwise they may promote a culture of what we can call oral governance or oral administration, which from an accountability point of view is counterproductive.

I'd like to add that there is a danger with all constitutional principles that they become rigid and fundamentalist. On this point there is some room for self-criticism against the Swedish model.

Publicity vs. privacy

A constitutional principle stating a presumption that all governmental information is public can constitute a threat against protection of privacy. The strong emphasis on publicity has in the Swedish legal system resulted in underdeveloped protection of the individual. It is a fact that whereas we have a lot of legal artillery to support free speech and FOI, there are no general provisions, neither in the constitution nor in ordinary law, to support privacy. In a

formal sense, we do not meet the standards of Article 8 in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This does not mean that privacy is regularly invaded and that there is nothing the individual can do about it if it happens. The detailed Publicity and Secrecy Law excludes a lot of personal information from being made public. And there is of course a data protection law. Apart from that there are efficient self-regulating systems working in the media sector. But even when all that is considered, one has to acknowledge that the Swedish legal system strikes the balance between openness and privacy in another way than many other European countries do.

This is probably going to change. Swedish legal standards on free speech and access to public information are under twofold pressure. First there are the EU and the European convention demanding harmonization – which means normal European laws instead of Nordic publicity principles. On top of that there are political demands in Sweden for legislation against what is considered to be too much media power and too little privacy protection; these opinions have always been there but are nowadays boosted by "the European argument", i.e. that Sweden has to give in to European standards. In my view, we have good reasons to adapt, but no reason to surrender. If the need for privacy protection has been underestimated in Sweden, it has on the other hand been overestimated in other European countries, sometimes even by the courts in Strasbourg and Luxembourg (see the cases of von Hannover and Bavarian Lager).

Computerized information

In the future most public information will be digitalized. How will that affect access to information? Well, in theory computers make it much easier for the government to provide access to information and for people to find what they are looking for. But so far, we have not seen too much of digitalized transparency. On the contrary, digitalization is mostly used as a pretext to restrict openness, rather than to increase it. I can see a couple of reasons for this.

The first is that digitalized information is not the same as information on paper. It is much more accessible. You do not have to read it document by document; you can have it all at once, and there are no limits to what you can do with it. Therefore, a publicity principle becomes a much more powerful tool in the digitalized world than it is in the world of paper documents. As a consequence, the balance between openness and secrecy may have to be reconsidered. It is a paradox that when real transparency comes within reach, it needs to be restricted.

Another reason is that we have a history of regarding "data information" not as a possibility but as a threat. In the seventies a special agency to protect people from computerized data was formed in Sweden (and in many other countries as well). It was literally designated to protect us against computerized information. It was called the Data Protection Board, and developed a high moral profile. This is more or less my generation; we were moulded in fear of George Orwell's 1984 and what computers could do to us, if the Data

Protection Board was not there to shield us from Big Brother. A lot of this vanished with the PCs and the Internet. But the underlying suspicion against all computerized information prevails. And it kind of still makes it legitimate to say that sorry, computerized areas are restricted.

I think that the greatest challenge in the field of access to public information is to find a proper balance between transparency and the need to restrict access to digitalized data. So far, at least in Sweden, people debating these issues tend to choose side – you are either in favour of openness and liberty or of privacy and "data protection". Personally I think we should stop talking about "data protection". We have passed 1984, we survived; nothing happened. At the same time, friends of transparency need to acknowledge that the accessibility in digitalized registers must be balanced with efficient protection of personal information, when revelation of that information can be harmful to the individual.

Final remarks

Access, transparency and propaganda

In a European context FOI issues are often discussed in terms of transparency. However, transparency is not altogether the same thing as access to public information. While access consists in offering a possibility for citizens, including the media, to see, transparency means making visible. The former is passive and the latter is active.

Transparency, in other words, means much more than keeping your files open. It starts already when you set up a public agency. It includes a clear and comprehensible description of the agency's assignment, how it is supposed to function, who is accountable for what etcetera. And it ends with informative and ongoing presentation of the agency's results.

The difference between access to documents and transparency is illustrated by the Swedish example. In general Swedish public administration cannot be described as particularly transparent. Even if it has gotten better during the last years, much thanks to the Internet – which is a marvellous transparency tool, there is still a lot to be done. The attitude has been that we do not need transparency, since we have the publicity principle. The conclusion is that transparency does not necessarily follow from efficient rules on access to public information.

On the other hand, transparency measures cannot replace the right to access. If a government's FOI-policy mostly consists of info sheets, press releases, information officers, etcetera, there are grounds for suspicion. Citizens', including journalists', access to government files cannot be compensated by active information policies. On the contrary there is an obvious risk that such strategies will turn into or be perceived as governmental propaganda.

So there is a need for both passive access and active transparency, but there has to be a balance. This is where I like to return to my initial remarks about the division of tasks between the government and the civil society.

The constitutional framework

As I pointed out, there is a constitutional framework, applied in most democracies. Its meaning is that government can keep its files open, provide information and encourage people to engage in public affairs. But it shall take little or no part in the distribution of ideas and information. According to the framework it is supposed to function like this:

Someone has to produce the information people need to hold its government accountable. It is not a good idea to let the government be responsible for that, since it would be more or less the same as asking the government to control itself. Therefore we have free speech and freedom of information, the fourth estate, to provide us with the necessary tools to hold our masters accountable.

It can of course be discussed how well this has been working, over the years and in different countries. On the whole, it has been a pretty successful theory, though. But the final question I would like to raise in this lecture is whether it will still be working in the future. We have gotten used to equate the fourth estate with the media. And we have gotten used to media that furnish us with – a lot of crap, yes – but also with enough serious and high quality information to meet the constitutional needs.

The role of the media

There are many ways to describe what role the media plays in society. From a constitutional point of view three functions can be observed: to inform, comment and examine. The informing function consists of collecting, gathering and presenting (comprehensible) information. Thereby media helps citizens to understand the world they are living in. The commenting function consists of providing a platform where common subjects can be discussed, different voices be heard and opinions be articulated. This platform is indispensible for the democratic dialogue. The examining function consists of critical investigations into all kinds of social phenomena that are of interest to the public. In this capacity media serves as an independent audit agency.

When we discuss FOI, we presume that professional journalists in a more or less institutionalized media sector will take care of all this. It is a prerequisite for the above mentioned division of labour between the government and civil society. In fact the "FOI-concept" cannot be fully grasped without involving journalism as an essential part of it.

As said, access to public documents does not require any activity from the government. It is to some extent an end in itself; a government that keeps its files open to the public shows that it has nothing to hide, which makes it trustworthy. But at the end of the day, the documents must also actually be asked for, read and used as a source of information; otherwise openness will lose a great deal of its meaning. Who will do that?

In the Swedish experience, individual citizens rarely practice their right to see public documents. Most citizens never use it at all, although many of them know their right and will refer to it if they have an explicit interest to see a document, for example when a neighbour has applied for a building permit

or in other matters which concern the individual personally. In other words, the public does not exercise this right in such a way that it can serve as a watchdog. Of course, organizations of different kinds can use it for those kinds of purposes, but apart from that, the watchdog function is left to journalists. In sum, the FOI-concept does not work without journalists practicing it.

Concretely, journalists collect and gather information from public records and present it to the citizens in a comprehensible way. By doing so they also indirectly supervise that the rules of openness are correctly applied and force public agencies to uphold well functioning routines for handing out information.

The constitutional balance reconsidered?

In the last ten-fifteen years or so, the economic pressure on traditional media has gradually increased. What I see is a market turning away from quality journalism because it is not profitable enough. If this continues we might reach a point where the described role of the media is no longer carried out efficiently enough. As a result the balance between government and civil society must be reconsidered.

In that case governments will have to take greater responsibility in order to secure that citizens can get good information, that there are well functioning platforms for public debate and that independent investigative journalism is being conducted. In opposition to this somewhat pessimistic perspective one can of course put one's hope in the Internet, saying that we do not need patronizing "old media" anymore; on the World Wide Web we can all be journalists and perform the role of the fourth estate. It would be nice to share that optimistic feeling, but personally I doubt that professional journalism can be replaced that easily.

For an orthodox believer in freedom of speech it might be hard to reconcile with the idea that government must take a more active part in this field. However, the aim of a principle must be more important than the principle itself. And besides, the principle is not always strictly applied. The clearest example of this is the different forms of public service media that already exist in many places.

My conclusion is that modern FOI-laws should not be restricted to granting passive access to information; they should also contain regulations on active transparency, forcing public agencies to secure that information is not only available but also spread to the public. In the best of worlds the distribution of ideas and information may not be a task for the government, but that is not the world we are living in. A modern democracy requires informed citizens. If this common interest cannot be met otherwise, it has to be done with the help of public authority.