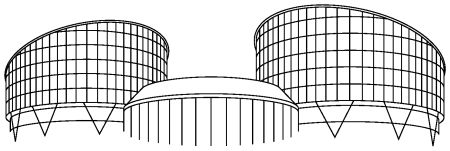

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

# CASE OF ARLEWIN v. SWEDEN

*(Application no. 22302/10)*

JUDGMENT

STRASBOURG

1 March 2016

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Arlewin v. Sweden,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Luis López Guerra, *President,*
Helena Jäderblom,
George Nicolaou,
Helen Keller,
Johannes Silvis,
Dmitry Dedov,
Branko Lubarda, *judges,*

and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 2 February 2016,

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 22302/10) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swedish national, Mr Raja Arlewin ("the applicant"), on 18 March 2010.

2. The applicant was represented by Mr K. Lewis and Mr J. Södergren, lawyers practising in Stockholm. The Swedish Government ("the Government") were represented by their Agent, Mr A. Rönquist, Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that he had been deprived of effective access to court and that the State had failed to provide him with sufficient protection against allegations that violated his right to privacy.

4. On 5 March 2012 the application was communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1970 and lives in Stockholm. He is self-employed and runs a business.

6. On 22 April 2004 the Swedish commercial television channel TV3 broadcast an episode of a television show entitled "Insider", in which it was claimed that "shady transactions and shady characters" were revealed. The

show was broadcast live with a few recorded features. In the show, the applicant, who was unknown to the broader public, appeared in pictures and was mentioned by name. He was singled out as the central figure of organised crime within media and advertising and as being guilty of several counts of fraud and other economic offences. The programme was re-broadcast on 25 April and 17 September 2004. At this time, no criminal investigation had been initiated against the applicant.

7. The television programme was produced in Sweden by the Swedish company Strix Television AB. It was sent by satellite link from Sweden to the London-based company Viasat Broadcasting UK Ltd and from there sent unaltered to a satellite which transmitted the programme to the Swedish audience. The encoded programme was viewable via a satellite receiver or a cable connection in Sweden a fraction of a second after it had been sent by satellite link. Even if it was viewable in the United Kingdom, which is doubtful, it would have been watched there by a small audience. It was presented in the Swedish language for a Swedish-speaking audience, and was sponsored by companies competing in the Swedish market. The anchorman of the show, X, a Swedish national, was a celebrity and a well-known television personality in Sweden; he was also the Chief Executive Officer of Strix Television AB. The show had a long run and was watched by many viewers.

8. In October 2006 the applicant brought a private prosecution against X for gross defamation, claiming damages in the amount of 250,000 Swedish kronor (SEK; approximately 27,000 euros). He maintained that he had been unreservedly pointed out as the central figure of organised crime within media and advertising and as being directly or indirectly responsible for a large number of serious crimes. He further alleged that X was responsible for the content of the programme since he had failed in his duty to appoint a legally responsible editor (*ansvarig utgivare*) for the programme and because he had been its anchor.

9. The applicant relied on Chapters 5 and 6 of the Constitutional Law on Freedom of Expression (*Yttrandefrihetsgrundlagen*, 1991:1469; hereafter "the Constitutional Law"), regarding freedom of expression offences and liability rules, and Chapter 5 of the Penal Code (*Brottsbalken*), dealing with defamation, as well as Articles 6 § 2, 8 and 13 of the Convention. In the latter respect, he argued that his appearance in the show breached his right to privacy as well as his right to be presumed innocent and that a decision to dismiss his claims would constitute a violation of his right to an effective remedy. The applicant submitted a legal opinion stating that it would be impossible, or at least not useful, to bring an action in the United Kingdom in the present case since the damage flowing from the television programme at issue had not occurred in the United Kingdom.

10. X disputed the claim on the grounds, *inter alia*, that he was not the responsible editor of the show and that he enjoyed the freedom to

communicate information as provided for under Chapter 10, section 2 of the Constitutional Law and as clarified by the Supreme Court (*Högsta domstolen*) in the case NJA 2005 p. 884 (see paragraphs 32 and 33 below).

11. In a preliminary ruling on 20 May 2008 the Stockholm District Court (*Stockholms tingsrätt*) dismissed the claim in so far as it was based on the Constitutional Law. It referred to the Supreme Court judgment in an almost identical case, NJA 2002 p. 314 (see paragraphs 28-31 below), and held that Chapters 1-9 of the Constitutional Law were not applicable to the television programme since it could not be regarded as emanating from Sweden. This was because the programme had first been sent by satellite link to Viasat Broadcasting UK Ltd, the British company responsible for the programme content, and thereafter uplinked to a satellite, which had in turn transmitted the programme to viewers in Sweden. As Chapters 1-9 of the Constitutional Law were not applicable, X could not be held responsible for the programme content under Chapter 6. The District Court further held that the applicant's claims under the Penal Code were to be determined following the main hearing in the case. The court finally drew the parties' attention to the Supreme Court case NJA 2005 p. 884.

12. The applicant appealed, repeating what he had stated in his earlier submissions. He further argued that all companies involved in the case were Swedish, including the receiving company in London, allegedly named Viasat AB, with its seat in Stockholm. Although Viasat AB had acquired the right to transmit the show from the Swedish company TV3 AB, it had had no impact on or responsibility for the programme selection. Having regard to the above, the offence committed against the applicant through the programme could not be examined by United Kingdom courts. The applicant also submitted that Swedish courts were competent to examine the case under the Brussels I Regulation (see further paragraph 35 below). X contested the arguments and submitted that it was the company Viasat Broadcasting UK Ltd, whose seat was in the United Kingdom, which was responsible for the programme service and decided on the final content of the programmes.

13. On 20 March 2009 the Court of Appeal (*Svea hovrätt*) upheld the District Court's decision. It held that the issue for it to determine was whether the general provisions in the Constitutional Law were applicable to the programme in question, that is, whether or not the broadcasting of the programme could be considered to have originated from Sweden within the meaning of Chapter 1, section 6(2) of that law. It further stated that the burden of proof concerning the applicability of the Constitutional Law rested on the applicant and that he had not, in response to X's refutation, established that the decisions concerning the programme content were taken in Sweden. Consequently, Chapters 1-9 of the Constitutional Law were not applicable in the case. The court further held that the material before it

indicated that it was possible for the applicant to bring claims before a British court.

14. The applicant appealed and referred to his earlier submissions. In addition, he requested that a question concerning the interpretation of the Brussels I Regulation be referred to the Court of Justice of the European Union (ECJ) for a preliminary ruling. According to the applicant, the regulation entitled a person claiming non-contractual damages to bring actions where the harmful event occurred. In the present case, the harmful event had occurred in Sweden and the applicant thus should have had the right to bring his action before the Swedish courts. Consequently, the position hitherto taken by the Swedish courts ran contrary to Community law.

15. On 21 September 2009 the Supreme Court rejected the applicant's referral request and refused leave to appeal in the case. It held that, since the District Court had found itself competent to examine the applicant's claims in so far as they were based on grounds other than the Constitutional Law, there was no reason to request a preliminary ruling from the ECJ.

16. The applicant subsequently withdrew his remaining claims before the District Court since there was no practical prospect of success in a continued procedure. On 17 November 2009 the District Court struck the case out of the list and ordered the applicant to pay X's legal costs and expenses.

17. Criminal proceedings were taken against the applicant in regard, *inter alia*, to the matters described in the television programme. He was convicted of aggravated fraud as well as tax and bookkeeping offences and sentenced to five years' imprisonment. The criminal proceedings were finalised by a Supreme Court decision to refuse leave to appeal on 4 October 2010. These proceedings, in particular their compliance with Articles 6 and 7 of the Convention, are the subject of an application lodged with the Court on 4 April 2011 (no. 32814/11).

## II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

### A. The Freedom of the Press Act and the Constitutional Law on Freedom of Expression

18. Freedom of expression in the media is regulated in the Freedom of the Press Act (*Tryckfrihetsförordningen,* 1949:105) and the Constitutional Law. The former regulates the freedom to express oneself in printed matter such as books and newspapers, and the latter regulates freedom of expression in other media such as radio, television, films, sound recordings and certain internet publications. It follows from Chapter 1, section 1(3) of the Constitutional Law that it applies to television programmes and from

Chapter 1, section 6(1) that the law applies to the transmission of television programmes directed at the general public and intended for reception using technical aids.

19. One basic principle in the legislation on freedom of expression in the media is the principle of exclusivity, which guarantees the standing of the Freedom of the Press Act and the Constitutional Law as the sole criminal and procedural laws in the areas of freedom of the press and freedom of expression in other media. In other words, a statement made in media amounting to abuse of the freedom of expression and covered by either of the two laws may only be dealt with in accordance with those laws.

20. Other basic principles are sole liability (*ensamansvar*), double coverage (*dubbel straffbarhet*) and protection of informants (*meddelarskydd*). The first is set out in Chapter 6, section 1 of the Constitutional Law, according to which liability for freedom of expression offences committed in a television broadcast rests only with the responsible editor. An exception applies when, for example, no qualified responsible editor had been appointed at the time when the offence was committed. In such a situation, the liability instead rests with the person responsible for appointing a responsible editor (Chapter 6, section 2). The person responsible for a freedom of expression offence shall be deemed to have had knowledge of the content of the presentation and to have consented to its publication (Chapter 6, section 4). Any other person who in some other way has contributed to the broadcast is excluded from liability.

21. Double coverage means that sanctions against statements in the media that are protected under the Constitutional Law may only be imposed if the act is on the list of offences set out in Chapter 7, section 4 of the Freedom of the Press Act, to which Chapter 5, section 1 of the Constitutional Law refers, and at the same time is punishable under criminal law. The list includes, *inter alia*, defamation and insulting language or behaviour which are punishable under the Penal Code.

22. The protection of informants and sources has several components: the freedom to communicate information (*meddelarfrihet*), the freedom to procure information and intelligence (*anskaffarfrihet*), the right to anonymity and a prohibition against inquiry (*efterforskningsförbud*), and a prohibition against reprisals (*repressalieförbud*). The protection applies in relation to public authorities and other public bodies. The freedom to communicate information is set out in Chapter 1, section 1(3) of the Freedom of the Press Act and Chapter 1, section 2 of the Constitutional Law and means that everyone has the right, with impunity, to provide information on any subject for publication in a medium covered by the Freedom of the Press Act or the Constitutional Law.

23. As noted above, the Constitutional Law is applicable to broadcasts of television programmes that are directed at the general public and intended for reception using technical aids. The scope of the Constitutional

Law is primarily decided on the basis of the connection of the broadcast to Sweden. Chapter 1, section 6(2) of the Constitutional Law provides as follows:

> "In regard to ... programmes diffused through satellite broadcasts emanating from Sweden, the provisions of this constitutional law on ... programmes in general are applicable."

It is stated in the preparatory works to this provision that a transmission should be considered to emanate from Sweden if the uplink occurs in an area under Swedish jurisdiction or from abroad, following the transmission of the programme from Sweden via landline or radio links (Government Bill 1990/91:64, pp. 52-53 and 109-110).

24. Although the Constitutional Law is not applicable to television programmes broadcast from transmitters outside Sweden, the protection of the freedom to communicate and the freedom to procure information and intelligence is maintained. Under the protection for correspondents (*korrespondentskydd*), laid down in Chapter 10, sections 1 and 2 of the Constitutional Law and Chapter 13, section 6(2) of the Freedom of the Press Act, these freedoms apply even if a radio or television programme is broadcast from transmitters outside Sweden provided that the communication or procurement takes place in Sweden (SOU 2012:55, p. 505). The provision in Chapter 10, section 2 of the Constitutional Law was interpreted in NJA 2005 p. 884 (see paragraph 32 below).

25. Chapter 9, section 4 of the Freedom of the Press Act, to which Chapter 7, section 1 of the Constitutional Law refers, makes it clear that private prosecution can be instituted by plaintiffs in connection with libel (Chapter 7, sections 4(14) and 4(15) of the Freedom of the Press Act) and certain offences against secrecy that infringe upon an individual's interests (Chapter 7, sections 5(1) and 5(2) of the Freedom of the Press Act). Correspondents (see previous paragraph) may, however, be held liable only for a limited number of serious offences which do not include libel (Chapter 5, section 3 of the Constitutional Law).

26. Damages on grounds of libel committed through a television programme may only be awarded if the utterances amount to an offence against the freedom of expression (Chapter 10, section 1 of the Constitutional Law).

## B. The Penal Code

27. Chapter 5 of the The Penal Code provides in so far as relevant:

**Section 1**

> "A person who points someone out as being a criminal or as having a reprehensible way of living or otherwise furnishes information intended to cause exposure to the disrespect of others, shall be sentenced for defamation to a fine.

If he was duty-bound to express himself or if, considering the circumstances, it was defensible to furnish information on the matter, and he can show that the information was true or that he had reasonable grounds for it, no punishment shall be imposed."

**Section 2**

"If the crime defined in section 1 is regarded as aggravated, a fine or imprisonment for no more than two years shall be imposed for gross defamation. In assessing whether the crime is aggravated, special consideration shall be given to whether the information, because of its content or the scope of its dissemination or otherwise, was calculated to bring about serious damage."

## C. Domestic practice concerning freedom of expression offences

### *1. NJA 2002 p. 314*

28. A Supreme Court decision of 5 June 2002 (NJA 2002 p. 314) concerned an action for gross defamation against two individuals and Strix Television AB due to statements made about the plaintiff in a television programme which had been broadcast by TV3. The programme had been produced by Strix Television AB for TV3 Ltd (now Viasat Broadcasting UK Ltd). The two individuals were employees of Strix Television AB and had contributed to the programme as well as having been its anchors. The programme had been transmitted directly from a studio in Stockholm by a communications satellite to TV3 Ltd's programme control centre in London and from there, unaltered, via satellite back to Sweden.

29. The two individuals requested the courts to dismiss the claim on the grounds that they could not be held responsible for the programme content since the Constitutional Law was applicable and they enjoyed the freedom to supply information as provided for under Chapter 10, section 2 of that law.

30. The Supreme Court initially pointed out that Chapters 1-9 of the Constitutional Law covered broadcasts via satellite in so far as the broadcasts emanated from Sweden within the meaning of Chapter 1, section 6(2) of that law. It considered that it could be assumed that the said rule on transmission of programmes referred to a purely technical transmission to a satellite from where the programmes are broadcast directly to the public in Sweden. In such a case, no real programming activities existed outside Sweden. It further stated that the provisions in the Constitutional Law on sole responsibility and the related provisions are based on programming activities being conducted in Sweden. If, however, the programming activities are conducted abroad, the conditions for applying the legal principles of freedom of the press are largely lacking. In determining whether programming activities are conducted in Sweden or abroad, it is the place where decisions on the programme content are taken which is crucial, and not the place where the programme is actually made or the technical means of broadcasting used.

31. The programme in question could not be regarded as having emanated from Sweden, as the company in control of programming was TV3 Ltd in London and because the programme had been sent to that company before being linked from there to the satellite transmitting it to the Swedish audience. Consequently, Chapters 1-9 of the Constitutional Law were not applicable to the transmission. However, the court continued, the question whether the defendants were protected as informants under Chapter 10, section 2 of that law did not concern a procedural issue and was therefore to be examined in the continued proceedings on the substance of the case in the lower courts. The court therefore rejected the defendants' request to dismiss the plaintiff's claim.

*2. NJA 2005 p. 884*

32. In a judgment dated 20 December 2005 (NJA 2005 p. 884) the Supreme Court dealt with the same individual television programme as in NJA 2002 p. 314. The court noted that it had previously taken the position that the Constitutional Law was not applicable to the broadcast in question, as the programme was found not to have emanated from Sweden. The issue was thus whether the persons summoned before the court in their capacity as programme hosts and participants were covered by the freedom of communication under Chapter 10, section 2 of that law and thereby excluded from liability under tort law for the statements made in the programme. It found that, according to Chapter 10, section 2, compared with section 1, the freedom of communication was applicable to statements in television programmes broadcast from transmitters outside Sweden. It further noted that the protection of informants under the Constitutional Law also covered – with certain exceptions which are not relevant here – persons participating by performing in a television programme. For a person communicating information to be protected in this respect it was also deemed necessary for the information to have been submitted to a receiver of information for publication, as set out in Chapter 1, section 2. This requirement was found to be met as the statements had been made in a live-broadcast programme that had been sent via a communications satellite to a broadcaster abroad before being transmitted to the Swedish public via satellite. In these circumstances, it was clear that the defendants, in their capacity as programme hosts and participants, were covered by the freedom of communication under the Constitutional Law.

33. Having found that the two individuals were covered by the provision at issue, the court concluded that they could not be held liable for libel in regard to any information given by them in the programme. The court added that this conclusion was valid regardless of the fact that no individual could be held responsible for the programme content as responsible editor or his or her replacement under the provisions of Chapter 6 of the Constitutional Law.

## D. Domestic practice and ongoing legislative work concerning compensation for violations of the Convention

34. A comprehensive summary of the issue of compensation for violations of the Convention in the Swedish legal order can be found in *Marinkovic v. Sweden* (no. 43570/10, §§ 21-31, 10 December 2013).

## E. European Union law and practice

35. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter the "Brussels I Regulation") laid down the basic principle that jurisdiction is to be exercised by the EU country in which the defendant is domiciled, regardless of his or her nationality. However, special jurisdiction rules allowed for a defendant to be sued in the courts of another EU country. For instance, matters relating to liability for wrongful acts could be decided by the courts in the place where the harmful event had occurred or could occur. (The Brussels I Regulation was replaced by a new regulation in January 2015, known as the "Brussels I Regulation Recast", which, in so far as relevant to the present case, contains the same substantive rules.) The relevant provisions read as follows:

**Article 1**

"1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

..."

**Article 2**

"1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

..."

**Article 3**

"1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 [Articles 5 to 24] of this Chapter.

..."

**Article 5**

"A person domiciled in a Member State may, in another Member State, be sued:

...

3. in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

..."

36. The EU Audiovisual Media Services Directive (Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services; hereafter "the AV Directive") is applicable to audiovisual media services, i.e. the broadcasting of, *inter alia*, television programmes. The jurisdiction over the media services providers, that is, the legal person who has editorial responsibility for the programme content and determines the manner of its organisation, is regulated in Article 2:

"1. Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.

2. For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are any of the following:

(a) those established in that Member State in accordance with paragraph 3;

(b) those to whom paragraph 4 applies.

3. For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:

(a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;

(b) if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in neither of those Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;

(c) if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State.

4. Media service providers to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:

(a) they use a satellite up-link situated in that Member State;

(b) although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State.

5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that in which the media service provider is established within the meaning of Articles 49 to 55 of the Treaty on the Functioning of the European Union.

6. This Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States."

37. In the case of *Shevill and Others v. Presse Alliance* (C-68/93; judgment of 7 March 1995) the ECJ stated that, on a proper construction of the expression "place where the harmful event occurred" in Article 5(3) of the Brussels Convention (the precursor to the Brussels I Regulation), the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seized. The criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim of the defamation are not governed by the Convention but by the substantive law determined by the national conflict of laws rules of the court seized, provided that the effectiveness of the Convention is not thereby impaired.

38. In its judgment of 25 October 2011 in the joined cases *eDate Advertising GmbH v. X* (C-509/09) and *Olivier Martinez and Robert Martinez v. MGN Limited* (C-161/10) the ECJ interpreted Article 5(3) of the Brussels I Regulation in relation to online content on websites in the following manner (para. 52):

"... [I]n the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been

accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised."

39. While the Brussels I Regulation requires EU Member States to make their courts available if jurisdiction is confirmed according to the Regulation, the ECJ noted in *Kongress Agentur Hagen GmbH v. Zeehaghe BV* (C-365/88; 15 May 1990) that the Regulation does not govern matters of procedure. This means that a court can reject a case for reasons relating to domestic procedural rules as long as the national procedural law does not impair the effectiveness of the Brussels I Regulation.

# THE LAW

## I. PRELIMINARY OBJECTIONS

### A. The Court's jurisdiction *ratione personae*

#### *1. The parties' submissions*

40. The Government submitted that the application was inadmissible for being incompatible with the provisions of the Convention *ratione personae*, arguing that it fell outside Sweden's jurisdiction under Article 1 of the Convention. They asserted that the broadcast of the programme in question, and not the statements as such, should be considered to have constituted an act that might give rise to an infringement of rights under the Convention. They stated that, according to Swedish case-law regarding the Constitutional Law, the broadcast of the episode in question did not emanate from Sweden (see paragraphs 28-33 above). Moreover, according to the AV Directive, which had been incorporated into Swedish legislation through the Radio and Television Act (*Radio- och tv-lagen*, 2010:696), the transmission of the programme fell outside Sweden's jurisdiction. Thus, Sweden did not have jurisdiction over the broadcast of the programme according to a binding provision of EU law, as the act of broadcasting the episode in question had been performed outside the territory of Sweden.

41. The applicant disagreed, maintaining that the question of jurisdiction rather went to the merits of the case, since it was the Supreme Court's conclusion regarding the jurisdiction which gave rise to his complaints on the lack of access to court and the lack of an effective remedy.

#### *2. The Court's assessment*

42. The Court notes that the core issue in the present case is whether the Swedish State violated the applicant's rights through the decisions of its courts to dismiss his defamation claim in applying the provisions of the

Constitutional Law, thereby denying him a remedy to protect his reputation. Consequently, the question whether Sweden had jurisdiction to examine those claims, within the meaning of Article 1 of the Convention, is so closely linked to the substance of the applicant's complaints that it should be dealt with as part of the merits of the case rather than as an issue of admissibility. The Government's objection as to the admissibility *ratione personae* must therefore be joined to the merits.

## B. Exhaustion of domestic remedies

### *1. The parties' submissions*

43. Alternatively, the Government contended that the application was inadmissible for failure to exhaust domestic remedies, as the applicant had not claimed damages from the State for the alleged violations of the Convention. They referred to several domestic decisions and judgments, including a Supreme Court judgment of 3 December 2009 (NJA 2009 N 70), concerning claims for damages against the Swedish State (on account of excessive length of tax proceedings), where the Supreme Court referred to its previous case-law. They held that, from that time, it was a general principle of law that, to the extent that Sweden had a duty to provide redress to victims of Convention violations through a right to compensation for damages, and this duty could not otherwise be fulfilled, compensation for damages could be ordered without direct support in law. This had been accepted by the Court as an effective remedy which potential applicants could be expected to exhaust (see, for instance, *Eriksson v. Sweden*, no. 60437/08, 12 April 2012). The present application had been introduced with the Court three months after the judgment of 3 December 2009. Accordingly, the legal position under domestic law had to be considered to have been sufficiently clear at the time of introduction.

44. The applicant maintained that the domestic remedies had been exhausted. He noted that a crucial feature distinguishing the decisions and judgments referred to by the Government from the present case was that the original act leading to a violation of his rights had been committed by an individual rather than the State or another part of the public sector for which the State was directly or indirectly responsible.

### *2. The Court's assessment*

45. The Court reiterates that the purpose of the requirement under Article 35 § 1 of the Convention is to afford the Contracting States the opportunity to prevent or put right the violations alleged against them before those allegations are submitted to the Court. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal

system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V, with further references).

46. However, the only remedies which Article 35 § 1 requires to be exhausted are those that relate to the breach alleged and are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness: it falls to the respondent State to establish that these conditions are satisfied (see, among many other authorities, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII and *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010).

47. Turning to the present case, it should be noted that the applicant's access to the Swedish courts was excluded because of the application of constitutional provisions, which have a special status in the Swedish legal system, different from that of other acts. The situation in the cases mentioned by the Government was thus not the same as in the present case. While the Court welcomes the development in Swedish law concerning the possibility to claim compensation on the basis of alleged violations of the Convention, it finds that the applicant's situation differs to such an extent that it cannot be said that this remedy was available to him.

48. In these circumstances, the Court finds that it has not been shown that there existed a remedy which was able to afford redress in respect of the violation alleged by the applicant and which he should have been required to pursue. The Government's objection as to the exhaustion of domestic remedies must therefore be dismissed.

### C. Further conclusions

49. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Moreover, it is not inadmissible on any other ground. It must therefore be declared admissible.

## II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

### A. Scope of the complaint

50. The applicant complained that the Swedish courts refused to examine on the merits the defamation case brought by him against X and thereby failed to provide him with an effective remedy to protect his reputation and secure his right to be presumed innocent.

51. The Court first reiterates that the right to be presumed innocent under Article 6 § 2 is afforded a person charged with a criminal offence. The present case concerns the defamation proceedings initiated by the applicant which does not relate to any criminal charge against him. The criminal proceedings brought against the applicant are dealt with in case no. 32814/11.

52. The essence of the applicant's complaint under Article 6 in the present case is that he was refused effective access to court. This issue will be examined under Article 6 § 1 which, in relevant parts, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing ... by an independent and impartial tribunal established by law. ..."

### B. The parties' submissions

#### *1. The applicant*

53. The applicant complained that he had not had effective access to court. He pointed out that the television programme at issue had been produced in Sweden by Swedish-speaking people and that it had been made exclusively for a Swedish audience. Furthermore, it had been a live broadcast, picked up by receivers in Sweden only milliseconds after its transmission to a receiver in England. In his view, the lack of access to a Swedish court was therefore unreasonable and without foundation. He further argued that the AV Directive did not stipulate that the broadcasts of TV3 fell outside Sweden's jurisdiction, nor had it been shown that there were any case-law from the ECJ indicating non-jurisdiction in cases like the present one. Rather, the lack of jurisdiction in the case had been based on the Supreme Court's interpretation of domestic law.

54. Moreover, even if there had been a remedy available to the applicant in the United Kingdom, he was of the opinion that the practical and economic obstacles for a Swedish person to bring legal proceedings abroad would render the remedy inefficient. Furthermore, in his view, a British court would not have been able to award him damages for any broadcast which occurred in Sweden and the burden of proof concerning such a possibility should rest with the Government. In any event, such a remedy would not affect the Swedish State's obligation under the Convention to

provide him with sufficient protection and effective legal remedies in Sweden.

*2. The Government*

55. The Government contended that they had fulfilled their obligations under Article 6 § 1 in the present case. They first pointed out that the Swedish system, involving a special procedure for cases concerning freedom of the press and freedom of expression and the possibility to pursue damages through a procedure under the Penal Code, offered an individual the possibility to defend his or her honour and reputation. At the same time, the special procedure for defamation cases that were related to the freedom of the press and the freedom of expression ensured that these core principles of a democratic society were protected. In this regard, the Government noted that a constant thread in the Court's case-law was the insistence on the essential role of a free press in ensuring the proper functioning of a democratic society. The importance of the principles of protection of sources and correspondents in ensuring a free press should also be noted.

56. Furthermore, defamation was criminalised under the Penal Code, the Freedom of the Press Act and the Constitutional Law and defamation was thus a criminal offence even if the defamatory statements were made through a constitutionally protected medium such as television. The Government therefore argued that Swedish legislation provided satisfactory protection against defamation. The fact that the legislation excluded broadcasts not emanating from Sweden did not affect this. A State should not be required to offer a remedy for an action taking place in another State when the latter State had jurisdiction.

57. The Government further stated that it was clear from the facts of the case and the AV Directive that Viasat Broadcasting UK Ltd was a company established in the United Kingdom and that the United Kingdom, through their Office of Communication ("Ofcom"), had supervisory jurisdiction over TV3's broadcasts. This had been confirmed by decisions taken by both the Swedish Broadcasting Authority (*Myndigheten för radio och tv*) and Ofcom. In the view of the Government, this indicated that the courts of the United Kingdom would have had jurisdiction to try the applicant's claims for damages. They added that British courts would have had jurisdiction in accordance with the Brussels I Regulation, as the harmful event occurred in the United Kingdom. In these circumstances, while Swedish courts also had jurisdiction under the Brussels I Regulation, the fact that the Swedish courts had found themselves not competent under Swedish law had not impaired the effectiveness of the regulation and thus had not conflicted with it. In this context, the Government referred to the ECJ judgment in *Kongress Agentur Hagen GmbH v. Zeehaghe BV* (see paragraph 39 above).

58. The Government accordingly submitted that the applicant had had effective access to a court in the present case, albeit not in a Swedish court.

They refrained from speculating on the possible outcome of such proceedings, since the applicant had not taken advantage of this possibility. The applicant's claim that recourse to the British courts would be too burdensome for a Swedish individual did not, in the Government's opinion, alter the fact that the applicant had had the possibility of pursuing a claim in the United Kingdom.

### C. The Court's assessment

59. Sweden did not have a regulatory framework in place that made it possible for the applicant to hold anybody civilly or criminally responsible in court for alleged infringements of his privacy rights. The question is whether Sweden had the obligation to provide the applicant with such possibilities or whether the fact that another State could provide the applicant with remedies relieved Sweden from that obligation.

60. It is common ground between the parties, and the Court agrees, that the broadcast of the programme in which the applicant appeared in pictures and was mentioned by name falls within the scope of his private life, within the meaning of Article 8 of the Convention. Thus, in substance, the defamation proceedings initiated by the applicant due to the broadcast concerned the applicant's "civil rights and obligations", but jurisdiction was excluded due to a procedural bar that limited an examination on the merits to programmes considered to emanate from Sweden. In these circumstances, the Court considers that Article 6 § 1 of the Convention is applicable to the applicant's complaint.

61. The Government argued, however, that jurisdiction in this matter lay not with Sweden but with the United Kingdom, pointing out that Viasat Broadcasting UK Ltd is a company established in the United Kingdom. In this connection, they invoked the "country of origin principle" of the AV Directive, according to which jurisdiction is to be determined primarily with reference to the country where the broadcaster's head office is located and where its editorial decisions are taken. They further mentioned that both the Swedish Broadcasting Authority and Ofcom had confirmed that the latter UK authority had supervisory jurisdiction over the broadcasts in question. In the Government's view, Swedish jurisdiction was therefore excluded through a binding provision of EU law. The applicant contested both that the broadcaster in the case had its head office in the United Kingdom and that its editorial decisions were taken there and argued that the AV Directive did not stipulate that the broadcasts of TV3 fell outside Swedish jurisdiction, the latter conclusion instead having been drawn entirely by way of the Supreme Court's interpretation of national law.

62. The Court first notes that the AV Directive deals with jurisdiction in matters relating to broadcasters' compliance with the regulatory framework – laid down in national as well as EU law – for this commercial and cultural

activity. The supervision performed by the authority of the single state designated to have jurisdiction would cover such issues as the registration and licensing of a broadcaster and the investigation whether its programmes comply with rules on advertising as well as restrictions aimed at preventing crimes and discrimination and protecting minors and public health. It is doubtful, however, that the Directive regulates all issues of jurisdiction that may arise in relation to the broadcast of a television programme. This conclusion appears to be supported by a judgment of 9 July 1997 of the ECJ in which the court, examining the AV Directive's similar predecessor, the Television without Frontiers Directive of 1989 (89/552/EEC), in particular its regulation of advertising, found that the Directive, whilst coordinating provisions on television advertising and sponsorship, did so only partially. The court further held that a State could take measures against a television broadcast although it was not designated as the broadcasting – and, thereby, jurisdictional – State under the Directive, provided that the measures would not prevent the transmission as such and would not involve a secondary control of a broadcast in addition to the one performed by the broadcasting State (Cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, paragraphs 27-38). Thus, it appears that the jurisdiction over broadcasters vested in one State under the 1989 Directive did not have general application, extending to matters not regulated therein. The same must be presumed to be valid also for the 2010 AV Directive. In this connection, it is telling that when, in Article 28, the AV Directive addresses the situation where a person's reputation and good name have been damaged by incorrect facts presented in a programme, it only talks about a right of reply or equivalent remedies, and does not deal with defamation proceedings and an appurtenant claim for damages.

63. The Court is thus not convinced by the Government's argument that the AV Directive determines, even for the purposes of EU law, the country of jurisdiction when an individual brings a defamation claim and wishes to sue a journalist or a broadcasting company for damages. Rather, jurisdiction under EU law is regulated by the Brussels I Regulation. According to Articles 2 and 5 of that Regulation, both the United Kingdom and Sweden appear to have jurisdiction over the present matter: X is domiciled in Sweden whereas Viasat Broadcasting UK Ltd is registered, and thus domiciled, in the United Kingdom, and the harmful event could be argued to have occurred in either country, as the television programme was broadcast from the United Kingdom and the alleged injury to the applicant's reputation and privacy manifested itself in Sweden.

64. Thus, while leaving open the question – in effect raised by the Government – whether a binding provision of EU law would have affected their responsibility under Article 1 of the Convention, the Court finds that the Government have not shown that Swedish jurisdiction was barred in the

case due to the existence of such a provision. Rather, jurisdiction was excluded by virtue of the relevant provisions of domestic law, namely the Constitutional Law, as interpreted by the jurisprudence of the Supreme Court.

65. Under Article 1 of the Convention, Sweden "shall secure to everyone within [its] jurisdiction the rights and freedoms" set out in the Convention. In this regard, the Court reiterates that both the applicant and X, the person against whom he brought the defamation proceedings, are Swedish nationals. Moreover, as will be further described in the following, there were strong connections between Sweden, on the one hand, and the television programme and the UK company responsible for the programme contents and involved in its broadcasts, on the other. These circumstances are sufficient to conclude that there was a *prima facie* obligation on the Swedish State to secure the applicant's rights, including the right of access to court. Consequently, the possible access of the applicant to a court in a different country, namely the United Kingdom, does not affect Sweden's responsibility as such under Article 1, but is rather a factor to consider in determining whether the lack of access to a court in Sweden, in the particular circumstances of the case, was proportionate under Article 6.

66. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal. In this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see *Golder v. the United Kingdom*, 21 February 1975, §§ 35-36, Series A no. 18). This right presupposes that the case brought can be tried on its merits.

67. However, the right of access to a court is not absolute and may be subject to legitimate restrictions. In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Still, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, for instance, *Golder v. United Kingdom*, cited above, § 38, and *F.E. v. France*, 30 October 1998, § 44, *Reports of Judgments and Decisions* 1998-VIII).

68. Turning to the Swedish legislation concerning defamation, the Court notes from the outset that defamation is a criminal offence under both the Penal Code and the Constitutional Law, which means that defamation is unlawful even if the defamatory statement is made through a constitutionally protected medium such as television. Furthermore, the Swedish system in general, including the procedure under the Penal Code and the special procedure for cases concerning freedom of the press and

freedom of expression, offers the individual a possibility to defend his or her reputation.

69. The Court acknowledges that the principle of freedom of communication and the limitations regarding liability for freedom of expression offences committed in a television broadcast, which normally rest only on the responsible editor, are important features in the Swedish legal system to protect the freedom of the press and the freedom of expression, and that those features, as a rule, can be considered necessary in a democratic society. Thus, in cases where Chapters 1-9 of the Constitutional Law are applicable and direct the individual who has been subjected to defamation to lay a criminal complaint against the responsible editor, the procedural limitations may be proportionate to the aim pursued.

70. However, in the present case, the relevant programme was broadcast in a manner which made the domestic courts consider that it did not emanate from Sweden within the meaning of the Constitutional Law. Consequently, Chapters 1-9 of that law were not applicable to the broadcast and the special procedure applicable to cases concerning freedom of the press and freedom of expression was not open to the applicant. Nevertheless, the broadcast fell within the scope of Chapter 10, section 2 of the Constitutional Law, meaning that the programme hosts and participants were covered by the freedom of communication, regardless of the fact that no individual could be held responsible for the programme content under Chapter 6 of that law (see paragraphs 32-33 above).

71. Accordingly, the situation was such that the applicant could not hold anyone responsible under Swedish law, either according to the special procedure in the Constitutional Law or under the general procedure in the Penal Code. The construction of the legal system led to the courts' refusal to examine the applicant's case on the merits.

72. Irrespective of whether UK courts would have had jurisdiction (see paragraph 63 above), the Court notes that the content, production and broadcasting of the television programme as well as its implications had very strong connections to Sweden. It was produced in that country by Swedish people for Swedish television companies. Like the applicant, the programme's anchorman, X, is a Swedish national who was domiciled in the country. The programme was presented in the Swedish language for an exclusively Swedish audience, who could pick up the broadcast via a satellite receiver or a cable connection. In contrast, the programme could be viewed, if at all, by only a few people in the United Kingdom. It was originally broadcast live, and it has not been explained by the Government how any editing or other measures pertaining to the control of the programme content took place outside Sweden. Furthermore, it was sponsored by companies competing in the Swedish market. Also, the allegations made against the applicant concerned criminal activities conducted in Sweden. As already mentioned, the alleged injury to the

applicant's reputation and privacy accordingly manifested itself there. In sum, except for the technical detail that the broadcast was routed via the United Kingdom, the programme and its broadcast were for all intents and purposes entirely Swedish in nature.

73. In these circumstances, the Court considers that the Swedish State had an obligation, under Article 6, to provide the applicant with an effective access to court. Instituting defamation proceedings before the British courts could not be said to have been a reasonable and practicable alternative for the applicant in this particular case, and the Swedish State therefore cannot escape responsibility under Article 6 with reference to this alternative. Instead, by bringing his case before the Swedish courts, the applicant tried the only viable option for an effective examination of his defamation claim. In dismissing the applicant's action without an examination of the merits, the Swedish courts impaired the very essence of his right of access to court. In the Court's view, the legal limitations on that access were too far-reaching and cannot, in the circumstances of the case, be considered proportionate.

74. Accordingly, the Court rejects the Government's objection that the application should be declared inadmissible for being incompatible with the provisions of the Convention *ratione personae* and finds that there has been a violation of Article 6 § 1 of the Convention.

## III. ALLEGED VIOLATION OF ARTICLES 8 AND 13 OF THE CONVENTION

75. The applicant complained, under Article 8, that the State had failed to provide him with sufficient protection against allegations that violated his right to privacy and, under Article 13, that it had failed to provide him with a remedy to have his claims against the defendant examined on the merits.

76. The Government contested those arguments.

77. The Court notes that these complaints are in substance the same as the one examined above under Article 6 § 1. The present part of the application must therefore also be declared admissible. However, having regard to the findings under Article 6 § 1, the Court finds that no separate issue arises under Articles 8 and 13.

## IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

79. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage. He further claimed that he had suffered financial losses due to the television programme. However, he considered it to be very difficult for him to establish a causal link between the financial loss and the alleged violations and thus asked the Court to take the losses into account while making a global assessment on an equitable basis.

80. The Government claimed in regard to pecuniary damage that, considering the applicant's statement concerning a causal link, the losses that the applicant may have suffered should not be taken into account. With respect to non-pecuniary damage, they left it for the Court to decide whether, should it find a violation, the finding of a violation would constitute sufficient reparation. However, should such compensation be awarded, the Government were of the opinion that the sum should not exceed EUR 7,000. Moreover, should the Court find a breach of the Convention in relation to only one of the Articles invoked, any compensation should be proportionately reduced.

81. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 12,000 in respect of non-pecuniary damage.

### B. Costs and expenses

82. The applicant also claimed 156,819 Swedish kronor (SEK) (approximately EUR 17,000) for the costs and expenses incurred before the domestic courts and SEK 97,875 (approximately EUR 10,500) for those incurred before the Court.

83. The Government submitted that the claim for legal fees incurred during the domestic proceedings had not been sufficiently specified as to the time spent on individual measures and that the hourly rate claimed exceeded the Swedish hourly legal aid fee. As regards the procedure before the Court, the Government submitted that the claim was excessive, considering that the applicant had been represented by the same legal counsel before the Court as in the domestic procedures. In total, the Government submitted that any sum should not exceed SEK 188,000 (approximately EUR 20,000), corresponding to SEK 156,819 for the domestic proceedings and SEK

31,000 for 20 hours of work at the Swedish legal aid rate for the proceedings before the Court.

84. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court agrees with the Government that regard should be had to the fact that the applicant was represented before it by the same legal counsel as in the domestic proceedings. Making an overall assessment, the Court considers it reasonable to award the total amount of EUR 20,000, including VAT, for costs and expenses in the domestic proceedings and the proceedings before the Court.

### C. Default interest

85. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join to the merits the Government's objection that the application is inadmissible *ratione personae* and *rejects* it;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 6 of the Convention;

4. *Holds* that no separate issue arises under Articles 8 or 13 of the Convention;

5. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

      (i) EUR 12,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

      (ii) EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 1 March 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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|---|---|
| Stephen Phillips<br>Registrar | Luis López Guerra<br>President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Silvis is annexed to this judgment.

L.L.G.
J.S.P.

# CONCURRING OPINION OF JUDGE SILVIS

1. This case is about the alleged defamation of the applicant in a television programme received in Sweden via a satellite that was uplinked from London (United Kingdom), where editorial control also lay, at least in a formal sense. In Sweden the programme could be viewed, as the broadcasting company had intended, with a decoding device directly from the satellite (DVB-S) or by cable television, since the programme was also retransmitted in Sweden terrestrially (DVB-T) almost simultaneously.[1] It appeared impossible for the applicant to have adequate and effective access to a court in Sweden to seek redress for the alleged defamation. In Sweden private actions for defamation can be brought against the media only under the terms of the Freedom of the Press Act and the Constitutional Law on Freedom of Expression. Such claims can be pursued even if "liability under criminal law has lapsed or an action under criminal law is otherwise excluded" (FPA Ch. 11, CLFE, Ch. 8). However, as is set out in the judgment, the possibility of bringing a private action in respect of the alleged defamation was excluded in accordance with the Constitutional Law since the television programme was considered not to emanate from Sweden, the broadcast having been transmitted via a company in the United Kingdom which was deemed to have had editorial control over it.

2. It is not the Court's role "to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention" (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 127, ECHR 2015). Nonetheless, when methods adopted by a High Contracting Party and the effects they entail are not in conformity with the Convention, the Court cannot avoid stepping in, even if this might touch upon sensitive constitutional issues. I do agree with the outcome of this case, but I respectfully disagree with some of the reasoning and the order in which the issues were addressed in reaching this conclusion.

3. From the point of view of the European Convention on Human Rights, the first question for the Court to ask in a case like this, even of its own motion if the Government had not raised it, is whether the applicant's complaint falls within Article 1 of the Convention. The applicant is a Swedish national residing in Sweden. Does the application concern a right or freedom to be secured by Sweden within its jurisdiction as understood in the Convention? It certainly does. I find unconvincing the reasons given in paragraph 42 of this judgment for joining the jurisdiction issue under

[1] See, on the underlying thematic problem, David I. Fisher, *Defamation via Satellite: A European Law Perspective*, The Hague (1998).

Article 1 to the merits of the complaint. The engagement undertaken by a Contracting State under Article 1 of the Convention is confined to "securing" the listed rights and freedoms to persons within its own "jurisdiction" (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161). There can be no reasonable doubt, I think, that the case brought before the Court falls within the jurisdiction of Sweden within the meaning of Article 1. An attack on a person's reputation surely affects a right under the Convention (Article 8) and the alleged harm done was within the territory of Sweden (*locus damni*), where the television programme was received by the public, and where the applicant, a Swedish national, had his reputation. To my mind these circumstances were more than enough for the Court to rebut the Government's argument of a lack of jurisdiction under the Convention before addressing the merits of the complaint concerning Article 6.

4. I do not think that establishing jurisdiction under Article 1 of the Convention alone should always be conclusive for obliging a respondent State to grant access to a court within its own territory. This is a matter where distinctions can be made. Hence, Article 6 § 1 will be complied with if the person concerned had available to him reasonable alternative means to protect effectively his rights under the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, §§ 68-74, ECHR 1999-I; *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 48, ECHR 2001-VIII; and *Chapman v. Belgium* (dec.), no. 39619/06, §§ 51-56, 5 March 2013). If litigation before an alternative forum abroad, determined in accordance with private international law, would not be too burdensome for the applicant concerned, this could (at least in theory) also be an acceptable way of securing his rights and freedoms. In the present case the Swedish courts indicated that the applicant could litigate in the United Kingdom. Supposing the English courts were to apply their domestic law, the standard of proof in the defamation case would differ.[1] In Sweden the truth of statements made is not incompatible with defamation, whereas in the United Kingdom it would be, but it may be doubtful whether that disadvantageous aspect for the applicant would fall within the complaint concerning the right of access to court.

5. It is a standard rule that courts in the member States of the European Union have jurisdiction in civil cases in the place where the defendant has his residence. According to European private international law, the choice

[1] It is well known that Regulation No. 864/2007 on the law applicable to non-contractual obligations (Rome II) excludes from its scope "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation". See on this point Aaron Warshaw, "Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims", 32 *Brook. J. Int'l L.* (2006). Available at: http://brooklynworks.brooklaw.edu/bjil/vol32/iss1/7. In Sweden the truth of statements made is not incompatible with defamation, whereas in the United Kingdom it would be.

of forum in a trans-border tort case, in so far as is relevant here, is regulated by the Brussels I Regulation, which (also) includes derogations from the standard rule. In *Shevill and Others* (Case C-68/93), *eDate Advertising and Martinez* (Joined Cases C-509/09 and C-161/10) and *Wintersteiger* (Case C-523/10) the European Court of Justice has allowed the courts assuming jurisdiction in a member State in accordance with the "place where the harmful event occurred" or where the centre of the alleged victim's interests is based to hear an action for damages for harm caused by the publication of a defamatory newspaper article or an Internet publication; the same would apply, it may be assumed, to a broadcast via satellite. The problem in the case in hand is thus certainly not one of European Union law on jurisdiction. Under the Convention, whether a domestic court can exercise jurisdiction over a defendant– like the broadcasting company in the United Kingdom in the present case – located or domiciled in a country other than the High Contracting Party against which the application is directed, in relation to an alleged offence or civil wrong committed via satellite or over the Internet, is primarily a question to be answered by the courts by applying domestic law and hence in conformity with their international obligations, including the relevant principles of European private international law. Jurisdiction in this domain of forum choice has a different meaning from that contained in the concept of "jurisdiction" in Article 1 of the Convention.

6. Although human rights issues are relevant to the determination of jurisdiction (forum) choices under European private international law, the right of access to court under Article 6 of the Convention in a specific High Contracting Party is distinguishable from this. The right of access to court may narrow the possibilities of choice of jurisdiction, favouring one particular choice over the others, but it may also dictate that jurisdiction should be allowed where other grounds would perhaps not suffice. Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way Article 6 embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18). It is important that access to court, when assessed as a right established under Article 6 of the Convention, is "practical and effective" (see *Bellet v. France*, 4 December 1995, § 38, Series A no. 333-B). For the right of access to be effective, an individual must "have a clear, practical opportunity to challenge an interference with his rights". The fact of having access to domestic remedies, only to be told that one's actions are barred by operation of law, does not always satisfy the requirements of Article 6 § 1 (ibid., § 36; see also *Nunes Dias v. Portugal* (dec.), nos. 2672/03 and 69829/01, ECHR 2003-IV). In the specific circumstances of a particular case, the practical and effective nature of this right may be impaired, for

instance by the prohibitive cost of the proceedings in view of the individual's financial capacity or by the excessive amount of security for costs in the context of an application to join criminal proceedings as a civil party (see *Aït-Mouhoub v. France*, 28 October 1998, §§ 57-58, *Reports of Judgments and Decisions* 1998-VIII, and also *García Manibardo v. Spain*, no. 38695/97, §§ 38-45, ECHR 2000-II) or excessive court fees (see *Kreuz v. Poland*, no. 28249/95, §§ 60-67, ECHR 2001-VI; *Podbielski and PPU Polpure v. Poland*, no. 39199/98, §§ 65-66, 26 July 2005; and *Weissman and Others v. Romania*, no. 63945/00, § 42, ECHR 2006-VII (extracts); see also, conversely, *Reuther v. Germany* (dec.), no. 74789/01, ECHR 2003-X).

7. Freedom of expression cannot outweigh in a general manner, without balancing the opposing interests in the case in hand, the right of an applicant claiming to be a victim of a damaged reputation to have practical and effective access to court. In normal circumstances the option to litigate in London (United Kingdom) cannot be considered a practical alternative for a Swedish resident alleging damage done to his reputation in Sweden. The connections to Sweden, as enumerated in paragraph 73 of the judgment, are overwhelming in this case. To my mind some of these connections, such as the nationality of the anchorman and the location of the sponsoring companies' activities, as well as the alleged place of the applicant's conduct, have no bearing on the applicant's right of access to court in Sweden. It would have been enough, I think, to establish that the alternative of initiating a private action in a United Kingdom court, for an individual residing in Sweden alleged to have suffered an attack on his reputation in Sweden, was not practical for the applicant from the point of view of geographical distance, legal resources and costs.