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

CASE OF SÖDERBÄCK v. SWEDEN

(113/1997/897/1109)

JUDGMENT

STRASBOURG

28 October 1998

In the case of Söderbäck v. Sweden[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr THÓR VILHJÁLMSSON, *President*,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr J.M. MORENILLA,
Mr L. WILDHABER,
Mr D. GOTCHEV,
Mr M. VOICU,
Mr V. BUTKEVYCH,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 30 June and 24 September 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 15 December 1997 and by the Government of the Kingdom of Sweden ("the Government") on 13 February 1998, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 24484/94) against Sweden lodged with the Commission under Article 25 by a Swedish national, Mr Per Söderbäck, on 17 December 1991.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Sweden recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 of the Convention.

Notes by the Registrar

1. The case is numbered 113/1997/897/1109. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of Rules of Court B, the applicant requested leave to be represented by a person who had represented him before the Commission but who did not fulfil the requirements of Rule 31 § 1. Mr R. Bernhardt, the then Vice-President of the Court, having refused to accede to the applicant's request, the latter appointed a lawyer fulfilling those requirements.

3. The Chamber to be constituted included *ex officio* Mrs E. Palm, the elected judge of Swedish nationality (Article 43 of the Convention), and Mr R. Ryssdal, the late President of the Court (Rule 21 § 4 (b)). On 31 January 1998, in the presence of the Registrar, Mr Bernhardt drew by lot the names of the other seven members, namely Mr I. Foighel, Mr R. Pekkanen, Mr J.M. Morenilla, Mr L. Wildhaber, Mr D. Gotchev, Mr M. Voicu and Mr V. Butkevych (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr Thór Vilhjálmsson, elected Vice-President of the Court, replaced Mr Bernhardt as President of the Chamber (Rule 21 § 6, second sub-paragraph).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 23 and 24 April 1998 respectively. On 8 June 1998 the Secretary to the Commission indicated that the Delegate would submit his observations at the hearing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 June 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Ms E. JAGANDER, Director, Ministry for Foreign Affairs, *Agent*,
Mr A. DEREBORG, Legal Adviser, Ministry of Justice,
Ms Y. OSVALD, Legal Adviser, Ministry for Foreign Affairs, *Advisers*;

(b) *for the Commission*
Mr M.A. NOWICKI, *Delegate*;

(c) *for the applicant*
Mr B. SANDSTRÖM, *advokat*, *Counsel*,
Mr R. LIND, *Adviser*.

The Court heard addresses by Mr Nowicki, Mr Sandström and Ms Jagander, and also their replies to questions put by several of its members individually.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. Mr Söderbäck was born in 1957 and lives in Stigtomta. Since 1987 he has worked as a bus driver.

7. The applicant met K.W. in 1980. They were friends but did not have a steady relationship. On 19 September 1982 K.W. gave birth to a daughter, M., of whom the applicant was the father. The applicant visited K.W. and the child at the maternity ward on one occasion. In the following months he met M. twice at K.W.'s home. He also attended M.'s christening. During the spring of 1983, he once looked after M. for about an hour. No further contacts took place between the applicant and his daughter that year.

As appears from a report by the Social Council (*socialnämnden*) of Nyköping (see paragraph 13 below), K.W. claimed that the applicant had a problem with alcohol and considered it inappropriate that he met the daughter unless he was sober. The applicant maintained that he gave up his attempts to see M., in part because he felt obstructed by K.W., in part because his continued commitment to the daughter had been undermined by difficulties in his job. He had also had problems with alcohol.

8. According to the applicant, these problems ceased when he met A.H. in 1984. She had a two-year-old son. They started cohabiting in January 1985.

9. In 1983 K.W. met M.W. They began to live together in May 1983. K.W. and M.W. married in January 1989.

10. The applicant met his daughter once in 1984. He wished to see her more often but K.W. allegedly opposed further contacts. However, the applicant saw the daughter from time to time between 1984 and 1986 when he and A.H. took her son to his childminder, who lived close to M.'s childminder. The applicant met M. again in June 1986 when she attended A.H.'s son's birthday party.

11. Since K.W. allegedly refused the applicant access to M., he contacted the social authorities in Nyköping in June 1987 and asked for help in arranging for access to M. In November 1987 the applicant and K.W. met once at the social welfare office to discuss the matter. K.W. expressed the wish that the applicant should not have access to his daughter yet. The

responsible social worker had some further contacts with the applicant and K.W. separately in 1988, but no meetings took place between the applicant and M. As appears from the relevant diary entries, he contacted the authority concerned once every other month, at the most.

12. In November 1988, M.W. applied to the District Court (*tingsrätten*) of Nyköping for permission to adopt M. In February 1989 the applicant, who objected, requested the District Court to grant him access. The court decided to obtain an opinion from the Social Council of Nyköping (Chapter 4, section 10 of the Parental Code – *Föräldrabalken*) and to adjourn its examination of the question of access pending the outcome of the adoption proceedings.

13. The Council carried out an investigation during which it heard the applicant (Chapter 4, section 10, of the Parental Code), K.W. and M.W. In an opinion of 31 October 1989, the Council concluded that adoption of M. by M.W. would not be in the child's best interests and, accordingly, recommended the District Court to reject M.W.'s application. In reaching this conclusion, the Council had regard to the following considerations.

In the first place, it was observed that K.W. and M.W. had been living together for over six years and had been married since January 1989. It appeared that their marriage was stable and harmonious. M.W. had become M.'s psychological father and had feelings for her as though she was his own child. M.W. considered it appropriate to confirm this by adopting her and thereby secure her position within the family.

The report further noted that the applicant seemed to have a stable relationship with A.H. and her son. He had affirmed that he had always had an interest in his daughter but that, for a few years, he had not had the energy to have contact with her because of his difficult situation. He was opposed to adoption and considered that his daughter had a right to know her natural father. The applicant was aware of the fact that the contact had to be developed cautiously over a certain period.

In addition, the report observed:

> "The investigators are of the opinion that [M.], like all other children, has a right to know her descent. It is also important that she be informed as early as possible. Thus, we disagree with [K.W.'s] and [M.W.'s] opinion that it is better for [M.] to wait. On the contrary, we believe that, in all probability, it will be a traumatic experience for [M.] to be told, in her teens or as an adult, that [M.W.] is not her natural father. We also consider that [M.] has a right to get to know her father and his family. We do not share [K.W.'s] and [M.W.'s] fears that [M.] would become distant from [M.W.], although it would be natural for her to react in one way or another. However, we are of the opinion that it could be beneficial for [M.] to get to know her father and his family. Her feeling of belonging to [M.W.] does not, for that reason, have to be changed and [M.W.] will probably always be [M.'s] psychological father.

> The investigators do not consider that there is question of making an assessment of who is the 'best' father but rather a matter related to the right to know, and to enjoy access to one's descent. Therefore we do not find it appropriate to support M.W.'s request to adopt M."

14. The District Court held a hearing on 12 December 1989 during which it heard the applicant (Chapter 4, section 10, of the Parental Code) and M.W. By decision of 22 December 1989, the court granted M.W. permission to adopt M. under Chapter 4, section 6, of the Parental Code. The court gave the following reasons:

> "The investigation in the case shows that [M.] since birth has lived with [K.W.] and that [M.W.] has taken part in the care of [M.] since she was eight months old. According to the information received, [M.] sees [M.W.] as her father. [The applicant] appears to have met [M.] occasionally in the beginning, but access has thereafter practically ceased. In these circumstances, M. cannot be considered to have such a need of contact with [the applicant] as to constitute an impediment to adoption.
>
> For these reasons, and since adoption must otherwise be considered to be in her interest, the application shall be granted."

15. On 5 February 1991 the Svea Court of Appeal (*Svea hovrätt*) upheld the District Court's decision. On 19 June 1991 the Supreme Court (*Högsta domstolen*) refused leave to appeal.

II. RELEVANT DOMESTIC LAW

16. General provisions on custody and access are to be found in Chapter 6 of the Parental Code. Section 3 provides that, from birth, the custody of a child rests with the child's parents, if they are married, or its mother, if the parents are not married. According to section 4, unmarried parents may obtain joint custody on application.

Under Chapter 6, section 15, the child's custodian shall see to it that the child's need of access to, *inter alia*, a parent who does not have custody is satisfied to the largest possible extent. If the custodian objects to the access requested by a parent who does not have custody, the courts shall, on an action brought by the latter parent, determine the question of access in keeping with the child's best interests.

17. Chapter 4 of the Parental Code contains provisions on adoption. Section 3 provides that a spouse may, with the consent of the other spouse, adopt the other spouse's child. According to section 5(a), a child who has not attained the age of 18 may not be adopted without the consent of its parents. Such consent is however not required from a parent who does not have custody of the child.

Under Chapter 4, section 6, the competent court is to examine whether adoption is appropriate and may grant permission only if it is to the

advantage of the child and if the prospective adopter has brought up the child or intends to do so or if there are special reasons for the adoption in view of the special relationship between the adopter and the child.

According to Chapter 5, section 8, an adopted child is for legal purposes regarded as the adopter's child and not that of the natural parent, except where the natural parent is the adopter's spouse. Where this exception does not apply, the rights of access enjoyed by the natural parents to the child cease by virtue of the adoption.

PROCEEDINGS BEFORE THE COMMISSION

18. Mr Söderbäck lodged an application (no. 24484/94) with the Commission on 17 December 1991. He complained that the decision to grant, without his consent, permission to adopt his daughter had constituted a violation of his right to respect for family life as guaranteed by Article 8 of the Convention. He further alleged a breach of Article 6 (right to a fair trial) on the ground that the District Court and the Court of Appeal had violated the Swedish Constitution.

19. The Commission declared the application admissible on 27 November 1996 in as far as concerned the applicant's complaint under Article 8 of the Convention and declared the remainder of the application inadmissible. In its report of 22 October 1997 (Article 31), it expressed the opinion that there had been a violation of Article 8 (ten votes to five). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

20. At the hearing of 24 June 1998 the Government, as they had done in their memorial, invited the Court to hold that there had been no violation of the Convention in the present case.

21. On the same occasion the applicant reiterated his request to the Court to find a violation of Article 8 and to make an award of just satisfaction under Article 50.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

22. The applicant complained that the District Court's decision of 22 December 1989 granting M.W. permission to adopt his daughter M. and the judgments of the Court of Appeal and the Supreme Court upholding this decision (see paragraphs 14–15 above) had given rise to a violation of his right to respect for family life as guaranteed by Article 8 of the Convention, which reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

23. The Government contested this allegation, whereas the Commission agreed with the applicant that the measure amounted to a violation of this Article.

24. The Court observes that it is not disputed that, when the adoption was granted, there existed certain ties between the applicant and M. In the light of this, and bearing in mind that the parties' arguments before the Court were centred on the issue of compliance with Article 8, the Court proposes to proceed on the basis that it was applicable to the present case.

25. On this assumption, the adoption order, which is not disputed before the Court, amounted to an interference with the applicant's right to respect for family life under paragraph 1 of Article 8 (see the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, pp. 19–20, § 51). Such interference constitutes a violation of this Article unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 of Article 8 and can be regarded as "necessary in a democratic society".

26. The Court notes that the District Court's decision to grant adoption under Chapter 4, section 6, of the Parental Code had been taken on the ground that adoption would be in the child's best interest (see paragraphs 14 and 17 above). The Court does not doubt that the measure was "in accordance with the law" and pursued the legitimate aim of protecting the rights and freedoms of the child. It remains to be considered whether it was "necessary in a democratic society".

27. In the Government's submission, the adoption of M. by M.W. was "necessary". When deciding on the adoption issue the Swedish courts must have been faced with a difficult task, but there was no reason to assume that they had misjudged the situation or had disregarded any of the legitimate interests involved (see paragraph 14 above).

28. The applicant, who agreed with the Commission's opinion, emphasised *inter alia* that, in advising against adoption, the Social Council had pointed out that it was in the daughter's best interest to be informed of the true identity of her natural father (see paragraph 13 above).

29. The Commission stressed that, at the time of the District Court's decision (22 December 1989), the applicant's earlier problems, which in part had caused the contacts between him and M. being limited, appeared to have been solved (see paragraphs 7 and 8 above). Thus, his personal situation did not warrant that his daughter be given away for adoption. Instead, the decision had been based on the fact that the adopter, M.W., had taken part in the care of M. since she was eight months old and that, as a consequence, she saw M.W. as her father (see paragraph 14 above).

In view of the above, the Commission considered that the adoption, although it was supported by relevant reasons, was not sufficiently justified, since it had not been shown that it corresponded to an overriding requirement in the child's best interests. The Commission based its reasoning on the Court's judgment of 7 August 1996 in Johansen v. Norway (*Reports of Judgments and Decisions* 1996-III, pp. 1008–09, § 78).

Thus, the margin of appreciation having been overstepped, the adoption could not be regarded as having been "necessary in a democratic society".

30. The Court recalls that the Johansen judgment concerned the deprivation of a mother's parental rights and access in the context of compulsory and permanent placement of her daughter in a foster home with a view to adoption by the foster parents. The measure had been imposed some six months after the daughter's birth, during which period the mother had had access to her twice a week. The judgment stressed that taking a child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permitted and that any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child. It considered the measures particularly far-reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures could only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests (see paragraph 78 of the Johansen judgment).

31. The Court considers that the present case falls to be distinguished from the Johansen case in the following respects. While it is true that the adoption in the present case, like the contested measures in the Johansen case, had the legal effect of totally depriving the applicant of family life with his daughter, the context differs significantly. It does not concern the severance of links between a mother and a child taken into public care but, rather, of links between a natural father and a child who had been in the care of her mother since she was born. Nor does it concern a parent who had had custody of the child or who in any other capacity had assumed the care of the child. Accordingly, in the Court's view, it is inappropriate in the present case to apply the approach employed in the Johansen judgment.

32. The Court further observes that, during the period under consideration, the contacts between the applicant and the child were infrequent and limited in character and when the adoption was granted he had not seen her for quite some time. Admittedly, this state of affairs was to a certain extent due to the fact that the child's mother was opposed to contacts. Another factor was the applicant's own personal problems (see paragraphs 7, 10–11 above). However, while it appears that those problems were solved by the end of 1984, it was not until June 1987, when the child was four years and nine months, that the applicant sought the assistance of the social authorities for arranging access.

33. Moreover, the child had been living with her mother since her birth and with her adoptive father since she was eight months old (see paragraph 9 above). He had taken part in the care of M., who regarded him as her father (see paragraph 14 above). Thus, when the adoption was granted by the District Court in December 1989, *de facto* family ties had existed between the mother and the adoptive father for five and a half years, until they married in January 1989, and between him and M. for six and a half years. The adoption consolidated and formalised those ties (see paragraph 14 above). In taking the measure the District Court had regard not only to the investigation carried out by the Social Council but also to the evidence given by the applicant and the adoptive father at a hearing (cf. the above-mentioned Keegan judgment, pp. 20–21, § 55) and was thus in a better position than the European judges in striking a fair balance between the competing interests involved. This decision had been upheld on appeal to the Court of Appeal and the Supreme Court (see paragraphs 14–15 above).

34. Against this background, and having regard to the assessment of the child's best interests made by the domestic courts, as well as to the limited relations that the applicant had with M. during the relevant period, the Court is satisfied that the decision fell within the margin of appreciation. Given the aims sought to be achieved by allowing the adoption to go ahead, it cannot be said that the adverse effects it had on the applicant's relations with the child were disproportionate.

35. Accordingly, there has been no violation of Article 8 of the Convention in the present case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 8 of the Convention in the present case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 October 1998.

Signed: Thór VILHJÁLMSSON
President

Signed: Herbert PETZOLD
Registrar