

FIFTH SECTION

CASE OF E.S. v. SWEDEN

(Application no. 5786/08)

JUDGMENT

STRASBOURG

21 June 2012

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 E.S. v. Sweden,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Mark Villiger,

Ann Power-Forde,

Ganna Yudkivska,

André Potocki, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 15 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 5786/08) 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, Ms E.S. (“the applicant”), on 21 January 2008. The President of the Section acceded to the applicant’s request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr J. Södergren, a lawyer practising in Stockholm. The Swedish Government (“the Government”) were represented by their Agent, Ms C. Hellner.

3. The applicant invoked, in particular, that the Swedish State had failed to comply with its obligations under Article 8 of the Convention to provide her with remedies against a violating act of her stepfather. She also invoked Article 13 of the Convention.

4. On 7 January 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1987.

6. In September 2002, when the applicant was 14 years old, she discovered that her stepfather had hidden a video camera in the laundry basket in the bathroom. The camera was directed at the spot where the applicant had undressed before taking a shower.

7. The incident was reported in 2004 and on 21 October 2005 the public prosecution indicted the stepfather for sexual molestation (*sexuellt ofredande*) under Chapter 6, section 7 of the Penal Code due to the said event.

8. On 20 January 2006, represented by an officially appointed counsel (*målsägandebiträde*), the applicant submitted a claim for damages of 25,000 Swedish kronor (SEK) (approximately EUR 2 750) to be joined to the criminal proceedings. The basis of the claim was that the stepfather had, through the act for which he was being prosecuted, severely violated the applicant’s personal integrity and should therefore pay compensation for the violation and for her pain and suffering.

9. Before the District Court (*Falu Tingsrätt*), the applicant, her stepfather, her mother and a cousin were heard. The applicant explained that on the relevant day, just before she was about to take a shower, her stepfather had something to do in the bathroom. When she discovered the camera, it was in recording mode, making a buzzing sound and flashing. She did not touch any of the buttons. Crying, she took the video camera, wrapped in a towel, to her mother. The stepfather took the camera from the mother. Subsequently, the applicant saw her mother and stepfather burn a film, but

she was not sure whether it was a recording of her.

10. The applicant's mother confirmed the applicant's statement and added that she did not know whether anything had been recorded since the film had been burned without her seeing it. She had not reported the incident to the police until 2004, when she had heard that the applicant's cousin had also experienced incidents with the accused.

11. The stepfather explained that he had lived with the applicant's mother from 1997 to the autumn of 2003. They had separated due to, *inter alia*, the incident in question. He had wanted to try to film with a hidden camera, but it was an impulsive act. He was not sure whether the camera had been in recording mode or whether any film had been recorded. The applicant's mother had burned the film without any of them seeing it.

12. By judgment of 14 February 2006 the District Court convicted the stepfather. It found it established that he had had a sexual intent in hiding the camera in the laundry basket and directing it at the part of the bathroom where it was usual to undress. It added that the buzzing sound from the camera perceived by the applicant strongly suggests that the camera was switched on and actually did record. Otherwise, there would be no point in hiding the camera among the clothes in the laundry basket. The hole in the laundry basket indicated that the approach was quite refined. Regardless of the fact that, afterwards, no one verified the contents of the film, it can under the present circumstances be considered established that the stepfather actually filmed the applicant when she appeared nude.

13. In the judgment, in which the stepfather was also convicted of three additional acts of sexual molestation against the applicant and her cousin, a suspended sentence combined with compulsory community service for seventy-five hours was imposed on him. Moreover, he was ordered to pay the applicant damages in the amount of SEK 20,000.

14. On appeal, by judgment of 16 October 2007, the Court of Appeal (*Svea hovrätt*) acquitted the stepfather of the incident in question.

15. The court found it established that the stepfather had put a camera in the bathroom and that he had started the recording system before the applicant was about to take a shower. Whether a recording had actually been made, however, was unclear. It was apparent, the court continued, that the stepfather's motive was to film covertly the applicant for a sexual purpose. Given this motive, it was also regarded as certain that the stepfather did not intend the applicant to find out about the filming. Nor was he, according to the court, indifferent to the risk that she would find out about it. The court thereafter assessed whether the act legally constituted sexual molestation within the meaning of Chapter 6, section 7 of the Penal Code. It referred to a Supreme Court judgment (NJA 1996 p. 418) in which the Supreme Court had held, among other things, that the filming of sexual abuse was not a crime in itself as in Swedish law there was no general prohibition against filming an individual without his or her consent. Following that line of reasoning, and although finding that the act in question constituted a violation of personal integrity, notably in the light of the applicant's age and relationship to her stepfather, the Court of Appeal found that the stepfather could not be held criminally responsible for the isolated act of filming the applicant without her knowledge. Even if she had indeed obtained knowledge of the filming, the court reiterated, this knowledge was not covered by the stepfather's intent.

16. The Court of Appeal went on by pointing out that the act might, at least theoretically, have constituted an attempted child pornography crime (*försök till barnpornografibrott*) considering the applicant's age. However, since no charge of that kind had been brought against the stepfather, the Court of Appeal could not consider whether he could be held responsible for such a crime. In conclusion, despite finding the stepfather's behaviour extremely reprehensible, he was acquitted and the applicant's claim for damages dismissed.

17. On 12 December 2007 the Supreme Court (*Högsta domstolen*) refused leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. The relevant provisions of the Penal Code (*Brottsbalken*, 1962:700) include the following:

Chapter 6 on sexual crimes Section 1

“A person who by violence or threat which involves, or appears to the threatened person to involve an imminent danger, forces another person to have sexual intercourse or to engage in a comparable sexual act, that having regard to the nature of the violation and the circumstances in general, is comparable to forced sexual intercourse, shall be sentenced for rape to imprisonment for at least two and at most six years. Causing helplessness or a similar state of incapacitation shall be regarded as equivalent to violence.

If having regard to the nature of the violence or the threat and the circumstances in general, the crime is considered less serious, a sentence of imprisonment for at most four years shall be imposed. If the crime is gross, a sentence of imprisonment for at least four and at most ten years shall be imposed for gross rape. In assessing whether the crime is gross, special consideration shall be given to whether the violence involved a danger to life or whether the perpetrator caused serious injury or serious illness or, having regard to the method used or the victim's youth or other circumstances, exhibited particular ruthlessness or brutality.”

Section 2

“A person who, under circumstances other than those defined in Section 1, makes someone engage in a sexual act by unlawful coercion shall be sentenced for sexual coercion to imprisonment for at most two years. If the person who committed the act exhibited particular ruthlessness or if the crime is otherwise considered gross, a sentence of at least six months and at most four years shall be imposed for gross sexual coercion.”

Section 3

“A person who induces another person to engage in a sexual act by gross abuse of his or her dependent state shall be sentenced for sexual exploitation to imprisonment for at most two years. The same shall apply to a person who engages in a sexual act with another person by improperly taking advantage of the fact that the latter is helpless or in some other state of incapacitation or is suffering from a mental disturbance. If the accused has exhibited particular ruthlessness or if the crime is otherwise to be considered gross, imprisonment for at least six months and at most six years shall be imposed for gross sexual exploitation.”

Section 4

“A person who engages in a sexual act with someone under eighteen years of age and who is that person's offspring or for whose upbringing he or she is responsible, or for whose care or supervision he or she is responsible by decision of a public authority, shall be sentenced for sexual exploitation of a minor to imprisonment for at most four years. This also applies to a person who, in circumstances other than those mentioned previously in this Chapter, engages in a sexual act with a child of under fifteen years. If the person who committed the act exhibited particular lack of regard for the minor or if the crime by reason of the minor's young age or otherwise is regarded as gross, imprisonment for at least two and at most eight years shall be imposed for gross sexual exploitation of a minor.”

Section 5

Repealed

Section 6

“If a person has sexual intercourse otherwise than as previously provided in this Chapter with his or her own child or its offspring, imprisonment for at most two years shall be imposed for sexual intercourse with offspring. A person who has sexual intercourse with a blood sibling shall be sentenced to imprisonment for at most one year for sexual intercourse with a sibling. The provisions of this Section do not apply to a person who has been made to commit the act by unlawful coercion or other improper means.”

Section 7

Before 1 April 2005 the section provided, in as far as relevant, the following:

“If a person sexually touches a child less than fifteen years of age otherwise than as previously provided in this Chapter, or induces the child to undertake or participate in an act with sexual implication, a fine or imprisonment for at most two years shall be imposed for sexual molestation.

A sentence for sexual molestation shall also be imposed on a person who by coercion, seduction or other improper influence induces a person who has attained the age of fifteen but not eighteen to undertake or participate in an act with sexual implication if the act is an element in the production of pornographic pictures or constitutes pornographic posing in circumstances other than those relating to the production of a picture.

This shall also apply if a person exposes himself or herself in such a manner that the nature thereof gives offence or otherwise manifestly behaves indecently by word or deed towards the latter in a way that flagrantly violates a sense of propriety.” (Law 1994:1499)”

Currently, the relevant legislation is placed in Chapter 6, section 10 and reads as follows:

“A person who, otherwise than as previously provided in this Chapter, sexually touches a child under fifteen years of age or induces the child to undertake or participate in an act with sexual implications, shall be sentenced for sexual molestation to a fine or imprisonment for at most two years.

This also applies to a person who exposes himself or herself to another person in a manner that is likely to cause discomfort or who otherwise by word or deed molests a person in a way that is likely to violate that person’s sexual integrity.” (Law 2005:90)”

Section 8

“A person who promotes or improperly financially exploits casual sexual relations for payment of another person shall be sentenced for procuring to imprisonment for at most four years. A person who, holding the right to the use of premises, grants the right to use them to another in the knowledge that the premises are wholly or to a substantial extent used for casual sexual relations for payment and omits to do what can reasonably be expected to terminate the granted right, he or she shall, if the activity continues or is resumed at the premises, be considered to have promoted the activity and shall be sentenced in accordance with the first paragraph.”

Section 9

“If the crime provided for in Section 8 is gross, imprisonment for at least two and at most six years shall be imposed for gross procuring. In assessing whether the crime is gross, special consideration shall be given to whether the accused promoted casual sexual relations for payment on a large scale or ruthlessly exploited another.”

Section 10

“A person who, by promising or giving recompense, obtains or tries to obtain casual sexual relations with someone under eighteen years of age, shall be sentenced for seduction of youth to a fine or imprisonment for at most six months.”

Section 11

“Criminal responsibility as provided for in this Chapter for an act committed against someone under a given age shall be required of a perpetrator who did not realise, but had reasonable grounds for assuming, that the other person had not attained such age.”

Section 12

“An attempt to commit rape, gross rape, sexual coercion, gross sexual coercion, sexual exploitation, gross sexual exploitation, sexual exploitation of a minor, gross sexual exploitation of a minor, procuring and gross procuring shall be dealt with in accordance with the provisions of Chapter 23. This also applies to preparation for and conspiracy to commit rape, gross rape, gross sexual exploitation of a minor and gross procuring, together with failure to reveal such crime.”

Section 13

“If, in a case of sexual exploitation of a minor under Section 4, first paragraph, second sentence or an attempt to commit such a crime, or in a case of sexual molestation under Section 7, first paragraph, there is little difference in age and development between the person who committed the act and the child, public prosecution shall not occur unless it is called for in the public interest.”

Chapter 16 on crimes against public order

Section 10 a

“A person who

- 1) portrays a child in a pornographic picture;
- 2) disseminates, transfers, grants use, exhibits or in any other way makes such a picture of a child available to some other person;
- 3) acquires or offers such a picture of a child;
- 4) brings about contact between a buyer and a seller of such pictures of children or takes any other similar step to facilitate dealing in such pictures; or
- 5) possesses such a picture of a child

shall be sentenced for committing a child pornography crime to imprisonment for at most two years, or, if the crime is petty, to a fine or imprisonment for at most six months.

By child is meant a person whose pubertal development is not complete or who is less than 18 years of age. If a person's pubertal development is completed, liability will be imposed for deeds committed under points 2-5 above only if it is apparent from the picture or its attendant circumstances that the depicted person is less than 18 years of age.

....” (Law 2010:1357)”

Before 1 January 2011, the second paragraph of the section read:

“By child is meant a person whose pubertal development is not complete or, if it is apparent from the picture and its attendant circumstances, who is less than 18 years of age.

...”

Chapter 16, section 17

“A person preparing or conspiring to mutiny [...] shall be sentenced in accordance with the provisions of Chapter 23. The same shall also apply [...] to the crime of attempting to commit a child pornography crime described in section 10a, first paragraph (Law 2010:399)

...”

Chapter 23, section 1

“A person who has begun to commit a crime without bringing it to completion shall, in cases where specific provisions exist for the purpose, be sentenced for attempting to commit a crime if there was a danger that the act would lead to the completion of the crime or such danger had been precluded only because of fortuitous circumstances.

Punishment for attempt shall be at most what is applicable to a completed crime and not less than imprisonment if the least punishment for the completed crime is imprisonment for two years or more.”

19. The Code of Judicial Procedure (*Rättegångsbalken 1942:740*) provides in so far as relevant:

Chapter 17, section 3

“A judgment may not be given for something else or more than that properly demanded by a party. In cases amenable to out-of-court settlement, the judgment may not be based on circumstances other than those pleaded by a party as the foundation of his action.”

Chapter 30, section 3

“The judgment may relate only to an act for which a prosecution was properly instituted or to a matter referred by statute to the court's criminal jurisdiction. The court is not bound by a claim regarding the legal characterisation of the offence or applicable provisions of law.”

20. The Tort Liability Act (*Skadeståndslag 1972:207*) provides in so far as relevant:

Chapter 2, section 1

“Anyone who deliberately or negligently causes a personal injury or damage to property shall compensate the injury or damage inferred. (SFS 2001:732)”

Chapter 2, section 3

“Anyone who seriously violates another person through a crime involving an attack against the person, freedom, serenity or honour of that person shall compensate the damage the violation inferred. (SFS 2001:732)”

A. Domestic practice concerning covert filming

21. In a judgment of 16 October 1992 (NJA 1992 p. 594) concerning a person who had secretly filmed sexual intercourse between himself and his girlfriend and who had subsequently shown the film to several persons, the Supreme Court noted that it was not prohibited under Swedish law to film another person without his or her consent or to show the film to others. This was so, the court continued, even in situations where the deed in question deeply violated the personal integrity of the person concerned. Apart from certain exceptional situations, the only general sanctions available were the criminal provisions on defamation in conjunction with Chapter 1, section 3 of the Torts Liability Act (now Chapter 2, section 3 of the named act). The court found that the accused person had committed defamation by showing the film to others.

22. A further judgment dated 27 June 1996 (NJA 1996 p. 418) concerned a man who had filmed and photographed a sleeping woman while assaulting her and committing sexual offences against her. The District Court found his acts to constitute, *inter alia*, sexual molestation. The Court of Appeal and the Supreme Court held that the filming and photographing did not constitute criminal offences under Swedish law and that these acts were thus to be disregarded when assessing the man's conduct under criminal law.

23. Yet another judgment dated 23 October 2008 (NJA 2008 p. 946) concerned, *inter alia*, a person who had covertly filmed his ex-girlfriend with another man in an intimate situation and who had subsequently e-mailed the film, together with certain descriptive messages, to others. The Court of Appeal found the filming to constitute molestation and the sending of some of the e-mails to amount to defamation. It also awarded the ex-girlfriend damages for, *inter alia*, violation of personal integrity. The Supreme Court granted leave to appeal concerning only the former alleged offence, namely the sexual molestation, and the issue of damages. The court reiterated that Swedish law contained no general prohibition against covert filming. The court also noted that in cases where the covert filming did not constitute a crime, no damages could be awarded. Although the need for a strengthened legal scheme in this regard had been acknowledged in Swedish legislative work already in the 1960s, the Court further noted, it had so far not led to any concrete results. According to the court, it was highly questionable whether the fact that acts of filming of an individual in situations where such filming deeply violated the personal integrity of the person concerned were left wholly unsanctioned under Swedish law, was compatible with the requirements of Article 8 of the Convention. Given this finding, the court continued, it was legitimate to examine whether sanctions could be provided by interpreting otherwise non-applicable domestic provisions in a treaty-conform manner. In this regard, the court referred to domestic case-law concerning compensation for violations of the Convention (see paragraphs 27-29 and 30). However, the court noted, another requirement under the Convention was that no one should be punished for an act which, at the time when it was committed, was not clearly criminalised by law. After having found that the filming in the present case did not fall under any applicable criminal provision, it was left unsanctioned and no damages were awarded.

B. Pending legislative work concerning covert filming

24. In January 2011 the Swedish Ministry of Justice issued a report on illicit photographing (Ds 2011:1) in which it proposed to criminalise such photographing - the term being used as meaning both photographing and filming - in certain situations. The aim of the proposal was in particular to protect individuals from interference in their private sphere by other individuals. It was proposed that the new criminal provision should cover anyone who, in a manner violating another individual's personal integrity, photographed or by other technical means recorded a picture of the individual in a home, bathroom, changing closet or a similar space. Moreover, the provision was proposed also to cover photographing or recording in any other space than the ones mentioned, if the act was committed in a pushy, covert or intrusive manner or if it constituted a serious violation of another individual's personal integrity in his or her capacity as a private person. It was proposed that sentences under the provision could range from penalties to imprisonment of up to one year. According to the report, no need to criminalise attempted photographing had emerged and it was therefore proposed that such acts, an example being the placing of technical equipment with the aim to film someone, were not to be covered by the new provision.

25. In outlining the reasons for the proposal it was stated, *inter alia*, that acts of covert or unauthorized filming of individuals by other individuals had constituted a general problem for a long time and that the problem was growing. The technical development had resulted in that individuals could be photographed at in principal any place, at any time and in any circumstances. It was also acknowledged that such acts may violate an individual's personal integrity regardless of whether he or she was made aware of the filming while it was ongoing or found out about it at a later stage. The report also referred to domestic case-law and noted that although the showing of a photograph or film to other people had been found to constitute a criminal act in some cases, the mere filming had been left unsanctioned. The report furthermore referred to Article 8 of the Convention and to the State's positive obligations under the article. In all, the report concluded, it was held unsatisfactory that acts such as the ones at issue were not prohibited by law.

C. Domestic practice concerning child pornography crime

26. In a judgment of 25 February 2005 (NJA 2005 p. 80), which concerned the photographing and filming of certain young individuals aged over 15 but under 18, the Supreme Court held that the pubertal development of the individuals was clearly complete and that it was impossible, from the pictures alone, to determine whether they had attained the age of 18 or not. Their age could moreover not be read from any text accompanying the pictures or any other attending circumstances. In such a situation, and regardless of whether the person responsible for the pictures was aware of the individuals' age or not, the act could not be held to constitute a child pornography crime.

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

27. In a judgment of 9 June 2005 (NJA 2005 p. 462) concerning a claim for damages brought by an individual against the Swedish State, *inter alia*, on the basis of an alleged violation of Article 6 of the Convention on account of the excessive length of criminal proceedings, the Supreme Court held that the plaintiff's right under Article 6 of the Convention had been violated. Based on this finding, and with reference, *inter alia*, to Articles 6 and 13 of the Convention and the Court's case-law under these provisions, in particular the case of *Kudła v. Poland* ([GC], no. 30210/96, ECHR 2000-XI), the Supreme Court concluded that the plaintiff was entitled to compensation under Swedish law for both pecuniary and non-pecuniary damages.

28. In a decision of 4 May 2007 (NJA 2007 p. 295), concerning length of detention, the Supreme Court held that the principle concerning a right to damages established in the above-mentioned case of 9 June 2005 also applied with regard to the rights contained in Article 5 of the Convention. The Supreme Court stated that the plaintiff's right to damages on account of a violation of the Article should be assessed in the first place under domestic law which, to the extent necessary, should be interpreted in accordance with the Convention. If **Sweden's** obligations under Article 5 § 5 could not be met by such an interpretation, the domestic courts should award compensation without the support of specific legal provisions.

29. In a judgment of 21 September 2007 (NJA 2007 p. 584), the Supreme Court held that the plaintiffs' right to respect for their private life under Article 8 of the Convention had been violated as a police decision on a medical examination of some of them had not been "in accordance with the law". Having found that compensation for the violation could not be awarded directly on the basis of the Tort Liability Act, the Supreme Court held that there was no reason to limit the scope of application of the principle established in the above-mentioned two cases to violations of Articles 5 and 6 of the Convention and concluded that the plaintiffs should be awarded non-pecuniary damages for the violation of Article 8.

30. A further Supreme Court decision of 29 October 2007 (NJA 2007 p. 747) concerned a claim for damages brought by an individual against a private insurance company. The claim concerned an alleged violation of Article 8 of the Convention related to secret surveillance undertaken in respect of the plaintiff. The Supreme Court noted that the Convention did not impose duties on individuals. Even if the State may have positive obligations under the Convention, the court continued, in view of the rule-of-law-value held by the principle of predictability, an individual could not be obliged to compensate another individual directly on the basis of the Convention.

31. Yet another Supreme Court judgment of 28 November 2007 (NJA 2007 p. 891) concerned a claim for damages against the Swedish State on the basis of an alleged violation of Article 2 of the Convention relating to the suicide of the plaintiff's father while in detention. The Supreme Court concluded that the case revealed no violation of Article 2. However, in its reasoning leading to this conclusion, the Supreme Court noted, *inter alia*, that according to the Court's case-law there was a right to an effective remedy under Article 13 connected to the State's duty under the Convention to take measures to protect the lives of individuals in custody or who were otherwise deprived of their liberty, which should, in principle, include a possibility of obtaining compensation for damage.

32. In a judgment in 2009 (NJA 2009 n 70), which concerned length of tax proceedings, the Supreme Court referred to the abovementioned case-law and held it to be a general principle that in so far as the State had the obligation to compensate someone due to a Convention violation and such compensation could not be awarded on the basis of national law, the obligation was to be fulfilled by

awarding compensation without a particular reference to domestic law. The ruling of the Supreme Court concerned only the amount of compensation awarded.

33. In a judgment of 16 June 2010 (NJA 2010 p. 363), lastly, which concerned, *inter alia*, length of proceedings before the District Court and the Court of Appeal in a civil case against the State, the Supreme Court found violations of Articles 6 and 13 of the Convention and awarded the plaintiff compensation.

34. Furthermore, the Chancellor of Justice has delivered decisions concerning compensation to individuals for violations of the Convention. In a decision of 23 June 2009, the Chancellor of Justice awarded an individual damages for violations found under, *inter alia*, Articles 8 and 13. The case concerned, *inter alia*, storage of certain personal information concerning the applicants in the data bases of the Swedish Security Service.

35. In May 2009 the Government decided to set up a working group on tort liability and the Convention to study the current legal situation. In December 2010 the working group submitted its report (*Skadestånd och Europakonventionen*, SOU 2010:87) to the Government. In the report it is proposed that the Tort Liability Act be amended in order to allow natural and legal persons to obtain damages from the State or a municipality for violations of the Convention. Such an action against public authorities would be examined by a general court which would need first to establish that a right provided by the Convention has been violated. The aim of the proposal is to provide a legal basis for granting non-pecuniary damage arising from disregard of the Convention, and to fulfil, together with the other already existing legal remedies, **Sweden**'s obligations under Article 13 of the Convention.

III. COUNCIL OF EUROPE SOURCES

36. In the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, drafted in October 2007, the Council of Europe observed, *inter alia*, that the sexual exploitation of children, in particular child pornography and prostitution, were destructive to children's health and psycho-social development and that sexual exploitation and abuse of children had grown to worrying proportions at both national and international level, in particular as regards the increased use by both children and perpetrators of information and communication technologies. The Convention therefore obliged its Parties to take the necessary legislative or other measures to prevent all forms of sexual exploitation and sexual abuse of children and to criminalise certain intentional conducts, including offences concerning child pornography. The Convention was ratified by **Sweden** on 25 October 2007 and entered into force on 1 July 2010.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 8 AND 13 OF THE CONVENTION

37. The applicant complained that the Swedish State failed to comply with its obligations under Article 8 to provide her with remedies against the act of her stepfather. She also invoked Article 13 and complained that her claims had not been effectively examined by the domestic courts because the Court of Appeal had failed to award her compensation from her stepfather based on the direct application of the Convention.

38. The Court recalls that it is the master of the characterisation to be given in law to the facts of a case. In the present case, it considers that the applicant's complaint is entirely directed against the remedies available to her against her stepfather and that it does not include a complaint of lack of a remedy against the State to enforce the substance of a Convention right or freedom at the national level. The complaint is therefore to be examined under Article 8 of the Convention alone, which provides as follows:

“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.”

39. The Government contested the applicant’s claims.

A. Admissibility

40. The Court finds, and this is common ground between the parties, that the applicant’s complaint concerned her moral integrity within the concept of “private life” as defined by Article 8.

41. The Government maintained that the application was inadmissible because the applicant had not exhausted the domestic remedies in respect of claiming damages from the State due to the alleged violation of Article 8 of the Convention. They referred to the Swedish Supreme Court’s decisions and judgments of 9 June 2005, 4 May 2007, 21 September 2007 and 28 November 2007 as well as the Chancellor of Justice’s decision of 23 June 2009 (see paragraphs 27-29, 31 and 34), in which individuals had been awarded compensation for pecuniary and non-pecuniary damage due to the violation of various Articles of the Convention. In the Government’s opinion, Swedish law thus provided a remedy in the form of compensation for both pecuniary and non-pecuniary damage in respect of any violation of the Convention, including under Article 8. The application was lodged with the Court two and a half years after the delivery of the first of the mentioned Supreme Court judgments and four months after the judgment of 21 September 2007 concerning Article 8 in particular. Accordingly, the legal position under domestic law had to be considered to have been sufficiently clear at the time when the present application was introduced before the Court.

42. The applicant disagreed and maintained that the domestic remedies had been exhausted. The applicant noted that a crucial feature distinguishing the judgments referred to by the Government from the present case was that the latter concerned an act committed by an individual and not the State or any other part of the public sector for which the State was directly or indirectly responsible. Furthermore, the applicant noted the ongoing legislative work on the subject (see paragraph 35) and maintained that the results of the work as well as the final content of any proposed law in this field would remain uncertain for a long period ahead.

43. The Court reiterates that the purpose of the requirement of exhaustion of domestic remedies 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).

44. Turning to the present case, the Court notes that the early judgments referred to by the Government concerned matters under Articles 5 and 6 of the Convention and that a judgment awarding damages under Article 8 was delivered only four months before the application at issue was lodged with the Court. Moreover, the judgments and decisions referred to by the Government concerned acts committed by the state or by organs under direct or indirect control of the state while the present case concerns an alleged failure of the State’s positive obligations due to an act committed by an individual. The underlying issues in the cases mentioned by the Government were thus different from those raised in the present case and do not resemble the situation in the case at issue. 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 must be kept in mind that this development is a rather recent one. Consequently, it cannot generally be required of an individual applicant to pursue a compensation claim in respect of Convention issues that have not been determined by the domestic courts or are not closely related to issues that have been so determined. The reason for this is that, in many of these cases, the existence of the remedy cannot yet be

considered as sufficiently certain (see, for example, *Bladh v. Sweden* (dec.), no. 46125/06, §§ 23-27, 10 November 2009 and *Fexler v. Sweden*, no. 36801/06, § 44, 13 October 2011).

45. In these circumstances, in the Court's view, it has not been shown with sufficient clarity that, at the time of the applicant's lodging the present application, there existed a remedy which was able to afford redress in respect of the violation alleged by the applicant and which she should be required to have pursued. The Government's objection as to the exhaustion of domestic remedies must therefore be dismissed.

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

B. Merits

1. The parties' submissions

47. The applicant maintained that the Swedish legal system contained no specific provision concerning acts of covert or illicit filming and that it did not offer any remedy to protect her against the concrete act of her stepfather. She pointed out the outcome of the domestic proceedings and submitted that there was nothing that she could have done differently in a procedural sense in order to have a remedy in the national proceedings.

48. The applicant did not wish to argue that the behaviour was of such character as necessarily to confer upon **Sweden** an obligation to set up a system of criminal prosecution and punishment. However, by not even awarding her non-pecuniary damages in the domestic proceedings on the basis of the Torts Liability Act or the Convention alone, the State had failed to fulfil its positive obligations under the Convention. She argued that these obligations were particularly important concerning vulnerable individuals like children and that her vulnerability was accentuated in the present case as she had had reason to have faith in the stepfather and as she was practically under his custody.

49. The Government contended that it had fulfilled its positive obligations under Article 8 in the present case.

50. It initially pointed out that even in cases of very severe offences, such as the rape of a minor, the Court had repeatedly stated that States enjoyed a wide margin of appreciation with regard to ensuring adequate protection under Article 8 and that only significant flaws in legislation and practice, and their application, would amount to a breach of a State's positive obligations under the said provision.

51. The offence at issue, however, could not be characterised as a very severe offence because, *inter alia*, there was no element of physical contact between the applicant and her stepfather. The State should therefore be afforded a very wide margin of appreciation and could in this view not be considered obliged to introduce a general prohibition against the photographing or filming of individuals without their consent. The Government also noted that the applicant did not argue that the act was such as to confer upon **Sweden** an obligation to set up a system of criminal prosecution and punishment.

52. The Government further submitted that while there was no such general prohibition in place under Swedish law, filming or the conduct of the person filming could under certain circumstances constitute criminal behaviour, in particular sexual molestation and child pornography offence. Other penal provisions that may be applicable were breach of domicile peace or, with regard to the handling of images, defamation.

53. In the present case, the Government observed, the Court of Appeal had found that the stepfather's act corresponded to the objective criteria that constituted the offence of sexual molestation under Chapter 6, section 7 of the Penal Code but that it was not possible to prove the subjective element required for criminal liability under that provision, namely his intent that the applicant would find out about the filming. The domestic court had also held that the act could, at least in theory, constitute an attempted child pornography offence but that the indictment did not cover such an offence. The Government pointed out, however, that it would have been difficult for the public prosecution to establish such an offence because a finding of a child pornography crime required a picture of a pornographic nature and because, in the present case, the video tape had been

destroyed by the applicant's mother without anyone seeing it.

54. In sum, according to the Government, it was clear in the present case that the act at issue fell within the scope of Swedish criminal legislation, notably the provisions concerning sexual molestation and child pornography offence. It was also clear that the stepfather had been prosecuted for the act but could not be convicted due to, *inter alia*, the lack of requisite evidence. Thus deterrent sanctions existed in this case and were backed up by an effective law-enforcement machinery. The Government recalled in this context that the Convention did not require a guarantee that a prosecution should result in a conviction (see, for example *Öneryıldız v. Turkey* [GC], no. 48939/99, § 96 and 147, ECHR 2004-XII).

55. As to the applicant's claim for damage, the Government noted that it had not been possible for the Court of Appeal to award damages based on Chapter 2, section 3 of the Torts Liability Act as no crime within the meaning of the Penal Code had been found. Nor could the court award damages based on Article 8 of the Convention as a sole legal ground. Finally, the applicant did not have the possibility of claiming damages from the stepfather in subsequent civil proceedings, as both the prosecution of the stepfather and her claim for damages in connection to his act were finally adjudicated when the judgment in the criminal proceedings gained legal force.

56. In the Government's view, though, the applicant could in the criminal proceedings have invoked other grounds for her claim for damages directed against her stepfather than the act cited in the indictment, notably that he had caused her personal injury by acting negligently under chapter 2, section 1, of the Tort Liability Act. This provision would have covered any physical and psychological injury.

2. *The Court's assessment*

(a) **General principles**

57. The Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *Airey v. Ireland*, 9 October 1979, § 32, Series A no. 32 and *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91).

58. The choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation, whether the obligations on the State are positive or negative. There are different ways of ensuring respect for private life and the nature of the State's obligation will depend on the particular aspect of private life that is at issue (see, for example, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 104, 7 February 2012). Thus, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State is correspondingly narrowed. The same is true where the activities at stake involve a most intimate aspect of private life (see, among others, *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I and *Mosley v. the United Kingdom*, no. 48009/08, § 109, 10 May 2011). The states are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see, for example, *A v. Croatia*, no. 55164/08, § 60, 14 October 2010). While recourse to the criminal law is not necessarily the only answer, effective deterrence against grave acts where fundamental values and essential aspects of private life are at stake requires efficient criminal law provisions (see, for example, *X and Y v. the Netherlands* cited above, §§ 24 and 27, *M.C. v. Bulgaria*, no. 39272/98, § 150, ECHR 2003-XII and *K.U. v. Finland*, no. 2872/02, § 43, 2 December 2008). As to lesser grave acts, the protection afforded by civil law may be sufficient (see, *mutatis mutandis*, *X and Y v. the Netherlands* cited above, § 27).

59. It must also be kept in mind that only significant flaws in legislation and practice, and their application, would amount to a breach of the State's positive obligations under Article 8. The Court can not replace the domestic authorities in the assessment of the facts of the case; nor can it decide on the alleged perpetrator's criminal responsibility (see *M.C. v. Bulgaria* cited above, § 167-168).

Nonetheless, the limits of the national authorities' margin of appreciation are circumscribed by the Convention provisions. In interpreting them, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved (see, for example, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI).

(b) Application of the principles to the present case

60. The Government maintained that the act at issue fell within the scope of Swedish criminal legislation, notably the provisions concerning sexual molestation and child pornography offence. They pointed out in this respect that although Swedish criminal law contained no specific provisions concerning acts of covert or illicit filming, such acts could nevertheless involve criminal behaviour under general Swedish legislation, such as for example sexual molestation, child pornography, breach of domicile peace or, with regard to the handling of images, defamation. Swedish legislation also included civil law rules providing for compensation due to violations of personal integrity and personal injury. In support thereof, they pointed to various domestic case-law. Having regard thereto, the Court is satisfied that, although Swedish law contained no specific provisions concerning covert or illicit filming, there was a legal framework in place which could, at least in theory, cover acts such as the one at issue.

61. The incident took place in September 2002 and was reported to the police in 2004. Acting thereon, the authorities initiated criminal investigations against the stepfather, who was indicted of sexual molestation on 21 October 2005. The matter was examined in criminal proceedings before three legal instances, before which the applicant was represented by an officially appointed counsel and had the possibility to claim damages from the stepfather.

62. With regard to the outcome of the domestic proceedings, it will be recalled that on 14 February 2006 the District Court convicted the stepfather of sexual molestation. On 16 October 2007, the stepfather was acquitted by the Court of Appeal. The latter found it unclear whether a recording had actually taken place since the video tape had been destroyed without anyone seeing it. The case before it thus concerned an attempted act of covert filming as opposed to a completed act. Moreover, although finding that the stepfather's aim had been to film the applicant covertly for a sexual purpose, it also found he had not intended her to find out about the filming, nor been indifferent to the risk that she may find out about the act. Given this lack of requisite intent, the Court of Appeal found that the act could not constitute sexual molestation under the Swedish Penal Code. Consequently, the applicant's claim for damages was rejected. On 12 December 2007 the Supreme Court refused leave to appeal.

63. The Court notes that at the relevant time similar outcomes had been seen in Swedish case-law (see for example NJA 1996 p. 418, paragraph 22). Nevertheless, there are no indications that it was clear to the authorities, notably to the public prosecution, when indicting the stepfather, or to the District Court, when convicting him on 14 February 2006, that the disputed act could not be covered by the provision on sexual molestation. Shortly after the final judgment in the current case, namely in October 2008, the Swedish Supreme Court passed a judgment in another case (NJA 2008 p. 946, see paragraph 23), in which it found *inter alia* that an impugned completed act of covert filming did not constitute sexual molestation. At the same time it expressed its view that it was highly questionable whether the fact that acts of filming of an individual in situations where such filming deeply violated the personal integrity of the person concerned were left wholly unsanctioned under Swedish law, was compatible with the requirements of Article 8 of the Convention. It goes without saying, that the authorities in the present case could not at the relevant time have been aware of the subsequent Supreme Court judgment.

64. It will be recalled that the Court of Appeal in its judgment of 16 October 2007, acquitting the stepfather of sexual molestation, pointed out that considering the applicant's age the act might, at least theoretically, have constituted an attempted child pornography crime. However, since no charge of that kind had been brought against the stepfather, the court could not consider whether he could be held responsible for such a crime. The Government maintained that it would have been difficult to establish such an offence because that would have required at least a picture of pornographic nature, which did not exist in the present case since the video tape had been destroyed by the applicant's

mother. The Court finds reason to add in this respect that obviously the authorities could not be held responsible for the lack of evidence in the form of a film, nor for the possibility that other elements may also have been lacking for the offence to have constituted attempted child pornography crime. Nevertheless, it notes that by virtue of Chapter 16, section 17, a person could be convicted of attempted child pornography described in section 10a, first paragraph, and that the Court of Appeal specifically pointed to that possibility, at least theoretically. It is not for the Court to speculate on why a charge of attempted child pornography was not brought against the stepfather in the present case. In any event it recalls that only significant flaws in legislation and practice, and their application, can constitute a breach of the State's positive obligations under Article 8. The Court cannot replace the domestic authorities in the assessment of the facts of the case, nor decide on the alleged perpetrator's criminal responsibility.

65. Having regard to the findings above, it cannot be concluded that at the relevant time the disputed act of the stepfather was not in theory covered by the Penal Code. It could fall within the provision concerning sexual molestation and attempted child pornography under Chapter 6, section 7 and Chapter 16, sections 10 a) and 17. Nor can it be concluded that any procedural requirements made it impossible for the applicant to enjoy practical and effective protection by the Penal Code. The case thus differs from, for example, *X and Y v. the Netherlands* (cited above, §§ 29-30) in which the main reason why the Dutch Penal Code could not provide Y practical and effective protection against the serious physical sexual offence to which she was subjected, was the procedural requirement in Article 248 ter, that a complaint had to be lodged by Y as the actual victim, and the fact that in the case of an individual like Y, the legal representative could not act on her behalf for that purpose. Finally, in the present case there were no obstacles, for which the authorities could be held responsible, to launching an effective investigation to identify and prosecute the perpetrator (as opposed to for example, *K.U. v. Finland*, cited above, § 49).

66. The question remains of whether, in the special circumstances of the present case, where the stepfather was acquitted of sexual molestation, and no charge of attempted child pornography was brought against him, it was a significant flaw in Swedish legislation that the Penal Code did not contain another provision which could have covered the act at issue. More concretely, it could be argued that if the Penal Code at the relevant time had contained specific provisions concerning acts of covert or illicit filming, completed and attempted, such provisions could also have covered the act at issue in the present case. In that assessment, it should be recalled though, that civil law remedies were also available to the applicant and that she, represented by counsel, chose to join her claim for damages to the criminal proceedings.

67. The Court reiterates that, in cases arising from individual petitions, its task is not to review the relevant legislation in the abstract. It must confine itself, as far as possible, to examining the issues raised by the case before it. Accordingly, its task is not to assess in the abstract the absence in Swedish legislation of specific provisions concerning acts of covert or illicit filming, nor to assess the domestic case-law referred to in paragraphs 21-23, in which acts of covert filming deeply violated the personal integrity of the persons concerned but were left wholly unsanctioned.

68. Accordingly, the Court must confine itself to examining whether, in the present case, in September 2002 when the incident took place, the absence of a provision in the Penal Code on attempted covert filming constituted a significant flaw in Swedish legislation. More specifically, in the present case, should the legislators have foreseen that in a case of attempted covert filming of a minor for a sexual purpose, where the film was subsequently destroyed without anyone having seen it, and where the person who filmed did not intend the minor to find out about the filming, the provision of sexual molestation could not cover the act, and a charge of attempted child pornography offence would not necessarily be brought.

69. In this assessment, the Court reiterates the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adapting to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal

tradition (see, among others, *Korbely v. Hungary* [GC], no. 9174/02, §§70-71, ECHR 2008).

70. These considerations are the expression of the general principles as stated above (see paragraph 58) that the choice of means calculated to secure compliance with Article 8 of the Convention in the sphere of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation.

71. The Court also observes the technical developments in the sphere of filming and photography and reiterates that increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data (see *Von Hannover v. Germany*, no. 59320/00, § 70, ECHR 2004-VI with further references). In this context, it notes that **Sweden** has taken active steps in order to combat the general problem of illicit or covert filming of individuals by issuing a proposal to criminalise certain acts of such filming in situations where the act violates the personal integrity of the filmed person.

72. In the light of the above, and having regard to the special circumstances of the present case, notably the fact that at the relevant time, in September 2002, the disputed act of the stepfather was in theory covered by the provision in the Penal Code concerning sexual molestation and by the provision on attempted child pornography, in the Court's view the Swedish legislation and practice and their application to the case before it, did not suffer from such significant flaws that it could amount to a breach of **Sweden**'s positive obligations under Article 8 of the Convention.

73. Therefore, there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;
2. *Holds* by four votes to three that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 21 June 2102, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Dean Spielmann Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Spielmann, Villiger and Power-Forde is annexed to this judgment.

D.S.
C.W.

DISSENTING OPINION OF JUDGES SPIELMANN, VILLIGER AND POWER-FORDE

We disagree, respectfully, with the majority's view that there has been no violation of Article 8 of the Convention.

In our opinion, the starting point in our analysis is the principles laid down in the case *X. and Y. v. Netherlands* (application no. 8978/80). There, for the first time the Court developed the notion of positive obligations under Article 8. In particular, it found a breach of these obligations in that the respondent Government had, in that case, failed to provide legislation which enabled the offence of indecent assault upon a mentally handicapped person to be punishable. As the Court stated in § 27 of that judgment, it was confronted with "a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions".

According to this case-law, a breach of positive obligations under Article 8 requires two conditions: (i) that the case concerns fundamental values and essential aspects of family life; and (ii) that there is a lacuna in the legislation which fails to protect these values.

As regards the first condition, it is indisputable, in our view, that what was in issue in this case was a very serious offence and, indeed, one where fundamental values and essential aspects of the applicant's private life were at stake. Those core values were, initially, protected in that the applicant's stepfather was convicted by the District Court on 14 February 2006. That court found that he had filmed the applicant, then an adolescent, when she was nude. However, that judgment was later quashed by the Court of Appeal's judgment of 16 October 2007 in circumstances where that court, nevertheless, confirmed that the act in question constituted a violation of the applicant's personal integrity and that the stepfather's conduct was extremely reprehensible.

As regards the second condition, we note that the Court of Appeal in second instance found that what the applicant's stepfather had done did not amount to a crime under Swedish law since there was no general prohibition against filming an individual without his or her consent. That court clearly acknowledged that there was a lacuna in the Swedish legislation.

In this context we are concerned by the argument that the applicant's stepfather could not be convicted because he had not intended the victim to find out about the filming nor been indifferent to the risk that she might find out about the act (§ 62). We have difficulty in accepting the principle that for a criminal offence to have been committed, the victim (in this case an individual being filmed in a covert and clandestine manner in circumstances where an intimate aspect of her private and person life is being invaded) must have knowledge of the offence. To our minds, both the *mens rea* and the *actus rea* were sufficiently present once the domestic courts accepted that the stepfather had intended to film the applicant secretly and had proceeded to do so. It may be that the Swedish legislation is directed, primarily, at situations where an individual is filming persons in the open, say, on a public street, and where only an unequivocal refusal by the persons concerned could possibly lead to a criminal conviction. But that is not at all the situation here.

Finally, we note that in the present case the stepfather could have been prosecuted on other grounds, namely, on account of attempted child pornography, though no charges were eventually brought. Of course, positive obligations are an obligation of means, not of result; they do not imply that a person must be convicted in all circumstances. There may be good reasons why a prosecution is not brought, such as, for example, where an offence is time-barred or where there is insufficient evidence upon which to prosecute. We can also accept that the Public Prosecutor's Office is free to prosecute or not according to the "principle of opportunity" (*principe d'opportunité des poursuites*) well known in criminal procedures in Europe. But we have not been made aware of any such reasons – and the fact remains that the stepfather was not prosecuted.

On the whole, we find that there was a significant omission in the relevant Swedish legislation which resulted in the applicant being left without protection. This leads us to conclude that there has been a failure on the part of the respondent Government to discharge its positive obligations under Article 8 of the Convention and, that, consequently, there has been a breach of that provision.

E.S. v. **SWEDEN** JUDGMENT

E.S. v. **SWEDEN** JUDGMENT – SEPARATE OPINION

E.S. v. **SWEDEN** JUDGMENT - SEPARATE OPINION