

Lund, June 22, 2017

To:

The European Court of Human Rights



Academic Rights Watch

Bevakar den akademiska friheten i Sverige

Amicus brief in favor of Mr. Thomas Lundeberg (Lundeberg v. Sweden, Appl.nr. 30605/17)

As representatives of Academic Rights Watch (ARW), we wish to present to the European Court of Human Rights the present amicus brief in favor of the applicant Mr. Thomas Lundeberg (Lundeberg v. Sweden, Appl.nr. 30605/17). We will refer to Mr. Lundeberg's application to the Court as "the Application".

Our intent is to comment on the case from the perspective of academic freedom. In this connection we wish acknowledge the Court's repeated commitment to academic freedom as a fundamental value in a democratic society protected under article 10 in the ECHR (*Sorguç v. Turkey* 23 June 2009 § 21 and 35; *Hertel v. Switzerland* 25 August 1998 § 31). The present case also concerns, to a very considerable degree, Mr. Lundeberg's reputation, protected under article 8, and his right to a fair trial, protected under article 6.

About Academic Rights Watch

ARW is an independent Swedish academic watchdog devoted to the monitoring and advancing of academic freedom in Sweden. Its members are professors at some of Sweden's most renowned universities (Gothenburg, Lund, Uppsala and Umeå). ARW's main activities consist in documenting violations of academic freedom on its website (www.academicrightswatch.se). This is done in a context in which specialists in higher education have found Sweden to be one of the weakest states in Europe concerning the legal protections of academic freedom (see, for a recent study, Karran et al, 2017, "Measuring academic freedom in Europe: a criterion referenced approach", *Policy Reviews in Higher Education* 1(2)).

Since ARW was founded, in 2012, it has documented a large number of violations using as its gold standard the UNESCO Recommendations Concerning the Status of Higher-Education Teaching Personnel (1997) and the Council of Europe's Recommendation 1762 (2006) on academic freedom and university autonomy. In addition, ARW supports academic freedom by, among other things, writing opinion pieces in Swedish media and by helping academics who have had their rights violated to file complaints to various legal authorities.

Facts concerning Mr. Lundeberg's case

The facts of the case concerning Mr. Lundeberg are presented in detail in the Application, and we will not repeat them here. Suffice it to say that Mr. Lundeberg was found guilty of scientific fraud following an investigation by the Swedish Research Council (SRC), a public authority. The SRC

investigation and announcement of fraud formed the basis of a decision, in 2006, to the same effect by the then Rector at Karolinska Institutet, Sweden's most prestigious medical research institution and Mr. Lundeberg' former employer. (Mr. Lundeberg left his position as Professor at Karolinska in 2003 finding his academic activities and standing to be undermined by the fraud accusations.)

However, it has in our view been proven beyond reasonable doubt that the investigation carried out by the SRC was, from a procedural standpoint, seriously and fundamentally flawed. The grave procedural errors have been painstakingly identified, with reference to relevant parts of the Swedish constitution (Instrument of Government), by then Professor of Constitutional Law and now member of the Supreme Administrative Court Mr. Thomas Bull, whose legal statement from 2012 can be found in appendix 25 in the Application.

To summarize some of Mr. Bull's findings, there was no explicit recognition in SRC's announcement of fraud of arguments and documents that Mr. Lundeberg had submitted to the investigating body in his defense. In fact, on closer scrutiny, it turned out that many of those documents had not even been registered and acknowledged as belonging to the investigation. Mr. Bull found this defect to be in serious violation of the requirements of objectivity and impartiality enshrined in the Swedish constitution (chapter 1 article 9 instrument of government). Mr. Bull also found that many documents and arguments that were held against Mr. Lundeberg were not communicated to him. As a consequence, Mr. Lundeberg was not granted the opportunity to comment on the allegations. This, too, was a blatant violation of constitutional requirements, Mr. Bull concluded.

The upshot of Mr. Bull's expert assessment was that the process whereby Mr. Lundeberg was found guilty of scientific fraud must be disqualified on constitutional grounds and that the SRC must initiate a new investigation consistent with constitutional demands.

However, this has not happened. Since 2006, Mr. Lundeberg has exhausted all available means provided by the Swedish legal system in his efforts to have the fraud investigation and the decision that followed nullified, alas without any success whatsoever.

In 2010, similar procedural flaws, though in the view of some commentators of lesser gravity, were detected in another fraud investigation carried out by the SRC, which led to the SRC actually nullifying that investigation. Since the SRC responded differently in Mr. Lundeberg's case, the question can legitimately be asked whether the SRC has acted in agreement with a constitutional clause requiring equality before the law (chapter 1 article 9 instrument of government).

The devastating effects on Mr. Lundeberg's reputation and academic freedom

The SRC investigation and the subsequent decision by the Rector of Karolinska Institutet have had devastating effects on Mr. Lundeberg's reputation as an academic and have effectively prevented him from continuing an outstanding and internationally recognized career as a notable academic and scholar. Mr. Lundeberg makes this quite clear in the Application. A person's right to the protection of his reputation is guaranteed under article 8 in the ECHR.

To appreciate the gravity of the situation it is pivotal to keep in mind that a scientist's most important asset is his reputation. Although many elements of scientific inquiry can be documented and objectively verified by others in retrospect, there are many other things that simply have to be accepted on trust, i.e. that the scientific experiment reported in a scientific publication was actually carried out and in the way it is reported, that the figures and data presented are accurate representations of actual experimental outcomes, and so on.

Thus, when a scientist's reputation qua researcher has been tarnished, many colleagues, funding agencies and potential employers will decide that the research and publications can no longer be trusted. This goes not only for previous work but also for future research. The scientist's teaching can no longer be trusted either since teaching, in part, involves the dissemination of research outcome. The effect is a life-long ban on research and teaching as it will be practically impossible to be hired as a researcher or teacher or to apply to funding agencies for research grants.

Thus, a damaged reputation in practice means the end of an academic career. This is all the more true if the fraud claims stem, as they did in Mr. Lundeberg's case, from a public agency (SRC) and from the Rector of a first-class medical university (KI). It should be emphasized that Mr. Lundeberg, before the allegations were raised against him, enjoyed an outstanding reputation as a distinguished Professor at Sweden's finest medical institution. The fact that Mr. Lundeberg has subsequently been banned from research and teaching from his new employer, and the fact that he has been unable to secure a position as professor elsewhere, despite an exceptionally strong scientific record, bear clear and unequivocal witness to the dramatic effects that the flawed state investigations of which Mr. Lundeberg was the unfortunate victim have had on his reputation and academic freedom.

We will now substantiate these claims further, referring to international academic standards as codified in the aforementioned UNESCO Recommendations. Mr. Lundeberg qualifies as belonging to the higher-education teaching personnel in the sense of the UNESCO Recommendations (definitions (e) and (f)). His professional activities therefore fall under the statutes of the Recommendations.

The UNESCO Recommendations are quite clear on the importance of adhering to strict international standards of due process when a member of the higher-education teaching personnel should be subject to discipline (articles 48 and 49). An investigation terminating in an assessment or decision whether or not a member of the higher-education teaching personnel is guilty of fraud must be viewed as a disciplinary procedure already in the light of the gravity of the charges and the potential consequences for the accused, as already explained, even if no further disciplinary action is taken on the basis of that assessment or decision. The UNESCO Recommendations also clearly state that conducting research and teaching without interference are rights enjoyed by all higher-education teaching personnel (articles 28 and 29).

Thus, as far as the international consensus regarding academic freedom is concerned, Mr. Lundeberg's case illustrates how a fundamentally flawed *de facto* disciplinary process (violations of articles 48 and 49 in the UNESCO Recommendations) which it has been impossible to appeal or roll back has led to severe and prolonged violations of his academic rights to conduct research and teaching without interference (violations of articles 28 and 29 in the UNESCO Recommendations).

As defenders of academic freedom, recognizing its necessity in a democratic society, we are appalled by the grave and prolonged injustice which Mr. Thomas Lundeberg has had to endure. An obviously biased and unconstitutional state investigation into his scientific credential left his exceptional academic and personal reputation in tatters. The Swedish authorities have, regrettably, persistently failed to nullify the investigation and thereby also failed to block its disastrous effects on Mr. Lundeberg's academic and personal life.

Why the Swedish system for handling accusations of fraud is not in conformity with the ECHR

Mr. Lundeberg was very likely the victim of a smear campaign designed to tarnish his reputation. As mentioned in the Application, the accusations came mainly from another professor with whom Mr. Lundeberg previously had a business partnership. This partnership

ended in deep animosity after several court proceedings. It was at this time the colleague started accusing Mr. Lundeberg for scientific fraud. Through the decision of the then new Rector of KI, this personal vendetta against Mr. Lundeberg could be continued and legitimized in the form of a public authority investigation. The colleague continued to stand in close contact with the investigating body at the Swedish Research Council (SRC) and continuously supplied material to the investigation. She was also given access to documents even though she was not a party to the dispute.

Due to the SRC's at the time poor standards of objectivity and impartiality the colleague succeeded, perhaps beyond expectations, to dupe the committee into believing that Mr. Lundeberg was guilty of fraud. The Rector of KI then decided, based on the committee's conclusions, that Mr. Lundeberg had committed scientific fraud.

The accuser's final victory came, however, when the administrative courts would not allow either the committee's conclusions or the Rector's decision to be appealed or reconsidered. Mr. Lundeberg appealed the decision by KI to the Stockholm county administrative court. The court found that the decision could not be appealed because the decision was not considered in practice to have any negative effect on the personal or economic situation of the applicant. We now know that this was a severe error of judgment on the part of the court. The appellant court reviewed the case but sided with the first instance. The supreme administrative court did not give leave to appeal.

Thus it is very likely that the present case illustrates the strategic use of the Swedish system for handling accusations of fraud in an astonishingly successful smear campaign.

As reported in the local media (e.g. Skeri, N., 2008, "SLU-professor anklagar forskare för stöld", Upsala Nya Tidning, March 12), the acting former colleague only a few years later went on to accuse one of her doctoral students for scientific fraud, perhaps inspired by her past success. This time there was a scientific conflict in the background concerning the student's lack of success in confirming the professor's theory in an experimental study. A formal investigation was launched, but no evidence of fraud could be found.

But even if there were no smearing intentions on the part of the accusing former colleague, Mr. Lundeberg's case should alert us to the serious possibility that accusations of fraud could be strategically motivated and have their roots in the accuser's self-interest. The accuser has in such a case nothing, or very little, to lose and everything to gain from triggering an investigation of the kind conducted by the SRC in Mr. Lundeberg's case.

The ultimate motive for such strategic use of the Swedish system need not be to tarnish the reputation of the accused. A researcher could very well use the same method in order to silence the voice of a scientific opponent, perhaps one advocating a rival theory, through an attack on his reputation.

Thus, the strategic use of the Swedish system as it stands presents a risk not only in relation to scientists' right to the protection of their reputation under article 8 of the ECHR but also a risk in relation to their right to freedom of speech and academic freedom under article 10 of the ECHR.

At the same time it is obviously of the utmost importance to investigate serious accusations of scientific fraud in order to secure trust in the scientific process. This point is intimately connected to the protection of academic freedom, a value recognized by the Court, since, as is generally agreed, academic freedom is granted to scholars on the conditions that they commit themselves to the highest possible scientific standards in their research. Without trust in science, academic freedom is thoroughly undermined.

Thus, the more general question of principle raised by Mr. Lundeberg's case concerns which of the following two alternatives is the best system for addressing accusations of fraud, taking into account, on the one hand, individual scientists' interest in protecting their reputation and academic freedom from strategic attacks and, on the other hand, society's interest in protecting academic freedom and the institution of science from fraudulent behavior:

(A) That the result of a public authority's investigation of accusations of scientific fraud is treated as an outcome or decision that can be formally appealed, e.g. on procedural grounds.

(B) That the result of a public authority's investigation of accusations of scientific fraud is *not* treated as an outcome or decision that can be formally appealed (the current legal practice of the Swedish administrative courts and authorities).

Both (A) and (B) protect the institution of science from fraud and arguably do so equally well. However, (A) is better than (B) from the point of view of protecting individual scientists' reputation from strategic accusations of fraud as part of a smear campaign, which may or may not ultimately aim at silencing the voice of a scientific rival. By contrast, (B) does not provide sufficient safeguards against such strategic attacks on scientists' reputation. It is true that (B) has the advantage of consuming less administrative resources, but this consideration should not be given much weight since fundamental rights are at stake. Hence, (A) is overall the better alternative.

Thus, we believe that the legal practice of the Swedish administrative courts and other authorities to disallow appeals in these cases is not in conformity with the European Convention of Human Rights. The courts and authorities should allow such appeals.

Mr. Lundeberg was not granted the possibility to appeal in order to protect his reputation, free speech and academic freedom, which are civil rights protected under article 8 and 10, respectively, of the ECHR. Therefore, Sweden has violated Lundeberg's right to a fair trial protected under article 6. As a consequence, there have also been violations of articles 8 and 10.

Mr. Lundeberg has applied for compensation from the Swedish Chancellor of Justice. His request for compensation was however rejected. For the aforementioned reasons this was an inadequate decision. Thus, Lundeberg has a right to be adequately compensated for the violations of the said rights by the European Court of Human Rights.

Conclusion

We hope that the Court takes the facts and considerations presented in this amicus brief into account in its verdict and that the effects are that the Swedish system for handling investigations into scientific fraud is declared not to be in conformity with the ECHR and, furthermore, that Mr. Thomas Lundeberg is adequately and proportionally compensated for the unacceptable and sustained injustice inflicted upon him.

Sincerely,

Prof. Dr. Erik J. Olsson,

also on behalf of

Assoc. Prof. Dr. Jens Stillhof Sörensen
Assoc. Prof. Dr. Magnus Zetterholm

Academic Rights Watch – monitoring academic freedom in Sweden