

DEFENCE RIGHTS IN EVIDENTIARY PROCEEDINGS

NATIONAL REPORT SWEDEN

CIVIL RIGHTS DEFENDERS

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CIVIL RIGHTS DEFENDERS

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ABBREVIATIONS

DREP – Defence Rights in Evidentiary Proceedings

Procedural rights directives — EU directives on the procedural rights of suspects and accused persons in criminal proceedings

EU – European Union

EU Charter – Charter of Fundamental Rights of the European Union

European Convention on Human Rights (ECHR) – Law (1994:1219) on the European Convention for the Protection of Human Rights and Fundamental Freedoms

JO – Parliamentary Ombudsman

JK – Chancellor of Justice

RB — Code of Judicial Procedure (1942:740)

RF – Proclamation (1974:152) on a New Instrument of Government

RåR – Guidelines from the Prosecutor-General

1 SUMMARY

This report was produced within the framework of the “Defence Rights in Evidentiary Proceedings” project funded by the European Union (EU). The aim of the project is to identify how evidence is used in criminal proceedings in five member states to determine whether a common evidentiary standard can be formulated at an EU level. A common standard will contribute to the strengthening of procedural rights in criminal proceedings in the EU and to a more effective prosecution of cross-border crime. The report is based on Civil Rights Defender’s mapping of applicable law, existing case law, interviews with actors in the judicial system, and lessons learned from a seminar on the subject in January 2020. Appendix 1 is specifically addressed to lawyers.

The principle of free evaluation of evidence has a strong position in Swedish law. Although there is some case law from the court of appeal in which rejection of evidence was applied, the general position is that rejection in court is only relevant in exceptional cases, for example in the case of torture under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Evidence that is not rejected must not serve as grounds for a conviction if it means that the rights of the defendant would be irrevocably undermined. In this assessment, the Supreme Court largely follows the case law of the European Court of Human Rights, which applies a so-called test of overall fairness. The implication of the test is that the trial should on the whole be fair, which effectively means that some elements of impropriety may be permissible. Elements of impropriety in the investigation may also have implications for the evaluation of evidence and for the sentencing. During the preliminary investigation, there is more scope to have evidence excluded, that is, taken out completely or put in the so-called slush pile.

The report notes that the current system does not meet the requirement for an effective remedy in the sense that the individual’s circumstances are restored to what they were prior to the violation. This is partly because the most effective evidentiary remedies (such as rejection) are only rarely applied, and partly because the use of remedies can be unpredictable as actors in the judicial system have a wide margin of discretion in this matter. It is also noted that the investigating authorities have little incentive to avoid violating the rules, as even improper evidence may serve as grounds for a conviction. Other tools, such as filing a complaint with the Parliamentary Ombudsman (JO) or the Chancellor of Justice (JK), or a report of misconduct with the police, are intended to prevent systematic violations, but are not effective in restoring the individual’s circumstances to what they were before the violation. It is furthermore uncertain whether these remedies actually lead to a change in the application of the law.

Based on our findings in the report, Civil Rights Defenders offers a number of policy proposals. Decision makers should consider codifying the rules of rejection and analysing whether there is a need to constitutionally protect certain procedural guarantees. They should also review sanctions for rule violations in criminal cases in order to create better incentives for the investigating authorities to comply with legislation.

Courts should strive to raise awareness of European law and to ensure clarity in their reasoning, specifically concerning the grounds on which certain evidence has been rejected or denied probative value. At the same time, the Swedish Prosecution Authority and the

Swedish Police Authority should consider whether disciplinary measures for violations of regulations restricting the gathering of evidence should be used to a greater extent than today. In addition, the Prosecution Authority should introduce a procedure to verify that the suspect's rights are upheld in evidentiary proceedings and establish clearer internal guidelines on when improper evidence may be used. The Prosecution Authority should increase its efforts to share information about the investigation with the defence within a reasonable timeframe.

Defence lawyers should engage in competence development within the area of European law and make use of existing legal remedies in criminal proceedings, including tools from EU law. The Swedish Bar Association should ensure that lawyers have the opportunity to improve their knowledge of EU law and the ECHR.

2 INTRODUCTION

2.1 BACKGROUND

Cooperation within the field of criminal law has long been high on the EU's agenda. In 2009, a common standard for the gathering of evidence and rules on the admissibility of evidence was proposed, but the proposal did not lead to any legislation (European Commission, 2009). Instead, six directives have been adopted which set out a minimum standard for the procedural rights of suspects and accused persons in criminal proceedings (the so-called procedural rights directives):

- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings
- Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer
- Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the presumption of innocence and the right to be present at the trial in criminal proceedings
- Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings
- Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings

The directives aim to harmonise the regulatory framework within the member states and to create a common standard for safeguards in criminal cases and the right to a fair trial. Another aim is to improve conditions for cross-border cooperation when evidence is obtained in one member state for the purpose of being used in a trial in another.

In order to give teeth to the rights outlined in the directives, effective remedies must be provided against their infringement. The provision on the right to an effective remedy in EU law means that individuals must have access to redress before a court-like body if the minimum standards in the directives are not upheld in criminal proceedings. However, what remedies the national legal system must provide in order to comply with the requirements of the directives is not specified.

Comparative studies have shown major differences between criminal procedure rules in different member states (European Parliament, 2018). The range of available remedies against rights violations also varies across EU member states, from inadmissibility of unlawfully obtained evidence to compensatory measures such as damages (European Commission, 2019, p. 3.12). While some countries rely on compensatory remedies, others have a series of legal bans on certain types of evidence. In cross-border cases, some countries have chosen to apply domestic rules for the gathering of evidence abroad, while others have adopted specific rules of admissibility for foreign evidence.

The different rules for evidence management across EU countries and remedies against procedural violations may pose challenges to cross-border judicial cooperation in criminal matters, as different regulatory frameworks inevitably come to clash. It also means that there is no common standard for the right to a fair trial upheld within the EU.

A ban on evidence obtained in violation of procedural rights as well as all evidence derived from it (the so-called *fruit of the poisonous tree* doctrine) is considered the most effective remedy by some researchers, based on the view that, in criminal proceedings, the individual's circumstances must be restored to what they were prior to the violation (Soo 2018, p. 47). The EU directive on the presumption of innocence is in agreement with this conclusion, as can be seen in recital 44 which states that an effective remedy "should, as far as possible, have the effect of placing the suspect or accused person in the same position in which they would have found themselves had the breach not occurred". Evidentiary remedies (such as inadmissibility of evidence) may thus play a significant role in situations where it is not possible to remedy the infringement by other means.

2.2 THE WIDER IMPACT OF A LACK OF EFFECTIVE REMEDIES

The right to an effective remedy is a fundamental human right as enshrined in a series of international human rights conventions. The requirement of an effective remedy against violations of EU law is set out in Article 19(1) of the Treaty on European Union and Article 47(1) of the Charter of Fundamental Rights of the European Union (EU Charter). The directives on access to a lawyer, legal aid, the rights of children, and the presumption of innocence require suspects or accused persons to have access to an effective remedy in case of a violation of the rights enshrined in said directives. However, as the requirement for an effective remedy can also be found in Article 47 of the EU Charter, this applies to all of the procedural rights directives.

European law thus calls for an effective remedy against rights violations, including procedural rights in criminal cases. The lack of an effective remedy risks undermining the protection provided by national law and Sweden's international commitments. Rule violations in criminal proceedings may erode the probative value of the evidence presented and make the whole procedure problematic from a legal certainty perspective. In such a situation, the individual may feel that they have been wrongly convicted or received an unreasonably high sentence. An effective remedy against this type of violation is therefore needed to maintain due process in criminal cases.

From the individual's standpoint, effective remedies are also important to maintain confidence in the legal system. There is a high value in society and its citizens having confidence in the legal system and its ability to prosecute crimes in a manner that ensures legal certainty. If the state and its officials do not comply with existing rules regarding, for example, the gathering of evidence, it is of particular importance that there are sanctions against such kinds of violations. The use of problematic tools, such as evidence contrary to procedural rights, risks eroding this trust and the sense of security in the state's ability and ambition to protect individual rights. These violations also risk becoming systematic if there is no incentive for law enforcement agencies to act in accordance with applicable law.

Finally, the lack of an effective remedy also affects EU law as a whole. If remedies against violations of EU rights in the national legal system do not fulfil the requirements for an

effective remedy as set out in EU law, this means that the impact of EU law differs across member states. Since cooperation between member states is based on a principle of mutual trust, it is important that the assumption of trust is realised in practice. Ultimately, a uniform application of EU law also contributes to a more effective cooperation between member states and to strengthening the position of EU law.

2.3 ABOUT THE PROJECT AND THE PRESENT REPORT

The EU-funded research project “Defence Rights in Evidentiary Proceedings” (DREP) aims to study regulations on admissibility and rejection of evidence in Sweden, Croatia, Ireland, Lithuania, and Poland in order to identify similarities and differences between these countries and to determine whether a common standard can be formulated at an EU level. The present report, produced as part of the project, examines the extent to which suspects and accused persons are able to participate in and influence procedures relating to the gathering of evidence, gain access to such evidence, and challenge evidence unlawfully obtained. The report describes the circumstances in Sweden and is intended to provide in-depth knowledge of the extent to which effective remedies are available against violations of procedural rights in criminal cases. The report will also be used as basis for a regional report, in which conclusions will be compiled from the different project countries. The regional report will be produced by the international civil society organisation Fair Trials in 2021.

The present report consists of six chapters. The opening chapter offers a summary of the report. The chapter “**Introduction**” presents the background to the project and the report and outlines the methodology. The chapter “**Legal and Institutional Background**” offers an introduction to Swedish criminal proceedings and its participating actors. The chapter “**Evidentiary Rules**” provides an overview of the extent to which evidence that is in any way flawed can be questioned. The chapter “**Evidentiary Remedies**” describes remedies available against evidence unlawfully accessed or obtained in a Swedish context and analyses the effectiveness of existing remedies. In the chapter “**Conclusions**”, the previous chapters are brought together. Finally, on the basis of these conclusions and in relation to existing knowledge, a number of **Recommendations** are made to the actors in the judicial system. Appendix 1 provides an overview of how lawyers can uphold their clients’ rights and exercise control over legal compliance in criminal cases. Appendix 2 contains the questionnaire templates on which interviews with actors in the judicial system have been based.

The report uses the terms *unlawful* or *improper* evidence alongside other, more descriptive, expressions such as *unlawfully accessed*, *unlawfully obtained*, or *unlawfully gathered evidence*. These terms refer to evidence gathered or used in a manner contrary to applicable law or gathered in breach of procedural guarantees. Within the context of the present report, these terms should be considered synonymous. *Evidentiary remedies* refers to legal remedies against a rights violation in criminal proceedings which has resulted in evidence.

2.4 METHOD

The content of the report is based on an examination of the current legal position, including legislation and case law, interviews with professional lawyers working with the issues on a

daily basis, monitoring of ongoing cases pertaining to these issues, and conclusions from the webinar “How free is the free evaluation of evidence?”

By studying legislation and case law, Civil Rights Defenders has been able to determine the principles for evidence management applied in Sweden as well as the legal framework for remedies against violations of rights in the procedural rights directives.

Since there are few legal rules in this area, a mapping of relevant legal cases has contributed to a greater understanding of how the Swedish system works. Civil Rights Defenders has identified roughly ten court cases dealing with the specific issue of procedural rights violations that have resulted in evidence. Due to the fact that there are few precedents relating to the issue, court of appeal and district court judgments have also been reviewed. Civil Rights Defender’s selection of legal cases has been broader than the questions guiding the project and also includes case law dealing with bans on evidence that were not preceded by rights violations. These legal cases are out of principle important in order to understand how issues of evidence are generally approached by Swedish courts.

Because the legal position in this area is not clear, it has also been important to monitor ongoing cases that may affect the development of the law. Civil Rights Defenders has thus monitored a number of ongoing criminal cases relevant to the questions guiding the project, including:

- Supreme Court Case B 6137-20,
- Supreme Court Case B 6197-20,
- Svea Court of Appeal Case B 4665-20 (Supreme Court Case B 4175-20),
- Västmanland District Court Case B 5279-18.

In the summer of 2020, fifteen interviews were also conducted with judges, prosecutors, and defence lawyers in order to gain a practical perspective on these issues. All of the judges interviewed currently work in district courts. All of the lawyers regularly work with criminal cases; for three of them, it is their main focus. Among the prosecutors interviewed, several work operatively (with individual cases) while some work at the Prosecution Development Centre with methodological and legal development. The interviews were conducted with individuals working in different parts of Sweden, including Stockholm, Uppsala, Malmö, and Linköping. The interview questions had been circulated to Civil Rights Defenders and other Fair Trials partners in order to achieve greater convergence among the national studies (see Appendix 2 containing Fair Trials’ interview templates). Civil Rights Defenders has adjusted the questions somewhat in order to adapt them to a Swedish context. The interviews were largely conducted online and took on average ca one hour.

The webinar “How free is the free evaluation of evidence?” brought together defence lawyers, prosecutors, and judges to discuss the questions guiding the project. During the webinar, participants watched presentations by a researcher, a prosecutor, and a defence lawyer speaking about evidentiary proceedings from their different perspectives. This opportunity provided further knowledge of evidentiary proceedings and procedural guarantees in criminal cases, and highlighted the challenges for and knowledge gaps of individual judges, prosecutors, and lawyers in this matter.

3 LEGAL AND INSTITUTIONAL BACKGROUND

3.1 THE SWEDISH CRIMINAL JUSTICE MODEL

Swedish criminal proceedings are an adversarial process between two parties independent in relation to the court. The defendant is represented by an independent public defender. The adversarial principle means that all parties are to be heard on equal terms in the process. The court is not one of these parties presenting an argument; instead, it listens to what each party has to say and must not assist either party. On the basis of the arguments presented by the parties, the court adjudicates the case. The process also includes elements of an inquisitorial legal system. This is expressed in the court's obligation to ensure that each case is investigated according to what its nature requires and that irrelevant matters are not presented, in accordance with 46:4 of the Swedish Code of Judicial Procedure (1942:740) (RB).

The basic principles governing Swedish procedural law are the principles of oral proceedings, concentration, immediacy, and best evidence. From the principle of concentration, it follows that the case should be prepared in such a way that it can be completed in one hearing and without unnecessary interruptions (46:11 RB). The principle of oral proceedings, expressed in 46:5 RB, means that as a general rule all evidence must be brought before the court orally. Under this provision, parties may submit or read out written submissions or other written statements only if the court finds that it would facilitate the understanding of a statement or otherwise be of advantage to the proceedings. In accordance with 46:6, fourth paragraph, RB, evidence may be presented with reference to audio and video recordings and other documents in the case, if the court finds it appropriate.

The principle of immediacy means that evidence which has not been presented during the main hearing (either presented orally or invoked) cannot be used as grounds for a judgment (30:2 RB). It is up to the prosecutor to decide which evidence is to be invoked in court and presented at the main hearing. Thus, material gathered during the preliminary investigation does not automatically become part of the trial materials in court. As a result of the principle of best evidence, examinations (both of the suspect and of any witnesses) during the main hearing take precedence over interrogations and interviews conducted during the preliminary investigation. This means that, as a general rule, interrogations and interviews conducted during the preliminary investigation should not be invoked in court (35:14 RB).

In 2021, the government proposed, through a draft bill submitted for review by the Swedish Council on Legislation, to change the principle of immediacy so that evidence from the preliminary investigation stage would weigh more heavily in the court's evaluation of evidence than it does today. The bill is part of a wider effort by the government to streamline the prosecution of criminal offences, as it is thought that prosecutors have insufficient tools to curb serious organised crime. In public debate, it has been argued that serious criminals exploit the principle of immediacy by remaining silent throughout the preliminary investigation and then adapting their version of the story to the prosecution's evidence after gaining access to the trial materials. If implemented, the amendment would affect all criminal cases and not just serious crimes. At the time of writing (April 2021), the draft bill, "Expanded possibilities for

the use of early interrogations”, is under review by the Council on Legislation. Because the bill would mean that interrogations and interviews from the preliminary investigation can be of greater importance, it is vital to ensure that procedural rights are fully upheld at the preliminary investigation stage. In this context, the present report becomes particularly useful as it examines, among other things, the extent to which investigating authorities and courts verify that procedural rights are upheld in criminal proceedings.

3.2 ACTORS IN CRIMINAL PROCEEDINGS AND THEIR ROLE IN EVIDENTIARY PROCEEDINGS

3.2.1 The court

The role of the court in evidentiary proceedings is rather minor and normally limited to the evaluation of evidence invoked by the parties. As a starting point, the court must evaluate all evidence invoked by the parties and no evidence has a predetermined value. In criminal cases involving public prosecution, the court may gather its own evidence (35:6 RB). However, this rarely happens in practice.

There is no explicit obligation for the court to verify whether evidence has been obtained correctly. Instead, it is up to the parties to request the rejection of evidence invoked in the trial, after which it is up to the court to decide on the matter. If evidence is rejected, the court will not take note of its content. However, rejection of evidence rarely occurs in practice, see chapter four, “Evidentiary Rules”.

During the preliminary investigation, the role of the court is even more limited. A witness examination before a court can take place already during the preliminary investigation, if the witness refuses to comment on an important circumstance during questioning or if it is otherwise of particular importance for the investigation to obtain the testimony (23:13 RB). The court may also hear evidence before the main hearing if the evidence is otherwise at risk of being lost (23:15 RB).

The court has the exclusive right to order certain coercive measures during the preliminary investigation, including secret coercive measures (27:21 RB). However, a prosecutor may make a preliminary decision on the use of coercive measures (except bugging) pending the court’s decision if the latter would entail a significant delay in the investigation. The court also has the power to issue certain types of search warrants, including search warrants for service of a writ of summons in criminal proceedings. It is always a court that appoints the public defender.

A judge is prevented from adjudicating a case if they have previously taken a position on the question of guilt (4:13 p. 8 RB). However, this does not apply to coercive measures, wherefore the same judge may order coercive measures and then rule in the case. There is no clear rule on this, but conversations with judges indicate that it is customary to try to avoid having the same judge decide on secret coercive measures and then adjudicate the case. It also happens that the same judge decides on the question of whether to issue a detention order and then adjudicates the case.

3.2.2 The prosecutor

The prosecutor leads the preliminary investigation, decides whether to initiate legal proceedings, and represents the state in criminal cases. The prosecutor and the police have a responsibility to ensure the legal certainty of the investigation and must, according to 23:4 and 45:3a RB, carry out their duties objectively, which involves an obligation to also include evidence that may indicate the suspect's innocence. This also means that the prosecutor has an obligation to report any shortcomings in the investigation to the court, such as whether the evidence was gathered in an unlawful manner or if the procedural rights of the defendant have been infringed. If this does not happen, it may affect how the court later evaluates the evidence presented during the main hearing (Interview Summary 2020, p. 7 ff.). Any law enforcement activities prior to a preliminary investigation must also be conducted objectively (23:4 RB).

Either a police officer or prosecutor can act as lead investigator. The police are usually in charge of the investigation during the reconnaissance phase and in cases of less serious crime. The prosecutor leads the preliminary investigation in such cases where, for example, the suspect is in custody, in cases involving juveniles, or in the case of serious or complex crime. The prosecutor normally takes over the investigation when someone becomes suspected on reasonable grounds, and at the very least when legal proceedings are initiated. If the prosecutor is lead investigator, they direct the preliminary investigation and may hire a police assistant or instruct a police officer to take investigative measures (23:3 RB).

It is the lead investigator who has the authority to decide on coercive measures. If a prosecutor leads the preliminary investigation, they are thus the one to make that decision. If the legal grounds for the use of coercive measures are unclear, or if a measure is very extensive or interventional, the matter may be referred to the prosecutor even if a police officer is lead investigator. In practice, the question of whether to use coercive measures is fairly often handed over to the prosecutor for review. The prosecutor has exclusive power to make decisions about the suspect's arrest (24:6 RB), permission for secret coercive measures pending the court's decision (27:21a RB), as well as the seizure of mail pending the court's decision (27:9a RB), (Bring et al. 2019, p. 30).

The primary task of the prosecutor is to initiate legal proceedings and represent the state in criminal cases where the prosecutor must prove that a crime has been committed. In the case of crimes subject to public prosecution, it is primarily the prosecutor who is responsible for bringing an action. If it is considered necessary from a general point of view, the prosecutor may in some cases also bring an action in cases that otherwise fall under private prosecution, in accordance with e.g. 5:5 the Swedish Penal Code (1962:700). Here, too, the prosecutor must be objective and consider whether something comes to light that changes the state of the evidence.

There is no regulation stating specifically that the person in charge of the investigation must ensure that the evidence has been lawfully obtained. Interviews with actors in the judicial system indicate that the general assumption is that the rules have not been violated, unless, for example, the public defence counsel points to an error (Interview Summary 2020, p. 8). Often the prosecutor does therefore not assess the legality of the evidence provided by the police. However, the prosecutor may refrain from using certain evidence if there are suspicions that it was obtained in an incorrect way. One way for prosecutors to get around

questionable evidence is to produce more evidence that supports the same claim, but which has been obtained in a lawful manner (Interview Summary 2020, p. 7 ff.). The prosecutor's duty of objectivity could be seen as a means to ensure that procedural rights are guaranteed, but the legislation lacks an explicit provision on who is responsible for ensuring the rights of suspects during the preliminary investigation. In view of the current division of roles between the police and prosecutor, however, it should be the lead investigator who is responsible for ensuring that these rights are upheld during the preliminary investigation – that is, in practice most often the prosecutor.

3.2.3 The police

Once a report that a crime has been committed has been filed, the police make an assessment of the possibilities for investigating that crime. If the police consider the possibilities for solving the crime too limited, the case may be closed without action. Otherwise, a preliminary investigation is opened. As outlined above, the prosecutor or the police can take charge of the preliminary investigation (as lead investigator). Preliminary investigations into crimes of a simple nature are led by the police, who hand over the material from the preliminary investigation to the prosecutor for a decision on whether to initiate legal proceedings.

If the lead investigator is a police officer, they alone are responsible for evidentiary proceedings during the preliminary investigation phase. If so, the police carry out the practical gathering of evidence, such as interviews, forensic examinations, and other investigative measures. As lead investigator, the police have the same power to use coercive measures as the prosecutor. If the prosecutor is lead investigator, a police officer may still take investigative measures if there is an urgency and so-called imminent danger. In non-urgent cases, the police are allowed to decide on forms of investigation involving the least violation of privacy without permission from the lead investigator, such as examination of publicly available spaces or other indoor areas (28:10 RB; SOU 1995:47 p. 320).

3.2.4 The defence counsel

The accused has a right to represent themselves in criminal proceedings, to request a public defence counsel, or to hire a private lawyer. The work of a public defence counsel is paid for with state funds. However, if the accused is convicted of the crime, they will be liable to repay the state for all or part of the costs, depending on their income.

A public defence counsel shall be appointed at the request of the suspect if they have been arrested or detained. A public defence counsel shall also be appointed at the request of a person suspected of a crime for which the range of punishment prescribes six months in prison or more (21:3a RB). In addition, according to the same section a public defence counsel must be appointed if there are special reasons, for example if the criminal investigation or choice of penalty is complex or taking the individual's personal circumstances into account.

The appointment of a public defence counsel is decided by the court (21:4 RB). Lawyers shall primarily be appointed as public defence counsel. If there are special reasons, a person without the title of lawyer may be appointed (21:5 RB). The provision states that the court must, as far as possible, comply with the individual's wishes as to who should be

appointed their public defence counsel. As far as private defence counsel is concerned, there is no requirement for them to be a lawyer. In practice, legal representatives in criminal cases are usually lawyers who have been appointed as public defence counsel; that is, individuals usually choose to request a public defence counsel if they are entitled to do so.

The defence counsel is involved in the evidence-gathering process as soon as they have been appointed. According to the law, defence counsel may make requests, take measures to safeguard their client's rights (21:8 RB), and conduct their own evidence gathering. During the preliminary investigation, the defence may request the lead investigator to include certain evidence in the investigation, such as photographs of the crime scene or special expert opinions. The lead investigator then decides whether or not the evidence is necessary for the investigation. A negative decision can be appealed to a senior prosecutor or to a court. However, the request by the defence is typically granted as it is also the prosecutor's responsibility to ensure a satisfactory preliminary investigation. If the investigation is flawed, it may be advantageous for the defence to question gaps in the investigation at the main hearing so that the prosecutor's evidence is attributed a lower value (Interview Summary 2020, p. 5 f.)

In order to best represent their client's interests, the defence counsel needs to study the preliminary investigation and find out what evidence has been obtained in the investigation. Information obtained during the preliminary investigation remains confidential for the duration of the investigation, in accordance with 18:1 and 35:1 the Public Access to Information and Secrecy Act (2009:400). As a general rule, the suspect has a right to access the information; however, under 23:18 RB, that right is limited to such information that the suspect can access without negatively affecting the investigation. In practice, the defence's insight into the evidence may therefore be limited until the final serving, which according to 23:18a RB must take place before an action is brought, which poses a challenge for the defence's own gathering of evidence. The time available for the defence to familiarise itself with the preliminary investigation before the main hearing can sometimes be brief, which further complicates the defence's own gathering of evidence (Interview Summary 2020, p. 6). New evidence can be added at all stages of the criminal proceedings until the judgment becomes final. In interviews with prosecutors, the problem of late evidence was highlighted, that is, when the defence presents new evidence at a late stage in the trial. In those cases, the prosecutor must assess whether the preliminary investigation should be reopened. The emergence of new evidence may delay and prolong criminal investigations, which is particularly serious if the suspect is being held in custody (Interview Summary 2020, p. 7 ff.).

Since certain evidence can only be obtained by the authorities (such as forensic investigations), it can be difficult for the defence to gather evidence without the prosecutor's knowledge. This means that in some cases the defence refrains from gathering certain evidence out of concern that it may be used against the client (Interview Summary 2020, p. 5 f.). Another challenge described by lawyers in interviews with Civil Rights Defenders is that the defence may only be compensated for evidence gathering that results in evidence invoked in court, meaning that other evidence gathering is not reimbursed with state funds. This creates an imbalance in the possibilities for evidence gathering between the defence counsel and the prosecutor/police, who have greater resources for evidence gathering.

In interviews as part of the project, lawyers working as public defence counsel have stated that it is of particular importance in serious crimes that the defence provides its own

evidence, in particular where complex technical evidence is involved. At the same time, it may be relevant for the defence to provide its own evidence even in simpler cases. Several of the defence lawyers interviewed by Civil Rights Defenders argue that the lack of access to relevant evidence during the preliminary investigation is an obstacle to challenging the evidence. In particular, two lawyers point out that a lack of insight into the investigation makes it difficult to question evidence in connection with detention hearings (Interview Summary 2020, p. 6).

4 EVIDENTIARY RULES

4.1 THE PRINCIPLE OF FREE EVALUATION OF EVIDENCE

Swedish law is based on the principle of free evaluation of evidence, as expressed in 35:1 RB. The principle of free evaluation of evidence was introduced in Sweden when the new Code of Judicial Procedure entered into force in 1948. The old Code of Judicial Procedure was based on the legal theory of evidence which prohibited the use of certain evidence and meant that the probative value of different types of evidence was predetermined by law. This system required specific evidence, such as a certain number of witnesses, to prove that particular legal relations existed. Judges could not include all the evidence in their assessment, only the evidence that the law assigned probative value. The legal theory of evidence combined with a primarily written process was considered obsolete and not to lead to substantively true judgments, wherefore the current Code of Judicial Procedure introduced the free evaluation of evidence and a concentrated oral process.

The free evaluation of evidence includes both the free production and free evaluation of evidence. The free production of evidence means that the parties have a right to refer to any evidence they can obtain. The free evaluation of evidence means that the court must carry out a conscientious examination of all the evidence and that no evidence has a predetermined value. With the aim of achieving a substantively correct judgment, it is considered that the court should be able to obtain all relevant information (Mellqvist and Lindh 2020, p. 37). However, the court must respond to and consider any arguments put forth by the parties as to the value of the evidence, and the assessment of the probative value may be affected by evidence being unlawfully obtained. The *fruit of the poisonous tree* doctrine, which means that further evidence stemming from evidence unlawfully obtained should also be rejected, has never been applied in Sweden after the adoption of the new Code of Judicial Procedure.

The fact that unlawfully obtained evidence can be used as conclusive evidence in a conviction and be attributed a high probative value has been demonstrated in NJA 1986 p. 489. The case concerned a person charged with driving while intoxicated based on a blood sample taken by a laboratory assistant instead of a licensed nurse or doctor, as required by law. The Supreme Court found that high demands had to be placed on the probative value of the blood test as it had been gathered in breach of the law, but that in this case there was no reason to attribute a lower probative value to the test than if it had been administered correctly.

However, the principle of free evaluation of evidence is not an absolute, and there are certain limitations which mean that evidence can be rejected or may not serve as grounds for a conviction. Some of the restrictions are regulated by law, while others have come about through case law.

4.2 THE CODE OF JUDICIAL PROCEDURE AND OTHER LEGISLATION

One fundamental exception to the free evaluation of evidence can be found in 35:7 RB, which states that the court may reject evidence if the circumstance which a party wishes to prove is irrelevant to the case, if the evidence is not needed, if the evidence would clearly be ineffective, if the evidence could be produced at considerably less inconvenience or lower cost, or if, despite reasonable efforts, the evidence cannot be heard and the judgment should not be further delayed. Under 36:17 RB, the court must also reject questions that are leading, manifestly irrelevant, or confusing or otherwise inappropriate. The primary purpose of these rules is to weed out irrelevant evidence and create the conditions for a procedurally efficient trial.

There have been instances where courts have rejected evidence on the grounds that it is manifestly ineffective (35:7 3 p. RB) because it is contrary to the requirements of the ECHR. In the recently settled case B 4175-20, the Supreme Court clarified that “manifestly ineffective” means that it is clear that the evidence is completely without probative value. In general, it is difficult to comment on the probative value of the evidence ahead of its examination in the Supreme Court’s view. The scope for rejecting unlawfully accessed or obtained evidence under 35:7 3 p. RB should therefore be highly limited.

There are also evidentiary rules that target specific forms of evidence. With regard to hearings, it follows from the principles of immediacy and oral proceedings that questioning must generally be conducted orally during the main hearing. In accordance with 35:14 there is a general ban on written or recorded testimonies during the main hearing (so-called witness attestations). According to the same provision, a written account or audio recording of a testimony delivered by a person outside the main hearing may be invoked as evidence in the proceedings only if it is specifically provided for, if an examination cannot be conducted before the court, or if there are special reasons in view of the costs or inconveniences that an examination at or outside the main hearing may entail, what can be assumed to be established through such an examination, the importance of the story, and other circumstances. Furthermore, from 36:16 and 37:3 RB it is clear that previous statements by the witness or accused may only be invoked when the story at the main hearing differs from what has previously been said or when the witness or accused cannot or does not wish to comment during the trial. Exceptions to the ban on written witness attestations are also made for the taking of evidence abroad in accordance with 35:12 RB and the Act (1946:817) on the Taking of Evidence in a Foreign Court of Law, as well as for expert opinions in certain cases in accordance with 40:8 RB. Where the circumstances allow for a trial to go ahead without the presence of the defendant or the injured party, information previously given by them may be presented to the court in accordance with 46:5 RB.

Under 36:3 RB, relatives are exempt from the obligation to testify. Through case law, the Supreme Court has developed guidelines on the right not to incriminate oneself and one’s relatives. For example, previous interviews with a relative who does not wish to testify at the main hearing may not be read aloud (RH 1980:112; RH 1999:43). The right not to incriminate

oneself is linked to the right to information in situations where the individual is initially questioned as a witness but subsequently served with suspicion of a crime.

The Swedish Prosecution Authority's handbook on seizures also states that communication between the suspect and their relatives obtained in violation of the seizure ban in 27:2 RB is to be excluded from the investigation (Swedish Prosecution Authority 2015, p. 36). The Prosecution Authority has also issued guidelines on when and how infiltration and entrapment to secure evidence may be used (RÅR 2016:1). In an interview with Civil Rights Defenders, a prosecutor stated that, in the case of serious crime, evidence is more likely to be invoked even if it has been unlawfully obtained.

Another ban on evidence is set out in 36:5–5a RB on the ban that applies in certain cases on examining witnesses who are legally bound by an obligation of secrecy. Under 36:5 RB, lawyers, doctors, and psychologists, among others, may only be examined as witnesses if authorised by law or if consented to by the person for whose benefit the duty of secrecy applies. Under the same provision, attorneys, counsel, or defence counsel may be heard as witnesses concerning information which has been entrusted to them for the performance of their duties only if the party so permits.

Swedish law contains certain restrictions on the right to use surplus information. Surplus information is, according to 27:23a RB and section 28 of the Act (2020:62) on Covert Surveillance of Data, such information that relates to a crime other than the one which led to the use of coercive measures, and which has arisen from the use of secret coercive measures. This restriction involves a prohibition on opening a criminal investigation and, in some cases, on using the information in any way for the purpose of investigating crimes. However, there are exceptions to this ban. For example, a preliminary investigation may be initiated based on surplus information resulting from bugging, provided that the penalty prescribed for the offence is at least three years in prison.

As stated, Swedish law does not contain any provisions governing how police and prosecutors should treat unlawfully obtained evidence, and there is no obligation to evaluate the legality of a piece of evidence before it is invoked in court. The provisions mentioned in this chapter provide a kind of framework for the investigating authorities in criminal cases, but it is worth noting that a violation of these rules does not automatically lead to evidence being rejected. This is a consequence of the principle of free evaluation of evidence. Admittedly, there are examples of strong protection, including the ban on reading out interviews with relatives in court unless they consent. At the same time, it is not inconceivable that evidence gathered in breach of any of the provisions outlined above would be accepted on the basis of the free evaluation of evidence. Ultimately, courts have a great deal of leeway to determine whether evidence resulting from a rule violation should be allowed in criminal proceedings.

4.3 THE IMPACT OF THE ECHR

4.3.1 Rejection

The ECHR applies as law in Sweden, and under 2:19 Instrument of Government (RF), laws or regulations may not be issued in violation of Sweden's obligations under the convention. Swedish courts must thus comply with the requirements of Article 6 ECHR, which imposes a limitation on the free evaluation of evidence. The European Court of Human Rights has in

several cases ruled that it is the proceedings as a whole that is the subject of its assessment, rather than individual elements of evidence production, and that rules on the admissibility of evidence are primarily a matter for each national legal system (*Schenk v. Switzerland*, *Teixeira de Castro v. Portugal*).

However, the European Court of Human Rights states that under certain conditions the procedure may be rejected automatically (*Gäfgen v. Germany*; *Ibrahim and Others v. the United Kingdom*). This applies to cases where evidence has been obtained through torture, or where oral statements are the result of inhuman or degrading treatment under the definition in Article 3 ECHR. However, it is possible to use physical evidence obtained as a result of inhuman or degrading treatment without the proceedings being deemed unfair as a whole. This reasoning entered into Swedish case law through NJA 2011 p. 638. In the case, a police infiltrator engaged in comprehensive entrapment to secure evidence, which involved elements of threat and resulted in the conclusive evidence against the accused. The Supreme Court held that, in light of the principle of free production of evidence, evidence may only be rejected under Article 6 ECHR as an exception, where information has been obtained in breach of an absolute prohibition such as that laid down in Article 3 ECHR. The rule that rejection may only be used as a legal remedy in exceptional cases has been further confirmed in Case B 4175-20, in which the Supreme Court ruled on 21 April 2021. See more below.

4.3.2 Evidence that may not serve as grounds for a conviction

Normally, evidence gathered in breach of procedural rights other than Article 3 ECHR can thus not be rejected. Instead, the European Court of Human Rights applies a so-called test of overall fairness, that is, it examines whether the trial can be considered fair as a whole. In this report, we write about how evidence contrary to the right to a fair trial “must not serve as grounds for a conviction.” In practice, however, this means that the court evaluates the evidence, which remains among the trial materials throughout the process. It could therefore be said that, in this situation, the court denies the evidence probative value. However, the expression “must not serve as grounds for a conviction” appears in court practice in parallel with statements saying that evidence should be attributed high/low probative value. This is an indication that courts differentiate between the notion that certain evidence “must not serve as grounds for a conviction” and the evaluation of evidence. If evidence must not serve as grounds for a conviction, it often means that rights protected in the ECHR have been violated in the gathering of evidence, and the assessment is made on the basis of the requirements of the ECHR. Where certain evidence is deemed to render the proceedings unfair as a whole, that evidence must not be part of the proceedings, irrespective of the probative value attached to it, with an effect similar to the evidence being rejected. Since Swedish law generally allows for all kinds of evidence, there is also no precise terminology around the rejection of evidence, which may explain the ambiguities regarding the meaning of these concepts in case law.

The European Court of Human Rights has clarified what a review of whether a trial has been fair might look like. An overall assessment may take into account whether the accused is particularly vulnerable (for example, because of age or disability), whether the question of guilt is decided by professional or lay judges, whether the defence has been given the opportunity to challenge the evidence, whether the origin of the evidence has been taken into account in the evaluation of evidence, and whether the evidence was conclusive for a conviction (*Ibrahim and Others v. the United Kingdom*).

Swedish case law on the right to a fair trial is largely based on the positions of the European Court of Human Rights and provides an overview of the criteria to be taken into account when examining whether certain evidence may serve as grounds for a conviction. In Supreme Court Case B 4175-20, which concerned the right to information and the right to a lawyer, the Supreme Court held that in cases where the right to a lawyer has been infringed, the evidence may not normally be rejected in full. However, when the evidence is assessed, the requirements arising from the right to a fair trial must be taken into account. The presumption against the trial being fair weighs heavily in the overall assessment, i.e. there should be strong arguments as to why the right to a fair trial has not been irrevocably undermined (*Ibrahim and Others v. the United Kingdom*). In the case, the Supreme Court broadly follows the reasoning of the European Court of Human Rights on the criteria applicable when examining whether a trial has been fair. However, in relation to the actual circumstances, the Supreme Court considers that, in order to break the presumption, the evidence must not be conclusive (p. 32). This is not fully in line with the reasoning of the European Court of Human Rights, which contains a number of criteria that should be taken into account in the assessment.

The test of overall fairness may therefore mean that certain evidence may not serve as grounds for a conviction. This view is supported by existing case law, for example in RH 2017:38, where the Court of Appeal for Northern Norrland, with reference to the ECHR, chose not to take into account information that emerged in a police interrogation in which the suspect's right to a lawyer was not upheld. In Svea Court of Appeal Case B 9446-13, it was also deemed that evidence obtained in breach of the right to information or the right to a lawyer could not be used as a grounds for a conviction. In this case, the defendant was a child. No far-reaching conclusions can be drawn based on one court case, but it indicates that the rights to information and to a lawyer are stronger for minors than for adults, as the courts have taken into account the age of the accused in their assessment of the of evidence (see Appendix 1 for a more detailed description of the case).

In accordance with the case law of the European Court of Human Rights, the Supreme Court has stressed the importance of giving the defence an opportunity to challenge the evidence. In NJA 2011 p. 638, the Supreme Court stated that the defence must be given the opportunity to make observations on the value and durability of the evidence and to submit evidence in rebuttal. In NJA 2009 p. 475, a retrial was granted partly because the defence had not been given the opportunity to present their arguments as to whether the actions by the police constituted unlawful entrapment.

4.4 EVALUATION OF EVIDENCE AND REDUCTION OF SENTENCE

Because Swedish law generally allows evidence even if it has resulted from a rights violation, the court is faced with determining the probative value of such evidence relatively often. There are no specific rules for how the value of the evidence should be determined. Courts often rely on their knowledge, past experience, and Supreme Court precedents that clarify how different types of evidence should be assessed in different contexts.

In the aforementioned NJA 1986 p. 489, a blood sample which had not been obtained in the manner prescribed by law was attributed high probative value and was relied on as conclusive evidence in a conviction. In NJA 1998 p. 204, the Supreme Court allowed a video recording of unclear origin as evidence, but found that, in the absence of further investigation into the origin of the recording, it could not be completely ruled out that the tape did not in fact show

what had really happened. The Supreme Court thus ruled that the video recording neither alone nor in conjunction with the rest of the investigation showed that the accused had committed the act under prosecution and the action was dismissed. In RH 2011:14, which concerned a speed limit violation, a form that had not been filled out correctly was allowed as evidence. However, the inaccuracies resulted in the evidence not being deemed to have sufficient probative value, and the prosecution was therefore dismissed.

In NJA 2011 p. 638, the Supreme Court found that a confession achieved through police entrapment was improper. However, the court held that the permissibility of the police action was only of indirect importance. Instead, the crucial question was whether the trial had been fair as a whole. In the case, the Supreme Court held that the defendant's statement, in which they assumed responsibility for the death of the injured party and which was obtained through police entrapment, must be attributed very low probative value. However, the entrapment allowed the police to obtain additional evidence (including finding the victim's body), which was sufficient to prove the charge. In addition, the Supreme Court noted that the defence had ample opportunity to influence the value attributed to the evidence and to make comments. Overall, a conviction could be made even though the investigation involved improper measures by the police.

In NJA 2007 p. 1037, however, the prosecution was not successful, as an act of criminal entrapment by the police was deemed to irrevocably undermine the rights of the defendant. Criminal entrapment has thus in itself been considered an obstacle to prosecuting and convicting a person. In RH 2010:62, however, the probative value was not affected by the fact that the evidence was the result of carefully planned and very far-reaching deception of the accused, who had provided information about their guilt during a job interview in the Netherlands staged by the police. This, despite the court finding that the interview had not been documented in a manner required in ordinary police interrogations and there was no possibility for the court to verify in hindsight how the entrapment to secure evidence had been carried out.

Legal remedies against evidence contrary to the right to interpretation/translation vary depending on whether the court deems the inadequate interpretation/translation to have affected the individual's ability to participate effectively in the trial and to present their version. Deficiencies in interpretation/translation which the court deems not to have affected the outcome of the case were assessed in the context of the court's evaluation of evidence (the Court of Appeal for Southern Norrland's judgment in Case B 1457-16). If the deficiencies are serious, these have been considered to constitute procedural errors and the case has been remanded to a lower court for reconsideration (Svea Court of Appeal's judgment in Case B 8261-19).

In NJA 1991 p. 512, the Supreme Court stated that, if a witness is not present at the trial, their information must be evaluated with great caution. In the same case, the Supreme Court further reduced the probative value, as the informant received a mitigation of sentence in the United Kingdom for information he provided to Sweden and the information differed in part from the defendant's version.

If someone is found guilty of a crime in spite of elements of impropriety in the investigation, the court can decide on a mitigation of sentence. In NJA 2011 p. 638, in which the elements of impropriety involved a confession obtained through entrapment to secure evidence, the Supreme Court reduced the sentence from ten to eight years. In RH 2010:62 mentioned

above, however, the Court of Appeal for Southern Norrland did not consider the rights of the accused weakened to such an extent that there were sufficient grounds to reduce the sentence.

5 EVIDENTIARY REMEDIES

5.1 WHAT IS AN EFFECTIVE LEGAL REMEDY?

Legal remedy is a broad concept. A remedy can be of a procedural (such as which courts the individual can turn to) or substantive nature (the type of action that can be pursued). Often, an effective legal remedy includes the possibility to subject a rights violation to judicial review. When dealing with issues concerning the rejection of evidence, the European Court of Human Rights proceeds from the assumption that the remedy should ensure that the trial as a whole is fair.

In this report, we take as a starting point the purposes that legal remedies are intended to achieve in order to be considered effective. Remedies against rule violations aim to, for example, offer the individual redress – that is, give the individual the same standing they would have had if the violation had not occurred – or to induce law enforcement agencies to comply with rights legislation and prevent procedural violations in the future. In light of these objectives, it is not sufficient for compensation for a violation to take place outside the criminal proceedings, as this does not restore the situation to the circumstances prior to the violation. This is why the present report focuses on evidentiary remedies.

5.2 IMPLEMENTATION OF THE PRINCIPLE OF AN EFFECTIVE REMEDY IN SWEDEN

In connection with the implementation of the procedural rights directives, Sweden amended a number of provisions, including in RB. However, it was not considered necessary to introduce any specific adjustments to meet the directives' requirements for an effective remedy (gov. bill 2012/13:132; gov. bill 2013/14:157; gov. bill 2015/16:187; gov. bill 2017/18:58; gov. bill 2018/19:42; gov. bill 2018/19:71). The legislative history deals only with the issue of an effective remedy in relation to other rights in the directives, in passing, or not at all. For example, with regard to the directive on the right to a lawyer (2013/48/EU), the government deemed there to be a number of remedies available in the event that the right to contact a third party is not respected, including appeal and the possibility to turn to JK for voluntary settlement of claim. The bill implementing the directive on the presumption of innocence contains a specific chapter on remedies, in which the government deems that no legislative changes are needed to implement the provisions of the directive. Among other things, the government argues for its position by referring to the possibility of appeal, extraordinary remedies, reduction of sentence, the right to raise an objection of disqualification during the trial, and compensatory remedies such as damages.

5.3 EVIDENTIARY REMEDIES IN A SWEDISH CONTEXT

5.3.1 Exclusion of evidence during the preliminary investigation

There is no provision regulating at what stage of the process the rejection of evidence should be considered. As a result, evidence may be excluded as early as during the preliminary investigation. Interviews conducted by Civil Rights Defenders with defence lawyers and prosecutors show that the police or prosecutor sometimes chooses to exclude evidence from the investigation if it becomes known that the evidence has been obtained in an unlawful manner, which means that the material is put in the so-called slush pile or cut altogether. Material in the slush pile is not handed over to the court when a prosecution is commenced. Even if the material remains in the preliminary investigation report, the court shall not be made aware of it unless it is invoked by the prosecutor. On the other hand, the prosecutor can invoke the contents of the preliminary investigation report at any time throughout the trial and this material also becomes public when it is submitted to the court.

The defence may request the lead investigator to remove certain evidence. This may include house searches conducted in breach of the rules or seizures carried out despite a seizure ban. However, the investigating authorities do not have an obligation to exclude unlawfully gathered evidence, and one of the defence lawyers interviewed by Civil Rights Defenders argues that prosecutors have a fair amount of discretion in removing evidence as a result of the principle of free evaluation of evidence. The indication Civil Rights Defenders received in interviews with actors in the judicial system is that it is easier to exclude evidence at the preliminary investigation stage than to succeed with a motion to have the evidence rejected in court.

5.3.2 Motion to reject and possibility to retry/appeal

As has been mentioned, the rejection of evidence can be requested as early as during the preliminary investigation. Once the trial has begun, the defence may request the court to reject evidence that was not left out at the preliminary investigation stage. If a motion to reject is requested, the court must decide whether or not to reject the evidence. A decision on rejection can also be made during the main hearing where the question of guilt is being considered (see, for example, Solna District Court's judgment in Case B 10453-19). A decision on the question of rejection can be appealed in connection with an appeal of the judgment.

As a general principle, all decisions in criminal cases can be retried (RåR 2013:1), including decisions to allow/reject evidence. If the decision has been made by the Police Authority or another authority conducting criminal investigations, the decision may be reviewed by a prosecutor at a local public prosecution office. A decision by a prosecutor can be retried by a director of public prosecution or deputy director, whose decision can, in the final instance, be reviewed by the Prosecutor-General. Some decisions are appealed to the district court, such as decisions on seizures or not to issue a restraining order. Decisions on confidentiality issues cannot be retried by the police/prosecutor (RåR 2013:1).

Decisions and judgments by a district court are appealed to the court of appeal, whose decisions and judgments are in turn appealed to the Supreme Court. The Supreme Court requires leave to appeal, which in accordance with 54:10 RB is granted only if it is important

that the appeal be heard for purposes of guiding the application of the law, or if there are exceptional grounds for review.

5.3.3 Evaluation of evidence

If the court chooses not to reject the evidence, the party may argue that certain evidence must not serve as grounds for a conviction as it undermines the defendant's right to a fair trial. In addition, the defence may argue about the probative value of the evidence, for example by arguing that the probative value should be affected by the evidence being unlawfully obtained. If so, the court takes note of the evidence referred to and is obliged to consider the arguments by the defence. The defence may also argue that the sentence should be reduced as a rights violation has occurred.

5.3.4 Setting aside a judgment and remanding a case to a lower court

Setting aside means that the court dismisses the value of a lower court's judgment without issuing its own. It may result in the case being dismissed or referred back to a lower court for reconsideration. Setting aside and remand are applicable when a **procedural error** has been committed during the original trial or when an appeal gives rise to an **investigation** not carried out at first instance (Welamson and Munck 2016, p. 113).

A procedural error is defined as an infringement or incorrect application of a procedural rule. A procedural error is considered to have occurred if the case was entertained in spite of a procedural impediment, if the judgment was given against someone who was not properly summoned nor appeared in the case, if the rights of a person who was not a party to the action have been adversely affected by the judgment, or if it is not clear from the judgment how the court has ruled in the case (59:1 p. 1-3 RB). Setting aside and remand may also be applicable in other cases of procedural error if the error has affected the outcome of the case and cannot be remedied in the court of appeal without substantial inconvenience (51:28 RB). It has previously been deemed that issues relating to, for example, quorum are not a remediable error, while failure to examine certain circumstances or evidence can be remedied by assessing the circumstance or evidence in a higher court (Welamson and Munck 2016, p. 118). If the rights violation can be attributed to a failure to examine certain circumstances/evidence, it is thus possible not to remand the case and remedy the error directly in the higher court instead.

Remand can also become relevant in cases where the lower court has not ruled on an issue that needs to be assessed in order to adjudicate the case. One such issue may be that the court needs to evaluate new evidence or assess issues within the context of a new objection not previously assessed by the court of first instance.

Procedural rights violations resulting in evidence may constitute a procedural error that causes the case to be referred back to a lower court. In the Svea Court of Appeal Case B 8261-19, for example, the district court's judgment was set aside and the case was referred back to the district court for further consideration due to inadequate interpretation. The court of appeal found that one of the interpreters had not fully understood the questions asked and was unable to reproduce the defendant's answers. Because the case was largely based on information provided by the defendant and the case was relatively complex, the court of appeal deemed that inadequate interpretation could jeopardise the defendant's right to a fair

trial. In NJA 2007 p. 75, which did not concern evidentiary issues but does show that inadequate translation may constitute a procedural error, the Supreme Court concluded that competent service could not be considered to have taken place. In the case, the defendant, whose mother tongue was not Swedish, had been in need of an interpreter in the criminal case and the summons to the main hearing had been difficult to interpret.

5.3.5 Extraordinary remedies

Extraordinary remedies are remedies that may be used even after the deadline for appeal has expired and the decision or judgment has become final. Swedish law provides for the following extraordinary remedies: retrial, restoration of expired time, and complaint of a grave procedural error (58-59 RB). A complaint of a grave procedural error becomes relevant when a serious procedural error affecting the outcome of the case has occurred, and a retrial may become relevant when new circumstances or evidence come to light after the verdict. Restoration of expired time can be used if a party to a case has not appealed in a timely manner but has a legal excuse.

Extraordinary remedies are generally intended for use in exceptional cases. Evidence gathered or accessed incorrectly does not in itself constitute grounds for the use of extraordinary remedies. However, if any previously unknown deficiency in the evidence emerges only after the trial, it may lead to a retrial if the deficiency means that the conditions for extraordinary remedies are met.

5.4 AN EFFECTIVE REMEDY – PERSPECTIVES FROM ACTORS IN THE JUDICIAL SYSTEM

In general, the prosecutors, judges, and defence lawyers interviewed by Civil Rights Defenders are of the opinion that the national legal system contains the necessary procedural safeguards and otherwise fulfils Sweden's international obligations (Interview Summary 2020, p. 11-12 and 17). Their conception of legal remedies is generally broader than the one on which this report has been based and also includes different types of compensatory remedies such as the possibility to receive damages. In addition, different types of enforcement mechanisms, such as filing a police report or complaining to a supervisory authority, are considered to contribute to the individual achieving effective redress if a rights violation has occurred (Interview Summary, p. 11-12). A particular wrongdoing being highlighted in criticism from a supervisory authority is often seen as an effective remedy, since it is assumed that the authority it concerns will comply with the decision and not repeat the same violation in the future. At the same time, defence lawyers have expressed a certain scepticism about the ability of supervisory authorities to provide redress. They say that remedies outside the criminal trial itself cannot be effective because they have no impact on the criminal case.

In general, those interviewed by Civil Rights Defenders did not reflect specifically on what the EU requirement for an effective remedy means for the Swedish criminal trial process. When it comes to avenues of redress, the actors in the judicial system are more likely to rely on tools contained in national law; the remedy that interviewees had the best grasp of was argumentation on the question of the evaluation of evidence. At the same time, Civil Rights Defenders has seen in its investigation that defence counsels have used arguments based on

European law (primarily the ECHR) and thus invoked evidentiary remedies, such as the rejection of evidence.

Finally, the defence lawyers who were interviewed point to a number of problematic areas which make access to an effective remedy more difficult in the context of a criminal trial. Among others, these include limitations on information that can be obtained while the preliminary investigation is ongoing, which also affects the possibility for the defence to gather its own evidence (Interview Summary 2020, p. 11).

5.5 ARE SWEDISH LEGAL REMEDIES EFFECTIVE?

5.5.1 Evidentiary remedies

As outlined in Chapter 4, rejection of evidence is only applied in exceptional cases in Swedish law. A study of the relevant case law shows that evidence not being allowed to serve as grounds for a conviction is not common either. Even though the European Court of Human Rights has made clear that the presumption against the trial's fairness weighs heavily in the overall assessment, case law and interviews with actors in the judicial system show that the scope for complete dismissal of evidence is not very extensive. Instead, this applies in special situations where the trial as a whole has been affected by the violations that have occurred. One possible exception is cases where the accused is a minor; if so, the procedural rights standard appears to be higher.

In most cases, the procedural infringement is considered in the context of the court's evaluation of evidence instead (Interview Summary p. 4, 12). In general, evidence resulting from a breach of the law or improper investigative measures shall be assessed with caution. However, the fact that evidence has been unlawfully accessed or obtained does not automatically lower the value of the evidence (NJA 1986 p. 489). The probative value may be affected if the requisite procedural safeguards are not respected, by ambiguity in the origins of the evidence, or by inaccuracies in the evidence. However, there is no fundamental impediment to attributing such evidence a high probative value.

Elements of impropriety in the investigation may also lead to a mitigation of sentence which, however, is not applied automatically when it has emerged that a procedural infringement has occurred either (RH 2010:62). In practice, it is up to the court to assess whether there are grounds for lowering the probative value or reducing the sentence. In that assessment, the court may rely on the criteria of the European Court of Human Rights for a fair trial, previous precedents, and its assessment of the extent to which elements of impropriety have affected the rights of the accused.

As a result of the principle of free evaluation of evidence, there is no regulation of remedies against procedural infringements. At the preliminary investigation stage, there is more or less no regulation on how the exclusion of evidence should be carried out in practice and it is often up to the lead investigator and the defence counsel to agree on a solution. What is more, the division of responsibilities between the police and prosecutor is not defined clearly in the legislation, as the legislation in this area is much too general. This makes it difficult in practice to determine who is responsible for ensuring that rule breaches and rights violations do not occur.

During the trial, the court has a great deal of discretion in matters of evidence. As a precondition for the free evaluation of evidence, there is no detailed regulation that determines in advance how evidence should be evaluated. Instead, regulating the court's decisions in matters of evidence is the European Court of Human Rights' standard concerning the ban on certain evidence, and that standard – of overall fairness – is not very high when it comes to restoring rights in criminal cases. At the same time, this system means that decisions on remedies may differ on a case-by-case basis and that it is not clear in advance what type of infringement may result in an evidentiary remedy. This is clear from the case law, as certain rights violations lead to evidentiary remedies (mitigation of sentence in NJA 2011 p. 638, remand in Svea Court of Appeal Case B 8261-19) while others do not (RH 2010:62, Court of Appeal for Southern Norrland's judgment B 1457-16).

When evidence is excluded during the preliminary investigation, rejected by the court, or not allowed to serve as grounds for a conviction, this means that the individual's rights can be restored. The latter, however, involves a less powerful form of redress, as the court hears the evidence in question and the assessment of the defendant's guilt may therefore be "tainted" by this knowledge. A reconsideration of the case upon remand also makes it possible to rectify the deficiencies that led to the judgment being set aside. On the other hand, the damage caused by evidence being accessed or obtained in violation of procedural rights cannot be fully repaired through evaluation of the evidence or a reduced sentence. However, they do provide some compensation to the individual for the violation that has occurred.

As this chapter has shown, the most powerful remedies are only applied to a low extent. Evaluation of evidence is the tool intended to ensure that the trial is fair as a whole, but in practice a rights violation does not necessarily lower the probative value. In addition, there are no clear criteria in Swedish law for when different types of remedies should be applied. Instead, this determination is entrusted to individual lead investigators or judges. It is therefore difficult to say that the Swedish system is predictable when it comes to evidentiary remedies and that individuals thus have access to an effective remedy that fully restores their rights.

5.5.2 Evidentiary remedies in combination with others

In addition to evidentiary remedies, the Swedish legal system offers a number of other ways to denounce violations outside the criminal proceedings. These include actions for damages, reporting a crime to the police, and disciplinary actions. In Sweden there are also a number of authorities that supervise legislative compliance, including JK and JO. These remedies form a natural part of the Swedish legal system and an important link in order to maintain balanced criminal proceedings. However, they do not fulfil the purpose of providing the individual with redress by restoring circumstances to their state prior to the violation. Instead, they are focused on identifying structural problems and preventing future violations. It is debatable whether these remedies, together with the evidentiary remedies, create a system that ensures a fair trial for the individual. Firstly, JO cannot change a judgment or decision, nor can it review claims for damages; it can only criticise the relevant authority or official. The criticism is intended to guide future application of the law by the authorities and does not offer rectification or redress for the individual. In addition, JO has limited resources and investigates far from all the reports it receives. Secondly, JO's effectiveness in practice has been questioned by lawyers interviewed by Civil Rights Defenders, who argue that JO decisions rarely lead to an actual change in the way the law is applied.

Non-evidentiary remedies have not been the focus of this report, wherefore it is not possible to account for other remedies in addition to JO in this section. However, based on the investigation undertaken within the context of the project, including interviews with actors in the judicial system, there are indications that the Swedish legal system does not provide an effective remedy against procedural violations in criminal cases, even in combination with non-evidentiary remedies.

6 CONCLUSIONS

Our examination of the legal position shows that, although evidentiary remedies do exist to some extent in Swedish law, it is rarely the case that the individual's rights are restored as though the violation had never taken place. The free evaluation of evidence has advantages in that it allows for differentiated assessments and substantively true judgments. However, the free evaluation of evidence is not sufficient to provide effective protection against procedural rights violations in criminal cases. The notion that it is sufficient for the trial to be fair as a whole is not unproblematic if there is no compensation for rule violations, especially with regard to the requirement for an effective remedy under EU law which requires effective redress in the event of a violation.

Given the scant regulation in this area and the high level of discretion for law enforcement parties, there is also a risk that assessments relating to legal remedies could differ on a case-by-case basis. The Swedish judicial system enjoys a high degree of trust from society. In other words, society generally trusts that the judicial system is able to determine in each case whether the trial has been fair and that appropriate remedies are being used. While the most blatant violations are more likely to be addressed by Swedish legal remedies, it is unclear how the vast majority of procedural violations are dealt with in criminal proceedings. It is questionable whether remedies that are not regulated by law are applied consistently and can therefore be considered effective.

Even though knowledge of EU law is growing, actors in the judicial system need to learn more about its legal requirements in criminal proceedings. The fact that there is little regulation in this area makes it difficult for actors in the judicial system to identify when the issue of an effective remedy against procedural violations should be raised in their work. For example, the majority of judges, prosecutors, and defence lawyers interviewed by Civil Rights Defenders argue that questions about the admissibility of evidence rarely arise and that questions of evidence do not usually take up much space during the main hearing. However, one lawyer, who has sought legal remedy for procedural violations, argues that it is not uncommon for questions about unlawfully obtained evidence to arise. In the interviews, prosecutors have largely referred to their duty of objectivity but have not been able to formulate how, concretely, they work to ensure that procedural rights are not violated. Even though actors in the judicial system fulfil their duty of objectivity, it is important that the procedure is not only impartial but also appears impartial to the individual, who may not have a high degree of confidence in the judicial system.

Checks and accountability are also impeded by the fact that the division of responsibilities between the police and prosecutor is not always clear. Furthermore, in the current model procedural bans are not underpinned by concrete sanctions to which officials may be subject

if they act in violation of applicable law. Since the general rule is that unlawfully obtained evidence is not automatically rejected, authorities have little incentive to be wary of measures that could potentially involve procedural rights violations. It is Civil Rights Defenders' assessment that the current system could be improved by providing investigating authorities with better incentives and conditions for complying with the rules that limit their powers in evidentiary proceedings.

Other remedies outside of the criminal proceedings can provide some redress for the individual and help prevent violations. However, this type of remedy has clear disadvantages for the individual. JO does not examine all the reports it receives and its decisions at best amount to criticism of the official or authority responsible, never financial compensation to the individual. It is therefore uncertain whether these remedies actually provide the form of redress required by the procedural rights directives.

The legislative proposal to attribute higher probative value to early interrogations and interviews (read more under *The Swedish Criminal Justice Model*) raises the question of whether there is a need for stronger protection of procedural guarantees during the preliminary investigation and more insight into the investigation for the defence while the preliminary investigation is still ongoing.

7 RECOMMENDATIONS

Drawing on the conclusions of the report and lessons learned during the project, Civil Rights Defenders deems that the following measures and actions should be implemented in order to better actualise the right to an effective remedy against violations of the procedural rights directives in Sweden.

Decision makers

- The legislature should set up an inquiry to analyse how evidence resulting from a rule violation should be handled and whether there is a need to codify the rules on rejection
- The legislature should consider constitutionally protecting procedural guarantees in criminal cases
- The legislature should consider taking legislative measures to clarify the division of responsibilities between the police and prosecutor in cases where individual rights are violated or instruct the Prosecution Authority to establish guidelines on the division of responsibilities between the police and prosecutor in evidentiary proceedings
- The legislature should consider creating stronger incentives for investigating authorities to comply with rules restricting the gathering of evidence
- The legislature should consider reviewing the system of sanctions for officials who commit rule violations

The court

- Courts should work to raise awareness of EU law and the case law of the European Court of Human Rights in relation to procedural rights in criminal cases

- Justifications given in the court's reasoning should specify more clearly why evidence has been rejected or attributed no probative value

The Swedish Prosecution Authority and the Swedish Police Authority

- The Prosecution Authority should introduce a procedure to verify that the rights of suspects are upheld in criminal proceedings
- The Prosecution Authority should put further efforts into sharing information about the investigation with the defence within a reasonable time frame
- The Prosecution Authority should establish clearer internal guidelines regarding when unlawfully accessed or obtained evidence may be used
- The Prosecution Authority and the Police Authority should consider whether disciplinary measures in case of non-compliance with rules restricting the gathering of evidence should be used to a greater extent than today

Defence lawyers and the Swedish Bar Association

- Defence lawyers should make use of existing remedies, including those arising from EU law
- Defence lawyers should question evidence to a greater extent than they do today
- Defence lawyers should work to improve their knowledge of criminal proceedings under EU law and the ECHR
- The Bar Association should offer lawyers the opportunity to strengthen their knowledge of EU law and the ECHR

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Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer

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Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings

Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings

9 APPENDIX 1: GUIDANCE FOR LAWYERS

Lawyers serve as an important check on criminal proceedings. The lawyer's main task is to monitor the rights of their client (i.e. the suspect) and ensure that these are not compromised. This is evidenced by both applicable legislation and legal ethics that stipulate a duty of loyalty toward the client. The lawyer is responsible not only for the rights of their client in individual cases, but also for compliance in general. Therefore, this guide provides an overview of how lawyers can uphold their clients' rights and exercise control over compliance in criminal cases.

The guide contains links that are clickable in the digital version. The digital report can be downloaded from Civil Rights Defenders' website crd.org.

9.1 SUBSTANTIVE GROUNDS

It is important to remember that the ECHR and EU law are part of the Swedish legal system. The ECHR takes precedence over other national legislation (2:19 RF) and EU law takes precedence when the current situation is subject to EU legal provisions. These two systems are important tools for lawyers' efforts to uphold their clients' rights. They may be invoked directly in national proceedings.

9.1.1 The ECHR

The central provision of the ECHR in criminal cases is the right to a fair trial (Article 6). In addition, a number of other articles of the ECHR may be applicable, such as the right to life (Article 2), the prohibition of torture (Article 3), the right to respect for private and family life (Article 8), or the right to an effective remedy (Article 13).

The European Court of Human Rights has developed extensive case law on these rights and their application in criminal proceedings. The European Court of Human Rights also publishes guides on specific articles of the convention or topics common in its case law. These guides can be found via the [link](#).

To date, the European Court of Human Rights has published guides in English on, for example:

- [Prisoner's rights](#)
- [Article 2 — the right to life](#)
- [Article 5 — the right to liberty and security \(prohibition on unlawful detention\)](#)
- [Article 6 — the right to a fair trial in criminal cases](#)
- [Article 8 — the right to respect for private and family life](#)
- [Article 13 — the right to an effective remedy](#)

9.1.1.1 *European Court of Human Rights case law*

General starting points for the rejection of evidence

Rules on the admissibility of evidence are a national concern and Article 6 ECHR does not constitute a requirement for a ban on certain evidence in itself. The task of the European

Court of Human Rights is to examine whether the trial as a whole has been fair. Evidence accessed or obtained illegally may therefore be admissible in trial (*Bykov v. Russia; Prade v. Germany; Beuze v. Belgium*).

The test of overall fairness

In order to determine whether the proceedings have been fair, care shall be taken to assess whether the rights of the defence have been upheld. In the context of the test of overall fairness, the European Court of Human Rights has taken into account the following factors (*Bykov v. Russia; Simeonovi v. Bulgaria; Beuze v. Belgium; Ibrahim and Others v. the United Kingdom*):

- The type of rule violation
- Whether the defence has been given the opportunity to challenge the evidence
- Whether the evidence is of good quality and whether circumstances surrounding the origins of the evidence may affect its value
- Whether there is supporting evidence and if the evidence is conclusive for the outcome of the case
- The public interest in prosecuting certain types of crime
- Compliance with procedural rules
- Whether the question of guilt has been settled by a professional or lay judge
- If the accused is particularly vulnerable (due to, for example, age or disability)
- Other relevant procedural guarantees in national law

Article 3 (prohibition of torture) and rejection

If torture has occurred at any stage of the criminal proceedings, evidence resulting from the torture must be rejected. This applies to both statements and physical evidence. In these situations, the test of overall fairness is not applied.

However, in the case of degrading treatment that does not qualify as torture within the meaning of the ECHR, the European Court of Human Rights makes a slightly different assessment. While oral statements automatically lead to the proceedings being deemed unfair, the situation is another for physical evidence (the test of overall fairness is applied). The European Court of Human Rights applies the same reasoning for evidence gathered abroad, if there is “a real risk” of infringement of Article 3 ECHR (*Gäfgen v. Germany; Jalloh v. Germany; Othman (Abu Qatada) v. the United Kingdom; El Haski v. Belgium*).

Article 8 (right to respect for private and family life)

A breach of Article 8 ECHR (such as covert interception in breach of the right to privacy) does not automatically mean that Article 6 is also considered violated (*Bykov v. Russia; Prade v. Germany; Khodorkovskiy and Lebedev v. Russia; Dragojevic v. Croatia*).

Nor does an illegal house search automatically lead to the trial as a whole being considered unfair and thus causing evidence to be dismissed (*Kalneniene v. Belgium; Prade v. Germany; Lee Davies v. Belgium*). However, in *Lisica v. Croatia*, the European Court of Human Rights deemed that evidence produced through an illegal house search violated the applicants’ right to a fair trial and that the use of the evidence had an impact on the trial as a whole.

Article 6(2) and (3) (procedural guarantees in criminal cases)

The procedural safeguards in Article 6 ECHR (such as the presumption of innocence or the right to a defence lawyer) are primarily seen as tools for achieving the requirement of fair trial. Therefore, they are not assessed individually, but included in the overall fairness assessment. In *Knox v. Italy*, the European Court of Human Rights ruled that the right to a fair trial had been violated. Among other things, the court took into account the fact that the suspect did not have access to a lawyer or an independent interpreter as well as the suspect's vulnerability in general. See also *Zaichenko v. Russia* and *Dvorski v. Croatia* on the right against self-incrimination. In *Baytar v. Turkey*, the European Court of Human Rights deemed that failure to provide an interpreter during police interrogation had caused the right to a fair trial to be irrevocably undermined.

As regards the right to a lawyer, the European Court of Human Rights first makes an assessment of whether the individual has actually been deprived of that right. The court then examines whether there are compelling reasons for restricting this right. One could say that there is a presumption that the trial has not been fair unless there are compelling reasons to deny the suspect a lawyer (*Ibrahim and Others v. the United Kingdom*). However, the test of overall fairness is also applied in relation to the right to a defence lawyer.

9.1.2 EU law

EU law contains relevant provisions in, for example, the EU Charter and the procedural rights directives. While the EU Charter provides comprehensive protection of human rights at the level of EU law, the procedural rights directives focus specifically on rights in criminal proceedings.

The procedural rights directives consist of:

- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings
- Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer
- Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the presumption of innocence and the right to be present at the trial in criminal proceedings
- Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings
- Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings

The procedural rights directives should be considered a tool with potential, as they have not been tested to the same extent as the rights enshrined in the ECHR. Thus, it cannot be ruled out that the procedural rights directives in the interpretation of the Court of Justice of the European Union may provide the individual with a stronger protection in criminal proceedings compared to the standard of the European Court of Human Rights. For more information about the specific rights in the procedural rights directives and a selection of relevant case law, see the guides provided by Fair Trials below.

Application of the EU Charter in criminal proceedings

The right to interpretation/translation

The right to information

The right to a defence lawyer

The right to be present and the presumption of innocence

The right to legal aid

More detailed information about the rights contained in the procedural rights directives and relevant case law of the Court of Justice of the European Union can be found in this [guide](#) by Fair Trials.

9.1.2.1 Invoking EU law: general principles

EU law is an autonomous legal system that takes precedence over the national law of each EU member state (Declaration No. 17 Concerning Primacy, annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon). At the same time, EU law is integrated into national law and creates rights and obligations for individuals within the framework set out in the founding treaties (Bernitz, et al. 2018, p. 100). Swedish courts are thus obliged to apply EU law in full and interpret Swedish law in accordance with the content and purpose of EU law. Furthermore, the case law of the Court of Justice of the European Union makes clear that national courts may be obliged to draw attention, ex officio, to EU legal provisions with direct effect (Bernitz et al. 2018, p. 103).

The EU Charter is the human rights act of the EU. Since the Treaty of Lisbon entered into force, it constitutes primary law, which means that Swedish courts must take its provisions into account in their judgments when EU law applies. Regulations and directives constitute secondary law, that is to say, they are adopted in order to make primary law concrete.

Direct effect

The principle of direct effect means that an individual may invoke rights under EU law vis-à-vis the state directly if the requirement of clarity, precision, and unconditionality of the relevant EU provision is met. As a result of its status as primary law, the EU Charter always has direct effect, which means that its provisions can be invoked directly before a national court. Initially, this principle applied only to primary law, but was subsequently extended to regulations and directives.

While EU regulations apply directly in national legal systems, EU directives must be incorporated into national law. In the latter case, the legislature is instructed to adapt national law in order to achieve the results envisaged in the directive. However, in its case law, the Court of Justice of the European Union has extended the doctrine of direct effect to EU directives in those cases when member states have not implemented them correctly (Bernitz et al. 2018, p. 118). This means that individuals can base claims against the state on directives not incorporated or inadequately incorporated into Swedish law.

Directives do not normally have horizontal direct effect (that is, they cannot be invoked against another private entity). However, this is less relevant in criminal cases, where the other party

is usually the state. Read more about the direct effect of the directives under Section B4 and about the direct effect of the EU Charter under Section B6 [here](#).

Interpretation in conformity with EU law

In order to uphold the purpose of the directives, national courts are also obliged to interpret national law in a manner that is consistent with EU law, including when directives have not been properly implemented (Bernitz et al. 2018, p. 124; NJA 2013 p. 1162). This may mean a departure from domestic legal sources such as statements in the legislative history or previous case law (Bernitz et al. 2018, p. 130). This is important to keep in mind in order to demand that national rules be interpreted in a way that is consistent with EU law when provisions in national law differ from those of EU law.

Read more about interpretation in conformity with EU law under Section B5 [here](#).

The Francovich principle

With regard to provisions in EU directives which do not appear to have been fully incorporated into national law, even in the case of an interpretation in conformity with the treaties, the Court of Justice of the European Union has clarified through case law that member states are obliged to compensate for injuries caused to individuals as a result of a breach of EU law (the Francovich principle), *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.*; *Francovich and Others v. Italy*. This means that a right to damages may exist in the case of non-implementation of directives, incorrect implementation of rules under EU law, the existence of national rules contrary to EU law, or the incorrect application of the law by courts, etc. (Bernitz et al. 2018, p. 132). This right is particularly strong when individuals are unable to take advantage of the direct effect of EU legal instruments or interpretation in conformity with EU law. In Sweden, in such cases damages are to be paid on the basis of EU law, in accordance with JK's practice (cf. JK dnr 4840-16-40 where JK refers to the Francovich principle).

The Francovich principle applies provided that:

- The EU legal rule which has been breached was set up to protect the rights of the individual,
- The infringement is sufficiently clear, and
- There is a causal link between the infringement and the harm suffered by the individual (Bernitz et al. 2018, p. 132-133).

The aforementioned EU legal principles of direct effect, interpretation in conformity with EU law, and the right to damages constitute remedies to actualise the procedural rights directives in concrete cases, if they do not achieve full impact through domestic remedies.

9.1.3 National case law

This section provides a review of Swedish legal cases relevant to the questions raised in the report and which provide an overview of the current legal position.

9.1.3.1 *The right to a lawyer and the right to information*

In RH 2017:38, several interrogations were conducted without a lawyer even though the suspect repeatedly stated that he wanted to be represented by a lawyer. In the case, no formal decisions were made to reject evidence, and information from the interrogation was thus allowed to be presented during the main hearing. Instead, the court chose to disregard information that emerged during the interrogations on the grounds that, according to the case law of the European Court of Human Rights, such hearings must not serve as grounds for a conviction.

In the Supreme Court's judgment in Case B 4175-20, a conversation recorded by a police body camera on the way to the police station had been invoked as evidence. The Svea Court of Appeal had rejected the evidence, arguing that the circumstances surrounding the origins of the recording constituted such breaches of the procedural safeguards under RB and the ECHR that it was obvious the evidence would be ineffective. However, the Supreme Court held that such evidence should not normally be rejected but rather assessed in the context of the free evaluation of evidence. Following a review of relevant EU law and the case law of the European Court of Human Rights in this area, the court found that a restriction on the right to a lawyer creates a presumption that the trial has not been fair. However, such a restriction does not always infringe on the right to a fair trial. Instead, an overall assessment must be made, taking into account a variety of as well as complex circumstances. As the court of appeal had not heard the evidence invoked or the remaining evidence, the Supreme Court ruled that the court of appeal had no basis for rejecting the evidence. The case was therefore remanded to the lower court for reconsideration.

The case law of the European Court of Human Rights invoked by the Supreme Court in Case B 4175-20 makes it clear that the presumption that the trial has been unfair weighs heavily in the overall assessment and that there must be strong arguments as to why the right to a fair trial has not been irrevocably undermined (*Ibrahim and Others v. the United Kingdom*). The Supreme Court essentially follows the reasoning of the European Court of Human Rights, but makes the assessment that, in order to break the presumption, the evidence must not constitute conclusive evidence (p. 32), which is not entirely in line with the reasoning of the European Court of Human Rights, as the latter has developed a number of criteria which may impact on the assessment.

In RH 2010:62, the Court of Appeal for Southern Norrland ruled that information that had emerged during an interrogation-like situation (entrapment to secure evidence through a staged job interview) could be taken into account and attributed high probative value and serve as grounds for a conviction.

JO has in a number of cases raised the issue of the right to a lawyer and the right to information. JO has pointed out that there is no room under Swedish law for the police to engage in other forms of conversation with suspects than interrogation, which presupposes that the procedural safeguards for the suspect are upheld (JO dnr 2527-2003 with references). In JO 2013/14 p. 133, a prosecutor and the Police Authority were criticised for conducting several interrogations without the suspect having access to a lawyer. In JO 2009/10 p. 68, a prosecutor was criticised for not allowing a lawyer to attend an initial interrogation with a person who was served with suspicion of murder. The right to information became relevant in JO 2016/17 p. 393, in which JO confirmed that if a suspect has a lawyer with the right to attend an interrogation, the latter must be informed of the time and place of

the interrogation. This applies regardless of the suspect's attitude toward being questioned without the presence of their defence lawyer. JO criticised the interrogating officer for endangering the legal certainty of the suspect.

9.1.3.2 The right to a lawyer and the right to information for minors

In Case B 9446-13, the Svea Court of Appeal ruled that an unequivocal waiver is required for someone to be considered to have renounced an important right guaranteed under Article 6 ECHR. In the case of minors, the court refers to the case law of the European Court of Human Rights and holds that, in addition, the authorities must have done what could reasonably be required of them to ensure that the minor is fully aware of their right to defend themselves and understands, to the extent possible, the consequences of their actions. The court of appeal held that it was not clear the authorities had taken such measures and it was therefore questionable whether the accused's right to a fair trial would be respected if the information from the interrogation was used in support of a conviction. Consequently, the court of appeal chose to disregard the information that had emerged in the interrogations and as a result of his confrontation with the content of the interrogations.

The Court of Appeal for Western Sweden followed a similar reasoning in Case B 1132-10, choosing to disregard the information obtained during an interrogation held with an accused minor without a lawyer. During the interrogation, the defendant had confessed himself guilty of raping a child. At a later police interrogation, he withdrew his confession and repeated his denial during the trial. In connection with the first interrogation, the defendant stated that he did not wish to have a lawyer present at the interrogation, and the interrogating officer accepted his statement. The court of appeal referred to the fact that JO, in decision 2008/09 p. 92, has stated that a lead investigator must assess objectively whether a suspect under the age of 18 is in need of a public defence counsel, even if the suspect or their legal guardian states that they are not. The court emphasised that, in order for an underage suspect to be deemed to have waived their right to a lawyer, they must have understood the consequences of the renouncement of this right and it is not sufficient for the interrogating officer to inform the accused of their right to a lawyer.

The right to a lawyer and special rights for children in criminal proceedings are also discussed in JO 2016/17 p. 400. The police interrogated a suspect under the age of 18 without a lawyer present. JO noted that the scope for conducting interrogations in such situations is very limited, and that interrogations of suspects under the age of 18 who are in custody should in principle never be conducted without a lawyer present. Criticism was aimed at the Police Authority.

In Case B 10453-19, in a decision before the main hearing, Solna District Court rejected evidence in the form of an interrogation with two police officers about information provided by the underage defendant during an interrogation that began without the defendant being informed of his rights. The prosecutor argued that the information had emerged during a conversation and not an interrogation-like situation. The court referred to the fact that, although the accused had not been served with suspicion at the time, there was an actual suspicion of crime and reason to believe that he would be served with suspicion. Furthermore, the court pointed to the statements made by the accused during the conversation being spoken in response to direct questions. The court also took into account the fact that the accused was a minor in its assessment of when the rights to a lawyer and to information come into play.

However, in all of the judgments referred to in this section, the accused was convicted on the basis of other evidence.

9.1.3.3 The right to interpretation and translation

In NJA 1974 p. 221 it was found that incorrect interpretations had occurred during a trial leading to a conviction. The Supreme Court rejected the petition for a retrial and grave procedural error, finding that the outcome of the case had not been affected by the incorrect translations.

In Case B 1457-16 in the Court of Appeal for Southern Norrland, it was raised that some incorrect translations had occurred during the trial in the district court. However, the court deemed that these were minor inaccuracies which did not affect the outcome of the case. In addition, the accused claimed that there had been deficiencies in the interpretation during the preliminary investigation. The court of appeal noted that the interpretation during the preliminary investigation had involved a number of different interpreters, often via telephone, and that it could not be ruled out that this may have led to some misunderstandings. However, the court deemed that there had been no evidence of such differences between the stories of the individuals heard, as recorded in the preliminary investigation report and in their statements before the district court, that there were grounds to believe that the defendants' right to a fair trial had been violated because of shortcomings in the interpretation during police interrogations in the preliminary investigation. However, the court of appeal held that information provided during the preliminary investigation should be assessed with great care.

In NJA 2007 p. 75, the Supreme Court referred a case back to the court of appeal in which it held that the accused, who was in need of interpretation, had not received adequate information and that, therefore, competent service could not be considered to have taken place.

In Case B 8261-19, during the trial in the Svea Court of Appeal, the acting interpreter pointed out shortcomings and inaccuracies in the translation of the examination of the accused in the district court. The conviction in the district court was largely based on information provided by the accused. The court of appeal judged that the translation was so poor that it was not possible to form a clear understanding of the course of events based on the examination. The inadequate interpretation was therefore deemed to constitute a serious procedural error which could be presumed to have had an impact on the outcome of the case, which was referred back to the district court.

9.1.3.4 The right not to incriminate oneself or one's relatives

The right to the presumption of innocence and not to incriminate oneself was invoked in NJA 2001 p. 563. The Supreme Court dismissed the charge of perjury as, by explaining the true course of events in an earlier trial, the defendant would have revealed that she had committed a crime, wherefore she had the right to refuse to speak under oath and a reasonable excuse for knowingly providing false information.

In NJA 2015 p. 702, the Supreme Court held that the accused has a right to remain silent and that the silence of the accused can only be attributed importance in situations which clearly require an explanation.

In RH 1980:112 and RH 1999:43, the court of appeal ruled that 36:3 RB constitutes an obstacle to referring, during the main hearing, to information from interrogations with the defendant's relatives conducted during the preliminary investigation.

In the high-profile case B 5279-18 in Västmanland District Court, both the right not to incriminate oneself and the right not to incriminate one's relatives were invoked. The district court decided not to allow the reading or replaying of a police interrogation with one of the defendants from a time before she was served with suspicion of a crime. The district court based its decision partly on the fact that she had not been served with suspicion of a crime in the interrogations and partly on that, as a relative of another defendant, she had no obligation to testify. Both the defendant's procedural rights under the ECHR and RB's rules on the right of a relative to refuse to testify were cited as grounds for the district court's decision. All defendants were acquitted due to a lack of evidence. At the time of writing (April 2021), the prosecutor has appealed against the decision.

9.1.3.5 Reading or replaying witness interviews conducted outside the trial

In RH 2001:71, the reading of an interview with a witness who had been deported during the preliminary investigation with a ban on re-entry was allowed. The court of appeal found that the defence had opportunity to ask questions of the witness during the interrogation and that the information provided by the witness did not constitute the only evidence in the case, and therefore deemed that allowing the evidence would not be contrary to Article 6 ECHR. The court also held that invoking the interrogation transcript was permissible under the rules in RB, as the witness could not be examined before the court. The interrogation transcript was therefore deemed the best evidence that could be found in that part, but the court also held that the interrogation on its own was of very low probative value.

In NJA 1990 p. 273, an examination before a foreign court was allowed as evidence, even though neither the prosecutor nor the counsel for the defence were present, as their questions were read out to the person under examination.

In NJA 1992 p. 532, the Supreme Court ruled that it was not appropriate to allow the reading of an interview with the injured party, as the defence had not been allowed to question the injured party and the interview constituted conclusive evidence in the case. The court found that the proceedings did not conflict with the wording of RB 35:14 because the injured party could not be served with a subpoena and had been living at an unknown address. However, the court held that it would be contrary to the case law of the European Court of Human Rights to let information provided by a witness or injured party to serve as grounds for a conviction if the information constituted conclusive evidence against the accused and the latter was not given the opportunity to question the person who provided the information. The Supreme Court thus set aside the conviction of the accused in the court of appeal and remanded the case to the lower court.

A similar reasoning occurred in NJA 1991 p. 512, where, on the other hand, the Supreme Court concluded that the defendant's rights had been adequately upheld as their lawyer had attended the examination, which was conducted abroad. However, the court maintained that the fact that the witness did not attend the trial meant that the information he provided must be assessed with great caution.

In NJA 2015 p. 222, the Supreme Court assessed whether the accused could be considered to have waived their right to question the injured party about information which constituted conclusive evidence. The court held that the accused could have called for a new interview with the injured party on several occasions once he had become aware that the injured party would not be present at the trial. As he did not, the court argued that he had waived his right to question the injured party.

9.1.3.6 *Trial in absentia*

The right to attend one's own trial was dealt with in NJA 2009 p. 836. The accused, who had been acquitted by the district court, was sentenced to 10 years in prison by the court of appeal without being present and able to respond to what their co-defendant said. The Supreme Court held that the court of appeal should not have settled the case in the defendant's absence and referred the case back to the court of appeal for reconsideration.

In April 2021, the Supreme Court granted leave to appeal in Cases B 6137-20 and B 6197-20, where the court will examine whether the defendants' absence from the main hearing in the court of appeal has constituted a hindrance to the court of appeal trying the charges against them.

9.2 PRACTICAL ADVICE

This section provides practical advice on things that are important to consider in criminal proceedings when procedural rights have not been upheld.

As a general rule, there is no prohibition of evidence in Swedish law. However, invoking the right to a fair trial may result in certain evidence not being allowed to serve as grounds for a conviction, denying the evidence any probative value, or attributing it a lower probative value. The assessment of whether the right to a fair trial has been satisfied takes into account a number of criteria and may differ depending on the right or infringement in question.

It is important to clarify the circumstances of the individual case and then identify all legal bases. In addition to national provisions, arguments can be supported by case law from the European Court of Human Rights, EU directives, and case law from the Court of Justice of the European Union in this area. Such tools as interpretation in conformity with EU law and the direct effect of EU legal instruments may also be relevant.

Consider complaining as early as possible in the process if you want certain evidence removed from the preliminary investigation report. Request a review of the police or prosecutor's decision where possible. One advantage of an early objection is that the investigating authorities will not use the evidence in the investigation and that it will not give rise to additional evidence (*fruit of the poisonous tree*). It is important to remember that, if evidence is not removed from the preliminary investigation report, it becomes public once the report is handed over to the court and can be invoked by the prosecutor in the trial. In some situations, it may be more strategically advantageous to argue on the evaluation of evidence instead of requesting that material be excluded from the preliminary investigation. At the same time, keep in mind that even if the court chooses to dismiss the evidence altogether, this is not possible in practice if the court has already taken note of the content of the evidence.

Deferred review of rule violations may be less beneficial given the negative effects the individual may have to endure while the investigation is ongoing. While the preliminary investigation is ongoing, the court cannot normally examine questions of evidence. Often, the role of the court during the preliminary investigation is limited to detention hearings. However, in detention hearings, the degree of suspicion and grounds for suspicion are examined. The procedural rights directives make clear that the rights granted therein are not limited to the trial itself. They also refer in particular to the rights to liberty and the presumption of innocence, and imply that procedural rights should also be upheld in assessments in the context of the preliminary investigation. To the extent that the infringement of a directive affects the rights to liberty and the presumption of innocence, the national court must ensure that the provisions of the directive are upheld. Courts should therefore be able to assess the strength of the accusations in order to determine whether infringements of the directives have affected the proceedings and to avoid basing their decisions on documents that appear to have been obtained in breach of the directives.

If, after all, the evidence has been invoked in the trial, complaints can be made directly to the court. If the situation is included among the exceptions allowing for the rejection of evidence, such rejection should be requested. Otherwise, the arguments presented should aim to lower the probative value of the evidence as much as possible.

9.3 FURTHER READING

[Fair Trials' guidance on requesting a preliminary ruling](#)

[Various guides, guidance, and reports on procedural rights in criminal proceedings and EU law](#)

Fair Trials' guides on procedural rights during COVID-19:

[Access to a lawyer \(when the right to a defence lawyer is completely denied\)](#)

[Access to a lawyer \(the right to an effective defence\)](#)

[Access to a lawyer \(the right to private conversations\)](#)

[Access to the material in the case](#)

[Access to interpretation/translation](#)

[Access to an effective remedy](#)

10 APPENDIX 2: INTERVIEW QUESTIONS

10.1 QUESTIONS FOR DEFENCE LAWYERS

1. Information about interview

- a. Date of interview
- b. Identity of interview
- c. Name/code of interviewee

2. Information about interviewee

- a. How long have you been a practising lawyer?
- b. In what region or city do you practice?
- c. Does your practice consist of:
 - i. only (100%)
 - ii. mainly (over 50%)
 - iii. some (under 50%) or
 - iv. no criminal cases?
- d. How many criminal cases have you personally dealt with in the past year?
 - i. up to 20
 - ii. 20-50 or
 - iii. 50+
- e. In what percentage of your cases have you challenged the admissibility of evidence? In what percentage successfully?
- f. In what percentage of your cases have you sought to obtain evidence?
- g. What percentage of your criminal cases are legal aid cases?
 - i. none
 - ii. some (under 50%)
 - iii. most (more than 50%) or
 - iv. all (100%)

3. Defence involvement in evidence-gathering procedures

- a. Can you request evidence (i) domestically or (ii) abroad? If so, what is the procedure (grounds for the request and conditions that must be met)? How difficult is it?
- b. In what sort of cases (type of offence, type of evidence?) do you find it necessary for the defence to seek its own evidence?
- c. What obstacles do defence lawyers face when seeking evidence?
- d. At what stage of an investigation do you get involved? Does your involvement depend upon receiving access to the case-file?
- e. Does legal aid cover your time to participate in evidence-gathering?
- f. Do you consider that lawyers need to have a specific expertise to participate in evidence-gathering procedures?
- g. Could you describe any specific cases in which you requested evidence?

4. Defence challenge of evidence admissibility

- a. What is the procedure for challenging evidence admissibility?
- b. At what stage in the proceedings can a challenge be initiated?

- c. In practice, to what extent can violations of procedural safeguards give rise to challenges of evidentiary admissibility? Do you specifically check that the procedural safeguards of your client (e.g. information about rights in police custody) were upheld?
- d. What are the available remedies in the event of a successful challenge?
- e. Do you consider that the information provided in the case file is sufficient to enable you to assess the legality of the evidence?
- f. What further information would you need to be in a position to challenge the admissibility of the evidence?
- g. Where you consider that a procedural safeguard has been violated (e.g. you were denied a confidential consultation with your client prior to the questioning by the police or access to case file was denied or delayed), do you seek a remedy in the form of exclusion of evidence?
- h. Could you describe any specific cases in which you challenged evidence?
- i. What specific difficulties do you face when assessing evidence gathered abroad?

5. Substance: judges' assessment and decision-making

- a. In your view, how much time is typically spent during a trial discussing the admissibility of evidence?
- b. In your view, do courts make a sufficient assessment of the procedural safeguards during the pre-trial proceedings? Is the role of the lawyer to identify violations?
- c. How do judges tend to receive arguments about violations of procedural rights? How is the burden of proof split between the parties in case defence argues a violation of procedural rights?
- d. What remedies are applied or other consequences are drawn from violations? Can you give practical examples?

6. General questions

- a. Have you recently received specific training on evidentiary procedures?
- b. What information would you consider useful for lawyers to support participation in evidentiary procedures?

10.2 QUESTIONS FOR JUDGES

1. Information about interview

- a. Date of interview
- b. Identity of interview
- c. Name/code of interviewee

2. Information about interviewee

- a. What is your length of experience as a judge?
- b. What is your designation of judge (e.g. district judge)?
- c. What is your length of experience in previous legal professions?
- d. Does your practice consist of:
 - i. only (100%)
 - ii. mainly (over 50%)
 - iii. some (under 50%) or
 - iv. no criminal cases?

- e. How many criminal cases have you personally dealt with in the past year?
 - i. up to 20
 - ii. 20-50 or
 - iii. 50+
- f. In what percentage of your cases have challenges to the admissibility of evidence been made?

3. Admissibility of evidence

- a. What are your primary considerations when reviewing the admissibility of evidence?
- b. Do you specifically verify that the procedural safeguards of the accused person (e.g. information about rights in police custody) were upheld?
- c. Do you consider that the information provided in the case file is sufficient to enable you to assess the legality of the evidence?
- d. What further information would you need to be in a position to assess the admissibility of the evidence presented to you?
- e. What is your approach to the representations made by the prosecutor? And to the representations by the defence lawyer?
- f. How should the burden of proof be split between the parties in case defence argues a violation of defendant's procedural rights?
- g. Could you describe any specific cases in which you rejected evidence?
- h. What specific difficulties do you face when assessing evidence gathered abroad?
- i. In your view, how much time is typically spent during a trial discussing the admissibility of evidence?

4. Remedies

- a. What are the available remedies in the event of a successful challenge?
- b. What considerations do you have when determining which remedy is necessary?
- c. In practice, to what extent do violations of procedural safeguards during the pre-trial proceedings lead to challenges of evidentiary admissibility?
- d. Where you consider that a procedural safeguard has been violated, do you apply an evidentiary remedy in the form of exclusion of evidence?

5. General questions

- a. Have you recently received specific training on evidentiary procedures?
- b. To what extent do the jurisprudence of the European Court of Human Rights and other regional/international human rights standards inform your decision-making? How much training do you receive on such standards?
- c. If you could make changes to the law or practice governing the admissibility of evidence, what change or changes would you like to see?

10.3 QUESTIONS FOR PROSECUTORS

1. Information about interview

- a. Date of interview
- b. Identity of interview
- c. Name/code of interviewee

2. Information about interviewee

- a. What is your designation as a prosecutor (e.g. senior prosecutor, federal, district)?
- b. In what region or city do you practice?
- c. Length of experience as a prosecutor?
- d. Length of experience in other previous legal professions?
- e. Does your practice consist of:
 - i. only (100%)
 - ii. mainly (over 50%)
 - iii. some (under 50%) or
 - iv. no criminal cases?
- f. How many criminal cases have you personally dealt with in the past year?
 - i. up to 20
 - ii. 20-50 or
 - iii. 50+
- g. In what percentage of your cases do you face challenges regarding the admissibility of evidence?

3. Evidence-gathering procedures

- a. What are your primary considerations when seeking to collect evidence in an impartial way?
- b. Do you think that the involvement of a lawyer at pre-trial stage is useful to assist in the investigation?
- c. What are your primary concerns in respect of the legality of the evidence gathering? Do you apply specific guidelines to ensure the legality of the evidence collection?
- d. If you supervise the investigation phase of the criminal procedure, is legality of evidence gathering and admissibility of evidence part of that supervision?
- e. Do you specifically verify that the procedural safeguards of the accused person (e.g. information about rights in police custody) are upheld? In cases of violations, what approach do you take?
- f. What specific difficulties do you face when assessing the legality of the evidence gathered abroad?

4. Procedure: evidence admissibility

- a. In your view, how much time is typically spent during a trial discussing the admissibility of evidence?
- b. What is your approach to the representations by the defence lawyer regarding admissibility of evidence? And in your view, are defence lawyers given sufficient information about the evidence to challenge its legality?
- c. In practice, to what extent can violations of procedural safeguards give rise to challenges of evidentiary admissibility?
- d. What are the available remedies in the event of a successful challenge?

- e. Where a procedural safeguard has been violated (e.g. during police custody), do you think that a remedy in the form of exclusion of evidence is appropriate?

5. Substance: judges' assessment and decision-making

- a. In your view, do courts make an adequate assessment of the legality of the evidence gathered pre-trial?
- b. How do judges tend to receive arguments about violations of procedural rights?
- c. How do you think judges approach representations made by you? And by the defence?
- d. What remedies are applied or other consequences are drawn from violations? Can you give practical examples?

6. General questions

- a. Have you recently received specific training on evidentiary procedures?
- b. To what extent do the jurisprudence of the European Court of Human Rights and other regional/international human rights standards inform your decision-making? How much training do you receive on such standards?
- c. If you could make changes to the law or practice governing the admissibility of evidence, what change or changes would you like to see?