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In case no. 6184-19, the **Swedish Tax Agency** (Appellant) v. **AA** (Respondent), the Supreme Administrative Court delivered the following decision on 4 March 2022.

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RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court disallows the claim for compensation for litigation costs.

BACKGROUND

1. AA applied to the Swedish Tax Agency to change her surname. The application was rejected, whereupon AA appealed to the Administrative Court in Stockholm which rejected the appeal. The Administrative Court of Appeal in Stockholm granted her appeal to it, after which the Swedish Tax Agency appealed to the Supreme Administrative Court.

2. AA contested the grant of the Swedish Tax Agency's appeal and claimed compensation for litigation costs (costs for counsel).

3. The Supreme Administrative Court rejected the Swedish Tax Agency's appeal and ordered that the question regarding the right to compensation for litigation costs be determined by the Supreme Administrative Court in full session (HFD 2021 reported case no. 36).

CLAIMS, ETC.

4. *AA* claims compensation for litigation costs in a total amount of SEK 60,250 and asserts the following.

5. She has won against the Swedish Tax Agency regarding the question of the change of surname. The costs she has incurred in order to exercise her right have been justified taking into account the nature of the matter. To then deny her the right to compensation would infringe her right to a fair trial. Accordingly, pursuant to Chapter 2, section 11, second paragraph of the Instrument of Government, Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), or Article 47 of the Charter of Fundamental Rights of the European Union, the Supreme Administrative Court shall order the Swedish Tax Agency to compensate her for her litigation costs.

6. A decision regarding compensation for litigation costs must be taken in the administrative case. The possibility afforded to individuals to request damages from the state for litigation costs in administrative cases is insufficient in order for her right to a fair trial to be respected.

7. In support of her action, she refers to the rulings of the Supreme Court in case NJA 2015, p. 374; case NJA 2018, p. 49; case NJA 2020, p. 908 and case NJA 2021, p. 235, the judgments of the European Court of Human Rights of 6 July 2006 in the *Stankiewicz v. Poland* case, of 18 June 2020 in the *Černius and Rinkevičius v. Lithuania* case, and of 22 July 2021 in the *Zustović v. Croatia* case, and the judgment of the European Court of Justice in the *Toma* case (C-205/15, EU:C:2016:499).

8. The *Swedish Tax Agency* is of the opinion that AA's claim for compensation for costs is to be disallowed. In the event the Supreme Administrative Court finds that the claim is to be examined, it should be rejected.

REASONS FOR THE RULING

The question in the case

9. The question in the case is the manner in which a claim for compensation for litigation costs in a case in a general administrative court is to be handled.

Legislation, etc.

10. Chapter 2, Article 11, second paragraph of the Instrument of Government states that legal proceedings shall be carried out fairly and within a reasonable period of time.

11. Article 6.1 of the ECHR states that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

12. According to Article 47 of the Charter of Fundamental Rights of the European Union, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal previously established by law. Article 51.1 states that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union and to the Member States only when they are implementing Union law. Article 52.3 states that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

The Court's assessment

Liability for litigation costs in the administrative proceeding

13. The procedural rules for general administrative courts to be applied in administrative cases are principally set forth in the Administrative Court Procedure Act (1971:291). As regards cases before general courts, the principal procedural regime is set forth in the Code of Judicial Procedure and the Court Matters Act (1996:242).

14. As regards cases administered by general courts in accordance with the rules of the Code of Judicial Procedure, the starting point is that, as regards litigation costs, the losing party is to compensate the winning party for its costs. For certain types of cases and in certain situations, the court may instead order that each party bear its own costs. Detailed rules regarding the manner in which the court is to order an allocation of the litigation costs and the manner in which they will otherwise be handled by the court are set forth in Chapters 18 and 31 of the Code of Judicial Procedure.

15. In the handling of such matters involving the administration of justice determined by general courts and which are not to be handled in accordance with the Code of Judicial Procedure, the Court Matters Act is applicable. Section 32 states that a matter in which individuals are opposing parties, the court may, by application of the rules in Chapter 18 of the Code of Judicial Procedure, order one party or its representative, counsel or assistant to compensate the other party for such party's costs in the matter. No comparable reference to the Code of Judicial Procedure exists for the situation in which an individual has the state as the opposing party.

16. As regards the administrative proceeding, there are no provisions – with the exception of the cases in which an individual party's litigation costs can be compensated by the state in accordance with Chapter 43 of the Tax Procedures Act (2011:1244) – regarding compensation for litigation costs. As a consequence,

each party bears its costs irrespective of the outcome in the case. The purport of this so-called no-fee-shifting principle is thus that a winning party shall not be awarded compensation for litigation costs, and also that a losing party is not at risk of being found liable to compensate the opposing party's costs.

17. The no-fee-shifting principle in the administrative proceeding is not a substantive rule in the sense that general administrative courts are to establish in their rulings that each party is to bear their own cost. On the contrary, compensation for litigation costs has been an issue which, in the absence of legislative support, is not intended to be addressed by general administrative courts. Accordingly, as opposed to that which applies to general courts, nor is there a regime for handling the questions of principle and practice which arise where such claims for compensation are to be adjudicated.

18. When a party has asserted a claim for compensation for litigation costs, the Supreme Administrative Court has rejected or disallowed it. This has been justified, as a rule, on the basis that there is no legal ground for granting such compensation in administrative cases (see, for example, HFD 2019 reported case no. 72 and HFD 2020 notice no. 47). Even in those cases in which the claim has been rejected, this has thus been justified by the lack of legislative support and not by the fact that it follows from the no-fee-shifting principle that compensation is not to be awarded. Irrespective of the formulation of the decision, no substantive examination of the claim has thus been conducted in practice.

19. The fact that litigation costs are not compensated in the administrative proceeding has been justified in that it is common practice that an individual is to bear his or her own costs in administrative matters. In addition, it is usually pointed out that actions may be brought in general administrative courts without charge, that the proceeding is in writing as a general rule, and that the procedural demands imposed on the parties are low. It is also commonly stated that the general administrative courts have a duty to investigate and that an individual's opposing party is often a public authority which is to act objectively and thereby contribute

to guarantee the individual's procedural safeguards. In addition, the right in certain cases to have public counsel and the possibility to receive legal aid have been mentioned in this context. It has also been pointed out that compensation for litigation costs is a form of damages and that it is possible, under certain conditions, to be compensated for such costs in an administrative case by means of damages.

20. At no time has there been any provision in the Administrative Court Procedure Act which provides that a party shall compensate another party for its costs in the case. However, such rules have been considered on several occasions (see, for example, Government Official Report 1964:27, p. 666 ff.). In the beginning of the 1970's, however, the government stated that no general rule should be implemented regarding compensation for costs in administrative matters (Government Bill 1972:132, p. 195 f.). The Committee on Justice subsequently stated on several occasions in the 1980's that the government should examine the possibility for individuals to obtain compensation for their litigation costs in administrative cases (see, for example, Report 1984/85:JuU15, p. 53 and Report 1988/89:JuU19, p. 23).

21. The Judicial Committee, which was appointed in 1989, proposed that an individual would be entitled to compensation from the state for such individual's costs in an administrative case where, taking into account the circumstances, it was unreasonable for the individual to bear them. A condition for it to be unreasonable was that the individual has had considerable success in the case (Government Official Report 1991:106, part A, p. 630 ff.). The proposal made by the Judicial Committee did not lead to legislation.

22. The issue was raised again in conjunction with the advent of the Court Matters Act. As regards the fact that the proposal for the Court Matters Act lacked provisions regarding the allocation of litigation costs when an individual party has the state as the opposing party (*cf.* paragraph 15), the following appears from the preparatory works. The issue whether an individual party should be entitled to receive compensation for such party's litigation costs from the state when the

individual has a public authority as the opposing party and wins in the proceedings, plays an incomparably larger role for the administrative courts' cases than for the court matters. There is much to suggest that the answer to the question should be the same for the cases and matters concerned. A position on the issue should therefore not be adopted regarding the court matters in isolation but, rather, may be considered in another context (Government Bill 1995/96:115, p. 118).

23. The Committee on Justice stated that the Committee assumed that the government would consider the questions regarding litigation costs in both the court matter proceeding and the administrative proceeding and that this would take place within the not-too-distant future (Report 1995/96:JuU17, p. 10). Thereafter, the issue regarding litigation costs in administrative proceedings has not come up in legislative contexts on a more general level, even if the issue has drawn attention as regards cases involving public procurement (Government Official Report 2013:12 and Government Official Report 2018:44 and Government Bill 2021/22:120).

Case law from the Supreme Court, the European Court of Human Rights and the European Court of Justice

24. In case NJA 2015, p. 374, which applied to a matter regarding attachment and sale and where the state was the opposing party of an individual, the provision in section 32 of the Court Matters Act on the allocation of litigation costs was raised. The Supreme Court stated that, under certain circumstances, it would be a contravention of the provision in Chapter 2, section 11, second paragraph of the Instrument of Government according to which legal proceedings shall be carried out fairly, if the individual was not afforded the right to compensation by the state for such individual's litigation costs in a general attachment and sale case. The Court pointed out that this appeared to be particularly clear when it is a third party who is drawn into an attachment and sale proceeding and successfully defends their property against execution measures directed towards the debtor. The Court was of the opinion that it had support for adjusting the prevailing legal position

and found that the circumstances in the relevant case were such that the Swedish Tax Agency should be ordered to pay compensation for the individual's litigation costs.

25. In subsequent rulings, the Supreme Court has affirmed the principles following from the 2015 decision (cases NJA 2020, p. 908 and NJA 2021, p. 235).

26. In case NJA 2015, p. 374, the Supreme Court had as its point of departure the decision of the European Court of Human Rights in the *Stankiewicz* case. The case pertained to two spouses who had retained legal counsel to defend their property in a civil case which had been initiated by the state. The spouses won the long, drawn-out process in the national court, but did not receive compensation for their litigation costs. In light of the fact that the state enjoyed an advantageous position in the proceedings as regards liability for costs, and taking into account the fact that the dispute was complex and involved what was for the spouses a substantial amount of money, the European Court of Human Rights was of the opinion that it was not unwarranted on the part of the individual parties to retain legal counsel and that their costs had also not been unreasonable. Under such circumstances, the European Court of Human Rights determined that it was incompatible with Article 6.1 of the ECHR that the individual parties had been denied compensation for litigation costs.

27. Thereafter, the European Court of Human Rights developed its case law in this area by virtue of the judgment in the *Černius and Rinkevičius* case which concerned the conditions to succeed with a claim for damages pertaining to costs incurred in a prior administrative case, and the judgment in the *Zustović* case where the individual was deemed to have had reason to retain counsel in order to exercise her right in an application matter regarding the right to disability pension.

28. In respect of the interpretation of Article 47 of the Charter of Fundamental Rights of the European Union, the European Court of Justice has, in the ruling in the *Toma* case which pertained to the obligation to pay court fees, referred to the case law of the European Court of Human Rights and its interpretation of Article 6.1 of

the ECHR in the judgment in the *Stankiewicz* case (*Toma*, paragraphs 40, 41 and 55).

29. It follows from the above-referenced legal cases that, under certain circumstances, it may infringe the right to a fair trial in accordance with Chapter 2, section 11, second paragraph of the Instrument of Government and – in the event the case involves civil rights and obligations – Article 6.1 of the ECHR, if an individual who succeeds in a case against the state cannot obtain compensation for their litigation costs.

How shall a claim for compensation for litigation costs in a case in a general administrative court be handled?

30. It has thus been the case in administrative proceedings that an individual has not been able to receive compensation for their litigation costs within the scope of the administrative case. Notwithstanding the fact that the question has come up on a number of occasions, the legislature has found no reason to alter the administrative proceedings regime in this respect. The question is now whether, taking into account the right to a fair trial, there are reasons to alter this regime.

31. The administrative proceeding is formulated such that it regularly fulfils the requirements which may be imposed on a trial in order to be deemed fair. However, it cannot be excluded that, in exceptional cases, there may be situations in which the circumstances are such that it would not be compatible with the right to a fair trial if an individual party cannot obtain compensation for legitimate litigation costs. This applies in relation to the provision regarding fair trial in Chapter 2, section 11, second paragraph of the Instrument of Government, as well as Article 6.1 of the ECHR. The issue could also arise in relation to Article 47 of the Charter of Fundamental Rights of the European Union. However, the question is whether the right to a fair trial also entails that compensation in these situations must be awarded within the scope of the actual administrative case.

32. According to the regime applicable to date, an individual has been referred to requesting compensation for their litigation costs in administrative cases by means of the rules regarding damages (*cf.* case NJA 2010, p. 112; case NJA 2013, p. 762; and case NJA 2018, p. 1127). This regime entails that the individual must indeed initiate a separate proceeding in order to obtain compensation for their litigation costs. However, it is apparent from the case law of the European Court of Human Rights that such a regime is compatible with Article 6.1 of the ECHR (see, for example, the ruling in the *Černius and Rinkevičius* case in which the right to a fair trial was deemed to have been infringed, not because of the absence of a right to obtain compensation for costs in the administrative case in which the appellant had succeeded but, rather, due to the fact that it was difficult to separately obtain compensation for these costs in the form of damages). The provisions in Chapter 2, section 11, second paragraph of the Instrument of Government and Article 47 of the Charter of Fundamental Rights of the European Union may be deemed to have the same purport. The right to a fair trial thus does not entail that compensation for litigation costs must be granted in the administrative case itself.

33. To the extent it is nonetheless deemed to be critical to create a possibility for the administrative courts to award individuals compensation for their litigation costs, questions of both principle and practice arise which require considerations which should befall the legislature. Accordingly, such a regime should not – when the right to a fair trial does not so require – be implemented by means of case law.

34. In its case law to date, the Supreme Administrative Court has alternately rejected and disallowed claims for compensation for litigation costs (see paragraph 18). Since no substantive examination is to be carried out of such claims, they shall continue to be disallowed.

Conclusion

35. Based on the above, it follows that AA's claim for compensation for litigation costs is to be disallowed.

Justices Jäderblom, Jermsten, Knutsson (dissenting, addition), Ståhl, Bull (dissenting, addition), Classon, Askersjö (dissenting, addition), Baran (dissenting, addition), Gäverth (addition), Svahn Starrsjö, von Essen, Rosén Andersson, Anderson (dissenting, addition), Jönsson (dissenting, addition) and Haggren have participated in the ruling.

Judge Referees: Birgitta Fors Almassidou and Helen Lidö

DISSENTING OPINIONS AND ADDITIONS

Justices Knutsson, Bull, Askersjö, Baran, Anderson and Jönsson dissent and state the following.

1. AA's claim for compensation for litigation costs in the lower courts was brought for the first time in the Supreme Administrative Court and shall accordingly be disallowed on this basis. As regards the claim for compensation for costs incurred in the Supreme Administrative Court, we consider the following.

2. We concur with the majority that it cannot be excluded that, in exceptional cases, situations may arise in which the circumstances are such that it would not be compatible with the right to a fair trial in accordance with Chapter 2, section 11, second paragraph of the Instrument of Government and Article 6.1 of the ECHR if an individual party cannot obtain compensation for legitimate litigation costs in an administrative case (paragraph 31, *cf*. also paragraph 29). The majority is of the opinion that a compensation claim is not to be adjudicated in the case in which the

costs have been incurred and the claim has been asserted but, rather, that the claim is to be disallowed by the court (paragraph 34). According to the majority, the individual is instead referred to requesting compensation for costs by means of the rules regarding damages (paragraph 32).

3. In order for a claim to be disallowed, it is necessary that there is some form of impediment to adjudication, e.g. that the court lacks jurisdiction to adjudicate the claim. If there is no such impediment, the claim is to be admitted and either granted in whole or in part or rejected. The question is then whether there is any impediment for general administrative courts to adjudicate a claim for compensation for litigation costs.

4. Administrative proceedings have long been subject to a main rule according to which each party bears its own litigation costs irrespective of the outcome in the case (the so-called no-fee-shifting principle). This entails that a party is not entitled to compensation for their costs, and also that a party is not subject to any risk of being ordered to pay compensation for the opposing party's costs. The only exception to the no-fee-shifting principle applies in tax cases in which an individual, pursuant to Chapter 43 of the Tax Procedures Act, under certain conditions, is entitled to reasonable compensation for their costs.

5. The no-fee-shifting principle is not legally enshrined in the Administrative Court Procedure Act and there are no rules regarding the manner in which the administrative courts are to handle claims for compensation. The fact that the area is not governed by statute does not, however, entail that the courts are incompetent to adjudicate such claims or that there is any other impediment to their adjudication.

6. Over the course of the years, the Supreme Administrative Court has also as a rule adjudicated claims for compensation for litigation costs and rejected them in accordance with the no-fee-shifting principle (e.g., HFD 2019 reported case no. 72, HFD 2017 reported case no. 46 I, RÅ 2010 reported case no. 47 I, RÅ 2009

reported case no. 65, RÅ 2006 reported case no. 89, RÅ 2004 reported case no. 17, HFD 2021 case notice no. 23 and HFD 2019 case notice no. 9). It has also occurred that such claims have been disallowed but, then, most frequently based on the justification that there is no possibility to pay or grant compensation or that the claim cannot be granted. In practice, a substantive examination of the claim has thus been carried out also in these cases (e.g. HFD 2015 reported case no. 51, HFD 2020 case notice no. 47 and HFD 2018 case notice no. 37). However, on a number of occasions, it has occurred that claims for compensation for litigation costs have been disallowed on the basis that there is a lack of legal possibilities to adjudicate or decide questions concerning such costs (e.g. RÅ 2009 case notice no. 190 and RÅ 2009 case notice no. 202).

7. In tax cases, compensation for costs may be paid in certain cases but not, however, in cases regarding advance rulings where the matter has been initiated by the taxpayer. A claim from an individual has, notwithstanding the same, been adjudicated in such a situation and consequently rejected (e.g. HFD 2020 reported case no. 49 and HFD 2019 case notice no. 28). When the Court has also adopted a position regarding a claim for compensation and one regarding damages, the compensation claim has been rejected on the basis that it cannot be granted, while the claim for damages has been disallowed on the basis that it cannot be adjudicated (case no. 606-17 with judgment of 16 February 2018 and RÅ 2003 case notice no. 64).

8. It can be noted that the case law of the Supreme Administrative Court on the question of how a claim for compensation is to be handled is not entirely uniform. In almost all cases in the recent period of twenty years, however, the Supreme Administrative Court has conducted a substantive examination even if the outcome in a handful of them has resulted in disallowance of the claim and not rejection.

9. The conclusion of the majority that, in practice, no substantive examination of the claim has been carried out (paragraph 18) is accordingly incorrect. The conclusion

is based on the lack of legal support for granting compensation for litigation costs. The fact that there is no legal support for a certain outcome (grant), and the outcome thereby becomes something else (rejection), does not mean, however, that no examination has been carried out. Moreover, since 2011 in any event, by virtue of the provision in Chapter 2, section 11, second paragraph of the Instrument of Government regarding fair trial, there has been legal support for granting compensation for litigation costs in administrative cases.

10. The right to a fair trial has been constitutionally established since 2011 and is also incorporated in the ECHR and thereby has precedence over the no-fee-shifting principle. The examination of a compensation claim can thereby no longer be made exclusively by application of the no-fee-shifting principle but, rather, the right to a fair trial must also be taken into account. It may be presumed that the Supreme Administrative Court, at least since 2015 – when the Supreme Court affirmed the purport of the right to a fair trial, which the Supreme Administrative Court, by virtue of this ruling, establishes also applies in administrative cases – has taken into account the right to a fair trial in its examination, even if the question has not been expressly addressed.

11. Accordingly, there is no impediment for the general administrative courts to examine a claim regarding compensation for litigation costs. Our review of the case law of the Supreme Administrative Court also shows that the Court regularly examines such claims. No reason to question and alter this case law has come to light. AA's claim for compensation for litigation costs in the Supreme Administrative Court is thereby to be examined by the Court and may not be disallowed.

12. Having been outvoted on this issue, there is no reason for us to delve into the question whether, under certain circumstances, it may be relevant in an examination to deviate from the no-fee-shifting principle or whether the conditions are fulfilled in this case.

Justices Knutsson, Bull, Askersjö, Baran, Anderson and Jönsson add the following.

1. The majority's observation in paragraph 32 – that provision for the right to a fair trial in Article 6.1 of the ECHR can be seen to through national rules regarding damages – is not controversial but, rather, this view is well established by virtue of the case law of the European Court of Human Rights and the Supreme Court. According to the majority, the provision in Chapter 2, section 11, second paragraph of the Instrument of Government and Article 47 of the Charter of Fundamental Rights of the European Union may be deemed to have the same purport in this respect.

2. Thus, the majority equates the provision in the Instrument of Government with the corresponding provision in the ECHR, not only in respect of its substantive content (i.e. that a right to compensation for costs may exist), but also in respect of its legal effect in an individual case (i.e. that the right may be provided for through the rules regarding damages). In the former respect, we agree with the majority but, in the latter, we believe that the conclusion is not compatible with the position of the constitutional provisions in Swedish law.

3. By virtue of the fact that a legal rule becomes Swedish law, it has entirely different effects than if it is part of an international treaty. This is the reason why the special considerations must always be made when convention rules are incorporated in Swedish law and was, moreover, a fundamental thought when Sweden incorporated the ECHR by law, but did not find reason to afford it constitutional status and, instead, regulated its position by virtue of the provision in Chapter 2, section 19 of the Instrument of Government.

4. The fact that a court, as an alternative to applying a constitutional provision, may refer the individual to bringing an action for damages against the state entails a whole new way of viewing the issue of what weight the Constitution has in the application of law in an individual case which is examined in court. It may be

noted that the Supreme Court has not, in any of the rulings in which the right to a fair trial in the Instrument of Government is deemed to entail a right to compensation for litigation costs (see paragraphs 24 and 25), considered that damages could be an alternative. In addition, there is no support for such a view in the preparatory works for the Instrument of Government. On the contrary, within the constitutional reform in 2010, in connection with an amendment of the provision regarding judicial review in Chapter 11, section 14, it was stated that it was of particular weight that the rights rules in the Instrument of Government have full bearing on the application of law (Government Bill 2009/10:80, p. 147). No mention is made of that it, as an alternative of affording the Constitution such bearing, would be acceptable to refer to the possibility of obtaining damages.

5. In particular, following the 2010 constitutional reform, it is clear that the freedoms and rights in Chapter 2 of the Instrument of Government are not addressed exclusively to the legislature. The rights have a specific content and it is possible for individuals to enforce them. There has been a gradual transition to a more rights-based jurisprudence, and the courts need to more frequently adopt a position on legislation and the application of law on the basis of a rights perspective (Government Official Report 2020:44, p. 207 ff.). The disallowance of a claim, based on a rights provision in the Instrument of Government and instead referring the individual to bring a claim for damages in order to satisfy the protection of their rights runs counter to this development and does not align well with the position of the rights provisions in Swedish law.

6. It should be emphasised that the aforementioned does not apply in the situation in which there is legislation which supplements a rights provision in the Instrument of Government and provides concrete content. It is, for example, unproblematic in relation to the provision regarding a fair trial that an appeal is disallowed in accordance with the rules regarding the competence of a court, regarding the right to litigate or regarding periods of appeal. However, the Tort Liability Act – for obvious reasons – is not such an act as is intended to supplement the provisions of the Instrument of Government regarding a fair trial. In the absence of

supplemental legislation which concretely states what the right to a fair trial entails, this provision is to be accordingly applied.

7. Irrespective of the effect which the provision of the Instrument of Government regarding a fair trial has in an individual case, there are additional objections to the majority's reference to the damages rules. Taking the damages route in order to obtain compensation for litigation costs is, namely, in most cases, no realistic alternative for an individual.

8. The provisions of the Instrument of Government regarding a fair trial in Chapter 2, section 11, second paragraph has an area of application beyond its counterpart in Article 6.1 of the ECHR. The former covers all judicial proceedings in Sweden, as opposed to the latter which concerns civil rights and obligations as well as criminal charges. The main rule in Chapter 3, section 2 of the Tort Liability Act is that there is a requirement that the state is liable for an error or omission in the exercise of public authority in order for damages to be able to be awarded. Where a violation of a right in accordance with the ECHR has occurred, damages in accordance with section 4 may be payable without a requirement of error or omission.

9. In order for damages to be payable in accordance with the main rule, a general court must thus come to the conclusion in tort proceedings that the administrative court has committed an error or omission in the exercise of public authority, which should require that the ruling of the court is based on a clearly erroneous application of law. The mere fact that the court has not committed an error or omission in the exercise of public authority is not, however, a guarantee that the individual has received a fair trial.

10. A limitation in law or in the application of law of an absolute freedom or right in the Instrument of Government probably entails an infringement thereof which, in turn, may be claimed to constitute an error or omission in the exercise of public authority. Damages may then be awarded pursuant to Chapter 3, section 2 of the

Tort Liability Act (see Government Official Report 2020:44, p. 223 and p. 232). The right to a fair trial in Chapter 2, section 11, second paragraph of the Instrument of Government is an absolute right, and a decision by an administrative court to disallow a claim for compensation for litigation costs may thereby be regarded by a general court as such a violation of the Instrument of Government which renders damages awardable pursuant to Chapter 3, section 2 of the Tort Liability Act. In the event the decision to disallow constitutes a violation of the ECHR, damages may be awarded pursuant to section 4. In such cases, the individual does receive compensation for their litigation costs from the court, but it is naturally most unfortunate if the basis for damages is deemed to be that the administrative court has committed a violation of the Instrument of Government or the ECHR.

11. If a decision to disallow is not deemed to constitute a violation of the Instrument of Government or the ECHR, the prospects for success in an action for damages is presumably highly limited. The same applies where an individual complies with a ruling in this case and refrains from asserting a claim for compensation for litigation costs in the administrative case, as a consequence of which the administrative court need not take any decision regarding disallowance.

12. As regards an action for damages as a consequence of a decision by the Supreme Administrative Court, there are, furthermore, procedural impediments in accordance with Chapter 3, section 7 of the Tort Liability Act. Such an action may thus not be examined at all by a general court. Even if this would affect only a few cases in practice, it is an additional factor which makes reference to the tort rules as a means by which to satisfy the provision of the Instrument of Government regarding a fair trial difficult to digest.

13. If the majority's thinking regarding damages as an acceptable alternative to compensation for litigation costs is to work, it is necessary that a general court is prepared to disregard the regime in Chapter 3, section 2 of the Tort Liability Act and award damages pursuant to the Instrument of Government. This has

previously occurred in certain special cases (case NJA 2014, p. 323; case NJA 2014, p. 332; and case NJA 2018, p. 103), but it is highly uncertain whether the current situation may be handled in this manner, and it is otherwise a solution we cannot support.

14. The majority supports its conclusion regarding damages as an alternative to compensation for litigation costs on, *inter alia*, the judgment of the European Court of Human Rights in *Černius and Rinkevičius* (paragraph 32). As the majority observes, it was opined in the case that the right to a fair trial had been infringed, not because there was a lack of a right for the individual to obtain compensation for their litigation costs in the case in which they had succeeded but, rather, because it was difficult to obtain compensation for these costs by means of damages. The majority's model for the manner in which claims for compensation in administrative cases are to be handled may thereby paradoxically be in contravention of the right to a fair trial in Chapter 2, section 11, second paragraph of the Instrument of Government and Article 6.1 of the ECHR .

15. In aggregate, the majority's model for the manner in which claims for compensation for litigation costs in an administrative case are to be handled force an individual to pursue dual proceedings – first on the substantive issue of fact and thereafter on the one of compensation – before it is clear whether the requirement of a fair trial in the administrative case has been fulfilled. To this is to be added that the individual in a tort proceeding is at risk of being required to bear the opposing party's litigation costs. It is both cumbersome and resource-demanding and far from a comprehensive system which is indicated by the majority and it risks seriously obstructing the exercise by an individual of such individual's right on the issue of compensation. The system counteracts rather than promotes the right to a fair trial.

Justice Gäverth adds the following.

1. As stated in the decision, there have never been rules which grant a party a right to compensation for costs in administrative cases, with the exception of the provisions regarding compensation in certain cases concerning, *inter alia*, tax (paragraph 16). In the course of the years, the issue has been raised on several occasions of implementing rules which can provide individual parties with the right to compensation for litigation costs in administrative cases, but the legislature has not implemented such provisions (see paragraphs 20–23).

2. In conjunction with the 2010 constitutional reform, when the formulation by which a trial was to be conducted fairly and within a reasonable time was incorporated in Chapter 2, section 11, second paragraph of the Instrument of Government, there was no discussion in the preparatory works according to which the addition, which constitutes a fundamental provision regarding procedural safeguards, was intended to lead in certain cases to a right for individual parties to compensation for their costs in, for example, administrative cases. The absence of such statements may, rather, be interpreted as though the legislature did not intend to alter the applicable regime in this respect.

3. The aforementioned does not entail, however, that the legal position could not have been shifted somewhat such that there may exist situations in which upholding the principle regarding the right to a fair trial presupposes that an individual may obtain compensation for legitimate litigation costs in an administrative case (see paragraph 31 and *cf.* the rulings presented in paragraphs 24–27).

4. If and when such a situation is deemed to exist, the question arises as to the conditions under which compensation can be paid. In the aforementioned rulings, the individual was successful in their action. What it means to win a case, however, is not always given. The question must be answered, *inter alia*, on the basis of the type of case (*cf.*, for example, cases regarding judicial review or

legality review), and also on the basis of the manner in which the action is formulated. Two similar outcomes in this regard may be perceived differently depending on how the respective action has been formulated.

5. In the rulings referred to, it further appears to have been material to the right to compensation that the underlying issue was of great weight to the individual, something which may also be difficult to decide in an individual case since this is not infrequently a question of a purely subjective assessment.

6. Another question is whether it is at all necessary that the individual has succeeded in whole or in part in their action in order for compensation to be payable. Case law to which reference has been made may indicate such a view. If the individual requires legal aid in order to be able to pursue their action in a correct way, this need is not affected by whether the individual succeeds or not in their claim. In other cases, it is only the party who has the economic possibility who, notwithstanding an uncertain outcome, can pursue their action with the assistance of qualified counsel, while a party of lesser means may be compelled to refrain from retaining legal assistance and, perhaps, is not successful precisely for this reason. Maintaining the right to a fair trial cannot, in my opinion, be reasonably tied to the outcome of the same. Thus, this is also a question to be considered.

7. In the event the court in an administrative case comes to the conclusion that an individual party is to be compensated by the opposing party for legitimate litigation costs, there are no detailed rules for the manner in which this is to occur. In the case the state is the opposing party, the lack of such rules entail that it would be wholly impossible to resolve this within the scope of the proceedings. However, the situation is different when an individual's opposing party is a legal person such as, for example, an unemployment fund or another individual body (*cf*. HFD 2019 reported case no. 43). The question is, then, on which basis the court could order that such subject is liable to make payment for the opposing party's litigation costs and, similarly, how such a decision could be enforced.

8. In certain administrative cases, two individual parties may oppose one another at the same time as a decision-making public authority also appears as a party in the case. This is the scenario as regards certain dispute resolution cases in accordance with the Electronic Communications Act (2003:389). Comparable party positions may also arise in cases in accordance with procurement legislation. In these cases, the question regarding compensation for litigation costs also has an additional and complicating dimension (as regards procurement cases, *cf*. Swedish Government Official Report 2013:12 and 2018:44 and Government Bill 2021/22:120).

9. There are more questions – both such as may be anticipated and those which are currently difficult to anticipate or survey – which any decision as to whether an individual party is entitled to compensation for litigation costs in an administrative case raises.

10. Against the aforementioned background, it is, in my opinion, inappropriate that a general administrative court in a case awards an individual party compensation for litigation costs and thereby violates an established legal position which has always applied and with which all interested parties have complied and which, furthermore, the legislature has found no reason to alter.

11. In order to be able to address the few cases in which maintenance of the right to a fair trial in an administrative case presupposes that an individual party is granted compensation for legitimate litigation costs, the provisions of the Legal Aid Act (1996:1619) should, in my opinion, first be applied. Taking into account the limitations of the Legal Aid Act for granting someone legal aid, the aforementioned regime is not particularly well adapted to address the situations of the type now relevant, even if there is room for a more generous application within the context established by the Act. In order for the Legal Aid Act to adequately be able to address the situations in which the right to a fair trial presupposes that the individual him or herself need not bear their litigation costs, a review of the Legal Aid Act is required. Pending the occurrence of such, it remains, in my opinion, only to apply the provisions in Chapter 3, sections 2 and 4

of the Tort Liability Act even if this possibility in practice entails a number of difficulties for individuals.