

# SWEDEN

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## 1. National court system

Sweden has three types of courts, the general courts, the general administrative courts and the special courts.<sup>1</sup>

The general courts deal with both criminal and civil cases and consist of district courts, courts of appeal and the Supreme Court. There are 53 district courts in Sweden and in most cases parties can file an appeal against a district court's judgement with one of the six courts of appeal. The court of final appeal is the Supreme Court, the responsibility of which is to create precedents. For a case to be tried by the Supreme Court a leave to appeal is required by the Supreme Court.<sup>2</sup>

The proceedings in the general administrative courts involve disputes between authorities and individuals. The courts of first instance are 23 county administrative courts, the courts of second

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<sup>1</sup> Sweden/Justitiedepartementet (2007) *The Swedish judicial system – a brief presentation*, pp. 11-12.

<sup>2</sup> Sweden/Justitiedepartementet (2007) *The Swedish judicial system – a brief presentation*, pp. 11-12.

instance are the four administrative courts of appeal and the court of final appeal is the Supreme Administrative Court. Appeals to the administrative courts of appeal or the Supreme Administrative Court generally require a leave to appeal.<sup>3</sup>

The special courts in Sweden consists of the Labour Court, the Court of Patent Appeals, migration courts, the Higher Migration Court, the Market Court, five environmental courts, seven district courts acting as maritime courts and 25 district courts acting as land courts. The Labour Court is in most cases the first and only instance in labour disputes. However, in some cases labour disputes are first settled in a district court and then appealed to the Labour Court. The Court of Patent Appeals settles appeals against the decisions of the Swedish Patent and Registration Office, and if leave of appeal is granted appeals of the Court of Patent Appeals' decisions can be filed with the Supreme Administrative Court. The migration courts handles decisions by the Swedish Migration Board and appeals of the migration courts can be filed with the court of final instance, the Higher Migration Court.<sup>4</sup>

In cases concerning discrimination in working life where the individual is represented by the Equality Ombudsman<sup>5</sup> or an employee organisation, the Labour Court is the court of first instance and no action may be brought against a judgment or decision of the Labour Court.<sup>6</sup>

Individuals who are not represented by the Ombudsman or an employee organisation may bring a case of discrimination in working life to a district court, and the district court judgement can then be appealed to the Labour Court as the court of last instance.<sup>7</sup>

In other cases concerning discrimination there is a right to appeal judgements by the district courts to one of the courts of appeal. The court of final appeal is the Supreme Court, and for a case to be tried by the Supreme Court a leave to appeal is required.<sup>8</sup>

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<sup>3</sup> Sweden/Justitiedepartementet (2007) *The Swedish judicial system – a brief presentation*, pp. 11-12.

<sup>4</sup> Sweden/Justitiedepartementet (2007) *The Swedish judicial system – a brief presentation*, pp. 11-12.

<sup>5</sup> The Office of the Equality Ombudsman was formed on 1 January 2009 when the four previous anti-discrimination ombudsmen were merged into a single body. The Equal Opportunities Ombudsman (JämO) dealt with gender-based discrimination, the Ombudsman against Ethnic Discrimination (DO) focused on discrimination related to ethnicity, religion or other belief, the Disability Ombudsman (HO) was responsible for combating discrimination relating to disability, and the Ombudsman against Discrimination because of Sexual Orientation (HomO) monitored compliance with the rules prohibiting discrimination due to a person's sexual orientation.

<sup>6</sup> Sweden/Swedish Code of Statutes no 1974:371 (31.05.1974), chapter 2, sections 1-4.

<sup>7</sup> Sweden/Swedish Code of Statutes no 1974:371 (31.05.1974), chapter 2, sections 1-4.

<sup>8</sup> Sweden/Swedish Code of Statutes no 1942:740 (18.07.1942), chapters 50 and 54.

## 2. Restrictions regarding access to justice

According to the Discrimination Act<sup>9</sup> chapter 6, section 6, actions relating to discrimination in other areas than working life must be brought within two years from the date on which the act to which attention is called was performed or from the last date on which an obligation should have been fulfilled.

In cases concerning working life, there are more restrictions depending on the case. If the case concerns notice of termination or summary dismissal, provisions 40-42 of *lagen om* the Employment Protection Act<sup>10</sup> shall apply (the time limit ranging from two weeks to four months).<sup>11</sup>

For other working life related actions, sections 64-66 and 68 of the Employment (Co-determination in the Workplace Act]<sup>12</sup> shall be applied (the time limit ranging from one to four months).<sup>13</sup>

Actions relating to other areas than working life must be brought within two years.

According to chapter 1, section 3 of the Discrimination Act (2008:567) a contract or agreement that restricts someone's rights or obligations under the Discrimination Act is of no legal effect in that regard.<sup>14</sup>

Moreover, there is another limitation of access to justice; legal aid only covers parts of the legal costs, which has the effect that many groups in society cannot afford to go to trial.<sup>15</sup>

The conclusion regarding the right of effective access to a dispute resolution body in the field of discrimination in Sweden is that this right exists to some extent, but that there are several laws and regulations that limit this right. The main obstacles to real access to justice in the discrimination field concerns the financial costs that can be connected to bringing discrimination cases to court, that there is no right to appeal decisions by the Ombudsman, the low amount of damages awarded in discrimination cases (prior to 1 January 2009) and the restrictive statutes of limitation in cases concerning discrimination in working life.

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<sup>9</sup> Sweden/Swedish Code of Statutes no 2008:567 (05.06.2008).

<sup>10</sup> Sweden/Swedish Code of Statutes no 1982:80 (24.02.1982).

<sup>11</sup> Sweden/Swedish Code of Statutes no 2008:567 (05.06.2008), chapter 6, section 4.

<sup>12</sup> Sweden/Swedish Code of Statutes no 1976:580 (10.06.1976).

<sup>13</sup> Sweden/Swedish Code of Statutes no 2008:567 (05.06.2008), chapter 6, section 4.

<sup>14</sup> Sweden/Swedish Code of Statutes no 2008:567 (05.06.2008).

<sup>15</sup> Sweden/Private members' bill 2008/09:Ju329, *Likhet inför lagen*, by Peter Hultqvist and Anneli Särnblad.

### 3. Length of judicial proceedings

The discrimination cases examined were mostly cases from the Labour Court (as first and only instance), and in these cases no information was available regarding the length of the proceedings. In the remaining cases in general courts, the time from the judgement in the first instance to the judgement in the third and last instance was approximate two years.

In one case (that did not reach the Supreme Court) the judicial proceeding took approximately seven months from the judgement in the first instance to the judgement in the second instance. The time in this case from the institution of the proceeding until the decision was reached in the first instance was approximately nine months.<sup>16</sup>

### 4. Are procedures concluded within a reasonable time?

In general procedures in discrimination cases are concluded within reasonable time. However, the former Ombudsman against Ethnic Discrimination has raised concern that the legal proceedings in the district courts in cases related to the former Prohibition of Discrimination Act<sup>17</sup> sometimes have been very long, which may cause violations of article 6.1 of the European Convention.<sup>18</sup>

### 5. Does provision exist for speedy resolution of particular cases?

There are some general provisions in the Swedish Code of Judicial Procedure<sup>19</sup> that allows for speedy resolutions in particular cases, for example in chapter 42, section 6 and chapter 49, section 7. Chapter 42, section 6 states that if a summons is issued, preparation of the case shall take place, and the court shall proceed with the preparation in the aim of a speedy adjudication of the case. Chapter 49, section 7 states that any party who is of the opinion that the processing of the case has been delayed without reason by a district court decision may appeal from that decision separately.

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<sup>16</sup> Sweden/Hovrätten för Övre Norrland/T441-07 (09.01.2008).

<sup>17</sup> Sweden/Swedish Code of Statutes no 2003:307 (05.06.2003).

<sup>18</sup> Sweden/Ombudsmannen mot etnisk diskriminering (2008) *Remissvar förtursförklaring i domstol, dnr 351-2008*.

<sup>19</sup> Sweden/Swedish Code of Statutes no 1942:740 (18.07.1942).

The proposed law that aims to increase individuals' right to a speedy resolution of court cases has been introduced through government bill 2008/09:213.<sup>20</sup> According to the proposed law, an application regarding priority declaration can be made regarding all kinds of cases in the general courts, the general administrative courts, the Labour Court, the Market Court and the Court of Patent Appeals.<sup>21</sup>

## 6. Is it possible to waive the right of access to a judicial body?

According to chapter 1, section 3 of the Discrimination Act (2008:567) a contract or agreement that restricts someone's rights or obligations under the Discrimination Act is of no legal effect in that regard.

## 7. Access to non-judicial procedures

If an individual wants to bring a case of discrimination to court there are various options, to file a complaint with the Ombudsman (*Diskrimineringsombudsmannen; DO*), to be represented by an employee organisation (regarding employment discrimination) or to bring the case to court by oneself.

The competence of DO is set out in the Ombudsman Against Discrimination Act (*lag (2008:568) om Diskrimineringsombudsmannen*) and the Discrimination Act. DO is to work against the mentioned types of discrimination as well as to work for equal rights and opportunities regardless of e.g. ethnicity. DO has the task to help individuals subject to discrimination to safeguard their interests, to inform, educate and confer with agencies, corporations, private persons and organisations, to follow the international scientific and development work and to propose legislative changes or other measures to counter discrimination due to ethnicity. DO has also a general power to take initiatives regarding "other appropriate measures" within its competence.

Finally, DO can begin civil litigation on behalf of the private person concerned if she or he allows this. The ability to assist persons in court is granted by the Discrimination Act, although this is aggrieved person accepts the assistance.

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<sup>20</sup> Sweden/Swedish government (2009), *Förtursförklaring i domstol, government bill 2008/09:213*.

<sup>21</sup> Sweden/Swedish government (2009), *Förtursförklaring i domstol, government bill 2008/09:213*.

On its own initiative, DO has the power to demand from entities covered by the ban on discrimination a wide range of information and to demand access to job sites and other places of importance. DO also has the power to require representatives of an entity to attend an interview. These powers can be connected to a financial penalty, in order to make them effective. In some cases the Ombudsman can decide upon the penalty itself and in some cases apply for it from a specific board (*Nämnden mot diskriminering*). The application of the penalty (and it is relatively rarely that a penalty needs to be executed) can be appealed to the courts. These tools have, in Swedish academic writing, been considered to give the ombudsman a lot of its efficiency.<sup>22</sup>

Moreover, there is the possibility to file a complaint with the Office of the Chancellor of Justice. The Office of the Chancellor of Justice has, among other things, a duty to receive complaints and claims for damages directed to the Swedish State and decide on financial compensation for such damages.<sup>23</sup>

DO has certain powers when it comes to enforcing its supervisory and investigatory measures as provided in the 2008 Act. According to Chapter 4, Sections 4-5 of the Act, the Ombudsman may issue an order to secure compliance with a provision of the Act, backed up by a financial penalty (*vite*) which is payable if the measures prescribed are not taken within a given period of time. Such an order can in effect constitute economic damages for the party that e.g. refuses to investigate suspected discrimination or to report information as requested by the Ombudsman.

Cases of discrimination are civil cases in which settlements out-of-court are allowed (Discrimination Act Chapter 6, Section 1). In employment cases this is governed by the Trial in Labour Law Disputes Act of 1974 [*lagen om rättegången i arbetstvister*, (1974:371)]. This means that the victim of discrimination or the Ombudsman are free to agree on settlement out-of-court, something that has long been the ambition in Sweden, especially in labour cases. The *travaux préparatoires* of the 2008 Discrimination Act state that this should remain the ambition of DO, which is in line with the intentions of the legislator that those affected by the Discrimination Act should abide by it voluntarily.<sup>24</sup>

Settlements based on mediation in Sweden are typically agreed upon only after court proceedings are brought. The legal framework and levels of compensation available in court are an important part of the incentive to reach a mediated settlement. Such mediation is often performed on behalf

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<sup>22</sup> Göransson, Flemström and Slorach, *Diskrimineringslagen* page 147-148, Nordstedts Juridik 2009.

<sup>23</sup> Sweden/Swedish Code of Statutes no 1975:1345 (15.12.1975).

<sup>24</sup> Prop. 2007/08:95, p. 371.

of the supposed victim by either the Ombudsman or (in employment disputes) the trade union of the alleged victim, as it is the interest of both parties to avoid the legal costs and longer duration of court proceedings. All Ombudsman settlements are published on the website of the body. For these reasons, settlements out-of-court must in general be considered to mirror the sanctions and legal consequences of discrimination handled within the court system. They are not, however, subject to legislation.

## 8. Legal aid

In regard to legal aid, the main rule is that individuals shall use their legal protection cover included in their home insurance first of all, and that individuals normally will not receive legal aid if they have legal protection cover. If individuals have no legal protection cover in their home insurance, that does not mean that they will be automatically entitled to legal aid.<sup>25</sup>

Legal aid might be available to discriminated individuals, if they fulfil the general requirements for legal aid. Whether a discriminated individual will receive legal aid is determined on a case-by-case basis. However, legal aid only covers parts of the legal costs.<sup>26</sup>

Moreover, the Swedish State has also financed a number of NGOs working with issues closely related to access to justice. These NGOs are called anti-discrimination bureaus and they are located in various cities across Sweden. The aim of the NGOs is to offer legal and other advice to victims of discrimination free-of-charge and to raise awareness about discrimination in society. Due to lack of finances these organisations are, however, not able to represent victims of discrimination in court proceedings.<sup>27</sup>

Furthermore, the Swedish Trade Union Confederation (*Landsorganisationen, LO*) together with the Swedish Confederation for Professional Employees (*Tjänstemännens Centralorganisation, TCO*) have set up a special law firm for legal support of members (*LO-TCO rättsskydd*). This is the largest labour law firm in the country and provides legal consultation and procedural help in labour law conflicts and in cases concerning social security connected to the labour market. It provides help to all members of the trade unions involved. This is the most clear and concrete example of ways the trade union provides help to individuals in situations of discrimination, but

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<sup>25</sup> Sweden/Rättshjälpsmyndigheten (2007) *Legal aid in Sweden*.

<sup>26</sup> E-mail correspondence with Ylva Boström, Senior Lawyer at the Legal Aid Authority (10.07.2009).

<sup>27</sup> Sweden/Swedish Code of Statutes no 2002:989 (05.12.2002).

of course information and education by trade unions also plays a part in this area. There is no sign that trade unions generally did not support or provide assistance to victims of discrimination on the ground of race or ethnic origin.

The fact that legal aid is not assured automatically for all cases of discrimination and that legal aid does not cover all costs involved has the effect that the right to a fair proceeding in discrimination cases is limited in Sweden.

## 9. Forms of satisfaction available to a vindicated party

By tradition, the legal consequences of discrimination in Sweden have been largely governed by the private law, especially damages and invalidity of contracts. By tradition, the legal consequences of discrimination in Sweden have been largely governed by the private law, especially damages and invalidity of contracts. The 2008 Discrimination Act takes the private law sanctions further by introducing a new type of damages: compensation for discrimination [diskrimineringsersättning, Discrimination Act Chapter 5, Section 1]. This form of compensation is a clear example of new developments in Swedish private law, as this type of compensation clearly has both compensatory and punitive purposes, something that is expressed clearly in the travaux préparatoires of the 2008 Act. Thus, the amounts paid as compensation for discrimination are supposed to exceed the level of the damages normally awarded by the courts for cases of infringement of personal integrity as the result of the commission of a criminal offense [kränkning, Torts Act Chapter 2, Section 3]. The new penalty shall both compensate for the violation and act as a deterrent against discrimination.

Apart from compensation for discrimination, ordinary damages can also be awarded for economic loss due to discrimination, e.g. due to the loss of employment. A court can also declare a discriminatory provision invalid or modify it if the person discriminated against requests this (2008 Act, Chapter 5, Section 3).

## 10. Adequacy of compensation

Prior to the new penalty “compensation for discrimination” (introduced in the new 2008 Discrimination Act), which shall both compensate for the violation and act as a deterrent against discrimination, there was critique in Sweden regarding the low damages in discrimination cases.<sup>28</sup>

The new penalty, called “compensation for discrimination,” was introduced by the new Discrimination Act<sup>29</sup> in order to create conditions for higher levels of compensation for victims of discrimination. The new penalty shall both compensate for the violation and act as a deterrent against discrimination.

Since this penalty is new, it was so far impossible to draw any conclusions regarding if the compensation will be adequate.<sup>30</sup>

## 11. Rules relating to the payment of legal costs

In discrimination cases, the Discrimination Act<sup>31</sup> states that each party may be ordered to bear its litigation costs, if the party that has lost the case had reasonable grounds for bringing the dispute to court.<sup>32</sup> However, if the Ombudsman brings an action on behalf of an individual, the above mentioned rule does not apply.<sup>33</sup>

Employee organisations can also represent their members in discrimination cases in court free-of-charge, but this is only in cases concerning employment discrimination. The option to bring the discrimination case to court by oneself, involves costs for the individuals. Even if it is possible to cover some of the costs by either legal protection cover or legal aid, this never covers all costs involved. Therefore, many individuals cannot afford to bring discrimination cases to court.

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<sup>28</sup> Sweden/Integrations- och jämställdhetsdepartementet (2005) *Det blågula glashuset: strukturell diskriminering i Sverige, SOU 2005:56.*

<sup>29</sup> Ibidem.

<sup>30</sup> Sweden/Integrations- och jämställdhetsdepartementet (2009) *Ny diskrimineringslag och ny myndighet, Diskrimineringsombudsmannen.*

<sup>31</sup> Sweden/Swedish Code of Statutes no 2008:567 (05.06.2008).

<sup>32</sup> Sweden/Swedish Code of Statutes no 2008:567 (05.06.2008), chapter 6, section 7.

<sup>33</sup> Sweden/Swedish Code of Statutes no 2008:567 (05.06.2008), chapter 6, section 7.

Moreover, in cases of discrimination in working life the Labour Disputes (Judicial Procedure) Act<sup>34</sup> applies in regard to payment of legal costs. According to chapter 5, section 2 of this act each of the parties may be ordered to pay its own litigation costs if the losing party had reasonable cause to have the dispute tried.

## 12. Rules on burden of proof

Swedish private law has included provisions on the burden of proof for a long time. Modifying this burden has been seen as a suitable solution when a weaker party (either by position or by ability to obtain evidence) is involved but where a change in the substantive rules would challenge the balance of interests that the system as a whole is designed to protect. In cases where it is typically difficult to obtain evidence, the traditional approach in Swedish law has been to *reduce* the burden of proof, e.g. from the standard burden on the plaintiff to “show” [*styrka*] that a certain fact is true to the easier burden of “making it probable” [*sannolikt*]. While in such cases the burden of proof remains on the plaintiff, the defendant can in effect seldom simply deny the plaintiff’s version of events, but must instead seek to prove to at least some degree of certainty that the facts claimed by the plaintiff are not true. This means of reducing the burden of proof was previously used in Swedish discrimination legislation.

Under the influence of Community Law a solution that was previously less frequently used in Swedish law has gained in importance, namely the *shifting* of the burden of proof. While in effect the procedure often resembles the reduction model, such a shift entails a presumption that a fact is true unless the defendant can prove, i.e. show [*styrka*], that the fact in question is untrue. The plaintiff, meanwhile, only has to demonstrate circumstances that “give reason to presume” [*göra antagligt*] that a certain fact is true, a considerably lower burden of proof than the requirement to make it probable [*sannolikt*]. In the wake of the EC directives on discrimination, such a shift of the burden of proof was introduced in the old acts on discrimination at the beginning of the new century. This solution, in compliance with directive 2000/43/EC when it comes to the grounds of race or ethnic origin, has been maintained in the 2008 Act (Chapter 6, Section 3).

A shift of the burden of proof works partly in the same way as a reduction of the burden of proof in a certain field. While reducing the legal certainty of the defendant, he or she is required to retain documentation of procedures where discriminatory measures are often suggested to have

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<sup>34</sup> Sweden/Swedish Code of Statutes no 1974:371 (31.05.1974).

taken place, typically recruitment. The shifting construction, in which the defendant has to show that discrimination has not taken place if the plaintiff can demonstrate circumstances that *give reason to presume* that discrimination has taken place, thus forces employers, educational and healthcare institutions and others to better document their procedures and make them more transparent. This is particularly so as the typical defence to a presumption of discrimination is to show other, non-discriminatory, reasons for treating someone else in a different, typically better way, e.g. by choosing to hire someone not belonging to an ethnic minority. At the same time the plaintiff, typically the weaker party in discrimination cases, has a realistic possibility of winning the case.