In the Skärby case*,

_____

* Note by the Registrar: The case is numbered 14/1989/174/230. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

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The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court*, as a Chamber composed of the following judges:

_____

* Note by the Registrar: The amendments to the Rules of Court which entered into force on 1 April 1989 are applicable to this case.

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Mr R. Ryssdal, President,
Mr J. Cremona,
Mrs D. Bindschedler-Robert,
Mr J. Pinheiro Farinha,
Mr C. Russo,
Mr A. Spielmann,
Mrs E. Palm,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 23 February and 25 May 1990,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 12 April 1989 by the European Commission of Human Rights ("the Commission") and on 23 May 1989 by the Government of the Kingdom of Sweden ("the Government"), within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12258/86) against the Kingdom of Sweden lodged with the Commission under Article 25 (art. 25) by Mrs Ingegärd Skärby, Mrs Rigmor Skärby, Mrs Majken Skärby, Mr Bertil Skärby, Mr Rolf Skärby and Mrs Lena Hedman, Swedish nationals, acting on their own behalf and as the heirs of their parents, Christian and Maria Skärby, on 26 June 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Sweden recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and of the Government's application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the person who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mrs E. Palm, the elected judge of Swedish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 29 April 1989, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr J. Cremona, Mrs D. Bindschedler-Robert, Mr J. Pinheiro Farinha, Mr C. Russo and Mr A. Spielmann (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr R. Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicants' representative on the need for a written procedure (Rule 37 § 1). In accordance with the orders made in consequence, the Registrar received the Government's memorial and that of the applicants on 1 December 1989. In a letter which arrived on 14 December the Secretary to the Commission indicated that the Delegate would submit her observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 4 January 1990 that the oral proceedings should open on 20 February 1990 (Rule 38).

6. On 16 January the Government lodged their observations on the applicants' claims for just satisfaction. On 22 January the Commission produced the file of the proceedings before it.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr H. Corell, Ambassador, Under-Secretary
for Legal and Consular Affairs,
Ministry of Foreign Affairs, Agent,

Mr S. Tell, District Court Judge, former Legal
Adviser to the Ministry of Housing and Planning,

Mr H. Lagergren, Legal Adviser, Ministry of
Housing and Planning,

Mr P. Boqvist, Legal Adviser, Ministry of
Foreign Affairs, Advisers;

(b) for the Commission

Mrs G. Thune, Delegate;

(c) for the applicants

Mr B. Grennberg, Patent Agent, Counsel.

The Court heard addresses by Mr Corell for the Government, by Mrs Thune for the Commission and by Mr Grennberg for the applicants, as well as their replies to its question.

AS TO THE FACTS

I. Particular circumstances of the case

8. Mrs Ingegärd Skärby, Mrs Rigmor Skärby, Mrs Majken Skärby, Mr Bertil Skärby, Mr Rolf Skärby and Mrs Lena Hedman, who are Swedish nationals, are the children and heirs of Christian and Maria Skärby.

They lodged their application with the Commission on their own behalf and as their parents' joint heirs, since the two estates have legal personality. They reside at Nyhamnsläge, Ambjörby, Kisa and Höganäs.

9. In 1913 Christian and Maria Skärby bought a farm in Southern Sweden, on the shore of Skälderviken (in the west of the province of Skåne). Under the Preservation of Natural Resources Act (lagen om hushållning med naturresurser m m), which came into force on 1 July 1987, this region is listed as an area of national interest from the point of view of natural resources and cultural values.

The property, covering an area of approximately eight hectares, consisted of three different parts: Flundrarp 4:9, Stubbarp 8:17 and Stubbarp 8:18. In 1960 further land was purchased which was joined to Flundrarp 4:9, thereafter designated as Flundrarp 12:1. The present dispute originated in the applicants' attempts to build on it.

10. In 1962 the County Administrative Board (länsstyrelsen, "the Board") of Malmöhus County confirmed a building plan (byggnadsplan) which concerned the major part of Flundrarp 4:9 (see paragraph 18 below). According to this plan, amongst other things, the area located along the shore was to be preserved as a nature park - Swedish law does not however define this term or indicate what obligations attach thereto -, while the remaining area was to be used as agricultural land and as a garden for the main building, there being four other buildings on the parcel of land in question. The plan also indicated the limits and conditions with which the owners would have to comply if they wished to construct any new buildings.

When this plan, which was drawn up by the Municipality, was put up on display prior to its confirmation, the Skärby family asked the local authorities for information concerning the legal significance of the designation of the land because they wished to build on it. As those authorities were unable to reply to this request, the Skärbys turned in 1961 to the Board in Malmö. According to the applicants, the competent officials stated that the plan would not prevent the family from building houses which they might need in the future, if they did not lodge an objection to it; they therefore did not do so.

11. In 1964 the Board confirmed a plan which related to the remainder of Flundrarp 4:9 and to Stubbarb 8:17 and 8:18 and which laid down a number of requirements. Pursuant to section 110 of the 1947 Building Act (byggnadslagen, "the 1947 Act") new buildings not connected to water supplies and sewage systems were prohibited.

12. On several occasions between 1968 and 1986 the Skärby family tried to have the plan modified. A new plan, concerning a part of Flundrarp 12:1, was put to them in 1983. Under this plan it was proposed to allow the construction of dwelling-houses - on a site on which the applicants had never contemplated building - and to extend the area designated as a nature park.

This plan was approved by several of the joint heirs to the two estates, but some of them did not consent to the development agreement (exploateringsavtalet) which was linked to it. For its part, the Municipality considered that it could not endorse the planned modifications or lift the prohibition on building unless such prior consent was obtained.

13. On 28 February 1986 Mr Bertil Skärby applied to the Höganäs Building Committee (byggnadsnämnden) for a building permit for a house and two garages on Flundrarp 12:1, in the area designated as a nature park. His application was rejected on 24 March 1986 on the ground that the proposed buildings were not in line with the building plan in force. It followed that the Committee could see no reasons for granting an exemption from the building plan (see paragraph 18 below).

In so far as the decision implied a refusal to grant an exemption, it could not be appealed against (see paragraph 19 below).

Before the Convention organs, the applicants maintained that, in the circumstances of the case, they had been entitled to an exemption. They also alleged that they had been discriminated against in relation to their neighbours. Finally they stated that the Building Committee had been influenced by the fact that the Municipality intervened on its own account in the real estate market and was primarily concerned with the financial advantages which it could secure therefrom.

14. At an unspecified date the applicants again sought an exemption from the building plan for Flundrarp 12:1. The Building Committee refused their application on 24 July 1989. One of its members expressed a dissenting opinion in which she stated as follows: "From the outset, the Skärbys have been given erroneous information by the authorities and the local authority is under a duty to rectify the mistake and should therefore by way of exception allow an alteration to the plan".

15. Of the applicants only Mrs Majken Skärby and Mr Bertil Skärby reside on the property. The former, who was born in 1912 and who is in poor health, lives in the main building, which is badly insulated and close to a busy road. The latter, who was born in 1914, lives in a warehouse, with no running water and no heating.

II. Domestic law

16. Until 30 June 1987 a property owner's right to build on his own land was governed by the 1947 Act and by a Government Ordinance adopted in 1959 in pursuance of that Act (byggnadsstadgan, "the 1959 Ordinance"). On 1 July 1987 the Plan and Building Act 1987 (plan- och bygglagen, "the 1987 Act") replaced the 1947 Act.

The present case came under the 1947 Act and the 1959 Ordinance, except with regard to the last application for an exemption (see paragraph 14 above), to which the 1987 Act applied.

17. Where an area had become densely populated, or might do so, even where there was no town plan (stadsplan), the municipality in question was required to supervise the drawing up of a building plan. It had to designate the areas intended for the various schemes provided for in the plan and, where appropriate, the specific conditions to be met.

18. It fell to the Municipal Council (kommunfullmäktige) to approve the building plan, but it could entrust this task to the Building Committee. For the decisions adopted in this way to have legal force, they had to be confirmed by the County Administrative Board, following which it was open to any property owner to challenge them by appealing to the Government.

By virtue of paragraph 1 of section 110 of the 1947 Act, no new building could be constructed in breach of the building plan. The County Administrative Board could, however, grant an exemption "where there [were] special grounds and if the Building Committee [had given] its approval". The Government could also delegate this power to the Building Committee, which is what happened in most cases.

19. According to section 1 of the 1947 Act and section 55 of the 1959 Ordinance, any person wishing to construct a building had to apply to the Building Committee.

The examination of an application involved ascertaining that the proposed building did not contravene a plan in force (or, where applicable, the regulations for non-planned areas), or a building prohibition, and that it satisfied the relevant technical

requirements. If there were no such obstacles, a permit had to be granted.

If the application was incompatible with a current plan or if it related to a property covered by a building prohibition, it was, in practice, regarded as a request for an exemption.

The person concerned could appeal to the County Administrative Board against the refusal to issue a building permit or to grant an exemption. The Board's decisions could in turn be challenged before the Government, as far as exemptions were concerned, and in the Administrative Court of Appeal, in respect of permits. In the latter case, a further appeal lay on a point of law to the Supreme Administrative Court, subject to the granting of leave. Where the County Administrative Board dealt with both questions simultaneously, the appeal had to be lodged with the Administrative Court of Appeal. If that court considered that the proposed building did not require an exemption, it continued the examination of the question of the permit. Otherwise, it referred the file to the Government, together with its opinion on the grant of a permit.

The person concerned had no remedy where the Building Committee refused to allow an exemption from the plan (section 71 of the 1959 Ordinance).

20. When the Building Committee examined an application for a permit or an exemption, it was under a duty to comply with certain legal and administrative principles. Consequently, it was bound to have regard to various public and private interests, as well as the overall objective of the applicable legislation in the field in question. It had to decide on this basis whether there were sufficient grounds for allowing the application. At the same time, it was under a duty not to allow itself to be influenced by irrelevant considerations and to give its decision after fair proceedings, in conformity with the general principles of law, such as the principle that all citizens are equal before the law.

PROCEEDINGS BEFORE THE COMMISSION

21. In their application of 26 June 1986 to the Commission (no. 12258/86), the applicants alleged that their case had not been given a fair and public hearing by a tribunal. They relied on Article 6 (art. 6) of the Convention. They also submitted a number of other complaints: they had been deprived of the right to live in decent dwellings on their property (Article 8 of the Convention and Article 1 of Protocol No. 1) (art. 8, P1-1); the authorities had exceeded the limits imposed by the above-mentioned Articles (Article 17 of the Convention) (art. 17); and finally the Municipality's true purpose had been to compel the applicants to sell their property to it at a low price in order to be able to resell it to holiday-makers (Article 18 of the Convention) (art. 18).

22. On 9 May 1988 the Commission declared the application admissible as regards the first point and inadmissible as to the remainder of the applicants' claims.

In its report of 16 March 1989 (Article 31) (art. 31), it expressed the opinion, by twelve votes to five, that there had been a violation of Article 6 § 1 (art. 6-1) of the Convention. The full text of its opinion and the dissenting opinions contained in the report is reproduced as an annex to the present judgment*.

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* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 180-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

23. At the hearing on 20 February 1990, the Government confirmed the final submission in their memorial inviting the Court to find "that there has been no violation of the Convention in the present case".

AS TO THE LAW

I. SCOPE OF THE CASE

24. In their memorial of 1 December 1989 the applicants stated that they wished before the Court to raise again their complaints concerning Articles 8, 17 and 18 (art. 8, art. 17, art. 18) of the Convention and Article 1 of Protocol No. 1 (P1-1). These complaints are clearly separate from the complaint under Article 6 § 1 (art. 6-1) - the lack of adequate access to a court for the purpose of challenging the lawfulness of the contested decision of 24 March 1986 (see paragraph 13 above) - because they do not relate to the same facts. Moreover the Commission rejected them as manifestly ill-founded (see paragraphs 21-22 above). Accordingly, the Court does not have jurisdiction to examine them (see, as the most recent authority, the Powell and Rayner judgment of 21 February 1990, Series A no. 172, pp. 13-14, §§ 28-29).

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 (art. 6-1)

25. The applicants complained that Swedish law did not provide them with access to a court to challenge the above-mentioned decision prohibiting them from constructing a building at a specific site on their property (see paragraph 13 above). They relied on Article 6 § 1 (art. 6-1), which provides as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing ... by [a] ... tribunal ...."

The Commission agreed with this contention.

A. Applicability of Article 6 § 1 (art. 6-1)

26. The Government, for their part, pleaded that Article 6 § 1 (art. 6-1) was not applicable in this case.

1. Existence of a dispute ("contestation") over a "right"

27. In order to decide this question, the Court has first to ascertain whether there was a dispute ("contestation") over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. According to the principles enunciated in its case-law (see, inter alia, the Pudas judgment of 27 October 1987, Series A no. 125-A, p. 14, § 31), the dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question.

28. The Government argued that the Swedish legislation did not itself recognise a right to build without a building permit. In any event there had been no such a right in this instance in view of the nature of the criteria which determined not only planning decisions, such as the drawing up of a building plan, but also the grant of exemptions.

The Court does not subscribe to this view. It notes that the present dispute concerns the right to choose the site of a new building, a

right provided for in Swedish law although subject to the requirements of the 1947 Act (see paragraph 19 above). A dispute (contestation) within the meaning of Article 6 (art. 6) could therefore in principle arise if the lawfulness of a decision affecting this right were questioned. The fact that an exemption could be refused makes no difference in this respect.

In the Government's submission, however, section 110 of the 1947 Act (see paragraph 18 above) gave the Building Committee such a wide discretion that no dispute between the applicants and that committee could have arisen under it. The mere existence of "special grounds" did not justify an exemption, because the "approval" of the Building Committee was also a mandatory condition. In addition, they maintained that the right claimed could not be taken into account under Article 6 (art. 6) as the applicants had never exercised it.

The Court observes that the Building Committee did not enjoy unfettered discretion; it was bound by generally recognised legal and administrative principles (see paragraph 20 above and the Allan Jacobsson judgment of 25 October 1989, Series A no. 163, p. 20, § 69). In so far as the applicants could arguably claim that the Building Committee's refusal conflicted with these principles, a dispute (contestation) could arise in the present case. This being so, it makes no difference that the applicants did not exercise the right, claimed by them, to build a house on the site of their choice.

The Government contended, however, that there was no genuine and serious dispute over the right at issue because, in their view, the disagreement related not to the lawfulness of the decision taken but only to its appropriateness.

However, like the Commission, the Court finds that the dispute was a serious one. The applicants claimed to have been discriminated against; in addition they complained that the authorities had been guided by extraneous considerations and improper motives (see paragraphs 13 and 21 above). They thereby sought in substance to contest the lawfulness of the decision of 24 March 1986.

There was therefore a genuine and serious dispute ("contestation") concerning a "right".

2. The "civil" character of the "right" in issue

29. There can be no doubt that the right in question was a "civil right" within the meaning of Article 6 § 1 (art. 6-1); this is confirmed by the Court's established case-law (see, as the most recent authority, the Allan Jacobsson judgment, cited above, Series A no. 163, pp. 20-21, §§ 72-73). In the circumstances of the present case this finding is not affected by the Government's assertion that the dispute concerned only a minor question, the location of the building to be constructed.

3. Conclusion

30. In sum, Article 6 § 1 (art. 6-1) applies to the present case.

B. Compliance with Article 6 § 1 (art. 6-1)

31. In the applicants' submission, it had not been possible for them to challenge the refusal to grant an exemption from the building plan in a court satisfying the requirements of Article 6 § 1 (art. 6-1). Section 71 of the 1959 Ordinance did not provide for any remedy against the Building Committee's rejection of an application (see paragraph 19 above).

The Government, for their part, did not put forward any arguments on this question.

32. Like the Commission, the Court finds that there has been a violation of Article 6 § 1 (art. 6-1).

III. APPLICATION OF ARTICLE 50 (art. 50)

33. Article 50 (art. 50) provides as follows:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The claims submitted by the applicants under this provision concerned both compensation for damage and the reimbursement of costs and expenses.

A. Damage

34. The applicants sought a sum in respect of damage, without making a clear distinction - which would in their view be artificial - between pecuniary and non-pecuniary damage. In their memorial, they set such damage at 949,520 Swedish crowns, but at the hearing they specified that this figure was to be regarded merely as a rough indication of the amount to be accorded.

1. Pecuniary damage

35. The Court agrees with the Commission and the Government that no causal connection has been established between the violation found and the pecuniary damage alleged. It cannot speculate as to what the outcome might have been had the applicants been able to bring their complaints before a court (see, among other authorities, mutatis mutandis, the Allan Jacobsson judgment, cited above, Series A no. 163, p. 22, § 82). No award is therefore justified under this head.

2. Non-pecuniary damage

36. On the other hand, Mrs Ingegärd Skärby, Mrs Rigmor Skärby, Mrs Majken Skärby, Mr Bertil Skärby, Mr Rolf Skärby and Mrs Lena Hedman have suffered a degree of non-pecuniary damage, for which they should be awarded a total of 30,000 crowns.

B. Costs and expenses

37. The applicants claimed 60,000 crowns in respect of lawyers' fees and 17,408 crowns for general and travel expenses incurred by them and their counsel.

The Government accepted the second item but speculated as to the extent to which the first sum related to the applicants' counsel's work in connection with the complaints declared inadmissible. However, they left this question to be dealt with by the Court.

38. The Court considers it equitable to award the entire sum claimed.

FOR THESE REASONS, THE COURT

1. Holds unanimously that it does not have jurisdiction to examine the complaints concerning Articles 8, 17 and 18 of the Convention (art. 8, art. 17, art. 18) and Article 1 of Protocol No. 1 (P1-1);

2. Holds by five votes to two that there has been a violation of Article 6 § 1 (art. 6-1) of the Convention;

3. Holds by six votes to one that Sweden is to pay to Mrs Ingegärd Skärby, Mrs Rigmor Skärby, Mrs Majken Skärby, Mr Bertil Skärby, Mr Rolf Skärby and Mrs Lena Hedman a total of 30,000 (thirty thousand) Swedish crowns for non-pecuniary damage;

4. Holds unanimously that Sweden is to pay to the applicants 77,408 (seventy-seven thousand four hundred and eight) crowns in respect of costs and expenses;

5. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 June 1990.

Signed: Rolv RYSSDAL
President

Signed: Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 53 § 2 of the Rules of Court, the dissenting opinions of Mr Ryssdal and Mr Pinheiro Farinha are annexed to this judgment.

Initialled: R.R.

Initialled: M.-A.E.

DISSENTING OPINION OF JUDGE RYSSDAL

The applicants applied to the Building Committee for permission to build a house and two garages on a part of their estate which, according to a confirmed building plan, was designated as a nature park. Their application was however rejected on 24 March 1986 on the ground that the proposed buildings did not comply with the building plan in force.

It is established case-law that Article 6 § 1 (art. 6-1) guarantees to everyone claiming that an interference by a public authority with his "civil rights" is unlawful the right to submit that claim to a tribunal satisfying the requirements of that provision.

The question is, however, whether in the present case it was alleged that the Building Committee acted unlawfully as a matter of Swedish law.

The applicants obviously considered the decision of 24 March 1986 to be wrong, but they did not advance any reasons for their claim that the Building Committee was legally bound to grant an exemption from the building plan. I share the opinion of the minority of the European Commission of Human Rights that the applicants simply disputed the way in which the Building Committee exercised its discretion and that Article 6 § 1 (art. 6-1) is not applicable.

DISSENTING OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

1. I voted against finding a violation of Article 6 (art. 6) of the Convention. I did so for the following reasons.

(a) In my view Article 6 (art. 6) is not applicable. The case did not concern a civil right. The right of ownership is not at this

stage in our history an absolute right; although the property owner has powers to use and dispose of his property (jus utendi et fruendi), he does not have the right to do whatever he wants with it (jus abutendi). A social function also attaches to ownership and the property must be used in a way which is in conformity and compatible with the general interest. In the present case, the refusal to grant a building permit did not deprive the applicants of the ownership or the use of Flundrarp 12:1; the Höganäs Building Committee rejected the application for planning permission for a house and two garages in an area designated as a nature park (see paragraph 13 of the judgment) because the proposed buildings did not conform to the building plan in force.

It did so in the exercise of a discretionary power vested in the authorities to protect the general interest and no civil right pertaining to the applicant was thereby called in question.

(b) If Article 6 (art. 6) is not applicable, there can be no violation in this instance.

2. For the sake of consistency, since I voted against finding a violation, I also have to refuse in the same judgment to award compensation arising from a violation which in my view - whether I am right or wrong - never occurred.

3. On the other hand, the costs and expenses do not derive from the violation of the Convention, but are the result of procedural activities in a case in which the applicants were successful; for this reason, I voted with the majority on point 4 of the operative provisions.