COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF ZANDER v. SWEDEN

(Application no. 14282/88)

JUDGMENT

STRASBOURG

25 November 1993

In the case of Zander v. Sweden*,

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:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr B. WALSH,
Mr A. SPIELMANN,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr A.N. LOIZOU,
Mr M.A. LOPES ROCHA,
Mr D. GOTCHEV,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 June and 25 October 1993,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 December 1992, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 14282/88) against the Kingdom of Sweden lodged with the Commission under Article 25 (art. 25) by two Swedish nationals, Mr Lennhart and Mrs Gunny Zander, on 12 September 1988.

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 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 para. 1 (art. 6-1).

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* The case is numbered 45/1992/390/468. 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.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer 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 para. 3 (b)). On 29 January 1993, the Vice-President, Mr R. Bernhardt, drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr Bernhardt, Mr B. Walsh, Mr A. Spielmann, Mr I. Foighel, Mr A.N. Loizou, Mr M.A. Lopes Rocha and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Swedish Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicants' memorial on 4 May 1993 and the Government's memorial on 5 May. On 18 May the Secretary to the Commission informed the Registrar that the Delegate did not intend to file a memorial in reply.

On various dates between 18 May and 21 June 1993 the Commission produced a number of documents, which the Registrar had requested from it on the President's instructions, and the applicants filed some documents.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 June 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr C.H. EHRENKRONA, Assistant Under-Secretary for Legal Affairs,
Ministry for Foreign Affairs, *Agent*,
Mr U. ANDERSSON, Under-Secretary for Legal Affairs,
Ministry of Environment, *Adviser*;

- for the Commission

Mr F. MARTINEZ, *Delegate*;

- for the applicants

Mr S. MICHELSON, advokat, *Counsel*,
Mr S. HEMRÅ, *Adviser*.

The Court heard addresses by Mr Ehrenkrona, Mr Martinez and Mr Michelson as well as replies to its questions.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. Mr Lennhart and Mrs Gunny Zander, who are husband and wife, are Swedish citizens and live in Gryta in the municipality of Västerås.

7. Since 1966 the applicants have owned a property in Gryta, adjacent to land on which a company - Västmanlands Avfallsaktiebolag (VAFAB) - takes delivery of and treats household and industrial waste, amongst other things. VAFAB has been authorised to engage in this activity on the land in question since 1 July 1983, when the National Licensing Board for Protection of the Environment (koncessionsnämnden för miljöskydd - "the Licensing Board") first issued it with a permit to this effect under the provisions of the 1969 Environment Protection Act (miljöskyddslagen 1969:387 -"the 1969 Act").

8. Prior to this, it had been discovered in 1979 that refuse containing cyanide had been left on the dump and analyses of drinking-water emanating from a nearby well had shown excessive levels of cyanide in the water. The Health Care Board (hälsovårdsnämnden, later named miljö - och hälsoskyddsnämnden) of Västerås had prohibited the use of the water and had provisionally supplied the property owner dependent on the well with municipal drinking-water.

Further analyses effected in October 1983 showed excessive levels of cyanide in six other wells near the dump, one of which was on the applicants' property. As a result, the use of the water from these wells too was prohibited and the landowners concerned, including the applicants, were temporarily provided with municipal drinking-water.

However, in June 1984 the National Food Agency (livsmedelsverket) recommended that the maximum permitted level of cyanide be raised from 0.01 mg to 0.1 mg per litre. As a result, as of February 1985, the municipality stopped supplying the above-mentioned landowners with water.

9. In July 1986 VAFAB asked the Licensing Board to renew its permit and to allow it to expand its activities on the dump. The applicants together with other landowners demanded that the request should not be granted without an obligation being imposed on VAFAB, by way of precautionary measure under section 5 of the 1969 Act (see paragraph 12 below), to supply drinking-water free of charge to the owners concerned, as the proposed activity entailed and would continue to entail a risk of polluting their water.

10. By decision of 13 March 1987, the Licensing Board granted VAFAB's request and dismissed the applicants' and the other owners' claim, on the ground that there was no likely water connection between the

dump and the wells. It further stated that, notwithstanding a possible risk of pollution, it would be unreasonable to make the authorisation in question conditional upon such a general measure as that suggested by the claimants.

On the other hand, the Board attached a number of conditions to the granting of the permit, including the requirement that the water in the wells be carefully analysed at regular intervals and that the owners be informed of the results. Should the analyses give reason to suspect that the dump was causing pollution of the water, VAFAB would be under an obligation to take immediately any such action to supply the owners with water as deemed appropriate by the County Administrative Board (länsstyrelsen).

11. The applicants appealed to the Government, challenging the conditions set for the permit. The Government, as the final instance of appeal (see paragraph 13 below), upheld these and dismissed the appeal on 17 March 1988.

II. THE RELEVANT DOMESTIC LAW

A. The 1969 Act

12. According to section 1 of the 1969 Act, any use of land that may cause, inter alia, water pollution is considered an environmentally hazardous activity for the purposes of the Act.

Section 5 provides:

> "A person who engages in or intends to engage in an environmentally hazardous activity shall take such protective action, comply with such restrictions on the activity and take such other precautionary measures as may reasonably be required in order to prevent or remedy its detrimental effects. The duty to remedy detrimental effects continues to apply after the activity has ceased.
>
> In assessing the extent of obligations imposed under the first paragraph, regard should be had to what is technically feasible for the activity in question as well as to the public and private interests involved.
>
> In striking a balance between the various interests, particular weight should be attached, on the one hand, to the nature of the area that may be subjected to disturbance and to the impact of the disturbance and, on the other hand, to the usefulness of the activity, the costs of protective action and other financial implications of the precautionary measures in issue."

13. A decision by the Licensing Board authorising an environmentally hazardous activity must specify what activity is being permitted and on what conditions (section 18). It may be appealed against to the Government by any person concerned (section 48). At the time of the Government's dismissal of the applicants' appeal (see paragraph 11 above), its decisions were not subject to judicial review (for further details on this point, see, in

particular, the Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, pp. 19-20, para. 50). Since the entry into force, on 1 June 1988, of the Act on Judicial Review of certain Administrative Decisions, the lawfulness of a number of decisions by the Government may be challenged before the Supreme Administrative Court. However, it was not possible for the applicants to avail themselves of this remedy in respect of the Government's decision as the Act did not have retroactive effect.

14. The Licensing Board is composed of a chairman and three other members, all of whom are appointed by the Government. The chairman is required to be well-versed in legal matters and experienced in performing judicial tasks; in addition, one of the three members must have expertise and experience in technological matters, the second must have experience in activities falling within the competence of the National Environment Protection Board (naturvårdverket) and the third in industrial operations (section 11 of the 1969 Act).

15. Pursuant to section 34, a claim relating to an environmentally hazardous activity may be filed with the Real Estate Court (fastighetsdomstolen), a specially composed chamber of the District Court (tingsrätten). Such a claim may, for instance, seek to have the activity made conditional upon protective or precautionary measures being taken.

On the other hand, section 22 provides that the holder of a permit granted under the 1969 Act may not be ordered to discontinue the activity in question or to take precautionary measures other than those, if any, specified in the permit. The exceptions to this rule, contained in sections 23-25, 29 and 40, are not relevant to the present case.

B. The 1986 Environmental Damage Act

16. Under section 3 of the 1986 Environmental Damage Act (miljöskadelagen 1986:225 - "the 1986 Act"), a person who has suffered damage or injury as a result of pollution of groundwater or watercourses may lodge a claim for compensation with the Real Estate Court. The claim may be brought against the person or persons who have caused the deleterious activity to be carried on (section 6).

A condition for compensation is that there be a substantial probability of a causal link between the impugned activity and the damage or injury (section 3). The fact that the activity has been authorised under the 1969 Act is not a bar to liability under the 1986 Act.

A decision by the Real Estate Court on a compensation claim as mentioned above may be appealed against to the Court of Appeal (hovrätten) and, with leave, to the Supreme Court (Högsta domstolen).

PROCEEDINGS BEFORE THE COMMISSION

17. In their application (no. 14282/88) to the Commission of 2 September 1988, Mr and Mrs Zander alleged a violation of Article 6 para. 1 (art. 6-1) of the Convention in that it was not possible for them to have the decision authorising VAFAB to increase its activities on the dump reviewed by a court.

18. By decision of 14 October 1991, the Commission declared the application admissible. In its report of 14 October 1992 (Article 31) (art. 31), it expressed the unanimous view that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS MADE BY THE GOVERNMENT TO THE COURT

19. At the hearing on 22 June 1993, the Government invited the Court to hold, as submitted in their memorial of 5 May 1993, that there had been no violation of the Convention in the present case.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

20. The applicants complained that at the material time it had not been open to them under Swedish law to seek judicial review of the Government's decision of 17 March 1988, upholding the Licensing Board's decision of 13 March 1987 (see paragraph 11 above). They alleged a violation of Article 6 para. 1 (art. 6-1), which, in so far as relevant, provides:

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

21. The Government contested the applicability of this provision to the proceedings in issue, whereas the Commission upheld the applicants' view.

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 279-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

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

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

22. The Court reiterates that, according to the principles enunciated in its case-law (see, amongst other authorities, the Skärby v. Sweden judgment of 28 June 1990, Series A no. 180-B, p. 36, para. 27; and the Kraska v. Switzerland judgment of 19 April 1993, Series A no. 254-B, p. 48, para. 24), it 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. 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.

23. The Government maintained that the case differed in significant respects from previous cases where the Court has found the existence of a dispute (contestation) over a civil right. These differences were such as to warrant a contrary conclusion.

In the first place, the proceedings now before the Court concerned the granting of a licence by the public authorities to a third party, rather than a dispute between the authorities and a person claiming entitlement to the licence.

Moreover, despite their allegations that the value of their property had decreased and that they had suffered various other inconveniences as a result of the alleged pollution of their drinking- water, the applicants did not avail themselves of the possibility open to them of obtaining judicial review under the 1986 Act by filing a claim for compensation in the Real Estate Court (see paragraph 16 above), this being a remedy that satisfied the requirements of Article 6 para. 1 (art. 6-1). They would have been entitled to compensation under the above-mentioned Act had they been able to establish damage - for instance in the form of loss of property value - as a consequence of VAFAB's activities on the dump. Possibly in order to avoid legal costs or because it was difficult to prove damage, they chose instead to ask the Licensing Board, under the 1969 Act, to make VAFAB's licence conditional upon precautionary measures, which matter was not subject to judicial review.

The Licensing Board's function in relation to the applicants' request was simply to assess whether the activity in respect of which VAFAB had sought the Board's authorisation would entail a significant risk of damaging the water in their well and whether the requested conditions were called for. The Government contested that the mere evaluation by the Board of the existence of such a risk involved a determination of the applicants' "rights" under domestic law. In their view, the applicants could not maintain, on arguable grounds, that they were vested with any entitlement under Swedish

law to protection from the kind of risk in issue; nor, on the facts, was there any such risk affecting their property interests.

Finally, the Government were concerned that if Article 6 para. 1 (art. 6-1) were to be found applicable to the proceedings under the 1969 Act at issue in the present case, a foreseeable consequence might be an obligation for States to introduce a multitude of comprehensive court remedies, covering a wide range of environmental matters, in order to deal with complaints by large numbers of plaintiffs about exposure to potential, not just actual, risks of damage. This would be far more costly and cumbersome than the present procedure under the 1969 Act, which in the Government's view adequately protects not only the public interest but also individual interests, such as those of a potentially affected landowner. In the instant case, precautionary measures had been taken, though not to the extent demanded by the applicants.

24. The Court observes that the claim made by the applicants to the administrative authorities was based on section 5 of the 1969 Act. This provision lays down certain obligations incumbent upon a person who engages or intends to engage in an environmentally hazardous activity, without however specifying who is the beneficiary of those obligations.

On the other hand, it is to be noted that the applicants, as owners of land adjacent to the dump, had standing under Swedish law to ask the Licensing Board to require VAFAB to take certain precautionary measures under section 5 as a condition for granting the permit. In addition they could appeal to the Government against the Licensing Board's decision in this respect.

Furthermore, whilst the Licensing Board refused the requests for precautionary measures submitted by the applicants, its decision of 13 March 1987 none the less made VAFAB's permit conditional upon an obligation, apparently based on section 5, to supply water as deemed reasonable by the County Administrative Board to affected well owners, including the applicants, if future analyses of the wells were to give reason to suspect that the dump was causing pollution of the water.

Having regard to the foregoing, the Court is satisfied that the applicants could arguably maintain that they were entitled under Swedish law to protection against the water in their well being polluted as a result of VAFAB's activities on the dump.

25. In their appeal to the Government the applicants challenged the Board's assessment that the activities on the dump were unlikely to cause pollution of their well and that the measures requested were unreasonable. Any discretion enjoyed by the competent administrative authorities in this regard was limited both by the terms of section 5, including the requirement of preventing or remedying detrimental effects, and by the generally recognised principles of administrative law that such discretion is not unfettered. There was thus a serious disagreement between the applicants

and the authorities raising issues capable of going to the lawfulness of the conditions attached by the Board, in the exercise of its discretionary power, to VAFAB's licence.

Finally, the outcome of the dispute was directly decisive for the applicants' entitlement to protection against pollution of their well by VAFAB. The appeal lodged by the applicants with the Government thus involved a "determination" of one of their "rights" for the purposes of Article 6 para. 1 (art. 6-1).

2. Whether the applicants' right was a "civil right"

26. The Government maintained that, unlike the 1986 Act which governs compensation for damage of property resulting from environmentally hazardous activities, the 1969 Act regulates such activities primarily in relation to the general public interest. Whilst the former Act dealt mainly with civil-law issues, the latter Act was predominantly of public-law character.

27. The Court notes that the applicants' claim was directly concerned with their ability to use the water in their well for drinking purposes. This ability was one facet of their right as owners of the land on which it was situated. The right of property is clearly a "civil right" within the meaning of Article 6 para. 1 (art. 6-1) (see, inter alia, the Tre Traktörer AB v. Sweden judgment of 7 July 1989, Series A no. 159, p. 19, para. 43; and the Oerlemans v. the Netherlands judgment of 27 November 1991, Series A no. 219, pp. 20-21, para. 48). Consequently, notwithstanding the public-law aspects invoked by the Government, the Court, like the applicants and the Commission, considers that the entitlement in issue was a "civil right".

3. Conclusion

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

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

29. Under Swedish law it was not possible at the material time for the applicants to have the Government's decision of 17 March 1988, upholding the Licensing Board's decision of 13 March 1987, reviewed by a court (see paragraphs 11 and 13 above), and the Government admitted this.

Accordingly, there has been a violation of Article 6 para. 1 (art. 6-1) in the present case.

II. APPLICATION OF ARTICLE 50 (art. 50)

30. Mr and Mrs Zander sought just satisfaction under Article 50 (art. 50), according to which:

"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."

A. Non-pecuniary damage

31. The applicants did not seek compensation for pecuniary damage, but each claimed 250,000 Swedish kronor for non-pecuniary damage. They maintained that, through fear of pollution of the well, they had to collect drinking-water elsewhere - in buckets, cans and bottles - and they feared that the value of their property had fallen considerably; their being denied access to a court had aggravated the distress which they had suffered for over ten years as a result of fear of pollution.

32. The Government objected to the applicants' claim in that it seemed to imply that they had sustained actual damage in the form of pollution caused by VAFAB. If so, they had failed to pursue their claim before the Real Estate Court, which they could have done under the 1986 Act (see paragraph 16 above). Consequently, any compensation to be awarded under this head should not be based on an assumption that the water had been polluted as a result of VAFAB's activities. In any event, the amount should not exceed what had been awarded by the Court or the Committee of Ministers in similar cases.

33. The Court considers that the applicants suffered some non-pecuniary damage as a result of the absence of judicial review and, unlike the Delegate of the Commission, that sufficient just satisfaction would not be provided solely by the finding of a violation. Deciding on an equitable basis, it awards each of the applicants 30,000 Swedish kronor in this respect.

B. Costs and expenses

34. The applicants also claimed reimbursement of costs and expenses, totalling 239,980 kronor, in respect of the following items:

(a) 94,120 kronor to cover legal costs referable to the proceedings before the Licensing Board and the Government;

(b) 120,000 kronor for legal costs for the proceedings before the Commission and Court;

(c) 25,860 kronor for expenses incurred in travelling to Strasbourg.

35. The Court shares the view of the Delegate and the Government that item (a) must be rejected, as the costs in question cannot be said to have been incurred in order to prevent or obtain redress for the violation found by the Court.

As regards item (b), the Court disagrees with the Government that the amount claimed is excessive. It considers that both this and item (c) should be reimbursed in their entirety, less the sum paid by the Council of Europe by way of legal aid, namely 16,626 French francs.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that Article 6 para. 1 (art. 6-1) applies to the present case and has been violated;

2. Holds that Sweden is to pay, within three months, to each of the applicants 30,000 (thirty thousand) Swedish kronor for non-pecuniary damage; and to the applicants jointly 145,860 (one hundred and forty-five thousand, eight hundred and sixty) kronor for costs and expenses, less 16,626 (sixteen thousand, six hundred and twenty-six) French francs to be converted into kronor at the rate applicable on the date of delivery of the present judgment;

3. Dismisses 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 25 November 1993.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar