



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

COURT (GRAND CHAMBER)

CASE OF GUSTAFSSON v. SWEDEN

(Application no. 15573/89)

JUDGMENT

STRASBOURG

25 April 1996

In the case of Gustafsson v. Sweden ¹,

The European Court of Human Rights, sitting, in pursuance of Rule 53 of Rules of Court B (2), as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr A. SPIELMANN,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Mr F. BIGI,
Mr M.A. LOPES ROCHA,
Mr G. MIFSUD BONNICI,
Mr J. MAKARCZYK,
Mr B. REPIK,
Mr P. JAMBREK,
Mr E. LEVITS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 24 November 1995 and 28 March 1996,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 1 March 1995 by the European Commission of Human Rights ("the Commission") and on 15 May 1995 by the Government of the Kingdom of Sweden ("the Government"), within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and

¹ The case is numbered 18/1995/524/610. 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 the corresponding originating applications to the Commission. 2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

Fundamental Freedoms ("the Convention"). It originated in an application (no. 15573/89) against Sweden lodged with the Commission under Article 25 (art. 25) by a Swedish national, Mr Torgny Gustafsson, on 1 July 1989.

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 breaches by the respondent State of its obligations under Articles 6, 11 and 13 of the Convention (art. 6, art. 11, art. 13) and Article 1 of Protocol No. 1 (P1-1).

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 31).

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. 4 (b)). On 5 May 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr B. Walsh, Mr S.K. Martens, Mr R. Pekkanen, Mr A.N. Loizou, Mr F. Bigi and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 12 September 1995 and the applicant's memorial on 13 September 1995. In a letter of 19 October 1995 the Secretary to the Commission informed the Registrar that the Delegate did not wish to reply in writing.

5. On 28 September 1995 the Chamber, having regard to a request by the Government of 30 August, decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 53). The President and the Vice-President, Mr R. Bernhardt, as well as the other members of the Chamber being ex officio members of the Grand Chamber, the names of the other nine judges were drawn by lot by the President in the presence of the Registrar on 28 September 1995 (Rule 53 para. 2 (a) and (b)), namely Mr L.-E. Pettiti, Mr A. Spielmann, Mr I. Foighel, Mr J.M. Morenilla, Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici, Mr J. Makarczyk, Mr B. Repik and Mr E. Levits.

6. On 24 October 1995 the Grand Chamber dismissed a request to hear witnesses which the Registrar had received from the Government on 17 October (Rule 43 para. 1, taken together with Rule 53 para. 6). On various dates between 19 and 25 October, the Registrar received letters from the applicant providing comments on the above request.

7. On 27 September, 24 October 1995 and 10 January 1996 the applicant submitted further particulars on his Article 50 (art. 50) claims. On 10 November 1995 the Commission produced a number of documents from the file in the proceedings before it, as requested by the Registrar on the President's instructions.

8. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 November 1995. The Court had held a preparatory meeting beforehand. There appeared before the Court:

(a) for the Government

Mr C.H. Ehrenkrona, Assistant Under-Secretary for Legal Affairs,
Ministry for Foreign Affairs, *Agent*,
Mr D. Ekman, Permanent Under-Secretary, Ministry of Labour,
Mr P. Virdesten, Under-Secretary for Legal Affairs,
Ministry of Labour,
Mrs I. Åkerlund, Legal Adviser, Ministry of Labour,
Mrs H. Jäderblom, Legal Adviser, Ministry of Justice, *Advisers*;

(b) for the Commission

Mrs G.H. Thune, *Delegate*;

(c) for the applicant

Mr G. Ravnsborg, Lecturer in Law at the University
of Lund, *Counsel*.

The Court heard addresses by Mrs Thune, Mr Ravnsborg and Mr Ehrenkrona, and also replies to questions put by the Court and by the President.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

9. From the summer of 1987 until the end of the summer of 1990 the applicant owned the summer restaurant Ihrebaden at Ihreviken, Tingstäde, on the island of Gotland. The applicant further owned - and continues to own - the youth hostel Lummelunda at Nyhamn, Visby, also on Gotland. The restaurant's employees numbered less than ten. They were engaged on a seasonal basis, but had the option of being re-employed the following year. The applicant's ownership of the restaurant and youth hostel was direct and entailed his personal financial liability (*enskild firma*).

10. As the applicant was not a member of either of the two associations of restaurant employers, namely the Swedish Hotel and Restaurant Entrepreneurs' Union (*Hotell- och Restaurangar - betsgivareföreningen* -

"HRAF", which is affiliated to the Swedish Employers' Confederation (Svenska Arbetsgivareföreningen - "SAF")) and the Employers' Association of the Swedish Union of Restaurant Owners (Svenska Restauratörsförbundets Arbetsgivareförening - "SRA"), he was not bound by any collective labour agreement (kollektivavtal) between the two associations and the Hotel and Restaurant Workers' Union (Hotell- och Restauranganställdas Förbund - "HRF"). Nor was he obliged to subscribe to the various labour-market insurance schemes (Arbetsmarknadsförsäkring) developed through agreements between SAF and the Swedish Trade Union Confederation (Landsorganisationen).

It was, however, open to the applicant to accede to a collective agreement by accepting a substitute agreement (hängavtal). He could also subscribe to insurance schemes with Labour-Market Insurances or any of the other ten or so insurance companies in the field.

11. In late June or early July 1987 he refused to sign a separate substitute agreement with HRF. He referred to his objections of principle regarding the system of collective bargaining. He also emphasised that his employees were paid more than they would have been under a collective agreement and that they themselves objected to his signing a substitute agreement on their behalf.

The substitute agreement proposed to the applicant included these terms:

"Parties: [The applicant] and [HRF]

Term of validity: From 1 July 1987 up to and including 31 December 1988, thereafter for one year at a time, unless notice is given two months prior to the expiry of the [agreement]

...

As from the [above] date, the most recent agreement between [the employers' association] and [HRF] shall be applied between [the applicant and HRF]. Should [the employers' association] and [HRF] subsequently reach a new agreement or agree to amend or supplement the [present] agreement, [the new agreement, amendments or supplements] shall automatically apply as from the day on which [it or they] [has or have] been [agreed upon].

...

1. [The employer shall] [on his employees' behalf] subscribe to and maintain [five different] insurance-policy schemes with Labour-Market Insurances, ... as well as other possible insurance-policy schemes which [the employers' association and HRF] might later agree upon.

2. [The employer shall] issue employment certificates on a special form ... A copy shall be sent to [HRF].

3. [The employer shall] only employ [workers who are members] of or [have] requested membership of [HRF]. In the event of re-employment the provisions of

section 25 of the Employment Protection Act (lag (1982:80) om anställnings-skydd) shall apply.

4. [The employer shall] deduct on a monthly basis a part of the salary of employed members of [HRF] corresponding to their membership fees, and pay [the deducted part] to [HRF].

..."

12. On 16 July 1987, during further negotiations with the applicant, HRF proposed another substitute agreement, which he also rejected:

"Subject: The signing of a collective agreement regarding [the restaurant] Ihre baden ... and the Lummelunda youth hostel.

1. Having regard to the forthcoming end of the [season of 1987] the parties agree on the following procedure replacing the signing of a collective agreement.

The enterprise agrees to comply, during this season ..., with the collective labour agreement ('the green national agreement') between [HRAF] and [HRF], this including the obligation to subscribe to [certain] insurance schemes (avtalsförsäkringar) with Labour-Market Insurances.

2. The enterprise also agrees to [comply with] [the] collective labour agreement ... during the next season ..., either by way of membership of the employers' union or by signing a ... substitute agreement ..."

13. Had the applicant accepted a substitute agreement, it would have applied not only to those of his employees who were unionised but also to those who were not.

In the summer of 1986, one member of HRF was employed by the applicant. In 1987 he employed another member of that union and also two persons who were respectively members of the Commercial Employees' Union (Handelsanställdas Förbund) and the Union of Municipal Workers (Kommunalarbetareförbundet). In 1989, one member of the latter union was employed by the applicant.

14. Following the applicant's refusal to sign a substitute agreement, HRF, in July 1987, placed his restaurant under a "blockade" and declared a boycott against it. Sympathy industrial action was taken the same month by the Commercial Employees' Union and the Swedish Food Workers' Union (Svenska Livsmedelsarbetareförbundet).

In the summer of 1988 sympathy action was also taken by the Swedish Transport Workers' Union (Svenska transportarbetareförbundet) and the Union of Municipal Employees (Kommunaltjänstemannaförbundet). As a result deliveries to the restaurant were stopped.

15. One of the persons employed by the applicant at Ihre baden who was member of HRF had publicly expressed the opinion that the industrial action was unnecessary, as the salary and working conditions in the restaurant were not open to criticism.

According to the Government, the union action had its background in a request for assistance in 1986 by an HRF member employed by the applicant. In the view of the union, the applicant paid his employees approximately 900 Swedish kronor (SEK) a month less than what they would have received under a collective agreement. He did not pay his staff holiday compensation as provided for in the 1977 Annual Leave Act (semesterlagen 1977:480), nor salary during lay-offs due to poor weather conditions as required by the 1982 Employment Protection Act and he did not sign a labour-market insurance until 1988.

16. In August 1988 the applicant, invoking the Convention, requested the Government to prohibit HRF from continuing the blockade and the other trade unions from continuing their sympathy action and to order the unions to pay compensation for damages. In the alternative, he requested that compensation be paid by the State.

17. By a decision of 12 January 1989 the Government (Ministry of Justice) dismissed the applicant's request. The Government stated:

"The requests for a prohibition of the blockade and the sympathy action as well as compensation for damage from the trade unions concern a legal dispute between private subjects. According to Chapter 11, Article 3, of the Instrument of Government [Regeringsformen which forms part of the Constitution], such disputes may not be determined by any public authority other than a court of law, except by virtue of law. There is no provision in the law which authorises the Government to examine such disputes. The Government will not, therefore, examine these requests on the merits.

The claim for damages is dismissed."

18. The applicant applied to the Supreme Administrative Court (Regeringsrätten) for review under the 1988 Act on Judicial Review of Certain Administrative Decisions (lag (1988:205) om rättsprövning av vissa förvaltningsbeslut - "the 1988 Act"). On 29 June 1989 the Supreme Administrative Court dismissed the application on the ground that the Government's decision did not concern an administrative matter involving the exercise of public power, which was a condition for review under section 1 of the Act.

19. On 15 September 1989 the Swedish Touring Club (Svenska turistföreningen - "STF"), a non-profit-making association promoting tourism in Sweden, terminated the membership of the applicant's youth hostel, referring to a lack of cooperation and the applicant's negative attitude towards STF. As a result, the hostel was no longer mentioned in STF's catalogue of youth hostels in Sweden. In 1989 about half of the youth hostels in Sweden were enrolled in STF.

20. The applicant brought proceedings in the District Court (tingsrätten) of Stockholm. He contested what he considered to be his personal exclusion from STF, alleging that it had been caused by HRF threats that it would take industrial action against other youth hostels enrolled in STF if his hostel

was not excluded. He also challenged STF's termination of the membership of his youth hostel.

STF accepted, *inter alia*, that although the termination of the membership contract concerning the applicant's youth hostel had not been prompted by the conflict between the applicant and the trade unions, this conflict might have affected the timing of the decision. STF also referred to an opinion of the Competition Ombudsman (*ombudsmannen för näringsfrihet*) of 14 November 1989 to the effect that the termination of the contract in question would have only a very limited impact on his business.

21. By a judgment of 8 May 1991 the District Court rejected the applicant's action on both points. It found, *inter alia*, that the applicant had not shown that he had been personally excluded from STF by virtue of the termination of STF's contract concerning his youth hostel. It also found that he had not shown that the contract had been financially significant to his business. Reference was made to the Competition Ombudsman's finding.

22. The applicant appealed to the Svea Court of Appeal (*Svea hovrätt*) which, on 6 March 1992, upheld the District Court's judgment. The Court of Appeal found, *inter alia*, that STF's termination of the contract concerning the youth hostel had entailed the expiry of the applicant's personal membership of STF. This, however, had not been tantamount to his exclusion, given that he could have continued or renewed his membership. Moreover, although the contract had been of appreciable significance to the applicant's business, STF's termination of the contract could not be considered unreasonable.

23. At the beginning of 1991 the applicant sold his restaurant due to his difficulties in running his business which had allegedly been caused by the industrial action. The restaurant was bought by a person who signed a collective agreement with HRF. He continued, together with his family, to run the youth hostel in Lummelunda.

Following the above, the union action was terminated.

24. On 9 November 1991 the applicant requested the Government to support his application to the Commission. On 12 December 1991 the Government decided not to take any action in respect of the request.

II. RELEVANT DOMESTIC LAW

A. Freedom of association

25. Chapter 2, Article 1, of the Instrument of Government provides:

"All citizens shall be guaranteed the following in their relations with the public authorities:

1. freedom of expression: the freedom to communicate information and to express ideas, opinions and emotions whether orally, in writing, in pictorial representations, or in any other way;

...

5. freedom of association: the freedom to unite with others for public or private purposes; ..."

26. According to Chapter 2, Article 2:

"All citizens shall be protected in their relations with the public authorities against all coercion designed to compel them to divulge an opinion in any political, religious, cultural or other similar connection. They shall furthermore be protected in their relations with the public authorities against all coercion designed to compel them to participate in any meeting for the formation of opinion or in any demonstration or other expression of opinion or to belong to any political association, religious congregation or other association for opinions of the nature referred to in the first sentence."

27. Chapter 2, Article 12 paras. 1 and 2, reads:

"The freedoms and rights referred to in Article 1 paras. 1 to 5 ... may be restricted by law to the extent provided for in Articles 13-16 ...

The restrictions referred to in the preceding subsection may only be imposed to achieve a purpose which is acceptable in a democratic society. The restriction may never exceed what is necessary having regard to the purpose which occasioned it, nor may it be carried so far as to constitute a threat to the free formation of opinion as one of the foundations of democracy. No restriction may be imposed solely on grounds of political, religious, cultural or other such opinions."

28. Chapter 2, Article 14 para. 2 provides:

"Freedom of association may only be restricted in respect of organisations whose activities are of a military nature or the like or which involve the persecution of a population group of a particular race, skin colour or ethnic origin."

29. Pursuant to Chapter 2, Article 17:

"Any trade union or employer or association of employers has a right to take industrial action unless otherwise provided by law or by agreement."

B. Right of association

30. Section 7 of the 1976 Act on Co-Determination at Work reads:

"Right of association means the right of employers and employees to belong to an organisation of employers or employees, to benefit from their membership as well as to work for an organisation or for the founding of one."

31. Section 8 provides:

"The right of association shall not be violated. A violation... will occur, if anyone from the employer's side or the employee's side takes any action

to the detriment of anybody on the other side by reason of that person having exercised his right of association, or if anybody on either side takes any action against anybody on the other side with a view to inducing that person not to exercise his right of association. A violation will occur even if the action so taken is designed to fulfil an obligation towards another party.

An employers' or employees' organisation shall not have to tolerate a violation of its right of association encroaching upon its activities. Where there is both a local and a central organisation, these provisions shall apply to the central organisation.

If the right of association is violated by termination of an agreement or another legal measure or by a provision in a collective agreement or other contract, that measure or provision shall be void."

32. According to section 10:

"An employees' organisation shall have the right to negotiate with an employer regarding any matter relating to the relationship between the employer and any member of the organisation who is or has been employed by that employer. An employer shall have a corresponding right to negotiate with an employees' organisation.

A right of negotiation ... shall also be enjoyed by the employees' organisation in relation to any organisation to which an employer belongs, and by the employers' organisation in relation to the employees' organisation."

C. Judicial remedies

33. Chapter 11, Article 3, of the Instrument of Government provides:

"Legal disputes between private subjects shall only be settled by a court of law, unless otherwise provided by law ..."

34. In principle, it is possible for an employer against whom industrial action has been instituted to request a court injunction requiring that the action cease, and to claim damages. Such orders may be made by the relevant court if the industrial action is unlawful or in breach of an existing collective agreement.

If the industrial action amounts to a criminal offence, a claim for compensation may be made under Chapter 2, section 4, of the 1972 Compensation Act (skadeståndslag 1972:207).

35. Pursuant to section 1 of the 1988 Act, a person who has been a party to administrative proceedings before the Government or another public authority may, in the absence of any other remedy, apply to the Supreme Administrative Court, as the first and only judicial instance, for review of any decisions in the case which involve the exercise of public authority vis-à-vis a private individual. The kind of administrative decision covered by the Act is further defined in Chapter 8, Articles 2 and 3, of the Instrument of

Government, to which section 1 of the 1988 Act refers. According to these provisions the Act encompasses measures concerning, inter alia, personal and economic matters arising in relations between private persons and between such persons and the State. Section 2 of the Act specifies several types of decision which fall outside its scope, none of which are relevant in the instant case.

In proceedings brought under the 1988 Act, the Supreme Administrative Court examines whether the contested decision "conflicts with any legal rule" (section 1 of the 1988 Act). If the court finds that the impugned decision is unlawful, it must quash it and, where necessary, refer the case back to the relevant administrative authority (section 5 of the 1988 Act).

PROCEEDINGS BEFORE THE COMMISSION

36. In his application to the Commission of 1 July 1989 (no. 15573/89) Mr Gustafsson complained that the lack of State protection against the industrial action taken against his restaurant gave rise to a violation of his right to freedom of association as guaranteed by Article 11 (art. 11) of the Convention and also of his right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 (P1-1), in conjunction with Article 17 (art. 17) of the Convention. He further alleged breaches of his rights under Article 6 para. 1 (art. 6-1) (right to a fair hearing) and Article 13 (art. 13) (right to an effective remedy), complaining that the court remedies to which he could have recourse in order to challenge the industrial action would have been ineffective since such action was lawful under Swedish law.

37. On 8 April 1994 the Commission declared the application admissible. In its report of 10 January 1995 (Article 31) (art. 31), the Commission expressed the opinion that

(a) there had been a violation of Article 11 (art. 11) (by thirteen votes to four);

(b) it was not necessary to examine the complaint under Article 1 of Protocol No. 1 (P1-1) in conjunction with Article 17 (art. 17) of the Convention (by eleven votes to six);

(c) there had been no violation of Article 6 para. 1 (art. 6-1) of the Convention (by sixteen votes to one);

(d) there had been a violation of Article 13 (art. 13) of the Convention (by fourteen votes to three).

The full text of the Commission's opinion and of the four separate opinions contained in the report is reproduced as an annex to this judgment².

² For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-II), but a copy of the Commission's report is obtainable from the registry

FINAL SUBMISSIONS MADE TO THE COURT

38. At the hearing on 22 November 1995 the Government, as they had done in their memorial, invited the Court to hold that there had been no violation of the Convention in the present case.

39. On the same occasion the applicant reiterated his request to the Court stated in his memorial to find that there had been violations of Articles 6, 11 and 13 (art. 6, art. 11, art. 13) of the Convention, and of Article 1 of Protocol No. 1 (P1-1) in conjunction with Article 17 (art. 17) of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 (art. 11) OF THE CONVENTION

40. The applicant complained that the union action had infringed his right to freedom of association and that the failure of the respondent State to protect him against this action constituted a violation of Article 11 (art. 11) of the Convention, which reads:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

"2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article (art. 11) shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

41. The Government disputed this contention, whereas the Commission shared the applicant's view that there had been a violation.

A. Applicability of Article 11 (art. 11)

42. The Government contested the applicability of Article 11 (art. 11) to the matters complained of by the applicant. Unlike the applicants in previous cases where the Court had recognised a negative right to freedom of association (see the *Young, James and Webster v. the United Kingdom* judgment of 13 August 1981, Series A no. 44, pp. 21-22, paras. 55-58; and the *Sigurður A. Sigurjónsson v. Iceland* judgment of 30 June 1993, Series A

no. 264, pp. 15-16, para. 35), the applicant in the present case had not been compelled to join an association. The union action had primarily been aimed at making the applicant apply to his employees a certain agreement negotiated by the relevant labour organisations. This could have been achieved not only by the applicant joining one of the two employers' associations in the trade - the Swedish Hotel and Restaurant Entrepreneurs' Union ("HRAF") and the Employers' Association of the Swedish Union of Restaurant Owners ("SRA") - but also by his signing with the Hotel and Restaurant Workers' Union ("HRF") a substitute agreement to the existing collective agreements applied in the restaurant trade (see paragraph 10 above). He could have avoided the union action by availing himself of the possibility of entering into negotiations with the union with a view to reaching a solution based on a substitute agreement drafted in a way that was adapted to the special character of the business run by the applicant (see paragraphs 11 and 12 above). The conclusion of such an agreement might have affected the applicant's freedom as an employer to conclude contracts with his employees, but this freedom was not as such guaranteed by the Convention.

The Government in addition pointed out that in practice the union action had essentially had the effect of stopping deliveries of goods to his restaurant (see paragraph 14 above) and had not involved occupation or picketing of the applicant's business premises. Nor had he substantiated his claim that he had had to sell the restaurant or had suffered any other form of pecuniary damage as a result of the industrial action.

43. The applicant and the Commission maintained that the unions' boycott and blockade of his business had affected his right to negative freedom of association. Admittedly, had the applicant concluded a substitute agreement, the primary purpose of the action, namely to achieve the largest possible acceptance and the widest possible application of the collective agreement to which HRF was a party, could have been attained without the applicant becoming a member of HRAF or SRA. However, the applicant objected not only to formal membership but also to participation in the collective-bargaining system, since in both cases he would have become bound by a collective agreement with HRF. One of the most important effects of membership of an employers' association in Sweden was the members' participation, through the association, in collective bargaining and their undertaking to be bound by any collective agreement concluded by the association. Therefore, even though the applicant had had the possibility of accepting these obligations without formally joining HRAF or any other association, it would be artificial and formalistic to deny that his negative freedom of association had been affected.

44. The Court considers that although the extent of the inconvenience or damage caused by the union action to the applicant's business may be open to question, the measures must have entailed considerable pressure on the

applicant to meet the union's demand that he be bound by a collective agreement. He had two alternative means of doing so: either by joining an employers' association, which would have made him automatically bound by a collective agreement, or by signing a substitute agreement (see paragraphs 10 and 11 above). The Court accepts that, to a degree, the enjoyment of his freedom of association was thereby affected. Article 11 (art. 11) is thus applicable in the present case. The Court will therefore examine whether there was an infringement of his right to freedom of association for which the respondent State was responsible.

B. Compliance with Article 11 (art. 11)

1. General principles

45. The matters complained of by the applicant, although they were made possible by national law, did not involve a direct intervention by the State. The responsibility of Sweden would nevertheless be engaged if those matters resulted from a failure on its part to secure to him under domestic law the rights set forth in Article 11 (art. 11) of the Convention (see, amongst others, the *Sibson v. the United Kingdom* judgment of 20 April 1993, Series A no. 258-A, p. 13, para. 27). Although the essential object of Article 11 (art. 11) is to protect the individual against arbitrary interferences by the public authorities with his or her exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights.

In the most recent judgment delivered in this connection, Article 11 (art. 11) of the Convention has been interpreted to encompass not only a positive right to form and join an association, but also the negative aspect of that freedom, namely the right not to join or to withdraw from an association (see the above-mentioned *Sigurður A. Sigurjónsson* judgment, pp. 15-16, para. 35). Whilst leaving open whether the negative right is to be considered on an equal footing with the positive right, the Court has held that, although compulsion to join a particular trade union may not always be contrary to the Convention, a form of such compulsion which, in the circumstances of the case, strikes at the very substance of the freedom of association guaranteed by Article 11 (art. 11) will constitute an interference with that freedom (see, for instance, the above-mentioned *Sibson* judgment, p. 14, para. 29).

It follows that national authorities may, in certain circumstances, be obliged to intervene in the relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the negative right to freedom of association (see, *mutatis mutandis*, the *Plattform "Ärzte für das Leben" v. Austria* judgment of 21 June 1988, Series A no. 139, p. 12, paras. 32-34).

At the same time it should be recalled that, although Article 11 (art. 11) does not secure any particular treatment of the trade unions, or their members, by the State, such as a right to conclude any given collective agreement, the words "for the protection of [their] interests" in Article 11 para. 1 (art. 11-1) show that the Convention safeguards freedom to protect the occupational interests of trade-union members by trade-union action. In this respect the State has a choice as to the means to be used and the Court has recognised that the concluding of collective agreements may be one of these (see, for instance, the *Swedish Engine Drivers' Union v. Sweden* judgment of 6 February 1976, Series A no. 20, pp. 15-16, paras. 39-40).

In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and, in particular, in assessing the appropriateness of State intervention to restrict union action aimed at extending a system of collective bargaining, and the wide degree of divergence between the domestic systems in the particular area under consideration, the Contracting States should enjoy a wide margin of appreciation in their choice of the means to be employed.

2. Application of the foregoing principles

46. The applicant emphasised that he objected to becoming bound by a collective agreement mainly on grounds of political and philosophical conviction. Rather than subjecting himself and his employees to union corporatism, he wished to retain the personal character of the relationship between himself as employer and his employees.

The applicant and the Commission were of the view that the pressure which was brought to bear upon him was such as to require the Swedish authorities to take positive measures of protection. Because of the blockade and boycott, he was largely prevented from obtaining deliveries of the necessary goods for the running of his restaurant (see paragraph 14 above). As a result, the applicant's business suffered considerably and he had to sell the restaurant (see paragraph 23 above). These harsh measures had not been counterbalanced by any strong legitimate interests of HRF in forcing the applicant to sign a collective agreement. When taking action against the applicant, HRF had not represented any members employed by him. The only HRF member who was employed by the applicant had not asked for the union's assistance but had expressly stated that she found the industrial action unnecessary, as the terms of employment offered by him were not open to criticism (see paragraph 15 above). On the contrary, they were more favourable than those which would have applied under the collective agreement in force. For these reasons HRF's action was disproportionate to the interests which it sought to protect.

In such circumstances, the applicant and the Commission underlined, it was incumbent on the respondent State to provide for effective legal redress, for instance by making available to the applicant legal procedures which

would have made it possible for him to mitigate or terminate the action taken against him. Since no such legal protection existed in Swedish law, the facts giving rise to the applicant's complaint constituted a violation of his rights under Article 11 (art. 11) of the Convention.

47. The applicant further considered that the Government, having refrained from arguing before the Commission that the union action was justified, were estopped from changing their stance and adducing evidence in this respect in the proceedings before the Court.

The Commission's Delegate pointed out that the additional information and fresh arguments submitted by the Government on this point could and should have been adduced and invoked before the Commission. She invited the Court to consider very carefully what weight could be given to that information and to those arguments at this late stage of the proceedings.

48. The Government, in their memorial to the Court, stressed for the first time that the Commission's finding that the terms of employment of the applicant's employees were more favourable than those that would have applied under a collective agreement, was based on the applicant's own submissions to the Commission and had never been confirmed or accepted by the Government. Before the Court, the Government, relying on information provided by HRF, disputed this finding. The collective agreement which the union sought to achieve with the applicant had had the aim of substantially improving the economic and social conditions for the applicant's existing and future employees (see paragraph 15 above). In the absence of a collective agreement governing the relationship between the applicant and his employees, the latter could not benefit from the protection provided in important parts of the Swedish labour legislation. The working conditions applied by the applicant gave him a competitive advantage over other restaurant owners.

49. In the Government's opinion, the applicant was in effect challenging a system that had been applied in Sweden for sixty years and which could be said to have formed one of the most important elements in what had become known as the "Swedish model" of industrial relations, believed by many to have contributed significantly to the Swedish Welfare State. The Government stated that in Sweden most major employers were affiliated to an employers' organisation bound by a collective agreement and about 85% of employees were unionised. An essential and long-standing feature of the Swedish model was that industrial relations were determined primarily by the parties to the labour-market rather than by State intervention. Thus, wages, working hours, leave entitlements and various other kinds of terms of employment were governed by collective agreements, covering 90% of the labour-market, rather than by legislation. Another important feature was that employers should not be able to gain a competitive advantage over their competitors by offering less favourable working conditions than those provided for by collective agreements.

Moreover, the Government pointed out that, as a result of the prohibition under Swedish law to resort to strikes, boycotts and other means in industrial relations governed by a collective agreement, such actions had been kept at a tolerable level for many years. On the other hand, unions not bound by a collective agreement with a particular employer had been left with a wide discretion in taking measures to make that employer sign a collective agreement. This reflected the importance the legislator had attached to the right of trade unions to promote their interests.

50. In these circumstances, the Government considered that Sweden was not under an obligation under Article 11 (art. 11) of the Convention to take positive measures to protect the applicant against the union action.

51. As to the particular circumstances of the present case, the Court notes from the outset that the additional information concerning the terms and conditions of employment adduced by the Government before it supplement the facts underlying the application declared admissible by the Commission. The Court is not prevented from taking them into account in determining the merits of the applicant's complaints under the Convention if it considers them relevant (see the *Barthold v. Germany* judgment of 25 March 1985, Series A no. 90, p. 20, paras. 41-42; and the *McMichael v. the United Kingdom* judgment of 24 February 1995, Series A no. 307-B, p. 51, para. 73).

52. As indicated earlier (see paragraph 44 above), the union action must have entailed a considerable pressure on the applicant to meet the union's demand that he accept to be bound by a collective agreement, either by joining an employers' association or by signing a substitute agreement. However, only the first alternative involved membership of an association.

It is true that, had the applicant opted for the second alternative, he might have had less opportunity to influence the contents of future collective agreements than as a member of an employers' association. On the other hand, a substitute agreement offered the advantage that it would have been possible to include in it individual clauses tailored to the special character of the applicant's business. In any event, it does not appear, nor has it been contended, that the applicant was compelled to opt for membership of an employers' association because of economic disadvantages attached to the substitute agreement.

In reality the applicant's principal objection to the second alternative was, as in relation to the first alternative, of a political nature, namely his disagreement with the collective-bargaining system in Sweden. However, Article 11 (art. 11) of the Convention does not as such guarantee a right not to enter into a collective agreement (see the above-mentioned *Swedish Engine Drivers' Union* judgment, pp. 15-16, paras. 40-41). The positive obligation incumbent on the State under Article 11 (art. 11), including the aspect of protection of personal opinion, may well extend to treatment connected with the operation of a collective-bargaining system, but only

where such treatment impinges on freedom of association. Compulsion which, as here, does not significantly affect the enjoyment of that freedom, even if it causes economic damage, cannot give rise to any positive obligation under Article 11 (art. 11).

53. Furthermore, the applicant has not substantiated his submission to the effect that the terms of employment which he offered were more favourable than those required under a collective agreement. Bearing in mind the special role and importance of collective agreements in the regulation of labour relations in Sweden, the Court sees no reason to doubt that the union action pursued legitimate interests consistent with Article 11 (art. 11) of the Convention (see, for instance, the above-mentioned Swedish Engine Drivers' Union judgment, pp. 15-16, para. 40; and the Schmidt and Dahlström v. Sweden judgment of 6 February 1976, Series A no. 21, p. 16, para. 36). It should also be recalled in this context that the legitimate character of collective bargaining is recognised by a number of international instruments, in particular Article 6 of the European Social Charter, Article 8 of the 1966 International Covenant on Economic, Social and Cultural Rights and Conventions nos. 87 and 98 of the International Labour Organisation (the first concerning freedom of association and the right to organise and the second the application of the principles of the right to organise and to bargain collectively).

54. In the light of the foregoing, having regard to the margin of appreciation to be accorded to the respondent State in the area under consideration, the Court does not find that Sweden failed to secure the applicant's rights under Article 11 (art. 11) of the Convention.

55. In sum, the Court reaches the conclusion that the facts of the present case did not give rise to a violation of Article 11 (art. 11) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

56. The applicant, referring to his allegations mentioned above (see paragraphs 39, 43, 46 and 47 above), submitted that the respondent State's failure to provide protection against the industrial action had caused him pecuniary damage, in violation of Article 1 of Protocol No. 1 (P1-1), which reads:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The applicant contended that, as a consequence of the union action, he had had to sell his restaurant (see paragraph 23 above) at a loss of SEK 600,000.

57. The Government disputed the above allegation, whereas the Commission, having regard to its finding of a violation of Article 11 (art. 11), did not find it necessary to address the issue under Article 1 of Protocol No. 1 (P1-1).

58. The Government conceded that the industrial action, having mainly the effect that the applicant's suppliers could not deliver goods necessary for the running of his restaurant, must have led to difficulties in the running of the applicant's business. However, the applicant had failed to substantiate any actual financial damage caused thereby and the Government had doubts as to how serious the consequences actually were for his business. The Government also denied that this matter, which essentially concerned the contractual relationships between the applicant and his suppliers, could engage the responsibility of the State under Article 1 of Protocol No. 1 (P1-1). The State had not interfered with the applicant's business but had only passively tolerated the trade unions' activities in an open market. The situation was comparable to a consumer boycott instituted against a private company. Yet customers should be free to take such measures without the State incurring liability, even if the boycott led to bankruptcy of the company.

59. According to the Court's case-law, Article 1 (P1-1), which guarantees in substance the right of property, comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph (P1-1) and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph (P1-1), covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph (P1-2), recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule (see, among other authorities, the *Pressos Compania Naviera S.A. and Others v. Belgium* judgment of 20 November 1995, Series A no. 332, pp. 21-22, para. 33).

It was not contended that the second and third rules above were applicable and the Court sees no reason to hold otherwise. On the other hand, the applicant alleged that there had been a violation of the first rule, namely the right "to the peaceful enjoyment of his possessions".

60. Admittedly, the State may be responsible under Article 1 (P1-1) for interferences with peaceful enjoyment of possessions resulting from transactions between private individuals (see the *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, pp. 28-29,

paras. 35-36). In the present case, however, not only were the facts complained of not the product of an exercise of governmental authority, but they concerned exclusively relationships of a contractual nature between private individuals, namely the applicant and his suppliers or deliverers. In the Court's opinion, such repercussions as the stop in deliveries had on the applicant's restaurant were not such as to bring Article 1 of Protocol No. 1 (P1-1) into play.

III. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

61. The applicant alleged that there had been a breach of Article 6 para. 1 (art. 6-1) of the Convention on the ground that the court remedies at his disposal in order to obtain protection against the industrial action would not have been effective. Article 6 para. 1 (art. 6-1), in so far as is relevant, reads:

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

62. In the Government's and the Commission's opinion, Article 6 para. 1 (art. 6-1) was inapplicable.

63. According to the principles in the Court's case-law (see, for instance, the *Kerojärvi v. Finland* judgment of 19 July 1995, Series A no. 322, p. 12, para. 32), the Court has first to ascertain whether there was a dispute (contestation) over a "right" which could 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. Finally, the result of the proceedings must be directly decisive for the right in question. If the Court finds that there is a dispute over a right, it must examine whether the right in question was of a "civil" character.

64. The Government and the Commission observed that, although there were various possibilities for the applicant to have the merits of his case examined by a Swedish court (see paragraphs 33 and 34 above), it was clear that the union action against him was lawful and that Swedish law provided no basis for the national court to grant an order remedying the situation complained of by the applicant. In these circumstances, there was no dispute (contestation) over a right which could be said on arguable grounds to be recognised under Swedish law. Accordingly, Article 6 para. 1 (art. 6-1) was inapplicable.

65. The applicant, citing Swedish case-law, argued that the negative right to freedom of association was recognised under Swedish law. However, in his submission, by virtue of Article 17 of the Instrument of Government which leaves it to the parties in the labour-market to solve

industrial disputes (see paragraph 29 above), Sweden had abdicated its responsibilities as a Contracting Party to the Convention. The notion of an "arguable claim" in the Court's case-law under Article 6 (art. 6) of the Convention was not confined to the position under national law but referred also to the law of the Convention.

66. The Court observes that applicability of Article 6 (art. 6) of the Convention depends on whether there is a dispute over a right recognised by national law. The applicant's complaint under Article 6 para. 1 (art. 6-1) is not that he was denied an effective remedy enabling him to submit to a court a claim alleging a failure to comply with domestic law (as, for instance, in the *Sporrong and Lönnroth v. Sweden* judgment of 23 September 1982, Series A no. 52, pp. 29-30, paras. 80-82). Rather his complaint is essentially directed against the fact that the union action was lawful under Swedish law. However, that provision (art. 6-1) does not in itself guarantee any particular content for (civil) "rights and obligations" in the Contracting States (see, for example, the *Powell and Rayner v. the United Kingdom* judgment of 21 February 1990, Series A no. 172, pp. 16-17, para. 36). In the instant case there was no right recognised under Swedish law to attract the application of Article 6 para. 1 (art. 6-1) of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 (art. 13) OF THE CONVENTION

67. The applicant in addition submitted that the same facts as amounted to the alleged violation of Article 6 para. 1 (art. 6-1) (see paragraphs 62 and 66 above) also constituted a breach of Article 13 (art. 13), which provides:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

68. The Government disputed this allegation.

69. The Commission, having regard to its considerations with respect to the applicant's complaint under Article 11 (art. 11) (see paragraphs 43 and 46 above), was of the opinion that the applicant's claim under this provision (art. 11) was arguable on its merits. Furthermore, it was undisputed that no effective court or other remedy was available to the applicant, given that the industrial action did not contravene Swedish law. For these reasons the Commission shared the applicant's view that there had been a breach of Article 13 (art. 13).

70. According to the Court's case-law, Article 13 (art. 13) requires that, where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he or she should have a remedy before a national authority in order both to have his or her claim decided and, if appropriate, to obtain redress. However, Article 13 (art. 13) does not go so

far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority (see, for instance, the above-mentioned James and Others judgment, p. 47, para. 84; and the above-mentioned Powell and Rayner judgment, p. 16, para. 36). The applicant's complaint under the Convention being essentially directed against the fact that the union action was lawful under Swedish law, Article 13 (art. 13) is not applicable.

FOR THESE REASONS, THE COURT

1. Holds by eleven votes to eight that Article 11 (art. 11) of the Convention was applicable in the present case;
2. Holds by twelve votes to seven that there has been no violation of Article 11 (art. 11);
3. Holds by thirteen votes to six that Article 1 of Protocol No. 1 (P1-1) did not apply to the matters complained of by the applicant and that there has accordingly been no breach of it (P1-1);
4. Holds by fourteen votes to five that Article 6 para. 1 (art. 6-1) of the Convention did not apply in the present case and that there has accordingly been no breach of it (art. 6-1);
5. Holds by eighteen votes to one that Article 13 (art. 13) of the Convention did not apply in the instant case and that there has accordingly been no breach of it (art. 13).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 April 1996.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 55 para. 2 of Rules of Court B, the following separate opinions are annexed to this judgment:

- (a) partly dissenting opinion of Mr Ryssdal, Mr Spielmann, Mrs Palm, Mr Foighel, Mr Pekkanen, Mr Loizou, Mr Makarczyk and Mr Repik;
- (b) partly dissenting opinion of Mr Jambrek.

- (c) dissenting opinion of Mr Walsh;
- (d) dissenting opinion of Mr Martens, joined by Mr Matscher;
- (e) dissenting opinion of Mr Morenilla;
- (f) dissenting opinion of Mr Mifsud Bonnici;

R.R.
H.P.

**PARTLY DISSENTING OPINION OF JUDGES RYSSDAL,
SPIELMANN, PALM, FOIGHHEL, PEKKANEN, LOIZOU,
MAKARCZYK AND REPIK**

Although we agree with our colleagues that there has been no violation of Article 11 (art. 11) of the Convention, we arrive at this conclusion on the ground that Article 11 (art. 11) is not applicable to the complaint made by Mr Gustafsson.

The interests protected by Article 11 (art. 11) As the judgment points out (at paragraph 45), Article 11 (art. 11) has been interpreted to encompass also the negative aspect of freedom of association, namely the right not to join an association (see *Sigurður A. Sigurjónsson v. Iceland* judgment of 30 June 1993, Series A no. 264, pp. 15-16, para. 35). The Contracting States have a duty under Article 11 (art. 11) to put in place a legal framework enabling proper enjoyment of this negative right. It is apparent, however, from the Court's case-law that Article 11 (art. 11) is not a vehicle for regulating industrial relations in general or for generally protecting against prejudice suffered as a result of industrial action taken by one of the actors in the labour-market against another. The Court has thus held that the right to collective bargaining is not an inherent component of freedom of association under Article 11 (art. 11) (see the *Swedish Engine Drivers' Union v. Sweden* judgment of 6 February 1976, Series A no. 20, p.15, para. 39). In our view, neither does compulsion aimed at making an employer enter into a collective agreement in itself - that is to say, in the absence of compulsion to join an association - come within the safeguard afforded by Article 11 (art. 11).

The compulsion complained of by the applicant

The judgment acknowledges that "the union action must have entailed a considerable pressure on the applicant to meet the union's demand that he accept to be bound by a collective agreement, either by joining an employers' association or by signing a substitute agreement" (see paragraphs 44 and 52). The facts of the present case are thus to be distinguished from those in the cases of *Young, James and Webster v. the United Kingdom* (judgment of 13 August 1981, Series A no. 44) and *Sigurður A. Sigurjónsson* (cited above), where the complainants were compelled to join an association on pain of losing their means of livelihood. Here the applicant was not forced to join an association in order to be able to continue the pursuit of his economic activity, since he had another alternative available to him, namely negotiating a substitute agreement adapted to the special character of his business. His objection to that alternative - because of his disagreement with the collective-bargaining system in Sweden - does not bring into play any interest protected by Article 11 (art. 11).

Conclusion

In the light of the foregoing considerations, we have come to the conclusion that the facts complained of - in particular, the compulsion exerted on the applicant to become bound by an agreement governing the conditions of employment of his employees - do not attract the application of Article 11 (art. 11).

PARTLY DISSENTING OPINION OF JUDGE JAMBREK

1. According to the Court's case-law, Sweden had a positive obligation under Article 11 (art. 11) of the Convention to secure to everyone within its jurisdiction the effective enjoyment of his or her right to freedom of association with others, including the right not to join or to withdraw from an association. The Convention being a living instrument which must be interpreted in the light of present-day conditions, that obligation entailed a duty for the respondent State to prevent abuse of a dominant position by a trade union aimed at compelling anyone to join an association or to adhere to a system of collective bargaining.

To the above I would add that it does not follow from the expression "striking at the very substance of", which has been used in the Court's case-law in relation to complaints about compulsion to join an association, that a different or more stringent test applies to the assessment of whether there has been interference. Any interference with an individual's exercise of his or her right to negative freedom of association strikes, by definition and unconditionally, "at the very substance" of that freedom.

2. Like the majority, I consider that the responsibility of Sweden may be engaged even if the matters complained of did not involve direct intervention by the respondent State, notably if they resulted from the State's failure to secure to the applicant under domestic law the rights set forth in Article 11 (art. 11).

My position differs, however, on the interpretation and application of Article 11 (art. 11) in the light of the *Drittwirkung* doctrine. In my view, the industrial action giving rise to the applicant's complaint must be subject to the very same restrictions as would apply to direct interference by the State. If the union action was not justified under paragraph 2 of Article 11 (art. 11-2), the respondent State was under a positive obligation to take action to secure the applicant's enjoyment of his right to freedom of association.

3. As to the specific circumstances of the case, I consider that the facts complained of not only brought Article 11 (art. 11) into play but also amounted to an interference with the applicant's right to freedom of association as guaranteed by paragraph 1 of that Article (art. 11-1). It must therefore be considered whether that interference was justified under paragraph 2 (art. 11-2).

4. The union action, as was not contested, was clearly lawful under Swedish law and I see no reason to doubt that it was "prescribed by law" within the meaning of paragraph 2 of Article 11 (art. 11-2).

5. The restriction was obviously aimed at "the protection of the rights and freedoms of others".

In this respect the judgment refers to "the occupational interests of trade-union members" (see paragraph 45 of the judgment), to "the special role and

importance of collective agreements in the regulation of labour relations in Sweden" and to the legitimacy of collective bargaining "recognised by a number of international instruments" (see paragraph 53 of the judgment).

It is not clear from the wording of the judgment whether the majority assessed the unions' interests in relation to paragraph 1 or paragraph 2 of Article 11 (art. 11-1, art. 11-2). Whilst the section of the judgment dealing with "General principles" refers to "the words 'for the protection of [their] interests' in Article 11 para. 1 (art. 11-1)...", the section entitled "Application of the foregoing principles" omits to mention which of the paragraphs of Article 11 (art. 11) is being applied.

It is important, when applying the proportionality test in order to determine the question of necessity, to consider the "unions' interests" in their proper context. As the unions are not parties to the case before the Convention institutions, these interests should be taken into account in the assessment of the legitimate aim pursued by the impugned restrictions on the applicant's Article 11 (art. 11) rights. The sole issue is whether there was a reasonable relationship of proportionality between the aim sought to be achieved and Mr Gustafsson's interest in not being compelled to conclude a collective agreement.

6. However, for reasons which I will explain below, I do not find that there was a reasonable relationship of proportionality between the competing interests in the present case.

7. In the first place, it does not appear that Mr Gustafsson's persistent refusal to associate himself or his employees with the Swedish system of collective bargaining in any way interfered with the rights and freedoms of the Hotel and Restaurant Workers' Union ("HRF"). Nor does it seem that any personal interest of any individual union member was at stake. Indeed, the one of his employees who was a member of HRF at the relevant time had publicly declared that she found the action unnecessary as the salary and working conditions in Mr Gustafsson's restaurant were not open to criticism.

8. Moreover, I would not attach any weight to the further interests relied on by the majority, namely the corporate aim of "extending a system of collective bargaining" in view of "the special role and importance of collective agreements in the regulation of labour relations in Sweden" (see paragraphs 45 and 53 of the judgment).

In this connection, it should be borne in mind that approximately 85% of employees in Sweden were already covered by the collective bargaining system. As a result, that system, which was principally based on institutionalised relationships between employees and employers, was already remarkably far-reaching, entrenched and powerful. This was compounded by the fact that, according to the applicant, the collective-bargaining system proved an effective means of promoting membership of

the Swedish Social Democratic Party, to the point of making membership collective.

Further expansion of that system would have made it nearly all-encompassing and all-powerful, which could hardly be said to be consistent with the notion of pluralism in democratic society. On the contrary, in order to secure the objectives implied by that notion, namely institutional diversity and individual freedom of choice and self-fulfilment, the State may be required to take protective measures preventing trade unions from acquiring or using a dominant position, especially where they constitute important corporate actors enjoying broad economic, financial and political support.

9. Mr Gustafsson for his part had a number of legitimate interests to defend when confronted with the collective action by the unions. It not only endangered his business and financial interests but threatened his whole philosophy of business, employment relations and life-style.

As a matter of fact, it could be said that the employment policy applied by the applicant at a micro-level in his restaurant business was one based on co-determination and it sought to achieve the very same societal goals as the collective-bargaining system at a macro-level, namely industrial peace and solidarity.

10. Against this background, I do not find that the limitations which the union action entailed on the applicant's exercise of his right to freedom of association corresponded to any pressing social need. The reasons adduced by the Swedish Government in this respect were neither relevant nor sufficient for the purposes of paragraph 2 of Article 11 (art. 11-2). The form and degree of compulsion to which Mr Gustafsson was subjected were disproportionate to the legitimate aims pursued and were thus not necessary in a democratic society.

In these circumstances, the respondent State was under an obligation to take appropriate measures to protect the applicant against the union measures, so as to secure the effective enjoyment of his right to negative freedom of association as guaranteed by Article 11 (art. 11). By failing to do so, the State exceeded its margin of appreciation, thereby violating Article 11 (art. 11).

DISSENTING OPINION OF JUDGE WALSH

1. I agree with the dissenting opinion of Judge Martens that this case discloses a breach of Article 11 (art. 11). I also agree with his reasoning.

2. Sweden is answerable for all breaches of the Convention occurring within its jurisdiction whether caused by private parties or by the State or its agencies (see the *Young, James and Webster v. the United Kingdom* judgment of 13 August 1981, Series A no. 44, p. 20, para. 49).

3. Under paragraph 1 of Article 11 (art. 11-1) the applicant had the right of association with others. However, he also enjoyed as part of that freedom the correlative right not to be forced, directly or indirectly, into association with others. Even if one were to assume that this correlative right could be restricted in accordance with paragraph 2 of Article 11 (art. 11-2) there is nothing in the present case to bring it within that provision (art. 11-2).

4. I also agree with the rest of Judge Martens's opinion.

**DISSENTING OPINION OF JUDGE MARTENS, JOINED BY
JUDGE MATSCHER**

1. To my regret I cannot agree with the opinion of the majority. Since my analysis differs fundamentally from theirs, I will refrain from engaging in controversy and simply set out my own views.

2. I base myself on the facts as they have been established by the Commission. In so far as the Government have, before the Court, relied on new facts which are contradictory to those established by the Commission, I will ignore their assertions.

Certainly, in the proceedings before the Court the parties are, in principle, free to allege new facts - that is facts not relied on in the proceedings before the Commission - but this freedom is limited by principles of fair procedure. Under the Convention system the establishment and verification of the facts is primarily a matter for the Commission (see, *inter alia*, the *Ribitsch v. Austria* judgment of 4 December 1995, Series A no. 336, p. 24, para. 32). Consequently, additional facts supplementing or clarifying the facts established by the Commission are admissible (see the *McMichael v. the United Kingdom* judgment of 24 February 1995, Series A no. 307-B, p. 51, para. 73), but new facts which are contradictory to those established by the Commission, as a rule, are not. There are certainly exceptions to this rule: facts which were unknown to the parties and the Commission at the moment when the latter established its report and facts that occurred after that moment are also admissible. However, the former category does not include facts which the party adducing them could have known had it been reasonably diligent and careful. The new contradictory facts on which the Government now endeavour to rely fall into the latter category. The Government have not denied that before the Commission they were given ample opportunity to present their case. They merely said that in availing themselves of that opportunity they had omitted to consult the trade union concerned, giving no other reason for that omission than "practical difficulties". Their omission should remain at their own risk.

3. It will be recalled that the Commission established that:

(a) only one of the less than ten employees of the applicant was a member of HRF, the trade union which took action against the applicant;

(b) this employee has publicly expressed the opinion that the trade union's action was unnecessary since the salary and working conditions in the restaurant were not open to criticism; (c) the conditions of employment of the applicant's employees were more favourable than those resulting from the collective agreement in force.

Thus, the trade union's action did not purport to improve unacceptable, or at least less favourable, working conditions but merely to enrol the applicant and his employees into the collective bargaining system.

This is borne out by the fact that not only the applicant but also five of his employees had recourse to the Convention organs. The latter complained that the lack of State protection against what they called the unjustified industrial actions instituted against their employer's restaurant had violated their negative freedom of association. They pointed out that the aim of the action was to deprive them of any possibility of influencing the terms of their contractual relationship with their employer. In its decision of 8 April 1994 (application no. 15533/89, Decisions and Reports 77-A, pp. 10 et seq.) the Commission declared these complaints inadmissible, but since they strongly corroborate its findings of fact in the present case, they are, as such, a further argument against entertaining the new factual assertions made by the Government.

Article 11 (art. 11)

4. Provisionally, this case can be seen as a conflict between - on the one hand - a small employer whose deeply held political convictions involve that a particular system of collective bargaining and collective labour agreements has a harmful impact on the community at large and is unacceptable per se and who therefore not only refrains from joining an employers' association but also obstinately resists all efforts of the trade union concerned to integrate him somehow or other into that system, and - on the other hand - a trade union which is, understandably, of the opinion that its occupational interests require that every employer in the trade should take part in the system and therefore endeavours to crush the employer's resistance by collective action.

On this provisional analysis what is at stake is a conflict between two fundamental rights, that of the trade union relying on its positive freedom of association and that of the employer who invokes his negative freedom of association.

5. The Government deny, however, that the applicant's negative freedom of association was in issue. They submit that the primary aim of the collective action was not to compel the applicant to join an employers' association, but to make him bound by a collective agreement.

This argument fails.

A first point to make is that the subjective aim of the collective action is immaterial. What is decisive is the objective effect of the trade union's conduct. Objectively speaking, the applicant was confronted with a demand - under threat of collective action - to integrate himself into the collective-bargaining system either by joining an employers' association or by signing a so called "substitute agreement", which amounted to accepting to be bound not only by the existing collective labour agreement but also by future agreements or at least next season's agreement.

The applicant was thus subjected to serious compulsion to integrate himself, in one way or another, into the collective-bargaining system. That compulsion interfered with his negative freedom of association since it was

incompatible with an element necessarily inherent in that freedom, namely his freedom to negotiate his own labour agreements.

6. The Government say that such a freedom is not protected under the Convention. That argument fails to appreciate, however, the indissoluble link which, in the context of industrial relations, exists between trade-union freedom (as a special form of positive freedom of association), the right to bargain collectively and the right to take collective action in order to protect occupational interests. As is illustrated inter alia by the twin Articles 5 and 6 of the European Social Charter (and the pertinent conclusions concerning these provisions of the Committee of Independent Experts), under international labour law the right to bargain collectively is, if not an objective of, then at any rate a corollary of both the positive freedom of association of trade unions and its necessary derivative, the freedom of the unions to protect their occupational interests by collective action.

It is true that in its now twenty-year-old and rather reticent judgments on the scope of the protection which trade unions enjoy under Article 11 (art. 11) (the *National Union of Belgian Police v. Belgium* judgment of 27 October 1975, Series A no. 19; the *Swedish Engine Drivers' Union v. Sweden* judgment of 6 February 1976, Series A no. 20, and the *Schmidt and Dahlström v. Sweden* judgment of 6 February 1976, Series A no. 21) the Court refrained from subscribing to the Commission's carefully reasoned and extensively documented opinion that the right to bargain collectively is indispensable for the effective enjoyment of trade-union freedom and is thus an element necessarily inherent in that freedom as safeguarded under Article 11 (art. 11) (Series B no. 18, pp. 47 et seq., paras. 76-78). However, under present-day conditions - as reflected inter alia in the International Labour Organisation ("ILO") Committee on Freedom of Association's conclusions under ILO Convention no. 98 - it cannot be doubted that the right to bargain collectively is such an element, just like the right to protect the occupational interests of trade-union members by collective action.

Likewise, but on the reverse side of the same coin, an employer's negative freedom of association necessarily implies the freedom not be integrated into a collective-bargaining system, that is the freedom to negotiate his own labour agreements.

In sum, Article 11 (art. 11) is applicable. The next question is whether it has been violated.

7. The finding that Article 11 (art. 11) is applicable renders definitive the above provisional analysis of the case as a conflict between the positive freedom of association of the trade union and the negative freedom of association of the applicant employer. Consequently, it becomes necessary in the present case to determine the question left open in the *Sigurður A. Sigurjónsson v. Iceland* judgment (30 June 1993, Series A no. 264, p. 16, para. 35). In that judgment the Court recognised (as the Committee of Independent Experts had done with respect to Article 5 of the European

Social Charter) that "Article 11 (art. 11) must be viewed as encompassing a negative right of association", but left open the - crucial - question "whether this right is to be considered on an equal footing with the positive right".

8. In the context of a conflict between the two rights, the question is not so happily worded in so far as it postulates that the only way to resolve a conflict between them is by assigning them different weights. *Quaeritur ergo* which of the two is to be considered the weightier? In answering this question under the Convention, the point of departure should be the character of that instrument. The Convention purports to lay down fundamental rights of the individual and to furnish the individual an effective protection against interferences with these rights. Therefore, once it is recognised that Article 11 (art. 11) encompasses a negative as well as a positive freedom of association, the negative freedom should in principle prevail in a conflict between them.

The words "in principle" should be stressed. Admittedly, it has now been accepted that these rights are two sides of the same coin, but where they are in conflict the collective aspects of the positive right, notably the importance of social solidarity, must not be ignored. Consequently, it may well be that for the final balancing exercise in such cases it is material whether the negative freedom of an employee or that of an employer is at stake. Social solidarity does not always have the same content or the same value. In other words, it may make a difference whether the conflict of rights concerns a friction within the same camp (a dissension between a trade union and an individual employee) or one between camps (a dissension between a trade union and an individual employer); just as, where the conflict concerns only one camp, it may make a difference what is the object of the dissension.

However that may be, the predominance in principle of the negative right implies that in cases where (as here) trade unions use collective action as a form of compulsion for compelling an individual employer to be directly or indirectly integrated in the system of collective bargaining, there is no longer any room for the "striking-at-the-very-substance-of-the-right-guaranteed-by-Article-11" (art. 11) test of the *Young, James and Webster v. the United Kingdom* judgment (13 August 1981, Series A no. 44, p. 23, para. 52). This is because this rather restrictive test was based on the assumption - only accepted for the sake of the argument (*ibid.*, p. 21) - that the negative freedom is not enshrined in the Convention.

This test must be replaced by one which better reflects the human rights ideal that the individual must in principle be free to act according to his convictions and, accordingly, be protected against having to go against those convictions as a result of constraining collective action by one or more trade unions. In this context it should be recalled that one of the objectives of freedom of association is precisely the protection of freedom of thought, conscience and religion and freedom of personal opinion (see, *inter alia*, the

Vogt v. Germany judgment of 26 September 1995, Series A no. 323 p. 25, para. 64).

9. Since in case of conflict between the freedom of association and the freedom of dissociation the latter prevails in principle, the traditional - and legitimate - occupational interest of trade unions in achieving widespread organisation and universality of the collective-bargaining system cannot in itself justify the use of collective action in order to compel an individual employer to join an employers' association or to be otherwise integrated in the system of collective bargaining. It follows that such constraining trade-union action against an individual employer should be held to violate his negative freedom under Article 11 (art. 11) unless:

(a) it is prompted by other legitimate occupational interests than that of achieving widespread organisation and universality of the collective-bargaining system; and

(b) wielding the weapon of collective action is proportionate to those other interests.

This onus of alleging and proving such other interests should be on the trade union. In cases like the present one such other interests could be, for instance, that the employer exploits his employees who are members of the trade union and perhaps even his employees in general, if one is prepared - as I would be - to allow trade unions to act in such cases also in the interests of employees in general.

10. It follows that the High Contracting Parties, being bound to secure every individual's negative freedom of association, have a positive obligation to protect that freedom against abuse or disproportionate use of collective action by trade unions. The necessary inference is that Article 11 (art. 11) - just like Article 8 (art. 8) and Article 1 of Protocol No. 1 (P1-1) - implies a procedural requirement: individuals claiming to be victims of abuse or disproportionate use of collective action by trade unions should be able to seek legal protection before an independent and impartial tribunal. I note that this conclusion is consistent with the Committee of Independent Experts' case-law as to a positive obligation for Contracting States to provide legal remedies with respect to practices which unduly obstruct negative freedom of association under Article 5 of the European Social Charter (see Conclusions VIII, p. 77, and XI-1, p. 78).

11. In view of the Government's strongly worded argument based on the so-called "Swedish model", I would like to add that the requirement that victims of disproportionate use of trade-union action should be able to bring their case to court is also a requirement of the rule of law. The rule of law - that essential protection of the individual to which the Preamble of the Convention refers and which the European Court is bound to take into account - not only requires that the individual should be enabled to have a court review the lawfulness and proportionality of interferences in his rights by the executive, but also that he be secured similar protection against other

powerful entities created or allowed by the State. Under the Convention there is no scope for trade unions being exempt from judicial control to a greater extent than States.

Thus, also the rule of law requires that a legal system which - like the Swedish - confers on trade unions and employers' associations a constitutional right to take strike or lock-out or any similar measures, should make it possible for any individual victim of such actions to seek protection in the courts and to have them determine whether or not the trade union or employers' association, as the case may be, has abused its constitutional freedom. It may be that under the "Swedish model" the democratic legislature was convinced that granting trade unions an (almost) unrestricted right to promote their members' interests would best benefit the community as a whole, but the rule of law - and, moreover, legal equality within the Council of Europe - make it impossible to accept, even on the part of a democratic legislature, that for whatever reasons a trade union should have the privilege of being the sole and ultimate arbiter between the interests of its members and those of a small employer who objects to joining the system

12. It is common ground that under Swedish law it was not possible for the applicant to bring an action against the trade unions in order to have the courts assess whether or not there were relevant and sufficient grounds for interfering by collective action with his negative right of association (see paragraph 7 above). That suffices to warrant the conclusion that the applicant's rights under Article 11 (art. 11) have been violated.

13. The Government have argued that to hold that trade unions should be answerable in court with respect to collective actions would infringe the interpretative rule of Article 60 (art. 60) of the Convention since Swedish law ensures them, as a fundamental freedom, immunity from suit.

The argument fails. The immunity from suit which trade unions enjoy under Swedish law does not come within the category of the "human rights and fundamental freedoms" referred to in Article 60 (art. 60). The essential flaw of that immunity is that it is incompatible both with the rule of law and with a proper protection of the individual's negative rights under Article 11 (art. 11). Having created a right that is thus essentially flawed, Sweden should not be allowed to pass it off as a human right or fundamental freedom within the meaning of those terms in the context of the Convention.

Other complaints

14. In view of the above, I do not need to go into the complaints under Articles 1 of Protocol No. 1 (P1-1), 6 or 13 (art. 6, art. 13) of the Convention, since the lack of access to a tribunal is already decisive under Article 11 (art. 11).

I would only add that the procedural requirement of Article 1 of Protocol No. 1 (P1-1) has not been satisfied and that this justifies the conclusion that there is a violation under that provision (P1-1) also.

The argument of the Government that the blockade, being a measure of a private entity against a private person, falls outside the scope of Article 1 of Protocol No. 1 (P1-1) cannot be accepted. Even if collective actions of trade unions could, as the Government wrongly suggest, be simply put on a par with a commercial boycott and similar phenomena, the Government's argument fails to appreciate that a legal system that did not allow the victim of such commercial actions to bring a case against the tortfeasors in order to seek an injunction or damages would likewise violate Article 1 of Protocol No. 1 (P1-1). However that may be, the Government of a State which allows its trade unions an almost unrestricted right to take collective action whenever they deem such action in the interest of their members is certainly under a positive obligation to see to it that such action does not interfere with the rights of others under the first rule of Article 1 of Protocol No. 1 (P1-1); and this positive obligation implies at least that the victims of such collective action should have the opportunity to have an independent and impartial tribunal review the proportionality issue.

Conclusion

15. In sum, Sweden has violated Article 11 (art. 11).

DISSENTING OPINION OF JUDGE MORENILLA

1. To my regret I am unable to share the majority's approach and decision of non-violation of Article 11 (art. 11) of the Convention in this case. For reasons that I expressed in my dissenting opinion in the *Sibson v. the United Kingdom* judgment of 20 April 1993 (Series A no. 258-A, pp. 16-19), I do follow however its conclusion on the applicability of Article 11 (art. 11) of the Convention to the subject-matter of the applicant's complaint. In spite of a certain reluctance to "open the door" to the negative freedom of association (paragraph 45, sub-paragraph 2) the Court, following the *Sigurður A. Sigurjónsson v. Iceland* judgment of 30 June 1993 (Series A no. 264, pp. 15-16, para. 35), has interpreted this Article (art. 11) in its logical sense that this negative right of association - the right not to join or to withdraw from a trade union - is only one aspect of the freedom of association with others.

2. In my opinion, however, the majority has not reached the logical consequence of this premise, namely that the facts adduced by Mr Gustafsson amounted to a violation of his right not to join a trade union and of his right to refuse to enter into collective negotiation with trade unions under the menace of collective action such as a blockade or boycott.

3. The majority, on the contrary, arrives to its conclusion of non-violation after establishing as "general principles" of compliance with Article 11 (art. 11) of the Convention (paragraph 45 of the judgment) the following: (a) the subject-matter of the applicant's complaint did not involve a direct intervention by the State; (b) as the Court held in the above-mentioned *Sibson* judgment, only a form of compulsion which, in the circumstances of the case, strikes at the very substance of the freedom of association guaranteed by Article 11 (art. 11) will constitute an interference with that freedom; (c) the wording of Article 11 (art. 11) shows that the Convention safeguards freedom to protect the occupational interests of trade-union members by trade-union action; (d) according to the case-law of the Court (the *Swedish Engine Drivers' Union v. Sweden* judgment of 6 February 1976, Series A no. 20), the conclusion of collective agreements may be one of the means chosen by the State for achieving that purpose; and (e) the Contracting States should enjoy a wide margin of appreciation in their choice of the means to be employed.

4. This reasoning, in my opinion, is not consistent with the very substance of Mr Gustafsson's "negative" freedom of association guaranteed by Article 11 (art. 11). The positive obligation of Sweden under Article 1 (art. 1) of the Convention of securing the applicant's right requires that legal and procedural means be established to protect the individual against measures taken by the trade unions considered by employers or employees to be "unreasonable or inappropriate". In the present case the responsibility

of Sweden under the Convention is engaged precisely because of this failure.

5. The measures of blockade and boycott appear to have been taken by trade unions against the applicant for refusing the alternatives of either joining an employers' association or signing a "substitute" collective agreement. The collective compulsion was therefore not in the interest of Mr Gustafsson but rather in that of a system of imposed collective labour agreements in which the will of the individual does not seem to be taken into account. In the above-cited Swedish Engine Drivers' Union judgment (in paragraphs 39 and 40), the Court states the terms of collective agreements between employers and a trade union representing the employees (Article 11 (art. 11) of the Convention) and emphasises that the European Social Charter (Article 6 para. 2) "affirms the voluntary nature of collective bargaining and collective agreements". The right of trade unions under Article 11 (art. 11) of the Convention to strive for the protection of their members' interests "under national law" cannot, in my view, embrace measures so inconsistent with the very substance of the right to freedom of association, and the aim to achieve "industrial peace" seems to me also incompatible with such a right under the Convention.

6. The only restrictions that can be placed on the exercise of the right to freedom of association are those set forth in paragraph 2 of Article 11 (art. 11-2) of the Convention. These restrictions are to be prescribed by law and they must fulfil the standards established in this Article (art. 11). I think that the margin of appreciation of the State in social or political issues cannot be validly invoked to justify the lacunae of the Swedish legal system concerning protection of employers or employees against collective measures of compulsion when their pertinence and proportionality is not checked by the courts or by independent and impartial tribunals.

7. Since I have found a violation of Article 11 (art. 11) of the Convention by reason of the Swedish legal system not affording protection of the individual against collective action of trade unions to the detriment of his rights or possessions, the other complaints of the applicant under Article 1 of Protocol No. 1 (P1-1) and Articles 6 and 13 (art. 6, art. 13) of the Convention are mere consequences of the violation of Article 11 (art. 11). The operative part of the judgment has prompted me, however, to give a negative answer to the points at issue.

DISSENTING OPINION OF JUDGE MIFSUD BONNICI

1. I am in general agreement with the dissenting opinions of my brother judges Martens and Morenilla and I find that there has been a violation of Article 11 (art. 11).

2. To that concurring dissent, I would only add the following short observation. I too, like Judge Martens, was particularly impressed by the facts which are mentioned in paragraphs 11 and 15 of the judgment. It was not only the applicant, an employer, who was not a union member, as he did not choose to join the Swedish Hotel and Restaurant Entrepreneurs' Union ("HRAF"); his employees too, except one, were not members of the Hotel and Restaurant Workers' Union ("HRF"). Employer and employees had obviously opted not to adhere to any union in conformity with the fundamental right underlying Article 11 (art. 11) of the Convention. Both considered that it was in their respective interests that they stay out, as going in would in fact have meant that their relationship would be covered by a general collective agreement, which they both considered to be less advantageous than the terms on which they had mutually agreed. The only HRF member employed by the applicant at the relevant time had in fact "publicly expressed the opinion that the industrial action was unnecessary, as the salary and working conditions in the restaurant were not open to criticism".

3. The actions of the unions created a situation of compulsion which had decisive results. The most important and relevant of these was that the contract or contracts of service between the applicant and the employees were rendered completely ineffectual as they could, in no way, be carried out. Paragraph 52 of the judgment, in considering the matter of compulsion, concludes:

"Compulsion which, as here, does not significantly affect the enjoyment of that freedom, even if it causes economic damage, cannot give rise to any positive obligation under Article 11 (art. 11)."

In my view, however, the compulsion in issue did significantly affect the applicant's enjoyment of his right to freedom of association.