

**APPLICATION/REQUÊTE N° 10842/84**

Allan JACOBSSON v/SWEDEN

Allan JACOBSSON c/SUÈDE

**DECISION** of 15 April 1986 on the admissibility of the application

**DÉCISION** du 15 avril 1986 sur la recevabilité de la requête

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**Article 6, paragraph 1 of the Convention :** *Question of whether an action concerning a prolonged building prohibition involves civil rights and obligations and whether it constitutes a genuine and serious dispute between the owner and the authorities (Complaint declared admissible).*

**Article 25 of the Convention :** *Someone who complains about a prolonged building prohibition affecting his property can claim to be a victim of a violation of the Convention.*

**Article 26 of the Convention :** *Examination of the remedies available in Sweden against a prohibition on building. In particular, the fact of not having applied for a building permit when the prohibition was not in force does not constitute failure to invoke a remedy.*

**Article 1 of the First Protocol :** *Does a prolonged building prohibition constitute an infringement of the right to the peaceful enjoyment of possessions ? (Complaint declared admissible).*

**Article 6, paragraphe 1, de la Convention :** *Question de savoir si un litige concernant une interdiction prolongée de construire porte sur des droits et obligations de caractère civil et s'il constitue une contestation réelle et sérieuse entre le propriétaire et les autorités (Grief déclaré recevable).*

**Article 25 de la Convention :** *Peut se prétendre victime d'une violation de la Convention celui qui se plaint d'une interdiction prolongée de construire grevant sa propriété.*

**Article 26 de la Convention :** *Examen des recours disponibles en Suède contre une interdiction de construire. En particulier, le fait de n'avoir pas sollicité un permis de construire à l'époque où l'interdiction n'était pas en vigueur n'équivaut pas à l'omission d'exercer un recours.*

**Article 1 du Protocole additionnel :** *Une interdiction prolongée de construire constitue-t-elle une atteinte au droit au respect des biens ? (Grief déclaré recevable).*

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## THE FACTS

(français : voir p. 175)

The facts of the case, as they appear from the parties' submissions, may be summarised as follows.

The applicant is a Swedish citizen born in 1927 and resident at Rönninge. He is a building engineer by profession. He is represented before the Commission by Mr. Hasse W. Tullberg, a lawyer.

### *The particular facts of the case*

In 1974, the applicant bought a property of 2,644 m<sup>2</sup> called Salem 23 :1 situated in the centre of Rönninge in the municipality of Salem, a suburb south west of Stockholm. On this property is situated a one family house in which the applicant lives. The property has been subject to a prohibition on construction since 1965.

The applicant's property is situated in an area for which a subdivision plan (avstyckningsplan) has been in force since 1938. When the applicant bought the property it was also subject to a building prohibition which had been in force since 1965 and to an area plan (områdesplan) according to which the property was supposed to be used mainly as a public area.

The prohibition on construction issued by the County Administrative Board (länsstyrelsen) on 21 September 1965 applied to the central parts of Rönninge in the municipality of Salem. The decision was valid for one year.

The prohibition on construction has subsequently been prolonged by the County Administrative Board upon application from the municipality for one or two years each time.

Prohibitions on new construction pertaining to Salem 23 :1 have been issued for the following periods :

21 September 1965 -	21 September 1966
16 June 1967	- 14 June 1969
28 July 1969	- 1 July 1970
4 September 1970 -	27 August 1980

27 March 1981	- 27 March 1982
6 June 1983	- 6 June 1984
11 July 1984	- 11 July 1985
11 July 1985	- 11 July 1987

On 1 January 1974 the municipality of Salem was merged with the municipality of Botkyrka, but on 1 January 1983 Salem again became a separate municipality.

Upon request from the applicant the Building Committee (byggnadsnämnden) decided on 28 January 1975 to inform the applicant *inter alia* that the Committee was not prepared to permit the division of the applicant's property into smaller plots.

The applicant turned to the County Administrative Board of the Stockholm County and requested that the municipality be ordered to adopt a city plan for the central parts of Rönninge. In its decision of 31 March 1976 the Board, while noting that only the Government were competent to make the order requested, decided not to grant the request. The Board added, that the planning procedure was underway to such an extent that the Board did not find reason to suggest to the Government that an order be given to enforce the plan.

In 1975 the municipality stated that: "According to a survey plan for the southern parts of Salem adopted on 13 December 1972 the (applicant's property) is mainly situated in an area supposed to be used as green space, streets and car parks. The property cannot be used for building detached houses if the plan is to be followed."

On 15 January 1980 the Building Committee, upon inquiry from the applicant, replied that it was not prepared to grant the applicant an exemption from the prohibition on construction, or a building permit for the purpose of building a one family house and a garage on the property. The applicant appealed to the County Administrative Board, which by a decision on 25 April 1980 rejected the appeal. The County Administrative Board stated in its decision that it interpreted the decision of the Building Committee as a refusal to grant exemption from the prohibition on construction. It went on:

"According to a master plan adopted on 28 June 1979 by the Municipal Assembly (kommunfullmäktige) and relating to part of the municipality of Botkyrka the property is supposed to be used for building blocks of flats of more than two storeys. This use of the main part of the property has also been indicated in an area plan of 1972 for the centre of Rönninge.

In the opinion of the County Administrative Board the proposed buildings may be contrary to the aim of the prevailing building prohibition and hinder future town planning, where the question of using the property for other purposes can arise as indicated above.

In view of what has been said above and since there are no special reasons to accept the proposed buildings and to go against the Building Committee, being the organ primarily responsible for the development of the urbanisation, the County Administrative Board rejects the appeal."

The applicant did not lodge a further appeal to the Government, although he was informed of the possibility to do so.

On 6 June 1983 the County Administrative Board decided to issue a further prohibition on construction for the area in question. In its decision the Board noted *inter alia* that the newly created municipality should have some time to determine its position in respect of the planning of Rönninge. It also stated that an application for a further prohibition on construction would have to be founded on a time-schedule for the amendments of the plan or on any other way of terminating the prohibition.

The applicant appealed against this decision to the Government, which by a decision of 15 December 1983 rejected the appeal.

On 11 July 1984 the County Administrative Board issued a further prohibition on construction under Section 35 of the Building Act for the area in question for a maximum period of one year. From the decision it appears that the municipality had submitted a document according to which work was to be carried out during 1984 for the purposes of establishing certain building plans.

The applicant appealed to the Government, which on 8 November 1984 rejected the appeal.

On 12 June 1984, the Building Committee with reference to a building prohibition under Section 35 of the Building Act stated in an advance opinion that it would not be prepared to grant the applicant a building permit. The applicant appealed on the basis that the building prohibition referred to had ceased to be effective on 6 June 1984. In a new decision of 21 August 1984, the Building Committee conceded that a mistake had been made, and, therefore, quashed its decision of 12 June 1984 and took a new decision of similar contents since a new building prohibition was valid as from 11 July 1984. Subsequently the County Administrative Board dealt with the applicant's appeal against the decision of the Building Committee of 12 June 1984. The Board decided to quash the Building Committee's decision of 21 August 1984, and to reject the appeal against the decision of 12 June referring to the fact that a building prohibition was in force when the Board examined the case. The applicant has appealed against this decision to the Administrative Court of Appeal (kammarrätten) of Stockholm and to the Government. No decision has been handed down by these authorities.

On 11 July 1985 the County Administrative Board again prolonged the prohibition on construction until 11 July 1987. This decision has not been subject to appeal.

On 23 February 1984 the Municipal Council adopted a building programme according to which the area in which the applicant's property is situated should be used for the construction of multi-family houses in 1988. On 13 February 1984 the Board of the Municipality adopted an area programme which also foresees multi-family houses for the area in question. At the same time the Board stated that the planning should be given priority.

On 20 March 1986 the Municipal Council adopted an area plan for the area in question.

### *The Swedish legislation on construction and urban planning*

A property owner's rights to erect buildings on his property are regulated in the 1947 Building Act (byggnadslagen) and the 1959 Building Ordinance (byggnadsstadgan).

Section 1 of the 1947 Act sets forth the requirement of a permit for construction, according to rules laid down by the Government. Such rules are to be found in Section 54 of the 1959 Ordinance. As an example, a permit is required for all new constructions. However, permits are not required for the construction of certain buildings for public use, or smaller additions to existing residences and farms or smaller houses on such estates.

Section 5 of the Act also calls for an assessment that the real estate is suitable from a general point of view for building purposes. Such an assessment shall be made by planning in accordance with the Act, except for areas classified as non-urban (glesbebyggelse) or as "urban developments on a smaller scale" (tätbebyggelse av mindre omfattning). For the latter categories, the required assessment may be made when examining an application for a building permit.

### *Plans and regulations for non-planned areas*

Plans should take due consideration of public as well as individual interests.

A so-called master plan (generalplan) encompasses the major guidelines within a community or a part of a community.

A town plan (stadsplan) or a building plan (byggnadsplan) contains more detailed regulations on the development of the area. For areas not regulated by such plans, construction activities are regulated by the Ordinance.

The developments in areas covered only by older, so-called subdivision plans (avstyckningsplaner), are governed by these plans as well as regulations for non-planned areas (utcomplansbestämmelser).

A master plan is to be drawn up by the local municipality when necessary for the guidance of further detailed planning regarding the structuring and developing of the community. Upon request by the municipality, the master plan may be

confirmed (fastställt) by the County Administrative Board. Complete master plans are seldom deemed necessary. Instead, municipalities tend to meet their planning needs by using simpler, less detailed plans, usually described as area plans (områdesplaner). Such plans are not governed by law.

The Government may decide that a master plan must be prepared, when needed to further a development which is deemed urgent from a national point of view.

A master plan cannot cover an area which is already covered by a town or a building plan.

A town plan is to be drawn up by the municipality, when necessary as a result of the urbanisation of the community, in order to regulate constructions. Such a plan must contain information about the borders of blocks (byggnadskvarter), of public areas (allmänna platser), and of special zones, such as railway areas, harbours, recreational (sports) areas, etc. The town plan must also contain the further provisions deemed necessary regarding constructions in various areas, or regarding the use of properties in these areas. The Ordinance mentions *inter alia* specific use of blocks, prohibitions against construction on part of a block, construction methods to be used, the number of permitted buildings on a certain site (tomt) and the permitted surface area, location, height, and the number of flats in a building.

A town plan must be confirmed by the County Administrative Board, in order to become valid.

Should a municipality, although there is need to work out a town plan, fail to issue one, the Government may order the municipality to present such a plan within a fixed time limit for the Government's approval.

A town plan gives the municipality a right to redeem areas necessary for public use. The redemption value is decided by the Real Estate Court (fastighetsdomstolen), and shall be assessed according to the rules laid down in the Expropriation Act (expropriationslagen).

If an area has become densely populated or if such a situation is expected to emerge in the area, but this situation does not call for a town plan, a building plan must be issued by the municipality, to the extent necessary for the regulation of the development of the area. A building plan is largely the same as a town plan, but does not have as far-reaching legal consequences. A building plan must also be validated through a confirmation by the County Administrative Board, which may issue such a plan if the municipality has failed to produce one.

Subdivision plans only describe borders of blocks and land intended for public use.

All four categories of plans may be cancelled by decision of the County Administrative Board. Such a decision must take the interests of property owners into due consideration.

Regulations for non-planned areas *inter alia* prohibit constructions of new buildings, unless suitable from a general point of view. The same assessment regarding general suitability is made, whether executed as a part of the planning procedure or as a part of the processing of an application for a building permit for an area not covered by town or building plans.

#### *Prohibitions on construction*

Under Section 56 of the Building Ordinance, the authorities may not grant permits for new buildings, which would result in an urban development (*tätbebyggelse*) within an area which is not covered by a town plan or a building plan. The concept of "urban development" is defined as such concentrated building which would immediately or in the near future call for special installations for common needs (e.g. water supply, sewage systems and other utilities). This legal prohibition has been applied in an extensive way.

Areas governed by subdivision plans are exempted on a general basis from the so-called universal prohibition on construction in urbanised areas. The County Administrative Board may, however, include also areas covered by subdivision plans under this prohibition.

The prohibition on construction in urbanised areas does not pertain to all kinds of construction. Once a proposal for a town plan has been suggested for a certain area, it may become important to prevent construction even of smaller houses or changes to a house, which would normally not require any public supply of utilities. Furthermore, the prohibition does not automatically extend to areas covered by subdivision plans. A town plan has to be designed according to the existing situation. From many points of view, changes in this situation occurring during the planning procedure are very inconvenient. Therefore, on an application by the local community, the County Administrative Board may issue a prohibition against all construction of new buildings, or against measures equivalent to such constructions, pending the emergence of a town plan for the area. Such a prohibition is valid for one year only but may be prolonged for two years at a time. The prohibition is annulled and replaced by another prohibition when the municipality has adopted a proposal for a town plan. The new prohibition is automatically cancelled when the town plan has been confirmed. None of these prohibitions, however, is absolute, exemptions may be granted. Naturally, exemptions will not be granted, should the planning procedure be obstructed by the intended construction.

#### *Formation of property units*

On application, divisions of units of property are resolved by the Property Formation Agencies (*fastighetsbildningsmyndigheterna*). New units are to be designed

in such a way as to make all units concerned permanently suitable for their purpose, with regard to their location, size, and other prerequisites. Within town planned areas or areas subject to subdivision plans, a division must concur with the plan. Where other regulations pertain to the development of land, e.g. a prohibition on construction, the division has to be carried out so as not to obviate the purpose of the prohibition. If there are no plans for the area, divisions with a view to construction may not be made, if they were to impede appropriate use of the area, to result in inappropriate development or to obstruct appropriate planning for the area (chapter 3, sections 1 to 3 of the Act on Formation of Real Estate, fastighetsbildningslagen, Section 12 of the Act Promulgating the Act on Formation of Real Estate).

### *Decisions and review of decisions*

A person who wants to erect a building for which a permit is required must file an application with the local Building Committee. An application coming under any of the above prohibitions is in practice considered as including also an application for exemption from the prohibition in question. The applicant may, on the other hand, choose to apply for an exemption only, in order to apply for his permit when the matter of exemption has been resolved.

The examination of an application for a permit involves ascertaining that the intended building will not run counter to any confirmed plan, or, as the case may be, to the regulations of non-planned areas, or to a prohibition on construction, and that it satisfies technical demands on construction. In the absence of such obstacles, a permit should be granted.

Should the intended construction require exemptions of any kind, the Building Committee must also take a decision on this matter. In case the Committee lacks legal competence to do so, it normally would refer the application as regards exemption to the County Administrative Board, suspending its decision on the permit issue, pending the outcome of the exception issue.

A widely used practice among property owners is to request an "advance opinion" (förhandsbesked) regarding a certain type of construction on a specified unit of property. A negative response from the Building Committee is regarded as a rejection of an application for exemption, provided the execution of the matter and the substance of the decision justify such an interpretation. The reason is that this will give the applicant the right of appeal against statements by the Committee which in reality mean that no exemption is granted.

Decisions by the Building Committee to refuse building permits and exemptions may be appealed to the County Administrative Board.

A decision by the County Administrative Board to issue a prohibition on construction or, as the first instance, to refuse an exemption from a building prohibition



may be appealed to the Government, as may a decision by the Board to reject an appeal against the Building Committee's decision not to grant an exemption. A decision of the County Administrative Board to reject an appeal regarding an application for a building permit is, however, appealed to the Administrative Court of Appeal. Decisions by the Administrative Court of Appeal may be appealed to the Supreme Administrative Court (regeringsrätten), which may refuse to grant leave to appeal.

When a decision by the County Administrative Board has resolved both issues (the permit and the exemption) it may be appealed to the Administrative Court of Appeal. If this court should come to the conclusion that an exemption is not required, the matter will subsequently be processed as a simple matter of permit. Otherwise the Administrative Court of Appeal will transfer the matter to the Government for a decision. The Court also makes a statement to the Government on the permit issue.

For practical reasons, the County Administrative Boards try to keep matters of exemption apart from matters of permit, suspending their resolution on the latter issue until a final decision has been reached on the former.

A special rule applies when an application for a permit has been denied for the reason only, that it does not meet the general requirement of suitability laid down in the regulations for non-planned areas. Such a denial by the County Administrative Board may be appealed only to the Government. Should a matter of permit, on appeal to the Administrative Court of Appeal, include this issue of suitability, the Court is to refer the matter together with a statement of its own, to the Government.

There are no limits to the number of times a property owner may apply for permits or exemptions. The authorities are obliged to examine the matter in full each time they are seized with an application.

Moreover, the confirmation of town and building plans by the County Administrative Board may be appealed to the Government by the property owners concerned. The owners may also appeal against a decision to refuse confirmation of an adopted proposal for a plan. However, they cannot formally require a plan to be prepared by the local municipality or the County Administrative Board, nor can they demand an injunction by the Government, ordering a municipality to prepare a proposal for a town plan.

Decisions by the Property Formation Agencies may be appealed to the Real Estate Courts, whose decisions in turn may be appealed to the Court of Appeal (hovrätten), and from there to the Supreme Court (högsta domstolen).

### *Supervisory functions*

The County Administrative Board supervises planning and construction activities — including those of the Building Committees — within the county. The

National Board of Physical Planning and Building (planverket), which is a Government Agency, supervises the same fields on the national level.

The Parliamentary Ombudsmen supervise, on behalf of the Parliament, *inter alia*, the Regional Administrative Courts, the County Administrative Boards, and the Building Committees, to ensure that they act according to laws and statutes. The same supervision is, on behalf of the Government, carried out by the Chancellor of Justice (justitiekanslern).

None of these supervisory bodies may alter a decision by an authority. The County Administrative Boards may, however, intervene by issuing prohibitions and injunctions. Otherwise, a supervisory body may only point to committed errors, e.g. by referring a matter to the district prosecutor to act upon as he sees fit.

Those who, in the course of their official duties, deliberately or through gross negligence disregard their obligations, as laid down in laws and statutes, may be fined or sentenced to prison by a court (chapter 20 of the Penal Code). The Government and the local communities are under certain conditions liable for damages, *inter alia*, for property damage, caused by fault or negligence in exercising public authority. Litigations are tried by the general courts.

## COMPLAINTS

1. The applicant complains that Article 1 of Protocol No. 1 has been violated, in particular as a result of the long time the prohibition on construction has been in force and the expressed intention to deprive the applicant of his property in an uncertain future.
2. The applicant also submits that Article 6 para. 1 of the Convention has been breached since he cannot have examined by a court whether the Building Act has been correctly interpreted by the authorities, namely whether a prohibition on construction may be prolonged without any work going on for the purpose of adopting a city plan.
3. The applicant finally complains that he has had no effective remedy before a national authority, and that accordingly Article 13 of the Convention has been violated.

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## THE LAW

1. The applicant owns a property of 2,664 m<sup>2</sup> on which there is a house in which he lives. He wishes to divide the property and build a new house on the new unit of land. He complains about the fact that his property is subject to a prohibition on construction. He submits that the prohibition is unlawful. The applicant alleges violations of Article 1 of Protocol No. 1 and Articles 6 and 13 of the Convention. He also alleges violations of Articles 17 and 18 of the Convention.

The applicant has in particular complained that the duration of the prohibitions on construction violates Article 1 of Protocol No. 1. He has also submitted that the prohibition is unlawful pointing out that the municipality has never had the intention of elaborating a town plan for the area but that it wishes to maintain the prohibition on construction only to be able to prevent the division of property.

As regards Article 6 of the Convention the applicant has complained that he has not had the possibility of a court determination of the lawfulness under Swedish law of the prohibition on construction.

The Government have submitted that the application is inadmissible for failure to exhaust domestic remedies, notably the possibility to ask for a building permit before 6 June 1983 when the building prohibition was not in force. Insofar as the complaint relates to the period before 25 April 1980 the Government submit in addition that the applicant has not complied with Article 26 of the Convention since he did not appeal against the decision of the County Administrative Board of 25 April 1980.

In the alternative, the Government maintain that the application is manifestly ill-founded or even that the complaint is incompatible *ratione personae* with the provisions of the Convention since the applicant cannot reasonably claim to be a victim under Article 25.

As regards Article 6 of the Convention the Government have submitted that this complaint should be declared inadmissible as it falls outside the scope of Article 6 *ratione materiae*, since no "civil right" of the applicant has been determined.

Article 1 of Protocol No. 1 reads as follows:

"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."

Article 6 para. 1 first sentence of the Convention reads as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Commission considers that the applicant is entitled under Article 25 of the Convention to claim that he is the victim of a violation of the Convention as a result of the prohibition on construction which is in force for his property and which has, subject to some minor interruptions, been in force since he bought the property in 1974.

Accordingly, the Commission rejects the Government's submission that the complaint is incompatible *ratione personae* with the provisions of the Convention.

The Government have submitted that the applicant has not fulfilled the requirements of Article 26 of the Convention. In this respect the Commission notes that with regard to the building prohibitions the applicant has appealed to the final instance, the Government, against the building prohibitions which were issued on 6 June 1983 and on 11 July 1984. In this respect he must therefore be considered to have exhausted domestic remedies as required by Article 26.

The Government also maintain that the applicant failed to appeal to the Government against the decision of 25 April 1980 by the County Administrative Board and has, therefore, not exhausted domestic remedies at least as far as the application pertains to the time before that date. It is true that the applicant could have submitted a further appeal to the Government and the Commission accepts that this is a remedy which would normally be regarded as a domestic remedy for the purposes of Article 26. However, in view of the reasons for which the building prohibition was issued and the plans of the municipality, it must be regarded as excluded that this appeal could have any possibility of success. It cannot, therefore, in the particular circumstances of this case be regarded as an effective remedy, which the applicant was required to exhaust. The Commission also notes that this was not a remedy which could open any possibility to have the legality under Swedish law of the building prohibition decided by a Swedish court.

The Government furthermore maintain that the applicant should have applied for a building permit during the periods when prohibitions on construction were not in force as a refusal to grant a building permit could have been challenged before the Administrative Courts. The Commission, however, is unable to accept this as an effective remedy in the particular circumstances of the present case. The appeal to the Administrative Courts in the circumstances referred to by the Government would not have prevented the authorities from renewing the prohibition on construction, and such a prolongation of the prohibition would have prevented the courts from granting a building permit and the impossibility to challenge the lawfulness of the building prohibition before the courts would still have remained. In this connection it should be noted that, at one stage, on 12 June 1984 when a building prohibition was not in force, the Building Committee stated in a decision that it was not prepared to grant the applicant a building permit. Even if this decision, as it appears from the subsequent decision of the County Administrative Board, may have been based on wrong reasons it was nevertheless in substance confirmed by the Board since a building prohibition was then in force.

It follows that the application cannot be rejected under Article 26 in conjunction with Article 27 para. 3 of the Convention.

It remains to be examined whether the applicant's complaint under Article 1 of Protocol No. 1 is manifestly ill-founded and whether the complaint under Article 6 is incompatible *ratione materiae* with the Convention or manifestly ill-founded.

The first issue to be examined is whether in the circumstances of the case the prohibition on construction constitutes an interference with the applicant's right under Article 1 of Protocol No. 1 to peaceful enjoyment of his possessions. If this were so, it would then have to be examined whether the interference is justified under the terms of Article 1 of Protocol No. 1.

As regards Article 6 of the Convention the issues to be decided are whether the decision to prolong the prohibition on construction on the applicant's property was decisive for a "civil right" of the applicant, and, if so, whether a genuine and serious dispute arose between the applicant and the Swedish authorities in relation to the decision to prolong the building prohibition. In the affirmative, it would then have to be determined whether the applicant had at his disposal a procedure satisfying the requirements of Article 6 para. 1 in regard to that dispute.

The Commission has made a preliminary examination of these issues in the light of the parties' submissions. It considers that these issues are of such an important and complex nature that their determination requires an examination of the merits. These complaints must therefore be declared admissible.

For these reasons, the Commission

**DECLARES THE APPLICATION ADMISSIBLE**, without prejudging the merits of the case.