AS TO THE ADMISSIBILITY OF

Application No. 12091/86
by Anders ANDERSSON
against Sweden

The European Commission of Human Rights sitting in private on 9 March 1989, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
H. VANDENBERGHE
M. F. MARTINEZ
Mrs. J. LIDDY
Mr. L. LOUCAIDES

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 31 October 1985 by Anders ANDERSSON against Sweden and registered on 10 April 1986 under file No. 12091/86;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the Government on 14 October 1987 and 28 April 1988 and the applicant's observations of 17 February 1988 and 13 January 1989 as well as the submissions of the parties at the hearing held on 9 March 1989;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant is a Swedish citizen, born in 1947 and resident at Loftahammar. He is a fisherman by profession. Before the Commission the applicant is represented by Mr. Jan Axelsson, a lawyer practising in Stockholm.

The applicant owns a property which includes fishing waters in the Baltic Sea.

On 1 May 1985 new legislation entered into force which made fishing with hand-held tackle (handredskapsfiske) licence-free for everybody. Thereby the applicant's exclusive right to such fishing in his waters has been transformed so that everybody is now entitled to fish with hand-held tackle in these waters. The 1985 legislation involved in essence an amendment of the Fishing Rights Act (lagen om rätt till fiske) and a new Act on Compensation for Interferences with Private Fishing Rights (lagen om ersättning för intrång i enskild fiskerätt; hereinafter referred to as "the Compensation Act").

The amendment of the Fishing Rights Act consisted essentially of the introduction of a Section 20 a which reads as follows :

(Swedish)

"Vid kusten av Östhammars kommun i Uppsala län, Stockholms län, Södermanlands län, Östergötlands län, Kalmar län, Gotlands län och Blekinge län samt i Vänern, Vättern, Mälaren, Hjälmaren och Storsjön i Jämtland får svenska medborgare, utöver vad som följer av 7-11 och 14-20 §§, fiska i enskilt vatten med metspö, kastspö, pilk och liknande handredskap som är utrustat med lina och krok. Redskapet får dock inte ha mer än tio krokar. Ej heller får fiskemetoden som sådan kräva användning av båt.

(English translation)

"Along the coast of the municipality of Östhammar of the county of Uppsala, the county of Stockholm, the county of Östergötland, the county of Kalmar, the county of Gotland, the county of Blekinge and in the lakes of Vänern, Vättern, Mälaren, Hjälmaren and Storsjön of Jämtland, Swedish citizens may, subject to the provisions of Sections 7-11 and 14-20, fish in private waters with rod, casting rod, jig and similar hand-held tackle equipped with line and hook. The tackle may however not include more than ten hooks. The fishing method may also not require the use of a boat."

Section 1 para. 1 of the Compensation Act provides as follows:

(Swedish)

"Medför bestämmelserna om handredskapsfiske enligt 20 a § lagen (1950:596) om rätt till fiske ett inkomstbortfall för den som är innehavare av enskild fiskerätt, har han enligt denna lag rätt till ersättning av staten för inkomstbortfallet."

(English translation)

"If the provisions on fishing with hand-held tackle under Section 20 a of the Fishing Rights Act involve a loss of income for the proprietor of a private fishing right he is entitled under this Act to compensation from the State for the loss of income."

A transitional provision to the Compensation Act provides that income received as a result of measures taken after 1 March 1984 shall not be the basis for the calculation of compensation under the Act.

In the Government Bill 1984/85:107 (pp. 42-43), the Minister of Agriculture made inter alia the following statements:

The purpose of making fishing with hand-held tackle free was to meet the public's interest in leisure activities. In most cases no damage would be done to the fishing rights owner if fishing with hand-held tackle was made free. However, in some special cases there ought to be a possibility for the fishing rights owner to receive compensation. For a right to compensation it ought to be required that the interference was somewhat substantial. Everyone must be prepared to accept a certain interference in the public interest without compensation. Since free fishing with hand-held tackle would not affect the use of the water for other purposes than fishing the compensation rule could be restricted to cover interferences which resulted in ongoing use of fishing in private waters being rendered considerably more difficult. Compensation should not be paid for other interferences than in ongoing use of water for fishing. If the waters had not previously been used for fishing there could be no compensation. Expectation values should thus not be compensated. The compensation should be assessed on the basis of actual loss of income suffered by the individual fishing rights owner as a result of the free fishing with hand-held tackle. For a right to compensation it ought to be required that the damage did not appear to be insignificant seen in absolute figures.

Before the Government's proposal was submitted to Parliament, it was examined by the Law Council (lagrådet), composed of two judges of the Supreme Court (högsta domstolen) and one judge of the Supreme Administrative Court (regeringsrätten). The Law Council, although proposing a certain increase in the right to compensation, found that the proposed legislation did not violate the Swedish Constitution.

When the proposed legislation was examined in Parliament the Standing Committee on Agriculture (jordbruksutskottet) made the following statement (JoU 1984/85:20, page 15):

"The Committee supports the statement made by the Minister of Agriculture that this is not a question of such transfer of property which is covered by the provision in Chapter 2 Section 18 of the Instrument of Government on expropriation. However, the Committee also shares the view of the Minister of Agriculture that it is important that the question of

compensation is given a satisfactory solution with regard to the protection of the individual at which the said constitutional provision is aiming. For that reason those private fishing rights owners who suffer financial losses as a result of the free fishing with hand-held tackle, should be entitled to compensation for such losses in accordance with grounds laid down in the law. It is reasonable that this right to compensation covers every personal financial loss which the fishing rights owners may suffer."

Before coming to that conclusion and when summarising the Minister's reasoning in the Government Bill, the Standing Committee stated (at p. 13) that compensation should be paid if it could be established in some case that the fishing rights owner's own catches have been reduced as a direct consequence of the free fishing with hand-held tackle and that, as a result, he has had less income.

Claims for compensation should be submitted to the National Board of Fisheries (fiskeristyrelsen) before the end of 1989. The National Board of Fisheries decides on issues of compensation. No appeal lies against this decision. However, a property owner who is not satisfied with a decision of the National Board of Fisheries can institute proceedings before the Real Estate Court (fastighetsdomstolen).

The background and reasons for the 1985 legislation are

described as follows by the Government (with reference to the Government Bill 1984/85:107):

The reform constitutes a part of the public recreation policy. From the social aspect it is important for people to have opportunities for relaxation and activities in their leisure time. This need increases as leisure time increases and daily work requires less physical effort. There are numerous obstacles limiting opportunities for utilizing leisure time. Many leisure activities require expensive equipment. One's own holiday cottage, a craft or caravan and access to a car are often required to get to recreation areas. People living in large towns often live far from unexploited countryside and the recreation facilities offered thereby. Furthermore, many people who have moved to the towns previously had a natural and spontaneous contact with unspoiled nature which is now lost. Recreational fishing means a great deal to these people. All three of the big-city areas in Sweden are located close to the sea coast. Two of them also offer suitable lakes in the immediate vicinity of residential areas. Distance therefore does not have to be a problem for those who wish to go fishing in their leisure time. However, recreational fishing requires access to suitable fishing waters in the big-city areas. In the Gothenburg and Malmö areas it was possible for everyone to fish on the coast, but in the Stockholm area this was prevented by the fishery legislation which meant that fishing near the beaches and in most of the archipelago area was an exclusive right of the owner of the fishing rights.

Furthermore, an important task for society is to make a wide range of leisure activities available to all. This is particularly important since the opportunity of leisure activities and exercise is of great significance to health, adjustment and well-being in society. Recreational fishing offers unique opportunities for contact with nature, exercise and relaxation and it is open to anyone. It activates people from all groups of society. The social bias often evident in

other leisure activities does not exist in recreational fishing. It is also an important supplement to other leisure activities such as boating, hiking, holiday trips and camping. Recreational fishing can also provide an added source of livelihood, enabling settling in sparsely populated areas where other sources of livelihood are limited. An important task for society is to contribute to offering the public a rich and varied range of leisure opportunities. Experience shows that active recreational fishing plays an important part in the social recreation policy.

In the Bill submitted to Parliament, in which the reform was proposed, the Minister of Agriculture stated the following:

"It is unusually difficult to obtain any clear picture of the current legislation on fishing rights. This is evident from the summary of the system of regulations given in the memorandum. Regulations which at the time they were issued may have seemed reasonable and fair, now appear difficult to understand, complicated and sometimes illogical. One of the most striking examples of this is that on certain stretches of the coast the public may fish freely with nets but may not use hand-held tackle. The provisions of the Fishing Act are supplemented by provisions concerning conservation and operation of fishing issued by the Government in the Ordinance on Fishery and other provisions notified by the National Board of Fisheries or by the County Administrative Boards. This accumulation of regulations is extremely extensive and contains such a multitude of detail that it is difficult for an individual to acquire adequate information as to where, when and how he may fish. The fact that the regulations are often considered complicated or are misunderstood entails an apparent risk of even regulations which are well-motivated

from the conservation aspect being disregarded.

Even today the owners of fishing rights do not make full claim to their rights, but allow the public to fish with hand-held tackle and even with nets along large parts of the coastal stretches now under discussion.

In the light of this I look upon the proposal to increase the public's opportunities to fish freely with hand-held tackle as a natural and essential step towards simplification. If it is implemented, this will allow fishing with hand-held tackle in both public and private waters along all coasts and in the large lakes. The only limitation remaining will be the exclusion of salmon fishing along the coast of Norrland (from Östhammar municipality to the Finnish border). As long as only hand-held tackle are used, the reform will relieve both the public and the authorities of keeping track of where the boundary lies between public and private waters. Besides the other reasons favouring the reform, I also consider this simplification to have a considerable intrinsic value.

As appears from what I have already submitted, Parliament on two previous occasions, by requesting a proposal from the Government, has already reached a decision in principle to allow fishing with hand-held tackle to be free. The task of the Government now, therefore, is to draw up the legislative

proposals required to implement the reform. Replacing this reform by forming fishery conservation areas within all private waters in the areas under discussion is, for several reasons, not a realistic alternative. Fishery conservation areas cannot simply replace free fishing with hand-held tackle. The formation of such conservation areas aims primarily at improving fishery conservation and not at giving the public free access to fishing. Furthermore, in my opinion, fishery conservation areas formed compulsorily, as they often would be, would constitute a far greater interference with the individual's rights than the free fishing with hand-held tackle. Voluntary formation of fishery conservation areas which can give the public access to fishing-grounds to the same extent as free fishing with hand-held tackle cannot be expected within a reasonable time.

However, the reform should not entail any new obstacles to the formation of fishery conservation areas."

The Standing Committee on Agriculture made the following statement (JoU 1984/85:26 p. 10):

> "The Government's proposal... means that Parliament's wish, expressed two years ago, is now satisfied. An important recreational political reform is implemented since fishing with hand-held tackle, in the future, will be free along all coasts of Sweden and in the large lakes... It is a strong public interest to make possible, in this way, an increased offer of leisure activities to the population in for instance the metropolitan areas... The Committee also finds it valuable that the fishing legislation is considerably simplified by the proposal."

Chapter 2 Section 18 of the Instrument of Government (regeringsformen) reads:

> (Swedish)
>
> "Varje medborgare vilkens egendom tages i anspråk genom expropriation eller annat sådant förfogande skall vara

tillförsäkrad ersättning för förlusten enligt grunder som bestämmes i lag."

(English translation)

"Every citizen whose property is taken through expropriation or other similar use shall be entitled to compensation for the loss according to rules laid down by law."

Chapter 11 Section 14 of the Instrument of Government reads:

(Swedish)

"Finner domstol eller annat offentligt organ att en föreskrift står i strid med bestämmelse i grundlag eller annan överordnad författning eller att stadgad ordning i något väsentligt hänseende har åsidosatts vid dess tillkomst, får föreskriften icke tillämpas. Har riksdagen eller regeringen beslutat föreskriften, skall tillämpning dock underlåtas endast om felet är uppenbart."

(English translation)

"If a court or other public authority finds that a regulation is in conflict with a provision in the Constitution or other superior legislation or that the prescribed procedure in some significant respect has not been observed when it was adopted, the regulation may not be applied. However, if Parliament or the Government have issued the regulation, it shall be applied unless the irregularity is manifest."

As regards the financial losses suffered by the applicant under the 1985 fishing reform, the applicant submits that, since the introduction of that reform, his catches of pike have fallen from 2360 kg in 1985 to 1676 kg in 1988. His catches of perch have fallen from 1372 kg to 351 kg over the same period. The average price of pike can be estimated at approximately 15 SEK per kg and that of perch at approximately 7 SEK per kg.

During the 15 years period preceding the 1985 reform, the applicant's catches of pike and perch were lower than in 1985, pike varying between approximately 1500 and 750 kg with an exceptional low of 600 and perch between approximately 800 and 300 kg.

The increase in 1985 was due to the fact that, in order to compensate for the expected diminishing of the stock of pike and perch due to the 1985 fishing reform, the applicant doubled the fishing nets used from 540 metres to 1080 metres at a cost of 2.968 SEK (VAT not included). He also bought 14 bag-nets for catching eel at a cost of 9.100 SEK. As a consequence, he had to spend more than twice the time fishing as before the reform. Nevertheless, he has barely managed to keep his net income from fishing. If inflation is taken into account it has fallen. His net taxable income from fishing 1983 - 1987 was 16.476, 21.892, 22.546, 20.717 and 21.263 SEK respectively.

The season for fishing-nets is about four weeks in summer during spawning, when the bulk of pike and perch is caught. Before 1985, the applicant used to spend about 100 hours fishing during this period, now he has to spend about 200 hours. His work during the bag-net season (roughly late May - early September) has increased from approximately 25 to 60 hours.

In addition, as a consequence of the 1985 reform, people using hand-held tackle cause considerable damage to the applicant's fishing gear. The cost for replacing damaged equipment amounts to about 500 SEK yearly. He has to spend approximately 10 hours each year to mend damaged equipment. Furthermore, he has to check his bag-nets

more frequently making him spend another 15 hours yearly.

In the waters north-east of the island of Långö, where the applicant used to get considerable catches of eel, fishing by the public has become so intense that it is now impossible to fish with bag-nets since they will be damaged all the time. The loss can be estimated at 75 kg eel yearly worth 3.000 SEK.

It is of course difficult to fix the price of the applicant's work but a minimum would be the hourly wage of an agricultural worker including social charges. That amounts to 85 SEK. His hourly gross income as a fisherman would normally be considerably higher.

To sum up, the applicant's loss so far can be calculated to amount to 17.100 SEK. To this should be added cost of new equipment amounting to 12.068 SEK.

COMPLAINTS

1. The applicant alleges a violation of Article 1 of Protocol No. 1 to the Convention. He has been deprived of his exclusive right to fish in his waters. It is not a question of controlling the use of his property. There is no public interest which justifies the interference. In any event there is no reasonable relationship between the means employed and the aim sought to be realised. In addition, compensation is refused to him in an arbitrary and discriminatory manner.

2. The applicant also alleges a violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 as a result of the discriminatory rules on compensation.

3. The applicant alleges a breach of Article 6 of the Convention, in that he has not had the possibility of submitting his claims in relation to the unlawful interference with his civil rights to a tribunal meeting the requirements of the Convention. He is not allowed to dispute the legality of the interference with his property right. Nor is he allowed to dispute the legality of the principle according to which compensation for losses is refused in his case.

4. The applicant finally alleges a violation of Article 13 of the Convention, in that there is no appeal to a Swedish authority which constitutes an effective remedy for the above alleged violations of the applicant's rights under the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 31 October 1985 and registered on 10 April 1986.

On 4 May 1987 the Commission decided to invite the respondent Government to present written observations on the admissibility and merits of the application.

The Government's observations were received by letter dated 14 October 1987 and the applicant's observations in reply were dated 17 February 1988.

The Government submitted further observations in reply on 28 April 1988.

On 13 May 1988 the Commission, with reference to Rule 2 (b) of the Addendum to its Rules of Procedure, refused the applicant's request for legal aid. On 13 January 1989 the applicant submitted an estimate of the financial losses he had suffered as a result of the 1985 reform.

On 10 October 1988 the Commission decided to invite the parties to a hearing on the admissibility and merits of the application.

The hearing was held on 9 March 1989. It was a joint hearing involving also Applications Nos. 11763/85, 11764/85, 11765/85, 11766/85, 11767/85 and 11830/85. At the hearing the parties were represented as follows:

The Government

Mr.	Hans CORELL	Ambassador, Under-Secretary for Legal and Consular Affairs, Ministry for Foreign Affairs, Agent
Mr.	Ulf ANDERSSON	Assistant Under-Secretary, Ministry for the Environment and Energy, Adviser
Mr.	Carl Henrik EHRENKRONA	Legal Adviser, Ministry for Foreign Affairs, Adviser
Mr.	Pär BOQVIST	Legal Adviser, Ministry for Foreign Affairs, Adviser

The Applicants

Mr. Michaël HERNMARCK (Applications Nos. 11763 and 11764/85), Lawyer
Mr. Bo NILSSON (Applications Nos. 11765 - 11767/85), Chief Legal Adviser
Mr. Lars-Åke LINDBERG (assisting Mr. Bo Nilsson), Legal Adviser
Mr. Bertil GRENNBERG (Application No. 11830/85), Patent Attorney
Mr. Jan AXELSSON (Application No. 12091/86), Lawyer

THE LAW

1. The applicant complains that the new legislation which was introduced on 1 May 1985 and gave everybody a right to licence-free fishing with hand-held tackle in the applicant's fishing waters involved a violation of Article 1 of Protocol No. 1 (P1-1) to the Convention.

Article 1 of Protocol No. 1 (P1-1) 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."

The applicant also alleges a violation of Article 14 (Art. 14) of the Convention which prohibits discrimination in the enjoyment of the rights and freedoms guaranteed by the Convention.

The Government submit that the application should be rejected for failure to exhaust domestic remedies or, alternatively, as being manifestly ill-founded.

2. As to the condition of exhaustion of domestic remedies in Article 26 (Art. 26) of the Convention, the Government submit that the applicant has failed to apply to the National Board of Fisheries for compensation under the Compensation Act. If such an application were unsuccessful the applicant could bring an action against the State before the Real Estate Court. In such proceedings he could argue that the 1985 legislation is contrary to Chapter 2 Section 18 of the

Instrument of Government and, if such an argument were accepted, the Court could refuse to apply the legislation in application of Chapter 11 Section 14 of the Instrument of Government.

The applicant replies that, under the Compensation Act, the right to compensation is so restricted that it does not cover the applicant's claim. He submits that since he has had to compensate the fall of catches by investing in equipments and working more hours, there is no direct loss of income and consequently no right to compensation under the Compensation Act. Furthermore, the courts can only refuse to apply the legislation if it is proven that the law is "manifestly" contrary to the Instrument of Government, which cannot be proved since the Act has been examined by the Law Council and not been declared unconstitutional.

Article 26 (Art. 26) of the Convention provides that the Commission may only deal with a matter "after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken". It is established case-law that "the final decision" refers only to domestic remedies which can be considered to be "effective and sufficient" for the purpose of rectifying the subject-matter of the complaint (see, inter alia, No. 9599/81, Dec. 11.3.85, D.R. 42 p. 33). Where there is doubt as to the effectiveness of a given remedy, it must nevertheless be tried before an applicant can be said to have fulfilled the condition of exhaustion of domestic remedies. In a recent case against Sweden (No. 12810/87, Dec. 18.1.89, not yet published) the Commission found that a compensation claim based on Chapter 2 Section 18 of the Instrument of Government was not an "effective remedy" in the circumstances of that case.

The Commission considers it clear that some of the applicant's claims are such that he could not secure compensation for them under the Compensation Act. The same is however not true for the claims relating to the reduction of catches in fish and the claim that the applicant has been obliged to give up certain fishing. In these respects, the Commission notes that the Compensation Act entitles the applicant to compensation for loss of income resulting from the public's fishing with hand-held tackle under the new law. It further notes that there is no case-law supporting the argument that such claims cannot be considered as "loss of income" within the meaning of the Compensation Act. Moreover, it is still open to the applicant to introduce an action for compensation on that basis. The Commission cannot ascertain, in the preparatory works, any conclusive evidence that compensation for such claims is excluded.

The Commission therefore finds that the applicant has not satisfied the condition of exhaustion of domestic remedies in this respect. Although some of the applicant's claims cannot give rise to compensation under the Compensation Act it is not possible, in the Commission's view, to sever these claims from the other claims when examining the case under Article 1 of Protocol No. 1 (P1-1). This is so since the question of compensation is an element in the examination of the justification of any interference with the rights under Article 1 of Protocol No. 1 (P1-1).

Consequently, this part of the application is inadmissible under Article 27 para. 3 (27-3 + 26) in conjunction with Article 26 of the Convention.

3. The applicant further alleges a violation of Article 6 para. 1, (Art. 6-1) first sentence of the Convention which provides:

> "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 applicant complains that the 1985 Act, without further implementing measures, interfered with his private property right and hence his "civil rights" and that no court can determine whether he should keep his fishing rights around the island for himself.

The Government argue that Article 6 para. 1 (Art. 6-1) does not grant a right of access to court in order to challenge a law. The Commission recalls that in the James and Others judgment (Eur. Court H.R., judgment of 21 February 1986, Series A no. 98, p. 46, para. 81), the Court stated:

> "Confirmation of this analysis is to be found in the fact that Article 6 para. 1 (Art. 6-1) does not require that there be a national court with competence to invalidate or override national law.
>
> In the present case, the immediate consequence of the British legislation in issue is that the landlord cannot challenge the tenant's entitlement to acquire the property compulsorily in so far as the acquisition is in conformity with the legislation."

The Commission considers that the "right" to exclusive fishing with hand-held tackle, which the applicant had prior to the law, was taken away from him by the new law adopted by Parliament without any further implementing measures. A Swedish court could only examine a claim of a breach of the Constitution if it had competence to invalidate or set aside a law adopted by Parliament. However, it follows from what has been said above that Article 6 para.1 (Art. 6-1) does not guarantee access to court for such a claim.

The Commission further considers that, insofar as the applicant can be said to claim loss of income as a result of the fishing reform, he has access to court.

Accordingly, the application is, in this respect, manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant also alleges a violation of Article 13 (Art. 13) of the Convention 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."

Article 13 (Art. 13) does not guarantee a remedy whereby a Contracting State's laws as such can be challenged before a national authority on the ground of being contrary to the Convention or to corresponding domestic legal norms (James and Others judgment, loc. cit., p. 47, para. 85).

The applicant's allegations of violations of the rights of the Convention are directed at the effects of the Fishing Rights Act and the Compensation Act.

It follows from what has been said above that Article 13 (Art. 13) does not entitle the applicant to any remedy for such allegations.

Accordingly, there is no appearance of a violation of Article 13 (Art. 13) of the Convention.

It follows that the application is also in this respect

manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the Commission — President of the Commission

(H. C. KRUGER) — (C. A. NØRGAARD)