AS TO THE ADMISSIBILITY OF

Application No. 23773/94
by Knut BACK
against Finland

The European Commission of Human Rights sitting in private on 9 April 1996, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
P. LORENZEN
K. HERNDL

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 14 February 1994 by Knut BACK against Finland and registered on 29 March 1994 under file No. 23773/94;

Having regard to the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the respondent Government on 22 December 1995, the observations in reply submitted by the applicant on 21 February 1995, the Government's additional observations of 29 June 1995 and the applicant's additional observations of 18 September 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Finnish citizen, born in 1929 and resident on the island of Bergö. He is retired.

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

summarised as follows.

Particular circumstances of the case

In the 1980s the applicant owned a leisure house located on an island off Bergö on a real property belonging to others. Having been asked to remove the house, he lodged, in 1990, a request with the Building Board (rakennuslautakunta, byggnadsnämnden) of Malax (Maalahti) for permission to move it to his property Gigbådan 10:155 situated on another island off Bergö.

On 6 June 1990 the Ministry for the Environment (ympäristöministeriö, miljöministeriet; hereinafter "the Ministry") published a draft programme for the conservation of shore areas of international or national value (rantojensuojeluohjelma, strandskyddsprogram). 4.692 property owners made remarks on the draft.

In a decision of principle the Council of State on 20 December 1990 adopted a conservation programme including 138 shore areas. Measures for the conservation of an area in accordance with the 1923 Nature Conservation Act (luonnonsuojelulaki 71/23, lag 71/23 om naturskydd; hereinafter "the 1923 Act") were to be taken, inter alia, on the property owner's initiative, if a request for a permit for construction within a conservable area had been lodged or if other measures damaging the conservable values would be taken. If a shore area forming part of a private property was completely or almost completely included in the shore conservation programme, the owner was nevertheless to be allowed to construct leisure houses within the conservable area on condition that the location and use of the building would take nature conservation considerations into account.

In an opinion to the Building Board of 6 February 1991 the Environmental Office of the County Administrative Board (lääninhallitus, länsstyrelsen) of Vaasa objected to a building permit being granted to the applicant. The Board referred to the inclusion of Gigbådan 10:155 in the shore conservation programme and stated that it would, if necessary, take measures in order to prevent the implementation of a possible building permit.

On 20 February 1991 the Building Board rejected the applicant's request. On his appeal to the County Administrative Court (lääninoikeus, länsrätten) of Vaasa the Building Board's decision was quashed on 2 July 1991 and the matter referred back to the Board for new examination. The Court found that the applicant's request could not be rejected on the ground that the building site had been included in the shore conservation programme and on the basis of the negative opinion of the County Administrative Board.

On 21 August 1991 the Building Board granted the applicant a building permit for the purpose of moving his leisure house to Gigbådan 10:155.

On 11 September 1991 the County Administrative Board issued an activity prohibition concerning the property pursuant to section 18 of the 1923 Act. The prohibition was issued in order to ensure the aim of a possible expropriation. It concerned construction on, and use of, the property "in a manner jeopardising its conservable value". The prohibition was limited to one year. The Board noted that the area at issue had been included in the shore conservation programme. Given that no voluntary conservation or sale of the property had been achieved, the Board had proposed to the Ministry that it should be expropriated.

On 18 November 1992 the Supreme Administrative Court (korkein hallinto-oikeus, högsta förvaltningsdomstolen) rejected the applicant's appeal as far as it concerned the lawfulness of the activity prohibition imposed on 11 September 1991. In that respect the Court found no reason to change the decision of the County Administrative

Board. As far as the outcome of the appeal was mainly dependent on an assessment of the expediency of the prohibition, it was not referred to the Government (the Ministry), since the prohibition at issue was no longer in force.

On 4 December 1992 the County Administrative Board in pursuance of section 8 of the 1977 Act invited the applicant to comment on the possible expropriation of Gigbådan 10:155. The applicant objected to an expropriation.

On 12 January 1993 the County Administrative Board issued a further activity prohibition valid for one year, basing itself on section 18 of the 1923 Act and maintaining the reasons invoked in its decision of 11 September 1991. The prohibition was considered as a "prolongation" of the first prohibition issued on that date.

The applicant again appealed on 27 January 1993 to the Supreme Administrative Court, arguing that the second activity prohibition had been issued solely because the authorities had not been able to conclude the expropriation procedure before the first prohibition had expired. The issuing of a second prohibition for reasons identical to those invoked in support of the first one was unfair and contrary to the prevailing practice. The applicant also referred to the Council of State's decision of principle of 20 December 1990 which had afforded a limited right of construction to a particular group of property owners to which he belonged.

By a letter of 4 May 1993, i.e. after the expiry of the time-limit for the applicant's appeal against the activity prohibition, the County Administrative Board proposed to the Ministry that the Council of State should issue a permit for the expropriation of Gigbådan 10:155. Reference was made to the particular features of the forest and bird life on the property.

On 31 August 1993 the Supreme Administrative Court rejected the applicant's appeal as far as it concerned the lawfulness of the activity prohibition. As far as the appeal mainly concerned the expediency of the prohibition it was referred to the Government (the Ministry).

On 8 September 1993 the Ministry, deciding on behalf of the Government, rejected the remainder of the applicant's appeal. The Ministry considered that the relevant part of the applicant's property contained such "significant conservable values" that an activity prohibition was justified so as to prepare and carry out the conservation thereof. The conservable values were not substantiated.

In its opinion submitted on 27 October 1993 to the Parliamentary Ombudsman (eduskunnan oikeusasiamies, riksdagens justitieombudsman) in reply to a petition lodged, inter alia, by the applicant the Ministry stated, inter alia, that his property was to be considered as a conservable area described in section 1, subsection 2 of the 1923 Act. The Ministry referred to the inclusion of the property in the shore conservation programme which had indicated areas "of national importance for nature conservation". Reference was further made to a decision rendered by the Supreme Administrative Court on 22 June 1992 in which it had held that the decision by the Council of State to adopt the shore conservation programme had been lawful (see para. 4 of "Relevant domestic law and practice"). In addition, the 1923 Act contained no provisions prescribing how the need for an activity prohibition should be investigated. On the basis of the shore conservation programme and the decision of the Supreme Administrative Court of 22 June 1992 the Ministry therefore considered that the investigation of the possible existence of a conservable value of the applicant's property had been sufficient.

In his decision of 5 August 1994 the Ombudsman found, inter alia,

that the County Administrative Board's activities in regard to the applicant's property had been based solely on the Council of State's decision of principle and not on the underlying facts and legal norms upon which the measures taken by the Board should have been based. In particular, its decision to issue the activity prohibition on the applicant's property should have stated the conservable values justifying the prohibition. The Board was therefore admonished by the Ombudsman.

Following the expiry of the second activity prohibition the applicant was able to make use of his building permit.

On the applicant's request the County Administrative Board, on 22 February 1994, ordered that another part of his property should be conserved. On 27 May 1994 the Ministry compensated him for the interference with his property rights caused by that conservation measure. A further conservation request by the applicant still appears to be pending.

On 4 July 1994 the applicant requested the Environmental Centre of Western Finland (Länsi-Suomen ympäristökeskus, Västra Finlands miljöcentral; formerly the Environmental Office) to grant him compensation for the interference with his property rights caused by the activity prohibitions. In these proceedings the Ministry referred to a decision of the Supreme Administrative Court of 21 April 1995 (no. 5301/4/94; no. 1761 in its collection) in which a similar request had been rejected.

On 26 June 1995 the Environmental Centre rejected the applicant's request, considering, inter alia, that neither of the activity prohibitions had prevented him from using his leisure house which meanwhile had remained on his other property. The applicant did not appeal to the Supreme Administrative Court against this decision.

Relevant domestic law and practice

1. The establishment of conservation areas on private properties and related restrictions

Under the 1919 Constitution Act (Suomen Hallitusmuoto 94/19, Regeringsform för Finland 94/19), as in force at the relevant time, the right of Finnish citizens to their possessions was to be secured by law (section 6, subsection 1). As of 1 August 1995, everyone's property rights are guaranteed by section 12 of the Constitution Act (as amended by Act no. 969/95).

At the owner's request the County Administrative Board may establish a conservation area on a property of significant importance from the point of view of nature conservation (sections 1 and 9 of the 1923 Act). Such areas may be established in order to protect a place of great natural beauty or with otherwise remarkable nature or in order to protect a particular animal or plant species (section 1, subsection 2). To this end the State may expropriate real property (section 18, subsection 1). The County Administrative Board may, provisionally and for a maximum period of two years, prohibit an area from being used in a manner which could jeopardise the aim of such an expropriation. The prohibition is immediately enforceable irrespective of appeal proceedings, unless the appeal body decides otherwise. If no expropriation takes place, compensation shall be granted by the Board for any damage or inconvenience caused by the prohibition (section 18, subsection 2).

2. The reasoning required in administrative decisions

According to the 1982 Act on Administrative Procedure (hallinto-menettelylaki 598/82, lag om förvaltningsförfarande 598/82), an authority shall see to it that a matter is being investigated before

a decision is made. While a party to the proceedings shall present the grounds for his or her claim, it is up to the authority to obtain any other information (section 17).

The reasoning of an administrative decision shall contain the main facts and the legal provisions or other rules upon which it is based (section 24, subsection 1). The decision need not be reasoned if, inter alia, this would be clearly unnecessary or if the reasoning cannot be produced without the notification of the decision being significantly delayed (subsection 2).

Pursuant to section 24, subsection 1 the Supreme Administrative Court, in 1987, quashed a County Administrative Board's decision and referred the matter back for new examination. The Board had refused to grant a licence for an ambulating sales activity, considering that a granting of the request would not have been appropriate. The Court considered itself unable to review the matter judicially, since the Board's decision had not included the principal facts upon which the refusal had been based (decision of 17 February 1987; published as no. 73 in the Court's annual A, at p. 186).

3. Rules governing the formulation of appeals

According to the 1950 Act on the Right of Appeal in Administrative Matters (laki 154/50 muutoksenhausta hallintoasioissa, lag 154/50 om ändringssökande i förvaltningsärenden), the petition of appeal shall include, inter alia, the grounds for the appeal, unless they are apparent from the appellant's previous submissions (section 9 a).

4. Practice regarding the lawfulness of the shore conservation programme

In a decision of 22 June 1992 (published as no. 1 in the Court's annual A) the Supreme Administrative Court found, inter alia, that the Council of State had been competent to adopt the conservation programme, having regard to, inter alia, the general competence afforded to it by the Constitution Act. The Court furthermore had regard to the aim of the programme, i.e. to protect nationally valuable areas by resorting, in order to further the aims of the conservation, to measures provided for by current legislation which in an individual case would be at the authorities' disposal even in the absence of a programme. The Court therefore considered that the programme had not imposed such unreasonable limitations on the property owners and holders of a right of usufruct as to render the decision of principle unlawful in general terms.

The Court nevertheless considered that the decision of principle could be unreasonable or otherwise unlawful with regard to an owner of an individual area or a holder of a right of usufruct to such an area, if it contained, for instance, shore areas which due to their character did not fulfil the conditions for a conservable area or which were too large, in particular having regard to the aim of the programme, namely the conservation of nature on the shore. Although the decision-making concerning such questions would only take place during the implementation of the programme, it was not justified to retain a clearly non-conservable area in the programme with its de facto restrictions on the use of the area.

The Court finally examined the lawfulness of the decision of principle in regard to a property belonging to certain appellants, who had argued that it presented no conservable values within the meaning of section 1, subsection 2 of the 1923 Act. The Court carried out a detailed examination of the conservable values on the property, noting its particular geographical features, vegetation and bird life. It found that sufficient reasons had been shown for reserving the property as a conservable area. Accordingly, the Council of State's decision did

not violate the applicants' rights and their appeal was rejected.

On 20 October 1992 the Ombudsman rendered his decision in response to a petition relating to the adoption of the shore conservation programme. He considered, inter alia, that it could be questioned whether in the light of Article 1 of Protocol No. 1 to the Convention it was sufficient that decisions of principle for the adoption of nature conservation programmes were made on the basis of the general competence of the Council of State. He nevertheless concluded that its decision to adopt the shore conservation programme could not be considered as clearly violating section 6 of the Constitution Act or Article 1 of Protocol No. 1 to the Convention. Considering, however, the de facto effects of the decision of principle, the shore conservation programme should, for good reasons, have been prescribed by law.

COMPLAINTS

1. The applicant complains that neither the decision of the Council of State with preparatory documents nor the activity prohibition of 1993 contained any information as to the conservable values on his property Gigbådan 10:155. He was therefore unable to challenge the material basis for that prohibition which interfered with his already acquired right to move his leisure house to that property. He invokes Article 6 para. 1 of the Convention.

2. The applicant further complains that the activity prohibition issued in 1993 was unlawful, as it was merely based on the fact that his property had been included in the shore conservation programme. This programme only amounted to a declaration by the Council of State of its intention to have certain areas conserved. It could not in itself justify the activity prohibition, since it had not specified any conservation values on his property. Nor were any such values referred to in the Ministry's decision upholding the prohibition. In any case, the shore conservation programme had already afforded the applicant a limited right of construction and he had already been granted a building permit in accordance therewith. He invokes Article 1 of Protocol No. 1 to the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 14 February 1994 and registered on 29 March 1994.

On 10 October 1994 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 22 December 1995. The applicant replied on 21 February 1995. Additional observations were submitted by the Government on 29 June 1995 and by the applicant on 18 September 1995.

THE LAW

The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that neither the decision of the Council of State nor the activity prohibition of 1993 contained any information as to the conservable values on his property. He was therefore unable to challenge the material basis for that prohibition which interfered with his already acquired right to move his leisure house to that property. Under Article 1 of Protocol No. 1 (P1-1) he further complains that the prohibition was unlawful, as it was merely based on the fact that his property had been included in the shore conservation programme. This programme could not in itself justify the prohibition, since it had not specified any conservation values on his property. Nor were any such values referred to in the Ministry's decision upholding the

prohibition. In any case, the shore conservation programme had already afforded the applicant a limited right of construction and he had already been granted a building permit in accordance therewith.

Article 6 para. 1 (Art. 6-1) of the Convention reads, in so far as it is relevant, as follows:

> "In the determination of his civil rights ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ..."

Article 1 of Protocol No. 1 (Art. P1-1) to the Convention 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 Government question whether the applicant can claim to be a "victim" within the meaning of Article 25 (Art. 25) of the Convention, considering that he has agreed to conservation of part of his property, for which he has also received compensation. Moreover, he could eventually avail himself of his building permit and was able to seek compensation for any damage caused by the activity prohibition.

The Government furthermore submit that domestic remedies have not been exhausted, since the applicant did not, in his appeal to the Supreme Administrative Court, at least in substance refer to the allegedly deficient reasoning in the County Administrative Board's decision to issue the activity prohibition. Had he done so, the Supreme Administrative Court might have referred his case back to the County Administrative Board for reconsideration.

In the alternative, the Government submit that the application is manifestly ill-founded. Although the reasons advanced for the activity prohibition were admittedly not very extensive, the Supreme Administrative Court's decision was not arbitrary and thus not in violation of the applicant's right to a fair hearing under Article 6 para. 1 (Art. 6-1) of the Convention. In so far as the application concerns Article 1 of Protocol No. 1 (P1-1), the Government concede that the activity prohibition interfered with the applicant's right to the peaceful enjoyment of his possessions. This interference was nevertheless justified, since it was clearly based on section 18 of the 1923 Act and served the legitimate aim of facilitating the conservation of the relevant shore area. As to the proportionality of the interference, the Government underline that the prohibition at issue was in force only during one year and did not prevent the applicant from using his property in other ways. In addition, he must reasonably have expected not to be able to make use of his building permit immediately. Nor will he suffer any financial losses because of the prohibition, regard being had to the compensation procedure stipulated in section 18, subsection 2 of the 1923 Act. The proceedings relating to the activity prohibition also afforded him a reasonable opportunity of putting his case to the responsible authorities. Finally, he was not left in complete uncertainty as to the final fate of his property. Recalling the Contracting States' wide margin of appreciation in this field, the Government conclude that a fair balance was struck between the applicant's rights and the general interest.

The applicant maintains that he can still claim status as a "victim" as regards the activity prohibition and the related procedure. He further contends that he has exhausted domestic remedies in this respect. His appeal of 27 January 1993 referred to the Council of State's decision of principle of 20 December 1990 which afforded certain property owners a limited right of construction. Both the question whether the activity prohibition was consistent with the Council of State's decision and the expediency assessment of the prohibition were referred for examination by the Government. The question whether there were conservable values on his property was thus expressly addressed in the Ministry's decision of 8 September 1993.

As regards particularly the interference with his property rights, the applicant contends that it had no basis in domestic law. Instead it was exclusively based on an interpretation of the shore conservation programme to the effect that the Council of State's decision of principle already in itself contained sufficient substantiation of the conservable values on his property. This interpretation was incorrect, since under domestic law a decision of principle could not have such far-reaching effects.

The applicant furthermore submits that nothing in the draft shore conservation programme indicated that the adopted programme would constitute final proof of the existence of conservable values within the meaning of the Nature Conservation Act on individual properties located within the area to be conserved. The draft programme was so disputed that it would never have been approved, had it not been modified by a political agreement so as to guarantee a limited building right to certain groups of property owners such as himself. This building right was an administrative directive which implementing authorities had to respect.

The applicant also refers to the decision of the Supreme Administrative Court of 22 June 1992 according to which the question whether conservable values existed on individual properties included in the shore conservation programme was to be finally examined during the implementation thereof. When considering the activity prohibition, both the County Administrative Board and the Ministry were not only bound by the Nature Conservation Act. Under sections 17 and 24 of the Act on Administrative Procedure they were also under a duty properly to investigate the matter. However, they did not at all examine whether the applicant was among those entitled to a limited building right nor whether - and, if so, which - conservable values existed on his property. Instead it was implicitly accepted that the Council of State's decision of principle constituted final proof of the existence of such values. The absence of a proper investigation effectively circumvented the applicant's limited building right.

The Commission finds it appropriate to examine the applicant's complaints taken together. It observes that the voluntary conservation measures and the related compensation paid to the applicant concerned a part of his property other than that affected by the activity prohibition challenged in the present case. As regards this prohibition, the Commission notes that the applicant has eventually been able to avail himself of his building permit. However, this was only after the expiry of the prohibition. The Commission therefore considers that, as regards this prohibition and the related procedure, the applicant can still claim to be a "victim" of a violation of the provisions invoked by him.

The Commission nevertheless recalls that under Article 26 (Art. 26) of the Convention it may only deal with an application after all domestic remedies have been exhausted, according to the generally recognised rules of international law. An applicant must make normal use of remedies likely to be effective and adequate in respect of the matters of which he complains (cf., e.g., Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no. 51, p. 30, para. 66). The burden

of proving the existence of available and sufficient remedies lies upon the State (Eur. Court H.R., Deweer judgment of 27 February 1980, Series A no. 35, p. 15, para. 26).

The object of the present application is essentially the allegedly deficient reasoning in support of the County Administrative Board's decision to issue a second activity prohibition. The Commission cannot find that the applicant at least in substance raised this issue in his appeal to the Supreme Administrative Court. It is true that the Court was competent to examine proprio motu the facts underlying the activity prohibition and, if necessary, refer the matter back to the County Administrative Board. It is also true that the Convention has been incorporated into Finnish law and was directly applicable in the appeal proceedings.

The Commission must, however, also bear in mind the state of domestic law and practice when the second activity prohibition was issued in regard to the applicant's property. When reviewing the lawfulness of the inclusion of certain other property owners' property in the shore conservation programme the Supreme Administrative Court had, in a precedent of 1992, reviewed the existence of possible conservable values within the meaning of the Nature Conservation Act. It had requested the Ministry for the Environment to clarify the existence of conservable values on the property and the appellants had been able to challenge the Ministry's reference to such particular values (see "Relevant domestic law and practice", para. 4). Moreover, in a precedent of 1987 the Supreme Administrative Court had referred a matter back for new examination, considering itself unable to perform a judicial review, since the appealed decision had not included the principal facts upon which it had been based (see "Relevant domestic law and practice", para. 2). Finally, pursuant to section 9a of the Act on the Right of Appeal in Administrative Matters the applicant was under an obligation to state the grounds for his appeal to the Supreme Administrative Court.

The Commission therefore considers that the applicant was not, for the reasons referred to by him, absolved from the requirement to challenge the allegedly deficient reasons for the activity prohibition at least in substance in the proceedings before the Supreme Administrative Court (cf., e.g., Cardot judgment of 19 March 1991, Series A no. 200, pp. 18-19, paras. 34-36; No. 11244/87, Dec. 2.3.87, D.R. 55 pp. 98; No. 11921/86, Dec. 12.10.88, D.R. 57 p. 81).

The Commission furthermore observes that the applicant did not appeal to the Supreme Administrative Court against the refusal to grant him compensation for the damage allegedly caused by the activity prohibition. It is true that the same court's decision of 21 April 1995 in regard to a compensation request by another property owner might have left the applicant with the impression that an appeal in his own case would have lacked any prospects of success. The Commission recalls, however, that where doubts exist as to the effectiveness of a domestic remedy that remedy must be tried (e.g., No. 13669/88, Dec. 7.3.90, D.R. 65 p. 245).

Having regard to the above-mentioned particular elements, the Commission cannot but conclude hat the applicant did not exhaust the remedies available to him under Finnish law. Moreover, an examination of the application does not disclose the existence of any special circumstance which might have absolved him, according to the generally recognised rules of international law, from exhausting those remedies.

It follows that the application must be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission | President of the Commission

(H.C. KRÜGER) | (S. TRECHSEL)