AS TO THE ADMISSIBILITY OF

Application No. 18660/91
by Roland BENGTSSON
against Sweden

The European Commission of Human Rights sitting in private on 7 December 1994, the following members being present:

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

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 18 December 1990 by Roland BENGTSSON against Sweden and registered on 13 August 1991 under file No. 18660/91;

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

Having regard to the observations submitted by the respondent Government on 15 December 1993 and 18 March 1994 and the observations in reply submitted by the applicant on 13 February and 29 June 1994;

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 1933. He is a farmer and resides at Älmhult, Sweden. Before the Commission he is represented by Mr. Göran Ravnsborg, resident at Lund, Sweden.

A. The particular circumstances of the case

The applicant and his daughter own certain real estate (stadsäga) at Älmhult which is used for farming and forestry as well as for gravel exploitation.

On 12 January 1988 the Municipality of Älmhult applied to the Government in accordance with Chapter 2, sections 1 and 2 of the Expropriation Act (expropriationslagen 1972:719) for leave to expropriate substantial parts of the applicant's and his daughter's real estate for industrial purposes and for the construction of a container terminal to be used by Swedish Rail (Statens Järnvägar). The application was the result of an investigation of four different locations for the project and was accompanied by an explanation as to why the area belonging to the applicant was best suited for the purpose.

Having obtained the views of the parties involved, including the applicant and the Kronoberg County Council (länsstyrelsen), the Government (Bostadsdepartementet) decided on 11 January 1990 to grant the Municipality of Älmhult permission to expropriate the area in question. In its decision the Government stated inter alia:

(translation)

> "The Municipality has shown in their application for leave to expropriate that an area is needed for a container terminal and that the area in question for various reasons is far better suited for this than other proposed alternatives. The Government agree with the Municipality and the County Council that an area must also be reserved for the extension of the terminal and for transport intensive business in connection with the container terminal area. ... The Government conclude that the Municipality has shown that alternative areas for placement are missing and that the entire area requested in the application is necessary for urban development and for what follows therefrom.
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> According to Chapter 2, section 12, subsection 1, of the Expropriation Act leave to expropriate shall not be granted if, inter alia, the inconveniences following the expropriation, from a general and individual point of view, outweigh the advantages which would follow from it. It follows from the submissions obtained by the County Council from the Agricultural Board and the Forestry Board that (the applicant) has a strong personal interest in securing that the agricultural property unit is not forced to cede bigger areas of land. ... The Government find, however, that the (alternative) proposals submitted by the County Council render the future planning of the area difficult and lead to both a poor utilisation of the necessary exploitation installations and an unsuitable division of the land. When striking a balance between the different interests the Government find, therefore, that Chapter 2, section 12, of the Expropriation Act does not prevent the granting of leave to expropriate in accordance with the Municipality's request ... .
>
> The Government note that the Municipality has submitted that the agricultural land may be used for agricultural purposes until the area is required for industrial purposes."

The Government furthermore decided that the expropriation permit would expire if proceedings to this effect had not been instituted in

the ordinary courts of law before 11 January 1991.

In accordance with the provisions of the 1988 Act on Judicial Review of Certain Administrative Decisions (Lag 1988:205 om rättsprövning av vissa förvaltningsbeslut) the applicant challenged the Government's above decision before the Supreme Administrative Court (Regeringsrätten). He requested the Court to quash the Government's decision maintaining that it lacked objectivity and was based on an incorrect evaluation of the facts and the evidence submitted.

The Supreme Administrative Court rendered its decision on 27 June 1990. It found that the Government had not evaluated the facts and the evidence incorrectly and had not exceeded the margin of appreciation which the Expropriation Act left to them. The Court found that the decision did not violate any provision of the Expropriation Act or any other legal rule. Accordingly the Government's decision was upheld.

Pursuant to the expropriation permit issued by the Government on 11 January 1990 the Municipality instituted proceedings in the Real Estate Court (Fastighetsdomstolen) in order to expropriate the property in question. In a partial judgment of 15 January 1991 the Court decided that parts of the land would be transferred to the Municipality with the same rights as if the expropriation had been completed. This judgment was upheld by the Göta Court of Appeal (Göta hovrätt) on 11 September 1991. As an advance payment of the compensation therefor the applicant received 300,000 SEK. As regards the remainder of the applicant's land the Real Estate Court pronounced judgment on 17 December 1993 according to which the applicant was ordered to surrender his property and the Municipality was ordered to pay to the applicant an additional 3,286,650 SEK plus interest. Furthermore, the Municipality was ordered to pay the applicant's legal costs.

The judgment has been appealed against and the case is at present pending in the Göta Court of Appeal (hovrätten).

B. Relevant domestic law

a. The 1972 Expropriation Act

As regards expropriation the law applicable in the present case is primarily the 1972 Expropriation Act (Expropriationslag (1972:719), hereinafter "the 1972 Act").

As a rule it is for the Government to decide whether expropriation should be authorised. The decision takes the form of an expropriation permit and is based on the various conditions laid down in the Act. The permit does not automatically lead to an expropriation but it entitles a given public authority to effect the expropriation if necessary. The effect in law of the issuing of an expropriation permit is to confer on its holder a title to acquire the designated property.

According to Chapter 1, section 1, of the 1972 Act, land belonging to anyone but the Government may be acquired by expropriation with title, usufruct (nyttjanderätt) or easement (servitut). An expropriation permit is subject to a time-limit for service of a summons to appear in court for the purpose of judicial proceedings. Within this time-limit the authority must initiate judicial proceedings failing which the permit will lapse, Chapter 3, section 6 of the 1972 Act.

The expropriation is not completed until compensation has been fixed and paid. The compensation shall correspond to the market value of the expropriated land plus the further damage the owner has suffered (cf. Chapter 4, section 1, of the 1972 Act). The Real Estate Court has jurisdiction in respect of the compensation to be paid and appeals

against its decision may be lodged with the Court of Appeal and, in the final resort, with the Supreme Court (Högsta domstolen).

In Chapter 2 of the 1972 Act the grounds justifying the issuing of an expropriation permit are enumerated. The relevant provisions in this context are sections 1 and 2. According to Chapter 2, section 1, expropriation is allowed in order to enable the Municipality to acquire rights over land which is needed according to future public requirements, for urban development and what follows therefrom. Within areas of urban development (tätbebyggelse) expropriation is allowed only if there are reasons to assume that, within a foreseeable time, the area will be subject to building or other construction activities which are deemed important in the general interest, or if there is an urgent necessity for the Municipality to acquire rights over the land for the furthering of planned building or for any other similar reason.

According to Chapter 2, section 2, of the 1972 Act, expropriation is also permitted to make way for installations to supply the public need for transportation or other communications. The provision is meant to be used to provide land for all kinds of public need for communication and transportation. The travaux préparatoires indicate that the concept of "installation" (anläggning) should be given an extensive interpretation and include also installations which are not obviously necessary for transportation but are necessary for an appropriate use of the ground.

As regards the question of what investigation or evidence of the need for expropriation the expropriating party has to present before the Government Chapter 3, section 2, of the 1972 Act stipulates that the application for an expropriation permit should be in writing and state - inter alia - the claim and the circumstances on which it is founded and in addition the investigation that might be needed in every single case. Section 2 of the Expropriation Ordinance (Expropriations-kungörelse (1972:727)) furthermore provides that an application for an expropriation permit should include a description of the enterprise which in every single case should be complete so as to allow for an assessment of the necessity of the expropriation. According to Chapter 2, section 12, subsection 1, of the 1972 Act an expropriation permit must not be granted if the purpose of the expropriation can be attained by other appropriate means, or if the disadvantages following from the expropriation would outweigh its advantages from general and individual points of view.

b. The 1988 Act on Judicial Review of Certain Administrative Decisions

Since 1988 the Supreme Administrative Court examines cases under the 1988 Act on Judicial Review of Certain Administrative Decisions. In performing this task the Supreme Administrative Court is the only and final court. This Act was designed for the purpose of securing that Sweden fulfil its obligations under Article 6 of the Convention after the European Court of Human Rights in a number of cases had reached the conclusion that a court control of administrative decisions was required to a further extent than provided for under Swedish law and foreseen by the Swedish legislator.

According to the 1988 Act, the Supreme Administrative Court shall examine certain decisions which the Government or other administrative authorities have taken in administrative cases. The Act applies to decisions which affect the personal status of private citizens or their mutual personal and economic relations (cf. Chapter 8, section 2, of the Instrument of Government), as well as decisions which affect the relations between private citizens and the public administration and relate to obligations incumbent upon private citizens or otherwise interfere with the personal or economic affairs of private citizens (cf. Chapter 8, section 3, of the Instrument of Government), provided that the decision in question cannot be examined by a court of law in

some other way.

The basic provision of the 1988 Act, section 1 has the following wording:

(translation)

> "At the request of a private party in such administrative proceedings before the Government or an administrative authority as pertain to any situation envisaged by Chapter 8, sections 2 and 3, of the Instrument of Government, the Supreme Administrative Court is to review the issue whether the decision in the case is contrary to any legal rule referred to by the requesting party or which is in any way apparent from the circumstances.
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> Judicial review may pertain only to such decisions as
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> - imply exercise of public authority regarding a private subject,
>
> - may otherwise be reviewed by a court only following a request for relief for substantive defects and
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> - which could not otherwise be subject to review."

The Supreme Administrative Court's examination concentrates in principle on the question whether the challenged decision is contrary to any legal rule. According to the travaux préparatoires to the 1988 Act the examination should concentrate on the lawfulness of the challenged decisions but the Court also has the power to re-examine the facts upon which the application of the law has been based. Furthermore, the Supreme Administrative Court should examine whether the challenged decision is compatible with the constitutional principles set out in Chapter 1, section 9, of the Instrument of Government: objectivity, impartiality and the principle of equality before the law. In addition it should examine whether errors in the procedure have occurred which might have affected the outcome of the case. If the authority responsible for the challenged decision has had the discretion under the relevant law to make a choice between a number of different options, all of which must be considered lawful, the Supreme Administrative Court's examination should be restricted to the question whether the challenged decision falls within the discretion thus afforded to the authority concerned under the law in question.

When examining the Government Bill proposing this new remedy for adoption by the Parliament, the Council of Legislation (lagrådet) stated that it was to be noted that the examination of the lawfulness of an administrative decision in some cases must include an assessment of whether the prescribed balance of interests had been appropriately observed.

If the Supreme Administrative Court finds that an administrative decision is contrary to a certain legal provision, it shall quash the decision. If the quashed decision ought to be replaced by another decision, the Supreme Administrative Court shall refer the case back to the administrative authority which has taken the challenged decision. In a case where the Court finds the decision lawful, the decision will stand as valid.

An examination under the 1988 Act does not prevent the enforcement of the challenged decision, unless the Supreme Administrative Court decides otherwise.

No leave to appeal procedure applies under the 1988 Act.

The 1988 Act also contains certain provisions as to who may

request judicial review under the Act and as to the time-limit within which such a request shall be made. It also regulates how the Supreme Administrative Court shall be composed when applying the 1988 Act. In other respects, the procedure in cases examined under the 1988 Act is governed by the Administrative Procedure Act (Förvaltningsprocesslagen (1971:291)).

By virtue of a new Act (1991:1825) containing certain amendments to the 1988 Act, the latter shall remain in force until the end of 1994.

c. The Administrative Procedure Act of 1971

The proceedings before the administrative courts in Sweden are governed by the Administrative Procedure Act unless the material law applied by the court contains some rules of procedure. The administrative courts have a duty to carry out investigations ex officio to a further extent than the ordinary courts. It is the responsibility of the administrative court to ensure that each case is investigated to the extent required according to the nature of the case. The procedure before the Supreme Administrative Court is in principle a written procedure, but the Court may decide to hold oral hearings on specific matters if this is likely to assist it in its examination of a case or to expedite the proceedings (cf. section 9 of the Administrative Procedure Act).

COMPLAINTS

The applicant alleges a violation of Article 6 para. 1 of the Convention maintaining that the judicial review by the Supreme Administrative Court pursuant to the 1988 Act makes it impossible to accept this as a domestic remedy. He furthermore alleges that the review is limited to the extent that it does not fulfil the requirements of Article 6 para. 1. The applicant also complains that he has no right to an oral hearing in the proceedings before the Supreme Administrative Court.

The applicant finally complains that the expropriation of his property is contrary to Article 1 of Protocol No. 1 to the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 18 December 1990 and registered on 13 August 1991.

On 1 September 1993 the Commission (Second Chamber) decided to bring the application to the notice of the respondent Government and to invite them to submit written observations on the admissibility and merits of the issues raised under Article 6 of the Convention.

After an extension of the time-limit the Government's observations were submitted on 15 December 1993. Further observations were submitted by the Government on 18 March 1994. The applicant's observations in reply were submitted on 13 February and 29 June 1994 respectively.

THE LAW

1. The applicant complains that the proceedings before the Supreme Administrative Court did not fulfil the requirements of Article 6 para. 1 (Art. 6-1) of the Convention which, as far as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by [a] ... tribunal ...".

In support of his allegation the applicant submits that even in Swedish law the judicial review procedure in question cannot be considered as an ordinary remedy, which appears from the fact that the final administrative authority is not obliged to indicate in its decision that an appeal against its decision exists. Furthermore, whereas the Swedish Supreme Court and the Supreme Administrative Court normally review all aspects of a case and make independent and conclusive determinations as to the matter reviewed, the judicial review open to the applicant under the 1988 Act limits the powers of the Supreme Administrative Court to those of a cassation court which can only either sustain or quash the decision. As the review in the applicant's opinion furthermore is limited to questions of law this implies that the Supreme Administrative Court does not determine civil rights and obligations within the meaning of Article 6 (Art. 6) of the Convention.

The applicant also maintains that the review under the 1988 Act falls short of fulfilling the requirements of Article 6 para. 1 (Art. 6-1) of the Convention due to the fact that the procedural provisions applicable do not provide a right to an oral hearing regardless of the fact that the Supreme Administrative Court is the only "tribunal" which reviews the case.

The Government maintain that domestic law and practice show that although the review under the 1988 Act is supposed to concentrate on an examination of the lawfulness of the challenged administrative decision, it also includes a re-examination of the facts, and an examination as to whether the decision is compatible with the constitutional principles of objectivity, impartiality and equality before the law. The Supreme Administrative Court furthermore examines whether procedural errors have occurred and - in cases of expropriation - the review must also include an assessment of whether the prescribed balance of interests has been observed and may for this purpose even include an examination of new facts.

The Government furthermore refer to the fact that in the present case the Supreme Administrative Court actually not only examined the lawfulness of the challenged decision but also made an assessment of the balance of interests on which the decision to grant the expropriation permit rested.

As regards the question of an oral hearing the Government maintain that this question, as submitted, is of an abstract nature. In the alternative the Government maintain that this issue was not raised in the original application to the Commission and, consequently, it should be rejected as having been submitted out of time. In any event the Government point out that the applicant never requested an oral hearing for which reason he must be considered as having tacitly waived his right in this respect.

As regards the requirements of Article 26 (Art. 26) of the Convention to which the Government refer in respect of the question of an oral hearing the Commission recalls that according to Rule 44 para. 4 of its Rules of Procedure the date of introduction of an application shall in general be considered to be the date of the first communication from the applicant. The Commission may nevertheless for good cause decide that a different date be considered to be the date of introduction.

In the applicant's first communication with the Commission of 18 December 1990 he merely stated that the respondent Government, by issuing an expropriation permit had, in his opinion, violated Article 6 para. 1 (Art. 6-1) of the Convention as well as Article 1 of Protocol No. 1 (P1-1) to the Convention. This communication was clearly not sufficient to constitute a full application in accordance with Rule 44 paras. 1 and 2 of the Commission's Rules of Procedure, in particular

as it contained no statement of the facts or arguments. Nevertheless, the Commission considers that the letter with enclosures submitted on 18 December 1990 were sufficient to constitute the introduction of an application since they set out, albeit summarily, the object of the application (cf. No. 10293/83, Dec. 12.12.85, D.R. 45 p. 41).

Since the scope of the application in respect of the date of introduction is circumscribed by the terms of the applicant's first communication the Commission must next examine whether the further details of the application should be considered as legal submissions in respect of the applicant's main complaints to which the six months rule would not be opposable (cf. no. 12015/86, Dec. 6.7.88., D.R. 57 p. 108) or whether they should be considered as separate complaints introduced at a later stage (cf. No. 10857/84, Dec. 15.7.86. D.R. 48 p. 106).

In this respect the Commission notes the contents of the applicant's second communication with the Commission of 30 July 1991 which contained further arguments as to the basis for his complaints and was set out in the official application form provided by the Commission's Secretariat. Having regard to the contents of this communication the Commission agrees with the Government that the applicant did not therein, in substance, raise the issue of the lack of an oral hearing in the Supreme Administrative Court. The Commission furthermore considers that the complaint based on the lack of an oral hearing cannot be interpreted as merely a particular aspect of the complaint based on the allegation, considered below, that the scope of the judicial review offered under the 1988 Act did not fulfil the requirements of Article 6 para. 1 (Art. 6-1) of the Convention. The Commission finds that the complaint of a lack of an oral hearing contains a distinct, precise fact in respect of the right to a fair hearing. In these circumstances, for the purposes of the six months rule, the complaint must be considered separately.

Thus, the final decision to be taken into consideration in this respect is the judgment of the Supreme Administrative Court, which was given on 27 June 1990. However, the Commission finds that the complaint of a lack of an oral hearing was not raised in substance before 25 June 1993 when the applicant submitted further information to the Commission. That is more than six months after the date of the judgment.

It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

As regards the complaint that the review offered by the Supreme Administrative Court pursuant to the 1988 Act did not, in respect of its scope, fulfil the requirements of Article 6 para. 1 (Art. 6-1), the Commission recalls that this new Act provides for an appeal to the Supreme Administrative Court against administrative decisions involving exercise of public authority regarding a private individual or legal person in cases where no other judicial remedy is available. The scope of the Act is defined by reference to certain provisions in the Instrument of Government, and some enumerated categories of decisions are excluded from the application of the Act.

The examination by the Supreme Administrative Court under this new law is in principle limited to the question whether the challenged decision is in conflict with any legal rule and according to the travaux préparatoires the examination shall concentrate on the lawfulness of the challenged decision. However, the Commission recalls that the competence of the Supreme Administrative Court is not limited to an examination of how the law has been applied but may include a re-examination of the facts upon which the application of the law was based. The Supreme Administrative Court shall also examine whether fundamental legal principles such as objectivity, impartiality and

equality before the law have been respected. Moreover, the Supreme Administrative Court shall examine whether there have been any procedural errors which may have affected the outcome of the case.

The Commission also recalls that the scope of review must be assessed in the light of the fact that expropriation is not a matter exclusively within the discretion of the administrative authorities but is based on various conditions laid down in the Expropriation Act of 1972, in particular Chapter 2 of the Act where the grounds justifying the issuing of an expropriation permit are enumerated. For example the Commission recalls that according to Chapter 2, section 12, subsection 1 of the Act an expropriation permit must not be granted if the purpose of the expropriation can be attained by other appropriate means, or if the disadvantages resulting from the expropriation would outweigh its advantages from general and individual points of view. It was for the Supreme Administrative Court to satisfy itself that this provision had been complied with.

Finally, the Commission recalls that in the present case the applicant maintained, in his appeal to the Supreme Administrative Court, that the Government's decision regarding the expropriation permit lacked objectivity and was based on an incorrect evaluation of the facts and the evidence submitted. Confining itself as far as possible to examining the question raised by the case before it the Commission has found no evidence in this case which could lead to the conclusion that the Supreme Administrative Court in examining the above complaints, as submitted by the applicant, had to decline jurisdiction in replying to them or in ascertaining the various facts.

In these circumstances the Commission finds that the review available to the applicant in the instant case fulfilled the requirements of Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains that he has been deprived of his property contrary to Article 1 of Protocol No. 1 (P1-1) to the Convention which reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

He argues in support of his allegation that the authorities were not duly compelled to investigate into, and present reasonable alternatives to the expropriation in question which could have implied a fair balance between gains and losses. He considers that an excessive burden has been placed upon him.

In respect of this complaint the Commission recalls that the Government decided on 11 January 1990 to grant the authorities the expropriation permit and that this decision was upheld by the Supreme Administrative Court on 27 June 1990. With reference to this permit the authorities instituted court proceedings in order to finalise the expropriation. In these circumstances the Commission considers that there has been an interference with the applicant's right of property as guaranteed in Article 1 of Protocol No. 1 (P1-1) to the Convention.

However, the proceedings whereby a final decision as to the amount of compensation the applicant will receive pursuant to domestic legislation have not yet come to an end. Therefore, the Commission finds that it is premature to consider whether the interference with the applicant's property rights is justified since the question of a reasonable relationship of proportionality between the interference with the applicant's rights and the public interest objectives being pursued cannot be determined.

In such circumstances the Commission finds that the condition as to the exhaustion of domestic remedies has not been fulfilled and this part of the application must accordingly be rejected 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 — C.A. NØRGAARD