CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 54695/00
by Paul DANELL and Others
against Sweden

The European Court of Human Rights (Second Section), sitting on 22 March 2005 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs E. FURA-SANDSTRÖM,
Ms D. JOČIENĖ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 23 November 1999,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The present application was brought by fifteen Swedish nationals, Messrs Paul Danell, Sven Danell, Per Grape, Bengt-Olov Innala, Krister Innala, Olle Innala, Olov Innala, Tage Innala, Albin Luthström, Arne Luthström, Bertil Luthström, Sune Luthström, Rolf Styrefors, Lennart Svedlund and Stig Söderholm. Eight of them were professional fishermen and all of them held private fishing rights (*rätt till enskilt fiske*) in the

coastal areas of Haparanda. They live in the North of Sweden close to the border with Finland. They were represented before the Court by Mrs U. Sundin Bonnedahl, a lawyer practising in Umeå. The respondent Government were represented by Mrs I. Kalmerborn of the Ministry for Foreign Affairs as their Agent.

A. The circumstances of the case

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

On 16 September 1971 Sweden and Finland concluded the Frontier Rivers Agreement (hereinafter "the Agreement") under which an inter-state body, the Finnish-Swedish Frontier Rivers Commission (*finsk-svenska gränsälvskommissionen* - hereinafter "the Commission"), was established in order to ensure the implementation of the Agreement with respect to certain matters, including fishing, in the frontier area between the two countries covering *inter alia* the Torne River in the coastal area of Haparanda. The Agreement was incorporated into Swedish national law through the 1971 Act concerning the Frontier River Agreement of 16 September 1971 between Sweden and Finland (*lag*, 1971:850, *med anledning av gränsälvs-överenskommelsen den 16 september 1971 mellan Sverige och Finland*). To the extent that the Agreement did not include special provisions, the relevant national law in force within each of the States should apply (Chapter 1, Article 8).

In 1997 the Swedish Government issued an Ordinance concerning Fishing in the Torne River Fishing Area (*förordning om fisket i Torne älvs fiskeområde*, FIFS 1997:12), according to which the fishing of salmon and trout within the frontier area was prohibited during the period from 1 May until 5 July each year, as was fishing with stationary equipment (*fasta redskap*) for other fish. Under Article 22 of the Statute for the Fishing in the Torne River Fishing Area (*Stadgan för fisket i Torne älvs fiskeområde*, appendix B to the Agreement), the Commission was, subject to certain conditions, authorised by the Government to grant exemptions from the above prohibition for persons holding private fishing rights in the area.

For the 1999 season, the applicants, who held private fishing rights in the Torne River Fishing Area, requested the Commission to grant them an exemption from the above prohibitions.

On 21 May 1999 the Commission decided that one of its members was disqualified from taking part in the examination of the applicants' request and should therefore be replaced by a substitute. In taking this decision, the Commission observed that it was to apply the requirements of impartiality and fairness in Article 6 § 1 of the Convention, and emphasised that the requirement of impartiality was particularly strict since it was not possible to seek an amendment of the Commission's decisions.

On 31 May 1999 the Commission granted the eight professional fishermen authorisation to catch fish, other than trout and salmon, with stationary equipment, but rejected the remainder of the request. The Commission's decision contained a detailed reasoning, involving a number of factors, notably

- the contents of the Swedish 1997 Ordinance and a corresponding Finnish decree;
- an amendment of 15 April 1999 to the Swedish Ordinance authorising dispensation on the Swedish side for fishing with stationary equipment of even salmon and trout;
- the recommendation of a working party set up by both Governments regarding the authorisation of salmon fishing in certain areas on the Swedish side of the Torne River;
- the Commission's earlier practice aimed at avoiding discrimination;
- Finnish policies; and
- marine, biological considerations.

The Commission reiterated that the starting point for its assessment of the application for dispensation was the fundamental rule affirmed by both States that salmon fishing should be prohibited in the sea area in order to ensure a viable stock. The Commission noted that, once the biological conditions so permitted, further joint regulation on dispensations would be appropriate.

According to Chapter 8, Article 17, of the Agreement, the Commission's decision on a request for exemption could not be appealed, but came into force immediately.

Notwithstanding the above, the applicants appealed to the National Fishery Board (*Fiskeriverket*), claiming that they should be granted all the exemptions requested. On 9 July 1999, the Board rejected the appeal, stating that it lacked competence to examine the matter.

The applicants further appealed against the Commission's decision to the Environmental Court of Appeal (*Miljööverdomstolen*). Invoking Article 6 of the Convention, they claimed that they had the right to have their case, which concerned their civil rights, tried by an impartial tribunal. However, they argued, the Commission could not be considered to fulfil those requirements.

On 5 October 2000 the Environmental Court of Appeal dismissed the appeal. It observed that, while the Commission was an inter-state body, this fact did not bar review of the appeal by a Swedish court. Whether the applicants, as holders of private fishing rights, should be granted an exemption from the general prohibition on fishing, was an issue pertaining to their civil rights. Article 6 of the Convention was therefore applicable. However, the court held, the Commission could not be considered an independent and impartial tribunal since it had been authorised by the Government to grant exemptions from the prohibition against fishing and

the Government had the possibility to revoke that authorisation if it so wished. Thus, notwithstanding the rule in the Agreement prohibiting appeals against the Commission's decisions, the applicants had the right to have their case tried by such a tribunal. In this context it noted that it would probably not be possible to try the appeal according to the Act on the Judicial Review of Certain Administrative Decisions (*lagen om rättsprövning av vissa förvaltningsbeslut 1988:205*). However, the court did not consider that it was the correct forum for lodging an appeal, for which reason the appeal should be dismissed. The court did not specify where the applicants should appeal but stated:

> "The case concerns the question of exemption with respect to fishing for certain kinds of fish and/or to fishing with certain methods. It is worth noting that, as regards other waters than those in question here, the County Administrative Board decides about the laying out of stationary fishing equipment. The decisions can be appealed to the National Fishery Board. Requests for exemption for other fishermen can be considered either by the County Administrative Board or by the National Fishery Board. In the event that the National Fishery Board examines the request, its decision shall be considered on appeal by the administrative courts."

Concurrently with their appeals to the National Fishery Board and the Environmental Court of Appeal, the applicants also appealed to the County Administrative Court (*länsrätten*) of Northern Sweden. That court referred the appeal to the Commission since, according to the Administrative Court Procedure Act (*förvaltningsprocesslagen*), appeals should always be addressed to the authority which took the decision against which the appeal was directed. On 17 May 2000 the Commission referred the appeal back to the County Administrative Court without taking any measure, as it considered that no appeal against this decision was provided for by law.

On 17 April 2001 the County Administrative Court dismissed the appeal on the following grounds. Reiterating the reasoning of the Environmental Court of Appeal, the County Administrative Court agreed that the determination of the applicants' right to a dispensation was covered by Article 6 of the Convention and that they therefore had a right to a court but the Commission could not be considered a tribunal. However, the County Administrative Court concluded that it was not empowered to review an appeal against the Commission's decision. It stated, *inter alia*, that:

> "The County Administrative Court notes that the Finnish-Swedish Frontier River Commission is a special inter-state body and can, according to the County Administrative Court's opinion, not be equated with the County Administrative Board or the National Fishery Board. Thus, the County Administrative Court considers that national rules about how decisions by the County Administrative Board or the National Fishery Board may be appealed, does not give the County Administrative Court competence to consider the appeal against the decision of the Finnish-Swedish Frontier Rivers Commission."

The applicants appealed the decision to the Administrative Court of Appeal (*kammarrätten*) of Sundsvall which, on 19 December 2002, rejected

the appeal. The court stated that, although it agreed that the applicants had the right to have their complaint examined by an impartial and independent tribunal and that the Commission did not fulfil this requirement, it found that - as long as the Agreement was in force and failing an adequate agreement between Finland and Sweden - no Swedish court could be considered competent to examine the applicants' complaint.

The applicants appealed to the Supreme Administrative Court, which, to the Court's knowledge, has not yet delivered its decision. In the meantime, in February 2003 two of the applicants, Mr Rolf Styrefors and Mr Stig Söderholm, withdrew their appeal.

B. The Finnish-Swedish Frontier Rivers Commission, relevant law and practice

Provisions concerning the Finnish-Swedish Frontier Rivers Commission and the procedure before the Commission are contained in the Agreement (Chapters 2 and 8) and the Statute for the Finnish-Swedish Frontier Rivers Commission (appendix A to the Agreement). The Statute applies as Swedish law through an ordinance issued in 1971 (SFS 1971:1016).

The Commission is composed of six members, three of whom are appointed by the Finnish Government and three by the Swedish Government. Two of the members shall have experience as judges. Each State shall appoint one member who has experience as a judge, one technical expert and one person with knowledge of the conditions of the border area. In Sweden the latter person is appointed on a proposal from the County Administrative Board of the County of Norrbotten. For each member, there shall be one or more substitutes, who must fulfil the same requirements as those stipulated for full members and are subject to the same rules as the latter. The States remunerate their respective members. Other costs are usually shared between the States (see Chapter 2, Articles 2 and 4 of the Agreement).

The members shall be appointed for a certain period ("*viss tid*"), in practice usually for three years, and have in most cases been re-appointed several times.

The members of the Commission have to take a judicial oath or affirmation in his or her country before they commence their duties (section 5 of the Statute). Each member is subject to criminal liability for their actions on duty, under the law of his or her country (Chapter 2, Article 5 of the Agreement).

Certain guarantees of the Commission's independence follow from Chapter 11, Articles 2 and 7 of the Instrument of Government, according to which neither the Government nor Parliament nor any other authority may intervene in a court's or an administrative authority's handling of a particular case or attempt to influence the decision-making in a case.

The Commission is empowered to take measures which it deems necessary for the implementation of the Agreement. A qualified majority, which includes two members in each national group, is required for the Commission to take a decision. If such a majority cannot be attained, the matter has to be transferred to the two Governments for decision.

Under Chapter 2, Article 3 of the Agreement, the Commission shall carry out such inspections and inquiries as are necessary in order to fulfil its role under the Agreement. It may also contact the authorities in the Contracting States and request their representatives to provide such information and cooperation as is needed. If required, the Commission may appoint experts to carry out investigations.

Under Chapter 5, Article 5, the Commission may issue regulations dealing with certain aspects of fishing. In order to gain legal force, the Commission's decisions are to be confirmed by both Governments (Article 6).

The Commission is empowered to examines *cases* ("*mål*") which have been brought before it by application and which concern a subject listed in Chapter 8, Article 1, involving *inter alia* such issues as the grant of a building permit to erect a building in waters, the authorisation to control waters or to carry out activities that may cause water pollution, compensation for a deprivation of or interference with property, and damage. Pursuant to Article 17, questions which are not covered by Article 1 may be reviewed by the Commission as *matters* ("*ärenden*"), either upon application or on the Commission's own initiative. The applicants' requests for exemption in this case were dealt with as a *matter*.

Under Chapter 8, Article 3, the judicial and administrative authorities of the two States are to inform the Commission about any cases and matters relating to the geographical area to which the Agreement applies. The Commission will only deal with a case or matter falling within its competence.

Pursuant to Chapter 8, Article 4 of the Agreement, opposing parties, as well as the authorities and associations concerned, shall be informed of an application made in a *case* and shall be given an opportunity to submit their comments. Under Chapter 8, Article 6, the Commission shall as a rule hold an oral hearing in its examination of a case. Such a hearing is public. The Commission has to make sure that the case is investigated properly and shall carry out an inspection if deemed necessary (Chapter 8, Article 7 of the Agreement). If the investigation so requires, the Commission may designate a court to take evidence from a party or witnesses (ibid.).

Article 17 provides that, in its investigation of a *matter*, the Commission shall give the authorities and persons concerned an opportunity to state their opinion, shall collect the information and take those measures that are needed having regard to the nature of the case. An oral hearing shall be held if it is deemed to contribute to the clarification of the case.

In the examination of a *case* or a *matter*, all the members of the Commission shall participate (respectively Articles 13 and 17 of Chapter 8). In the event that the Commission is divided, it is the opinion held by a minimum of four members, and a minimum of two members from each State, which shall prevail. If no such majority can be attained in a case or matter, it shall, as a rule, be referred to both Governments.

A decision by the Commission in a compensation *case* may be appealed against to the highest water court in the relevant State, which in Sweden is the Environmental Court of Appeal. All other decisions taken by the Commission in respect of a *case* are immediately enforceable (Chapter 8, Article 15, of the Agreement). Similarly, no appeal lies against a decision by the Commission on a *matter.* However, in certain instances, such as a decision on a matter taken under Chapter 5, Article 5, on salmon and trout fishing in river areas, confirmation of the decision by both Governments is required for it to become valid (Chapter 8, Article 17).

COMPLAINTS

The applicants complained under Article 6 § 1 of the Convention that the Commission could not be considered an independent and impartial tribunal and that, since its decision could not be appealed, they had been refused access to court. On the same grounds, they claimed to have been denied the right to an effective remedy under Article 13 of the Convention.

THE LAW

A. Whether the applicants had exhausted domestic remedies

The Government maintained that domestic remedies had not been exhausted with regard to the right of appeal against the Commission's decision of 31 May 1999. Apart from the fact that an appeal by most of the applicants was still pending before the Supreme Administrative Court, the applicants had at their disposal several other effective means of redress of which they had not availed themselves.

First, the applicants had not appealed to the Supreme Court against the Environmental Court of Appeal's dismissal on 5 October 2000 of their appeal against the Commission's decision. In a ruling of 1994 (NJA 1994 p. 657), the Supreme Court had found that a ban against appeals could be disregarded with reference to Article 6 of the European Convention, although the general courts were not competent to try an administrative

case. The outcome might very well have been different in this case, since the Environmental Court of Appeal was empowered to examine appeals against decisions of the Commission pertaining to compensation.

Secondly, it was to be noted that the applicants did not avail themselves of the possibility to appeal against the decision of the National Fishery Board of 9 July 1999. Such an appeal could have been filed with the County Administrative Court of Gothenburg, whose decision could in turn have been appealed to the Administrative Court of Appeal of Gothenburg and further to the Supreme Administrative Court. In view of the fact that the Supreme Administrative Court had on several occasions concluded that a prohibition against appeals could not be upheld when a civil right was at stake, it could not be ruled out that the first and second administrative courts in Gothenburg would have come to another conclusion than did the administrative courts which had so far examined the applicants' appeal.

Thirdly, it should be recalled that two of the applicants, Rolf Styrefors and Stig Söderholm, had withdrawn their appeals to the Supreme Administrative Court. Insofar as those applicants were concerned, it was clear that this domestic remedy had not been and never would be exhausted.

As to the remainder of the applicants, their appeal against the decision of the Administrative Court of Appeal of Sundsvall to dismiss their appeal against the Norrbotten County Administrative Court's decision was still pending before the Supreme Administrative Court and the outcome was unknown. In this context the Government referred to the Supreme Administrative Court's decisions of 25 November 1997 (*RÅ 1997 ref. 65*) and 30 November 2001 (*RÅ 2001 ref. 56*) in which the latter accepted that the appellants had a right of access to a court for the determination of their civil rights even though the legislation in question did not permit an appeal. Therefore, the Government contended, this remedy would not be exhausted until the Supreme Administrative Court had refused leave to appeal or determined the merits. Until such time it would be premature for the Strasbourg Court to examine the merits of the present application.

The applicants stressed that, despite the bar against lodging an appeal against the Frontier Rivers Commission's decision of 31 May 1999, they had made several attempts to lodge an appeal with those instances that were the closest at hand, but to no avail. They could not reasonably be expected to exhaust further remedies.

The Court observes that, according to the provisions in Chapter 8, Articles 15 and 17 of the Agreement, no decisions by the Commission, other than those relating to compensation, could form the subject of a judicial appeal to the Environmental Court of Appeal. There is no basis in the relevant basic instruments to support the Government's view that the applicants have failed to exhaust domestic remedies.

The Court further notes that the applicants nevertheless took a number of steps before Swedish courts to obtain judicial review, namely the

Environmental Court of Appeal, the County Administrative Court of Northern Sweden and the Administrative Court of Appeal of Sundsvall, all of which held that they lacked jurisdiction to review the Commission's decision in the applicants' case. The latter held that, under the Agreement as in force, no court in Sweden was empowered to examine the applicants' complaint. Moreover, the appeal to which the Government referred has been pending before the Supreme Administrative Court since February 2003. In view of the foregoing it appears that the national courts have had a sufficient opportunity, for the purposes of the rule of exhaustion in Article 35 § 1 of the Convention, to examine the subject-matter of the applicants' case and to pronounce on the existence, or not, of a right to judicial appeal against the Commission's decisions beyond the limitations traced by the Chapter 8, Articles 15 and 17, of the Agreement.

None of the case-law relied on by the Government as evidence of a recognition in Swedish jurisprudence of the right of access to a court under Article 6 of the Convention, concerns an appeal to the Swedish courts against a decision taken by the Frontier Rivers Commission. At the same time, the Court cannot but note that, in their submissions on the issue of compliance with the right of access to a court under Article 6, the Government have placed particular emphasis on the special character of the Commission as an inter-state review body entrusted with the task of ensuring the implementation of an international agreement.

In the circumstances, it sees no grounds, other than formalistic ones, for distinguishing between those two applicants who withdrew their appeal to the Supreme Administrative Court and the remainder of the applicants.

Against this background the Court is satisfied that all the applicants have exhausted domestic remedies.

B. The complaint under Article 6 of the Convention

The applicants complained under Article 6 § 1 of the Convention that the Commission could not be considered an independent and impartial tribunal and that, since its decision could not be appealed, they had been refused access to a court. There had therefore been a violation of Article 6 § 1 of the Convention, which insofar as relevant reads:

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

The applicants maintained that there was a serious dispute pertaining to their civil rights and that Article 6 § 1 of the Convention was applicable to their case. However, in their view, the Frontier Rivers Commission did not meet the requirements of an "independent and impartial tribunal" under this provision. Not only could the Government revoke the powers conferred on the Commission to grant an exemption from the relevant fishing ban, it was also the case that, in the event that the Commission failed to reach the

requisite qualified majority, it would be for the Governments of both States to take a decision. Moreover, the term of office of Commission members – three years – was extremely short. There was no reason why the applicants, simply because they were resident in the particular area in question, should not be afforded the same judicial guarantees with respect to their claims as residents in other parts of Sweden. Nor was it justified to afford a possibility of judicial review with regard to only some of the Commission's decisions and not to others.

The Government first disputed the applicability of Article 6 § 1 to the impugned proceedings. They maintained that the applicants could not derive from the relevant national legislation a right to be granted such exemptions as those refused by the Commission in their case. The wording of the applicable provisions (i.e. the use of the word "may" as opposed to "shall") suggested that the Commission had an unfettered discretion and that no actual right could be said to be recognised in domestic law.

Should the Court, however, find that the applicants could arguably claim a right under domestic law to be granted the requested exemptions, the Government would not dispute that it was "civil" within the meaning of Article 6.

As regards the issue of compliance, the Government emphasised that the Frontier Rivers Commission was an independent and impartial tribunal established by law for the purposes of Article 6. Accordingly, by having their case determined by the Commission, the applicants had enjoyed access to a court as required by Article 6 of the Convention.

In any event, should the Court not accept this view, the Government considered that any limitation on the applicants' right of access to a court was compatible with Article 6 § 1. In this connection the Government stressed that the Frontier Rivers Agreement between Sweden and Finland was an international treaty to which the two States were committed under international law. Compliance with international treaties was an essential part of international law. The purpose of the Agreement was to facilitate co-operation between the two States as regards the border area and to make it possible to use the frontier waters effectively, while at the same time protecting them against water pollution and other harm, such as over-fishing. The Frontier Rivers Commission was established in order to administer that Agreement. The Commission had been given a far-reaching competence to decide independently on issues of a kind that would otherwise be determined by national administrative authorities and courts in the respective States. When preparing the Agreement, it was considered inappropriate to admit appeals against the Commission's decisions to national courts, since the interests of both States were involved. To create a second inter-state appeal body was deemed inconceivable. Hence, the two States agreed that, with a few exceptions, no appeal should lie against the Commission's decisions.

Through the creation of the Commission, a body was established which was able to take into account the interests of both States in matters relating to the frontier waters and to provide for the impartial treatment of their populations in such matters. The fact that the Commission was the first and only instance in respect of most subject-matters falling within its competence must be considered to pursue the legitimate aim of striving to use the frontier waters and the common natural resources in such a way that the interests of both States and of the border area were best served.

The Government further submitted that the alleged limitation on the right to a court was proportionate to the legitimate aim pursued. It was clear that the applicants were not without a means of legal process. They had had their request for exemptions examined and determined by a body which was highly independent in all respects and which was composed of, *inter alia*, permanent judges from the two States. There was every sign that they had been afforded a fair hearing. It could be recalled that the Commission itself was of the opinion that it had to apply Article 6 of the Convention to the proceedings. In these circumstances, it could not be said that the disputed limitation on the applicants' access to a court impaired the essence of their "right to a court" or was disproportionate for the purposes of Article 6 § 1 of the Convention.

The Court, having regard to the parties' submissions, considers that this complaint raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of its merits. The Court concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 1 of the Convention. No other grounds for declaring it inadmissible have been established. This part of the application must therefore be declared admissible.

C. The complaint under Article 13 of the Convention

With reference to the same facts as stated above, notably the absence of a possibility to lodge an appeal against the Commission's decision of 31 May 1999, the applicants alleged a violation of Article 13 of the Convention, which reads:

> "Everyone whose rights and freedoms as set forth in [the] 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."

The Government contended that, should the Court find Article 6 to be inapplicable or the complaint under that Article to be manifestly ill-founded, the applicants had no arguable claim, and so Article 13 was inapplicable in the present case. Alternatively, the Government submitted that Article 13 could not be read as requiring the provision of an effective remedy that would enable the individual to complain about the absence in domestic law of access to a court as secured by Article 6 § 1 (see the *Kudla v. Poland*

judgment of 26 October 2000, RJD 2000-XI, p. 236, para. 151). Thus, even if the Court were to consider that the applicants had an arguable claim under Article 6, Article 13 was not applicable in the present case. For both reasons, the Government submitted that the applicants' complaint under Article 13 of the Convention should be declared inadmissible as being incompatible *ratione materiae* with the provisions of the Convention.

In the further alternative, the Government submitted that, in the event that Article 13 should be considered applicable, it would be premature for the Court to decide whether the complaint under that provision was admissible, given that an appeal by thirteen of the applicants was currently pending before the Supreme Administrative Court.

The Court, for its part, having regard to the parties' submissions, considers that this complaint raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the complaint. The Court concludes, therefore, that this part of the application is also not manifestly ill-founded within the meaning of Article 35 § 1 of the Convention. No other grounds for declaring the said complaint inadmissible have been established. It must therefore be declared admissible.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

S. DOLLÉ
Registrar

J.-P. COSTA
President