CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 8719/02
by Bo FRANSSON and Sonja FRANSSON
against Sweden

The European Court of Human Rights (Fourth Section), sitting on 16 March 2004 as a Chamber composed of

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs V. STRÁŽNICKÁ,
Mr J. CASADEVALL,
Mr R. MARUSTE,
Mr L. GARLICKI,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 14 February 2002,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr. Bo Fransson and Mrs. Sonja Fransson are Swedish nationals, who were born in 1949 and 1945, respectively, and live in Gränna.

A. The circumstances of the case

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

The applicants own a property, Brunnström Södergård 1:7, in Gränna in the County of Jönköping. In 1987, during the administrative proceedings (*anläggningsförrättning*) regarding the construction of a common road which would in part run on the applicants' property, the applicants opposed the construction. On 25 June 1987 the Real Estate Formation Authority (*fastighetsbildningsmyndigheten*, hereinafter "the REFA") in Nässjö decided that the proposed road should be constructed, as the benefits of the road outweighed the inconveniences and costs of it and as the construction fulfilled all other requirements of the Construction Act (*Anläggningslagen*, 1973:1149).

Upon appeal, on 6 October 1989 the Real Estate Court (*fastighets-domstolen*) of Jönköping upheld the REFA's decision. It stated that the applicants underestimated the increase in traffic and the subsequent traffic dangers. The existing road could not be improved by making minor changes and the required amendments of the road would entail considerable costs – probably larger than the suggested new road – but would not improve the safety aspect significantly. The characteristics of the village would be better conserved with the new road which would not go through the centre of the village. The court further stated that the effects on certain individual properties could be remedied by various measures. It also noted that the majority of the property owners in the association of joint property owners (*samfällighet*) were in favour of the road construction and, seen as a whole, it found that the requirements of the Construction Act were fulfilled.

On 1 June 1990 the Göta Court of Appeal (*Göta hovrätt*) upheld the Real Estate Court's decision. On 4 December 1990 the Supreme Court (*Högsta domstolen*) refused leave to appeal.

Subsequent to the decision to construct the new road acquiring legal force, proceedings were initiated to establish the defraying of the cost for the construction and the compensation to be granted to the property owners concerned. On 25 June 1991 the REFA decided that, due to difficulties in establishing the amount of the damages before the construction had been completed, the compensation issue should be determined after the construction had been finalised rather than when the decision to construct the road had acquired legal force, as had initially been decided. However, an

equitable amount of compensation was granted to the property owners in advance. According to this decision the applicants received 8,000 Swedish *kronor* (SEK) in advance. On 18 November 1991 the Real Estate Court rejected the applicants' appeal and thus upheld the REFA's decision on this matter. The applicants did not pursue their appeal to the higher instances.

The road construction was finalised on 1 October 1993. On 29 November 1993 the REFA initiated compensation proceedings. It also appointed an expert to assist with the evaluation of the property. On 7 June 1994 the expert presented an evaluation proposal. Various negotiations and written submissions by the parties involved followed. On 17 May 1995 the expert presented a new evaluation which was again followed by correspondence and meetings between the different parties. On 29 May 1996 the REFA established that the applicants should be compensated in the amount of SEK 42,638 plus interest for the interference (*intrångsersättning*) and SEK 3,397 plus interest in respect of compensation accruing to the tenant of the applicants' property.

The applicants appealed against the compensation decision to the Real Estate Court. They engaged a lawyer for this purpose. It appears from correspondence from April 1997 that the applicants' lawyer noted that the proceedings had come to a standstill and that he had requested the Real Estate Court to take appropriate measures to pursue the proceedings. The applicants were summoned to appear for a hearing on 23 April 1998. However, the hearing was suspended. It appears that the suspension was due to the possible ineligibility of the legal representative of another property owner who was claiming compensation in the same proceedings. The applicants were again summoned to appear before the court on 1 September 1998. This hearing was postponed to 23 October 1998. However, it appears that there was no hearing on this date and that the applicants were again summoned to appear on 19 May 1999. However, this hearing was also cancelled. The applicants were summoned anew for the 3 September 1999 which appears to be the date when the hearing was held.

Before the Real Estate Court, the applicants had asked for SEK 460,500 in compensation, *inter alia*, for damage to their forest and existing pond and for not being able to realise their plans to construct a pond for the purpose of crayfish production. On 8 October 1999, after an inspection of the property in question, the Real Estate Court granted the applicants SEK 45,302 in compensation for the interference and SEK 48,208 in other compensation, amounting in total to SEK 93,592 plus interest. It did not grant any compensation for the planned construction of the pond, stating that no observable measures had been taken in this respect and that, thus, no economic damage had been sustained by the applicants. The Real Estate Court also decided that the parties should bear their own legal costs. In this respect, it noted that, as of 1 January 1993, the Real Estate Court could, in situations like the present one decide that the party losing the case should

pay the other party's legal costs, according to what was reasonable in the circumstances. It explained that this appeared from the wording of the relevant legal provision and from the preparatory works to this provision. In the present case, it found it reasonable that the applicants defray their own legal costs. It appears that the applicants received some compensation for their legal costs from their insurance.

On 22 December 2000 the Court of Appeal upheld the Real Estate Court's decision in its entirety. It further found that the applicants should bear their own legal costs of the proceedings before it.

The applicants appealed against the Court of Appeal's decision regarding the compensation and the legal costs. On 29 August 2001 the Supreme Court refused leave to appeal.

B. Relevant domestic law

The construction of the road in question was primarily regulated by sections 6 to 8 and 10 to 12 of the Construction Act. According to these provisions, a common construction can be made only if the economic or other benefits outweigh the costs and inconvenience that it entails. It is an obstacle to the construction if the owners of the properties concerned are on the whole opposed to it. The construction should be performed in a way which achieves its purpose with the least possible interference and inconvenience and without unreasonable costs.

At the material time, the right to compensation was governed by section 13 of the Construction Act which referred to chapter 4 of the Expropriation Act (*Exproriationslagen*, 1972:719). Pursuant to this regulation, compensation was to be granted for the loss in market value of the property which was due to the interference. Compensation was also to be granted for other economic damage that occurred due to the interference, including direct costs or loss of expected income. Admission to the roads was allowed after compensation had been given or after an estimated advance of the compensation had been given.

Before 1 January 1993 a person claiming compensation for an interference with his or her property did not have to defray the legal costs, regardless of the outcome of the case. However, under the provision applicable to the present situation, section 14, chapter 16 of the Real Estate Formation Act (*Fastighetsbildningslagen*, SFS 1970:988), the Real Estate Court could decide that, according to what was reasonable in the circumstances, the party who had lost the case should pay the other party's legal costs or that each party should defray their own legal costs.

COMPLAINTS

1. The applicants complain under Article 1 of Protocol No. 1 to the Convention. They argue that the Swedish State, by allowing the road construction, first forced them to abandon their plans concerning the use of their property and then failed to compensate them for the damage that this interference had entailed. In order to avail themselves of their right to compensation, they had to take costly proceedings for which, as a consequence of an allegedly erroneous interpretation of the law, they had to defray the costs. Moreover, the law regulating the distribution of legal costs was not accessible and foreseeable. Regardless of this, the law had been altered after the applicants had given up their property rights. The rules therefore changed to the applicants' detriment while the proceedings were pending. They were thus deprived of procedural rights and opportunities.

2. The applicants further complain under Article 6 of the Convention. They consider that, because they had to defray their legal costs, they were denied a fair trial. Moreover, they maintain that they should have been afforded free legal assistance by the State.

3. Also, under Article 6 of the Convention, the applicants complain that the proceedings were excessively lengthy.

THE LAW

1. The applicants complain that they were not fully compensated for being unable to pursue their plans concerning their property and that they had to defray their legal costs in the compensation proceedings. The applicants rely on Article 1 of Protocol No. 1, which 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.
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> 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 Court reiterates that this provision comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in

accordance with the general interest. These rules are not "distinct" in the sense of being unconnected: the second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule (see, for example, *Case of the former King of Greece and others v. Greece* [GC], no. 25701/94, § 50, ECHR 2000-XII).

Moreover, although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the proceedings at issue must afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. These proceedings should be governed by basic procedural guarantees (see, for example, *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, p. 19, § 55; and *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, p. 21, § 49).

The means employed in any interference with the protection of property, regardless of whether it falls under the above-mentioned first, second or third rule, must be proportional to the aims sought to be realised. In other words, a fair balance has to be struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. The issue of compensation will influence the assessment whether a fair balance has been struck between the various interests at stake. However, the Court will leave a wide margin of appreciation to the State to decide the appropriate compensation and will respect the domestic court's judgment on this issue unless that judgment was manifestly without reasonable foundation (see, among other authorities, *Lithgow and others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, §§ 120 and 122; *Beyeler v. Italy*, [GC], no. 33202/96, §§ 111 and 114, ECHR 2000-I; and *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 73).

Turning to the present case, the Court does not find any reason to question that the property in question was the applicants' "possession" for the purposes of Article 1 of Protocol No. 1. Moreover, the Court does not find it necessary to establish under which rule of Article 1 of Protocol No. 1 the current interference falls. However, the claim to have the legal costs covered by the opposite party cannot, in absence of any judgment or decision in favour of this claim, be considered as sufficiently established and enforceable as to be considered a "possession" (cf. *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, § 59).

The Court observes that the proceedings regarding the construction of the new road ended already in 1991. However, the Court also notes that the compensation proceedings had a close affinity to these proceedings. Leaving aside the matter of compliance with the six-month rule set down in

Article 35 of the Convention and in the light of the margin of appreciation attributed to the State, the Court is satisfied that the domestic court managed to strike a fair balance between the different interests at stake. This implies that the Court does not consider that the judgment, which in part granted the applicants' claim for compensation, together with the amount granted to the applicants in advance was manifestly without reasonable foundation. In this context, the Court reiterates that it is not its role to reassess the specific determination of the national courts.

As regards the procedural aspects of the compensation proceedings, the Court notes that the defraying of the legal costs is governed by domestic law. In this context the Court is not a fourth instance and will thus not, in the absence of any indication of arbitrariness, question the interpretation of the domestic law in the present case. The Court notes that it is a common solution that a party which has lost a case, in whole or in part, has to defray the legal costs. The applicants only had to defray their own legal costs. This solution, as such, cannot be said to deprive that party from putting his case before a court in order to challenge any interference with his or her rights. Furthermore, the applicants argue that the law was altered to their detriment while the proceedings were pending. The Court cannot agree with this argument since the compensation proceedings in question started in November 1993, eleven months after the new legal provision had entered into force. For these reasons, the Court is of the opinion that the applicants had reasonable opportunities to put their case before the domestic courts.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicants also complain under Article 6 of the Convention that they had to defray their own legal costs and that they were not granted legal aid. Furthermore, they complain that they did not get a fair hearing within a reasonable time. The provision in question reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...
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> ...
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> 3. Everyone charged with a criminal offence has the following minimum rights:
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> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> ..."

The Court would note the difference between asking that the legal costs be defrayed by the opposite party and requesting legal aid from the State. The first is a matter between two private parties, between whom a balance has to be struck. The latter, however, implies an obligation on the State to afford its means of legal assistance to one party.

The Court is of the opinion that, for the same reasons as stated above in relation to Article 1 of Protocol No. 1, the first matter does not give rise to an issue under Article 6 of the Convention.

Turning to the issue of legal aid, the Court reiterates that, in civil proceedings, Article 6 § 1 of the Convention embodies the right of access to a court for the determination of civil rights and obligations. However, it may be noted that this right is not absolute. Moreover, failure to provide an applicant with the assistance of a lawyer may breach this provision, where such assistance is indispensable for effective access to court, either because legal representation is rendered compulsory as is the case in certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or the type of case. The Court also recalls that Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants a right of effective access to court. The question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, §§ 26-28).

The Court is satisfied that the proceedings concerned the determination of the applicants' civil rights and obligations. The court observes that there is no indication that the applicants requested legal aid before the domestic courts. Leaving aside the prospects of success of such a request, the Court also notes that the applicants' costs were partially covered by insurance. They did thus not have to bear their entire costs from their own means. There was no formal obstacle preventing them from presenting their case personally. The fact that the REFA had already carried out an investigation, during which an expert had been appointed, to the costs of which the applicants did not have to contribute, substantially facilitated the applicants' possibility to present their case properly before the domestic courts in the appellate proceedings. In view of these circumstances, the Court discerns no appearance of a violation of Article 6 of the Convention.

It follows that the above complaint is manifestly ill-founded under Article 35 § 3 of the Convention and should accordingly be declared inadmissible.

3. The applicants further complain under Article 6 of the Convention about the length of the compensation proceeding.

The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicants' complaint concerning the length of the compensation proceedings;

Declares the remainder of the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President