

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

FIFTH SECTION

DECISION

Application no. 59122/08
Annika JACOBSON
against Sweden

The European Court of Human Rights (Fifth Section), sitting on 22 May 2012 as a Chamber composed of:

Dean Spielmann, *President,*
Elisabet Fura,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 27 November 2008,

Having regard to the decision of 12 January 2010,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Annika Jacobson, is a Swedish national, who was born in 1961 and lives in Hammenhög. She was represented by Mr P. Sjödin, a lawyer practising in Stockholm.

2. The Swedish Government ("the Government") were represented by their Agent, Ms G. Isaksson, of the Ministry for Foreign Affairs.

A. The circumstances of the case

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

4. In September 1997 the applicant bought, together with another person, the vacant lot Sandby 66:3 in the municipality of Simrishamn for 725,000 Swedish kronor (SEK). She is now the sole owner of the property, which covers about 33.6 hectares. It is leased to a forestry company, P7G Österlens Natur & Träförädling AB (hereafter "the company"), a family company owned by the applicant and Mr Göran Jacobson.

5. By a decree of 6 May 1974 the County Administrative Board (*länsstyrelsen*) had issued, under section 19 of the Nature Conservation Act (*Naturvårdslagen*, SFS 1964:822), several restrictions on the use of certain land, which included the property later bought by the applicant. For example, the decree prohibited, without the Board's permssion, the erection of new buildings or fundamental alterations of existing buildings, excavations, fillings and tippings of any kind, the collection of soil, stone, gravel, sand or clay, certain forest cultivation, and permanent camping or parking of a caravan.

6. With the purpose of creating a nature reserve, the County Administrative Board, by an interim decision of 17 November 1998, issued prohibitions pursuant to section 11 of the Nature Conservation Act against taking certain measures on a large part of the applicant's property. The Board noted that the land formed part of a larger area of national interest for public outdoor life and that there were species of animals and plants in need of long-term protection. It found that the land's natural assets were under threat from felling and other exploitation. Among other things, the decision made it unlawful, without the Board's permission, to undertake any works that would modify the topography or general character of the land, extract or collect materials, plant trees or bushes, put up fences in order to restrict the movement of wild animals or the public, construct roads, park caravans, and erect buildings or other constructions. The decision's three-year validity was later extended for an additional two years.

7. By a decision of 5 May 2003 the Board decided to establish a nature reserve, Mälarhusen, in accordance with Chapter 7, section 4 of the Environmental Code (*Miljöbalken*, SFS 1998:808). It covered 45 hectares, including 27.5 hectares of the applicant's property. The purposes, similar to the above interim decision, were the development of biological diversity on the land and the preservation of an area of importance to public outdoor life. Pursuant to Chapter 7, sections 5, 6 and 30 of the Code, the Board imposed extensive restrictions on the use of the property, including the prohibitions already in force under the interim decision. (The latter decision ceased to be vaild through the establishment of the nature reserve.) In the decision on the nature reserve, the Board noted that provisions regarding protected forest

land (*skyddsskog*) applied to the applicant's property, pursuant to the Forestry Act (*Skogsvårdslagen*, SFS 1979:429). The Board further described the area as follows:

> "The whole area around Sandhammaren, of which Mälarhusen is a part, is of geoscientific value as an extensive coastal dune area with active dune-building processes that are unique in Sweden. Mälarhusen itself consists primarily of pine forest on fossil sand dunes with elements of grey hair-grass and heather heath, dune wetlands overgrown with wet birch forest and wind-blown dunes. The variety of different biotopes helps create the conditions for a high level of biological diversity in the area. The area is important for outdoor activities and also has a land history value in that 'protective forests' were planted in parts of the area in different periods to bind the sand and prevent it from drifting.
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> The area as a whole is of national interest as a coastal zone and for outdoor activities (F5 Mälarhusen), whereas the common beach and the water area off the beach are of national interest for nature conservation (N72 Coastal area Nybrostrand – Simrishamn). The area borders the Sandhammaren nature reserve which is a Natura 2000 site. The Sandhammaren nature reserve has been declared by the Government a special protected area under Council Directive 79/409/EEC on the conservation of wild birds (the Birds Directive) and the Government has also proposed that it be included in Natura 2000 in line with Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive).
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> Most of the area in question contains natural habitats as defined in the Habitats Directive, for which protective measures are needed to protect their nature conservation value in the long term. The Mälarhusen nature reserve can therefore be seen to strengthen these natural habitats within Sandhammaren. This applies to habitats such as tree-covered sand dunes, shifting dunes with Ammophila arenaria and sublittoral sandbanks."

8. In connection with the establishment of the nature reserve, the applicant was offered SEK 275,000 as compensation for the encroachment of her property. No agreement on compensation was reached, however, and the applicant and the company, in 2002, instituted compensation proceedings under the Environmental Code against the State at the Environmental Court (*miljödomstolen*) in Växjö (see further below at § 12).

9. The applicant and the company appealed against the County Administrative Board's decision of 5 May 2003 to the Government which, on 23 October 2003, upheld the appealed decision.

10. The applicant and the company then requested a review of the Government's decision by the Supreme Administrative Court (*Regeringsrätten*) under the Act on Judicial Review of Certain Administrative Decisions (*Lagen om rättsprövning av vissa förvaltningsbeslut*, SFS 1988:205; hereafter "the 1988 Act"). They claimed that the property did not have such nature values that the establishment of a nature reserve was justified under the conditions of the Environmental Code. The existing values could instead be protected through a nature conservation agreement (*naturvårdsavtal*). Nor was the property of importance to public outdoor

life, as it was difficult to access. The appellants further argued that the impugned decision limited the right of ownership to such a far-reaching extent that it was to be equated with an expropriation and could not be considered as reaching a reasonable balance between public and private interests. Although the taxation value of the property was SEK 1,100,000 and the market value probably considerably higher, only SEK 275,000 had been offered as compensation by the State. Allegedly, while an expropriation under the Expropriation Act would have met the conditions regarding the protection of property under the Convention, the measures taken pursuant to Chapter 7 of the Environmental Code did not. Instead, the impugned decision circumvented both the Expropriation Act and the Convention.

11. The Supreme Administrative Court held an oral hearing, at which it heard two experts on behalf of the complainants. The two experts stated that the land was not of such importance that it merited the creation of a nature reserve. However, by a judgment of 2 June 2008 the court upheld the Government's decision, finding that the establishment of a nature reserve was in conformity with the relevant provisions of the Environmental Code (*Miljöbalken*), that there had not been any procedural irregularities that could have had a bearing on the decision and that there were no other reason to find that it contravened the law.

12. In the compensation proceedings before the Environmental Court, the applicant and the company have requested that the State be obliged to purchase the property for, in the first place, SEK 30,000,000 or be ordered to pay compensation with a similar amount for the depreciation of the property's market value, allegedly caused by the establishment of the nature reserve. They have also claimed interest as from 17 November 1998, the date of the County Administrative Board's interim decision. The State, represented by the Legal, Financial and Administrative Services Agency (*Kammarkollegiet*), has opposed a forced purchase and the claimed compensation for value depreciation. It has accepted that the company be compensated with SEK 440,000 for an infringement of its alleged business activities. In February 2004, at the applicant's request, the compensation case was adjourned pending the outcome of the Supreme Administrative Court's review of the decision to establish a nature reserve. The proceedings before the Environmental Court recommenced in June 2008 and the court held a preparatory hearing in the case on 17 June 2009. The parties have submitted several affidavits concerning the value of the land. The case is still pending.

B. Relevant domestic law and practice

13. The Environmental Code lays down the conditions under which a nature reserve may be created. According to Chapter 7, section 4,

subsection 1, a land or water area may be declared a nature reserve by a county administrative board or a municipality for the purpose of preserving biological diversity, protecting and preserving valuable natural environments or satisfying the need of areas for outdoor recreation. According to subsection 2 of the same provision, any area that is needed for the purpose of protecting, restoring or establishing valuable natural environments or habitats for species that are worthy of preservation may also be designated a nature reserve.

14. The second paragraph of the aforementioned provision has been drawn up to achieve coherence with the Birds Directive and the Habitats Directive. According to the preparatory works to the provision (Government Bill 1997/98:45, part 2, pp. 71-73), the creation of nature reserves presupposes that there are strong public interests in favour of such a measure. The fact that the preservation of biological diversity is a valid ground for creating a nature reserve emphasises that a comprehensive view should characterise the application of the provisions on the creation of a nature reserve. When determining the boundaries of a nature reserve, consideration should be had to the possible need of creating a "buffer zone" to achieve the purpose of preserving biological diversity. Hence, a larger nature reserve than the area in immediate need of protection may be created.

15. A decision establishing a nature reserve shall contain a statement of the reasons for the decision. The decision shall also specify any restrictions on the right to use land and water areas that are necessary in order to achieve the purpose of the reserve, such as prohibitions against development, the erection of fences, landfill sites, excavation, quarries, cultivation, ditching, planting, logging, hunting, fishing and the use of pesticides. Such restrictions may include prohibition of access to the area throughout the year or during parts of the year (Chapter 7, section 5 of the Code).

16. Where it is necessary in order to fulfil the purpose of a nature reserve, the county administrative board or the municipality may require owners of property and holders of special rights thereto to tolerate the following intrusions in the area (Chapter 7, section 6):

> 1. the building of roads, car parks, trails, rest hostels, camping sites, bathing places, sanitary facilities or similar amenities;
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> 2. public access to land in places where the public does not normally have a right of access;
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> 3. thinning, clearing, haymaking, planting, grazing, the erection of barriers or similar measures; or
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> 4. studies of animal and plant species and of soil and water conditions.

17. A county administrative board or municipality may in special circumstances grant exemptions from the rules it has issued for a nature reserve (Chapter 7, section 7).

18. When the creation of a nature reserve is considered, private interests shall be taken into account. Restrictions on the rights of private individuals to use land or water issued pursuant to Chapter 7 of the Code must therefore not be more stringent than necessary for the achievement of the purpose of the protection (Chapter 7, section 25).

19. Chapter 7, section 24 of the Code contains provisions on temporary prohibitions. Following a proposal that an area be protected as a nature reserve, a municipality or a county administrative board may impose a prohibition for a specified period of not more than three years against measures without prior permission which would affect the area and conflict with the purpose of the intended protection. A prohibition may be extended for a maximum period of two years. Similar rules applied under section 11 of the Nature Conservation Act (which was repealed at the time of the enactment of the Environmental Code).

20. Chapter 31 of the Code contains rules concerning the right to compensation for intrusions on property. It does not require the issue of compensation to have been resolved prior to a decision to create a nature reserve. Property owners are entitled to compensation when land is requisitioned or when the current use of the land is significantly hindered, if the decision contains restrictions issued, *inter alia*, pursuant to Chapter 7, section 5 or 6 (Chapter 31, section 4). Such compensation shall be reduced by an amount corresponding to the extent to which the property owner is obliged to accept the measure without compensation (Chapter 31, section 6). Compensation shall be paid by the State if the county administrative board has taken the decision for which the property owner is to be compensated (Chapter 31, section 7). If the creation of a nature reserve causes exceptional inconvenience for the current use of the property, the property owner may, instead of compensation, require that the property be bought in a compulsory purchase (*inlösen*; Chapter 31, section 8).

21. The county administrative board, acting on behalf of the State, shall aim to reach agreements with property owners who request compensation or claim that their property should be subject to compulsory purchase (section 34 of the Ordinance Concerning Area Protection Pursuant to the Environmental Code, Etc. – *Förordningen om områdesskydd enligt miljöbalken m.m.*, SFS 1998:1252). If no such agreement is concluded, a person who wishes to claim compensation or demand compulsory purchase shall – with certain exceptions irrelevant to the present application – bring an action before an environmental court against the party liable to pay compensation or purchase the property (Chapter 31, section 13 of the Code). An appeal against the judgment of the environmental court lies to the

Environmental Court of Appeal (*Miljööverdomstolen*; Chapter 23, section 1).

22. The right of common access to land (*allemansrätten*) is a general principle in Swedish law, based on custom. It is not regulated in any specific provision, but references are made to the principle in, *inter alia*, the Instrument of Government (*Regeringsformen*; Chapter 2, section 18) and the Environmental Code (Chapter 7, section 1). The exact scope of the right is not completely clear. In general terms, it comprises the right of the public to remain on properties of land and water which belong to others and to perform certain activities there, such as walking, picking of mushrooms and berries, making a fire or riding a horse, as long as these activities do not take place on land adjacent to houses or are carried out in a manner which ruins the property. It is a general limitation of the right of common access that its utilisation must not cause the property owners considerable damage or inconvenience.

COMPLAINT

23. The applicant complained under Article 1 of Protocol No. 1 to the Convention that the decision to establish a nature reserve violated her property rights.

THE LAW

24. The applicant complained that her property rights had been violated. She relied on Article 1 of Protocol No. 1 to the Convention, 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.

25. The Government contested the applicant's claim and submitted that the application was manifestly ill-founded. They argued that, as the applicant remained the owner of the property in question, she retained the right to use, lease and sell it, for which reason no deprivation of property had occurred. Moreover, the consequences which the establishment of the

nature reserve entailed for the applicant were not so serious as to amount to a *de facto* deprivation. Instead, the measures in question had been enforced to control the use of the property, within the meaning of the second paragraph of Article 1 of Protocol No. 1. In the Government's view, the decision to establish a nature reserve fulfilled all the conditions laid down in the Environmental Code and was thus lawful. As its purpose was to protect and preserve the biological diversity of the area and valuable natural environments and to satisfy the need of areas for outdoor recreation, it served legitimate aims in accordance with the general interest. Furthermore, the restrictions on the applicant's freedom to use her property imposed by the impugned decision had been limited as compared with what otherwise applied.

26. In the alternative, the Government maintained that the application was inadmissible for non-exhaustion of domestic remedies, referring to the ongoing compensation proceedings. They asserted that the compensation proceedings, which had been adjourned at the applicant's request pending the Supreme Administrative Court's review under the 1988 Act, had been delayed mainly due to the applicant's conduct in the review proceedings. She had made repeated requests for extensions of time-limits, including extensions for the submission of her additional observations which, in the end, totalled one year and nine months.

27. The applicant asserted that she had been deprived of practically all rights as owner of the property by virtue of the decision to establish a nature reserve and its far-reaching restrictions on use. Her right of use was no different from the right of common access pertaining to any member of the public. Through the decision and its restrictions the property had lost all economic value. In her view, the establishment of the nature reserve was tantamount to an expropriation, and the State should thus have expropriated the property and compensated her for its full value.

28. The applicant further contested that she had failed to exhaust domestic remedies. The judgment of the Supreme Administrative Court in regard to the establishment of the nature reserve was the final decision in the case. In any event, the compensation proceedings before the Environmental Court had taken a very long time, partly due to nine extensions of time-limits granted to the State in 2008-2011.

29. At the outset, the Court points out that the existence of the compensation proceedings before the Environmental Court was not mentioned by the applicant in the original application, although they had been initiated six years before the application was lodged. The Court became aware of these proceedings through the respondent Government's observations.

30. The Court reiterates that the purpose of Article 35 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are

submitted to the Convention institutions. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V, with further references).

31. Moreover, the Court has set out the general principles pertaining to the exhaustion of domestic remedies in a number of judgments. In *Akdivar and Others v. Turkey* ([GC], 16 September 1996, *Reports of Judgments and Decisions* 1996-IV) it held as follows (further case references – in brackets – deleted):

> "66. Under Article [35] normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (...).
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> Article [35] also requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (...).
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> 67. However, there is, as indicated above, no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the "generally recognised rules of international law" there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (...). ...
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> 68. In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (...). ...
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> 69. The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article [35] must be applied with some degree of flexibility and without excessive formalism (...). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (...). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants."

32. In the present case, the applicant claims that the establishment of a nature reserve on a large part of her property (27.5 out of a total of 33.6 hectares) has caused her economic damage as the property has lost all or almost all of its value. Accordingly, the heart of the matter is the issue of compensation for the alleged infringement of her rights as owner of the property.

33. In 2002 the applicant – together with the company – sued the State before the Environmental Court. These proceedings concern the right to compensation for intrusions on property in accordance with Chapter 31 of the Environmental Code (see § 20 above). These proceedings are clearly of relevance to the examination of the present case, partly because they provide a national remedy for a potential violation of the applicant's rights under Article 1 of Protocol No. 1 and partly because the possible compensation awarded could have a bearing on the question whether the alleged infringement of that provision was proportional or not.

34. The applicant has stated that the proceedings, which are still ongoing, have taken a very long time. While this is true, the Court notes that the proceedings are quite complex, as they involve a difficult assessment of the value of the property – for which many expert opinions have been submitted – and as they have been interrelated with the Supreme Administrative Court's review of the decision to establish the nature reserve. Moreover, substantial delays in the proceedings have been caused by the applicants themselves. In the Court's view, therefore, the compensation proceedings must be considered as offering an effective remedy within the meaning of Article 13 of the Convention for the violation alleged by the applicant. There are no special circumstances capable of exempting her from the obligation to exhaust that remedy.

35. The Government's objection must therefore be accepted and the complaint be declared inadmissible for non-exhaustion of domestic remedies within the meaning of Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Dean Spielmann
President