AS TO THE ADMISSIBILITY OF

Application No. 41242/98
by Ásmundur JÓNSSON et al
against Iceland

The European Commission of Human Rights (Second Chamber) sitting in private on 21 October 1998, the following members being present:

MM J.-C. GEUS, President
M.A. NOWICKI
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
I. CABRAL BARRETO
D. ŠVÁBY
P. LORENZEN
E. BIELIŪNAS
E.A. ALKEMA
A. ARABADJIEV

Ms M.-T. SCHOEPFER, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 23 March 1998 by Ásmundur JÓNSSON et al against Iceland and registered on 18 May 1998 under file No. 41242/98;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicants are Icelandic citizens, born in 1936 and 1938. They are resident in Suður-Þingeyjarsýsla. Before the Commission they are represented by Mr Magnús Thoroddsen, a lawyer practising in Reykjavík.

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

The applicants are farmers and the joint owners of a farm situated in the upper region of a salmon and trout river called the Laxá. It is an area whose natural features and ecosystem are considered to be unique.

In Iceland the water and fishing rights in rivers are owned by the landowners.

By Act of Parliament (No. 60/1956), an electrical power company called Laxárvirkjun was given a permit to construct a hydroelectrical power-plant (producing up to 12,000 kilowatts) in the river Laxá. In the late sixties the power company built an electric power-plant with a capacity of 54.6 megawatts. This caused anger among the inhabitants of the Laxár-valley.

On 18 and 19 May 1973 an agreement was signed between the power company, the local landowners' association (Landeigendafèlag Laxár og Mývatns) and the Government of Iceland. In this agreement the Government undertook to finance the construction of a fish-ladder alongside the power-station, ascending the ravines through which the Laxá flows to the upper region of the river, which the salmon had not previously been able to reach.

In a letter dated 6 May 1975 from the Nature Preservation Council (Náttýruverndarráð) to the Ministry of Finance (Fjármálaráðuneytið), the Council stated that, at a meeting on 28 April 1975, it had decided not to oppose a passage for salmon being opened to the upper region of the Laxá.

The construction of the fish-ladder was completed in 1980 and it was formally handed over to the landowners' association in 1981 but there were some faults in the construction so salmon were unable to ascend it. The landowners' association demanded that the ladder be improved so that salmon could ascend it and so that smolt, which had been put in tens of thousands into the upper region of the Laxá, could safely descend without getting killed in the turbines of the power-station on the way down.

In 1983 a new law, the National Power Company Act (No. 42/1983) (Lög nr. 42/1983 um Landsvirkjun) was enacted. As a result of that law the national power company Landsvirkjun took over the property of Laxárvirkjun.

In 1987 negotiations started between Landsvirkjun and the landowners' association on the improvement of the fish-ladder.

In a letter of 14 June 1990 the Nature Preservation Council announced its decision to oppose the transfer or passage of salmon past the power-plant. The Council's letter stated as follows:
[Translation]

"The Laxá is among the best known watercourses in Iceland, and the ecosystem of the Laxá and Mývatn is unique. The opinion of the board of the Mývatn Natural Research Establishment states that a transfer of salmon to the section of the Laxá upstream of the power-plant would involve significant risks for that ecosystem. The Icelandic Government have, by reason of the uniqueness of the Laxá and Mývatn area, placed it on a list of areas protected under the Convention on Wetlands of International Importance, especially as a Waterfowl Habitat, and thus assumed international responsibility for its protection. The Nature Preservation Council therefore considers that the risks inherent in such a transfer of salmon past the power-plant at Brúar on the Laxá river should not be taken, and decided at its meeting on 12 June 1990 to oppose the scheme."

As a result of this attitude, the Fishing Association (Veiðifélag Laxár og Krákár) sent a letter to the Council in an attempt to effect a change in its position. This was rejected in a letter of the Council dated 4 March 1991. The letter included the following passage:

[Translation]

"According to the Mývatn and Laxá Protection Act (No. 36/1974) (Lög nr. 36/1974 um Vendun Mývatns og Laxár í Suður Þingeyjarsýslu), changes to the lake surface levels and the flow of watercourses in the protected area are prohibited, except for the purposes of their protection or cultivation subject to the permission of the Nature Conservation Council. The dam considered in the draft agreement cannot in any manner be described as a structure designed for the purposes of protection or cultivation, and is therefore not allowed."

The landowners' association appealed against this decision to the Ministry for the Environment (Umhverfisráðuneytið) which upheld the Nature Preservation Council's decision on 31 October 1991.

On 25 November 1991 the Minister for the Environment rejected a compensation claim from the landowners against the Icelandic Treasury. The claim was also rejected by the Minister of Finance (Fjármálaráðherra) on 30 August 1994.

On 5 November 1995 the applicants introduced civil proceedings against the Icelandic State before the Reykjavík District Court (Héraðsdómur Reykjavíkur), seeking a declaration that the State was liable towards them in damages as a result of the above-mentioned refusal of the Icelandic authorities, which reduces the value of their property

rights in their farm. By judgment of the District Court of 27 September 1996, the applicants' claim was upheld.

On 17 December 1996 the Icelandic State appealed against the judgment to the Supreme Court (Hæstiréttur Íslands), which reversed it and found for the Icelandic State on 2 October 1997. The Supreme Court reasoned its judgment as follows:
[Translation]

"The Nature Conservation Council's decision of 12 June 1990 rejected the plans for further attempts to transfer salmon upstream of the Brúarfossar waterfalls in the Laxá. Its decision was based on the expert opinion that such transfer would involve significant risks to the ecosystem of the Laxá and Mývatn. The knowledge of that ecosystem was considerably greater in 1990 than at the time of the Laxá Agreement in 1973 and the years immediately following. A particular enactment had been passed in order to protect this ecosystem and to reduce the possibility of any action being taken in the area that conflicted with the best scientific evidence available at any particular time. ... It is not disputed that the Council had lawful authority to take the decision in question.

In the opinion of the respondent the Council's decision is to be regarded as a declaration of protection within the meaning of section 23 of the Nature Conservation Act then in effect, No. 47/1971. As regards compensation liability, they refer to sections 35 and 36 of the Act. Its section 35 grants the power to expropriate land, structures and ownership rights in order to implement a declaration of protection under that Act, and the first sentence of section 36 provides: "Any person who suffers financial loss as a result of the implementation of the above provisions shall be entitled to compensation from the State Treasury". As phrased, this latter provision can refer to any provision of the Act involving limitation of real property ownership rights. That interpretation would however lead to compensation liability on account of any financial loss ensuing from any limitation of real property ownership rights imposed under Act No. 47/1971. No arguments have been invoked in support of a compensation liability of such extent. We hold that section 36 is to be interpreted as only providing for compensation liability on account of a limitation of ownership rights if these are of such scope as to be analogous to expropriation within the meaning of section 72 of the Constitution, as amended by section 10 of Constitutional Enactment, No. 97/1995.

Act No. 36/1974 empowers the Nature Conservation Council to take decisions which may limit the exercise of the ownership rights of the landowners in the Mývatn and Laxá area, and which may, as the case may be, make the State liable for financial compensation. The Council's decision of 12 June 1990 was based on lawful and pertinent considerations, and it did not deprive the landowners and fishing right owners at the Laxá above Brúar of any rights of which they could have availed themselves previously. Their interest organisation was only prevented from carrying out measures which, in scientific opinion, jeopardised the Laxá and Mývatn ecosystem. The decision involved a limitation of the ownership rights of all landowners in the same situation, whose interests relate to the Laxá above Brúar. It is not relevant that this decision did not extend to all parties owning interests in the area prohibited by Act No. 36.1974, as the interests of the

landowners and fishing right owners above and below the Brúarfossar waterfalls in the Laxá are not comparable. When considering the special natural characteristics of the area above Brúar, the respondents are deemed not to have established that the Council's decision affected the equality of the landowners among themselves.

According to the above, the Nature Conservation Council's decision here in dispute is not held to have made the appellant liable for compensation under section 72 of the Constitution. It is therefore to be found free of all the claims of the respondents."

COMPLAINTS

1. The applicants claim, under Article 1 of Protocol No. 1 to the Convention, a violation of their right to the peaceful enjoyment of their possessions as they are prohibited from exploiting their fishing rights and as no compensation has been granted for this interference with their property.

2. The applicants further complain that they have been discriminated against on the basis of their geographical situation, as the restriction on the use of property affects only farmers who own land adjacent to the waters in their region, but not other farmers who own land bordering the Laxá beneath the power-plant, let alone all the other owners of fishing rights in Iceland. They invoke Article 14 of the Convention in this respect.

THE LAW

1. The applicants claim that their property rights have been interfered with as they are prohibited from exploiting their fishing rights and as no compensation has been granted for this interference with their property. They invoke 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.

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 Commission notes that the applicants have an exclusive right to use their own waters for fishing. However, the applicants are not allowed to put smolt into the upper waters of the Laxá and, in that way, exploit their fishing rights. The Commission considers that this constitutes an interference with the applicants' right to the peaceful enjoyment of their possessions as guaranteed by Article 1 of Protocol No. 1 to the

Convention. It must therefore be examined whether this interference is justified under the terms of Article 1.

Article 1 of Protocol No. 1 to the Convention guarantees the right of property. It comprises three rules. The first rule, which is set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, which is set out in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions. The third rule, which is set out 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. The three rules are connected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and are therefore to be construed in the light of the general principle enunciated in the first rule.

As regards the question whether the applicants have been deprived of property, the Commission recalls that, according to the established case-law of the Convention organs, deprivation of property within the meaning of Article 1 of Protocol No. 1 to the Convention is not limited to cases where property is formally expropriated. Deprivation may also exist when the measure complained of affects the substance of the property to such a degree that there has been a de facto expropriation or where the measure complained of can be assimilated to a deprivation of possessions (cf. Eur. Court HR, Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, p. 24, para. 63).

It is clear that the applicants have not been formally deprived of their property. They still retain the title to it. The applicants have not been deprived of their right to fish either. The interference relates only to the chance of a more lucrative use of the property concerned. Consequently, the Commission finds that the applicants were not deprived of their possessions and the second sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention does not apply.

The Commission considers that the restrictions on the applicants' property must be examined under the "control of use" rule in the second paragraph of Article 1 of Protocol No. 1 to the Convention. This provision must be understood to permit the enforcement of laws which are deemed necessary to regulate the use of property. The question of the justification of the interference must therefore be examined under the second paragraph of Article 1 of Protocol No. 1 to the Convention, to establish whether the interference was lawful, whether it pursued a general interest, and whether it was proportionate and therefore could be deemed necessary (cf. No. 11763/85, Dec. 9.3.89, D.R. 60, p. 141).

It is not disputed that the interference complained of was provided for by a law which served, furthermore, a legitimate aim in the general interest, i.e. the protection of the ecosystem of the river Laxá. The Commission also notes that, in the proceedings before the domestic courts, the applicants appear not to have argued that the authorities concerned had acted illegally or failed to perform the agreement between the power

company, the landowners' association and the Government of Iceland, signed on 18 and 19 May 1973. As regards the necessity test, the Commission finds that the Contracting States are left with a very wide margin of appreciation when restricting property rights for the purpose of nature conservation.

In weighing the conflicting interests it is of importance that the interference related only to the possibility of a more lucrative use of the property concerned as the applicants were not formally deprived of their property. The applicants had not been able to transfer salmon to the upstream of the Laxá previously and, as established by the Supreme Court in its judgment of 2 October 1997, they were only prevented from carrying out measures which, in scientific opinion, jeopardised the Laxá and Mývatn ecosystem.

The Supreme Court's decision was based on the fact that the knowledge of the ecosystem of the Laxá was considerably greater in 1990 than at the time when the previous agreement was reached in 1973 and even when the salmon ladder was constructed in 1981. A particular enactment had been passed in order to protect this ecosystem and to reduce the possibility of any action being taken in the area that conflicted with the best scientific evidence available at any particular time. Given the State's wide margin of appreciation in this domain, the Commission considers that the interference with the applicants' property right cannot in these circumstances be held to be disproportionate, even if the applicants did not receive any compensation.

Accordingly, the interference with the applicants' property right was justified under the terms of the second paragraph of Article 1 of Protocol No. 1 to the Convention.

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

2. The applicants further complain that they have been discriminated against on the basis of their geographical situation as the restriction in the use of property only effects the farmers who own land adjacent to the waters of the upper Laxá but not other farmers who own land bordering Laxá upstream of the power-plant or any other fishing-right-owners in Iceland. They invoke Article 14 of the Convention which reads as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Commission recalls that for a claim of a violation of Article 14 to succeed, it has to be established, inter alia, that the situation of the alleged victim can be considered similar to that of persons who have been better treated (Eur. Court HR, Fredin judgment of 18 February 1991, Series A no. 192, p. 19, para. 60). Furthermore, the Commission recalls that, for the purposes of Article 14 of the Convention, a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality

between the means employed and the aim sought to be realised (Eur. Court HR, Inze judgment of 28 October 1987, Series A no. 126, p. 18, para. 41).

As regards the alleged discrimination, the Commission has examined the complaint read in conjunction with Article 1 of Protocol No. 1 to the Convention and notes that the applicants' property is situated in an area which is considered to be unique as far as its natural features and ecosystem are concerned. A special statute on the protection of this area has been enacted by the Icelandic Parliament. As set out in the judgment of the Supreme Court the court's view was that the interference with the applicants' property involved a limitation of the ownership rights of all landowners in the same situation whereas the situation of other landowners or fishing right owners was not comparable. The Commission is of the opinion that it has not been established that the applicants were in a situation similar to that of other landowners who have been able to develop their property in the way the applicants would like to do.

An examination by the Commission of this complaint as it has been submitted does not, therefore, disclose any appearance of a violation of Article 14 of the Convention.

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

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER	J.-C. GEUS
Secretary	President
to the Second Chamber	of the Second Chamber