AS TO THE ADMISSIBILITY OF

Application No. 13625/88
by Siv ÖUNAPUU
against Sweden

The European Commission of Human Rights (Second Chamber) sitting in private on 14 October 1991, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
G. SPERDUTI
G. JÖRUNDSSON
A. WEITZEL
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ RUIZ
Mrs. J. LIDDY
Mr. M.P. PELLONPÄÄ

Mr. K. ROGGE, Secretary to the Second 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 9 June 1987 by Siv ÖUNAPUU against Sweden and registered on 23 February 1988 under file No. 13625/88;

Having regard to:

- the report provided for in Rule 47 of the Rules of Procedure of the Commission;

- the Commission's decision of 6 September 1990 to bring the application to the notice of the respondent Government and invite them to submit written observations on its admissibility and merits limited to the issue under Article 6 para. 1 of the Convention;

- the observations submitted by the respondent Government on 30 January and 22 May 1991 and the observations in reply submitted by the applicant on 30 March and 4 June 1991;

- the Commission's decision of 9 April 1991 to refer the application to the Second Chamber;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Swedish citizen, born in 1947 and resident at Malmö. She is a university student. Before the Commission the applicant is represented by Mr. Göran Ravnsborg, a university lecturer at Lund.

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

Particular circumstances of the case

The applicant was the owner of a property called Slätvaren 42 at Limhamn in the municipality of Malmö. She further owned an adjacent property called Slätvaren 2, which consisted of a narrow passage

permitting access for Slätvaren 42 to street P (Prångaregatan). Slätvaren 42 was situated alongside street S (Strandgatan).

According to a town plan adopted on 18 October 1983 Slätvaren 42 was granted an extended building right along street S. The plan indicated that if Slätvaren 42 was divided the building plot situated away from street S would be given a road easement (vägservitut) to street S over the plot closer to that street.

On 13 November 1985 the Building Committee (byggnadsnämnden) of Malmö adopted a proposal for division of building plots (tomtindelning). The proposal involved a division of Slätvaren 42 into two building plots, one called Slätvaren 48 and the other Slätvaren 49. The applicant's house is situated on Slätvaren 48. Having regard to the right to further construction allowed along street S Slätvaren 48 was given a road easement of a breadth of 2,5 metres and a height of 2,5 metres over Slätvaren 49 to that street. Slätvaren 2 was proposed to be added to the neighbouring property Slätvaren 1, as the passage was no longer considered necessary for Slätvaren 48.

The applicant opposed the proposal. She submitted that it was inconvenient to arrange an access from plot 48 to street S. It was better to keep Slätvaren 2 as a passage for access for plots 48 and 49 to street P. The applicant invoked Section 33 of the 1959 Building Ordinance (byggnadsstadgan, hereinafter "the 1959 ordinance").

On 16 July 1986 the County Administrative Board (länsstyrelsen) of the County of Malmöhus confirmed the division of building plots pursuant to Section 33 of the 1947 Building Act (byggnadslagen, hereinafter "the 1947 Act"). It found that Section 33 of the 1959 Ordinance did not prevent the division of building plots. Further, the taking of Slätvaren 2 for the purpose of enlarging another property created a better division of the properties in the area and the applicant had been compensated as the building right on Slätvaren 42 had been extended.

The applicant's appeal to the Government (Ministry of Housing) was rejected on 11 December 1986.

On 12 June 1987 Slätvaren 2 was transferred and added to Slätvaren 1 in accordance with the division of building plots. Following an agreement with the owner of that property the applicant was paid 8.505 SEK in compensation.

Relevant domestic law

Up to 1 July 1987 division of building plots was part of the planning system under the 1947 Act and the 1959 Ordinance. Under Section 28 of the 1947 Act a building block was to be divided into plots for the appropriate development in accordance with a town plan. A division was to take place at the request of the land owner or when the Building Committee found a division necessary and provided that the landowner could not reasonably argue that a division should not take place (Section 30).

Under Section 33 of the 1959 Ordinance the purpose of a division was to create a well-adapted, simple and clear division of a building block. Every property unit should have access to a street and regard was to be had to existing easements and property rights as well as to the express wishes of the property owner.

Under Sections 37 and 38 of the 1947 Act construction in a block which had not been divided into plots was prohibited. If a division had been carried out construction was allowed to the extent that it complied with that division. In both cases exemptions could be made for special reasons.

Under Section 34 para. 1 of the 1959 Ordinance a proposal for a division of building plots was to be made by a surveyor eligible to serve as Head of the Property Formation Authority. It was to be marked on a map and accompanied by a description. It further had to include the necessary easements. The division could be carried out provided the area was covered by a town plan and provided that it was in accordance with the conditions laid down in the 1970 Property Formation Act (fastighetsbildningslagen, hereinafter "the 1970 Act"). The division was adopted by the Building Committee and had to be confirmed by the County Administrative Board, from which an appeal lay to the Government.

The actual division of the property units was carried out by the Property Formation Authority (fastighetsbildningsmyndigheten). Under Chapter 3, Sections 1 and 2 of the 1970 Act property formation shall allow for each property unit to be permanently suitable for its purpose with respect to its location, size and other circumstances. Special regard should be had to the proper shape of the property and to its access to adjacent roads. The formation should correspond with the town plan or the division of building plots. However, exemptions from a town plan or a division of building plots could be allowed for special reasons provided that the derogation was in accordance with the purpose of the town plan.

When the property formation consisted of property regulation (fastighetsreglering) land could be transferred from one property to another (Chapter 5, Section 1). Moreover, the properties should be composed and shaped in a way which suited their purpose as well as before the property regulation. The property could not be changed in such a way as to decrease its value significantly (Chapter 5, Section 8).

If land was transferred from a property the owner had the right to compensation in money or by receiving other pieces of land. The parties could settle the question of compensation themselves (Chapter 5, Sections 2 and 18).

An easement created through a property regulation should be of essential importance to the purposeful use of the property benefiting from it. It could be created, changed or abolished without any formal request provided that this was important with regard to another measure involving a property regulation and if it was carried out in the same context (Section 10).

The Property Formation Authority's decisions with regard to property regulation, including the creation of easements, could be appealed against to a Real Estate Court (fastighetsdomstol), a specially composed District Court (tingsrätt). Further appeals lay to a Court of Appeal (hovrätt) and the Supreme Court (Högsta domstolen), in the latter case provided that leave to appeal was granted.

COMPLAINTS

1. The applicant alleges violations of Article 1 of Protocol No. 1 to the Convention on the ground that she has been forced to sell Slätvaren 2 without any "real" compensation and on the ground that Slätvaren 49 has been encumbered with an easement.

2. The applicant also alleges a violation of Article 6 para. 1 of the Convention on the ground that she has not had the possibility of a court review of the administrative decisions.

3. Finally, the applicant alleges violations of Articles 17 and 18 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 9 June 1987 and registered on 23 February 1988.

On 6 September 1990 the Commission decided to bring the application to the notice of the respondent Government and invite them to submit written observations on its admissibility and merits limited to the issue under Article 6 para. 1 of the Convention.

After an extension of the time-limit the Government's observations were submitted on 30 January 1991. The applicant's observations in reply were submitted on 30 March 1991.

On 9 April 1991 the Commission decided to refer the application to the Second Chamber.

Further observations were submitted by the Government on 22 May 1991 and by the applicant on 4 June 1991.

THE LAW

1. The applicant complains that she has been forced to sell her property Slätvaren 2 without any "real" compensation and that her property Slätvaren 49 has been encumbered with an easement. She alleges violations of Article 1 of Protocol No. 1 (P1-1) 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."

(a) Insofar as the complaint relates to Slätvaren 2 the Government submit that the transfer of this property to Slätvaren 1 amounted to a deprivation of the applicant's property. However, the complaint is manifestly ill-founded, as the deprivation was carried out in accordance with Swedish law and pursued a legitimate aim, that is to create a sensible division of the building block for the purpose of development, and as the applicant has not been made to carry an individual and excessive burden. Slätvaren 2 was so narrow that it could not serve as a passage for cars. A widening of Slätvaren 2 would have had negative effects for other property owners. Both Slätvaren 48 and 49 were owned by the applicant, who, through the town plan, was allowed to erect a further building on the last-mentioned property. It seemed natural to arrange for both her properties to have the same access to a street. Moreover, in 1987 the applicant received compensation for Slätvaren 2 in the amount of 8.505 SEK. This sum was considerably higher than the purchase price paid by her in 1983, namely 4.200 SEK, and must be regarded as reasonably related to the value of the property.

The applicant contends that Slätvaren 2 has always served a road function naturally and frequently used by the owners of Slätvaren 42. The width of the passage was quite enough for pedestrians.

The Commission recalls that Article 1 of Protocol No. 1 (P1-1) comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property; the second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions;

and the third rule, stated in the second paragraph, recognises that Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (Eur. Court H.R., Allan Jacobsson judgment of 25 October 1989, Series A No. 163, p. 16, para. 53).

The Commission considers that the transfer of Slätvaren 2 to Slätvaren 1 was a deprivation of the applicant's property which should be examined under the second sentence of the first paragraph of Article 1 of Protocol No. 1 (P1-1). The Commission must examine whether this deprivation was "in the public interest" and "subject to the conditions provided for by law" and "by the general principles of international law".

As regards the general principles of international law the Commission recalls that this condition does not apply to the taking by a State of the property of its own nationals (Eur. Court H.R., Lithgow and Others judgment of 8 July 1986, Series A No. 102, p. 50, para. 119). Consequently, this condition is not applicable in the present case since the applicant, who was deprived of her property by Sweden, is of Swedish nationality. It remains to be examined whether the interference satisfied the other two conditions.

As regards the question whether the deprivation was carried out in the "public interest" the Commission observes that the purpose of the deprivation, as stated in Section 28 of the 1947 Act and Section 33 of the 1959 Ordinance, was to create a well-adapted division of the building block for the purpose of development. This is a legitimate public interest for the purposes of the first paragraph of Article 1 of Protocol No. 1 (P1-1), even to the extent that it may imply the compulsory transfer of property from one individual to another (cf. Eur. Court H.R., Håkansson and Sturesson judgment of 21 February 1990, Series A No. 171, p. 15, para. 44, with further reference).

As regards the lawfulness of the deprivation the Commission recalls that its power to review compliance with domestic law is limited (see e.g. above-mentioned Håkansson and Sturesson judgment, p. 16, para. 47). It observes that the transfer of Slätvaren 2 to Slätvaren 1 was carried out in accordance with the 1970 Act. The measure thus had a basis in Swedish law. The Commission is therefore satisfied that the deprivation was lawful.

Finally, as regards the proportionality of the interference, Article 1 of Protocol No. 1 (P1-1) requires a reasonable relationship of proportionality between the means employed and the aim pursued. This implies that the owner shall not have to bear "an individual and excessive burden" (above-mentioned Håkansson and Sturesson judgment, p. 17, para. 51, with further reference). The Commission observes that the applicant in 1987 received 8.505 SEK for Slätvaren 2, while the price paid by her in 1983 was 4.200 SEK. The price received by her must be considered reasonable in relation to the value of the property (cf. above-mentioned Håkansson and Sturesson judgment, p. 18, para. 54). In these circumstances, and having regard to the wide margin of appreciation enjoyed by Contracting States under Article 1 of Protocol No. 1 (P1-1), the Commission concludes that the applicant has not been made to carry an individual and excessive burden.

Consequently, the interference with the applicant's right to peaceful enjoyment of her possessions was justified under the terms of the second sentence of the first paragraph of Article 1 of Protocol No. 1 (P1-1).

It follows that this complaint is manifestly ill-founded within

the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

(b) Insofar as the complaint relates to the easement established on Slätvaren 49 the Government submit that it is manifestly ill-founded. The easement constitutes a measure to control the use of the applicant's property and was a prerequisite for the transfer of Slätvaren 2 to Slätvaren 1. Therefore, the reasons justifying that transfer also justify the easement, which was established in the general interest. Moreover, there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The applicant contends that because of the easement the future building on Slätvaren 49 will have to include a 17 metres long tunnel highly disproportionate to that building as a whole. The annual costs for the tunnel will amount to 30.000 SEK. Had the applicant been allowed to keep and even widen Slätvaren 2 the neighbours would not have been burdened with any comparable costs or inconveniences.

The Commission considers that the easement established on Slätvaren 49 constitutes a measure of control of the use of the applicant's property which falls to be examined under the second paragraph of Article 1 of Protocol No. 1 (P1-1).

Under the second paragraph of Article 1 of Protocol No. 1 (P1-1) the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest by enforcing such laws as they deem necessary for the purpose. However, there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In striking the fair balance thereby required between the general interest of the community and the requirements of the protection of the individual's fundamental rights, the authorities enjoy a wide margin of appreciation (above- mentioned Allan Jacobsson judgment, p. 17, para. 55).

As regards the "general interest" served by the easement, the Commission notes that the easement served an aim under the 1947 Act, that is to create a well-adapted division of the building block for the purpose of development. This is a legitimate general interest for the purpose of the second paragraph of Article 1 of Protocol No. 1 (P1-1).

As regards the lawfulness of the easement the Commission notes that the easement was established in accordance with the 1970 Act and thus had a basis in Swedish law. The Commission is therefore satisfied that the easement is lawful.

As regards the proportionality of the interference, the Commission observes that both the property encumbered by the easement and the property which benefited from the easement belong to the applicant who previously, in the town plan, had been granted an extended building right on the first-mentioned property. However, under Section 37 of the 1947 Act such further construction was, in principle, dependent on whether a division of building plots had been carried out. As regards the tunnel which allegedly would have to be created in the case of future construction, the Commission cannot speculate on the possible inconveniences or costs caused by such an obligation.

In these circumstances, and having regard to the wide margin of appreciation enjoyed by the Contracting States under Article 1 of Protocol No. 1 (P1-1), the Commission finds that the interference with the applicant's right to the peaceful enjoyment of her possessions was justified under the second paragraph of Article 1 of Protocol No. 1 (P1-1).

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

2. The applicant further complains that she could not obtain a court review of the administrative decisions. She alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention, which reads, insofar as it is relevant:

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

The Government submit that, although the ownership of Slätvaren 2 was not transferred to the owner of Slätvaren 1 merely as a result of the division of building plots, this was decisive for the subsequent property formation proceedings which led to that transfer of ownership. The Government therefore do not contest the admissibility of this complaint and admit a violation of Article 6 para. 1 (Art. 6-1) of the Convention in that the applicant had no access to court to challenge the division of building plots.

The Commission finds that this complaint is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. As no other ground for declaring it inadmissible has been established the complaint must be admitted.

3. The applicant finally alleges violations of Articles 17 and 18 (Art. 17, 18) of the Convention.

Article 17 (Art. 17) of the Convention reads:

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Article 18 (Art. 18) of the Convention reads:

"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

The Commission finds no appearance of any violation of Articles 17 or 18 (Art. 17, 18) of the Convention.

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

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the complaint under Article 6 para. 1 (Art. 6-1) of the Convention;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)