AS TO THE ADMISSIBILITY OF

Application No. 21236/93
by Gärdh PERSSON
against Sweden

The European Commission of Human Rights sitting in private on 25 November 1996, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ

Mr. H.C. KRÜGER, Secretary to the Commission

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 November 1992 by Gärdh Persson against Sweden and registered on 25 January 1993 under file No. 21236/93;

Having regard to the reports provided for in Rule 47 of the Rules of Procedure of the Commission; Having regard to the information submitted by the applicant on 28 May 1993, 1 March, 19 April, 11 May and 6 June 1994, 10 March 1995 and on 18 March and 12 September 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Swedish citizen, born in 1937 and resident in Spånga. She brings the application both in her own name and on behalf of her late son Kjell Persson, born in 1965 and deceased in 1992. Before the Commission she is represented by Ms. Siv Westerberg, a lawyer practising in Gothenburg.

This is the applicant's second application to the Commission. The first one (No. 14451/88) concerned her right of access to her son while he was placed in a nursing home as well as her right to a court review of the prohibition of such access. In the Commission's Report of

14 April 1994, as later upheld by the Committee of Ministers, a violation was found of both Article 8 and Article 6 para. 1 of the Convention.

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

The applicant's son was seriously disabled from birth, suffering from tetraplegia and various other illnesses. Prior to his death he was being cared for by the applicant in their home. As he was unable to eat solids he received nourishing liquids through a probe. Occasionally, he would be in need of intravenous injections at the St. Göran hospital in Stockholm.

On 20 June 1992 - Midsummer Day - the applicant's son was again brought to the hospital after having removed his feeding-probe apparently at about 11.30-12.00 hrs. Allegedly, he arrived at the emergency ward of the hospital at 14.30 hrs, apparently because the taxi for the disabled was delayed. Only at about 16.00 hrs was he examined by a doctor despite the applicant's assertion that her son could become dehydrated already after four hours of not receiving any liquid. Following the examination the doctor ordered that the applicant's son should be given an intravenous glucose injection. This was, however, never done despite the applicant's subsequent reminders.

At 19.30 hrs the applicant's son was transferred to ward no. 52, where a nurse failed in her attempt to give him the injection. She then asked a nurse at the anaesthetic clinic to help her. The other nurse, however, declined to do so, referring to other duties.

On 21 June 1992 at 01.30 hrs the applicant's son died. According to the autopsy report, the final and certain death cause was respiration and circulation failure caused by dehydration. His tetraplegia, his very reduced weight and his bronchitis also contributed to his death.

On 19 November 1992 the applicant reported her son's death to the Disciplinary Board of Health and Medical Care (hälso- och sjukvårdens ansvarsnämnd) pursuant to the 1980 Act on the Supervision of Health and Medical Care Staff and Others (lag 1980:11 om tillsyn över hälso- och sjukvårdspersonalen m.fl.). The Disciplinary Board obtained a copy of the applicant's sons's patient records covering the two years preceding his death. It also obtained written submissions from the hospital staff from which the following appeared:

Dr. NN, on duty at the emergency ward on 20 June until 21.00 hrs, had examined the applicant's son around 16.00 hrs as soon as his symptoms had been presented to her by the duty nurse. Dr. NN had then been informed by the applicant that her son was extremely sensitive to dehydration. Dr. NN had found that he was dehydrated but not to such an extent that he was in need of emergency treatment. On the basis of her medical findings and the information provided by the applicant Dr. NN had prescribed a glucose injection in addition to the feeding-probe which was to be put back in place. She had also prescribed various blood tests and a temperature check. These tests had sought, inter alia, to verify the existence of a possible infection which could contribute to the dehydration. Dr. NN had then gone over with the nurse how the re-installation of the probe and the intravenous injection could best be administered. The staff on ward no. 52 knew the applicant's son well and were aware of the difficulties encountered in implementing such measures. The tasks were therefore shared between the emergency ward and ward no. 52. The nurse at ward no. 52 with previous experience of putting the feeding-probe back was to deal with that matter, while the most experienced nurse on the emergency ward was to administer the intravenous injection. Shortly before 21.00 hrs Dr. NN had been telephoned by the duty nurse on ward no. 52, who had requested anaesthetic staff to assist her, as she was experiencing difficulties

in administering the injection. Dr. NN had agreed to asking for such assistance but had not been informed of any deterioration of the patient's condition. Nor had she later been informed that no anaesthetic specialist had been able to come to the nurse's assistance. Before going off duty she had reported to Dr. AG that the patient had been prescribed an intravenous injection in addition to the feeding-probe.

Dr. AG, a specialist in internal medicine on duty at the hospital from 20 June at 17.00 hrs to 21 June 11.00 hrs, had not himself examined the applicant's son but had been informed by Dr. NN that an intravenous glucose injection had been prescribed. He had not later been informed that this injection had not been administered. He had been called to ward no. 52 on 21 June at 01.30 hrs only to note that the patient was already dead.

Ms. IK, duty nurse on the emergency ward on 20 June 1992, had received the applicant and her son on their arrival at 16.35 hrs and not at 14.30, as asserted by the applicant in her petition to the Disciplinary Board. On this point Ms. IK referred to the various annotations made in the ward's records. The applicant had told Ms. IK that her son had pulled out his feeding-probe sometime before noon. The applicant had objected to putting the probe back in place, as her son had been vomiting. She had preferred that he be given an intravenous injection. She had shown the nurse that he had only one blood vessel where an injection could be given. She had held her son while Ms. IK had stuck the needle into him. At that very moment he had begun to vomit significantly and Ms. IK had had to interrupt her attempt to inject the glucose. She had then requested help from the anaesthetic clinic and had been promised assistance within half an hour. As no one showed up she had renewed her request only to be informed that the anaesthetic staff were occupied with an urgent operation and could not know when assistance could be provided. The applicant's son was then moved to ward no. 52. The staff of that ward were informed by Ms. IK that the anaesthetic clinic would contact that ward directly in the assistance matter.

Ms. LO, the duty nurse on ward no. 52 on 20 June 1992 until 21.00 hrs, had been informed by Dr. NN that the applicant's son had removed his probe. Ms LO knew him from his previous stays on the ward. When he was transferred to that ward around 19.00-19.30 hrs his feeding-probe had already been put back in place. Ms. LO had prepared tea which the applicant had begun to serve to her son through the probe. Ms. LO had twice tried to administer the intravenous injection but, having failed, she had contacted the anaesthetic nurse so as to obtain assistance. She had been informed that the nurse was very occupied due to an operation but that assistance would be provided as soon as possible. Ms. LO had reported this to the night nurse who had taken over at 21.00 hrs.

Ms. PÖ, the duty nurse on ward no. 52 on 20 June 1992 as from 21.00 hrs, had been informed by Ms. LO that an intravenous injection had been prescribed to the applicant's son; that Ms. LO had repeatedly failed in attempting to administer the injection; and that assistance to this end was expected from the anaesthetic staff once they had finished with their operation. The applicant had asked Ms. PÖ whether she would try to administer the injection. Ms. PÖ had declined to do so, referring to Ms. LO's failed attempts and the promised assistance from anaesthetic staff. Soon after she had started her shift she and the other night staff on the ward had noticed that the applicant's son had seemed to be in a worse condition than during his previous stay there. On two occasions the applicant had inquired as to when the anaesthetic staff would show up. As that staff had already been contacted on several occasions in the matter Ms. PÖ did not contact them again but recommended that the applicant keep feeding her son liquid through his probe. Ms. PÖ had wanted to avoid causing unnecessary pain to the patient by again attempting to inject the glucose and possibly destroying the blood vessels which the anaesthetic

staff could use. From the patient's previous stay on the ward Ms. PÖ had learnt that it was extremely difficult to administer injections on him. Late in the evening she had received the results from the laboratory tests which had shown no acute signs of dehydration. On 21 June at 01.05 hrs Ms. PÖ had been called to the applicant's son's room, where the assistant nurse had arrived in response to the applicant's urgent request. The applicant had been holding her son in her arms and had asked the assistant nurse to help her suck out liquid which had apparently gone into the trachea. Ms. PÖ had noticed that the patient was showing no sign of life and had asked the applicant to put him down on the bed so as to enable the staff to commence heart massage and other emergency measures. At 01.25 hrs these measures had been stopped.

According to Dr. MB, Assistant Professor and Senior Physician in charge of the medical clinic, there were at the relevant time two physicians on duty until 22.00 hrs and at nighttime one. Further physicians, anaesthetic and surgical staff could be called in from their homes. The applicant's fears that her son would become dehydrated were contradicted by the laboratory tests; at least there was no question of any serious dehydration. During his last hours he had been receiving a certain amount of liquid through his probe and possibly also by a spoon. The exact cause of his death was very difficult to assess. However, his very weak general condition, a beginning infection and a certain dehydration probably interacted.

Dr. BS, Assistant Senior Physician on duty at the anaesthetic clinic, had been called to ward no. 52 on 21 June at about 01.00 hrs. On his arrival the applicant's son had already been dead. Dr. BS had not been informed of the request for assistance from the anaesthetic clinic for the purpose of administering the intravenous injection.

Ms. IN, the anaesthetic nurse on duty, had received such a request for assistance at about 19.40 hrs. She had then been occupied with an operation but had promised to come to ward no. 52 as soon as possible. She had not been informed that the matter was urgent. She had been occupied with several consecutive operations and, being the sole anaesthetic nurse, she had been unable to leave the operation ward.

According to Dr. JW, Senior Physician in charge of the anaesthetic clinic, there were, among other staff, one nurse on duty on the anaesthetic ward and one physician on duty. A further physician could be called in from his home. Due to an urgent operation the anaesthetic staff had been unable to respond to the initial requests for assistance in administering the intravenous injection to the applicant's son. Similar requests for assistance had also been made on behalf of other patients. Should the applicant's son have been in imminent need of the prescribed injection, he could have been transferred to a different ward or the other physician could have been called in to the clinic. However, no information had indicated that the patient had been in a critical state.

On 8 January 1993 the Disciplinary Board invited the applicant to comment on the above submissions. On 26 February 1993 she maintained her complaint and requested that the Disciplinary Board obtain her son's complete patient records so as to enable it to get a full picture of his care needs.

On 28 May 1993 the applicant reported the incident to the police. On 9 June 1993 a pre-trial investigation was opened concerning suspected negligence causing her son's death. The Public Prosecutor requested the National Board of Health and Social Welfare (Social-styrelsen) to reply to the following questions:

1. Was the cause of the applicant's son's death only dehydration?

2. Would the intravenous injection have prevented his

death?

3. If so, at what moment should the intravenous injection have been administered?

The National Board of Health and Social Welfare requested two members of its Scientific Council (Vetenskapliga rådet) to submit their views on the incident.

On 13 August 1993 the Disciplinary Board informed the Public Prosecutor that pursuant to the 1980 Act the applicant's petition would not be examined pending possible criminal charges.

In his opinion of 4 November 1993 Professor EV, member of the Scientific Council, considered that the applicant's son's immune system and possibility of coping with the absence of nutrition had been limited. At the time of his death he had weighed only some 27-28 kilograms. A blood test had shown the existence of an infection and the autopsy report had confirmed that he had been suffering from bronchitis. Professor EV therefore concluded that the death cause could not have been dehydration alone. Moreover, although the applicant's son had been more sensitive to a 12-hour-long absence of liquid than a normal patient would have been, this absence had scarcely been such that the intravenous injection of liquid would have saved his life.

In her opinion of 13 December 1993 Associate Professor MA, member of the Scientific Council, shared Professor EV's views. She noted that lung infections quickly become life-threatening if the patient has a deformed thorax (which the applicant's son had).

In its opinion to the Prosecutor dated 10 January 1994 the National Board of Health and Social Welfare endorsed the opinions of Professor EV and Associate Professor MA.

On 18 January 1994 the Chief Prosecutor (chefsåklagaren) of Stockholm decided to close the pre-trial investigation.

On 27 January 1994 the Disciplinary Board invited the applicant to comment on the opinions submitted by the National Board of Health and Social Welfare, Professor EV and Associate Professor MA. She contested their views on 23 February 1994.

On 25 February 1994 the applicant requested the Regional Prosecutor of Stockholm to review the Chief Prosecutor's decision of 18 January 1994. On 13 April 1994 the Superior Prosecutor (överåklagaren) of Stockholm upheld that decision. On 25 April 1994 the Prosecutor-General (Riksåklagaren) declined to examine the matter.

In its decision of 26 May 1994 the Disciplinary Board noted that the applicant's son had been hospitalised on about 60 occasions, mostly due to complications related to his probe-feeding. His medical state had often been difficult to diagnose both by virtue of external and X-ray examinations. He had been sensitive to infections and had suffered from various complications related to his severe disability. In the circumstances of the case the Disciplinary Board found that none of the officials reported by the applicant could be blamed for having, either deliberately or by negligence, failed to fulfil their professional duties. In particular, the fact that none of the three nurses IK, LO and PÖ had been able to administer the intravenous injection could not be criticised. Nor was there any reason to believe that the applicant's son had been in imminent need of that injection or of any other emergency treatment. There was thus no reason for Ms. IN to call in additional staff. The organisational charts of the medical and anaesthetic clinics were similar to those generally applied nationwide.

In her appeal to the Administrative Court of Appeal (kammarrätten) of Stockholm the applicant requested that a further

expert independent from Professor EV and Associate Professor MA be appointed to assess her son's treatment. She also repeated her request that his complete patient records be perused.

On 8 March 1995 the Administrative Court of Appeal upheld the Disciplinary Board's decision without having acceded to the applicant's requests. On 2 September 1996 the Supreme Administrative Court (Regeringsrätten) refused leave to appeal.

According to the 1980 Act, an official who has, either deliberately or by negligence, failed to fulfil his or her professional duties in a way which cannot be considered insignificant, may be punished by a disciplinary sanction in the form of a remark or a warning (section 12). Disciplinary proceedings take place before the Disciplinary Board of Health and Medical Care at the request of the National Board of Health and Social Welfare, the patient or a close relative of the patient (sections 19 and 24). As of 1 October 1994 the 1980 Act was replaced by Act No. 1994:954 (lag om disciplinpåföljd m.m. på hälso- och sjukvårdens område).

According to the 1972 Tort Liability Act (skadeståndslag 1972:207), the State, a municipality or a similar public organ is liable for personal or pecuniary damage caused by fault or negligence by a public official when carrying out an activity for which the State or the municipality is responsible (chapter 3, section 2). Such actions for damages are examined by ordinary civil courts.

According to the Code of Judicial Procedure (rättegångsbalken), a complainant has an independent standing in criminal proceedings. He or she may therefore pursue a private prosecution, if the Public Prosecutor has decided not to bring charges in spite of the complainant's request for such action in a matter falling under public prosecution (chapter 20, section 8, subsection 1). A private claim against an accused in consequence of a suspected offence may be joined with the criminal charges brought either by the Public Prosecutor or the complainant (chapter 22, section 1).

COMPLAINTS

1. The applicant complains both in her own name and on behalf of her deceased son that the failure of hospital staff to ensure that he was given the intravenous injection led to his death. The negligence allegedly took place because he was disabled. The applicant invokes Article 2 para. 1 of the Convention, both separately and in conjunction with Article 14.

2. The applicant also complains of a violation of her right to respect for her family life. In this respect she invokes Article 8 of the Convention.

3. The applicant furthermore complains that she had no right to a court review of the decision of the hospital staff not to give her son the intravenous injection. She invokes Article 6 of the Convention.

4. The applicant finally complains that the proceedings before the Disciplinary Board and the administrative courts lasted too long. She again invokes Article 6 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 9 November 1992 and registered on 25 January 1993.

On 11 May 1993 the Commission decided, in accordance with Rule 48 para. 2 (a) of its Rules of Procedure to request certain further information from the applicant. Such information was submitted on 28 May 1993, 1 March, 19 April, 11 May and 6 June 1994, 10 March 1995 and on 18 March and 12 September 1996.

THE LAW

1. The applicant complains both in her own name and on behalf of her deceased son that the failure of hospital staff to ensure that he was given the intravenous injection led to his death. The negligence allegedly took place because he was disabled. The applicant invokes Article 2 para. 1 (Art. 2-1) of the Convention, both separately and in conjunction with Article 14 (Art. 2-1+14).

Article 2 para. 1 (Art. 2-1) reads, in so far as relevant, as follows:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally ..."

Article 14 (Art. 14) 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."

(a) For the purpose of examining the present case, the Commission will assume that the respondent State may in principle be held responsible for the treatment of the applicant's son at St. Göran's hospital. Turning first to the complaint under Article 2 para. 1 (Art. 2-1) in isolation, the Commission recalls that the first sentence of that provision imposes an obligation on Contracting States not only to refrain from taking life "intentionally" but also to take appropriate steps to safeguard life. The State's positive obligation to protect life implies regulatory measures for hospitals and an efficient judicial system permitting the cause of death in a hospital and the possible liability of the doctors or the hospital to be established. If there is no indication that the authorities arbitrarily assessed the evidence before them, the Commission must rely on the facts established by those authorities (No. 20948/92, Dec. 22.5.95, D.R. 81-B pp. 35, 39-40 and the further references therein; cf. also No. 23412/94, Dec. 30.8.94, D.R. 79-A pp. 127, 135-137).

The Commission notes that the applicant's son's death was investigated, on the one hand, by the police and the Public Prosecutor and, on the other hand, by the Disciplinary Board of Health and Medical Care. The Disciplinary Board had regard to the expert opinions submitted at the request of the Public Prosecutor. It also heard the hospital staff either directly involved in or ultimately responsible for the applicant's son's treatment on 20-21 June 1992. Finally, it investigated the manner in which the work had been organised at the clinics responsible for his treatment.

The Commission observes that the applicant had ample opportunity to contest the various submissions to the Disciplinary Board. An appeal to an administrative court lay open to her against its decision. In the absence of any indication that the authorities arbitrarily assessed the evidence before them and given that no fresh evidence has been brought before the Commission, it must rely on the facts established on the domestic level. In the circumstances of the case it cannot find any appearance of negligence on the part of hospital staff. Accordingly, there is no appearance of a violation of Article 2 para. 1 (Art. 2-1) in isolation.

(b) As regards the alleged discrimination of the applicant's son, the Commission recalls that Article 14 (Art. 14) complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the

enjoyment of the rights and freedoms" safeguarded by those provisions. For the purposes of Article 14 (Art. 14) a difference in the treatment of persons in "relevantly" similar situations is discriminatory if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (cf., e.g., Eur. Court HR, Karlheinz Schmidt v. Germany judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, para. 24; Fredin v. Sweden judgment, Series A no. 192, p. 19, para. 60).

In the present case the Commission finds no indication that the applicant's son was subjected to discriminatory treatment during his hospital stay from 20 to 21 June 1992. Accordingly, there is no appearance of a violation of Article 14 (Art. 14) of the Convention in conjunction with Article 2 para. 1 (Art. 2-1).

(c) It follows that this complaint must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant furthermore complains of a violation of her right to respect for her family life. In this respect she invokes Article 8 (Art. 8) of the Convention which, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his ... family life, ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission has found no appearance of a violation of Article 2 (Art. 2) of the Convention and considers that no further issue arises under Article 8 (Art. 8).

It follows that this complaint must also be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant furthermore complains that she had no right to a court review of the decision of the hospital staff not to give her son the intravenous injection. She invokes Article 6 (Art. 6) of the Convention which, in so far as it is relevant, reads as follows:

> "1. In the determination of his civil rights ..., everyone is entitled to a ... hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

The Commission recalls that the applicability of Article 6 (Art. 6) depends on whether there was a dispute over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, and, if so, whether this right was of a "civil" character within the meaning of Article 6 para. 1 (Art. 6-1). In particular, the dispute must be genuine and serious, it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise and, finally, the results of the proceedings concerning the dispute must be directly decisive for such a right (cf., e.g., Eur. Court HR, Zander v. Sweden judgment of 25 November 1993, Series A no. 279-B, p. 38, para. 22). The notion of a dispute should be given a substantive rather than a formal meaning (cf., e.g., Eur. Court H.R., Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June

1981, Series A no. 43, p. 20, para. 45).

Assuming that Article 6 para. 1 (Art. 6-1) is applicable in respect of the present grievance, the Commission notes that under domestic law the applicant could have instituted criminal proceedings against the hospital staff allegedly responsible for her son's death. She could also have lodged a civil tort action for damages. In examining such a criminal or civil action the courts would have examined the alleged failure of hospital staff to administer the intravenous injection to her son.

In these circumstances the Commission considers that the actions which the applicant was entitled to bring before the Swedish courts constituted a sufficient court remedy for the purposes of Article 6 (Art. 6) of the Convention. Accordingly, there is no appearance of any violation of this provision on this point.

It follows that this complaint must also be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant finally complains that the proceedings before the Disciplinary Board and the administrative courts lasted too long. She again invokes the above-cited Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission notes that the applicant chose to institute disciplinary proceedings against hospital staff in lieu of privately prosecuting them or claiming damages in civil proceedings. The disciplinary proceedings resorted to were not decisive, for the purposes of Article 6 para. 1 (Art. 6-1), for the establishment of her right to compensation, since she could not assert that right in the disciplinary proceedings. Accordingly, the outcome of those proceedings was not decisive for any "civil right" of hers (cf. Eur. Court HR, Hamer v. France judgment of 7 August 1996, paras. 75-78, to be published in Reports of Judgments and Decisions for 1996; No. 22836/94, Dec. 29.11.95, unpublished). Accordingly, Article 6 para. 1 (Art. 6-1) does not apply to the disciplinary proceedings.

It follows that this complaint must be rejected as being incompatible ratione materiae with the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission