AS TO THE ADMISSIBILITY OF

Application No. 23735/94
by Harry PERSSON
against Sweden

The European Commission of Human Rights (First Chamber) sitting in private on 26 February 1997, the following members being present:

Mrs. J. LIDDY, President
MM. E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, 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 6 May 1993 by Harry PERSSON against Sweden and registered on 22 March 1994 under file No. 23735/94;

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

Having regard to the observations submitted by the respondent Government on 28 June 1996 and the observations in reply submitted by the applicant on 29 August 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Swedish citizen born in 1935, resides in Luleå. He is, since 1994, the sole owner of the real property Gautsträsk 1:16 situated within the municipality of Sorsele in the north of Sweden.

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

In September 1985, the applicant reported H.F., a tenant of a nearby summer cottage, to the police, claiming that he had illegally constructed and cleared a road on Gautsträsk 1:16, at the time owned by the applicant's father, and that he had, for this purpose, cut down trees on the property. In August 1989, after the police had investigated the matter, the applicant was informed that the case had been closed by the chief prosecutor as there was no evidence of any

criminal offence having been committed.

In October 1989, H.F. bought part of the property Gautsträsk 1:20, on which the summer cottage was situated. On 6 December he applied to the Real Estate Formation Authority (Fastighetsbildnings-myndigheten - "the Authority") for a partition (avstyckning). Later, he further requested that an easement (servitut) be established, giving him a right to use the above road located on Gautsträsk 1:16 and five other neighbouring properties (fastighetsreglering). After the death of the applicant's father, Gautsträsk 1:16 was, at this time, owned by the applicant, his mother and his two sisters.

On 31 August 1990 the Authority summoned the property owners concerned, including the applicant, to a meeting concerning the issues raised by H.F.'s application. The meeting was to take place at the property bought by H.F. The date of the meeting was erroneously given as 12 August 1990 instead of 12 September 1990. A new summons with the correct date was allegedly sent less than a week before the meeting.

In a letter to the Authority of 5 September 1990, the owners of Gautsträsk 1:16 opposed that H.F. should be allowed to use the road on their property as it was unsuitable in several respects. If it was necessary for H.F. to cross their property, they proposed that another road be constructed at a different location north of the road used by H.F. and that it be jointly owned and maintained by the property owners in the area (vägsamfällighet). The applicant further submitted his own survey of the roads in the area dated 26 February 1990. In this survey, he claimed that the road on their property was actually a track which had been used since the 1930's for walking and cycling and since the 1960's by a few stray cars. On aerial photographs from the 1960's and the 1970's the track was allegedly hardly perceptible. No major change had occurred until the beginning of the 1980's when H.F. started to use the road also in wintertime and cleared it from snow.

The applicant was not present at the meeting on 12 September 1990. He was, however, represented by his mother who opposed the establishment of an easement. The other property owners concerned approved. The Authority inspected the locus in quo (syn), including the alternative road location proposed by the owners of Gautsträsk 1:16.

By decision of 12 September 1990, the Authority decided to allow the partition. It further decided that Gautsträsk 1:16 and the other five properties in question be encumbered with an easement in accordance with H.F.'s application. As regards the easement, the Authority stated the following:(translation)

> "An easement is established for an access road encumbering Gautsträsk 1:16 and other properties. The easement is established in regard to an already existing road. The road has a suitable location on moderately broken ground. The road is used by the owners of the agricultural properties Gautsträsk 1:20, 1:21, 1:22, 1:13 and 1:26 as well as the owner of a summer cottage built on the property Gautsträsk 1:20. It is therefore not unreasonable that also the owner of the partitioned plot, H.F., may use the road. The alternative proposal concerning a road to the north is inferior. The lie is more hilly and the standard of the road is lower.
> ...
>
> The easement regarding the right to use the road is established without agreement [between the property owners].
> ...
>
> The established easements are of considerable importance as

required by Chapter 7, Section 1 of the Real Estate Formation Act [Fastighetsbildningslagen, 1970:988].
...

No compensation has been claimed. Thus, no compensation is to be paid."

The applicant appealed against the decision in so far as it concerned the easement. He called into question the impartiality of the land surveyor (förrättningslantmätare) who had conducted the proceedings and claimed that the summons had been served too late. He requested that a new meeting be held by a different surveyor and that summons be served to this meeting at least two weeks in advance.

The Authority agreed with the applicant's complaint that he had been called too late to the first meeting. On 7 November 1990 it therefore summoned the property owners to a new meeting and declared invalid the decisions taken on 12 September. The summons was sent to the applicant's permanent address in Luleå. In the summons the land surveyor declared that if there were no new circumstances he intended to affirm the previous decisions. The second meeting was to be held at the Land Surveyors' Office in Lycksele on 26 November 1990.

The applicant received the summons by forwarded mail on 15 November 1990 in Stockholm where he was at the time attending a course on town and country planning. He contacted the Authority by phone the same day and requested that the meeting be cancelled as he was unable to attend due to his studies. In letters to the Authority dated 19 and 25 November, he reiterated the request. He complained that the time between serving of the summons and the meeting was insufficient, maintaining that at least four weeks' notice should have been given. He also criticised, inter alia, the land surveyor's declared intention to affirm the previous decisions and the designated location of the second meeting, 130 km away from the properties concerned, which allegedly made it very difficult for the parties to attend. He further maintained his position as to the unsuitability of the road in question. The applicant's request for a cancellation of the second meeting was rejected and the meeting was held as scheduled by the same land surveyor. Again, the applicant was absent but represented by his mother. The Authority decided on the same day to allow the partition and establish the road easement. In the decision, reference was made to the reasons stated in the decision of 12 September. The applicant and the other owners of Gautsträsk 1:16, who had now claimed 13,000 SEK as compensation, were awarded compensation of 50 SEK, as the encumbrance on their property was considered to be minimal.

The applicant and the other owners of Gautsträsk 1:16 appealed to the Real Estate Court (Fastighetsdomstolen). On 14 March 1991 the court summoned the parties to a hearing to be held in Sorsele on 28 May 1991.

The hearing was held as scheduled. The applicant was present but not the other owners of Gautsträsk 1:16. The owners were represented at the hearing by a lawyer. They requested, in the first place, that the road easement be declared null and void in so far as it concerned their property and, in the second place, that they be awarded compensation of 10,000 SEK. The court inspected the area but did not view the alternative road location proposed by the appellants, although they had requested the court to do so.

On 2 July 1991 the Real Estate Court, agreeing with the Authority's assessments concerning the easement, upheld the appealed decision in all respects. It noted, inter alia, that about 60 metres of the road for which the easement had been established was located on Gautsträsk 1:16 and that it was connected to the country road at a more right angle than indicated on the map drawn up by the land surveyor.

The court, which was unanimous, consisted of two professional judges, one technical expert (fastighetsråd) and two lay judges.

The applicant and the other owners of Gautsträsk 1:16 appealed to the Court of Appeal of Upper Norrland (Hovrätten för Övre Norrland). They requested, firstly, that the decisions of the Authority and the Real Estate Court be quashed and the case be referred back to the Authority for new proceedings and, secondly, that the easement encumbering their property be declared null and void. They maintained their position as to the merits of the case. As to the location of the road for which the easement had been established, they recalled that the Real Estate Court had noted that it was connected to the country road at a right angle and not obliquely as indicated on the map drawn up by the land surveyor and as erroneously outlined on an economic map (ekonomisk karta).

The appellants further complained of the proceedings in the case. They reiterated their complaints relating to the proceedings before the Authority and further complained that the Authority had corresponded with them by handwritten notes. With respect to the proceedings of the Real Estate Court, they complained that it had failed to inspect the location of the alternative road. They further called into question the impartiality of the two lay judges of the Real Estate Court. In 1987, one of them, the head of the Forestry Board (Skogsvårdsstyrelsen) at Sorsele, had allegedly informed the applicant's mother that he found the road for which the easement was later established to be unnecessary for forestry purposes. Moreover, in a letter to the appellants in January 1990, he had expressed that he had examined the economic map and found that the road was marked on it. The appellants therefore claimed that, before the proceedings in the Real Estate Court, this lay judge had expressed his opinion that the road was authorised by the economic map. The complaints against the other lay judge concerned the fact that she had the same family name as H.F., their opponent in the case, and therefore might be related to him.

On 28 February 1992 the Court of Appeal, which did not hold a hearing in the case, upheld the Real Estate Court's decision on the merits. With respect to the procedural complaints lodged by the appellants, the Court of Appeal first found that the summons to the Authority's second meeting had not been served too late. The Court of Appeal rejected also the other procedural complaints concerning the proceedings before the Authority. As regards the proceedings before the Real Estate Court, the Court of Appeal noted that it had been appropriate for that court to inspect also the alternative road location but that its failure to do so did not constitute such a procedural error which would give reason to quash its decision and refer the case back to it for a new examination. The complaints concerning the participation of the lay judges in the Real Estate Court were also rejected, as it had not been shown that there were reasons to doubt their impartiality in the case. This latter decision was final.

The applicant and the other owners of Gautsträsk 1:16 thereafter appealed to the Supreme Court which, however, refused them leave to appeal on 10 November 1992.

COMPLAINTS

1. The applicant complains that he did not have a fair hearing in accordance with Article 6 of the Convention.

As regards the proceedings of the Real Estate Formation Authority, he submits that the summons to the Authority's meetings were served too late and that the second meeting on 26 November 1990 was held at a location which made it impossible for him to attend.

He also contends that the proceedings before the Real Estate Court were unfair and that the court was not impartial. He refers to the court's failure to inspect the alternative road location proposed by the owners of Gautsträsk 1:16 and the participation of the two lay judges in the court's examination of the case. Furthermore, the minutes of the court's hearing were allegedly incomplete and the chairman of the court behaved brusquely towards the lawyer representing the owners of Gautsträsk 1:16.

2. The applicant further claims that the decisions taken by the Authority and the courts in his case were not in accordance with the provisions of the Real Estate Formation Act and thus unlawful. He contends that the road for which the easement was established was unsuitable and inferior to the proposed alternative road. Moreover, the easement was not of considerable importance to H.F.'s property. It also created environmental damage on Gautsträsk 1:16. In this connection, the applicant asserts that land surveyors have been given almost unlimited powers to take arbitrary decisions affecting the individual's rights. He invokes Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention.

3. Further under Article 1 of Protocol No. 1, the applicant claims that the police and the public prosecutor failed to properly consider his complaints concerning the measures undertaken by H.F. on Gautsträsk 1:16.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 6 May 1993 and registered on 22 March 1994.

On 12 April 1996 the Commission (First Chamber) decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure. The Government were asked to deal with the questions whether the applicant had a fair hearing given the fact that the Real Estate Court did not inspect the alternative road location and whether the participation of the head of the Forestry Board at Sorsele as lay judge in that court gave rise to doubts as to the court's impartiality.

The Government's written observations were submitted on 28 June 1996 after an extension of the time-limit fixed for that purpose. The applicant replied on 29 August 1996.

THE LAW

1. The applicant complains that he did not have a fair hearing in accordance with Article 6 (Art. 6) of the Convention.

As regards the proceedings of the Real Estate Formation Authority, he submits that the summons to the Authority's meetings were served too late and that the second meeting on 26 November 1990 was held at a location which made it impossible for him to attend.

He also contends that the proceedings before the Real Estate Court were unfair and that the court was not impartial. He refers to the court's failure to inspect the alternative road location proposed by the owners of Gautsträsk 1:16 and the participation of the two lay judges in the court's examination of the case. Furthermore, the minutes of the court's hearing were allegedly incomplete and the chairman of the court behaved brusquely towards the lawyer representing the owners of Gautsträsk 1:16.

Article 6 (Art. 6) of the Convention reads, in relevant parts, as follows:

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

The respondent Government maintain that the complaint is manifestly ill-founded. As regards the Real Estate Court's failure to inspect the alternative road location, they submit that the decision whether to hold an inspection must be left to the discretion of the national courts, which are better equipped to assess the necessity thereof. Only in exceptional circumstances could a national court's decision in this respect be considered as a violation of Article 6 (Art. 6) of the Convention. The Government refer in this connection to the established case-law of the European Court of Human Rights with regard to the admittance of evidence. With respect to the present case, the Government state that the minutes of the proceedings of the Real Estate Formation Authority, which contained notes regarding the alternative road location, was available to the Real Estate Court and formed part of the basis for its judgment in the case. Thus, as the relevant information was available, that court did not find it necessary to inspect the alternative road location. According to the Government, there are no exceptional circumstances in the case that could warrant the conclusion that this decision fell outside the court's discretion.

As regards the Real Estate Court's alleged impartiality, the Government maintain that the statements made by the lay judge employed by the Forestry Board concerned mere facts and had no bearing on whether or not the easement should be established on the road in question. The statements were not such as to undermine confidence in the impartiality of that lay judge. The applicant's fears in this respect were not objectively justified.

The applicant submits that the failure of the Real Estate Court to inspect the alternative road location was a serious mistake which affected the outcome of the case, as it had been very difficult for the applicant and other land owners to communicate with the Real Estate Formation Authority and discuss the alternative, as the proceedings of the court were held in a very hostile attitude and as the court might have misunderstood which alternative was proposed by the applicant.

On the issue of impartiality, the applicant states that the lay judge employed by the Forestry Board had given the applicant's mother legal advice regarding the road in question. As an employee of the Board, he should not function as a lay judge as such commitments make the Board useless as adviser in legal matters and involve a risk of partiality.

The Commission first notes that the dispute in the present case concerned measures which affected the applicant's right to use his property. The proceedings in the case thus determined the applicant's civil rights within the meaning of Article 6 (Art. 6) of the Convention.

The Commission recalls that the Real Estate Formation Authority, at its meeting on 12 September 1990, inspected the locus in quo, including the alternative road location proposed by the applicant and the other owners of Gautsträsk 1:16. The applicant was not present at this meeting, but he was represented by his mother, at the time a co-owner of the property. The information gathered and the conclusions drawn by the land surveyor were available to the Real Estate Court when it decided not to hold a further inspection of the alternative location. Furthermore, the Commission notes that the applicant was present at the court's hearing and that there is no indication that he was unable to submit to the court any documentary evidence he saw fit.

In these circumstances and accepting the Government's view that the assessment whether certain evidence is necessary for the

determination of a case is primarily a matter for the national courts, the Commission considers that the failure of the Real Estate Court to inspect the alternative road location did not render the proceedings unfair.

With respect to the alleged partiality of the Real Estate Court, the Commission notes that the lay judge employed by the Forestry Board, before the court proceedings, had allegedly stated that he considered the road for which the easement was later established to be unnecessary for forestry purposes and that he had found that the road in question was marked on an economic map.

However, the easement was not established for forestry purposes. Furthermore, it appears undisputed that the road was marked on the economic map as the applicant, in his appeal to the Court of Appeal, claimed that it was erroneously outlined on that map. The Commission therefore considers that there were no objectively justified reasons to doubt the impartiality of this lay judge. With respect to the applicant's other complaints in regard to the proceedings in the case, the Commission finds that they do not reveal any appearance of a violation of the applicant's rights under Article 6 (Art. 6) of the Convention.

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

2. The applicant further claims that the decisions taken by the Authority and the courts in his case were not in accordance with the provisions of the Real Estate Formation Act and thus unlawful. He contends that the road for which the easement was established was unsuitable and inferior to the proposed alternative road. Moreover, the easement was not of considerable importance to H.F.'s property. It also created environmental damage on Gautsträsk 1:16. In this connection, the applicant asserts that land surveyors have been given almost unlimited powers to take arbitrary decisions affecting the individual's rights. He invokes Article 6 (Art. 6) of the Convention and Article 1 of Protocol No. 1 (P1-1) to the Convention.

As to the applicant's complaint that the decisions taken by the Authority and the courts in his case were not in accordance with the applicable legal provisions and thus unlawful, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. In particular, it is not competent to deal with a complaint concerning errors of law or fact allegedly committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention or its Protocols. The Commission refers, on this point, to its established case-law (cf., e.g., No. 10153/82, Z. and E. v. Austria, Dec. 13.10.86, D.R. 49 p. 67, and No. 12013/86, Alberti v. Italy, Dec. 10.3.89, D.R. 59 p. 100).

The applicant also complains, however, that the establishment of the easement violated his rights under Article 1 of Protocol No. 1, (P1-1) which provides the following:

> "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 provision 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."

In this respect, the Commission first notes that the applicant was not deprived of his possessions as a result of the decisions taken in his case. However, the decisions constituted a measure of controlling the use of his property falling under the second paragraph of the above provision. Such a measure is permissible in the general interest if there exists a reasonable relationship of proportionality between the means employed and the aim pursued. In striking a fair balance between the general interest of the community and the requirement of protection of the individual's fundamental rights, the authorities enjoy a wide margin of appreciation (cf. Eur. Court HR, Allan Jacobsson v. Sweden judgment of 25 October 1989, Series A no. 163, p. 17, para. 55). In the present case, the Commission recalls the Real Estate Formation Authority's decision of 26 November 1990, upheld on appeal, according to which the established easement was of considerable importance and the road in question was used by several properties in the area. The Authority further considered that the alternative road location was inferior. The Commission, therefore finds that the establishment of the easement was in the general interest within the meaning of the second paragraph of Article 1 of Protocol No. 1 (P1-1). Moreover, as the road was used by several properties in the area, the encroachment on the applicant's property resulting from the easement established for the benefit of the plot bought by H.F. must be considered minimal. In these circumstances and having regard to the above-mentioned margin of appreciation, the Commission does not consider the relevant decisions, including the award of compensation, to be disproportionate to the requirements of the general interest.

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.

3. Further under Article 1 of Protocol No. 1 (P1-1), the applicant claims that the police and the public prosecutor failed to properly consider his complaints concerning the measures undertaken by H.F. on Gautsträsk 1:16.

Noting that the applicant was informed in August 1989 of the chief prosecutor's decision to close the investigation of the matter and that, thus, this complaint has in any event been lodged after the expiration of the time-limit laid down in Article 26 (Art. 26) of the Convention, the Commission recalls that there is no right under the Convention to have criminal investigations or proceedings instituted against other persons.

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber