CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

AS TO THE ADMISSIBILITY OF

Application no. 67070/01
by Nergul SALI
against Sweden

The European Court of Human Rights (Second Section), sitting on 10 January 2006 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr V. BUTKEVYCH,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 27 February 2001,

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

Having deliberated, decides as follows:

THE FACTS

The applicant, Nergul Sali, is a Swedish national, who was born in 1968 and lives in Malmö. She is represented before the Court by Alexander Broch, a lawyer practising in Malmö. The Government are represented by their agent, Mrs Anita Linder of the Ministry for Foreign Affairs.

A. The circumstances of the case

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

In November 1989 the applicant and her brother started a grocer's shop called *Kungsgatans Jourbutik HB*. On 22 September 1993 the business was turned into a limited partnership and called *Kungsgatans Jourbutik KB.* The applicant's partnership was limited to a share worth 100 Swedish kronor (SEK), equal to approximately 10 euros (EUR).

It appears that, from March 1990 until September 1993, the applicant obtained financial support either in the form of sickness benefits or parental benefits (*föräldrapenning*).

Subsequently, the applicant applied to the Grocer's Unemployment Fund (*Köpmännens Arbetslöshetskassa*; hereafter the Fund), to which she had been a contributor since 1 October 1986, for the grant of unemployment benefit as from 4 October 1993. Her application was refused on 24 November 1993 on the grounds that she did not fulfil the requirement of being unemployed as set out in section 4 of the Unemployment Insurance Act (*lag om arbetslöshetsförsäkring*, 1973:370), according to which an owner of a business can only be deemed unemployed when the business no longer exists, and when this is due to other than accidental circumstances. The Fund noted that the notion "no longer exists" normally entails selling the real estate or giving up rented premises, and deregistration. It considered that the applicant had maintained a strong connection to the business, which continued to be run by the family.

The applicant's re-application was refused by the Fund on 20 December 1993.

On 5 January 2004 the applicant appealed against the decision to the National Labour Market Board (*Arbetsmarknadsstyrelsen*), which on 30 November 1994 upheld the decision.

On 24 February 1995 the applicant submitted an appeal against the Boards' decision, which was rejected by the latter as having been lodged too late. The applicant complained about this decision to the County Administrative Court in Stockholm (*Länsrätten i Stockholm*), arguing that her counsel had miswritten the date of receipt of the appeal decision. On 18 April 1995 the County Administrative Court confirmed the decision to reject the appeal, which the applicant appealed against to the Administrative Court of Appeal in Stockholm (*Kammerrätten i Stockholm*). On 20 June 1995, the Court of Appeal set aside the decision of the Board and the County Administrative Court, and referred the case back to the Board. The Board upheld its previous decision, against which, on 7 July 2005, the applicant lodged an appeal with the County Administrative Court. In her written pleadings, she maintained that her partnership in the business with SEK 100 had been for purely practical reasons, as otherwise her brother

would have had to re-register as a one-man firm, and consequently all previous trade agreements would have had to be changed accordingly. An oral hearing was not held before the County Administrative Court and the applicant did not ask for one to be held.

By judgment of 22 February 1996, the County Administrative Court found against the applicant.

On 1 March 1996 the applicant requested leave to appeal against that judgment to the Administrative Court of Appeal in Stockholm and on 23 May 1997 she requested, in addition, that an oral hearing be held in the leave to appeal proceedings. The latter request was refused on 30 April 1997 on the grounds that it was deemed unnecessary in the circumstances of the case and, by decision of 11 November 1997, the Administrative Court of Appeal refused her leave to appeal.

On 27 January 1998 the applicant requested that the Supreme Administrative Court (*Regeringsrätten*) grant her leave to appeal and that an oral hearing be held in the leave to appeal proceedings. By letter of 4 May 1998, the Supreme Administrative Court informed the applicant that oral hearings were not normally held before it, thus she was invited to submit her pleadings in writing within three weeks. By letter of 3 June 1998, the applicant maintained her request for an oral hearing in the leave to appeal proceedings as she found that the case raised problems under the Convention. Leave to appeal was refused by the Supreme Administrative Court on 31 August 2000.

B. Relevant domestic law and practice

Unemployment Insurance Act

Unemployment insurance may cover both employees and the self-employed. It is administered by a number of unemployment insurance funds which must be registered. A fund must have a least 10,000 members in order to be registered. The members elect a number of delegates, who in turn elect the fund's Board of Directors. The insurance is financed through membership fees, employments taxes and State subsidies. Although framed as private insurance, the Swedish unemployment insurance scheme is still characterized by several public-law features. Thus, the State has assumed responsibility for regulating its framework. The law regulates the activities of the fund as well as the latter's conditions of membership, in particular the requirements for compensation from the fund.

According to section 4 of the Unemployment Insurance Act (*lagen om arbetslöshetsförsäkring*, 1973:370; "the 1973 Act", which was replaced in 1998), a self-employed person was considered unemployed when his or her personal involvement in the business had permanently ceased, unless the National Labour Market Board, for special reasons, provided otherwise. In

principle, this meant that all business assets and real property had to be sold. This was deemed necessary in order to prevent unemployment insurance from being used to supplement the income of less profitable businesses (see Government Bill 1973:56 p. 175). For this reason, the case-law became strict and the relatives of the self-employed would also have difficulties qualifying for unemployment benefits. In 1984, and anew in 1992, the Government recommended a certain alleviation of the rules regarding the rights of the self-employed to unemployment benefits (see Government Bill 1983/84:126 and 1992/93:150). As from 1 July 1993 an amendment was made, which stated that a person who owns or is part owner – directly or indirectly – of a business in which he is personally active and has substantial influence, is considered self-employed.

In order to be granted unemployment benefits a person must fulfil a number of requirements regarding membership and work (sections 4 and 6 of the 1973 Act). Other basic requirements are that the person must be unemployed, be looking for a job, and no obstacles should exist preventing him or her from working. Such conditions must persist throughout the period of payment.

Procedure

The unemployment insurance fund is responsible for decisions about the payment of unemployment benefits. According to section 96a of the 1973 Act, an unemployment insurance fund should reconsider its decision at the request of the insured person. Before 1 October 1995, complaints about the fund's decision were lodged with the National Labour Market Board, which decision could be appealed to the county administrative courts (section 97 and 98 of the 1973 Act). Further appeals lay, subject to the grant of leave to appeal, to an Administrative Court of Appeal and the Supreme Court of Appeal. As of 1 October 1995, complaints about a fund's decision are no longer lodged with the Board but directly with the county administrative courts.

The procedure in the administrative courts is governed by the provisions of an Act of 1971. Section 9 provides:

> "The proceedings shall be in writing.
>
> An oral hearing may be held with regard to a certain issue when there is reason to assume that that would assist in the proceedings or be conducive to the speedy determination of the case.
>
> In the Administrative Court of Appeal and the County Administrative Court, an oral hearing shall be held if requested by an individual party to the proceedings, if it is not unnecessary and there are no particular reasons against holding a hearing (*I kammarrätt och länsrätt skall muntlig förhandling hållas, om enskild som för talan i målet begär det samt förhandlingen ej är obehövlig och ej heller särskilda skäl talar mot det*)".

In these circumstances, it was not possible for an individual party to obtain an oral hearing on request before the Supreme Administrative Court.

From the case-law of the national courts, it appears that the grounds stated in the third paragraph of section 9 for refusing an oral hearing have been interpreted as being alternative rather than cumulative (see *Regeringsrättens Årsbok* 1997 *ref* 62).

According to the preparatory work to the 1971 Act, an oral hearing could be a valuable supplement to written proceedings and could benefit the examination of a case in two particular situations: firstly, when it was necessary to hear a witness, an expert or a party or when it was difficult for a party to present the case in writing and, secondly, when different positions in the case needed to be resolved in order to eliminate unnecessary or pointless issues of dispute. In the latter case, the oral hearing takes on a preparatory character. It was stressed, however, that an oral hearing should not be seen as an alternative to the written procedure but as a supplement to it (see Government Bill 1971:30, p. 535).

It was further stated, in respect of the third paragraph of section 9, that a party's request for an oral hearing should be given close consideration. However, such a request should not have a decisive influence on the matter, as the question whether an oral hearing was necessary was to be determined primarily on the basis of the available information in the case. However, other circumstances could be of relevance, for instance the importance for the party of the matter at stake or the possibility that an oral hearing could enhance the party's understanding of a future decision in the case. Nevertheless, if the case was of a trivial character or the costs of an oral hearing would be disproportionate to the value of what was at stake in the case, this would be reason not to hold an oral hearing (see Government Bill 1971:30, p. 537).

COMPLAINTS

The applicant complained under Article 6 of the Convention that she was not granted an oral hearing in the leave to appeal proceedings before the Administrative Court of Appeal and the Supreme Administrative Court.

Moreover, she complained that the length of the proceedings exceeded the "reasonable time" requirement of the said provision.

Finally, she complained that the refusal to grant her unemployment benefit was in breach of Article 1 of Protocol No. 1 to the Convention.

THE LAW

1. The applicant complained under Article 6 of the Convention that she was not granted an oral hearing in the leave to appeal proceedings before the Administrative Court of Appeal and the Supreme Administrative Court. Article 6 § 1 of the Convention reads insofar as relevant as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, ... to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The Court reiterates that, in proceedings before a court of first and only instance, the right to a "public hearing" under Article 6 § 1 entails an entitlement to an "oral hearing" unless there are exceptional circumstances which justify dispensing with it. Also, provided a public hearing has been held at first instance, a less strict standard applies to the appellate level, at which the absence of such a hearing may be justified by the special features of the proceedings at issue. Thus, leave to appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court. Regard must be had to the nature of the national appeal system, to the scope of the appellate court's powers and to the manner in which the applicant's interests are actually presented and protected in the appeal, particularly in the light of the nature of the issues to be decided by it, and whether these raise any questions of fact or law which cannot be adequately resolved on the basis of the case file. The Court considers that this less strict standard should also apply if an oral hearing has been waived at first instance and requested only on appeal. In the interests of the proper administration of justice, it is normally more expedient that a hearing be held at first instance rather than later before the appellate court (see, for instance, *Miller v. Sweden*, no. 55853/00, §§ 29-30, 8 February 2005).

Turning to the particular circumstances of the present case, the Court notes that the applicant, represented by a lawyer throughout the proceedings, did not ask for an oral hearing at first instance before the Administrative Court in Stockholm, and her complaint now before the Court did not relate thereto. The Court therefore finds that she can reasonably be considered to have waived her right to a hearing at first instance.

Moreover, the Administrative Court of Appeal and the Supreme Administrative Court only determined whether or not leave to appeal should be granted and, as a consequence of their refusals to grant leave, did not make a full examination of the applicant's case.

Finally, in the circumstances of the present case, the Court is satisfied that the question whether or not to grant leave to appeal could be adequately resolved on the basis of the case file and the written submissions, and that, accordingly, the absence of an oral hearing before the Administrative Court of Appeal and the Supreme Administrative Court was justified.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

2. The applicant next complained under Article 6 § 1 that the length of the proceedings exceeded the "reasonable time" requirement of that provision.

The Government submitted that the proceedings commenced on 30 November 1994, when the National Labour Marked Board decided to reject the applicant's request for unemployment benefit, and ended on 31 August 2000, when the Supreme Administrative Court decided not to grant leave to appeal. Thus, the relevant period lasted five years and nine months.

When assessing the reasonableness of the length of the proceedings, the Government found that account should be taken of the applicable legislation which had been amended just before the applicant applied for unemployment benefits. They added that, in general, questions regarding the right to unemployment benefits for the self-employed are more complicated than others.

Moreover, they maintained that the applicant had contributed to the length of the proceedings, at least for a couple of months around June 1995, by not explaining from the very beginning that her counsel had miswritten the date of receipt of the National Labour Market Board's decision.

Finally, the Government submitted that there were no periods of inactivity for which the authorities could be criticised.

The applicant maintained that the proceedings commenced on 24 November 1993, when the National Labour Market Board gave its first decision, and that the proceedings thus lasted six years and nine months.

In her view the case was not complex, and she noted that the Government had failed to present any evidence as to the nature of the alleged complications in the case or how these should have affected the length of the proceedings.

The applicant agreed that she was responsible for delaying the proceedings for a couple of months, but maintained that, nevertheless, the overall length of the proceedings had exceeded the reasonable time requirement.

In particular, she found it open to criticism that it took the Supreme Administrative Court two years and seven month to refuse her leave to appeal, particularly since the case was determined merely on the basis of the case file.

The Court considers, in the light of the criteria established in its case-law on the question of "reasonable time" (the complexity of the case, the applicant's conduct and that of the competent authorities), and having regard to all the information in its possession, that an examination of the merits of this complaint is required.

3. The applicant complains that the refusal to grant her unemployment benefit was in breach of Article 1 of Protocol No. 1 to the Convention, which provides 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 Government alleged that Swedish unemployment insurance is financed mainly through public funds as opposed to membership fees, and that therefore it may be argued that entitlement to unemployment insurance is not a "possession" within the scope of Article 1 of Protocol No. 1 to the Convention.

Should the Court not agree, the Government submitted that the refusal to grant the applicant unemployment benefit constituted an interference with her property rights, which falls to be dealt with under the first sentence of the said Article, that it was "in accordance with the law", and a fair balance was struck between the demands of the general interest and those of the applicant.

In the Government's view, restrictive legislation regarding the right to unemployment benefits for the self-employed was necessary to protect the long-term stability and financing of the unemployment insurance scheme. Moreover, it had not been unreasonable to assume that the applicant was still a self-employed person whose business had not ceased. The applicant could easily have disposed of her share in the partnership, thereby refuting one of the main reasons for not granting her unemployment benefits.

The applicant submitted that entitlement to unemployment insurance was a "possession", within the scope of Article 1 of Protocol No. 1, and pointed out that, in this respect, the funds were similar to Government funds. Moreover, disputes related thereto may be brought before the administrative courts, which generally only examine litigation between the individual and the State. She contested the Government's allegation that Swedish unemployment insurance is financed mainly through public funds as opposed to membership fees.

The applicant pointed out that, since 1986, she had made substantial contributions to the unemployment fund, and therefore expected to receive

the benefits once she qualified for them. Accordingly, she found that the refusal to grant her such benefits could be characterised as an expropriation.

Finally, she maintained that as a limited partner she did not have any influence within the business or any rights under the Partnership Act. She had kept her share in the limited partnership for purely practical reasons, as otherwise her brother would have had to re-register as a one-man firm and, consequently, all previous trade agreements would have had to have been changed.

With regard to the question whether unemployment insurance may be considered to fall within the scope of Article 1 of Protocol No. 1 to the Convention, the Court refers to its case-law set out in its decision of 6 July 2005 in *Stec and Others v. the United Kingdom* ([GC], nos. 65731/01 and 65900/01, §§ 42-54, ECHR 2005-....). Notably, that there is no longer any justification for distinguishing between contributory and non-contributory benefits for the purpose of the applicability of the said Article.

The Court finds it unnecessary to examine this issue further, but will proceed on the assumption that the refusal to grant the applicant unemployment benefit constituted an interference with her peaceful enjoyment of possessions, for the purpose of Article 1 of Protocol No. 1. It thus remains to be determined whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

The Court accepts that restrictive legislation on unemployment benefits for the self-employed may be in the general interests of the community in order to protect the long-term stability and financing of the unemployment insurance scheme.

According to section 4 of the 1973 Act, a self-employed person was considered unemployed when his or her personal involvement in the business had permanently ceased, unless the National Labour Market Board, for special reasons, provided otherwise. In principle, this meant that all business assets and real property had to be sold. As of 1 July 1993 the law was amended, so that a person who owns or is part owner – directly or indirectly – of a business in which he or she is personally active and has substantial influence, is considered self-employed.

In the present case the applicant and her brother had established the business together in November 1989. It appears that the applicant worked physically in the grocer's shop only from November 1989 until March 1990. Thereafter she obtained financial support either in the form of sickness benefit or parental benefits. Nevertheless, after March 1990 she was still considered to be self-employed and, accordingly, member of the Grocer's Unemployment Fund.

In September 1993, when the business was turned into a limited partnership, the applicant obtained a share therein. It is not in dispute that the business continued to be run by the family thereafter.

When the applicant requested unemployment benefit as of 4 October 1993, she did not state any reasons for not continuing in the shop with her brother. Nor has she submitted any such information to the Court. Thus, it must be assumed that she had the choice to continue working in the shop.

The applicant has maintained that, although being a limited partner, she did not have any substantial influence within the business or any rights under the Partnership Act. She kept her share in the limited partnership for purely practical reasons as otherwise her brother would have had to re-register as a one-man firm, and trade agreements would have had to have been changed.

The Court first observes, however, that when the applicant became aware that the share could be an obstacle for her obtaining unemployment benefit, she did not make any attempt to dispose it of. Secondly, in so far as the alleged practical problems concerned the applicant, it appears that they could have been solved simply by selling the share to someone else.

Against this background, and having regard to the wide margin of appreciation enjoyed by the State in the area of social legislation, the Court finds that the present case does not disclose any indication of a failure on the part of the respondent State to strike a fair balance between the individual interests of the applicant and the general interests of Swedish society.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court by a majority

Declares admissible, without prejudging the merits, the applicant's complaint about the length of the proceedings under Article 6 § 1 of the Convention.

Declares the remainder of the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President