AS TO THE ADMISSIBILITY OF

Application No. 11287/84
by Carl-Erik SANDBERG
against Sweden

The European Commission of Human Rights sitting in private on 9 December 1987, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
G. BATLINER
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

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 3 July 1984 by Carl-Erik Sandberg against Sweden and registered on 10 December 1984 under file N° 11287/84.

Having regard to:

- the first report provided for in Rule 40 of the Rules of Procedure of the Commission;

- the Commission's decision of 8 October 1985 to communicate the application to the Government and to adjourn the further examination of the application pending the outcome of the Leander case before the European Court of Human Rights;

- the second report provided for in Rule 40 of the Rules of Procedure.

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as they appear from the applicant's submissions, may be summarised as follows.

The applicant is a Swedish citizen, born in 1951 and resident in Malmö. He is a storeman by trade. The applicant is represented by Mr. Dennis Töllborg, a lecturer at the University of Gothenburg.

On 1 March 1972 the applicant was employed as a civil storeman with the National Defence. The post is classified as a security class post, which means that personnel control under the Personnel Control Ordinance (personalkontrollkungörelsen) has to be carried out prior to and during employment. The applicant has been subjected to personnel control several times without any unfavourable outcome. However, in the spring of 1983 a general personnel control was carried out inter alia on the applicant and as a result thereof the applicant was transferred to a post in which he has no contact with security sensitive information. As a result of the transfer the applicant can no longer be promoted and he cannot accompany his colleagues on certain jobs.

The applicant has not been informed of the nature of the information which prevents him from performing the work which he has previously performed without criticism. A press officer has stated in general terms that the reason is that the applicant is regarded as a security risk.

Following the transfer, the applicant asked the Security Police in a letter of 27 September 1983 whether he had been subjected to a personnel control.

On 1 November 1983 the Security Police replied that a personnel control had been carried out on the applicant at the request of the Commander-in-Chief of the Armed Forces (överbefälhavaren). The applicant was however, for reasons of secrecy, not informed of whether any information about him had been supplied.

The applicant also appealed to the Government (Ministry of Justice) which in a decision of 9 February 1984 decided not to examine the appeal on its merits since the applicant was not the party who had requested before the Security Police that information should be supplied.

The applicant then applied to the Supreme Administrative Court (regeringsrätten) for re-opening of the proceedings alleging inter alia that the absence of a right of appeal for him was in conflict with Article 13 of the Convention.

On 20 June 1984 the Supreme Administrative Court rejected the application. One of the four judges dissented and wanted to grant the application.

The applicant has subsequently issued civil proceedings against the State before the District Court (tingsrätt) of Malmö claiming inter alia that the Court declare his transfer to be void and in breach of the labour agreement and of his contract of employment. He also claimed that he be reinstated in his previous post.

The Court held a hearing at which the applicant, Captain L., formerly the applicant's superior and at present in the commmand of the material department of the regiment, and Lieutenant-Colonel N., second to the regimental commander responsible for personnel administration at the regiment, were heard. In its judgment of 22 April 1985 the Court rejected the applicant's claims. It held that the decision to transfer the applicant was a work management decision included in the right for the employing authority to direct the work and based on the contract of employment. The Court also held that the transfer decision could not be interpreted as a notice of resignation. The Court finally considered that the applicant had not substantiated that the State had acted in breach of any labour agreement or of his contract of employment and that the investigation did not show that the employing authority had set aside the requirements of objectivity and impartiality laid down in the Instrument of the Government (regeringsformen).

The applicant appealed to the Labour Court (arbetsdomstolen) which on 12 March 1986 confirmed the District Court's judgment.

The applicant complained to the Parliamentary Committee on Justice by a letter received on 4 May 1987. The Committee at its meeting on 5 May 1987 decided not to take any measures on account of the complaint since it has no powers to do so in individual cases.

In letters dated 27 April 1987 addressed to the Parliamentary Ombudsman and the Chancellor of Justice respectively the applicant requested an investigation of his case and that these authorities act within their powers in order to change the transfer decision and to compensate him for the suffering the decision had caused him.

The Chancellor of Justice on 8 May 1987 decided not to take any measures because of the applicant's request since his complaints concerning the decision to transfer him had been examined by the courts and since the Chancellor of Justice has no powers to reconsider a decision by a court or another authority.

By letter of 24 August 1987 the applicant received a similar reply from the Parliamentary Ombudsman.

COMPLAINTS

1. The applicant complains that the fact that he has been denied the right to appeal against the decision of the Security Police to supply information on him constitutes a breach of Article 13 of the Convention.

2. If it is not accepted that Article 13 has an independent role, as implied in no. 1 above, the applicant submits that his transfer is a result of information supplied about him in the context of a personnel control. The applicant has not had the opportunity of repudiating such information. The fact that secret information is being registered on him is, in the applicant's view, a violation of Articles 8 and 10 of the Convention. Since the applicant cannot appeal against the relevant decision, Article 13 is also violated.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 3 July 1984 and registered on 10 December 1984.

The Commission decided on 8 October 1985, in accordance with Rule 42 para. 2 (b) of its Rules of Procedure, to communicate the application to the Government, without requesting their written observations at that stage, and to adjourn the examination of the case pending the outcome of the Leander case (Application No. 9248/81) before the European Court of Human Rights.

The judgment of the Leander case was delivered by the European Court of Human Rights on 26 March 1987 (Eur. Court H.R., Leander judgment of 26 March 1987, Series A No. 116).

The applicant was on 2 April 1987 requested to inform the Commission of whether he wished to maintain his application and to indicate in what way he considered that the facts of the present application differ from the facts of the Leander case.

The applicant's written reply was received by letters dated 27 April and 9 June 1987. The applicant pointed out that his case differs from the Leander case in so far as he has had recourse to all the remedies which the Government in the Leander case claimed surround the Swedish personnel control system, and which the Court accepted. The applicant submits that the Court has overestimated the powers and

the qualities of the Parliamentary Ombudsman.

THE LAW

Article 8 (Art. 8) of the Convention

1. The applicant submits that his transfer was the result of secret information being supplied about him in the context of a personnel control. The applicant has had no opportunity of repudiating the information. He claims that the fact that secret information is being registered on him is a violation of Article 8 (Art. 8) of the Convention, which reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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 issues in this case are similar to those of the Leander case. The Commission recalls its Report in the Leander case where the Commission concluded that there had been no breach of Article 8 (Art. 8) of the Convention. This opinion was later confirmed by the Court in its judgment (Leander v. Sweden, Comm. Report 17.5.85, para. 81 and Eur. Court H.R., Leander judgment of 26 March 1987, Series A No. 116, p. 27, para. 68).

The Commission and the Court found that the Leander case disclosed an interference with Mr. Leander's right to respect for his private life, as guaranteed by Article 8 para. 1 (Art. 8-1), both because of the storing and of the release of information relating to his private life, coupled with the refusal to allow him an opportunity to refute the information.

However, the above Convention organs found that the interference with Mr. Leander's private life was justified under the terms of Article 8 para. 2 (Art. 8-2).

The operation of the personnel control system as applied to the applicant was considered to pursue a legitimate aim, namely the protection of national security. The interference was considered to be "in accordance with the law" as it was found that Swedish law gives citizens "an adequate indication as to the scope and the manner of exercise of the discretion conferred on the responsible authorities to collect, record and release information under the personnel control system" (Eur. Court H.R., Leander judgment, loc. cit., p. 24, para. 56).

As regards the condition "necessary in a democratic society" in Article 8 para. 2 (Art. 8-2), there can be no doubt as to the necessity of laws empowering competent domestic authorities "to collect and store in registers not accessible to the public, information on persons" and "to use this information when assessing the suitability of candidates for employment in posts of importance for national security" (see above-mentioned Leander judgment, p. 25, para. 59).

However, while States must be given a wide discretion in chosing the means to protect their national security, there is a risk that a system of secret surveillance can be abused and it must

therefore be surrounded with sufficient safeguards ensuring effective control.

In the Leander case the Government invoked twelve different safeguards. In the Court's opinion four of these were particularly important, namely the presence of parliamentarians on the National Police Board, the supervision of the Chancellor of Justice and the Parliamentary Ombudsman as well as the Parliamentary Committee on Justice.

The Court, like the Commission, concluded in that case that the safeguards contained in the Swedish personnel control system met the requirements of Article 8 para. 2 (Art. 8-2).

The Commission considers that the facts of the present case, as submitted by the applicant, do not differ to such an extent that the assessment of the legal issues under Article 8 (Art. 8) of the Convention can be different from the conclusions in the Leander case. In this context the Commission has taken into account the applicant's allegation that in the Leander case the importance of the Parliamentary Ombudsman as a safeguard has been wrongly assessed by the Court and the Commission.

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.

Article 10 (Art. 10) of the Convention

2. The applicant further maintains that the same facts as constitute the alleged violation of Article 8 (Art. 8) also give rise to a breach of Article 10 (Art. 10) of the Convention, which reads:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..... .

2. The exercise of these freedoms, since it carries with it duties and responsibiities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Commission considers that the issues under Article 10 (Art. 10) in the present case are the same as in the Leander case i.e. whether the facts of the case disclose an interference with the applicant's right to freedom to express opinions and with the applicant's right to freedom to receive information.

a. Freedom to express opinions

The right of recruitment to the public service is not recognised by the Convention. However, it does not follow that in other respects civil servants fall outside the scope of the Convention and the protection of Article 10 (Art. 10) (Eur. Court H.R., Glasenapp and Kosiek judgments of 28 August 1986, Series A No. 104, p. 26, paras. 49-50, and Series A No. 105, p. 20, paras. 35-36, and Leander judgment, loc. cit., p. 28, para. 71).

In the Leander judgment the Court ascertained whether the personnel control procedure to which Mr. Leander was subjected

amounted to an interference with the exercise of freedom of expression, or whether the disputed measures lay within the sphere of the right of access to the public service, by putting the measures in the context of the facts of the case and the relevant legislation. The Court held that it was clear that the purpose of the Personnel control Ordinance was to ensure that persons holding posts of importance for national security have the necessary personal qualifications and that access to the public service therefore lay at the heart of the issue in the Leander case. The Court went on to state that the Swedish authorities took the relevant information on Mr. Leander into account only to satisfy themselves as to whether or not Mr. Leander possessed the necessary personal qualifications for the post in question. The Court accordingly found that there had been no interference with Mr. Leander's freedom to express opinions.

In the present case the applicant is not applying for a post in the public service, and has not been dismissed from one, but has been transferred from one post to another. The Commission considers that the principles developed by the Court in the Glasenapp, Kosiek and Leander cases must also apply in the present case.

The information concerning the applicant which was supplied by the National Police Board to the Commander-in-Chief of the Armed Forces was considered by the latter for the sole purpose of establishing whether the applicant possessed one of the necessary personal qualifications for the post he held. Accordingly the main question in this case is appointment to a particular function in the public service.

It follows that this complaint under Article 10 (Art. 10) is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

b. Freedom to receive information

In the Leander case, the Court held that Article 10 (Art. 10) does not in circumstances such as those prevailing in that case guarantee a right for an individual of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual (above-mentioned Leander judgment, p. 29, para. 74).

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

Article 13 (Art. 13) in conjunction with Article 8 (Art. 8) of the Convention.

3. The applicant complains that the fact that he has been denied the right to appeal against the decision of the Security Police to supply information on him constitutes a breach of Article 13 (Art. 13) of the Convention.

If it is not accepted that Article 13 (Art. 13) has an independent role the applicant submits that his rights under Articles 8 and 10 (Art. 8, 10) of the Convention have been infringed, and since he had no effective remedy before a national authority in Sweden concerning the decision to supply information on him, that his right under Article 13 (Art. 13) has been infringed.

Article 13 (Art. 13) of the Convention reads:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting

in an official capacity."

It is established case-law that Article 13 (Art. 13) cannot be invoked as an independent right but only in conjunction with an arguable claim of a violation of one or more of the rights and freedoms set forth in the Convention (Eur. Court H.R., Klass and Others judgment of 6 September 1978, Series A No. 28, p. 29 para. 64).

In the Leander case the alleged violation of Article 13 (Art. 13) was based on the fact that Mr. Leander had not been given the right to receive and to comment upon the material on which the appointing authority based its decision, and on the fact that he had not had any right to appeal to an independent authority, with power to render a binding decision, in regard to the correctness and release of information kept on him.

The Commission and the Court considered that arguable claims had been raised under the Convention at least in so far as Article 8 (Art. 8) was concerned and that Mr. Leander was entitled to an effective remedy. They further considered, with reference to the case-law of the Court, that for the purposes of the proceedings in question "an effective remedy under Article 13 (Art. 13) must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance" (Klass and Others judgment, loc. cit., p. 31, para. 69).

The Court, having found the Swedish personnel control system as such to be compatible with Article 8 (Art. 8) , found that "the requirements of Article 13 will be satisfied if there exists domestic machinery whereby, subject to the inherent limitations of the context, the individual can secure compliance with the relevant laws" (see above-mentioned Leander judgment, p. 30, para. 79). The Court went on by examining the remedies available under Swedish law in order to see if they were effective in this limited sense.

Among the remedies thus examined the following had already been considered by the Commission to be sufficient for the purpose of Article 13 (Art. 13):

(i) a formal application for the post and, if unsuccessful, an appeal to the Government;

(ii) a request to the National Police Board for access to the secret police register on the basis of the Freedom of the Press Act, and if refused, an appeal to the administrative courts;

(iii) a complaint to the Chancellor of Justice;

(iv) a complaint to the Parliamentary Ombudsman

(Comm. Report 17.5.1985, para. 96)

To these remedies, which were never exercised by Mr. Leander, the Court added the only remedy to which he had recourse, namely his complaint to the Government, that the National Police Board, contrary to the provisions of Section 13 of the Personnel Control Ordinance, had omitted to invite him to comment on the information contained in the secret police register.

The Court, as well as the Commission, found that the aggregate of remedies available to Mr. Leander satisfied the conditions of Article 13 (Art. 13) in the circumstances of the case and accordingly found that there had been no breach of Article 13 (Art. 13).

In the present case the applicant claims that, except for the remedy to the Government, he has had recourse to all the remedies

mentioned by the Court in the Leander judgment and that this fact constitutes a significant difference between this case and the Leander case.

The Commission notes that the complaint under Article 13 (Art. 13) is somewhat different in this case from the Leander case, as the applicant is complaining mainly of the fact that he had no effective remedy before a Swedish authority concerning the decision to supply information on him.

Out of the five remedies considered by the Court to satisfy the conditions of Article 13 (Art. 13) in the Leander case only four could have been used by the applicant in this case. Since he already held the post in question he could not apply for it and, if unsuccessful, appeal to the Government. However, he had instead another remedy which he used when he issued civil proceedings against the State before the District Court of Malmö claiming inter alia to be reinstated in his previous post.

The Commission notes that both the Chancellor of Justice and the Parliamentary Ombudsman have the competence to receive individual complaints and that they have the duty to investigate such complaints in order to ensure that the relevant laws have been properly applied.

The Commission considers that the applicant's possibility to issue civil proceedings against the State claiming to be reinstated in his previous post must be considered to be of considerable importance. In these proceedings an ordinary court has examined important aspects of the applicant's grievance, and the judgment of the Court was subject to appeal to the Labour Court, which also examined the case.

The Commission notes that there is no remedy whereby the applicant can appeal against the decision to supply information on him. Considering that the scope of Article 13 (Art. 13) in the circumstances is limited to making it possible for the individual to "secure compliance with the relevant laws", the Commission finds that the fact that the applicant could not appeal directly against the decision to supply information on him, does not mean that the aggregate of remedies available to him does not fulfill the requirements of Article 13 (Art. 13).

In the light of the above considerations the Commission finds the difference, which exists between the Leander case and the present case, not to be of such importance that the legal issues under Article 13 (Art. 13) in the present case can be distinguished from those in the Leander case. The Commission considers that also in this case did the aggregate of remedies satisfy the conditions of Article 13 (Art. 13).

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

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the Commission President of the Commission

(H. C. KRÜGER) (C. A. NØRGAARD)