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Legislative Council

LC Paper No. LS114/02-03

Paper for the Bills Committee on the Land Titles Bill

Observations on the issue whether the proposed cap on the amount of indemnity payable to an owner deprived of his property by fraud is contrary to the Basic Law

At the meeting of the Bills Committee held on 12 May 2003, the Administration presented a paper entitled "Indemnity" (the paper). The paper has set out the Administration's view on the issue whether the proposed cap in the Land Titles Bill (LTB) on the amount of indemnity payable to an owner deprived of his property by fraud would be contrary to the Basic Law, specifically its Articles 6 and 105. Members have instructed the Legal Service Division to respond to the paper.

The legislative proposal

2. Under clause 82 (1) of LTB, a person would be entitled to be indemnified by the Government in respect of any loss that he has suffered by reason of an entry in or omission from the Title Register, where such entry has been obtained, made or omitted by or as a result of (a) fraud; or (b) any mistake or omission of the Land Registrar or his officers. In cases involving fraud, an application for rectification of the relevant entry or omission must first have been made under clause 81 and adjudicated by the Court of First Instance (CFI) and a corresponding order has been made before the party suffering loss could claim the indemnity.

3. Clause 83(3) stipulates that in cases of fraud, the amount of indemnity payable is the lesser of (i) the value of the interest in land immediately before the date of the order made under clause 81 which relates to the fraud; or (ii) the amount determined by the Financial Secretary (FS) by notice published in the Gazette (the cap). The Administration has proposed that the amount to be determined by FS would be $30 million. Hence, if an owner's loss exceeds $30 million, he would not be fully compensated.

4. At this point, it may be useful to state two observations. The first is that the cap does not in any way restrict an owner's right to recover his unindemnified losses against the perpetrators of the fraud, although in reality such action may often be fruitless. Secondly, if an owner's losses are caused by any fraud, act or omission of the Land Registrar or his officers, the owner would not be able to proceed against the Government for his unindemnified losses. This is because clause 8(2) has expressly stipulated that the liability of the Government in such cases must not exceed the amount of indemnity payable under Part 9 of the Bill, i.e. $30 million (the limitation). It is therefore difficult to understand the Administration's statement in paragraph 7 of the paper that in case a claimant is entitled to indemnity as a result of any mistake or omission of the Land Registrar or his officers, there will be no cap on the indemnity.

Issues arising from the Basic Law

5. Article 6 of the Basic Law (BL) states that the Hong Kong Special Administrative Region (HKSAR) shall protect the right of private ownership of property in accordance with law. Article 105 of BL provides that HKSAR shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

6. It should be immediate apparent that LTB is intended to be enacted as a law to protect the right of private ownership of real property. Equally, it cannot be denied that LTB is intended to protect the rights of individuals and legal persons to the acquisition and disposal of real property, although the Bill may have less to do with the right to use and the inheritance of real property. Any view that the cap as well as the limitation would be contrary to Basic Law could only be understood in the context of the right to compensation for lawful deprivation of property and the express requirement that such compensation must correspond to the real value of the property concerned at the time, i.e. BL 105.

7. The issues may therefore be stated as follows:-

(a) whether the imposition of the cap and the limitation in LTB

means that the compensation for an owner may not correspond to the real value of his property concerned at the time;

(b) if the answer to (a) is in the affirmative, whether this means that the right of individuals and legal person to compensation for lawful deprivation of their property under BL 105 is thereby violated if the fact of lawful deprivation is established;

(c) if the answer to (b) is also in the affirmative, whether this means that the right of private ownership of property is not protected by law for the purpose of BL 6.

The Administration's View

8. The Administration has expressed in the paper the view that the scheme proposed in LTB would not deprive any person of his property for the purposes of BL 105. It listed several grounds in support. They shall be examined in turn.

Continuity

9. The Administration argued that BL sought to establish continuity in local law except changes that were necessary upon the resumption of sovereignty by the People's Republic of China. No new rights had been created. Under the current registration of deeds system that stemmed from pre-reunification days, a subsequent bona fide purchaser for value takes free of an unregistered lease. The lessee is not entitled to be compensated for his loss. It is unlikely that there would be any deprivation within the meaning of BL 105 because the unindemnified loss of an owner under the title registration scheme is not a loss of his existing right before the reunification.

Comparative Jurisprudence

10. The Administration referred first to section 51(xxxi) of the Australian Constitution (paragraph 26 of the paper), which was said to have provided for a guarantee of property rights. It went on to say that the Australian courts had held laws which were not directed at the acquisition of property as such but were concerned with the adjustment of competing rights, claims or obligations of persons in a particular relationship or area of activity were beyond the reach of the constitutional guarantee of "acquisition on just terms". In fact, section 51 is an empowering provision enabling the

Parliament of Australia to make laws for the peace, order and good government of the Commonwealth with respect to a wide range of matters. Paragraph (xxxi) refers to the acquisition of property on just terms from state or person for any purpose in respect of which the Parliament has power to make laws. It is therefore not entirely clear that it is directly related to our situation. The Administration appears to argue that just as the laws concerned with the adjustment of competing rights are not contrary to section 51(xxxi) of the Australian constitution, the cap and the limitation are laws adjusting competing rights or claims and are therefore not contrary to BL 105. If this is what the Administration really thought, then it has to establish first that the cap and the limitation are provisions governing competing claims or rights. The fact is that they are only limitation of liability provisions, although it may be argued that they are part of a scheme that adjusts competing claims or rights.

11. The paper (paragraph 27) next refers to Article 1 of the First Protocol of the European Convention of Human Rights (Article 1) and the related jurisprudence. The Article provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possession. 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 its 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."

It would be useful to note that the wording of Article 1 is quite different from BL 105. Its second paragraph clearly qualifies and limits the operation of the first paragraph.

12. The Administration argued that a distinction should be made between laws that were directed at expropriation for public purposes and laws that were directed at matters which were essentially of private law. When such private law interfered with the property rights of individuals, it had to satisfy the test of fair balance. It cited cases to support the making of such a distinction and the application of the fair balance test.

13. *Bramelid v. Sweden (1982) 5 EHRR 249* is a case concerned with

the interpretation and application of Article 1. The applicants' complaint was directed against certain provisions in the Swedish Companies Act, which gave the parent company that owned more than nine-tenths of the shares of a company the right to acquire the shares of the remaining shareholders. If there was dispute over the right or the purchase price, the dispute had to be settled by arbitration under the Arbitration Act. The applicants complained that the provisions had obliged them to sell their shares in a company at a price lower than their true value. They in effect submitted that they were victims of an expropriation which was not in public interest and was not accompanied by fair compensation. The European Court of Human Rights (ECHR) agreed that there was expropriation, whether formal or de facto, when the State seized or gave another the right to seize a specific asset for the realisation of a goal in the public interest. It went on to hold that the second sentence in Article 1 did not apply as the Swedish legislation was pursuing the general aim of reaching a system of regulation favourable to those interests which it regarded as most worthy of protection which had nothing to do with public interest. It then held that the companies legislation imposing an obligation in certain circumstances on minority shareholders to surrender their shares to a major shareholder, regulated relations of shareholders inter se. Rules of this kind were indispensable for the functioning of society and could not in principle be considered as breaching Article 1. It further held that in making rules having effects on property or legal relationship between individuals, the legislature should not create an imbalance that would result in one person being arbitrarily and unjustly deprived of his goods for the benefit of another. It then applied the test to the facts of the case and came to the conclusion that the provisions of the Swedish Act did not in any way establish an excessive imbalance to the point of violating the right to the peaceful enjoyment of possession.

14. The *Bramelid* case was applied in the English High Court case of *Family Housing Association v. Donnellan and others [2000] P. & C.R. 34.* The Family Housing Association commenced proceedings against the defendants for possession of two houses registered in its name. The defendants pleaded adverse possession. After the enactment of the Human Rights Act 1998, the Association sought to amend its particulars of claim alleging that the whole concept of adverse possession was contrary to its Convention rights. The county court judge allowed the amendment but the defendants appealed. The High Court allowed the appeal. Mr. Justice Park believed that the central issue was whether adverse possession can be a

deprivation within Article 1. He found that the *Bramelid* case had decided that Article 1 was directed against expropriation by the state or authorised by the state for public purposes. It was not directed against matters which were essentially ones of private law. Accordingly, the rule of adverse possession could not be a deprivation under Article 1.

15. In *Kowloon Poultry Laan Merchants Association v. Department of Justice [CACV 1521/2001]*, the Hong Kong Court of Appeal (CA) considered an appeal from the Court of First Instance (CFI). The appellants were a poultry wholesalers' association. They complained that the Government's requirement of separating the locations for sale of chicken from those for sale of water birds had caused them to suffer severe financial losses, and the Government had refused to compensate them for such losses. They claimed that this was a deprivation of property within the meaning of BL 105. CA held that the requirement of separate location was a control of land use and not a deprivation. In support of its view, CA quoted passages from the decision of the European Commission of Human Rights in *Baner v. Sweden* App. 11763/1985, 60 D.R. 128. At least two rules may be derived from those passages: (1) "Deprivation" referred to in Article 1 is not limited to where property is formally expropriated. It may also exist where the measure affects the substance of the property to such a degree that there has been a de facto expropriation or where the measure can be assimilated to a deprivation of possessions. (2) Legislation of a general character affecting and redefining the rights of property owners cannot normally be assimilated to expropriation even if some aspects of the property right are thereby interfered with or even taken away. This case may be considered as authority for applying the two rules in the interpretation of BL 105.

Fair Balance

16. The Administration appeared to have admitted that the provisions of LTB would interfere with ownership of property rights in land. It adapted the approach of ECHR in *Bramelid v. Sweden* and seemed to argued that such interference would be consistent with BL when a fair balance was struck between the general interest of society and the protection of the individual's property rights. It then listed the reasons for its view that the scheme proposed in LTB satisfied the fair balance test.

Analysis

17. We now return to consider the issues formulated in paragraph 7. It is a matter of fact that in cases where the value of the property exceeds the cap and the limitation, the compensation as provided by the indemnity would not correspond to the real value of the property. Before considering whether in such instances, the right to compensation for lawful deprivation of property envisaged by BL 105 has been violated, it must first be determined whether there is a deprivation of property.

18. The Administration has adopted the approach of ECHR in determining whether there is a deprivation under BL 105. The main difficulty with this position is the fact that ECHR's approach is very much based on the actual wording of Article 1. BL 105 on the contrary does not refer to any public purposes. It may be noteworthy that CA in the *Kowloon Poultry* case did not make any reference to any distinction between matters of private law and expropriation for public purposes. It emphasised instead the general character of the legislation. It seems that the approach of CA is to be preferred.

19. It must be admitted that nothing in LTB itself directly expropriates any property. Hence, direct deprivation is out of the question. What remains to be ascertained is whether the title registration scheme affects the substance of a property to such an extent that there would be a de facto deprivation. The *Kowloon Poultry* case appears to have accepted that BL Article 105 does cover a de facto deprivation. It has also suggested that the relevant test is the general character of the legislation. In our situation, it cannot be maintained that no compensation would be paid at all but only that the compensation would not correspond to the real value of the property when that real value exceeds the cap or the limitation. Consequently, the most that can be argued against the cap and the limitation is that they may result in a partial deprivation of an owner's property. As noted in paragraph 4 above, an owner suffering losses would nevertheless be free to pursue his claim against the perpetrators of fraud. The law does protect the owner's rights against fraud. It only does not guarantee full compensation. Clearly LTB is not a piece of legislation directed at partial deprivation of an owner's property. On the contrary, when comparing with the existing law, it would be a significant improvement as it would guarantee compensation to victims of fraud up to the cap without them needing to sue the fraudulent parties. The objective of LTB

is to establish a system of title registration for protection of property owners. Its provisions would affect and redefine rights of property owners. The cap and the limitation may result in an owner not being able to fully recover his losses. Applying the reasoning in *Kowloon Poultry* case, it is not unreasonable to conclude that LTB is a piece of legislation of a general character affecting and redefining the rights of property owners. It follows that the cap and the limitation would not constitute a deprivation for the purposes of BL 105.

20. Although we have reservation as to the direct application of the ratio in the ECHR case of *Bramelid v. Sweden*, we would agree with the Administration that the test of fair balance should be satisfied before rules interfering with property rights or legal relationship between individuals should be regarded as compatible with BL 6 and 105. Applying the test to the indemnity provisions is more complex and difficult because unlike the *Bramelid* case, the balance is not only between two classes of shareholders. The balance appears to be between the benefits to society having the title registration scheme and the protection of owners when not having the scheme and at the same time between the majority of owners who can enjoy having an indemnity scheme with reasonable levies and a minority being fully indemnified for their losses. This is a matter for Members to decide.

21. If it is assumed for argument's sake that the cap and the limitation result in a partial deprivation of an owner's property, would this mean BL 6 is violated? We believe that it is quite clear that the objective as well as the effect of LTB is to give better protection to purchasers of real property. The fact that in some cases an owner may not able to recover all his losses under the indemnity scheme or against the government owing to any fraud, act or omission could not be taken to mean that the law does not protect ownership of property.

Annex

22 The full texts of the cases referred to above are attached as Annex for Members' easy reference.

Prepared by

Legal Service Division
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15 May 2003

Annex

1. Bramelid v. Sweden

2. Family Housing Association v. Donnellan and others

3. Kowloon Poultry Laan Merchants Association v. Department of Justice

4. Banér v. Sweden

(1)

BRAMELID AND MALMSTRÖM *v.* SWEDEN
(Legislation allowing compulsory purchase of company shares)

BEFORE THE EUROPEAN COMMISSION OF HUMAN RIGHTS

Applications Nos. 8588/79 and 8589/79
12 October 1982

Under Swedish company legislation, the applicants were forced to sell their minority shareholding in a company to the majority shareholder. The share price was fixed by arbitrators. The applicants alleged violations of Articles 6 and 13 of the Convention and of Article 1 of Protocol No. 1. The complaints relating to Article 1 of Protocol No. 1 were declared inadmissible, the remaining allegations were declared admissible.

1. Right to Property. Deprivation of possessions in the public interest (Prot. No. 1, Art. 1).
Company shares, which had an economic value, were 'possessions' within the meaning of Article 1 of Protocol No. 1 [1(b)]. The provision related to expropriation whether formal or *de facto* by which the State took—or gave another the right to take—specific property for the realisation of a public interest. The disputed legislation had nothing to do with the notion of 'the public interest': it represented the application of a general policy relating to the regulation of commercial companies and concerned the relations of shareholders *inter se*. The second sentence of Article 1 of Protocol No. 1 did not apply [1(c)].

2. Right to Property. Peaceful enjoyment of possessions (Prot. No. 1, Art. 1).
The right of everyone to the peaceful enjoyment of his possessions could not form the basis for contesting the right of the national legislature to modify, when and how it considered desirable, the rules of private law which could have some effect on the property of individuals, provided that the legislature respected the principle of balance and did not deprive one person arbitrarily and unjustly of his goods for the benefit of another. On the facts the Commission found no breach of the condition [1(d)]. The Commission did not examine Article 1(2) of Protocol No. 1 [1(e)].

3. Six months rule. Final decision (Art. 26)
The Commission found that the final decision had occurred only when the arbitrators fixed the price for the shares. The applicants were thus not time barred because they had failed to introduce their applications within six months of the arbitrators' earlier decision ordering the sale of their shares [2(b)].

4. Fair hearing. Independent and impartial tribunal. Public hearing. Scope of review of arbitral decisions before the ordinary courts (Art. 6(1)).
Article 6(1) did not require that every decision on a dispute concerning civil rights and obligations had to be taken by a tribunal so described

in national law provided that the organ in question fulfilled the criteria of Article 6(1). The Convention did not prevent a decision of this nature being taken in first instance by an organ which did not have the characteristics of a court provided that the matter could thereafter be brought in a reasonable time before a court which had competence to judge the matter both on the facts and in law. The Convention did not prevent a person from waiving the rights guaranteed by Article 6(1) in civil cases provided that this waiver was not made under pressure. The Commission declared the applicants' complaints under Article 6(1) admissible because complex questions arose on the following points: the independence and impartiality of the arbitrators; the requirements of a fair and public hearing; the scope of review of arbitral decisions before ordinary courts; whether by acquiring shares the applicants had waived their rights under Article 6(1) [2(c)].

5. Right to an effective remedy before a national authority (Art. 13). The allegations under these provisions were linked to those relating to Article 6(1). This complaint was therefore also declared admissible [3].

The following case was referred to in the decision:

SPORRONG AND LÖNNROTH *v.* SWEDEN 5 E.H.R.R. 35.

DECISION AS TO ADMISSIBILITY

The Facts*

The facts of the case, as they were submitted by the applicants, can be summarised as follows:

The applicants are Swedish nationals . . . Lars Bramelid owned 300 shares in a limited company, the Aktiebolaget Nordiska Kompaniet (NK). Anne Marie Malmström owned one share in NK.

On 1 January 1977 a new Companies Act came into force in Sweden (*Aktiebolagslagen*). According to the terms of Chapter 14, section 9 of this Act, when a company owns, itself or through a subsidiary, more than 90 per cent. of the shares and more than 90 per cent. of the votes in another company, it has the right to purchase the remaining 10 per cent. of the shares in that other company. For their part shareholders whose shares are liable to be so purchased have the right to require them to be purchased. The Act does not explain how the purchase price is to be calculated, except in the case where the purchasing company has acquired the majority of the shares by virtue of a takeover bid. In such a case, section 9(3) of the Act lays down that the purchase price shall be fixed at the offer price, unless there are special reasons for deciding otherwise.

Chapter 14, section 9, subsections 1 to 3 of the Companies Act is in the following terms:

> When a parent company itself, or through a subsidiary, owns more than nine-tenths of the shares, and more than nine-tenths of the votes

This admissibility decision was drafted in French; the published text is an unofficial translation—Ed.

in a subsidiary, it has the right to purchase the shares of the remaining shareholders in the subsidiary in question. The shareholders whose shares are liable to be purchased have the right to require the purchase of their shares.

If there is a dispute over the question of whether there is a right to purchase, or an obligation to purchase, or over the purchase price, the dispute shall be settled by three arbitrators under the Arbitration Act (1925: 1945) in so far as the other provisions of this chapter do not otherwise provide. Section 18, subsection 2 of the said Act on the time limit within which the arbitral award must be made, does not apply.

If the parent company has acquired the majority of the shares in the subsidiary by virtue of a general offer made to the shareholders to sell their shares to the parent company at a fixed price the sale price should be the same as that price unless there are special reasons for deciding otherwise.

This last provision had no equivalent in the previous Companies Act of 1944. Its *ratio legis* was explained in the Bill (Prop. 1975:103). It seems strange, said the Bill, that when the majority of shareholders have accepted the offer, the remaining shareholders have the possibility of obtaining a better price by the compulsory sale procedure. This appeared to the Government's eyes to be a kind of blackmail of the purchasing company.

The provision does not apply if there are special reasons for deciding otherwise—for example, if a long time has elapsed between the public offer and the start of the procedure for purchasing the remaining shares, if the information supplied in the public offer was incomplete, or if important new facts have emerged subsequently.

If there is a dispute on the point of whether there was a right or an obligation to sell, or as to the value of the shares, the dispute is settled by three arbitrators in accordance with the Arbitration Act (*Lag om Skiljemän*). This Act provides in particular that each party nominates an arbitrator, and that these two nominated arbitrators choose the third. The arbitrators have to give the parties the opportunity of presenting their arguments orally or in writing. The award must be given in writing and signed by all the arbitrators, who must indicate, in their award, the date and place of its delivery and inform the parties as soon as possible. Appeal lies to a court of first instance, in particular if an arbitrator has been irregularly nominated, or if bias has been proved, or if there has been some procedural irregularity which could have influenced the decision, or if there is a dispute as to the fees payable to the arbitrators.

The previous Companies Act of 1944 contained similar provisions. However, the right to purchase or the obligation to sell only existed if 90 per cent. of the shares were owned by the purchasing company itself (excluding its subsidiaries); moreover, the purchase price had to be fixed by the arbitrators according to the actual value of the shares. Finally, the party who was not satisfied with the arbitral award could apply to the courts to fix the price (section 174(2) and section 223(2)).

The capital of NK was divided into 4,062,000 shares of two votes each and 30,000 shares of one vote each.

In order to obtain shares in NK, the company Åhlén och Holm Aktiebolag (Åhléns) decided to make alternative purchase offers to the shareholders of NK.

On 7 July 1976, Åhléns had acquired 3,660,255 of the two-vote shares in NK, being 89·45 per cent. of the total shares in NK. On the same day, Åhléns agreed with its subsidiary Aktiebolaget Wessels that the subsidiary would, before the end of 1976, acquire all the shares in 'NK' which could still be purchased. In other words, in 1976, Åhléns still did not possess more than 90 per cent. of the capital shares in NK. According to the applicants, this agreement was designed to prevent the minority shareholders from being able to insist on the purchase of their shares at the true value under the terms of the previous legislation.

On 3 January 1977, Åhléns declared that it had 3,634,126 two-vote shares and Wessels declared that it had 323,640 as well as 12,229 one-vote shares, all of which represented a total of more than 90 per cent. of the shares in NK. Åhléns was thus authorised to purchase the remaining shares.

In the event of a dispute over purchase, arbitration was to take place according to Chapter 14, section 10, of the Companies Act which was worded as follows:

> When a parent company wishes to purchase the shares of a subsidiary under section 9, and it is impossible to agree on the point, the parent company shall request the subsidiary's board of directors in writing to submit the dispute to arbitration and shall choose its arbitrator.
>
> When requested, in accordance with subsection (1), the subsidiary's board of directors shall promptly, by notice published in [certain newspapers], ask the shareholders who have been asked to sell to inform the board, in writing, of the name of their arbitrator within 15 days after the publication of the notice. The request must also be sent, by letter, to each of the shareholders concerned, if the company knows their addresses.
>
> If all the shareholders on the register of members, and to whom the purchase requests have been made, have not nominated a common arbitrator within the prescribed time limit, the subsidiary's board of directors must ask the regional court to nominate an attorney. The attorney must ask the Executive Office for the district to nominate an arbitrator and must protect the rights of the shareholders who are not represented in the action.

In accordance with these provisions, the administrative Council of Åhléns, by a letter of 3 January 1977, asked its counterpart in NK to submit to arbitration the question of the purchase of the remaining shares. Åhléns announced that it had chosen as its arbitrator Mr. Löfgren, a chartered accountant.

Also on 3 January, NK's board of directors informed its shareholders that they had to choose their arbitrator. The shareholders having failed to nominate an arbitrator, NK's board of directors

asked the Stockholm regional court (*Tingsrätt*) to nominate a trustee for this purpose. This was done on 19 January 1977.

On 21 January 1977, at the request of the trustee, the Stockholm regional administration (*Länsstyrelsen*) nominated Mr. Olsson, a chartered accountant, as the second arbitrator. Messrs. Löfgren and Olsson agreed to nominate Professor Nial to be third arbitrator and president of the arbitration tribunal.

In their interim award of 22 November 1977, the arbitrators decided that Åhléns had the right to purchase the remaining shares in NK at a price still to be fixed. They also declared that Åhléns was immediately to become the owner of the remaining shares. The arbitrators considered that, according to the legislation in force, this decision was not appealable.

Åhléns asked that the purchase price of the shares should be fixed at the same level as that at which the majority of shareholders had voluntarily sold their shares after the public offer, or in other words, according to their calculations, at 46·22 SKr per share.

The minority shareholders submitted that section 9(2) did not apply in this case, and that the true value of the shares was significantly higher than the proposed price. The applicants maintained that this value was, in fact, around 150 SKr per share. Anne Marie Malmström also claimed 4,030 SKr for her costs before the tribunal.

On 5 September 1978, having heard the parties seven times, the arbitrators gave their final award. They declared that section 9, subsection (3) applied to the case. They added that it was not possible to determine the 'objective' value of the shares, because to do this would have meant formulating hypotheses and making subjective judgments. They considered that the object of the provision requiring minority shareholders to abide by the price accepted by the majority, required that this provision should apply even when one could expect a considerably higher valuation.

The arbitrators, nevertheless, proceeded to an estimate of the value of the shares and declared that if one could *grosso modo* estimate the value at a price higher than that offered by Åhléns, the difference was not sufficiently large to render section 9(3) of the new Companies Act inapplicable.

In accordance with that provision, they fixed the purchase price at 53 SKr per share, being 46·89 SKr for the share itself and 6·11 SKr for dividends obtained before the date of the award. Anne Marie Malmström was also allowed 1,530 SKr for her costs of the arbitration.

Grounds of Appeal

1. The applicants complained of having been obliged to sell their shares in NK at a price lower than their true value. Lars Bramelid complained of having received 53 SKr per share, although he

considered that the real value was approximately 150 SKr. Anne Marie Malmström claimed that according to the arbitrators' calculations, the true value per share was 64·25 SKr on 3 January 1977—that is, 37 per cent. higher than the price eventually fixed.

The applicants claimed that this deprivation of assets by being required to sell at a price lower than the true value could not be justified, in their case, by reasons of the public interest, since this 'expropriation' had been the act of a private company. They contended that there had, therefore, been a violation of Article 1 of Protocol No. 1.

2. The applicants also alleged that Swedish legislation only allowed them to fight the arbitral award before the ordinary courts if there was proof of a serious procedural flaw or bias in an arbitrator. They said the other side had had the opportunity to influence the nomination of the arbitrators. Even if no fact known to them could cast a shadow on the personal integrity of the arbitrators, the arbitrators could nevertheless not be considered as fulfilling the conditions required of an independent and impartial tribunal established by law, because the arbitration had been conducted in camera and the judgment had not been given publicly. The applicants claimed that there had, therefore, been a violation of Article 6(1) of the Convention.

Moreover, the applicants submitted that the Companies Act in force before 1977 allowed arbitration awards to be appealed to the ordinary courts. Under that legislation, arbitrators could moreover take into account the true value of the shares when they fixed the price.

According to the applicants, the reform of the legislation had manifestly allowed their rights under the Convention to be infringed. They alleged that the Swedish Government bore the full responsibility for this state of affairs, since the new legislation was contrary to the interests which the Convention seeks to protect.

The applicants considered that they had no effective remedy before a national authority to enforce their rights. They invoked Article 13 of the Convention.

3. Finally, Lars Bramelid claims damages for the 'expropriation' of his shares estimated at 100 SKr per share, a total of 30,000 SKr.

Anne Marie Malmström claims damages of 100 SKr for the 'expropriation' of her share, plus 2,500 SKr representing the sum which the arbitrators had refused to award her to cover the cost of her legal representation before the arbitral tribunal, as well as all other costs incurred during the proceedings before the Commission.

The Law

1. (a) The applicants complain of having been compelled to sell their shares in the NK company at less than their true value. They consider that they were deprived of their possessions in circumstances

contrary to Article 1 of Protocol No. 1, given that this deprivation of property was not carried out in the public interest.

They allege a violation of Article 1 of Protocol No. 1 which provides:

> 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 European Court of Human Rights has defined the general objective of this provision as follows:

> By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property. This is the clear impression left by the words "possession" and "use of property" (in French *biens, propriété, usage des biens*); the *travaux préparatoires*, for their part, confirm this unequivocally: the drafters continually spoke of 'right of property' or 'right to property', to describe the subject matter of successive drafts which were the forerunners of the present Article 1.[1]

(b) It is necessary to examine, as a preliminary issue, whether the rights in Article 1 of Protocol No. 1 can be exercised in relation to a company share. Such a share is an object of a complex nature: it certifies the fact of membership and the rights which are attached to it (notably the right to vote), it represents part of the capital of the company and also constitutes, to some degree, a title to property in the fortune of the company. In the event, NK's shares had, undoubtedly, an economic value. The Commission, therefore, considers that, for the purposes of Article 1 of Protocol No. 1, those shares of NK which were held by the applicants were 'possessions' giving rise to a property right.

(c) The essence of the parties' arguments is clearly based on the second sentence of the first paragraph of Article 1 of Protocol No. 1. The applicants have in effect submitted that they were victims of an expropriation which was not in the public interest and was not accompanied by fair compensation.

Even though the word 'expropriated' does not appear in the text, the terms of this provision, in particular the words 'deprived of his possessions . . . in the public interest' as well as the reference made to 'the general principles of international law' show clearly that it relates to expropriation, whether formal or *de facto*, that is to say the act by which the State seizes—or gives another the right to seize—a specific asset to be used for the realisation of a goal in the public interest. The *travaux préparatoires* of Article 1 of Protocol No. 1 confirm this interpretation.

[1] MARCKX *v.* BELGIUM (1979) 2 E.H.R.R. 330, para. 63.

The Swedish legislation of which the applicants complain is of an altogether different kind. It is in fact the expression and the application of a general policy with regard to the regulation of commercial companies and concerns above all the relations of shareholders *inter se*. It goes without saying that, in enacting legislation of this type, the legislature is pursuing the general aim of reaching a system of regulation favourable to those interests which it regards as most worthy of protection, something which however has nothing to do with the notion of 'the public interest' as commonly understood in the field of expropriation.

The Commission is therefore of the opinion that the second sentence of the first paragraph of Article 1 of Protocol No. 1 does not apply to the applicants' present appeal.

(d) The Commission must therefore now proceed to consider whether the obligation placed on the applicants by virtue of the Swedish Act to surrender their shares to the Åhléns Company, the majority shareholder in NK, infringed their right to peaceful enjoyment of their possessions as that right is guaranteed by the first sentence of the first paragraph of Article 1 of Protocol No. 1.

As the Commission has just emphasised, the obligation placed in certain circumstances on minority shareholders to surrender their shares to a majority shareholder flows from company legislation which regulates the relations of shareholders *inter se*. In all the States parties to the Convention, laws governing private-law relations between individuals, including legal persons, contain provisions which determine, so far as property is concerned, the effects of those legal relations and, in certain cases, oblige one person to surrender to another property of which the former has hitherto been the owner. One may cite by way of example the division of property upon succession particularly in the case of agricultural property, the winding-up of certain matrimonial settlements and above all seizure and sale of goods in the course of execution proceedings.

Rules of this kind, which are indispensable for the functioning of society under a liberal régime, cannot in principle be considered as breaching Article 1 of Protocol No. 1. With reference *mutatis mutandis* to the opinion expressed by the Court on relations between states and individuals,[2] the Commission must nevertheless satisfy itself that, when making rules as to the effects on property of legal relations between individuals, the legislature does not create an imbalance between them which would result in one person arbitrarily and unjustly being deprived of his goods for the benefit of another.

In this case, the Commission considers that the Swedish Act, which, in certain circumstances, requires minority shareholders to sell their shares at a price to be fixed by arbitration, while recognising their right to have them purchased on the same conditions if they so wish, does not in any way establish to their detriment an excessive

[2] *Cf.*, para. 69 of SPORRONG AND LÖNNROTH *v.* SWEDEN 5 E.H.R.R. 35.

imbalance to the point of violating the right to the peaceful enjoyment of possessions.

The applicants have pointed out that the new Act which came into force on 1 January 1977 made it easier to set in motion a compulsory purchase of shares, because it no longer required 90 per cent. of the shares to be concentrated for this purpose in the hands of one and the same company. This argument is only admissible to the extent that the applicants had acquired their shares in NK before 1 January 1977. However that may be, in the Commission's view, the right of everyone to the peaceful enjoyment of his possessions cannot form the basis for challenging the right of the legislature to amend, when and how it considers desirable, the rules of private law which can have some effect on the property of individuals, subject of course to the principle of balance which has just been referred to.

Finally, in the circumstances of this case, the Commission cannot ignore the fact that the price of the applicants' shares was fixed by qualified arbitrators in a carefully reasoned decision and following criteria which, whatever the applicants may say against them, do not appear either arbitrary or unreasonable.

The Commission therefore does not find, in this case, any breach of the right of the applicants to the peaceful enjoyment of their possessions within the meaning of the first sentence of the first paragraph of Article 1 of Protocol No. 1.

(e) Having come to that conclusion, the Commission considers that it would be pointless also to examine whether the defendant Government could reasonably have invoked the second paragraph of the same Article, the applicants not having based their argument on that provision. The preceding considerations are sufficient in fact to establish that this appeal is manifestly ill-founded within the meaning of Article 27(2) of the Convention.

2. (a) The applicants complain that the arbitrators who ruled on the right of purchase of their shares and who fixed the price were not an independent and impartial tribunal established by law, that their proceedings were conducted in camera and that the Act only allowed arbitral awards to be appealed to ordinary tribunals if one could prove a serious procedural irregularity or bias on the part of an arbitrator. They also complained that the other side had had the opportunity to influence the nomination of the arbitrators. They claim that they were thereby victims of a violation and they invoke Article 6(1) of the Convention which reads 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, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the

opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(b) The defendant Government submits that the arbitrators' first award cannot be examined by the Commission by reason of the delay in bringing the application.

According to the terms of Article 26 of the Convention 'the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.'

The Commission recalls that the arbitrators gave two awards: the interim award of 22 November 1977 acknowledging Åhléns' right to purchase the remaining shares in NK and the final award of 5 September 1978 fixing the compensation.

The Commission emphasises that six months after the first award the applicants still did not know the price at which their shares were to be purchased. The applicants complain, in particular, that they were obliged to surrender their shares at a lower price than their true values. However, the purchase price was only fixed by the final award of 5 September 1978. The Commission is therefore of the opinion that this final award must be taken as the 'final domestic decision'. The applications having been introduced on 26 February 1979, the six-month limitation period in Article 26 of the Convention has been complied with.

(c) The Commission considers that the procedure followed by the arbitrators was decisive for private rights and obligations. In consequence, the proceedings dealt with civil rights and obligations in the sense of Article 6(1), a point which was not in dispute between the parties.

Article 6(1) does not require that every decision on a dispute over civil rights and obligations has to be taken by an organ which is described in national law as a court provided that the organ can be considered as such within the meaning of Article 6(1) of the Convention. The provision, moreover, does not prevent a decision of this kind being taken in the first instance by an organ which is not in the nature of a court, provided that the matter can thereafter be brought within a reasonable time before a court with jurisdiction to decide the matter both as to law and to fact.

Finally, the Convention does not prevent a person from waiving the rights guaranteed by Article 6(1) of the Convention, when civil rights and obligations are in issue, provided that this waiver is not made under duress.

In this case, the Commission must examine whether the arbitrators who ruled on the sale and the sale price of the applicants' shares were a tribunal in the meaning of Article 6(1), whether they offered all the guarantees of independence and impartiality and whether their proceedings were fair and public, as is required by this

provision. If the reply to one of these questions were negative, it would be necessary to examine whether the recourse to a court recognised under section 21 of the Swedish Arbitration Act, despite its limited character, allowed one to conclude that the applicants had, in fact, the guarantees required by Article 6(1). Finally, the Commission might be called on to examine whether, given Chapter 14, sections 9 and 10, of the Swedish Companies Act, the acquisition and holding of a share in a company under Swedish law does not imply the tacit renunciation of certain rights guaranteed by Article 6(1) of the Convention, in so far as these concern the forced sale of these shares.

The Commission considers that the applicants' arguments based on Article 6 cannot be declared inadmissible but that they raise sufficiently complex problems to require an examination on the merits. These grounds of appeal must therefore be declared admissible.

3. Finally, during the hearing before the Commission on 12 October 1982, the applicants alleged that they had not had an effective remedy in Sweden for the violations of the Convention of which they claimed to be victims. They invoked Article 13 of the Convention which reads as follows:

> 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.

The Commission does not consider that this raises another separate ground of appeal. It is rather a legal argument relating to their complaints about the proceedings concerning the purchase and the valuation of their shares in the 'NK'. The Commission therefore considers that the examination of these allegations should follow the decision on the complaints relating to Article 6(1) and mentioned above.

For these reasons, THE COMMISSION:

Declares Inadmissible the complaint of the applicants that the forced purchase of their shares was a violation of Article 1 of Protocol No. 1;

Declares Admissible the remainder of this application.

Appeal allowed; minute of order to be agreed between counsel; the Part 20 claim to be heard in the county court; permission to appeal to the House of Lords refused.

H8 *Solicitors*—Joseph Aaron & Co., Ilford; Collyer Bristow; Armstrong & Co.

H9 *Reporter*—Edward Peters.

FAMILY HOUSING ASSOCIATION v. DONNELLAN AND OTHERS

CHANCERY DIVISION (Park J.): July 12, 2001[1]

[2002] 1 P. & C.R. 34

H1 *Real property—Adverse possession—Amendments to particulars of claim to take account of Human Rights Act 1998—Whether adverse possession breached Art. 1 Protocol 1 or Art. 6 of the European Convention on Human Rights—Whether amendments should have been permitted*

H2 The defendants occupied two houses in Lambeth of which the claimant Association was the registered owner. The Association had commenced possession proceedings against the defendants in 1995, in which the defendants pleaded that they had acquired adverse possession under section 15 of the Limitation Act 1980 and that the Association's title was extinguished under section 17 of the Act. After the Human Rights Act 1998 came into effect, the Association applied for permission to amend its particulars of claim so as to raise arguments that the whole concept of adverse possession was contrary to Article 1 of Protocol 1 and Article 6 of the European Convention on Human Rights. H.H. Judge Knight gave the Association permission to make the amendments but also gave the defendants permission to appeal. The appeal was remitted to the High Court where it was argued that the statutory provisions relating to adverse possession should be read under section 3 of the Human Rights Act so that the Association was not deprived of its property or that, if they could not be so read, the court should make a declaration of incompatibility under section 4 of the 1998 Act.

H3 **Held**, allowing the appeal, that the part of Article 1 of Protocol 1 which was about deprivation was directed against expropriations by the State or authorised by the State for public purposes. It was not directed against matters which were essentially ones of private law. Further, the rules on adverse possession were not incompatible with Article 6 of the Convention. It had been decided by the European Court of Human Rights in *Stubbings v. United Kingdom* that, where a national law prescribes limitation rules which are proportionate and which are not so restrictive as to impair the very essence of the right of the claimant to bring his case to court, the national law did not thereby infringe the right to a fair trial within Article 6. The period of 12 years under the Limitation Act 1980 plainly gave the holder of the paper title a reasonable opportunity to bring a claim asserting his ownership and stopping the period of adverse possession from running.

H4 **Cases referred to:**
(1) *Bramelid v. Sweden* (1983) 5 E.H.R.R. 249.
(2) *Holy Monasteries v. Greece* (1995) 20 E.H.R.R. 1.
(3) *JA Pye (Oxford) Ltd v. Graham* [2001] 2 W.L.R. 1293; [2001] H.R.L.R. 27; (2001) 82 P. & C.R. 23.
(4) *James v. United Kingdom* (1986) 8 E.H.R.R. 123; [1986] R.V.R. 139.
(5) *Marckx v. Belgium* (1979–1980) 2 E.H.R.R. 330.
(6) *Sporrong and Lonnroth v. Sweden* (1983) 5 E.H.R.R. 35.

[1] Paragraph numbers are as added by the publishers.

H5 **Legislation referred to:**
Human Rights Act 1988, ss. 3 and 4; Limitation Act 1980, ss. 15 and 17.

H6 **Appeal** from a decision of H.H. Judge Knight given in the Central London County Court on November 1, 2000. The learned judge thereby gave the defendants, Phillipa Donnellan, Andrew Cato and other persons unknown permission to appeal from his decision to allow the claimant, the Family Housing Association, to amend particulars of claim in an action to recover possession of certain property from the defendants so as to raise arguments on the Human Rights Act 1998. The facts are stated in the judgment.

H7 *Nicholas Vineall* for the claimant.
Stephen Knafler for the defendant.
The second defendant appeared in person.

1 **PARK J.:**

Overview

The defendants occupy two houses in Lambeth of which the Association is the registered owner. As long ago as 1995 the Association commenced possession proceedings. The defendants pleaded a defence of adverse possession. They claimed that they, or predecessors through whom they claimed, had been in adverse possession for over 12 years so that, under provisions of the Limitation Act 1980, the Association was not entitled to recover possession from them (section 15). Indeed, so the defendants pleaded, the Association's title was extinguished (section 17). A lot of time has clearly passed without the case making much progress. I know virtually nothing about that, but I am told that there are issues of what I might call a traditional nature for adverse possession cases. Those issues will have to be tried (absent a settlement). I imagine that they will cover such questions as whether the possession of the defendants or their predecessors was "adverse" within the meaning of the Limitation Act, and whether the possession was sufficiently continuous and sufficiently long in time. I am not concerned with any of that.

2 I am concerned with a point which arose in the following way. After the 1998 Act (the Human Rights Act) came into force, the Association applied for permission to amend its particulars of claim so as to raise arguments that the whole concept of adverse possession is contrary to its (the Association's) Convention rights. H.H. Judge Knight, in the Central London County Court, gave the Association permission to make the amendments, but he also gave the defendants permission to appeal. Originally the permission was for an appeal direct to the Court of Appeal, but the Court of Appeal has remitted the appeal to the High Court (Civil Procedure Rules, Part 52.14(2)), So it now comes before me.

3 My decision is that the appeal will be allowed for reasons which I will explain.

4 I record that Mr Knafler of counsel appeared for Miss Donnellan, the first defendant, and Mr Vineall of counsel appeared for the Association. I am grateful to them both for their particularly helpful arguments. The second

defendant, Mr Cato, appeared in person, but he was content to adopt the submissions of Mr Knafler.

The law

5 Adverse possession is a statutory concept, though there is by now a wealth of case law about it. The statutes are those dealing with limitation of actions, and one presently in force is the Limitation Act 1980. The two principal provisions are sections 15(1) and 17:

> "15(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
>
> ...
>
> 17 Subject to—
> (a) section 18 of the Act; and
> (b) section 75 of the Land Registration Act 1925;
> at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished."

Schedule 1 paragraph 8 goes into a little more detail about the time at which a paper owner's right of action accrued (that being an important concept referred to in section 15(1)).

6 I mention at this stage that I have been kindly and helpfully informed by Mr Vineall that there is a Bill currently before Parliament which will make significant changes to the law of adverse possession as it affects registered land. However, the provisions of that Bill do not affect the issues which are presently before me.

7 The 1998 Act introduced the Convention into our domestic law. As far as possible domestic legislation is to be interpreted and given effect in a way which is compatible with Convention rights (section 3). Where that cannot be done, the court may make a declaration of incompatibility (section 4), which may lead to amending legislation by statutory instrument (section 10). The Convention right principally relied on by Mr Vineall, on behalf of the Association, is the right in Article 1:

> "Protection of Property
> Every natural of 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."

8 I should comment on the Article at this stage. It is one Article and it should be read as a whole. Nevertheless, as has frequently been pointed out, there are three parts to it corresponding to the three sentences. Sentences 1 and 2 in the first paragraph of the Article are the sentences which confer the rights. Sentence 2, as well as conferring a right not to be deprived of possessions, identifies certain exceptions in which the deprivation of

possessions is not to be regarded as an infringement of the right. Sentence 3 is the whole of the second paragraph and (like the second part of sentence 2) is in the nature of a saving, permitting certain aspects of a State's legal system to take effect notwithstanding the rights of persons to protection of their property.

9 Saying a little more about the sentences, I add this. Sentence 1 is the peaceful enjoyment provision. Sentence 2 is the non-deprivation provision. The two sentences, though both relating to a person's possessions, address different matters. Sentence 1 is concerned with a person being able to enjoy his possessions while he has them. Sentence 2 is concerned with a person not being deprived of his possessions, except in permitted circumstances.

10 I should also refer to Article 6, of which I read only the first sentence:

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

11 For most of this judgment, I shall consider only Article 1, which is at the heart of Mr Vineall's case. At the end I shall briefly refer to Article 6.

The relevant events in this case

12 I have said that the Association's possession action was commenced in 1995. However, for my purposes I can begin with Knight J.'s decision, which was given on November 1, 2000. He was asked to give permission for the Association to amend its particulars of claim so as to raise arguments under the 1998 Act. I will not read the amendments at length. They are contained in a number of paragraphs. The central proposition advanced is that the rule that after 12 years of adverse possession a freeholder is deprived of his title to the land is in breach of Article 1 and/or of Article 6. It is said that the statutory provisions should be read so that the Association is not deprived of its property, or that, if they cannot be so read, the court should make a declaration of incompatibility under section 4 of the 1998 Act.

13 Knight J. gave permission for the amendments to be made. He had time to give only a brief judgment, and I think it is necessary for me to read only one sentence:

> "I see the force of Mr Knafler's submission, but I cannot say that this is a case which is so clear that the propositions contained in the re-amendment are unwinnable."

Having said that, the judge gave permission for the amendments to be made. As I have said earlier, he also gave permission for an appeal, which, after a brief visit to the Court of Appeal, has been remitted to the High Court (in the event to me) by direction of Tuckey L.J. The letter from the Civil Appeals office dated March 21, 2001 quote Tuckey L.J. as having commented as follows:

> "Until there is a binding decision on the Human Rights Act point, I think this Court is bound to say that it is arguable. The appeal should not therefore be heard in this Court. It is, of course, open to the defendants to appeal to the High Court."

The nature of the present appeal in this court

14 Under the Civil Procedure Rules, Part 52.11, the general rule is that an appeal is a review, not a rehearing. Normally I would be very slow to interfere with the decision of the judge in the county court, but in my judgment this case is exceptional and I think that it is right to do so. The critical point is that, although the amendments seek to make some points grounded in the particular facts of the case, the Association's argument is, in my view, purely one of law.

15 Mr Vineall submits that if an owner of a property would lose his title to it by reason of adverse possession by another person, he is thereby deprived of his possession within the meaning of sentence 2 in Article 1. Mr Knafler's proposition is that that is simply wrong as a matter of law. He says that the types of deprivations to which sentence 2 refers are matters such as expropriations by public authorities or expropriations by private parties taking effect under laws enacted for governmental purposes of a public nature.

16 Adverse possession is a matter of private law. The State has nothing to do with the operation of the law in a case such as the present one, except in the background sense that the U.K. Parliament has enacted the statutory provisions which, if the conditions set out in them exist, mean that the Association's title has been extinguished and the defendant's have acquired possessory titles. That is in essence Mr Knafler's argument.

17 I agree with it. I will explain my reasons later, but for the present I stay with the issue of what is the nature of the present appeal. There are two points to make. The first is that, on the particular argument before me, the specific facts of the individual case are irrelevant. On this Convention issue there is no need to have a trial before a court can decide whether an adverse possession case is incapable of being a deprivation of the type addressed in sentence 2 of Article 1. There is a need to have a trial on what I have referred to earlier as the traditional adverse possession issues, but not on this issue of whether the Convention can make a difference to a case between two private parties.

18 Secondly, given the nature of the argument sought to be raised by the Association's amendments and the grounds on which the defendants object to it, I think that the court should decide the question of law or, at the very least, should not feel that it is constrained to refrain from deciding that question. For myself I do not think it appropriate for the court to say that, because the legal argument might be quite difficult, the court should allow the amendment and let the trial judge decide whether, as a matter of law, the argument introduced by the amendment cannot be correct.

19 The analogy of a strike-out application was raised in argument, and I think that the analogy is valid. If a claimant pleads a case where the defendant can say that, even accepting the facts as pleaded by the claimant, the case (or a particular argument in it) is bound to fail as a matter of law, the defendant can apply for the case (or the particular argument) to be struck out. If the court considers that the legal argument is difficult, it might, I suppose, decide as a matter of trial management not to deal with it at that stage. However, frequently the court will decide the legal argument then rather than leave it over until later. The court's approach should be, or at least can be, similar if the point of law is not raised in the original pleadings and there is an application for it to be struck out, but

instead is sought to be added by amendment, and permission for the amendment is opposed.

20 I have had the benefit of the legal arguments being fully and clearly explained to me. I believe that I have all the materials which I need to deal with this particular issue and I intend to deal with it. The arguments are not easy. My decision may be wrong, but I see no justification for me taking the easy way out and not deciding the point now.

Can adverse possession be a deprivation within Article 1?

Analysis and Discussion

21 Mr Knafler submits, and I agree, that both under the jurisprudence of the European Commission on Human Rights (the Commission) and the European Court of Human Rights (the Court) and under highly persuasive *dicta* of the Court of Appeal, sentence 2 of Article 1 does not apply at all to the operation of the private law of adverse possession. I review first the European jurisprudence, which I am required to consider by section 2(1) of the 1988 Act.

22 1. *Sporrong & Lonroth v. Sweden* (1982) 5 E.H.R.R. 35. This case only deals with the issue obliquely and to some extent inferentially. The applicants owned properties in Stockholm which were threatened with some form of Swedish expropriation. The expropriations never happened, but the threat of them existed for many years. In our terms we might say that the properties were subject to a kind of blight because of the actions of the public authorities. The applicants were not compensated under Swedish law and complained to the Commission. The Court held that the applicants had not been deprived of their properties within sentence 2 of Article 1, either directly or through a *de facto* expropriation.

23 The relevance of the case is that the discussion of the Article at pages 50 and 51 of the report is all expressed in terms of whether there had been an expropriation. It is said by Mr Knafler that the Court assumed that what the Article had in mind as a deprivation was some form of actual or *de facto* expropriation by a public authority. I am inclined to agree, but I accept that the assumption is *sub silentio* and not explicit.

24 2. *Bramelid v. Sweden* (1982) 5 E.H.R.R. 249. This case is, in my view, much more explicit. Swedish company law had a provision similar to our section 429 of the Companies Act 1985. If a takeover bidder acquired 90 per cent of the shares in a target company, it could compel the non-accepting minority to be bought out at a price determined by an arbitrator. This procedure was put into effect, and two non-accepters complained to the Commission of infringement of their Convention rights, including their rights under Article 1 not to be deprived of their possessions. The Commission decided that the complaint was unfounded. I quote the following passage from pages 255 to 256, which I consider to be of major importance in the present case:

> "The essence of the parties' arguments is clearly based on the second sentence of the first paragraph of Article 1 Protocol Number 1. The applicants have, in effect, submitted that they were victims of an expropriation which was not in the public interest and was not accompanied by fair compensation.
>
> Even though the word 'expropriated' does not appear in the text, the terms of this provision, in particular the words deprived of his possessions ... in the public interest', as well as the reference made to 'the general principles of international law' show clearly that it relates to expropriation, whether formal or de facto; that is to say, the act by which the state seizes or gives another the right to seize a specific asset to be used for the realisation of a goal in the public interest. The *travaux préparatoires* of Article 1 of Protocol Number 1 confirm this interpretation.
>
> The Swedish legislation of which the applicants complain is of an altogether different kind. It is, in fact, the expression and the application of a general policy with regard to the regulation of commercial companies and concerns above all the relations of shareholders inter se. It goes without saying that in enacting legislation of this type, the legislature is pursuing the general aim of reaching a system of regulation favourable to those interests which it regards as most worthy of protection, something which, however, has nothing to do with the notion of 'the public interest' as commonly understood in the field of expropriation.
>
> The Commission, therefore, of the opinion that the second sentence of the first paragraph of Article 1 Protocol number 1 does not apply to the applicants' present appeal."

In my view, that case decides that the part of Article 1 which is about deprivation is directed against expropriations by the state or authorised by the State for public purposes. It is not directed against matters which are essentially ones of private law.

25 3. *James v. United Kingdom* (1984) 6 E.H.R.R. 455. This case was a challenge by major residential landowners, including the Grosvenor Estate, against being compelled by the Leasehold Reform Act 1967 to transfer freeholds to long leaseholders. The Commission affirmed the principles stated in Bramelid. It said that the concept of deprivation of possessions in Article 1 "was not intended to be so wide as to cover every case in which property passes from one person, against his will, to another, by virtue of the operation of rules of private law". That is a description which, as closely as makes no difference, fits the law of adverse possession.

26 In the *James* case itself, the Commission concluded that the Leasehold Reform Act did effect a deprivation within Article 1, notwithstanding that the properties affected passed from one private owner (like the trustees of the Grosvenor Estate) to another, but that was because the Act was "essentially a matter of social reform". It cannot be said in the present case that the adverse possession provisions of the Limitation Act 1980 are essentially a matter of social reform.

27 For completeness, I should record that in the *James* case the Commission went on to decide that the deprivation under the Act was saved by sentence 3 of Article 1. The case was later considered by the Court, which upheld the Commission's decision.

28 4. *Holy Monasteries v. Greece* (1994) 20 E.H.R.R. 1. In this case a Greek statute had the effect that properties owned by several monasteries of considerable antiquity would pass to the State unless the monasteries could produce documentary titles. Many of them could not do so. The Court held that the statute infringed Article 1. The relevance in the present context is that the Court recognised that persons (like the monasteries) might in the past have become owners of land by means which were not documented,

including by adverse possession. Thus, the Court considered that titles acquired by adverse possession were protected by Article 1. It would be astonishing if the acquisition of titles in that way had earlier been infringements of Article 1.

29 The cases to which I have referred so far are the European jurisprudence relied on by Mr Knafler. I believe that by themselves, they support his proposition that the operation of the law of adverse possession does not involve the sort of deprivation of a person's possessions which Article 1 prohibits.

30 However, Mr Vineall submits that there is another decision of the Court which may change the position. The case is *Marckx v. Belgium* (1979–80) 2 E.H.R.R. 330. If a woman had an illegitimate child, Belgian law restricted her ability to give or bequeath property to her child. There was no such restriction in the case of a married woman with legitimate children. The Court held that the law infringed the Convention in various ways, one of which was that it infringed the mother's rights in respect of her possessions under Article 1. Mr Vineall points out that, in this respect, the Court held that the Article could impact on a rule which was essentially one of private law, not public law. Up to a point that is true; but the decision was directed solely at sentence 1 of Article 1, under which the mother was entitled to the peaceful enjoyment of her possessions. The Belgian State, by allowing the offending law to remain in force, maintained and permitted a legal regime which denied to the mother "a traditional and fundamental aspect of the right of property". The case was not concerned with deprivation of property, and there is nothing in it to cast doubt on the principles established and supported, in my view, by the *Bramelid* and *James* cases that the part of Article 1 which is concerned with deprivation of property, sentence 2 of the Article, is directed at expropriation by public bodies or for public purposes.

31 I pass from the European jurisprudence to cases in this country. One stands out, namely the recent decision of the Court of Appeal in *JA Pye (Oxford) Ltd v. Graham* [2001] Ch. 804; (2001) 82 P. & C.R. 23. It is a case specifically about adverse possession. It was an appeal from a decision of Neuberger J. He had decided the case before the 1998 Act came into force, which was on October 2, 2000. He held on the facts that the defendants had acquired a possessory title by adverse possession. At the end of his judgment, he made certain observations to the effect that the law of adverse possession was unsatisfactory.

32 The claimant, the paper owner, appealed, and by the time that the appeal came before the Court of Appeal, the 1998 Act had come into force. The claimant appealed on two grounds. The first was that Neuberger J. had misapplied the law of adverse possession to the facts. The second was that if he had not, the Court of Appeal ought now to come to a different decision in the light of the 1998 Act and the Convention, especially Article 1. The Court of Appeal allowed the appeal on the first ground, so the paper owner did not need to rely on its second ground, the Article 1 argument. However, the Court of Appeal did deal with the argument, albeit obiter. It disagreed with it. Mummery L.J. stated that Article 1 did not impinge on the adverse possession provisions of the Limitation Act 1980. Keene L.J. agreed and added observations of his own to the same effect. Sir Martin Nourse agreed with Mummery and Keene L.JJ.

33 Mr Vineall accepts that the case is against him, but he wishes to argue

that the members of the Court were wrong. I agree that what they said was *obiter*, but the issue had clearly been argued thoroughly, and the members of the Court had considered the position with care. I think it most unlikely that a first instance judge, or indeed another composition of the Court of Appeal, would depart from what was said in the *Pye* case, and I do not think it right to permit the Association to make the amendment on the off chance that they might get the issue before the House of Lords, which just might take a different view.

34 I add that Knight J.'s decision giving the Association permission to appeal was reached before the Court of Appeal judgments in the *Pye* case. If he had had them before him, I think it is unlikely that he would have given permission at all.

35 There are two other matters that I should deal with on Article 1. Then I must deal briefly with Article 6.

36 First, Mr Vineall has drawn my attention to the recent decision of the Court of Appeal in *Wilson v. First County Trust* [2002] Q.B. 74; [2001] 3 W.L.R. 42. The Court declared that a provision of the Consumer Credit Act 1974 was incompatible with Article 1. The case is very important, and I have read the judgment with care. I cannot, however, see anything in it which affects what I have to decide. It concerned restrictions on the rights of a pawn-broker to enforce his rights. They were introduced for purposes of consumer protection and are not a matter purely of private law, like the law of adverse possession.

37 Secondly, I should refer to the words of Tuckey L.J. which I quoted at an early point in this judgment. I am not altogether clear what the learned Lord Justice meant by them. However, he plainly had not had the benefit of the arguments and authorities which have been presented to me. His comment does not deflect me from my decision.

Article 6

38 Finally, I should refer to Article 6, which is not significantly relied on by Mr Vineall but has been referred to in connection with limitation provisions and is also sought to be invoked in the amendments which the Association wishes to make to its particulars of claim.

39 The first sentence of Article 6 reads as follows:

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

40 If a person is barred from arguing a point by limitation, he plainly does not receive a fair and public hearing of his arguments on that point. However, looking simply at the text of the Convention, the right is one to a hearing "within a reasonable time", not at any time however remote into the future. Going beyond the text of the Convention, it has been decided by the European Court of Human Rights that, where a national law prescribes limitation rules which are proportionate and which are not so restrictive as to impair the very essence of the right of the claimant to bring his case to court, the national law does not thereby infringe the right to a fair trial within Article 6: see in particular *Stubbings v. United Kingdom* [1996] 25 E.H.R.R. 213. Under sections 15 and 17 of the Limitation Act 1980 the period is 12 years, which plainly gives to the holder of the paper title a

reasonable opportunity to bring a claim asserting his ownership and stopping the period of adverse possession from running.

41 There is room for improvement in the detail of the law of adverse possession, as the Bill presently before Parliament demonstrates, but rules whereby title can be acquired by adverse possession are found in nearly all legal systems and they cannot be rejected as inherently incompatible with Article 6.

Conclusion

42 For the reasons which I have given, I consider that the Convention issues which the Association wishes to raise pursuant to the amendments are already covered by authority. On the law, as it has been clearly laid down both in European and domestic decisions, the Convention arguments as applied to adverse possession are incorrect. I respectfully disagree with the judge's decision to grant permission to appeal, and I repeat that I doubt that he would have granted it if he had had the Court of Appeal judgments in *Pye v. Graham* before him.

43 Accordingly, I allow the defendants' appeal.

Appeal allowed.

H8 *Solicitors*—Evans Butler Wade; Steel & Shamrash.

H9 *Reporter*—David Stott.

HANSON v. SWEB PROPERTY DEVELOPMENTS LTD (SUED AS SOUTH WEST ELECTRICITY BOARD)

COURT OF APPEAL (Sedley and Dyson L.JJ.): July 27, 2001[1]

[2001] EWCA Civ 1377; [2002] 1 P. & C.R. 35

H1 *Real property—Purchase of property subject to vendor carrying out certain works—National Conditions of Sale applied—Notice of completion—Validity of notice—Whether outstanding obligations debarred vendor from issuing valid notice—Whether sufficient performance by purchaser—Whether purchaser entitled to complete by tender of lesser sum*

H2 In 1996 the appellant agreed to purchase property subject to the respondent vendor carrying out certain works. The agreement specified a completion date and a purchase price of £13,248. The National Conditions of Sale applied. On February 4, 1997 the respondent served a notice of completion of works pursuant to clause 19(4) of the agreement. The appellant denied that the works to the property were properly completed and a consequential dispute arose as to the correct completion figure. On March 21, the respondent sent a further notice to the appellant to complete the contract within 10 days and on March 27, a completion statement showing the amount required to complete the matter as being £6,056. On April 5, the appellant wrote a letter to the respondent (copied to his own solicitors) specifying a sum (£2,962) he was prepared to pay on completion, with the balance to be held by him pending resolution of the dispute. The respondent replied on April 7 that the completion statement was not agreed and that completion would only proceed on the basis of the letter of March 27. The appellant did not actually pay or tender any sum on the date fixed for completion and, on April 11, the respondent rescinded the contract. The appellant sought a declaration that the notice to complete served on March 21 was invalid because (i) at the time, the respondent was not willing to fulfil its outstanding obligations under the contract as required by condition 22 of the National Conditions of Sale; there was an implied term of the contract pursuant to which it was obliged to carry out the outstanding items of work, and it was in breach of that obligation; (ii) even if the notice was valid, the appellant's letter of April 5 was a sufficient performance of his completion obligation as to payment. He genuinely believed that the sum he had instructed his solicitors to pay was all that he was obliged to pay; and (iii) it was not open to respondent to say that he did not tender the sum referred to in the letter of April 5, because the failure to tender was caused by the respondent's letter of April 7. H.H. Judge Cotterill found that the execution of the works was, at the very lowest, substantially performed and that the service of the notice was wholly justified. On appeal to the Court of Appeal:

H3 **Held,** dismissing the appeal, that (i) there was an implied term that the work would be done in a proper manner and the items of outstanding work did amount to breaches of the implied term such as to give rise to a cause of action and a claim for damages for breach of contract. They were not, however, outstanding obligations within the meaning of condition 22 such that they debarred the respondent from serving a valid notice to complete; (ii) the writing of the letter of April 5 (coupled with the fact that the appellant genuinely believed that the sum due at completion was no more than £2,962) was not sufficient performance to entitle the appellant to

[1] Paragraph numbers in this judgment are as assigned by the court.

CACV001521/2001

CACV1521/2001

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO.1521 OF 2001

(ON APPEAL FROM HCAL NO.2630 OF 2000)

BETWEEN

KOWLOON POULTRY LAAN MERCHANTS ASSOCIATION	Applicant (Appellant)
AND	
DEPARTMENT OF JUSTICE for and on behalf of DIRECTOR OF AGRICULTURE FISHERIES CONSERVATION DEPARTMENT OF HKSAR	Respondent

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Coram: Hon Mayo VP and Hon Suffiad J in Court

Date of Hearing: 10 July 2002

Date of Judgment: 10 July 2002

J U D G M E N T

Hon Suffiad J : (Giving the judgment of the court)

1. This is an appeal by the appellant, originally the applicant, against the decision of Chung J given on 15 June 2001, whereby the judge refused the applicant's application for leave for judicial review.

Background

2. The appellants are a poultry wholesalers' association representing 10 poultry wholesaling businesses or "laans" who from 1974 to 1997 rented stalls in Cheung Sha Wan Temporary Poultry Market where they sold chicken as well as water birds, that is ducks and geese, until the outbreak of

the "bird flu" in December 1997.

3. As a result of the outbreak of "bird flu", the Public Health (Animals and Birds) (Amendment) (No.2) Regulations was enacted on 27 February 1998, whereby ducks and geese and other water birds were required to be traded at a separate location from chicken. These regulations reflected scientific advice that avian flu was carried by ducks and geese and could spread from them to chicken and then to humans. As a result, they were not allowed to sell water birds from their stalls in Cheung Sha Wan Temporary Poultry Market but only chicken.

4. Another location in the Western Wholesale Food Market was made available to them from which to sell water birds. The appellants have been compensated for the slaughter of their poultry in December 1997. It is alleged by the appellants that each of them have suffered severe financial loss as a result of the decision to separate the locations for selling chicken and for selling water birds. The appellants say that this is due to the fact of the alternative site for selling water birds at the Western Wholesale Food Market offered by the Government is not practical because of its distance from customers and the small size of the stalls offered. This, they say, has resulted in their having to close down the duck and geese wholesaling side of their businesses. However, Government decided that no compensation would be paid to them for the decision to separate the locations for selling chicken and for selling water birds.

5. The judge below found that this decision by the Government not to compensate them was made in August 1998. It is against this decision of the Government not to compensate them that the appellants seek judicial review. The hearing for leave to issue judicial review came before Chung J who refused leave to the appellants and it is against that decision of Chung J which they now appeal.

6. The judge below refused leave to the appellants on the basis that he did not consider that the appellants had been deprived of their property, under Article 105 of the Basic Law. In so holding the judge below had this to say :

> "Counsel argued that 'property' in Art. 105 should include a business or trade. She submitted that by requiring the Applicant's members to move the ducks and geese operation to the Western Wholesale Market, Government has 'deprived' them of their businesses, even though this was done in accordance with the amended Regulations and By-laws. The putative respondent denied that the businesses of the Applicants' members had been deprived and contended that they could continue their businesses in the new market. Applicant's Counsel accepted that in the light of this argument, the issue of whether the businesses of the Applicant's members had been deprived, turns at the end on whether it was reasonable for Government to move the ducks/geese operation to the Western Wholesale Food Market. I have already found against the Applicant on this point. In such case, even if 'property' should include a trade or business, I do not consider that the Applicant has been deprived of its property."

7. The appellants put forward two grounds of appeal. Firstly, the judge erred in finding that there is no deprivation of the appellant's property pursuant to Article 105 from the Basic Law; and secondly, the judge was wrong not to grant the appellant an extension of time to apply for leave for judicial review. Article 105 of the Basic Law provides as follows :

> "The [HKSAR] shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.
>
> Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay."

The appellant's argument

8. Firstly, the appellants relied on the definition given to "property" by the Interpretation and General Clauses Ordinance (Cap. 1) which provides that :

> "property includes :
>
> (a) money, goods, choses in action and land; and
>
> (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition;"

9. It is submitted by the appellants that the reduction of profit, as a result of being deprived of continuing their duck and geese wholesaling businesses at the Cheung Sha Wan Temporary Poultry Market is a deprivation of property within the meaning of Article 105 of the Basic Law which entitles the appellants to compensation.

10. It is further submitted by the appellants that the judge below erred when he linked entitlement to compensation under Article 105 with the issue of whether the Government's action of segregating the operation of chicken and water birds was reasonable. They say that even if such action was reasonable on the part of the Government, the appellants are still entitled to compensation under Article 105 if there had been a deprivation of the property.

11. The appellants further complained that the judge should not have penalized the appellants for the delay by refusing to extend time because the intervening period between October 1998 and August 2000 was taken up with attempts by the appellants to pursuade the Government to reconsider its position and it is commendable that the appellants should attempt to resolve the matter by negotiation before resorting to litigation.

The respondent's arguments

12. The respondent was not called upon at the hearing. The argument presented by the respondent contained in their skeleton argument is quite simply that there is here no deprivation of property but that the new regulations and By-laws control the use of the land rented by the Government to the appellants. They say that there has been no taking away of the land used by the appellants and that the appellants are still enjoying the use of that land in the Cheung Sha Wan Temporary Poultry Market to sell chicken, albeit that they cannot sell water birds there.

13. They further submit that since there was delay of some two years, the burden is on the appellants to show good reason why the court should extend time for leave to issue judicial review. In the absence of any good reason advanced, the court should not exercise its discretion in the appellants' favour.

Decision

14. It is accepted that the test for leave to issue judicial review has a low threshold and that it depends on the potential arguability of the matter brought by the applicant.

15. The crux of this dispute as we see it is whether or not the appellant had made out an arguable case that they have suffered a "deprivation of property" as it is understood in Article 105 of the Basic Law such that they should be given leave for judicial review. Accepting for present purposes that the profit, business or goodwill, even relating to the future, can amount to "property" has there been any deprivation? In our view, there has not been any deprivation made out in this case for the following

reasons. The appellants have not been deprived of the use of the land rented to them by the Government at the Cheung Sha Wan Temporary Poultry Market. They are still selling chicken there. They are prohibited by the new regulations and By-laws to sell water birds there. That is not deprivation but rather control of use of land. Moreover and so far as their businesses of selling water birds is concerned, they have not been deprived of that business either by the new regulations and/or by the new By-laws. Their reduction of profit, if any, does not result from any "deprivation of property".

16. Indeed, Government has provided them with an alternative location, namely the Western Wholesale Food Market, from which to sell water birds. In that sense, there is no deprivation. Even if they have suffered a reduction of profit selling water birds at this alternative location for the reasons advanced by them, that does not equate with a "deprivation of property" under Article 105 of the Basic Law. To that extent, we agree with the judge below that the appellants have not made out any case to show that there has been a deprivation of property under Article 105.

17. If authority be needed for the view which we have taken above, that is to be found in the judgment of the European commission, which made the following observations and the case of **Ban ér v. Sweden**, App. No.11763/1985, 60 D.R. 128 at pages 139-140 :

> " As regards the question whether the applicant has been deprived of property, the Commission recalls that, according to the established case-law, deprivation of property within the meaning of Article 1 of Protocol No.1 is not limited to cases where property is formally expropriated, i.e. where there is a transfer of the title to the property. 'Deprivation' may also exist where the measure complained of affects the substance of the property to such a degree that there has been a *de facto* expropriation or where the measure complained of 'can be assimilated to a deprivation of possessions' (cf. Eur. Court H.R., Sporrong and Lönnroth judgment of 23 September 1982, Series A no.52 p. 24 para. 63).
>
> It is clear that the applicant has not been formally deprived of his property. He still retains the title to it. The applicant has also not been deprived of his right to fish, including the right to fish with hand-held tackle. What he has lost is his right to exclude others from fishing with hand-held tackle.
>
> Legislation of a general character affecting and redefining the rights of property owners cannot normally be assimilated to expropriation even if some aspect of the property right is thereby interfered with or even taken away. There are many examples in the Contracting States that the right to property is redefined as a result of legislative acts. Indeed, the wording of Article 1 para. 2 shows that general rules regulating the use of property are not to be considered as expropriation. The Commission finds support for this view in the national laws of many countries which make a clear distinction between, on the one hand, general legislation redefining the content of the property right and expropriation, on the other.
>
> The Commission has for the same reasons in cases concerning rent regulations, which have seriously affected the right to property, nevertheless held that such regulations fall to be considered under the 'control of use' rule (cf. Mellacher and Others v. Austria, Comm. Report 11.7.88, at present pending before the European Court of Human Rights)."

18. The view that we have taken can be tested in a very simple way. If the appellant be correct in the view that they have taken, then it follows that future legislative restrictions on land use, such as planning control and zoning, can amount to "deprivation of property" and would have to be compensated for under Article 105. That cannot be correct and underlines the fallacy of the argument

presented by the appellants. Having reached the decision above that the appellants have not made out any case as to deprivation, the arguments as to the failure of the judge below to extend time for leave to judicial review falls away. We cannot see how the judge could be faulted for refusing to extend time in this matter.

19. For the reasons given above, the appeal is dismissed.

(Simon Mayo)
Vice-President

(A.R. Suffiad)
Judge of the Court of First Instance,
High Court

Representation:

Mr Paul Wu and Miss Lorinda Lau, instructed by

Messrs Lawrence K.Y. Lo & Co., for the Applicant (Appellant)

Mr Kwok Sui Hay, instructed by Secretary for Justice, for the Respondent

APPLICATION/REQUÊTE N° 11763/85

Sten BANÉR v/SWEDEN

Sten BANÉR c/SUEDE

DECISION of 9 March 1989 on the admissibility of the application

DÉCISION du 9 mars 1989 sur la recevabilité de la requête

Article 6, paragraph 1 of the Convention *: This provision does not guarantee a right of access to a court with competence to invalidate or override a law.*

Article 13 of the Convention *: This provision does not guarantee a remedy which would provide a review of the conformity of legislation with the Convention.*

Article 14 of the Convention, in conjunction with Article 1 of the First Protocol *: Legislation which allows everyone the right to fish in private waters but grants compensation only to owners who have suffered a loss of income. In this case, difference in treatment based on an objective and reasonable justification.*

Article 26 of the Convention *:*

a) The six month period runs from the date of the final domestic decision after use of the effective and sufficient domestic remedies.

b) In case of a complaint under Article 1 of Protocol No. 1 because of loss of income due to the Swedish law of 1985 allowing everyone the right to fish in private waters, neither the Act on Compensation for Interferences with Private Fishing Rights nor a compensation claim based on Chapter 2 Section 18 of the Constitution constitutes an effective remedy.

Article 1, paragraph 2 of the First Protocol *: This provision does not as such guarantee a right for an owner to receive compensation.*

The restrictions created by the Swedish law of 1985 allowing everyone the right to fish in private waters constitute a control of the use of property. Examination of

whether the interference is lawful, in the general interest and proportionate to the aim. In determining the demands of the general interest, the Contracting States enjoy a margin of appreciation.

Article 6, paragraphe 1 de la Convention *: Cette disposition ne garantit pas un droit d'accès à un tribunal habilité à censurer ou annuler la loi.*

Article 13 de la Convention *: Cette disposition ne garantit pas un recours en vertu duquel s'opérerait un contrôle de la conformité d'une législation avec la Convention.*

Article 14 de la Convention, combiné avec l'article 1 du Protocole additionnel *: Législation qui donne à tous le droit de pêcher dans les eaux privées mais qui n'accorde une indemnisation qu'aux propriétaires ayant subi une perte de revenus. En l'espèce, différence de traitement fondée sur une justification objective et raisonnable.*

Article 26 de la Convention *:*

a) Le délai de six mois court dès la date de la décision interne définitive après exercice des recours internes efficaces et suffisants.

b) S'agissant d'un grief tiré de l'article 1 du Protocole additionnel en raison de la perte de revenus par la loi suédoise de 1985 donnant à tous le droit de pêcher dans les eaux privées, ne constituent des recours efficaces ni la loi d'indemnisation des atteintes aux droits de pêche privée ni l'action en indemnisation fondée sur le chapitre 2, article 18 de la Constitution.

Article 1, paragraphe 2, du Protocole additionnel *: Ce paragraphe ne garantit pas, comme tel, un droit pour le propriétaire de recevoir une indemnité.*

Les restrictions que comporte la loi suédoise de 1985 donnant à tous le droit de pêcher à la ligne dans les eaux privées, constituent une réglementation de l'usage des biens. Examen du point de savoir si l'ingérence est légale, conforme à l'intérêt général et proportionnée au but. Pour déterminer les impératifs de l'intérêt général, les Etats contractants jouissent d'une certaine marge d'appréciation.

THE FACTS

(français : voir p. 146)

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

The applicant is a Swedish citizen, born in 1920. He is an estate owner. He is represented before the Commission by Mr. Michaël Hernmarck, a lawyer practising at Danderyd, outside Stockholm.

The applicant is the owner of an estate called the Sjöö Estate. It is an overall name for an agricultural estate which consists of several registered properties.

The properties are located in the municipality of Enköping in the county of Uppsala and cover an area of 1,000 hectares. The estate also includes water areas which cover some 600 hectares of the lake of Mälaren. Since 1964 the water areas have no longer been leased to professional fishermen. At that time two tenants earned their living on fishing in the waters of the Sjöö Estate. No fishing licences have been sold to the public by the applicant. Such fishing as has taken place has been for household purposes by the holder of the Estate. In addition, the employees of the Estate are allowed to fish for household purposes without payment of compensation. The fish, which can be caught in the waters with hand-held tackle, consist principally of pike, pike-perch and perch. White fish, burbot and eel are also found.

On 1 May 1985 new legislation entered into force which made fishing with hand-held tackle (handredskapsfiske) licence-free for everybody. Thereby the applicant's exclusive right to such fishing in his waters has been transformed so that everybody is now entitled to fish with hand-held tackle in these waters. The applicant states that, as a result, the number of fishermen increased significantly. The people who visit these waters in pleasure boats or go ashore on the beaches have with them, and use, casting rods and the like. The number of fishermen during the summer has increased considerably compared to the situation before 1 May 1985. There has also been an increase in illegal fishing. Previously, some people used to "poach" using hand-held tackle when they were visiting in order to sunbathe or swim or for other recreational purposes. Now, when this type of fishing has been made legal, nets are also being laid along the side of boats, especially when people stay overnight. The fishing waters are attractively located some sixty minutes by car from the centre of Stockholm and close to other towns which surround the lake of Mälaren. These waters are now subject to great pressure from sporting fishermen.

The 1985 legislation involved in essence an amendment of the Fishing Rights Act (lagen om rätt till fiske) and a new Act on Compensation for Interferences with Private Fishing Rights (lagen om ersättning för intrång i enskild fiskerätt; hereinafter referred to as "the Compensation Act").

The amendment of the Fishing Rights Act consisted essentially of the introduction of a Section 20 (a) which reads as follows:

(Swedish)

"Vid kusten av Östhammars kommun i Uppsala län, Stockholms län, Södermanlands län, Östergötlands län, Kalmar län, Gotlands län och Blekinge län samt i Vänern, Vättern, Mälaren, Hjälmaren och Storsjön i Jämtland får svenska medborgare, utöver vad som följer av 7-11 och 14-20 §§, fiska i enskilt vatten med metspö, kastspö, pilk och liknande handredskap som är utrustat med lina och krok. Redskapet får dock inte ha mer än tio krokar. Ej heller får fiskemetoden som sådan kräva användning av båt."

(English translation)

"Along the coast of the municipality of Östhammar in the county of Uppsala, the county of Stockholm, the county of Östergötland, the county of Kalmar, the county of Gotland, the county of Blekinge and in the lakes of Vänern, Vättern, Mälaren, Hjälmaren and Storsjön in Jämtland, Swedish citizens may, subject to the provisions of Sections 7-11 and 14-20, fish in private waters with rod, casting rod, jig and similar hand-held tackle equipped with line and hook. The tackle may however not include more than ten hooks. The fishing method may also not require the use of a boat."

Section 1 para. 1 of the Compensation Act provides as follows:

(Swedish)

"Medför bestämmelserna om handredskapsfiske enligt 20 a § lagen (1950:596) om rätt till fiske ett inkomstbortfall för den som är innehavare av enskild fiskerätt, har han enligt denna lag rätt till ersättning av staten för inkomstbortfallet."

(English translation)

"If the provisions on fishing with hand-held tackle under Section 20 (a) of the Fishing Rights Act involve a loss of income for the proprietor of a private fishing right he is entitled under this Act to compensation from the State for the loss of income."

A transitional provision to the Compensation Act provides that income received as a result of measures taken after 1 March 1984 shall not be the basis for the calculation of compensation under the Act.

In the Government Bill 1984/85:107 (pp. 42-43), the Minister of Agriculture made *inter alia* the following statements:

The purpose of making fishing with hand-held tackle free was to meet the public's interest in leisure activities. In most cases no damage would be done to the fishing rights owner if fishing with hand-held tackle was made free. However, in some special cases there ought to be a possibility for the fishing rights owner to receive compensation. For a right to compensation it ought to be required that the interference was somewhat substantial. Everyone must be prepared to accept a certain interference in the public interest without compensation. Since free fishing with hand-held tackle would not affect the use of the water for other purposes than fishing the compensation rule could be restricted to cover interferences which resulted in ongoing use of fishing in private waters being rendered considerably more difficult. Compensation should not be paid for other interferences than in ongoing use of water for fishing. If the waters had not previously been used for fishing there could be no compensation. Expectation values should thus not be compensated. The compensation should be assessed on the basis of actual loss of income suffered by the individual fishing rights owner as a result of the free fishing with hand-held

tackle. For a right to compensation it ought to be required that the damage did not appear to be insignificant seen in absolute figures.

Before the Government's proposal was submitted to Parliament, it was examined by the Law Council (lagrådet), composed of two judges of the Supreme Court (högsta domstolen) and one judge of the Supreme Administrative Court (regeringsrätten). The Law Council found, although proposing a certain increase in the right to compensation, that the proposed legislation did not violate the Swedish Constitution.

When the proposed legislation was examined in Parliament the Standing Committee on Agriculture (jordbruksutskottet) made the following statement (JoU 1984/85:20, page 15):

> "The Committee supports the statement made by the Minister of Agriculture that this is not a question of such transfer of property which is covered by the provision in Chapter 2 Section 18 of the Instrument of Government on expropriation. However, the Committee also shares the view of the Minister of Agriculture that it is important that the question of compensation is given a satisfactory solution with regard to the protection of the individual at which the said constitutional provision is aiming. For that reason those private fishing rights owners who suffer financial losses as a result of the free fishing with hand-held tackle, should be entitled to compensation for such losses in accordance with grounds laid down in the law. It is reasonable that this right to compensation covers every personal financial loss which the fishing rights owners may suffer."

Claims for compensation should be submitted to the National Board of Fisheries (fiskeristyrelsen) before the end of 1989. The National Board of Fisheries decides on issues of compensation. No appeal lies against this decision. However, a property owner who is not satisfied with a decision of the National Board of Fisheries can institute proceedings before the Real Estate Court (fastighetsdomstolen).

The applicant states that, since he has not suffered any financial loss in the sense that he has lost income as a result of the new legislation, he has no right to compensation under the Compensation Act and he has thus not submitted any claim for such compensation.

The background and reasons for the 1985 legislation are described as follows by the Government (with reference to the Government Bill 1984/85:107):

The reform constitutes a part of the public recreation policy. From the social aspect it is important for people to have opportunities for relaxation and activities in their leisure time. This need increases as leisure time increases and daily work requires less physical effort. There are numerous obstacles limiting opportunities for utilising leisure time. Many leisure activities require expensive equipment.

One's own holiday cottage, a craft or caravan and access to a car are often required to get to recreation areas. People living in large towns often live far from unexploited countryside and the recreation facilities offered thereby. Furthermore, many people who have moved to the towns previously had a natural and spontaneous contact with unspoiled nature which is now lost. Recreational fishing means a great deal to these people. All three of the big-city areas in Sweden are located close to the sea coast. Two of them also offer suitable lakes in the immediate vicinity of residential areas. Distance therefore does not have to be a problem for those who wish to go fishing in their leisure time. However, recreational fishing requires access to suitable fishing waters in the big-city areas. In the Gothenburg and Malmö areas it was possible for everyone to fish on the coast, but in the Stockholm area this was prevented by the fishery legislation which meant that fishing near the beaches and in most of the archipelago area was an exclusive right of the owner of the fishing rights.

Furthermore, an important task for society is to make a wide range of leisure activities available to all. This is particularly important since the opportunity of leisure activities and exercise is of great significance to health, adjustment and well-being in society. Recreational fishing offers unique opportunities for contact with nature, exercise and relaxation and it is open to anyone. It activates people from all groups of society. The social bias often evident in other leisure activities does not exist in recreational fishing. It is also an important supplement to other leisure activities such as boating, hiking, holiday trips and camping. Recreational fishing can also provide an added source of livelihood, enabling settling in sparsely populated areas where other sources of livelihood are limited. An important task for society is to contribute to offering the public a rich and varied range of leisure opportunities. Experience shows that active recreational fishing plays an important part in the social recreation policy.

In the Bill submitted to Parliament, in which the reform was proposed, the Minister of Agriculture stated the following:

> "It is unusually difficult to obtain any clear picture of the current legislation on fishing rights. This is evident from the summary of the system of regulations given in the memorandum. Regulations which at the time they were issued may have seemed reasonable and fair, now appear difficult to understand, complicated and sometimes illogical. One of the most striking examples of this is that on certain stretches of the coast the public may fish freely with nets but may not use hand-held tackle. The provisions of the Fishing Act are supplemented by provisions concerning conservation and operation of fishing issued by the Government in the Ordinance on Fishery and other provisions notified by the National Board of Fisheries or by the County Administrative Boards. This accumulation of regulations is extremely extensive and contains such a multitude of detail that it is difficult for an individual to acquire adequate information as to where, when and how he may fish. The fact that the

regulations are often considered complicated or are misunderstood entails an apparent risk of even regulations which are well-motivated from the conservation aspect being disregarded.

Even today the owners of fishing rights do not make full claim to their rights, but allow the public to fish with hand-held tackle and even with nets along large parts of the coastal stretches now under discussion.

In the light of this I look upon the proposal to increase the public's opportunities to fish freely with hand-held tackle as a natural and essential step towards simplification. If it is implemented, this will allow fishing with hand-held tackle in both public and private waters along all coasts and in the large lakes. The only limitation remaining will be the exclusion of salmon fishing along the coast of Norrland (from Östhammar municipality to the Finnish border). As long as only hand-held tackle are used, the reform will relieve both the public and the authorities of keeping track of where the boundary lies between public and private waters. Besides the other reasons favouring the reform, I also consider this simplification to have a considerable intrinsic value.

As appears from what I have already submitted, Parliament on two previous occasions, by requesting a proposal from the Government, has already reached a decision in principle to allow fishing with hand-held tackle to be free. The task of the Government now, therefore, is to draw up the legislative proposals required to implement the reform. Replacing this reform by forming fishery conservation areas within all private waters in the areas under discussion is, for several reasons, not a realistic alternative. Fishery conservation areas cannot simply replace free fishing with hand-held tackle. The formation of such conservation areas aims primarily at improving fishery conservation and not at giving the public free access to fishing. Furthermore, in my opinion, fishery conservation areas formed compulsorily, as they often would be, would constitute a far greater interference with the individual's rights than the free fishing with hand-held tackle. Voluntary formation of fishery conservation areas which can give the public access to fishing-grounds to the same extent as free fishing with hand-held tackle cannot be expected within a reasonable time.

However, the reform should not entail any new obstacles to the formation of fishery conservation areas."

The Standing Committee on Agriculture made the following statement (JoU 1984/85:26 p. 10):

"The Government's proposal... means that Parliament's wish, expressed two years ago, is now satisfied. An important recreational political reform is implemented since fishing with hand-held tackle, in the future, will be free along all coasts of Sweden and in the large lakes... It is a strong public interest to make possible, in this way, an increased offer of leisure activities to the

population in for instance the metropolitan areas... The Committee also finds it valuable that the fishing legislation is considerably simplified by the proposal."

The applicant has submitted an estimate of the financial losses he has suffered as a result of the 1985 reform. On the basis of an income of 35 SEK per hectare fishing water area the applicant has calculated that his loss per 1 April 1985 with a discount rate of 4%, capitalised for all time, amounts to 525,000 SEK.

Chapter 2 Section 18 of the Instrument of Government (regeringsformen) reads:

(Swedish)

"Varje medborgare vilkens egendom tages i anspråk genom expropriation eller annat sådant förfogande skall vara tillförsäkrad ersättning för förlusten enligt grunder som bestämmes i lag."

(English translation)

"Every citizen whose property is taken through expropriation or other similar use shall be entitled to compensation for the loss according to rules laid down by law."

Chapter 11 Section 14 of the Instrument of Government reads:

(Swedish)

"Finner domstol eller annat offentligt organ att en föreskrift står i strid med bestämmelse i grundlag eller annan överordnad författning eller att stadgad ordning i något väsentligt hänseende har åsidosatts vid dess tillkomst, får föreskriften icke tillämpas. Har riksdagen eller regeringen beslutat föreskriften, skall tillämpning dock underlåtas endast om felet är uppenbart."

(English translation)

"If a court or other public authority finds that a regulation is in conflict with a provision in the Constitution or other superior legislation or that the prescribed procedure in some significant respect has not been observed when it was adopted, the regulation may not be applied. However, if Parliament or the Government have issued the regulation, it shall be applied unless the irregularity is manifest."

COMPLAINTS

1. The applicant complains that, as a result of the 1985 legislation concerning the right of the public to fish with hand-held tackle in his waters without the payment of compensation, there has been a breach of Article 1 of Protocol No. 1 to the Convention. The applicant submits that the interference with his right of property must

be characterised as a "deprivation of possessions" and not as "control of use" of his property. The applicant further submits that, as he receives no compensation for this deprivation of possessions, there is no reasonable proportion between the public interest pursued and the protection of his fundamental rights.

2. The applicant also submits that there has been a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1 in that equal persons are treated unequally as regards compensation under the new Act. The interference, which the licence-free fishing involves for the fishing rights owners, is of the same character and has the same effect for all of them. They should therefore be treated equally as regards compensation for their losses. However, since only one category of fishing rights owners can obtain compensation, while other categories, to which the applicant belongs, are entirely excluded from the opportunity even to claim or bring a case for compensation, there is a discrimination in conflict with Article 14 of the Convention.

3. The applicant also claims that there has been a violation of Article 6 para. 1 of the Convention since he cannot bring before any court the dispute as to whether the new legislation is in conflict with the Swedish Constitution and Article 1 of Protocol No. 1.

4. The applicant also submits that he has no effective remedies for the alleged violations of the Convention and that therefore Article 13 of the Convention has been violated.

5. Finally, the applicant complains that Article 17 of the Convention has been violated.

.....

THE LAW

1. The applicant complains that the new legislation which was introduced on 1 May 1985 and gave everybody a right to licence-free fishing with hand-held tackle in the applicant's fishing waters involved a violation of Article 1 of Protocol No. 1 to the Convention.

Article 1 of Protocol No. 1 reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Government submit that the application should be rejected for failure to exhaust domestic remedies or, alternatively, as being manifestly ill-founded.

2. As to the condition of exhaustion of domestic remedies in Article 26 of the Convention, the Government submit that the applicant has failed to apply to the National Board of Fisheries for compensation under the Compensation Act. If such an application were unsuccessful the applicant could bring an action against the State before the Real Estate Court. In such proceedings he could argue that the 1985 legislation is contrary to Chapter 2 Section 18 of the Instrument of Government and, if such an argument were accepted, the Court could refuse to apply the legislation in application of Chapter 11 Section 14 of the Instrument of Government.

The applicant replies that, under the Compensation Act, the right to compensation is so restricted that it does not cover the applicant's claim and the courts can only refuse to apply the legislation if it is proven that the law is "manifestly" contrary to the Instrument of Government, which is not possible to prove since the Act has been examined by the Law Council and not been declared unconstitutional.

Article 26 of the Convention provides that the Commission may only deal with a matter "after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken". It is established case-law that "the final decision" refers only to domestic remedies which can be considered to be "effective and sufficient" for the purpose of rectifying the subject-matter of the complaint (see, *inter alia*, No. 9599/81, Dec. 11.3.85, D.R. 42 p. 33). In a recent case against Sweden (No. 12810/87, Dec. 18.1.89, D.R. 59 p. 172) the Commission found that a compensation claim based on Chapter 2 Section 18 of the Instrument of Government was not an "effective remedy" in the circumstances of that case.

The issue of non-exhaustion in the present case is twofold: on the one hand, whether the applicant could secure compensation under the Compensation Act and, on the other hand, whether he could secure compensation under Chapter 2 Section 18 of the Instrument of Government.

The applicant does not allege that he has lost any actual income as a result of the new law, but that the result of the law is that he has been deprived of property. He has lost the potential opportunity to make profitable use of his former exclusive right to fish and has therefore suffered a value loss since he can no longer sell fishing permits. The loss can be estimated, on the basis of possible income from fishing permit sales, at 525,000 SEK.

There is no case-law showing that the applicant could secure compensation on this basis under the Compensation Act. Furthermore, having regard to the text of the Compensation Act, including its transitional provision and the preparatory works, the Commission finds that the Government have failed to show that the

Compensation Act could possibly secure the applicant any compensation for the alleged financial losses.

As regards compensation on the basis of the constitutional provision in the Instrument of Government, the Commission notes that a court could only grant compensation under that provision if it found that the Compensation Act was "manifestly" contrary to the Constitution. In view of the fact that the Compensation Act was examined by the Law Council, composed of two judges of the Supreme Court and one judge of the Supreme Administrative Court, which found that its provisions did not violate the Constitution, it cannot be held that a compensation claim based on Chapter 2 Section 18 is an "effective" remedy in the circumstances.

Consequently, the application cannot be rejected, under Article 27 para. 3 in conjunction with Article 26 of the Convention, for failure to exhaust domestic remedies.

3. The Commission has next examined whether the application is manifestly ill-founded, as claimed by the Government. It here notes that, prior to the introduction of the new legislation in 1985, the applicant had an exclusive right to use his own waters for fishing. The new provision in Section 20 (a) of the Fishing Rights Act implies that the applicant no longer has an exclusive right to fishing with hand-held tackle. In this respect, everybody has henceforth the right to fish in his waters. The applicant submits that as a result of the new legislation the public has, to a considerable extent, started fishing with hand-held tackle in his waters, both from the shore and from boats.

The Commission considers that the introduction of the new legislation in 1985 and its effects constitute an interference with the applicant's right to the peaceful enjoyment of his possessions as guaranteed by Article 1 of Protocol No. 1. It must therefore be examined whether this interference was justified under the terms of Article 1.

Article 1 of Protocol No. 1 guarantees the right of property. It comprises three rules. The first rule, which is set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, which is set out in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions. The third rule, which is set out in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are connected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and are therefore to be construed in the light of the general principle enunciated in the first rule.

A preliminary issue under Article 1 is whether in the present case the interference with the right to peaceful enjoyment of possessions is to be regarded as a

deprivation of possessions (the second rule), control of the use of property (the third rule) or a third form of interference to be considered under the first rule.

4. In order to determine this issue, it is appropriate to recall the general legal situation concerning fishing rights and the particular situation of the applicant as well as the public's rights before and after the 1985 law reform.

Before the 1985 reform the regulations concerning fishing rights were very complicated and differed according to the geographical area concerned. For instance, the three big-city areas of Sweden (Stockholm, Gothenburg and Malmö) are situated close to water areas. In the Gothenburg and Malmö areas fishing with hand-held tackle on the coast was open to everybody also before the 1985 reform. However, in the Stockholm area such fishing near the shores, in the archipelago area and in the lake of Mälaren, was the exclusive right of the fishing rights owner. On some stretches of the coast outside Gotland and Blekinge fishing with nets was free but not with hand-held tackle. The result of the 1985 reform was that fishing with hand-held tackle was free along all coasts and in the large lakes in both public and private waters, apart from salmon fishing along the north-east coast.

The public's right of access to private land (allemansrätten) implies that any landowner in Sweden must accept that everybody uses his land in certain manners. As regards water areas everybody is entitled to travel by boat or swim across and temporarily stay in private waters, and, in the winter time, to walk or otherwise move around on the ice provided that serious inconveniences are not caused to the owner. As regards the use of land everybody may pass over private land by foot. It is permitted to camp for a short while, to swim and to make picnics.

The 1985 reform gave the public a right to fish in private waters. This fishing right was however limited to fishing with hand-held tackle. The property owner retained the exclusive right to other manners of fishing, for instance with net. The result of the reform was, consequently, that the landowner was deprived of his previous exclusive right to fish with hand-held tackle. The essential economic significance of this was that the landowner could no longer make any profit from this sort of fishing by selling fishing cards or otherwise.

The 1985 reform was not limited to a restricted number of properties, but covered all properties on the Swedish east coast from the municipality of Östhammar in the County of Uppsala to Blekinge County and all the properties in or around the five largest lakes, including the lake of Mälaren.

5. As regards the question whether the applicant has been deprived of property, the Commission recalls that, according to the established case-law, deprivation of property within the meaning of Article 1 of Protocol No. 1 is not limited to cases where property is formally expropriated, i.e. where there is a transfer of the title to the property. "Deprivation" may also exist where the measure complained of affects the substance of the property to such a degree that there has been a *de facto*

expropriation or where the measure complained of "can be assimilated to a deprivation of possessions" (cf. Eur. Court H.R., Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 24, para. 63).

It is clear that the applicant has not been formally deprived of his property. He still retains the title to it. The applicant has also not been deprived of his right to fish, including the right to fish with hand-held tackle. What he has lost is his right to exclude others from fishing with hand-held tackle.

Legislation of a general character affecting and redefining the rights of property owners cannot normally be assimilated to expropriation even if some aspect of the property right is thereby interfered with or even taken away. There are many examples in the Contracting States that the right to property is redefined as a result of legislative acts. Indeed, the wording of Article 1 para. 2 shows that general rules regulating the use of property are not to be considered as expropriation. The Commission finds support for this view in the national laws of many countries which make a clear distinction between, on the one hand, general legislation redefining the content of the property right and expropriation, on the other.

The Commission has for the same reasons in cases concerning rent regulations, which have seriously affected the right to property, nevertheless held that such regulations fall to be considered under the "control of use" rule (cf. Mellacher and Others v. Austria, Comm. Report 11.7.88, at present pending before the European Court of Human Rights).

The Commission observes in the present case that the aim of the 1985 reform was to extend the public's right to fish with hand-held tackle. This right had existed in large areas of Sweden already before 1985. In those areas the property owners could not exclude fishing with hand-held tackle. This shows that the restrictions at issue were not alien to the property of fishing waters in Sweden even before 1985. The restrictions which this reform entailed on the applicant's right to his property cannot be assimilated to expropriation or be said to have had such severe consequences that they affected the substance of the right to property.

Consequently, the Commission finds that the applicant was not deprived of his possessions and the second sentence of the first paragraph of Article 1 of Protocol No. 1 does not apply.

6. The Commission considers that the restrictions on the applicant's property must be examined under the "control of use" rule in the second paragraph of Article 1.

The applicant argues that the second paragraph cannot apply since the 1985 reform does not involve any true "control" of any "use" which he has made of his property. However, the French text speaks of "réglementer l'usage des biens", which more accurately describes what, in the Commission's view, must be the purpose of the second paragraph. This provision must be understood to permit the enforcement of laws which are deemed necessary to *regulate* the use of property.

The Commission considers that the 1985 reform was a law which was enforced to regulate the use of property. The question of the justification of the interference created by the 1985 reform must therefore be examined under the second paragraph of Article 1 of Protocol No. 1, to establish whether the interference was "lawful", whether it pursued a "general interest", and whether it was proportionate and therefore could be "deemed necessary".

The Commission here notes that the interference with the applicant's fishing rights was provided for by the set of provisions contained in the 1985 legislative reform, notably Section 20 (a) of the Fishing Rights Act and the Compensation Act. It is true that, according to the applicant, the interference with his rights was unlawful under the Swedish Constitution. The Commission, however, having regard to the background of the 1985 legislation and the finding of the Law Council, concerning the compatibility of the new legislation with the Constitution, cannot find that the 1985 legislation failed to meet the requirement in Article 1 of being "lawful".

The condition of "general interest" leaves a wide margin of appreciation to the national legislation. The Convention organs will respect the legislator's judgment as to what is a "general interest" unless that judgment be "manifestly without reasonable foundation" (cf. Mellacher Report, cited above, para. 206).

The applicant contests that the interference was in the "general interest" arguing *inter alia* that the new Act was based on political considerations with the purpose of charming part of the electorate.

The Commission notes that the aim of the 1985 Act was to make recreational fishing with hand-held tackle available to everybody. The Parliamentary Standing Committee on Agriculture stated as its opinion that the legislation was an important recreational political reform. It considered that it was a strong public interest to provide, in this way, for an increased opportunity of leisure activities for the public, *inter alia* in the metropolitan areas. It was also valuable that the provisions concerning fishing rights were considerably simplified by the reform.

The Swedish Parliament's opinion that such a reform was in "the general interest" cannot in the Commission's view be considered to transgress the margin of appreciation left to the democratic institutions when regulating the rights of property owners and finding the right balance between the individual and the public interests. The Commission again notes in this context that the right of the public to fish with hand-tackle existed in large areas of Swedish waters already before the reform of 1985.

As regards proportionality, the Commission recalls that, under paragraph 2 of Article 1, the State may enforce such laws as it "deems necessary". In the application of this test of necessity regard must be had to the principle of respect for peaceful enjoyment of possessions which is enunciated in the opening sentence of

Article 1. For this reason the Commission must also examine "whether a reasonable relationship of proportionality existed between the means employed and the aim sought to be realised", or in other words, "whether a fair balance was struck between the demands of the general interest in this respect and the interest of the individual or individuals concerned" (Eur. Court H.R., Agosi judgment of 24 October 1986, Series A no. 108, p. 18, para. 52, and Sporrong and Lönnroth judgment, *loc. cit.*, p. 26, para. 69).

The applicant stresses that since he did not receive any compensation the requirement of proportionality was not met.

It follows from the case-law of the Convention organs that as regards deprivation of possessions there is normally an inherent right to compensation (Eur. Court H.R., James and Others judgment of 21 February 1986, Series A no. 98, p. 36, para. 54, and Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 51, para. 122). However, in the Commission's view such a right to compensation is not inherent in the second paragraph. The legislation regulating the use of property sets the framework in which the property may be used and does not, as a rule, contain any right to compensation. This general distinction between expropriation and regulation of use is known in many, if not all, Convention countries.

This does not exclude that the law may provide for compensation in cases where a regulation of use may have severe economic consequences to the detriment of the property owner. The Commission is not required to establish in the abstract under which circumstances Article 1 may require that compensation be paid in such cases. When assessing the proportionality of the regulation in question it will be of relevance whether compensation is available and to what extent a concrete economic loss was caused by the legislation.

The 1985 legislation comprises a special Compensation Act which provided a right for the fishing rights owner to claim compensation for loss of income resulting from the free fishing with hand-held tackle. There is a dispute between the parties as to the interpretation of the right to compensation under the Compensation Act and as to whether the applicant would have any right to compensation thereunder. It seems to be uncontested, however, that the applicant is not entitled to any compensation for an alleged reduction of the value of his property or for any estimated value of the income he could have had if he had, for instance, sold fishing permits before the 1985 reform.

The Commission recalls that the applicant owns a large property including large areas of fishing waters. He can therefore be said to have suffered more than many others from the new Act. Nevertheless, the Commission accepts the opinion of the Swedish Parliament that the interference created by the introduction of free fishing with hand-held tackle may in general be regarded as a comparatively minor interference. It also accepts that it may be regarded as an important "general interest" to make fishing waters available for everybody.

The Commission further recalls that the interference with the applicant's property right was limited to one form of fishing in his waters, namely fishing with hand-held tackle. The applicant had not before the reform derived any income from such fishing. He cannot, therefore, claim any direct loss of income from the reform. As to the allegation that the value of his property was reduced, the Commission notes that the legislation affected many fishing properties all over Sweden and it is not easy to see how a specific and concrete reduction in value could result from this general legislation. Even assuming that some theoretical loss in value could be established, the Commission cannot find that such a loss caused by general legislation must necessarily be compensated on the basis of Article 1 of Protocol No. 1.

Given the State's wide margin of appreciation in this domain the Commission considers that the interference with the applicant's property right cannot be held to be disproportionate. Consequently, the Swedish State was entitled under the second paragraph of Article 1 to "deem necessary" the enforcement of the 1985 legislation with the effects it had on the applicant's property right.

Accordingly, the interference with the applicant's property right was justified under the terms of the second paragraph of Article 1 of Protocol No. 1.

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

7. The applicant claims that he has been a victim of discrimination in the enjoyment of his possessions under Article 1 of Protocol No. 1. He alleges a breach of Article 14 of the Convention, which provides:

> "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."

According to the applicant persons in an equal position are treated unequally as regards compensation under the 1985 Compensation Act. The Government argue that the fishing rights owners belonged to two different categories according to whether or not they had previously had an income from their waters. Furthermore, they were not subject to differential treatment as the same compensation rules applied to all of them.

The Commission does not find that differential treatment is excluded because the legislation applies to all fishing rights owners. The criterion is whether the legislation effectively entailed differences of treatment in regard to the fishing rights owners. The Commission finds that there was a difference of treatment as one group of owners received no compensation at all, namely those who had previously not had any income from their fishing waters.

However, for the purpose of Article 14 a difference of treatment is only discriminatory if it does not pursue a legitimate aim and there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, *inter alia*, Eur. Court H.R., Belgian Linguistic judgment of 23 July 1968, Series A no. 6, pp. 33-34, paras. 9-10).

An examination of the complaint under Article 14 thus amounts in substance to an examination similar to the one carried out above under Article 1 of Protocol No. 1, and the Commission sees no reason to diverge from its previous conclusion. The aim pursued by the legislation was a legitimate one in the general interest and having regard to the State's margin of appreciation the principle of proportionality was not infringed. The provisions in the Compensation Act restricted the right to compensation to "loss of income", thereby excluding the fishing rights owners who had not previously had an income from leasing or selling. This distinction has a reasonable and objective justification and is consequently not discriminatory.

The Commission therefore finds that the facts of the case do not disclose a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 to the Convention.

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

8. The applicant further alleges a violation of Article 6 para. 1, first sentence of the Convention, which provides:

> "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."

The applicant complains that the 1985 Act, without further implementing measures, interfered with his private property right and hence his "civil rights". The interference, in the applicant's opinion, amounts to a violation of the Swedish Constitution. However, he cannot bring this claim before any court in Sweden since Parliament is the supreme body as regards the interpretation of the Constitution and a court may only set aside the law if the law is considered to be "manifestly" in conflict with the Constitution.

The Government argue that Article 6 para. 1 does not grant a right of access to court in order to challenge a law.

The Commission recalls that in the James and Others judgment (*loc. cit.*, p. 46, para. 81) the Court stated:

> "Confirmation of this analysis is to be found in the fact that Article 6 para. 1 does not require that there be a national court with competence to invalidate or override national law. In the present case, the immediate consequence of the British legislation in issue is that the landlord cannot challenge the tenant's entitlement to acquire the property compulsorily insofar as the acquisition is in conformity with the legislation."

The Commission considers that the "right" to exclusive fishing with hand-held tackle, which the applicant had prior to the law, was taken away from him by the new law adopted by Parliament without any further implementing measures. A Swedish court could only examine a claim of a breach of the Constitution if it had competence to invalidate or set aside a law adopted by Parliament. However, it follows from what has been said above that Article 6 para. 1 does not guarantee access to court for such a claim.

Accordingly, the application is, in this respect, manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

9. The applicant also alleges a violation of Article 13 of the Convention which provides:

> "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."

Article 13 does not guarantee a remedy whereby a Contracting State's laws as such can be challenged before a national authority on the ground of being contrary to the Convention or to corresponding domestic legal norms (James and Others judgment, *loc. cit.*, p. 47, para. 85).

The applicant's allegations of violations of the rights of the Convention are directed at the effects of the Fishing Rights Act and the Compensation Act.

It follows from what has been said above that Article 13 does not entitle the applicant to any remedy for such allegations.

Accordingly, there is no appearance of a violation of Article 13 of the Convention.

It follows that the application is also in this respect manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

10. The applicant finally alleges a breach of Article 17 of the Convention which provides:

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

Referring to its considerations above the Commission finds no issue under Article 17 of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

(TRADUCTION)

EN FAIT

Les faits de la cause, tels que les parties les ont exposés, peuvent se résumer comme suit.

Le requérant est un ressortissant Suédois, né en 1920, propriétaire foncier. Il est représenté devant la Commission par Me Michaël Hernmarck, avocat à Danderyd, près de Stockholm.

Le requérant est propriétaire du domaine de Sjöö, appellation générique d'un vaste domaine agricole composé de plusieurs propriétés inscrites au cadastre.

Les propriétés sont situées sur la commune d'Enköping, dans le comté d'Upsal et couvrent une superficie de 1.000 ha. Le domaine comporte également des zones aquatiques, représentant quelque 600 ha du lac de Mälaren. Depuis 1964, les eaux n'ont plus été affermées à des pêcheurs professionnels. A cette époque, deux fermiers gagnaient leur vie en pêchant dans les eaux du domaine de Sjöö. Aucun permis de pêche n'avait été vendu au public par le requérant car la pêche d'alors servait aux besoins domestiques du propriétaire du domaine. En outre, les employés du domaine sont autorisés à pêcher pour leurs propres besoins sans verser de redevance. Les poissons que l'on peut pêcher à la ligne dans les eaux du domaine sont essentiellement des brochets, des sandres et des perches. On y trouve également corégones, barbots et anguilles.

Le 1er mai 1985, entra en vigueur une nouvelle loi qui autorisait tout un chacun à pêcher à la ligne avec une canne à pêche (handredskapsfiske). Dès lors, le droit exclusif du requérant de pêcher dans ses eaux se trouvait transformé en un droit de pêche ouvert à tous pourvu que ce fût à la ligne. Le requérant affirme que le nombre de pêcheurs s'en est fortement accru. Les gens qui fréquentent ces eaux en bateaux de plaisance ou s'installent sur les berges transportent avec eux et utilisent des cannes à lancer et autres engins de pêche analogues. Pendant l'été, le nombre de pêcheurs s'est accru considérablement, comparé à la situation d'avant le 1er mai 1985. Il y a

eu également augmentation de la pêche illégale. Auparavant, certains avaient l'habitude de braconner à la ligne pendant qu'ils se trouvaient sur les terres pour y prendre le soleil, y nager ou s'y livrer à d'autres loisirs. A présent que ce type de pêche est devenu légal, les gens posent des filets le long des coques des bateaux, notamment quand ils passent la nuit sur le lac. Les eaux attirent du monde car elles sont situées à une heure environ en voiture du centre de Stockholm et tout près d'autres villes des bords du lac de Mälaren. Elles sont désormais très fréquentées par les amateurs de pêche.

La législation de 1985 emportait essentiellement modification de la loi sur les droits de pêche (lagen om rätt till fiske) et édictait une nouvelle loi portant indemnisation des atteintes aux droits de pêche privée (lagen om ersättning för intrång i enskild fiskerrätt) ; ci-après « la loi d'indemnisation »).

L'amendement à la loi sur les droits de pêche portait essentiellement sur l'introduction d'un article 20 a), ainsi libellé :

(suédois)

"Vid kusten av Östhammars kommun i Uppsala län, Stockholms län, Södermanlands län, Östergötlands län, Kalmar län, Gotlands län och Blekinge län samt i Vänern, Vättern, Mälaren, Hjälmaren och Storsjön i Jämtland får svenska medborgare, utöver vad som följer av 7-11 oc 14-20 §§, fiska i enskilt vatten med metspö, kastspö, pilk och liknande handredskap som är utrustat med lina och krok. Redskapet får dock inte ha mer än tio krokar. Ej heller får fiskemetoden som sådan kräva användning av båt."

(traduction française)

« Le long des côtes de la commune d'Östhammar, des comtés d'Upsal, de Stockholm, d'Ostergötland, de Kalmar, de Gotland, de Blekinge et dans les lacs de Vänern, Vättern, Mälaren, Hjälmaren et Storsjön du Jämtland, les ressortissants suédois peuvent, sous réserve des dispositions des articles 7 à 11 et 14 à 20 de la loi, pêcher dans les eaux privées à l'aide de cannes, cannes à lancer, gaules et autres articles de pêche munis d'une ligne et d'un hameçon. L'équipement ne peut cependant pas comporter plus de dix hameçons. La méthode de pêche peut ne pas exiger l'utilisation d'un bateau. »

L'article 1 par. 1 de la loi d'indemnisation est ainsi libellé :

(suédois)

"Medför bestämmelserna om handredskapsfiske enligt 20 a § lagen (1950 :596) om rätt till fiske ett inkomstbortfall för den som är innehavare av enskild fiskerrätt, har han enligt denna lag rätt till ersättning av staten för inkomstbortfallet."

(traduction française)

« Si les dispositions relatives à la pêche à la ligne selon l'article 20 (a) de la loi sur les droits de pêche entraînent un manque à gagner pour le propriétaire d'un droit de pêche privée, celui-ci a droit, aux termes de la présente loi, à une indemnité versée par l'Etat pour cette perte de revenu. »

Une disposition transitoire prévoit que le revenu perçu suite aux mesures prises après le 1er mars 1984 ne doit pas servir de base au calcul de l'indemnité versée au titre de la loi.

En présentant le projet de loi du Gouvernement (1984/85 :107 (pp. 42-43)), le ministre de l'Agriculture fit notamment les déclarations suivantes :

La décision de libéraliser la pêche à la ligne vise à répondre aux besoins du public en activités de loisirs. Cette mesure n'entraînera le plus souvent aucun préjudice pour le propriétaire des droits de pêche. Dans certains cas toutefois, il faudra prévoir la possibilité pour ce propriétaire de percevoir une indemnité. Pour ouvrir droit à indemnisation, il faut que l'ingérence revête une certaine importance. Chacun doit dès lors être disposé à accepter une certaine ingérence d'intérêt général n'ouvrant pas droit à indemnisation. Etant donné que pêcher librement à la ligne n'affectera pas l'usage des eaux à des fins autres que la pêche, la règle de l'indemnisation pourrait se borner à couvrir les cas d'ingérences qui ont rendu beaucoup plus difficile le maintien de la pêche en eau privée. L'indemnité ne sera pas versée pour d'autres ingérences que l'utilisation des eaux à des fins de pêche. Si les eaux n'étaient pas antérieurement utilisées pour la pêche, il n'y aura pas lieu à indemnisation. Ne donnent dès lors pas lieu à indemnisation les espérances de gains. L'indemnisation sera calculée sur la base de la perte réelle de revenu subie par le propriétaire des droits de pêche suite à la libéralisation de la pêche à la ligne. Pour ouvrir droit à indemnisation, il faudra que le préjudice n'apparaisse pas insignifiant en chiffres absolus.

Avant que le Gouvernement ne soumette la proposition au Parlement, le texte en a été examiné par le Conseil des Lois, (lagrådet) composé de deux magistrats de la Cour suprême (högsta domstolen) et d'un juge de la Cour administrative suprême (regeringsrätten). Le Conseil a estimé que la législation envisagée n'était pas contraire à la Constitution suédoise, mais propose toutefois d'augmenter le droit à indemnisation.

Lorsque le Parlement a examiné la législation proposée, la commission permanente de l'Agriculture (jordbruksutskottet) fit la déclaration suivante (JoU 1984/85 :20, p. 15) :

« La commission appuie la déclaration faite par le ministre de l'Agriculture selon laquelle il ne s'agit pas d'un transfert de propriété du type couvert par la disposition sur l'expropriation figurant au chapitre 2, article 18 de la Constitution. La Commission partage cependant le point du vue du ministre sur

l'importance de donner au problème de l'indemnisation une solution satisfaisante pour la protection de l'individu visé par cette disposition constitutionnelle. C'est pourquoi les propriétaires de droits de pêche privée qui, avec la libéralisation de la pêche à la ligne, subissent des pertes financières, devront être indemnisés conformément aux motifs énoncés dans la loi. Il est raisonnable que ce droit à indemnisation couvre toute perte financière personnellement subie par le titulaire des droits de pêche. »

Les demandes d'indemnisation devaient être présentées à l'Office national des pêches (fiskeristyrelsen) avant la fin de 1989. L'Office tranche les litiges. Sa décision est sans appel. Toutefois, le propriétaire d'un terrain qui n'est pas satisfait d'une décision de l'Office national des pêches peut engager une procédure devant le tribunal foncier (fastighetsdomstolen).

Le requérant affirme que, n'ayant pas subi de perte financière au sens de perte de revenu du fait de la nouvelle législation, il n'a droit à aucune indemnisation à ce titre et n'a donc présenté aucune demande en ce sens.

Le Gouvernement expose comme suit la genèse et les motivations de la loi de 1985 (voir le projet de loi présenté par le Gouvernement 1984/85 :107) :

La réforme fait partie de la politique de promotion des loisirs dans le public. Du point de vue social, il est important pour la population de pouvoir se reposer et se livrer à des activités pendant ses loisirs. Ce besoin augmente au fur et à mesure que s'accroît le temps de loisirs et que le travail quotidien exige moins d'efforts physiques. Or, de nombreux obstacles limitent la possibilité d'utiliser le temps de loisirs. Bon nombre d'activités récréativess nécessitent en effet un équipement coûteux. Posséder une maison de vacances, un bateau ou une caravane ou disposer d'un véhicule sont souvent des conditions nécessaires pour se rendre sur les aires de loisirs. Les habitants des grandes villes vivent souvent loin de la campagne et des possibilités de loisirs qu'elle offre. En outre, bien des gens qui ont déménagé en ville avaient auparavant avec la nature non dégradée un contact naturel et spontané qu'ils ont dorénavant perdu et la pêche récréative signifie beaucoup pour eux. Les trois grandes mégapoles suédoises sont situées près de la mer. Deux d'entre elles offrent également des lacs intéressants dans le voisinage immédiat des zones résidentielles. L'éloignement ne doit dès lors pas être un problème pour ceux qui désirent aller pêcher pendant leurs loisirs. Toutefois, la pêche à la ligne exige d'avoir accès à des eaux appropriées aux alentours des grandes villes. Dans les régions de Göteborg et Malmö, chacun pouvait aller librement pêcher sur la côte alors que dans la région de Stockholm, la législation y faisait obstacle puisque pêcher près des berges et dans la plupart des îles de l'archipel était un droit exclusif du titulaire des droits de pêche.

Au surplus, la société a pour tâche importante de mettre à la disposition de tous un large éventail d'activités de loisirs. Ceci est d'autant plus important que la possibilité de se livrer à des activités de loisirs et à des exercices physiques a une grande importance pour la santé, l'adaptation et le bien-être de l'individu dans la société.

La pêche récréative offre des occasions uniques de contact avec la nature, d'exercice et de relaxation et elle est accessible à tous. Elle s'adresse à des gens appartenant à tous les groupes de la société. Le préjugé social qui se manifeste souvent dans d'autres activités de loisirs n'existe pas pour la pêche. Celle-ci est également un complément important à d'autres activités récréatives telles que bateau, randonnée, voyages de vacances et camping. La pêche peut aussi fournir une source complémentaire de subsistance, puisqu'elle permet de s'installer dans des zones peu peuplées où les autres moyens de gagner sa vie sont limités. L'une des tâches importantes de la société est de contribuer à offrir au public une gamme riche et variée de possibilités de loisirs. L'expérience montre que la pêche joue un rôle important dans la politique sociale des loisirs.

Dans le projet de loi soumis au Parlement pour proposer une réforme, le ministre de l'Agriculture déclarait :

« Il est anormalement difficile d'avoir une vue très nette de l'actuelle législation sur les droits de pêche, comme en témoigne le résumé de la réglementation figurant dans l'exposé des motifs. Des règlements qui pouvaient paraître raisonnables et équitables au moment où ils ont été émis semblent aujourd'hui difficiles à comprendre, compliqués et parfois illogiques. L'un des exemples les plus frappants est qu'en certains endroits de la côte, le public peut librement pêcher au filet mais non à la ligne. Les dispositions de la législation sur la pêche sont complétées par des dispositions sur la conservation et la gestion des pêches, édictées par le Gouvernement dans l'ordonnance sur la pêche et par d'autres prescriptions de l'Office national des pêches ou des conseils administratifs de comté. Cette accumulation de règlements couvre un vaste domaine et contient une multitude de détails telle qu'il est difficile à un particulier de savoir exactement où, quand et comment il peut pêcher. Le fait de juger souvent compliquée la réglementation ou de mal la comprendre risque de faire négliger même des règlements qui sont bien inspirés du point de vue de la conservation de la nature.

Même aujourd'hui, les titulaires de droits de pêche ne revendiquent pas pleinement leurs droits, mais laissent le public pêcher à la ligne et même poser des filets sur une grande partie des bandes côtières actuellement en cause.

Cela étant, je considère la proposition d'augmenter les possibilités pour le public de pêcher librement à la ligne comme une étape normale et essentielle vers la simplification. Si elle est mise en œuvre elle permet la pêche à la ligne dans les eaux tant publiques que privées, le long des côtes et dans les grands lacs. La seule limitation qui subsistera sera d'exclure la pêche au saumon le long de la côte du Norrland (depuis la commune d'Östhammar jusqu'à la frontière finlandaise). Tant qu'on n'utilise que des cannes à pêche, la réforme évitera au public comme aux autorités d'avoir à définir où se situe la frontière

entre les eaux privées et les eaux publiques. Outre les autres raisons militant en faveur de la réforme, je considère aussi que cette simplification a en soi une valeur considérable.

Comme il ressort de ce que j'ai déjà fait valoir, en demandant au Gouvernement de faire une proposition, le Parlement a déjà par deux fois proclamé le principe de la liberté de la pêche à la ligne. Il revient à présent au Gouvernement d'élaborer les propositions de loi nécessaires pour appliquer la réforme. Il ne serait pas réaliste de remplacer cette réforme par la création d'aires de conservation des pêches dans la totalité des eaux privées en cause et ceci pour plusieurs raisons. Les aires de conservation ne sauraient remplacer le libre exercice de la pêche car leur création vise essentiellement à améliorer la protection des pêches et non à donner au public un libre accès à la pêche. En outre, la constitution forcée d'aires de protection de la pêche — cas le plus fréquent — portera selon moi beaucoup plus atteinte aux droits de l'individu que la liberté de pêcher. Il ne faut pas compter sur la constitution volontaire et dans un délai raisonnable d'aires de protection de la pêche susceptibles de donner au public le même accès aux zones de pêche que la liberté de la pêche à la ligne.

Toutefois, la réforme ne devrait pas mettre de nouvel obstacle à la constitution des aires de protection de la pêche. »

La commission permanente de l'Agriculture a fait la déclaration suivante (JoU 1984 :85 :26 p. 10) :

« La proposition du Gouvernement ... signifie que le désir exprimé par le Parlement il y a deux ans est à présent satisfait. Une importante réforme de la politique des loisirs est mise en œuvre puisqu'à l'avenir, la pêche à la ligne pourra être pratiquée librement le long des côtes de Suède et dans les grands lacs ... Il est d'un puissant intérêt général de permettre d'accroître ainsi l'offre de loisirs à la population des grandes villes par exemple ... La Commission estime également appréciable que la proposition simplifie beaucoup la législation sur la pêche. »

Le requérant a soumis une estimation des pertes financières qu'il a subies en raison de la réforme de 1985. Sur la base d'un revenu de 35 couronnes par hectare de zone de pêche, le requérant a calculé que sa perte au 1er avril 1985 s'élève à 525.000 SEK, compte tenu du taux d'intérêt de 4 % capitalisé pour la totalité de la période.

Le chapitre 2, article 18 de la Constitution (regeringsformen) se lit ainsi :

(suédois)

« Varje medborgare vilkens egendom tages i anspråk genom expropriation eller annat sådant förfogande skall vara tillförsäkrad ersättning för förlusten enligt grunder som bestämmes i lag. »

(traduction française)

« Tout citoyen à qui les biens sont enlevés par expropriation ou utilisation analogue a droit, pour la perte ainsi subie, à une indemnisation conforme à la réglementation prévue par la loi. »

Le chapitre 11, article 14 de la Constitution se lit ainsi :

(suédois)

« Finner domstol eller annat offentligt organ att en föreskrift står i strid med bestämmelse i grundlag eller annan överordnad författning eller att stadgad ordning i något väsentligt hänseende har åsidosatts vid dess tillkomst, får föreskriften icke tillämpas. Har riksdagen eller regeringen beslutat föreskriften, skall tillämpning dock underlåtas endast om felet är uppenbart. »

(traduction française)

« Lorsqu'un tribunal ou une autre autorité publique constate qu'un règlement est contraire à une disposition de la Constitution ou à tout autre texte de loi supérieur ou que la procédure prévue pour tout aspect important n'a pas été respectée lors de l'adoption du texte, le règlement peut ne pas être appliqué. Si toutefois c'est le Parlement ou le Gouvernement qui a édicté le règlement, celui-ci doit être appliqué sauf irrégularité manifeste. »

GRIEFS

1. Le requérant se plaint de ce que, suite à la législation de 1985 prévoyant le droit pour le public de pêcher à la ligne dans ses eaux sans lui verser d'indemnité, il y a violation de l'article 1 du Protocole additionnel à la Convention. Selon lui, l'atteinte à son droit de propriété doit se définir comme une « privation de propriété » et non pas comme une « réglementation de l'usage » de son bien. Le requérant soutient en outre qu'en l'absence d'indemnisation pour la perte de son bien, il n'y a pas de rapport raisonnable de proportionnalité entre l'utilité publique visée et la protection de ses droits fondamentaux.

2. Le requérant invoque également une violation de l'article 14 de la Convention, combiné avec l'article 1 du Protocole additionnel, puisque des personnes se trouvant en situation d'égalité sont inégalement traitées s'agissant d'indemnisation au titre de la nouvelle loi. L'ingérence que suppose la liberté de pêcher à la ligne pour les titulaires de droits de pêche est de même nature et a les mêmes effets pour tous. Tous doivent donc être traités également s'agissant de l'indemnisation de leur perte. Or, seule une catégorie de titulaires de droits de pêche peut obtenir une indemnisation alors que les autres, comme le requérant, sont totalement privés même de la possibilité d'engager une action en indemnisation : il y a dès lors discrimination contraire à l'article 14 de la Convention.

3. Le requérant soutient également qu'il y a eu violation de l'article 6 par. 1 de la Convention puisqu'il ne peut porter devant aucun tribunal le litige concernant le point de savoir si la nouvelle loi est contraire à la Constitution suédoise et à l'article 1 du Protocole additionnel.

4. Le requérant soutient également ne disposer d'aucun recours effectif pour se plaindre des violations alléguées de la Convention, ce qui entraîne une violation de l'article 13 de la Convention.

5. Enfin, le requérant se plaint d'une violation de l'article 17 de la Convention.

.....

EN DROIT

1. Le requérant se plaint de ce que la nouvelle législation, introduite le 1er mai 1985 et donnant à tout un chacun le droit de pêcher librement dans les eaux lui appartenant, emporte violation de l'article 1 du Protocole additionnel à la Convention :

L'article en question se lit ainsi :

« Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.

Les dispositions précédentes ne portent pas atteinte au droit que possèdent les Etats de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes. »

Le Gouvernement soutient que la requête doit être rejetée pour défaut d'épuisement des recours internes ou, à titre subsidiaire, pour défaut manifeste de fondement.

2. Sur la condition de l'épuisement des recours internes prévue à l'article 26 de la Convention, le Gouvernement fait valoir que le requérant n'a pas demandé d'indemnisation à l'Office national des pêches, conformément à la loi d'indemnisation. Si cette requête aboutissait, le requérant pourrait engager contre l'Etat une action devant le tribunal foncier. Dans cette procédure, il pourrait soutenir que la législation de 1985 est contraire au chapitre 2, article 18 de la Constitution et si son argumentation était acceptée, le tribunal pourrait, conformément au chapitre 11, article 14 de la Constitution, refuser d'appliquer la loi.

Le requérant réplique qu'aux termes de la loi d'indemnisation, le droit à indemnisation est tellement limité qu'il ne couvre pas son grief : les tribunaux ne peuvent refuser d'appliquer la loi que s'il est prouvé qu'elle est « manifestement » contraire à la Constitution, ce qui est impossible à établir puisque la loi a été examinée par le Conseil des Lois qui ne l'a pas déclarée inconstitutionnelle.

L'article 26 de la Convention stipule que la Commission ne peut être saisie « qu'après l'épuisement des voies de recours internes, tel qu'il est entendu selon les principes de droit international généralement reconnus, et dans le délai de six mois, à partir de la date de la décision interne définitive ». Il est de jurisprudence constante que « la décision définitive » ne renvoie qu'aux recours internes pouvant être qualifiés d'« efficaces et suffisants » pour apaiser l'objet du grief (voir notamment No 9599/81, déc. 11.3.85, D.R. 42 p. 33). Dans une récente affaire contre la Suède (No 12810/87, déc. 18.1.89, D.R. 59 p. 172), la Commission a estimé qu'une action en indemnisation fondée sur le chapitre 2, article 18 de la Constitution n'était pas « un recours efficace » dans les circonstances de l'espèce.

En l'occurrence, la question du défaut d'épuisement est double : d'une part, le requérant peut-il obtenir une indemnisation au titre de la loi d'indemnisation et, d'autre part, peut-il obtenir une indemnisation au titre du chapitre 2, article 18 de la Constitution ?

Le requérant n'allègue pas avoir effectivement perdu un revenu du fait de la nouvelle loi, mais avoir été privé d'un bien en conséquence de la loi. Il a perdu la possibilité de faire un usage rentable de son précédent droit de pêche exclusif et a dès lors subi une moins-value puisqu'il ne peut plus vendre seul des permis de pêche. Sur la base du revenu à attendre de la vente des permis de pêche, cette moins-value peut être estimée à 525.000 SEK.

Il n'existe pas de jurisprudence montrant que le requérant peut obtenir une indemnisation sur cette base, au titre de la loi d'indemnisation. Au surplus, vu le texte de cette loi et notamment la teneur des dispositions transitoires et des travaux préparatoires, la Commission estime que le Gouvernement n'a pas montré que cette loi pourrait garantir au requérant une quelconque indemnisation pour les pertes financières alléguées.

S'agissant d'une indemnisation sur la base de la disposition figurant dans la Constitution, la Commission relève qu'un tribunal ne peut accorder d'indemnisation en vertu de ce texte que s'il est établi que la loi d'indemnisation est « manifestement » contraire à la Constitution. La loi en question ayant été examinée par le Conseil des Lois, composé de deux magistrats de la Cour suprême et d'un juge de la Cour administrative suprême, qui ont estimé que ses dispositions n'étaient pas contraires à la Constitution, on ne saurait soutenir dans ces conditions qu'une action en indemnisation fondée sur le chapitre 2, article 18 soit un recours « efficace ».

En conséquence, la requête ne peut pas être rejetée pour défaut d'épuisement des recours internes, au sens de l'article 27 par. 3 lu en liaison avec l'article 26 de la Convention.

3. La Commission a ensuite examiné le point de savoir si la requête était manifestement mal fondée, comme le prétend le Gouvernement. Elle relève ici qu'avant l'introduction de la nouvelle législation en 1985, le requérant avait le droit exclusif

d'utiliser ses propres eaux pour la pêche. La nouvelle disposition figurant à l'article 20 a) de la loi sur les droits de pêche implique qu'il n'a plus cette exclusivité pour la pêche à la ligne. En effet, tout un chacun a dorénavant le droit de pêcher dans les eaux du requérant. Ce dernier soutient que, par suite de la nouvelle loi, le public s'est mis à pêcher à la ligne dans ses eaux, tant à partir du rivage que de bateaux.

La Commission estime que l'introduction de la nouvelle législation en 1985 et ses effets constituent une ingérence dans l'exercice du droit au respect de ses biens, que garantit au requérant l'article 1 du Protocole additionnel. Elle doit dès lors examiner si cette ingérence se justifiait au regard de l'article 1.

L'article 1 du Protocole additionnel garantit le droit à la propriété, comprenant trois règles différentes. La première, exprimée dans la première phrase du premier paragraphe, est d'ordre général et énonce le principe du respect des biens. La seconde, énoncée dans la deuxième phrase du premier paragraphe, couvre la privation de propriété et l'assortit de certaines conditions. La troisième, énoncée dans le second paragraphe, reconnaît que les Etats contractants ont notamment le droit de réglementer l'usage des biens conformément à l'intérêt général. Les trois règles sont liées entre elles. La deuxième et la troisième concernent des cas particuliers d'ingérence dans le droit au respect des biens et doivent dès lors être intreprétées à la lumière du principe général énoncé dans la première règle.

Une question préliminaire à régler au regard de l'article 1 est celle de savoir si, en l'espèce, l'ingérence dans le droit au respect des biens doit être considérée comme une privation de propriété (deuxième règle), une réglementation de l'usage des biens (troisième règle) ou une troisième forme d'ingérence à examiner au regard de la première règle.

4. Pour trancher la question, il convient de rappeler la situation juridique prévalant en général à propos des droits de pêche et la situation particulière du requérant, ainsi que les droits du public avant et après la réforme de 1985.

Avant la réforme, la réglementation relative aux droits de pêche était très compliquée et différait selon les régions géographiques concernées. Les trois grandes régions urbaines de Suède (Villes de Stockholm, Göteborg et Malmö) se situent près de l'eau. Dans les zones de Göteborg et Malmö, la pêche à la ligne sur la côte était ouverte à tous dès avant la réforme de 1985. Dans la région de Stockholm toutefois, cette forme de pêche près des côtes, dans la zone de l'archipel et dans le lac de Mälaren, n'était accessible qu'aux titulaires des droits de pêche. Sur certaines bandes de la côte de Gotland et de Blekinge, la pêche au filet était libre mais pas la pêche à la ligne. Le résultat de la réforme de 1985 a été d'instituer pour tous la liberté de pêcher à la ligne le long de toutes les côtes et dans les grands lacs, tant dans les eaux publiques que dans les eaux privées, exception faite de la pêche au saumon le long de la côte nord-est.

Le droit d'accès du public aux terres privées (allemansrätten) implique qu'en Suède tout propriétaire foncier doit accepter de chacun qu'il utilise sa terre d'une certaine manière. S'agissant des eaux privées, tout un chacun a le droit de les traverser en bateau ou à la nage, d'y séjourner temporairement et, l'hiver, de marcher ou de se déplacer autrement sur la glace à condition de ne pas causer d'inconvénients graves au propriétaire. S'agissant de terres privées, tout un chacun peut les traverser à pied, camper quelque temps, y nager et y faire des pique-niques. La réforme de 1985 a donné au public le droit de pêcher dans les eaux privées, tout en limitant ce droit à la pêche à la ligne. Le propriétaire du terrain conserve l'exclusivité des autres modes de pêche, au filet par exemple. Dès lors, la réforme a eu pour résultat que le propriétaire du terrain est privé de son ancien droit exclusif de pêcher à la ligne. Du point de vue économique, le résultat majeur est que le propriétaire du terrain ne peut plus tirer aucun profit de ce type de pêche en vendant des permis de pêche ou autrement.

La réforme de 1985 n'est pas limitée à un petit nombre de terres, mais couvre la totalité des propriétés de la côte est de la Suède, depuis la commune d'Östhammar dans le comté d'Upsal jusqu'au comté de Blekinge et toutes les propriétés situées sur les grands lacs, ou aux alentours, notamment le lac de Mälaren.

5. Sur le point de savoir si le requérant a été privé de ses biens, la Commission rappelle que, selon la jurisprudence constante, une privation de propriété au sens de l'article 1 du Protocole additionnel ne se limite pas aux cas d'expropriation formelle du bien, c'est-à-dire lorsqu'il y a eu transfert du titre de propriété. Une « privation » peut aussi exister lorsque la mesure incriminée affecte la substance du droit de propriété à un degré tel qu'il y a expropriation de fait ou que la mesure en cause peut « s'assimiler à une privation de propriété » (cf. Cour eur. D.H., arrêt Sporrong et Lönnroth du 23 septembre 1982, série A n° 52, p. 24, par. 63).

Il est clair que le requérant n'a pas été formellement privé de son bien. Il en conserve le titre de propriété. Il n'a pas non plus été privé de son droit de pêche, notamment de celui de pêcher à la ligne. Ce qu'il a perdu, c'est son droit à exclure autrui de la pêche à la ligne. Une législation de caractère général affectant et redéfinissant les droits des propriétaires ne peut normalement pas s'assimiler à une expropriation, même si tel ou tel aspect du droit de propriété s'en trouve affecté ou supprimé. Les exemples abondent dans les Etats contractants où le droit de propriété est redéfini par des mesures législatives. A vrai dire, le libellé de l'article 1 par. 2 montre que des règles générales réglementant l'usage des biens ne doivent pas passer pour une expropriation. La Commission trouve cette thèse étayée par la législation interne de bon nombre de pays qui distinguent clairement entre, d'une part, la législation générale redéfinissant la teneur du droit de propriété et, d'autre part, l'expropriation.

La Commission a néanmoins déclaré, pour les mêmes raisons, dans des affaires concernant une réglementation des loyers affectant gravement le droit de propriété,

que cette réglementation devait être considérée comme relevant de « la réglementation de l'usage » des biens (cf. Mellacher et autres c/Autriche, rapport Comm. 11.7.88, affaire actuellement devant la Cour européenne des Droits de l'Homme).

La Commission relève qu'en l'espèce le but de la réforme de 1985 était d'élargir le droit du public de pêcher à la ligne, droit qui existait dès avant 1985 dans de grandes régions de Suède. Dans ces régions, les propriétaires de terrains ne pouvaient pas écarter le public de la pêche à la ligne. Ceci montre bien que les restrictions litigieuses n'étaient pas étrangères à la propriété des eaux de pêche en Suède dès avant 1985. Les restrictions que cette réforme a entraînées pour le droit du requérant sur ses biens ne sauraient dès lors pas s'assimiler à une expropriation ni être réputées avoir eu des conséquences rigoureuses au point d'affecter la substance du droit de propriété.

La Commission constate dès lors que le requérant n'a pas été privé de ses biens et que la deuxième phrase du premier paragraphe de l'article 1 n'est donc pas applicable.

6. La Commission estime que les restrictions aux biens du requérant doivent être examinées à la lumière de la norme de « réglementation de l'usage des biens », énoncée au paragraphe 2 de l'article 1.

Le requérant soutient que le deuxième paragraphe ne saurait s'appliquer puisque la réforme de 1985 n'implique, selon la version anglaise de l'article, aucun véritable « control » d'un quelconque « use » qu'il faisait de son bien. Toutefois, la version française parle de « réglementer l'usage des biens », ce qui, de l'avis de la Commission, décrit plus précisément ce que doit être l'objet du deuxième paragraphe. Cette disposition doit en effet être comprise comme autorisant la mise en vigueur des lois jugées nécessaires pour *réglementer* l'usage des biens.

La Commission estime que la réforme de 1985 était une loi mise en vigueur pour réglementer l'usage des biens. La question de la justification de l'ingérence provoquée par la réforme doit dès lors être examinée au regard du second paragraphe de l'article 1 du Protocole additionnel pour établir si l'ingérence était « conforme à la loi », si elle poursuivait un but « d'intérêt général » et si, étant proportionnée, elle pouvait être « jugée nécessaire ».

La Commission relève ici que l'ingérence dans les droits de pêche du requérant était prévue par le jeu des dispositions figurant dans la réforme législative de 1985, exactement dans l'article 20 a) de la loi sur les droits de pêche et de la loi d'indemnisation. Il est exact que, selon le requérant, l'ingérence dans l'exercice de ses droits était illégale au regard de la Constitution suédoise. Cependant, vu le contexte de la législation de 1985 et les conclusions du Conseil des Lois sur la compatibilité de la nouvelle législation avec la Constitution, la Commission ne saurait conclure que la loi de 1985 ne respectait pas la condition de légalité figurant à l'article 1.

La condition de «l'intérêt général» laisse au législateur interne une grande marge d'appréciation. Les organes de contrôle de la Convention respecteront l'appréciation du législateur sur ce qui est «d'intérêt général» à moins qu'elle ne soit «manifestement dépourvue de base raisonnable» (cf. rapport Mellacher loc. cit., par. 206).

Le requérant conteste que l'ingérence fût «d'intérêt général», arguant notamment de ce que la nouvelle loi se fondait sur des considérations politiques ayant pour but de rallier une partie de l'électorat.

La Commission relève que le but de la loi de 1985 était de rendre accessible à tous la pêche à la ligne. La commission parlementaire permanente de l'Agriculture a été d'avis que la législation en question était une importante réforme de la politique des loisirs. Elle a estimé qu'il était d'un puissant intérêt général d'accroître ainsi la possibilité pour le public de se livrer à des activités récréatives, dans le voisinage des grandes villes notamment. Il était aussi appréciable que la réforme ait grandement simplifié la réglementation relative aux droits de pêche.

L'avis du Parlement suédois sur l'intérêt général de la réforme ne saurait, selon la Commission, être considéré comme outrepassant la marge d'appréciation laissée aux institutions démocratiques lorsqu'elles réglementent les droits des propriétaires et qu'elles recherchent un juste équilibre entre intérêts particuliers et intérêt général. Dans ce contexte, la Commission relève là encore que le droit du public de pêcher à la ligne existait dès avant la réforme de 1985 dans de vastes zones des eaux suédoises.

Sur la question de la proportionnalité, la Commission rappelle qu'aux termes du paragraphe 2 de l'article 1, l'Etat peut mettre en vigueur les lois «qu'il juge nécessaires». Dans l'application de ce critère de nécessité, il faut tenir compte du principe du respect des biens énoncé à la première phrase de l'article 1. C'est pourquoi la Commission doit également examiner «s'il existait un lien raisonnable de proportionnalité entre les moyens employés et le but visé», autrement dit «si un juste équilibre a été maintenu entre les exigences de l'intérêt général de la communauté et les impératifs de la sauvegarde des droits fondamentaux de l'individu» (Cour eur. D.H., arrêt Agosi du 24 octobre 1986, série A n° 108, p. 18, par. 52 et arrêt Sporrong et Lönnroth, loc. cit., p. 26, par. 69).

Le requérant souligne que faute d'indemnisation, la condition de proportionnalité n'a pas été respectée.

Il découle de la jurisprudence des organes de contrôle de la Convention que, s'agissant de privation de biens, il existe normalement un droit implicite à indemnisation (Cour eur. D.H., arrêt James et autres du 21 février 1986, série A n° 98, p. 36, par. 54 et arrêt Lithgow et autres du 8 juillet 1986, série A n° 102, p. 51, par. 122). De l'avis de la Commission toutefois, un tel droit à indemnisation n'est pas inhérent au deuxième paragraphe. La législation réglementant l'usage des biens

construit le cadre dans lequel le bien peut être utilisé et ne prévoit en général pas de droit à indemnisation. Cette distinction générale entre expropriation et réglementation de l'usage des biens est connue de bon nombre, sinon de la totalité des Etats membres de la Convention.

Ceci n'exclut pas toutefois que la loi puisse prévoir une indemnisation dans les cas où une réglementation de l'usage des biens peut avoir des conséquences économiques graves au détriment du propriétaire du bien. La Commission n'est pas tenue d'établir in abstracto dans quel cas l'article 1 exige le versement d'une indemnité. Pour apprécier le caractère proportionné de la réglementation en question, il sera utile de rechercher si une indemnisation est offerte et dans quelle mesure la législation a entraîné en pratique une perte financière.

La législation de 1985 comporte une loi d'indemnisation spéciale qui prévoit le droit pour le propriétaire des droits de pêche de réclamer une indemnisation pour le manque à gagner résultant de la liberté de pêcher à la ligne. Il y a litige entre les parties sur l'interprétation du droit à indemnisation selon la loi y afférente et sur le point de savoir si le requérant aurait à ce titre le droit d'être indemnisé. Il ne semble pas contesté cependant que le requérant n'a droit à aucune indemnisation pour la moins-value alléguée de son bien ni pour une quelconque valeur estimée du revenu qu'il aurait pu retirer, par exemple, de la vente des permis de pêche avant la réforme de 1985.

La Commission rappelle que le requérant possède un grand domaine comportant de vastes zones de pêche. Il peut dès lors être réputé avoir subi plus que d'autres les effets de la nouvelle loi. Néanmoins, la Commission souscrit à l'avis du Parlement suédois selon lequel l'ingérence due à l'introduction de la liberté de pêcher à la ligne peut en général passer pour relativement mineure. Elle admet également pouvoir considérer comme un «intérêt général» important de permettre à tous l'accès des eaux de pêche.

La Commission rappelle en outre que l'ingérence dans le droit de propriété du requérant se limitait à un seul mode de pêche dans ses eaux, à savoir la pêche à la ligne. Or, le requérant ne tirait avant la réforme aucun revenu de ce type de pêche et ne saurait dès lors prétendre avoir subi du fait de la réforme une perte directe de revenu. Quant à son allégation que la valeur de son bien s'en est trouvé réduite, la Commission relève que la législation a affecté bien des propriétés de pêche dans toute la Suède et il n'est pas facile de voir comment cette législation générale a pu entraîner une réduction précise et concrète de la valeur des propriétés. A supposer même que l'on puisse établir une certaine moins-value théorique, la Commission ne saurait en conclure qu'une telle perte, provoquée par la législation en général, doit nécessairement être indemnisée sur la base de l'article 1 du Protocole additionnel.

Vu la grande marge d'appréciation laissée à l'Etat dans ce domaine, la Commission estime que l'ingérence dans le droit de propriété du requérant ne saurait être qualifiée de disproportionnée. L'Etat suédois était dès lors fondé, au regard du

paragraphe 2 de l'article 1, à « juger nécessaire » la mise en vigueur de la législation de 1985, avec les effets qu'elle a eus sur le droit de propriété du requérant.

En conséquence, l'ingérence dans le droit de propriété du requérant était justifiée au regard du second paragraphe de l'article 1 du Protocole additionnel.

Il s'ensuit que la requête est, sur ce point, manifestement mal fondée au sens de l'article 27 par. 2 de la Convention.

7. Le requérant prétend avoir été victime d'une discrimination dans la jouissance de ses biens, droit que lui garantit l'article 1 du Protocole additionnel. Il allègue à cet égard une violation de l'article 14 de la Convention, qui se lit ainsi :

> « La jouissance des droits et libertés reconnus dans la présente Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation. »

Selon le requérant, des personnes se trouvant en situation d'égalité n'ont pas été traitées à égalité s'agissant de l'indemnisation prévue par la loi de 1985. Le Gouvernement réplique que les titulaires d'un droit de pêche appartenaient à deux catégories différentes, selon qu'avant la réforme ils tiraient ou non un revenu de leurs eaux. De plus, ces propriétaires n'ont pas été soumis à un traitement différent puisque les mêmes règles d'indemnisation étaient applicables à tous.

La Commission n'estime pas qu'un traitement différentiel soit exclu parce que la législation s'applique à tous les propriétaires de droits de pêche. Ce qu'il faut savoir, c'est si la législation a effectivement entraîné des différences de traitement pour les titulaires de droits de pêche. La Commission constate qu'il y a eu effectivement une différence de traitement puisque certains propriétaires, ceux qui ne tiraient précédemment aucun revenu de leurs eaux de pêche, n'ont reçu aucune indemnisation.

Toutefois, aux fins de l'article 14, une différence de traitement ne revêt un caractère discriminatoire que si elle ne vise pas un but légitime et s'il n'y a pas de lien raisonnable de proportionnalité entre les moyens employés et le but visé (voir notamment Cour. eur. D.H., arrêt Affaire linguistique belge du 23 juillet 1968, série A n° 6, pp. 33-34, par. 9-10).

L'examen du grief tiré de l'article 14 est en substance analogue à celui qui a été mené ci-dessus au regard de l'article 1 du Protocole additionnel et la Commission ne voit aucune raison de s'écarter de sa conclusion précédente. Le but poursuivi par la loi était légitime et d'intérêt général et, vu la marge d'appréciation laissée à l'Etat, le principe de proportionnalité n'a pas été méconnu. Les dispositions de la loi d'indemnisation restreignaient le droit à indemnisation à « une perte de revenu » excluant par là même les titulaires de droits de pêche qui ne tiraient précédemment

aucun revenu de la location ou de la vente de leurs droits de pêche. Cette distinction, ayant une justification objective et raisonnable, n'est par conséquent pas discriminatoire.

La Commission constate dès lors que les faits de la cause ne révèlent aucune violation de l'article 14 de la Convention, lu en liaison avec l'article 1 du Protocole additionnel.

Il s'ensuit que la requête est, sur ce point aussi, manifestement mal fondée au sens de l'article 27 par. 2 de la Convention.

8. Le requérant allègue en outre une violation de l'article 6 par. 1 première phrase de la Convention, qui se lit ainsi :

> « Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle. »

Le requérant se plaint de ce que la loi de 1985, sans autre mesure d'application, a porté atteinte à son droit de propriété et donc « à ses droits de caractère civil ». L'atteinte en question équivaut, selon lui, à une violation de la Constitution suédoise. Il ne peut cependant pas exposer ce grief devant un tribunal en Suède car le Parlement est l'organe suprême d'interprétation de la Constitution et un tribunal ne peut écarter la loi que si celle-ci est jugée « manifestement » contraire à la Constitution.

Le Gouvernement fait valoir que l'article 6 par. 1 n'accorde pas un droit d'accès à un tribunal pour contester une loi.

La Commission rappelle que, dans l'arrêt James et autres (loc. cit., p. 46, par. 81), la Cour a déclaré que :

> « La justesse de cette analyse se trouve confirmée par le fait que l'article 6 par. 1 n'exige pas l'existence d'une juridiction nationale habilitée à censurer ou annuler le droit en vigueur. En l'espèce, la législation britannique en cause a pour conséquence directe d'empêcher le propriétaire de combattre le droit du preneur au rachat dès lors que ce dernier cadre avec elle. »

La Commission estime que le « droit » exclusif de pêcher à la ligne, dont jouissait le requérant antérieurement à la loi, lui a été ôté par la nouvelle loi adoptée par le Parlement, sans autre mesure d'application. Un tribunal suédois ne pouvait donc examiner un grief de violation de la Constitution que s'il avait compétence pour invalider ou écarter une loi votée par le Parlement. Il découle cependant de ce qui a été dit plus haut que l'article 6 par. 1 ne garantit pas l'accès à un tribunal pour exposer un tel grief.

En conséquence, la requête est, sur ce point, manifestement mal fondée au sens de l'article 27 par. 2 de la Convention.

9. Le requérant allègue également une violation de l'article 13 de la Convention selon lequel :

> « Toute personne dont les droits et libertés reconnus dans la présente Convention ont été violés, a droit à l'octroi d'un recours effectif devant une instance nationale, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles. »

L'article 13 ne garantit pas un recours permettant de dénoncer, devant une autorité nationale, les lois d'un Etat contractant comme contraires, en tant que telles, à la Convention ou à des normes juridiques nationales équivalentes (arrêt James et autres, loc. cit., p. 47, par. 85).

Les allégations de violation des droits garantis au requérant par la Convention concernent les effets de la loi sur les droits de pêche et de la loi d'indemnisation.

Or, il découle de ce qui précède que l'article 13 ne donne au requérant aucun recours pour exposer ces allégations.

En conséquence, il n'y a pas apparence de violation de l'article 13 de la Convention.

Il s'ensuit que la requête est, sur ce point aussi, manifestement mal fondée au sens de l'article 27 par. 2 de la Convention.

10. Le requérant allègue enfin une violation de l'article 17 de la Convention, qui se lit ainsi :

> « Aucune des dispositions de la présente Convention ne peut être interprétée comme impliquant pour un Etat, un groupement ou un individu, un droit quelconque de se livrer à une activité ou d'accomplir un acte visant à la destruction des droits ou libertés reconnus dans la présente Convention ou à des limitations plus amples de ces droits et libertés que celles prévues à ladite Convention. »

Renvoyant aux considérations exposées plus haut, la Commission ne voit aucune question litigieuse se poser sur le terrain de l'article 17 de la Convention.

Par ces motifs, la Commission

DÉCLARE LA REQUÊTE IRRECEVABLE.

APPLICATION/REQUÊTE N° 12115/86

S. v/FRANCE

S. c/FRANCE

DECISION of 13 April 1989 on the admissibility of the application

DÉCISION du 13 avril 1989 sur la recevabilité de la requête

Article 26 of the Convention *: Lawyer appointed for civil proceedings in France, considering that he can no longer appear on behalf of his client, due to the latter's incapacity. If the judge considers that the proceedings are nevertheless adversarial, the person concerned must appeal against the decision if he considers that he has not had a fair hearing.*

Article 25 of the Convention and
Rule 26 of the Rules of Procedure of the Commission *: Applicant lacking legal capacity assisted before the Commission by a curator* ad litem *appointed by the competent domestic authority.*

Article 26 de la Convention *: Avocat constitué dans une instance civile en France estimant ne plus pouvoir comparaître au nom de son client du fait de l'incapacité de celui-ci. Si le juge estime que la procédure est néanmoins contradictoire, l'intéressé doit recourir contre cette décision s'il estime qu'il n'a pas bénéficié d'un procès équitable.*

Article 25 de la Convention et
Article 26 du Règlement intérieur de la Commission *: Requérant incapable assisté devant la Commission d'un représentant ad litem nommé par le juge national compétent.*
