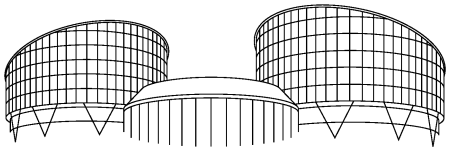

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KARIN ANDERSSON AND OTHERS v. SWEDEN

(Application no. 29878/09)

JUDGMENT

STRASBOURG

25 September 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Karin Andersson and Others v. Sweden,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President,*
Ann Power-Forde,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 2 September 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 29878/09) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eighteen Swedish nationals, Ms Karin Andersson, Mr Per Bernhardtson, Ms Gunilla Bring, Mr Ulf Bäcklund, Mr Berndt Eriksson, Ms Carina Granberg, Ms Agneta Holmström, Mr Gustaf Härestål, Mr Björn Höjer, Ms Inga-Britt Höjer, Mr Christer Johansson, Mr Curt Lindgren, Mr Håkan Olsson, Mr Roger Olsson, Mr Göran Osterman, Mr Lars Sjöstedt, Mr Christer Skoog and Mr Olle Stenlund ("the applicants"), on 4 June 2009.

2. The applicants were represented by Mr J. Ebbesson, a professor of environmental law, and Mr B. Rosengren, a lawyer, both practising in Stockholm. The Swedish Government ("the Government") were represented by their Agent, Mr A. Rönquist, of the Ministry for Foreign Affairs.

3. The applicants alleged, in particular, that they had been denied effective access to court in relation to decisions taken on the construction of a railway, in violation of their rights under Articles 6 and 8 of the Convention.

4. On 21 May 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants own property close to Umeå, in the vicinity of a Natura 2000 area, the European network of nature protection areas established under the EU Habitats Directive of 1992 (see further below at paragraph 33). Most of them live there (permanently or on a part-time basis).

A. Proceedings on permissibility of railway project

6. On 15 October 1999, the National Rail Administration (*Banverket*; hereinafter "the NRA") applied to the Government for permission, under the Environmental Code (*Miljöbalken*), to construct a 10 km long railway section in a river area in the north of Sweden (constituting the final section of a railway called "Botniabanan", the total length of which is 190 km). The NRA presented some alternative railway stretches, all located in a specified "corridor", but recommended the one named "alternative east". The proposed railway construction concerned certain areas which were or were going to be part of Natura 2000.

7. It appears that six of the present applicants own houses or land within the mentioned "corridor": Ms Carina Granberg, Ms Agneta Holmström, Mr Gustaf Härestål, Mr Björn Höjer, Ms Inga-Britt Höjer, and Mr Christer Skoog. Ownership of Mr Skoog's property was transferred to Ms Granberg on 7 January 2011. The properties of the other twelve applicants – houses and land in their ownership or owned houses located on non-freehold sites – are situated outside the "corridor". The distance from their properties to the "corridor" or the specific stretch of the railway fixed in later proceedings vary; the houses appear to be situated 300 – 2500 metres away whereas the closest piece of land is located about 50 metres from the "corridor".

8. On 12 June 2003 the Government, after having heard the European Commission, granted the application and allowed the construction of the railway in the proposed "corridor" under the condition, *inter alia,* that the NRA adopt a railway plan before 1 July 2009 and also a specific plan for the realisation of the necessary environmental compensation measures in the Natura 2000 areas. The plan on compensation measures had to be presented to the Government before the railway plan was adopted. The Government stated, *inter alia*, that the activity could be permitted, despite its harmful effect on the environment in a Natura 2000 area, if there were no alternative solutions and the railway had to be constructed for reasons of public interest.

9. A number of individual property owners, including three of the applicants in the present case – Ms Bring, Mr Bäcklund and Mr Osterman –

petitioned the Supreme Administrative Court (*Regeringsrätten*) for a judicial review of the case and requested that the Government's decision be quashed. The property owners claimed that the decision contradicted Swedish law as well as applicable European Union law, including the Habitats Directive. It was argued, firstly, that the decision contravened the general rule in the Environmental Code on the site to be chosen for activities and installations that may affect human health or the environment. This aspect allegedly had a direct and clear bearing on their civil rights. Secondly, they asserted that the Government's decision violated Swedish regulations on nature conservation by failing to consider relevant alternative sites for the railway.

10. On 1 December 2004 the Supreme Administrative Court dismissed the petitions for a judicial review because it was not possible to determine who should be considered an interested party at that stage of the railway planning. The exact route of the railway would not be established until the railway plan had been drawn up. Until then, it could not be assessed with any certainty who would be affected to the extent that they were entitled to bring an action or what account should be taken of their interests. Further stating that the parties affected to a sufficient extent by the future railway would be able to obtain a judicial review of the later decision to adopt the railway plan, the court refused the petitioners *locus standi*.

11. One judge dissented, finding that the issue of *locus standi* in respect of each petitioner should be further investigated by the court in order to ensure that the individual interests were taken into account, having regard to the binding character of the Government's decision in the later railway planning proceedings.

B. Proceedings on permits for construction of railway and bridges

12. In 2003 and 2004 the NRA applied to the County Administrative Board (*länsstyrelsen*) in the County of Västerbotten for a permit to construct the railway in the specific Natura 2000 area and to the Environmental Court (*miljödomstolen*) in Umeå for permits to build two bridges.

13. The County Administrative Board granted a construction permit for the railway by a decision of 14 October 2004, which was subsequently appealed against to the Environmental Court.

14. The Environmental Court decided to examine the cases jointly. By judgments of 24 May 2005 and 13 June 2005, considering itself bound by the Government's decision of 12 June 2003 on the permissibility of the railway project, the court decided to grant all the permits requested by the NRA.

15. On 15 June 2006 the Environmental Court of Appeal (*Miljööverdomstolen*) in Stockholm quashed the Environmental Court's judgments and referred the cases back to the latter instance. The appellate

court found that the Government's decision had not contained a detailed examination of measures necessary to compensate for environmental harm caused by the railway project, and that these issues had to be settled as part of the determination of the construction permit requests.

16. On 26 April 2007 the Environmental Court decided anew to grant the permits requested by the NRA. The court considered itself bound by the Government's decision as to the permissibility of the railway project and thus limited its examination to the environmental compensation measures, as indicated by the decision of the Environmental Court of Appeal.

17. Two applicants – Ms Granberg and Mr Skoog – appealed against the Environmental Court's judgment in so far as it concerned the permit for the railway construction. All applicants except Mr Osterman appealed against the part which concerned the permit to construct the bridges.

18. By a judgment of 6 December 2007 the Environmental Court of Appeal affirmed the binding nature of the Government's permissibility decision and approved the construction of the railway and the bridges with certain added conditions.

19. On 9 May 2008 the Supreme Court (*Högsta domstolen*) refused leave to appeal and, thus, the Environmental Court of Appeal's judgment became final.

C. Proceedings on adoption of railway plan

20. On 21 June 2005 the NRA adopted a railway plan for the area in question.

21. Twelve applicants – all but Ms Holmström, Mr Härestål, Mr Höjer, Ms Höjer, Mr Sjöstedt and Mr Stenlund – appealed to the Government against the railway plan. They essentially complained of the specific stretch of the railway, invoking, *inter alia*, nuisance such as noise and vibrations affecting the enjoyment of their property.

22. By a decision of 28 June 2007 the Government referred to its decision on permissibility of 12 June 2003. It found that the specific stretch chosen in the railway plan was situated within the permitted "corridor" and thus rejected the appeals.

23. All of the applicants and several other petitioners turned to the Supreme Administrative Court and requested that it, by way of a judicial review, order the quashing of the Government's decision. They claimed, *inter alia*, that, although their civil rights were affected by the planned railway, they had not had these rights considered and determined by a court, in violation of the Convention. As to the chosen location of the railway, they also asserted that the Government's decision was contrary to provisions of the Environmental Code and the EU Habitats Directive.

24. On 10 December 2008 the Supreme Administrative Court, after having held a hearing in the case, rejected the petition, finding that the

railway plan was in line with the Government's decision of 12 June 2003 on the permissibility of the railway project and that the proceedings for the adoption of the plan did not demonstrate any failings. The court considered that the question of permissibility of a railway project was within the power of the Government, which had to take into account public interests such as environmental, industrial, economic and regional policy. The Government's permissibility decision was binding for the subsequent proceedings in that courts and other decision-making bodies could not examine issues that had been determined by that decision. Thus, in the proceedings concerning the construction permits requested by the NRA, the various instances could decide on conditions and other details but not on the general permissibility as defined in the Government's decision. Similarly, in the third stage of the decision process – the adoption of the railway plan – it was for the authorities and courts to decide only on the precise location of the railway, within the area designated by the Government's decision. The Government had not been obliged to review its decision of 12 June 2003 on the permissibility of the railway project and the designation of the "corridor" in which the railway could be located. These issues could not be examined in the third stage of the decision process. The Supreme Administrative Court further stated that, if private interests were affected by the location of a railway project, judicial review could be obtained by petitioning the court in proceedings against the Government's permissibility decision. The fact that the court, on 1 December 2004, had concluded that no individual petitioner could be considered to have *locus standi* in relation to the permissibility decision did not compel it to include in its current examination of the adoption of the railway plan the issues of permissibility of the project or its general location.

25. One judge dissented, considering that the Supreme Administrative Court's judgment contravened its decision of 1 December 2004. She noted, *inter alia*, that the adoption of a railway plan – as opposed to the construction permits – had direct consequences for the individual as it entailed a right for the railway company, under certain conditions, to expropriate land. Consequently, the court, in the instant case, should have examined all the objections presented by the appellants, including the claim that there were better alternative locations for the railway. According to the dissenting judge, a full judicial review had also been foreseen by the court in its earlier decision.

D. Compensation and others measures taken

26. It appears from the parties' observations in the case that at least ten of the applicants (including seven with houses or land situated outside the "corridor") have received some form of compensation as a consequence of the railway construction, either for land requisitioned or for reduced

residential value or market value. In one case, the change to noise-reducing windows was partly paid by the NRA. It is not clear whether the other applicants requested compensation. In the vicinity of some properties, whose owners have not received compensation, noise barriers have been erected in order to keep the noise from the railway below the applicable target values.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Planning of railway construction

27. The planning of railway construction is regulated in the Railway Construction Act (*Lagen om byggande av järnväg*, 1995:1649). In addition, during planning and review of a railway construction, the general provisions in Chapter 2-4 of the Environmental Code (*Miljöbalken*) apply, stipulating, *inter alia*, that the site least intrusive on the interests of human health and the environment should be chosen for activities and installations.

28. The planning process of a railway construction is divided into three phases, in which the work is intended to gradually develop from outline studies to detailed plans and in which the outcome of one phase is intended to serve as a starting point for the next phase. Consideration is to be given to private interests as well as public interests such as the protection of the environment. The process begins with a preliminary study to identify and examine possible options to find out which alternatives warrant further study. The enterprise intending to build the railway is required by the regulations in the Environmental Code to consult relevant county administration boards, municipalities and non-profit organisations whose purpose is to safeguard nature protection and environmental interests, as well as parts of the general public who are likely to be particularly affected.

29. A railway investigation is to be conducted when the preliminary study shows that alternative routes should be examined. The alternatives and their consequences should be described so as to allow them to be compared both with one another and with the alternative of not carrying out any railway expansion at all. A railway investigation should include consultation with the country administrative board, supervisory authorities and individuals who are likely to be particularly affected. The investigation must contain an environmental impact assessment formulated in accordance with the regulations of the Environmental Code. The investigation results in the National Transport Administration (*Trafikverket*; before April 2010: the NRA) deciding on a corridor in the terrain where the railway should be located.

B. The Government's permissibility assessment

30. Major railway projects are also subject to a Government permissibility assessment (Chapter 17 of the Environmental Code). The permissibility assessment is made on the basis of the railway investigation. No appeal lies from the Government's decision, but a judicial review of the decision can be obtained through an application to the Supreme Administrative Court.

31. According to the preparatory works of the Environmental Code, the Government's decision on the issue of permissibility is binding on subsequent reviews. Hence, if the Government has reviewed the permissibility of an activity, courts and authorities cannot review this issue (Government Bill 1997/98:45, part 1, pp. 436 et seq.). In principle, the Government's assessment should take place at a relative early stage of the process and primarily concern the permissibility of an activity. The issue of permissibility under the Code also includes the issue of the location of the activities (*ibid*., pp. 440 et seq.). A permissibility review for a railway results in the Government granting permission to construct the railway within a defined corridor.

C. The environmental courts' review

32. Pursuant to Chapter 11 of the Environmental Code, a permit is required for water operations. The term "water operations" refers, *inter alia*, to the construction in water areas and the diverting of water away from water areas. Decisions on permits are taken by an environmental court and may be appealed to the Environmental Court of Appeal and the Supreme Court. Appeals may be made by any person subjected to an adverse judgment or decision, or by authorities, municipality committees or other bodies entitled to appeal pursuant to specific provisions.

33. The EU Habitats Directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora) – which defines how Natura 2000 sites are managed and protected – and the EU Birds Directive (Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds) have been implemented in Swedish legislation, primarily through the provisions of the Environmental Code and the Ordinance on Site Protection under the Environmental Code (*Förordningen om områdesskydd enligt miljöbalken m.m.*,1998:1252).

34. Pursuant to Chapter 7, section 28a of the Code, a permit is required for activities or measures which may significantly affect the environment in a Natura 2000 site. Such a permit may only be granted if the activity or measure will not damage the habitats under protection or cause that the species under protection are exposed to a disturbance that may significantly impinge on their conservation in the area. However, a permit may

nevertheless be granted if 1) there is no alternative solution, 2) the activity or measure must be carried out for imperative reasons of vital public interest, and 3) the necessary measures are taken to compensate for environmental losses, so as to ensure that the purpose of protecting the site concerned can still be achieved (Chapter 7, section 29).

35. If a permissibility review under Chapter 7, section 29 of the Code concerns an activity or measure that may affect the environment in an area that contains a prioritised species or habitat, the review may only take account of circumstances that concern 1) human health, 2) public safety, 3) vital environmental protection interests, or 4) other imperative circumstances of overriding public interest. With regard to circumstances referred to in point 4 the European Commission must be given the opportunity to state an opinion before the matter is settled.

36. Decisions on permits under Chapter 7, section 28a of the Code are taken by a county administrative board. If, however, a permit is required according to, *inter alia*, Chapter 11 of the Code, the decision should be taken by the authority deciding on the latter permission. Decisions by the county administrative board may be appealed to an environmental court and further to the Environmental Court of Appeal and the Supreme Court.

D. The Government's review of a railway plan

37. In the third planning phase a railway plan is elaborated by the enterprise that intends to construct the railway, pursuant to the provisions of the Railway Construction Act. The plan must describe the location and design of the railway construction in detail as well as the land and the special rights that need to be claimed for the railway itself and its construction. The railway plan must contain an environmental impact assessment. Moreover, consultation is required with affected property owners, municipalities and country administrative boards, and with other parties who may have a substantial interest in the matter. Subsequently, the National Transport Administration, having consulted the county administrative board, must assess whether the plan is to be adopted. If the plan involves making compulsory claims on, *inter alia*, land or special rights, the National Transport Administration must make a special assessment whether the advantages that may be secured by the plan outweigh the inconvenience that it causes the individual parties. A decision by the National Transport Administration to adopt a plan may be appealed to the Government. The Government's decision is final. However, it is possible to request judicial review of the decision.

38. By virtue of an adopted railway plan, the railway constructor has the right to purchase necessary land, through a court decision or by a cadastral procedure. In cases concerning purchases and compensation the Expropriation Act (*Expropriationslagen*, 1972:719) applies.

E. Judicial review and domestic case-law

39. The 1988 Act on Judicial Review of Certain Administrative Decisions (*Lagen om rättsprövning av vissa förvaltningsbeslut*, 1988:205) was introduced as a result of the European Court's findings in several cases that the lack of judicial review of certain administrative decisions infringed Article 6 § 1 of the Convention. It was replaced by the 2006 Act on Judicial Review of Certain Government Decisions (*Lagen om rättsprövning av vissa regeringsbeslut*, 2006:304), which entered into force on 1 July 2006.

40. In 2004, at the time of the judicial review of the Government's permissibility decision, the 1988 Act applied. It stipulated that an individual who was a party to administrative proceedings before the Government or any other public authority concerning, *inter alia*, the right to property or the relations between private subjects and public bodies which related to the individual's personal and economic circumstances could, in the absence of any other remedy, apply to the Supreme Administrative Court, as the first and only court, for review of any decisions which involved the exercise of public authority *vis-à-vis* the individual. In proceedings brought under the 1988 Act, the Supreme Administrative Court examined whether the contested decision "conflicted with any legal rule". According to the preparatory works (Government Bill 1987/88:69, pp. 23-24), its review of the merits of the cases concerned essentially questions of law but could, in so far as relevant for the application of the law, extend also to factual issues; it also had to consider whether there were any procedural errors which could have affected the outcome of the case. If the Supreme Administrative Court found the impugned decision unlawful, it had to quash it and, where necessary, refer the case back to the relevant administrative authority.

41. In 2008, at the time of the judicial review of the Government's decision on the railway plan, the 2006 Act applied. The procedural framework is essentially the same as described above with some exceptions. For example, in contrast to the 1988 Act, it is no longer required that the individual has been a party to previous proceedings to be able to apply for a judicial review (Government Bill 2005/06:56, p. 12). Thus, any individual can apply for judicial review of decisions by the Government as long as they concern the individual's civil rights or obligations within the meaning of Article 6 § 1 of the Convention. However, in practice this had already applied for a number of years in accordance with domestic case-law (RÅ 1999 ref. 27).

42. In a judgment from 2011 concerning the Government's permissibility decision on the construction of a road in Stockholm, the Supreme Administrative Court found that, although it could not be established at that stage which petitioners (all of whom owned property within the suggested corridor) would finally be affected by the road construction, the location of the road was in fact decided through the

Government's decision and could not be subject to review in any subsequent proceedings concerning the road project. Consequently, in the Supreme Administrative Court's view, the contested decision entailed an assessment of the petitioners' civil rights or obligations within the meaning of Article 6 § 1 of the Convention, and thus, the petitioners were considered to have *locus standi* in the judicial review of the Government's permissibility decision (HFD 2011 not. 26).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

43. The applicants complained under Article 6 of the Convention that they had been denied a fair trial with regard to their civil rights, as they had been refused a full legal review of the Government's decision to permit the construction of the railway, which was situated on or close to their properties. The latter decision had significantly affected the applicants' property as well as the environment in the area concerned. Article 6 § 1 of the Convention reads, in so far as relevant, as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to [a] ... hearing ... by an independent and impartial tribunal established by law..."

A. Admissibility

1. Compatibility ratione materiae

44. The respondent Government contended that Article 6 was not applicable in relation to the twelve applicants who did not own houses or land located in the "corridor" specified by the NRA, within which the railway was constructed. As, allegedly, their civil rights had not been affected, their complaints should be declared inadmissible for being incompatible *ratione materiae*.

45. The applicants contested the Government's objection. They claimed that they had submitted maps showing the location of their properties to the Supreme Administrative Court in the proceedings concerning the adoption of the railway plan. The opposing party – the Government – had not objected to the standing of the applicants, nor had their request been rejected by the court on the ground that they or their properties were not affected by the railway construction.

46. The Court first notes that the applicants, in the domestic as well as the instant proceedings, have complained about the railway construction and its location, invoking both general environmental aspects and more

individual concerns such as the impact of noise and vibrations on the enjoyment of their homes and property and on human health, necessarily including their own, as well as the reduction in value of their property. While public interests such as environmental harm in general may be recognised as valid grounds for an individual complaint under domestic law, in the present case the Court cannot find that these claims concerned the applicants' "civil rights" within the meaning of Article 6. However, the other issues raised by the applicants, in particular the effects of the railway project on their homes and land, related to their "civil rights". Furthermore, there was a genuine and serious dispute over those rights and the domestic proceedings were decisive for them (see, for instance, *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 43, ECHR 2000-IV).

47. As regards the Government's claim that Article 6 is not applicable to the twelve applicants who did not own houses or land inside the "corridor", the Court is not in a position to determine how close to the "corridor" or the actual railway the individual properties need to be in order for the rights of property owners to be considered affected. It should be noted, however, that, except for the Supreme Administrative Court's decision of 1 December 2004 – which concluded that, at that stage of the proceedings, it was not possible to assess who would be affected by the construction of the railway – the applicants' domestic appeals and requests were not dismissed on the ground that they were not sufficiently concerned by the construction. Furthermore, at least ten of the applicants – of which seven have their houses and land situated outside the "corridor" – have received some form of compensation. There is no indication that any applicant's request for compensation has been refused. In these circumstances, the Court considers that the applicants' "civil rights" were sufficiently affected for their complaints to fall under Article 6 of the Convention.

48. The Government's objection as to the compatibility *ratione materiae* of the twelve applicants' complaints must accordingly be rejected.

2. Compatibility ratione personae

49. The Government further claimed that the application should be declared inadmissible for being incompatible *ratione personae* in so far as it concerned the complaints of Mr Johansson and Mr Skoog. With respect to Mr Johansson, they stated that he had only been subject to compensatory measures in regard to land owned by a joint-property association in which he was a member. They pointed out that rights and obligations incumbent on joint property fall within the competence of the association and not its individual members. With respect to Mr Skoog, they referred to the fact that he had transferred his property to Ms Granberg in January 2011.

50. The applicants pointed out that Mr Skoog had been the owner of the property in question at the time of the events in the case and during the following years.

51. The Court notes that Mr Johansson, in addition to jointly owned property, owned individual property in the area at issue (located outside the "corridor"; see further paragraph 7 above) and that this was the basis for his membership in the joint-property association. In so far as the applicability of Article 6 is concerned, his situation is thus no different from the other applicants in the case (see paragraph 47 above). As to Mr Skoog, it should be stressed that the applicants' complaint under Article 6 concerns access to court, which issue must be determined on the basis of the facts pertaining at the time of the domestic proceedings in the case. While Mr Skoog's property was transferred to another applicant in January 2011, he was the owner of said property throughout those proceedings and also at the time when the present application was lodged. Consequently, there is no reason to find that either Mr Johansson or Mr Skoog could not be a victim within the meaning of Article 34 of the Convention.

52. The Government's objection as to the compatibility *ratione personae* of their complaints must accordingly also be rejected.

3. Exhaustion of domestic remedies

53. The Government finally maintained that all the applicants had failed to exhaust domestic remedies. They pointed out that only three applicants had requested a judicial review of the Government's permissibility decision of 2003 before the Supreme Administrative Court. Further, the judgment of the Environmental Court of 2007, approving the construction of the railway and two bridges, had not been appealed against by one applicant. Moreover, in the proceedings concerning the adoption of the railway plan, six applicants had failed to appeal to the Government against the decision of the NRA.

54. In addition, the Government asserted that the applicants had, and still have, the possibility to claim compensation before the Swedish courts or the Chancellor of Justice. Referring to several judgments and decisions by the Supreme Court in recent years, the Chancellor's subsequent compensation awards as well as the European Court's conclusions in, *inter alia*, the cases of *Eskilsson v. Sweden* ((dec.), no. 14628/08, 24 January 2012) and *Eriksson v. Sweden* (no. 60437/08, 12 April 2012), they stated that Swedish law provided a remedy in the form of compensation for both pecuniary and non-pecuniary damage in respect of any violation of the Convention, including violations under Article 6. The Government pointed out that the limitation period in respect of compensation claims against the State – ten years from the point in time when the damage had occurred, under Section 2 of the Limitation Act (*Preskriptionslagen*, 1981:130) – had not yet run out.

55. The applicants disagreed. In regard to the permissibility proceedings, they stated that, while only three of them had requested a review before the Supreme Administrative Court, their request had been dismissed for lack of standing because the court had found that it could not be established which

property owners would be affected by the project until the railway plan had been adopted. There was nothing to suggest that that outcome would have been any different if all the applicants had requested a review. With respect to the examinations of the environmental courts and the Supreme Court, the applicants maintained that these proceedings had not provided an effective remedy to challenge the Government's decision of 2003 on the permissibility of the railway construction in the specified location, as the courts had clearly stated that they were bound by that decision. As to the proceedings concerning the adoption of the railway plan, the applicants submitted that what mattered in terms of exhaustion of remedies was that all of them had requested a judicial review by the Supreme Administrative Court of the Government's decision. The right to request such a review was not dependent on whether a petitioner had been active in the proceedings before the Government's decision.

56. Finally, in respect of the issue of non-exhaustion based on failure to claim compensation domestically, the applicants claimed that no such procedure provided a remedy addressing the lawfulness of the Government's decisions concerning the site of the railway construction.

57. The Court reiterates that normal recourse should be had by an applicant to a remedy which is available and sufficient to afford redress in respect of the breaches alleged. If there are several potentially effective remedies, it is normally enough if the applicant has recourse to one of them.

58. In the present case, a number of individual property owners – including three of the applicants – petitioned the Supreme Administrative Court for a judicial review of the Government's decision of 12 June 2003 to allow the construction of the railway in question. Given the binding nature of the Government's permissibility decision on the later proceedings – as confirmed by the judgments and decisions taken in regard to construction permits and the adoption of the railway plan – it would seem natural for discontented property owners to challenge that very decision by the only means available, a petition for judicial review. However, the Supreme Administrative Court dismissed the petition without an examination of its merits in respect of all petitioners. The reason for the dismissal was not that the court found itself incompetent to rule on such a petition or that the particulars of the individual property owners were such that they lacked a justifiable interest in having a judicial review of the Government's decision. Instead, the Supreme Administrative Court considered that it could not be assessed with any certainty who would be sufficiently affected by the railway project until the railway plan had been drafted. In other words, it was too early to determine who would be entitled to bring a legal action against the Government's decision. The court added that a judicial review would instead be available of the later decision to adopt the railway plan.

59. Given the Supreme Administrative Court's decision to dismiss the challenge against the Government's permissibility decision – and the

reasons given for the dismissal – it must be concluded that, in this particular case, the petition for judicial review was not an effective remedy, at least not at that point in time. It would not have made any difference if all applicants had joined that petition. The same goes for the subsequent proceedings relating to construction permits. Whether or not it was at all possible to have an assessment of the impact of the railway project on the enjoyment of individual homes and property in these proceedings, it is clear that the environmental courts found themselves bound by the Government's permissibility decision and limited their examination to more general environmental issues. For these reasons, the applicants who did not partake in the various petitions and appeals during the first two sets of proceedings must be excused for their lack of action.

60. Coming to the third stage of the domestic examination of the railway project – the proceedings on the adoption of the railway plan – it is true that six applicants failed to appeal to the Government. However, such an appeal was not a prerequisite for the right to subsequently request a judicial review. This is shown by the fact that when the applicants made a petition for judicial review, they were all accepted as petitioners by the Supreme Administrative Court. None of them had their case dismissed for failure to exhaust previous remedies. Therefore, since all of the applicants participated in these judicial review proceedings and since the Supreme Administrative Court had previously, in its decision of 1 December 2004, indicated that this was the time to obtain a judicial examination of their individual interests, all of the applicants must be considered to have exhausted the potentially effective domestic remedies available in relation to the construction of the railway.

61. Finally, with respect to the Government's submission that the applicants could claim compensation for a violation of the Convention before the Swedish courts or the Chancellor of Justice, the Court, in several cases, has observed that domestic case-law has developed since 2005 and has concluded that, following a Supreme Court judgment of 3 December 2009 (NJA 2009 N 70), there is now an accessible and effective remedy of general applicability, capable of affording redress in respect of alleged violations of the Convention (see, among other authorities, *Eriksson v. Sweden*, cited above, §§ 48-52, and *Marinkovic v. Sweden* (dec.), no. 43570/10, § 43, 10 December 2013, and – in regard to the domestic case-law developments – the latter decision, §§ 21-31). However, this remedy, which introduced a general principle of law that compensation for Convention violations can be ordered without direct support in Swedish law, was established after the present application had been lodged on 4 June 2009. The assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged to the Court. The question arises whether the applicants should still be obliged to make use of this remedy, for which the limitation period has

not yet expired. Such an obligation may exceptionally exist, depending on the particular circumstances of each case (see, for example, *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX, and *Andrei Georgiev v. Bulgaria*, no. 61507/00, § 78, 26 July 2007). In this respect, it should be noted that the domestic developments have been gradual and set out in case-law with no specific reference to the type of case or situation in which the applicants have been involved. Moreover, the various domestic proceedings relating to the construction of the railway in question lasted for nine years, from 1999 to 2008. In these circumstances, it would not be reasonable to expect the applicants to turn again to the domestic courts or to the Chancellor of Justice to make use of a remedy established after the introduction of the present application. Consequently, there are no exceptional circumstances in the instant case which would justify a departure from the general rule that the issue of exhaustion of domestic remedies is assessed with reference to the time when the application was lodged to the Court. It has not been shown that, at that time, there was case-law demonstrating that compensation for Convention violations could be awarded for a lack of access to court. Nor had a compensation remedy of general applicability been established yet.

62. The Government's objection as to the exhaustion of domestic remedies must accordingly also be rejected.

63. No other ground for declaring the application inadmissible has been invoked or established. It must therefore be declared admissible.

B. Merits

1. The applicants' submissions

64. The applicants submitted that the Swedish courts had failed to ensure them a fair trial in respect of their civil rights by denying them a judicial review of the Government's permissibility decision of 12 June 2003. Once that decision had taken effect the administrative authorities and courts were bound by it in all the subsequent examinations and could only decide on issues relating to the construction and design of the railway. In the applicants' view, the only effective way to determine their civil rights would have been a judicial review before the Supreme Administrative Court. However, that possibility had been closed through the court's decision of 1 December 2004 to dismiss the petition for judicial review, referring to later proceedings concerning the railway plan, and its judgment of 10 December 2008 not to examine the issues of location and effects of the railway in the proceedings concerning the railway plan.

2. The Government's submissions

65. The Government submitted that the question of permissibility lay within the Government's power since they were best placed to make the overall review required, taking account of the relative weight of environmental protection, employment policy, regional policy and other aspects. The permissibility review was therefore mainly of a political nature. Furthermore, in relation to issues of urban and regional planning policies, where the community's general interest was pre-eminent, the State's margin of appreciation was arguably greater than when exclusively civil rights were at stake. Moreover, there was nothing to indicate that the decision on permissibility of the railway had been arbitrary or taken in conflict with national or international legislation or that the Government had erred in fact or in law. A fair balance had allegedly been struck between the competing interests of the individuals concerned and the community as a whole.

66. Moreover, the Government asserted that the applicants had had a clear and practical opportunity to challenge the issues that they believed interfered with their rights in the various proceedings relating to the railway. They contended, *inter alia*, that the minimum safeguards to ensure a fair balance between the applicants' and the community's interests had been put into place in the present case; the construction of the railway had been preceded by an environmental impact assessment procedure, assessing the probability of compliance with applicable environmental standards and enabling interested parties, including the applicants in the instant case, to contribute their views.

67. The Government further argued that the applicants' claims as concerned human health, the environment and the consideration of alternative sites for the railway had indeed been considered in the proceedings on the adoption of the railway plan, including the 2008 judicial review of the Supreme Administrative Court. The applicants had also had the opportunity to have the alleged nuisances emanating from the railway, including loss of residential value and noise issues, examined by the relevant authorities and courts. The Government further pointed out that the majority of the applicants had received compensation for reduced residential value or permanent loss of market value and that measures had been taken to reduce or exclude noise nuisance. Allegedly, affected applicants still had the possibility of instituting proceedings to claim compensation.

3. The Court's assessment

68. From the outset, the Court recognises the complexity of the planning and construction of infrastructure, such as a railway in the present case, as well as the public and economic concerns that such a process entails. The choice of how to regulate the construction of railways is a policy decision for each Contracting State to take according to its specific democratic

processes. Article 6 § 1 cannot be read as expressing a preference for any one scheme over another. What Article 6 § 1 requires is that individuals be granted access to a court whenever they have an arguable claim that there has been an unlawful interference with the exercise of one of their (civil) rights recognised under domestic law (see *Athanassoglou and Others v. Switzerland* [GC], cited above, § 54).

69. Turning to the facts of the present case, it is clear – and undisputed – that the applicants had civil rights, at least in relation to the enjoyment of their property, which they wished to invoke in the domestic proceedings. As has been mentioned above (paragraph 58), the Government's decision of 12 June 2003 to permit construction of the railway in the specified "corridor", as soon as it was final, acquired binding force on the further examinations relating to the railway. Thus, the Supreme Administrative Court's judicial review of the Government's decision would have been the natural point in time for the rights of the local property owners to be determined. However, the court, on 1 December 2004, denied the petitioners *locus standi* and stated that the parties sufficiently affected by the future railway could have a judicial review of the later Government decision on the railway plan. Nevertheless, the courts in the subsequent proceedings, including the Supreme Administrative Court when it examined the railway plan in 2008, found, in accordance with the applicable rules, that they were bound by the Government's permissibility decision, and accordingly did not examine any issues that had been determined by that decision.

70. It is true that certain details of the railway project could be determined in the subsequent proceedings and that several applicants have received some form of compensation for the effects of the railway construction. The fact remains, however, that the applicants were not able, at any time of the domestic proceedings, to obtain a full judicial review of the authorities' decisions, including the question whether the location of the railway infringed their rights as property owners. Thus, notwithstanding that the applicants were accepted as parties before the Supreme Administrative Court in 2008, they did not have access to a court for the determination of their civil rights in the case.

There has therefore been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

71. Referring to the same facts and to the Court's findings in the case of *Taşkın and Others v. Turkey* (no. 46117/99, § 119, ECHR 2004-X), the applicants submitted that there had been a violation also of their right to respect for their private and family life under Article 8 of the Convention, as it entailed a right "to appeal to the courts against any decision, act or omission where they consider[ed] that their interests or their comments [had] not been given sufficient weight in the decision-making process".

72. The Government disagreed. They made the same preliminary objections as under Article 6. In addition, they claimed that, even if there had been an interference with the applicants' rights under Article 8, it had not been shown that the railway in question entailed such adverse effects for them that the minimum level required to attract the application of Article 8 had been reached.

73. The Court notes that this complaint is in substance the same as the one examined above under Article 6. As it is so linked, the present complaint must be declared admissible. However, having regard to the findings under Article 6, the Court finds that no separate issue arises under Article 8.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

75. The applicants stated that they did not request any other compensation than costs and expenses for their legal representation, as they had introduced the application for reasons of principle.

76. The Court, accordingly, does not award any amount under this head.

B. Costs and expenses

77. The applicants claimed a total of 562,500 Swedish kronor (SEK; approximately 61,000 euros (EUR)) in costs and expenses for the proceedings before the Supreme Administrative Court concerning the railway plan and the proceedings before the European Court. This amount corresponded to legal fees for 100 hours of work by Mr Rosengren (60 hours in the domestic proceedings and 40 hours in the present proceedings) and expenses for 50 hours of work by Mr Ebbesson (20 hours in the domestic proceedings and 30 hours in the present proceedings), all at an hourly rate of SEK 3,750 (approximately EUR 410), inclusive of value-added tax (VAT).

78. The Government submitted that the claims for legal fees incurred during the domestic proceedings were excessive and not sufficiently specified as to the time spent on every measure. They also noted that Mr Rosengren had represented six petitioners who were not applicants in the present proceedings. Furthermore, the hourly rate claimed exceeded the

Swedish hourly legal aid fee, which for 2013 was SEK 1,552.50 (VAT included). In total, the Government accepted compensation for the domestic proceedings in the amount of SEK 62,125 (approximately EUR 6,800), corresponding to 30 hours of work by Mr Rosengren and 10 hours by Mr Ebbesson. As regards the proceedings before the European Court, the Government found also these claims excessive, noting that both representatives were already familiar with the circumstances of the case as they had acted on the applicants' behalf in the domestic proceedings. The compensation for the present proceedings should thus not exceed SEK 54,375 (approximately EUR 5,900), corresponding to 20 hours of work by Mr Rosengren and 15 hours by Mr Ebbesson. Finally, the Government submitted that the compensation should be reduced in the event that the Court found a breach of the Convention in relation to only part of the applicants' complaints.

79. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard should be had to the fact that Mr Rosengren represented also other petitioners than the applicants in the domestic proceedings, that a substantial part of the applicants' pleadings, notably in the domestic proceedings, concerned environmental issues which have not been considered to fall under the applicants' "civil rights" within the meaning of Article 6 of the Convention and that, albeit of lesser importance, the complaint under Article 8 has been found to raise no separate issue. Making an overall assessment, the Court considers it reasonable to award the total amount of EUR 20,000, including VAT, for costs and expenses in the domestic proceedings and the proceedings before the Court.

B. Default interest

80. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that no separate issue arises under Article 8 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to them, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 25 September 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President