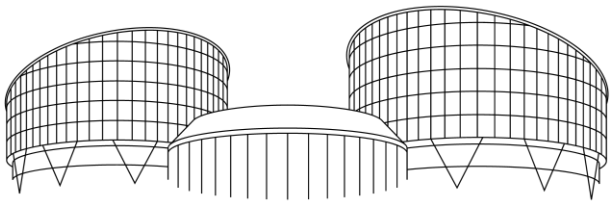

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF HANDÖLSDALEN SAMI VILLAGE AND OTHERS v. SWEDEN

(Application no. 39013/04)

JUDGMENT

STRASBOURG

30 March 2010

FINAL

04/10/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Handölsdalen Sami Village and Others v. Sweden,

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

Josep Casadevall, *President,*
Elisabet Fura,
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Ann Power, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 2 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 39013/04) 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 the following four Swedish Sami villages (*samebyar*): Handölsdalen, Mittådalen, Tåssåsen and Ruvhten Sijte (formerly Tännäs) ("the applicants") on 29 October 2004.

2. The applicants were represented by Mr J. Södergren and Mr C. Crafoord, lawyers practising in Stockholm. The Swedish Government ("the Government") were represented by their Agent, Mr C.-H. Ehrenkrona, of the Ministry for Foreign Affairs.

3. The applicants alleged, in particular, that they had not had effective access to court and that the length of the national proceedings had been unreasonable.

4. By a decision of 17 February 2009, the Court declared the application partly admissible.

5. The applicants and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant Sami villages are all situated in the municipality of Härjedalen in the county of Jämtland.

7. The Sami have, since ancient times, inhabited the northern parts of Scandinavia and the Kola Peninsula. Originally living by hunting, fishing and collecting, the Sami activities changed over time to concern mainly reindeer herding. Their historical use of the land has given rise to a special right to real estate, the reindeer herding right (*renskötselrätten*). Presently regulated in Sweden by the Reindeer Husbandry Act (*Rennäringslagen*, 1971:437), it comprises the right to use land and water for the Sami's own sustenance and that of his reindeer. The right may only be exercised by the members of a Sami village. Such villages are both geographical grazing areas and economic entities. They do not have any public legal status (see *Könkämä and 38 Other Sami Villages v. Sweden*, no. 27033/95, Commission decision of 25 November 1996, Decisions and Reports 87, p. 85 *in fine*). The reindeer herding area comprises approximately one-third of the surface of Sweden and is divided into all-year land and winter grazing land. In certain parts of the country, the borders of the herding area are controversial and have not been statutorily defined, especially as concerns the winter grazing land.

8. On 20 September 1990 a large number of private owners of land in the municipality of Härjedalen instituted proceedings against five Sami villages, the four applicants and the Idre Nya Sami village, before the District Court (*tingsrätten*) of Sveg. On 4 June 1991 more landowners initiated a similar action against the Sami villages. The landowners sought a declaratory judgment (*negativ fastställelsetalan*) that the Sami villages had no right to reindeer grazing on their land without a valid contract to that effect concluded between the landowner and the village.

9. On 26 June 1991 the District Court issued a summons and decided that the two cases were to be examined jointly. At a preparatory meeting on 16 September 1991, the court rejected the villages' request for dismissal of the cases on procedural grounds.

10. On 25 November 1991 the Sami villages submitted their response, contesting the landowners' action. The villages claimed that they had the right to winter grazing within their respective areas based on (1) prescription from time immemorial (*urminnes hävd*), (2) the provisions of the reindeer grazing and reindeer husbandry acts of 1886, 1898, 1928 and 1971, (3) custom, or (4) public international law, more specifically Article 27 of the UN Convention on Civil and Political Rights, as compared with Chapter 1, section 2, of the Instrument of Government (*Regeringsformen*).

11. Following three extensions of the time-limit fixed by the District Court, the landowners replied to the Sami villages' submissions on 10 April 1992. An additional preparatory meeting was held on 27 August 1992, at which the parties discussed, *inter alia*, the possibility of reaching a settlement. Furthermore, the villages were ordered to elaborate on their claim based on custom and to specify their means of evidence. They did so on 23 December 1992 following two extensions of the time-limit set. At the same time, they requested that the court inspect some of the properties concerned.

12. On 27 May 1993, having been granted several extensions, the landowners submitted a specification of the means of evidence offered. During the following months, the parties exchanged views on questions of evidence and submitted specifications of supplementary evidence. On 9 May 1994 the District Court sent a summary of the respective positions to the parties for comments. A further preparatory meeting took place on 18 May 1994.

13. During the summer and autumn of 1994, further comments were exchanged. On 26 and 27 October 1994 a preparatory meeting was held in order to plan the schedule for the main hearing. Between December 1994 and June 1995, further views were exchanged, among other things on the Sami villages' request for an inspection.

14. By a decision of 22 June 1995, the District Court rejected the request for an inspection on the ground that the villages had not shown that an inspection of certain properties was necessary for an examination of whether they had a right to winter grazing on the land in question.

15. The parties were summoned for the main hearing at the beginning of August 1995. On 1 September 1995 some more landowners initiated a similar action against the Sami villages. This case was joined to the other two.

16. The main hearing started on 18 September and ended on 25 October 1995. It lasted for 16 days. The District Court heard a large number of experts and witnesses and had regard to substantial documentary evidence. During the hearing, as well as on seven previous occasions, the court struck out the case in regard to some of the landowners following withdrawal of the action on their part. The three joined cases eventually comprised property belonging to 571 landowners.

17. Having examined the developments of the Sami culture and reindeer herding since prehistoric times, the District Court issued a 192-page judgment on 21 February 1996. It found that, from the 16th to the late 19th century, there had not been any winter grazing which had established a right for the Sami to such grazing on the relevant properties and that, from the late 19th century, the actual winter grazing, as annually recorded by the so-called Lapp bailiffs (*lappfogdar*), had not lasted long enough in the respective parishes to create a right to grazing on those properties based on

prescription from time immemorial, such prescription requiring at least 90 years' use of the land. For these reasons, the Sami villages could not claim a right to use the properties under the various laws, including the Reindeer Husbandry Act presently in force. Moreover, the court found that a right to real property could not legally be established through "custom" and that a right to winter grazing on the properties in question could not be based on the provisions of the UN Convention and the Instrument of Government. The court therefore concluded that there was no right of the Sami villages to reindeer grazing on the plaintiffs' land without a valid contract and accordingly gave judgment in favour of the landowners. The court ordered the Sami villages jointly to pay the plaintiffs' legal costs, amounting to approximately 4,000,000 Swedish kronor (SEK; about 400,000 euros (EUR)).

18. On 15 March 1996 the Sami villages appealed to the Court of Appeal (*hovrätten*) of Nedre Norrland. They demanded that the District Court's judgment be quashed, that the landowners' action be rejected and that the decision on litigation costs not be enforced. They completed their appeal on 2 September 1996.

19. On 8 November 1996 the landowners responded and requested that the Sami villages not be allowed to invoke circumstances in their defence that had not been presented to the District Court. In a submission of 20 December 1996, the villages, on their part, made an additional demand that the District Court's judgment be set aside and the case remitted to that court on the ground that a procedural error had occurred. During the following months, the parties exchanged views on these and other matters. The landowners submitted their comments on the villages' additional demand on 2 June 1997.

20. By a decision of 16 June 1997, the Court of Appeal ruled on twelve different procedural issues. Among other things, it rejected the Sami villages' request that the appealed judgment be set aside and the case remitted. It also rejected the landowners' request that the villages not be allowed to invoke certain circumstances in their defence, with one exception. Thus, the court did not allow the villages to argue that winter grazing without protests from landowners for a period of less than 90 years would qualify for a continued right to such grazing based on prescription from time immemorial or the provisions of the reindeer grazing and reindeer husbandry acts. Furthermore, the Court of Appeal rejected the Sami villages' requests for an inspection of the *locus in quo* and for an order against the landowners to produce maps of the areas concerned. In its reasons for the various rulings, the court referred, *inter alia*, to the provisions of the Code of Judicial Procedure (*Rättegångsbalken*) concerning the conditions for invoking new circumstances and evidence not previously examined by the District Court.

21. On 18 June 1997 the parties were ordered to complete their respective actions by the end of October 1997.

22. On 24 September 1997 the Sami villages claimed that there was a procedural hindrance (*rättegångshinder*) as they lacked the capacity to act as parties in relation to the issue concerned by the proceedings in question. By a decision of 4 November 1997, the Court of Appeal rejected this claim, stating that, under the provisions of the Reindeer Husbandry Act, they had the necessary legal capacity. On 1 December 1997 the villages appealed against that decision to the Supreme Court (*Högsta domstolen*). At their request, the Court of Appeal granted the villages an extension of the time-limit set for the completion of their appeal until the Supreme Court had rendered its decision on the procedural issue. By a decision of 18 February 1999, the Supreme Court refused the villages leave to appeal.

23. In a submission of 4 March 1999, the Sami villages demanded that the State, through the Chancellor of Justice (*Justitiekanslern*), intervene on their side in the proceedings. At the end of May 1999, the Chancellor informed the Court of Appeal that he did not intend to apply to participate in the proceedings.

24. In March and July 1999 the Sami villages were ordered to complete their appeal, which they did on 11 October 1999, after having been granted extensions of the time-limits set. Shortly thereafter, the landowners were ordered to submit the means of evidence they invoked, which they did on 21 February 2000, also following time-limit extensions.

25. In January 2000 the landowners applied for the Sami villages' appeal to be dismissed and in February 2000 the villages reiterated their demand that the District Court's judgment be quashed and the case remitted. By a decision of 19 December 2000, the Court of Appeal rejected these requests.

26. On 7 November 2000 the Sami villages requested that the court obtain an opinion from an expert (*sakkunnig*). Following the landowners' objection and the villages' further comments, the court rejected this request on 8 March 2001.

27. In January 2001 the court ordered the parties to make submissions on the question of which landowners were to be considered opposite parties in the appellate proceedings. The Sami villages submitted several comments between January and April 2001 and the landowners made their submissions in May and August 2001, after extensions of the time-limits set.

28. On 31 May 2001, having interpreted one of the landowners' submissions as a motion for dismissal of the Sami villages' appeal, the Court of Appeal rejected that motion. On 18 June 2001 the villages adduced some written evidence not previously presented. The landowners objected to that evidence but, by a decision of 5 September 2001, the court allowed the villages to present it.

29. The main hearing in the Court of Appeal was held between 1 and 31 October 2001 and lasted 16 days. The appellate court heard the same evidence as the District Court and, as already mentioned, some additional written evidence introduced by the Sami villages.

30. Following some landowners' withdrawal of their action and the Idre Nya Sami village's withdrawal of its appeal, the Court of Appeal, by decisions of 8 October and 16 November 2001, struck out the case and set aside the District Court's judgment – including the Idre Nya Sami village's liability for litigation costs – in so far as it concerned these same parties.

31. By a judgment of 15 February 2002, the Court of Appeal upheld the District Court's judgment and ordered the applicants to pay the plaintiffs' legal costs in the appellate proceedings, amounting to approximately SEK 2,900,000 (about EUR 290,000).

32. The Court of Appeal initially referred to the conclusion by the Supreme Court in the so-called "Taxed Mountains Case" (*Skattefjällsmålet*, NJA 1981, p. 1) that the rights pertaining to reindeer herding were exhaustively regulated by the Reindeer Husbandry Act. Consequently, the right of winter grazing was dependent on the conditions for prescription from time immemorial being met, those conditions having been regulated in the old Land Code (*Jordabalken*) of 1734.

33. As regards prescription from time immemorial and the burden and standard of proof in this respect, the Court of Appeal stated the following:

> "Under Chapter 15, section 4 of the old Land Code, the following applied to proof of prescription from time immemorial. 'If someone pleads prescription from time immemorial and fault is found with this claim, let him then show by means of old letters and writings deemed sufficient in law, or by means of credible men who have good local knowledge and can bear witness, on oath, that they neither know themselves nor have heard from others that the situation has ever been different. If he is unable to do this, the prescriptive right shall then be without force and effect.' According to the preparatory works for the 1928 Reindeer Grazing Act and the [1971] Reindeer Husbandry Act, in cases subject to dispute, the question of whether a right to winter grazing applies in a certain area is to be examined by a court on the basis of the evidence that is required under general law for proof of prescription from time immemorial (see Government Bill 1928:43, p. 71, and Government Bill 1971:51, p. 158). The burden of proof that winter grazing has taken place on the property owner's land to such an extent that the Sami villages have a right to continued winter grazing may therefore be deemed to rest with the Sami villages.
>
> In this case, the Sami villages claim that a right to winter grazing based on prescription from time immemorial has come into being as Sami have been in Härjedalen since prehistoric times, as reindeer were early on associated with the Sami culture, as reindeer management took on a completely nomadic form in the late sixteenth century or, at all events, during the seventeenth century, and it can be assumed that even then, in the winter, depending on the weather conditions and access to food, the reindeer belonging to the Sami wandered in search of food, and as the custom that developed at that time has endured until modern times. However, in the opinion of the Court of Appeal, for a right to winter grazing on the disputed lands to be deemed to have arisen on the basis of prescription from time immemorial, it must

> be required in addition that the results of the investigation indicate with sufficient strength that Sami have used the lands in question or parts of them for winter grazing for their reindeer with at least some regularity without hindrance, that is, without objection from other holders of rights."

The court further held that account had to be taken of the special features of reindeer husbandry. The herding required much space and necessitated movement between various grazing areas. The right to winter grazing based on prescription could not require that reindeer grazed in a particular area every winter. However, a basic condition for that right was that the area had been used in such a way that every instance of grazing could be seen as part of a recurring pattern, although absence from the area in question could be more or less prolonged.

34. The Court of Appeal examined extensive evidence dating back several hundred years and drew the following conclusions. As regards the period before the entry into force of the Reindeer Grazing Act of 1886 (most notably, the 17th, 18th and 19th centuries), it had not been shown that free winter grazing – that is, in the absence of contracts or the authorities' permission – had taken place in Härjedalen. On the contrary, the individual landowners had protested against reindeer grazing on their land. At the time of the enactment of the 1886 and 1898 Acts, the disputes between the domiciled population and the nomadic Sami about the use of the land at issue had been particularly sensitive in Härjedalen, and the investigation did not show that any winter grazing had occurred outside the boundaries of the "reindeer grazing mountains". According to the evidence presented with respect to the situation in the 20th century, grazing outside these mountains had existed during wintertime only in limited areas and protests from landowners had been commonplace.

35. The appellate court thus found, in agreement with the District Court, that, before the 20th century, there had not been such winter grazing outside the reindeer grazing mountains which, together with the grazing that had taken place during the 20th century, could create a right to use the relevant properties on the basis of prescription from time immemorial. The longest period in the latter century during which winter grazing had occurred in one area without landowners' objections was 50 years, thus insufficient to establish a right based on prescription.

36. The applicants appealed to the Supreme Court on 19 March 2002. Their appeal was completed on 22 May 2002. In the following months, they submitted documents as to the question of who was to represent them before the Supreme Court.

37. On 29 April 2004 the Supreme Court refused the applicants leave to appeal.

38. The Sami Fund (*Samefonden*) has granted the applicants a loan of SEK 14,700,000 (approximately EUR 1,470,000) to pay the litigation costs

incurred in the domestic proceedings. The loan, which is free of interest, is due on 30 November 2010.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Reindeer Husbandry Act

39. The nature and scope of Sami rights to land and water are governed by the Reindeer Husbandry Act. A person of Sami descent may use land and water in order to maintain himself and his reindeer (section 1). The reindeer herding right is a usufruct of economic value founded on prescription from time immemorial (section 1, subsection 2). It is to be exercised irrespective of contracts and free of charge, without limitations in time and space and on land belonging to the State as well as to private subjects, in accordance with the conditions laid down in sections 15-25 of the Act. These provisions also contain restrictions on the exercise of such rights depending, *inter alia*, on whether the land belongs to the State or to private subjects. The reindeer herding right includes the right of members of a Sami village to engage in hunting and fishing, to graze reindeer and to erect certain structures and buildings needed for reindeer herding, as well as to collect wood and timber from the forests. It pertains to all Sami, but may only be exercised by members of a Sami village.

40. Section 3 of the Act defines the areas where reindeer herding may be conducted (*renskötselområdet*). In so far as the county of Jämtland is concerned, herding may be carried out throughout the year on the so-called "reindeer grazing mountains" (*renbetesfjällen*) and in those areas within the county which, at the end of June 1992, belonged to the State and were made available specifically for reindeer grazing. Winter grazing may be carried out from 1 October to 30 April in such areas outside the reindeer grazing mountains where, since time immemorial, reindeer grazing has been conducted during certain times of the year.

Section 3, subsection 2, defines "reindeer grazing land" as land that has been declared to constitute reindeer grazing land through the process of delimitation of Crown lands (*avvittring*, that is, a process taking place between the 17th and the 20th centuries with the aim of separating private land from Crown land and imposing taxes on the former) or that has been used as such land since time immemorial. The notion of "reindeer grazing mountains" refers to mountains reserved for the Sami for reindeer grazing through the process of delimitation of Crown lands and the areas which have since then been made available for extension of the mountain grazing areas.

41. A Sami village is a geographical grazing area and an economic entity. Its main object is to manage reindeer herding within the grazing area of the village to the common benefit of its members (section 9). A village

may acquire rights and undertake commitments and represents its members with regard to issues related to reindeer husbandry (section 10). The members of a Sami village are Sami who participate or have participated in reindeer herding within the community's grazing area, as well as their closest family members (section 11).

B. Prescription from time immemorial

42. As mentioned above, the reindeer herding right is based on prescription from time immemorial. This was specified in the Reindeer Husbandry Act through a 1993 amendment, following the Supreme Court's conclusion in the "Taxed Mountains Case" that the right to certain mountain areas in northern Sweden could be based on prescription from time immemorial in combination with occupation. Provisions on ownership and other, more limited, rights to land based on prescription from time immemorial are mainly found in the old Land Code of 1734. For a right of ownership or usufruct based on such prescription to arise, the land had to have been occupied or used for such a long time that nobody knew or had heard that the situation had ever been different (Chapter 15, section 1, of the old Code).

43. The qualification period required is estimated to be approximately 90 years (see Bengtsson, *Samerätt*, 2004, p. 79, with references). Section 6 of the Act on Implementing the new Land Code (*Lagen om införande av nya jordabalken*; 1970:995) stipulates that the provisions of the new Land Code are not to interfere with any rights to land based on prescription from time immemorial that have arisen before the new Land Code came into force (1 January 1972). This implies that any historical provision that could have given a person or entity rights to certain land before that date is still valid. As more specifically regards the Sami right to winter grazing based on prescription from time immemorial, the area has not been geographically demarcated in the Reindeer Husbandry Act. If there is a dispute about whether a particular piece of land has traditionally been used for herding during certain times of the year – and thus may be used for winter grazing – the issue is to be decided by the courts on the basis of the evidence presented (see Government Bill 1928:43, p. 71, Government Bill 1971:51, p. 158, and the report by the Reindeer Husbandry Policy Committee, SOU 2001:101, p. 169).

C. Legal aid

44. Under section 6 of the Legal Aid Act (*Rättshjälpslagen*, 1972:429) in force at the material time, legal aid could be given to natural persons who fulfilled certain conditions, in particular that their financial resources were limited. A legal entity like a Sami village was thus not entitled to legal aid.

D. The Sami Fund

45. The Sami Fund is regulated in sections 16-28 of the Reindeer Husbandry Ordinance (*Rennäringsförordningen*, 1993:384). The Fund's purpose is to subsidise and promote reindeer husbandry, Sami organisations and Sami culture. As regards the promotion of reindeer husbandry, the subsidies can be used for the purchase and lease of land for reindeer herding, rationalisation of reindeer husbandry and other measures. The means are administered by the Legal, Financial and Administrative Services Agency (*Kammarkollegiet*). Decisions on how the means are to be used are taken by the board of the Sami Fund, which consists of six persons of Sami origin.

46. The revenue of the Sami Fund mainly consists of charges for leases to others than reindeer owners of land belonging to the State where reindeer husbandry may be carried out all the year round. Such revenue, which includes, for instance, licensing fees for hunting and fishing, is divided equally between the Sami village concerned and the Sami Fund.

47. In its budget proposal for 2009 (Government Bill 2008/2009:1), which was approved by Parliament, the Government laid down that some of the revenue of the Sami Fund could be used to part-finance the lease of land for winter grazing in the areas concerned in the present case.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION IN REGARD TO EFFECTIVE ACCESS TO COURT

48. The applicants asserted that, given the high legal costs of the proceedings, they did not have an effective access to court. They relied on Article 6 § 1 of the Convention which, *inter alia*, provides the following:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by [a] tribunal ..."

A. The parties' submissions

49. The applicants submitted that a lack of resources had affected the quality of their defence in that the main responsibility for their litigation had rested with the legal council of the Swedish Sami Association (*Svenska samernas riksförbund*), a lawyer with little experience of litigation. They further asserted that the reason for the allegedly enormous legal costs for both sides in the proceedings was the legislation, which was defective in that it did not define the winter grazing areas, which had necessitated the

pursuit of thorough and time-consuming historical research. The applicants thus had not had any reason to blame the landowners for making the proceedings complex, as that responsibility had rested with the State. With this in mind, and having regard to the vital values at stake, the applicants submitted that their right to an effective access to court and a fair hearing had necessitated the grant of legal aid. The loans received from the Sami Fund will have to be repaid and were of no relevance in this respect. Rather, the payment of the legal costs in the case, together with increasing costs for reindeer herding through the payment of fees to lease land for grazing, puts strain on the economy of the Sami villages and may lead to bankruptcies.

50. The Government emphasised that the primary issue was not whether the lack of legal aid as such constituted a violation of Article 6. Nor was it of immediate relevance how the applicants had financed their counsels in the domestic proceedings or how their financial situation had been affected by the legal costs incurred. Instead, the crucial issue was whether the applicants had been afforded a reasonable opportunity to present their case effectively under conditions that had not placed them at a substantial disadvantage vis-à-vis the landowners, and thus whether they had been granted a fair hearing within the meaning of Article 6. The Government maintained that this was the case and argued that the applicants had been represented by legal counsel during the entire domestic proceedings and had been able to appeal to the Court of Appeal and the Supreme Court. Moreover, during the major part of the proceedings, they had been assisted by two counsels, one of whom was a member of the Swedish Bar Association. In the Government's opinion, there was nothing to indicate that the legal representation was insufficient or that the courts handled the issue of legal costs in an unreasonable way or otherwise in contravention of domestic law. The Government further pointed out that the applicants' opposite party had not been a powerful company like, for example, McDonalds in the case of *Steel and Morris v. the United Kingdom* (no. 68416/01, ECHR 2005-II), but had mainly consisted of private individuals. Thus, the parties had been on a relatively equal footing. Moreover, the applicants had been granted advantageous interest-free loans from the Sami Fund to enable them to pursue and accomplish their action.

B. The Court's assessment

51. The Court reiterates that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial. It is central to the concept of a fair trial, in civil as in criminal proceedings, that litigants are not denied the opportunity to present their case effectively before the court and that they are able to enjoy equality of arms with the opposing side. Article 6 § 1 leaves to the State a

free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure. The question of whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon the importance of what is at stake for the applicants in the proceedings, the complexity of the relevant law and procedure and the applicants' capacity to represent themselves effectively.

The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate. It may therefore be acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigants or the prospects of success in the proceedings. Moreover, it is not incumbent on the State to seek, through the use of public funds, to ensure total equality of arms between the parties to the proceedings, as long as each side is afforded a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage *vis-à-vis* the adversary (see *Steel and Morris v. the United Kingdom*, cited above, §§ 59-62, with further references).

52. Turning to the facts of the present case, the Court reiterates that the applicants, being legal entities, were not entitled to legal aid and, consequently, did not apply for such a benefit.

53. However, the applicants' complaint is not exclusively directed against the fact that they were excluded from receiving legal aid. Rather, they claim that the national proceedings involved excessive legal expenses – due to their own litigation costs and the courts' orders that they, as losing parties, pay the landowners' legal costs – by virtue of which they did not have effective access to a court. Noting that the grant of legal aid was a means that would have had an impact on the applicants' financial situation, the Court considers that similar considerations to those outlined above are relevant to the circumstances of the present case.

54. First, as regards what was at stake for the applicants, it is reiterated that the national courts examined whether they had a right to free winter grazing on the land in question. As the proceedings concerned property belonging to 571 landowners, the issue determined was undoubtedly of considerable importance to the applicants.

55. Furthermore, with respect to the complexity of the case, it is to be noted that the Reindeer Husbandry Act does not regulate which particular pieces of land may be used for winter grazing, but leaves it to the courts to determine disputes on the basis of the evidence presented. The proceedings in issue involved an examination of reindeer herding in the area over several centuries and the applicants, in claiming a right to winter grazing, were called upon to show that the Sami had used the land unchallenged for at

least 90 years. In these circumstances, it is evident that the case was of a complex nature.

56. Against this background, the Court must assess the extent to which the applicants were able to present their case despite the legal costs incurred. At the outset, the Court cannot find that the national courts handled the issue of legal costs unreasonably or otherwise in contravention of domestic law. Furthermore, it must be stressed that the applicants are four Sami villages, legal entities with a certain number of members, and their situation was not therefore comparable to that of an individual litigant. Moreover, although not of decisive importance, it is to be noted that, while they did not receive any contributions from public funds, they were granted loans from the Sami Fund to defray the costs of the proceedings.

57. More importantly, the applicants were in fact represented by legal counsel throughout the proceedings. Furthermore, they were able to appeal to the Court of Appeal and the Supreme Court. As is evident from the judgments and the various decisions taken during the proceedings, they presented a large amount of material to the courts and made numerous submissions on the substance of the case as well as on issues of procedure. The way in which the applicants conducted their defence does not indicate that they were unable to present their case properly.

58. Moreover, as the Court noted in regard to the principle of equality of arms and the burden of proof in its decision on the admissibility of the case, the impugned judgments were pronounced following adversarial proceedings, in which both the District Court and the Court of Appeal held lengthy oral hearings, both the Sami villages and the landowners adduced an extensive body of evidence and there is no indication that the applicants were prevented by the courts from introducing all the material and arguments they considered relevant to the case (§ 62 of the decision of 17 February 2009)

59. In conclusion, the Court does not doubt that the applicants' adversaries, the landowners, had greater financial resources. Moreover, the complexity of the case, having a bearing also on the length of the proceedings, certainly contributed to the costs that the applicants had to bear. However, examining the proceedings as a whole, the Court finds that the applicants were afforded a reasonable opportunity to present their case effectively before the national courts and that there was not such an inequality of arms *vis-à-vis* the landowners as to involve a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION IN REGARD TO THE LENGTH OF THE PROCEEDINGS

A. The parties' submissions

60. The applicants maintained that the length of the proceedings was in breach of the "reasonable time" requirement laid down in Article 6 § 1 of the Convention. While acknowledging that the period before the District Court could partly be explained by the extensive material that was examined for the first time, they submitted that there had been no justification for the time spent by the Court of Appeal or the Supreme Court. They argued that the ultimate reason for the complex and difficult procedure was the applicable law, being deficient in that it did not define the borders of the winter grazing areas. The responsibility for the lengthy proceedings thus rested with the State.

61. The Government rejected the allegation and instead asserted that the proceedings had been dealt with in an efficient and diligent manner by the courts and that there had been continuous activity on the part of the District Court and the Court of Appeal. They submitted that the case had involved 571 complainants and five defendants, that it had been of a complex legal nature, both materially and procedurally, that extensive material had been submitted by both parties and that they had requested and been granted extensions of the time-limits set on several occasions. Moreover, the courts had had to determine not only the substance of the case but also a number of procedural issues.

B. The Court's assessment

62. The Court notes that the proceedings began on 20 September 1990, when the first action for a declaratory judgment was initiated before the District Court. They ended on 29 April 2004, when the Supreme Court refused leave to appeal, and thus lasted approximately 13 years and 7 months.

63. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

64. The present case came before three levels of jurisdiction. As it involved the examination of extensive evidence on winter grazing during several centuries on a large area of land and as it had more than 500 parties, it was undoubtedly of great complexity. Moreover, it is true, as asserted by the Government, that the parties made extensive submissions and procedural

motions in the case and, on several occasions, requested and were granted extensions of the time-limits set by the courts. Some of the delays in the case were thus clearly attributable to the parties.

65. Nevertheless, it was the responsibility of the courts to see to it that the proceedings were conducted expeditiously, especially in view of the fact that the matter examined was of great importance to the parties, not least the applicant Sami villages. Notwithstanding the complexity of the case, the Court finds that the overall duration of the proceedings – 13 years and 7 months – indicates that the proceedings were not sufficiently expeditious. The Court notes, moreover, that there were unnecessary delays, notably before the Supreme Court, which contributed to the overall duration. It took the Supreme Court one year and two and a half months to decide, on 18 February 1999, to refuse the Sami villages leave to appeal in regard to the procedural question of whether they lacked the capacity to act as parties. During that period, the proceedings before the Court of Appeal were adjourned. The Supreme Court also spent about two years before deciding, on 29 April 2004, to refuse leave to appeal in regard to the substance of the case. Moreover, during the major part of the year 2000 there does not appear to have been much activity on the part of the appellate court.

66. In these circumstances, and taking into account the overall duration of the proceedings and the criteria laid down in its case-law, the Court considers that the length of the proceedings in the instant case was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6 § 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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

68. The applicants claimed SEK 15,631,810 (approximately EUR 1,560,000) in respect of pecuniary damage. Arguing that there would have been no domestic proceedings had the right to winter grazing been clearly defined in the law, they claimed the full legal costs incurred in those proceedings as pecuniary damage, both the costs of their own representation (SEK 8,927,634 or about EUR 890,000) and those of their opposite parties which they were ordered to pay (SEK 6,704,176 or about EUR 670,000). They further claimed EUR 1,312,750 in respect of non-pecuniary damage. In this respect, they argued that the uncertainty of the future of reindeer

herding, affected by the prolonged proceedings and the high costs incurred, had led to emotional distress and suicides among the Sami. The amount claimed consisted of compensation of EUR 22,250 for each of the 59 individual members of the applicant Sami villages.

69. The Government contended that the applicants' own legal costs should be dealt with as costs and expenses and not as pecuniary damage. In any event, there was no causal link between these costs and the part of the application that had been declared admissible. As to the opposite parties' legal costs, the Government acknowledged that such costs could be compensated, but only in so far as they related to the part of the length of the proceedings not considered to be in conformity with Article 6 § 1. Claiming that the applicants had failed to explain what amount could be attributed to this delay, the Government questioned whether there was a causal link between the alleged damage and the finding of a violation in respect of the length of the proceedings. However, should the Court find that compensation should be awarded, they maintained that the excessive length resulted only in a very small increase of the opposite parties' legal costs. In regard to the applicants' claim for non-pecuniary damage, the Government contested that others than the applicant Sami villages could be compensated and insisted, bearing in mind that several factors contributed to the relative protraction of the domestic proceedings, that any compensation for non-pecuniary damage awarded to each of the four applicants should not exceed EUR 2,500.

70. The Court considers that the legal costs for the applicants' own representation cannot be compensated as pecuniary damage, but are to be dealt with under costs and expenses. With respect to the legal costs of their opposite parties, however, the Court accepts that there is a causal link between the violation found and the alleged pecuniary damage insofar as the length of the proceedings increased the expenses which the applicants were ordered to pay. Still, the Court reiterates its conclusion above (§ 65) that the unacceptable delays in the proceedings mainly occurred before the Supreme Court, which decided the issue of leave to appeal on two occasions. During these periods, there cannot have been much activity on the part of the opposing parties, which contributed to an increase in their legal costs. Accordingly, only a minor part of the costs that the applicants had to pay was caused by the excessive length of the proceedings. Ruling on an equitable basis, the Court awards the applicants jointly EUR 25,000 under this head.

The Court further considers it appropriate to make an award for non-pecuniary damage. While finding no ground to compensate individual Sami for distress, it awards the applicant Sami villages the joint sum of EUR 14,000 for the excessive length of the proceedings.

B. Costs and expenses

71. The applicants claimed SEK 1,234,862 (about EUR 125,000), including value-added tax (VAT), in reimbursement for costs in the proceedings before the Court. The amount consisted of SEK 1,080,000 for their legal representation (480 hours of work at a rate of SEK 2,250), SEK 85,000 for a legal opinion submitted by Professor Ulf Bernitz and SEK 69,862 for the work of external consults. Additionally, the above-mentioned claim of SEK 8,927,634 for pecuniary damage, consisting of the costs of the applicants' legal representation before the domestic courts, is to be dealt with under this head.

72. The Government contested the claim for compensation relating to the domestic proceedings, maintaining that no part of the costs could be considered to have been incurred in an attempt to prevent or redress the violations alleged in the complaints declared admissible. With respect to the proceedings before the Court, the Government noted that the applicants' claim appeared to concern the case as a whole and not only the complaints declared admissible. However, acknowledging the extensive and complex nature of the case, they recognised that compensation could exceed what is generally awarded in cases concerning the length of proceedings. In this light, should the Court find a violation of both admissible complaints, the Government were prepared to agree to compensation for 160 hours of work. The Swedish legal aid fee being SEK 1,380 (including VAT), they found an hourly rate of SEK 1,500 (including VAT) reasonable, thus arriving at a total of SEK 240,000 (approximately EUR 24,000). The Government contested, however, the payment of any compensation for the above-mentioned legal opinion or work carried out by external consults. Should the Court find a violation only in relation to one of the admissible complaints, the Government was of the opinion that the compensation should be proportionally reduced.

73. According to the Court's case-law, only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, 10 May 2001, § 120). In the present case, the Court reiterates that three of the applicants' complaints were declared inadmissible by its decision of 17 February 2009, including the principal complaint about the alleged violation of their property rights under Article 1 of Protocol No. 1 to the Convention, which also constituted the substantive issue in the domestic proceedings. Furthermore, in the present judgment, no violation has been found in regard to the effective access to court. The only successful complaint concerns the length of the proceedings. The Court also notes that the work of the applicants' legal representatives in the domestic

proceedings does not appear to have been undertaken in an attempt to accelerate the proceedings.

In the above circumstances, the Court rejects the claim relating to costs and expenses in the domestic proceedings in its entirety. As regards the proceedings before the Court, it rejects the claims relating to the costs of the legal opinion and the work of external consults. Bearing in mind that a violation has been found only in relation to the length of the proceedings, it awards the applicants, by way of costs and expenses, the global and joint sum of EUR 15,000, including VAT, roughly corresponding to 100 hours of work at the rate proposed by the Government.

C. Default interest

74. The Court considers it appropriate that the default interest 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

1. *Holds* by six votes to one that there has been no violation of Article 6 § 1 of the Convention in regard to effective access to court;

2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention in regard to the length of the proceedings;

3. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, inclusive of VAT as applicable, to be converted into Swedish kronor at the rate applicable at the date of settlement:
      (i) EUR 25,000 (twenty five thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 14,000 (fourteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

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

4. *Dismisses* by six votes to one the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 30 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Ziemele is annexed to this judgment.

J.C.M.
S.Q.

PARTLY DISSENTING OPINION OF JUDGE ZIEMELE

1. I consider that there was a violation with regard to both effective access to court and the length of proceedings in the circumstances of this case. Accordingly, in my view, the decision under Article 41 should have reflected this.

2. The case has arisen in the context of the dispute between the Sami, an indigenous people, and landowners in Sweden. In the last ten to twenty years, significant developments have taken place as far as the rights of indigenous peoples in international human rights law are concerned. As a result of new instruments (including the 1989 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries and the 2007 UN Declaration on the Rights of Indigenous Peoples), old and new monitoring institutions (including the UN Working Group on Indigenous Populations, the UN Special Rapporteur on the Rights of Indigenous Peoples and the UN Expert Mechanism on the Rights of Indigenous Peoples), and concluding observations on State reports, general comments and case-law from existing UN human rights treaty bodies (including General Comment No. 23 and several cases examined by the Human Rights Committee under the International Covenant on Civil and Political Rights), special rights and special measures have been introduced in an attempt to overcome discrimination against indigenous peoples and thus to achieve equal rights. With the stated purpose of guaranteeing their cultural identities and other cultural rights, these special steps include the right of indigenous peoples to own the land which such groups have traditionally used and to engage in traditional economic activities.

3. In this regard, two Articles of the 2007 Declaration, as adopted by General Assembly Resolution 61/295, are noteworthy:

Article 26

> "1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."

Article 27

> "States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems,

> to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process."

4. Thus, the particular feature of this case is that it involves the Swedish Sami people or, to be precise, the Sami villages which were respondents in civil proceedings in the Swedish courts. They were taken to court by Swedish landowners who disputed the rights of Sami to winter grazing on certain lands. The dispute was settled in accordance with the rule that the burden of proof regarding these property rights lies with the Sami. It was the Sami who had to produce documentary and other evidence to the court to show that they had been winter grazing on the disputed land from time immemorial since the Swedish landowners' title to the land was presumed to be valid.

5. In my view, in considering the rights of indigenous peoples, the Chamber based its reasoning on two false premises. First, it accepted as incontestable the fact that the plaintiffs in the domestic proceedings had valid title to the land. Second, it accepted that the rules on the burden of proof, as laid down in Sweden in the old Land Code of 1734, that is, long before any recognition of indigenous peoples emerged, were perfectly able to govern the situation. This approach excluded considerations relating to the specific context of the situation and rights of indigenous peoples in so far as it could be relevant to the issue of effective access to court.

6. According to the standard set by the legislation and explained by the domestic courts, the Sami villages were required to produce "old letters and writings deemed sufficient in law" or evidence by witnesses that they had used the land from time immemorial for winter grazing (see paragraph 33 of the judgment). The Court of Appeal went further and said that "it must be required *in addition* (italics added – IZ) that the results of the investigation indicate with sufficient strength that Sami have used the lands in question or parts of them for winter grazing for their reindeer with at least some regularity without hindrance ..." (ibid.). Apart from the question whether it is appropriate and fair to place such a burden on the Sami, it is clear that this process required extensive research and contributed to the legal costs of the proceedings. So that the Sami could participate in the proceedings, they had to borrow a considerable amount of money from the Sami Fund. According to Swedish law, Sami villages are not entitled to legal aid. Interestingly, it is the Kingdom of Sweden that has imposed this model of Sami villages, without considering its consequences, for example with regard to legal-aid issues.

7. I note that the UN Committee on the Elimination of Racial Discrimination (CERD) stated in its 2008 concluding observations regarding the periodic reports of Sweden under the International Convention on the Elimination of All Forms of Racial Discrimination: "While noting

the State party's stated intention to address the reports of various inquiries regarding Sami land and resource rights in a bill to be submitted to Parliament in March 2010, the Committee reiterates its concern about the limited progress achieved in resolving Sami rights issues. ... [T]he Committee reiterates its concern regarding ... land disputes. ... It is also concerned about de facto discrimination against the Sami in legal disputes, as the burden of proof for land ownership rests exclusively with the Sami, and about the lack of legal aid provided to Sami villages as litigants" (UN Doc. CERD/C/SWE/CO/18, §§ 19-20).

8. It is true that the main issues raised in the present case were declared inadmissible by the majority of the Chamber in the decision adopted on 17 February 2009. Thus, the complaints concerning the alleged violation of the right to use land for winter grazing and the excessive burden of proof in so far as it related to equality of arms in the court proceedings were declared inadmissible. Only a very limited range of issues was left for the merits stage. Nevertheless, the Chamber declared admissible the issue of effective access to court, at least as far as the high legal costs incurred by the Sami villages in the proceedings were concerned. In the circumstances of this case, and given the burden of proof that the Sami had to satisfy, as well as the number of years spent in the domestic courts, it is no surprise that the legal costs reached such a level. The legal costs incurred show the unfairness of the approach adopted in Sweden as concerns land disputes between the Sami people and Swedish landowners. In the view of the CERD, this amounted to *de facto* discrimination. The European Court of Human Rights was not asked to deal with a claim of discrimination. However, from the Court's perspective this should have been seen as a case of ineffective access to court, especially as one party appears to have been obviously disadvantaged.

9. In the light of the above, it is unclear to me what conclusions are to be inferred when in paragraph 56 of the judgment the Court draws a comparison with an individual litigant. If the Court means to say that Sami villages are better off or in some other way stronger than individual litigants in Sweden, this ignores the realities described above.

10. The Court has explained its approach, as cited in paragraph 51, as concerns effective access to court. The standard is that parties are afforded a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage with respect to the adversary. In cases where one party by definition is disadvantaged, proper access to court is ensured by adopting such procedures and safeguards as indeed enable that party to enjoy the same opportunities. This is what the CERD meant when criticising the fact that the burden of proving the right rests exclusively with the Sami, because the whole system presumes that the landowners have the right and they do not have to prove anything. There is therefore no doubt in my mind that the applicants' access to court was not effective. It could not

be effective until and unless the entire approach to land disputes of this kind is revised to take account of the rights and particular circumstances of indigenous peoples. The excessive legal costs and the fact that the applicants had to borrow money from their own Fund are elements of the overall unfairness.