

COUNCIL OF EUROPE

EUROPEAN COMMISSION OF HUMAN RIGHTS

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY

of Application No. 434/58

submitted by W. W. S

against the Government of Sweden.

The European Commission of Human Rights, sitting in private on 30th June 1959, under the Presidency of Mr. C.H.M. WALDOCK, the following members being present:

M. C. Th. EUSTATHIADES, Vice-President

M. P. BERG

M. P. FABER

M. L.J.C. BEAUFORT

M. H. SUSTERHENN

M. S. PETREN

Mme G. JANSSEN-PEVTSCHIN

M. M. SØRENSEN

M. N. ERIM

M. F. ERMACORA

M. P. MODINOS, Director of Human Rights,
Secretary to the Commission;

A 48.495

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HAVING REGARD to the Application lodged on 6th November 1958, by W. S. against the Government of Sweden and registered on 26th November 1958, under file No. 434/58;

HAVING REGARD to the declaration made in accordance with Article 25 of the Convention on 4th February 1952, whereby the Government of Sweden recognized the competence of the Commission to receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victims of a violation by one of the High Contracting Parties of the rights set forth in the Convention;

HAVING REGARD to the report provided for in Rule 45, paragraph 1, of the Rules of Procedure of the Commission;

HAVING REGARD to the decision whereby the Commission on 9th January 1959 declared the Application inadmissible with respect to the Applicant's allegations concerning his son's education and religious upbringing and referred to the Swedish Government for its observations on the question of admissibility that part of the Application which related to the Applicant's action in the Swedish Courts for the purpose of obtaining a right of access to his child;

HAVING REGARD to the observations of the Swedish Government of 1st April 1959 on the points set out in the above Decision of the Commission;

HAVING REGARD to the Order of the President of the Commission dated 21st April 1959, whereby the Parties were invited to appear before the Commission on 29th and 30th June, 1959, to submit orally their further explanations of their views on the question of the admissibility of the Application;

HAVING REGARD to the further explanations of the Parties given before the Commission on 29th and 30th June 1959, the Applicant appearing in person without Counsel and the Swedish Government being represented by:

M. B.K.C. Hjern, Head of the Legal Department in the Ministry of Justice, as Agent,

and M. J.L. Myrsten, Secretary in the Ministry for Foreign Affairs, as Counsel,

THE COMMISSION, having deliberated,

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THE FACTS OF THE CASE

Whereas the facts leading up to the present case are set out in the summary of the facts contained in the Commission's Decision of 20th December, 1957, declaring inadmissible the Applicant's first Application (No. 172/56); and whereas the facts of the present case, as presented to the Commission; may be summarised as follows:-

Having regard to the terms of the above-mentioned decision of the Commission of 20th December, 1957, the Applicant filed a petition on 14th January, 1958 in the Court of First Instance of Köping (Västmanlands västra domsagas häradsrätt), applying for a right of access to his infant son. This petition was subsequently remitted by the Court of Köping to the Court of First Instance of Stockholm (Rådhusrätt) which is the competent Court with respect to the child.

When filing his petition on 14th January 1958 for a right of access to his son, the Applicant also sought to obtain an official statement as to whether or not his son was being educated in the Roman Catholic faith to which the Applicant himself belongs. Subsequently, the Applicant was informed that his son had been registered in the census of the Swedish Lutheran Church and was being educated in that faith. He was also informed that his son was only being taught the Swedish language, a language in which he himself was unable to correspond with his son.

On 20th July, 1958, the Applicant applied to the Swedish Embassy in Bonn for an entry permit into Sweden, stating that he wished to appear in person before the Court at Stockholm in connection with his application for a right of access to his son. The Applicant also applied, through M. Nilsson, his Counsel in Sweden, to the Court at Stockholm for a ruling that his personal appearance in the proceedings is necessary.

The Aliens Commission (Utlännings-Kommissionen) according to the Applicant's Counsel, telephoned him to inquire whether the Court at Stockholm had given a ruling in regard to the Applicant's personal appearance in the proceedings and was informed that the Court had not yet done so. Nevertheless, on 21st October, 1958, the Aliens Commission refused the Application for an entry permit. A letter from the Swedish Embassy in Bonn, dated 22nd November, 1958, informing the Applicant of this decision did not state the grounds for the refusal of the entry permit.

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The Court of First Instance at Stockholm on 28th October, 1958, refused to make an order ruling that the personal appearance of the Applicant in the proceedings is necessary. The text of the Court's decision, as translated by the Agent of the Swedish Government at the oral hearing of 29th June, 1959, reads as follows:

"Since M. S. 's personal appearance cannot be deemed to have such a significance for the exposition of the case that his personal appearance should be compelled, contrary to the decision of the Aliens Commission on 21st October, 1958, to refuse his application for an entry visa to attend the main proceedings in the case, the City Court does not find any grounds for issuing such an order."

In a letter dated the next day, the Applicant's Counsel informed him of the Court's refusal to make the order, adding that he (Counsel) had insisted on the Applicant's personal appearance at the main proceedings, but that the Court had decided with reference to the Utlännings-Kommissionen's decision that the Applicant need not personally appear in Court." By the same letter Counsel informed the Applicant that the main proceedings concerning his petition for a right of access to his son had been fixed to take place on 26th November, 1958.

On 4th November, 1958, the Applicant's Counsel again submitted a request to this Court at Stockholm for a ruling that the Applicant's personal appearance is necessary in the proceedings in order that he may upon oath confirm the information already submitted to the court on his behalf and furnish further information to the Court.

At a preliminary hearing, on 11th November 1958, at which the Applicant's ex-wife, Mme F , was present with her Counsel, the Applicant's Counsel repeated the request for a personal appearance. The Court, by decision of the same date, refused this request, stating that it did not find any grounds on which it could reverse its previous decision of 28th October, 1958. It further decided that, pursuant to Chapter 37, para. 4, of the Swedish Law of Procedure, a letter rogatory should be addressed to a competent Court in the Federal Republic of Germany in order to enable the Applicant to submit his evidence upon oath before that Court. It adjourned the proceedings fixed for 26th November, 1958, pending the receipt of the record of the hearing before the German Court in question.

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Meanwhile on 6th November, 1958, the Applicant had submitted the present Application to the European Commission of Human Rights and Fundamental Freedoms, the Application being registered on 26th November, 1958.

On 9th December, 1958, the Applicant withdrew M. Nilsson's power of attorney on the ground that he (Counsel), by informing the Court that the Applicant would have no objection to being heard by a German Court, had acted without instructions.

The letter rogatory was executed by the Court of First Instance (Amtsgericht) of Velbert in the Federal Republic of Germany, where the Applicant has his domicile. The Court held a hearing on 8th January, 1959, at which the Applicant appeared but declined to answer any of the questions put to him.

The Applicant's grounds of Complaint

As regards Article 6, Paragraph 1.

Whereas the Applicant complains that the refusal of his application for an entry permit by the Aliens Commission on 21st October, 1958 and the subsequent decisions of the Court at Stockholm on 28th October and 11th November, 1958, not to make an order ruling that his personal appearance in the proceedings is necessary have deprived him of his right to a fair hearing; and whereas he contends that, in consequence, he is the victim of a violation of Article 6, paragraph 1, of the Convention by the Swedish authorities;

As regards Article 8.

Whereas the Applicant appears further to complain that, by allegedly violating his right to the fair hearing of his petition for a right of access to his child, the Swedish authorities must be regarded as having also violated his right to respect for his family life which is guaranteed by Article 8 of the Convention;

As regards Article 9, of the Convention and Article 2 of the Protocol.

Whereas the Applicant complains that the education and religious upbringing of his son in Sweden constitute violations of the right to freedom of thought, conscience and religion which is guaranteed by Article 9 of the Convention, and also of the right of a parent to ensure his son's education and teaching in conformity with his own religious and philosophical convictions, which is guaranteed by Article 9 of the Protocol.

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THE COMMISSION'S DECISION of 9th JANUARY, 1959.

On 9th January, 1959, the Commission delivered an interim decision in the case in which it at once declared inadmissible, under Article 27 paragraph 1(b) of the Convention, that part of the Application which relates to alleged violations of Article 9 of the Convention and Article 2 of the Protocol, but retained the remainder of the Application for further examination of the question of its admissibility. The relevant passage of the Commission's decision was as follows:-

"Whereas the Commission under the express terms of Article 27, paragraph 1(b) of the Convention, may not deal with any Application submitted under Article 25 which is substantially the same as a matter already examined by the Commission, if it contains no relevant new information;

WHEREAS the Applicant's complaints in the present Application with reference to his son's education and religious upbringing are matters in regard to which he also submitted complaints in his previous Application No. 172/56;

WHEREAS an examination, including an examination ex-officio of the facts alleged in the present Application in relation to these complaints shows that the matters complained of are substantially the same as those alleged in the previous Application;

WHEREAS it is true that the Applicant by letters of 16th January and 12th June, 1958, has produced fresh information concerning the education of his infant son; whereas, however, this information is not such as could alter the grounds on which the Commission rejected the Applicant's complaint as formulated in his first Application; whereas, therefore, the information submitted by the Applicant cannot be considered relevant new information within the meaning of Article 27, paragraph 1(b)

The Commission decides, that for the reasons stated above, the Application with respect to the Applicant's allegations concerning his son's education and religious upbringing, must be rejected in accordance with Article 27, paragraph 1(b);

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WHEREAS, on the other hand, in so far as it relates to the Applicant's action in the Swedish courts to obtain a right of access to his child, the present Application raises new matters of complaint which are not substantially the same as those raised in the previous Application; and whereas accordingly this part of the Application is not excluded from the Commission's consideration under the provisions of Article 27, paragraph 1(b) of the Convention;"

In addition, without in any way prejudging its ultimate decision on the admissibility or otherwise of the Application, the Commission, under Rule 45, paragraph 3(b) of the Rules of Procedure, referred to the Swedish government for its observations on the question of admissibility that part of the Application, which relates to the Applicant's action in the Swedish Courts for the purpose of obtaining a right of access to his child. The Commission invited the Swedish Government to present its observations in particular on two points:-

- (a) whether in the circumstances of the present case the refusal to the Applicant of the right to appear before the Court in person and to have access to the Court on terms of equality with his wife is a matter which is capable of falling within the scope of Article 6, para. 1 of the Convention;
- (b) what, if any, remedies were available to the Applicant under Swedish law with respect to the refusal of an entry permit by the Aliens Commission and/or with respect to the decisions of the Court at Stockholm concerning the appearance of the Applicant before the Court in person;

Swedish Governments Objections to the
Admissibility of the Application

As regards Article 6.

WHEREAS the Swedish Government, by its written observations of 1st April, 1959 and its oral pleadings of 29th June, 1959, submits:

(1) With reference to the refusal of the Aliens Commission to grant the Applicant an entry permit, that the right to enter a foreign country is not one of the rights guaranteed by the Convention; and that the Application, in so far as it is based on this ground, is inadmissible as being outside the jurisdiction of the Commission;

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(2) With reference to the refusal of the Court at Stockholm to make an order prescribing the personal appearance of the Applicant in the proceedings,

- (a) that the Swedish Law of Procedure provides that a party shall appear at the main proceedings in the case unless his attendance can be deemed to be of no relevance for the general consideration of the case; that personal appearance is, however, prescribed in a case like the present one; that personal appearance is part of the normal procedure of the Swedish Courts so that usually a party does not have to make a request to the Court asking to be summoned in person; that in the present case the Court appears to have gone into the question whether the Applicant's presence was necessary in the proceedings because it was aware of the refusal of the Alien's Commission to grant the Applicant an entry permit but found that the Applicant's personal appearance was without importance for the outcome of the case; that the decision of the Alien's Commission refusing an entry permit should be considered simply as an objective obstacle preventing the personal attendance of a party in Court, comparable with other objective obstacles such as illness;
- (b) that the Applicant's complaint on this ground is inadmissible, even if it be considered that the Court at Stockholm arrived at a wrong conclusion when it decided not to prescribe the personal appearance of the Applicant in the proceedings; that the right to a "fair trial" within the meaning of Article 6, paragraph 1., of the Convention should be understood as aiming to guarantee, as far as possible, a fair outcome to the litigation; that this assumption is supported by the wording of Article 25 of the Convention which states that the Commission can receive petitions from any person claiming to be the victim of a violation of the rights set forth in the Convention; that it cannot be established whether the Application has been such a victim until the proceedings have taken place and a judgement has been rendered; and that in the present case the proceedings are still pending;

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(c) that Article 6, paragraph 1, of the Convention does not contain any provision to the effect that a party to civil proceedings has the right to be present in person at the trial of his case; that in the present case the Applicant had the opportunity of submitting his case to the Courts through his Counsel in Sweden; that, in addition, the Court of First Instance at Stockholm had ordered that the Applicant should be given an opportunity of being heard upon oath before a Court in the country where he resided, namely, before the German Court at Velbert;

and that on these several grounds the Applicant's complaint, that by being prevented from attending the proceedings in the Court at Stockholm he has been deprived of his right to a fair hearing in violation of Article 6, paragraph 1, is manifestly ill-founded and should accordingly be rejected in conformity with Article 27, paragraph 2, of the Convention.

As regards Article 8.

Whereas the Swedish Government has not submitted any grounds of objection to the admissibility of the Applicant's complaint with regard to Article 8 of the Convention separately from those submitted as objections to the admissibility of the complaint with regard to Article 6, paragraph 1.

As regards Article 26.

Whereas the Swedish Government submits that under Swedish law the Applicant would have a right of appeal from an adverse decision in the Court of First Instance at Stockholm to the High Court; that the proceedings before the High Court would take the form of a rehearing of that case in connection with which it would be open to the Applicant to make a further request for a ruling that his personal appearance in the proceedings is necessary; that, in consequence, the Applicant has not yet exhausted the domestic remedies in Sweden with respect to the question of his personal appearance in the proceedings and the Application should accordingly be rejected in conformity with Article 26 of the Convention.

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Resumption of the Applicant's Proceedings in
the Court of First Instance at Stockholm

By a letter dated 13th March, 1959, M. Sture Grufberg, a lawyer in Stockholm, informed the Applicant that the Stockholm Court had appointed him, under the system of free legal aid, to replace M. Milsson as Counsel. On 30th May, 1959, M. Grufberg filed a request with the Court of First Instance at Stockholm asking the Court to fix a date for the continuation of the Applicant's proceedings for a right of access to his son and at the same time making a fresh request to the Court, on the ground of new evidence having come to light, for an order ruling that the personal appearance of the Applicant in the proceedings is necessary. The Applicant, by a letter dated 21 June, 1959 endorsed the action of his Counsel in making these requests to the Court of First Instance at Stockholm

Decision of the Commission

As regards Article 6

WHEREAS it appears from the facts presented to the Commission:

- (a) that prior to 20th July 1958 the Applicant had on a number of previous occasions applied for an entry permit into Sweden, first, with a view to seeing his wife and, later, in connection with proceedings pending in the Swedish courts for the judicial separation and divorce of the parties to the marriage; that on some occasions his application for an entry permit had expressly stated that the purpose for which it was required was in connection with proceedings in the Swedish Courts to which he was a party; that, nevertheless, these applications had been refused by the Aliens Commission;
- (b) that the Applicant's letter of 20th July 1958 to the Swedish Embassy in Bonn, in which he again asked for an entry permit into Sweden, expressly stated that he wished to appear in person before the Court at Stockholm in connection with his proceedings for a right of access to his son; that the Aliens Commission telephoned to the Applicant's Counsel to enquire whether the Applicant's personal appearance in the proceedings was necessary and was informed by him that the Court had not yet pronounced upon the question; that on

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21st October 1958 the Aliens Commission rejected the Applicant's request for an entry permit without waiting to hear the ruling of the Court in regard to the need for the Applicant's personal appearance in the proceedings;

- (c) that the Court of First Instance at Stockholm, in the course of the preliminary proceedings in the case, was made aware of the fact that the Aliens Commission had previously on several occasions refused requests from the Applicant for an entry permit; that the Court inquired of the Aliens Commission as to its decision in regard to the Applicant's request for an entry permit in connection with the pending proceedings and was informed by the Aliens Commission that the request had been refused; that the Court then addressed itself to the question whether the Applicant's personal appearance in the proceedings was necessary; that, according to the Applicant's Counsel, the Court gave a ruling on 28th October that the Applicant's personal appearance cannot be deemed to be so significant for the exposition of his case as to require the Court to prescribe his personal appearance in the proceedings contrary to the decision of the Aliens Commission;
- (d) that a preliminary hearing of the case was held on 11th November 1958, at which the Applicant's ex-wife, Mrs. F , was present with her Counsel and submitted both orally and in writing allegations concerning the character and manner of life of the Applicant; that the Applicant's Counsel at this hearing again submitted a request to the Court for a ruling that the Applicant's personal appearance in the proceedings is necessary; that the Court, however, by a decision of the same date, refused this request, stating that it did not find any grounds on which it could reverse its previous decision of 28th October 1958;
- (e) that at the same hearing on 11th November, 1958, the Court decided to issue letters rogatory to the competent German Court in order to enable the Applicant to submit his evidence upon oath before that Court and adjourned the proceedings pending receipt of the record of the hearing in the German Court; that the Applicant, believing his personal appearance before the Swedish Court to be essential for the success of his action, declined to submit his evidence to the German Court;

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WHEREAS Article 6, paragraph 1, of the Convention provides that "in the determination of his civil rights and obligationseveryone is entitled to a fair and public hearing...."; whereas it is clear that the right to be present in person in civil proceedings is not as such, guaranteed by this provision of Article 6, paragraph 1, nor by any other provision of the Convention; whereas, however, the question arises whether in certain classes of case or in certain sets of circumstances the right to a fair hearing guaranteed by Article 6, paragraph 1, implies a right to be present in person at the hearing of the case, and whereas one class of case in which this question appears to arise with particular force is a case where the personal character and manner of life of the party concerned is directly relevant to the formation of the Court's opinion on the point which it is called upon to decide; and whereas, furthermore, a case in which a parent, following upon a divorce, makes an application to the Court for a right of access to a child of the marriage is without doubt a case of this kind;

WHEREAS, also, the right to a fair hearing guaranteed by Article 6, paragraph 1, of the Convention appears to contemplate that everyone who is a party to civil proceedings shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him under a substantial disadvantage vis à vis his opponent; whereas in the present case the Applicant's ex-wife, Mrs. F. , is opposing his petition to the Court at Stockholm for a right of access to his child; and whereas Mrs. F. has exercised her right under the Swedish Law of Procedure to be present in person at the hearing of the case and has submitted orally and in writing statements depreciatory of the Applicant's character and manner of life; whereas the Applicant, on the other hand, owing to the rejection by the Aliens Commission of his request for an entry permit, is not able to be present in person to answer the statements of his ex-wife in front of the Court which will adjudicate upon his petition for a right of access to his son;

WHEREAS full weight has to be given to the fact that the Applicant is represented by Counsel in the proceedings in Sweden and also to the fact that, by issuing letters rogatory, the Court at Stockholm made it possible for the Applicant to give testimony on oath before a German Court for transmission to the Swedish Court as evidence in the Applicant's proceedings for a right of access to his son; whereas, however, in the present case the personal character and manner of life of the Applicant appear to be matter directly relevant to the formation of the Court's opinion on the merits of his claim, and

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whereas in such a case it may be open to question whether the inability of the Applicant to present himself and to testify before the Court empowered to adjudicate upon his claim does not place him at a substantial disadvantage vis à vis the other party, his ex-wife, who is in a position to attend the hearings and to impugn in Court his personal character and manner of life;

Gene / WHEREAS under general international law a State has the right, in virtue of its sovereignty, to control the entry and exit of foreigners into and out of its territory; and whereas it is time that a right or freedom to enter the territory of States, Members of the Council of Europe, is not, as such, included among the rights and freedoms guaranteed in Section 1 of the Convention; whereas, however, a State which signs and ratifies the European Convention of Human Rights and Fundamental Freedoms must be understood as agreeing to restrict the free exercise of its rights under general international law, including its right to control the entry and exit of foreigners, to the extent and within the limits of the obligations which it has accepted under that Convention; and whereas the question that is raised in the present case is whether by the exercise of its right under general international law to refuse an entry permit to the Applicant the Swedish Government has deprived him of rights which are guaranteed to him in Section 1 of the Convention, namely, his right to the fair hearing of his petition for a right of access to his son (Article 6) and his right to respect for his private and family life (Article 8);

WHEREAS, having regard to the several considerations of fact and of law set out above, the Commission is of the opinion that the possibility that the facts of the present case may involve a violation of one or other of the rights and freedoms guaranteed in the Conventions cannot be excluded in limine upon a preliminary examination of the case; and whereas accordingly the Commission does not consider that the Application is manifestly ill-founded within the meaning of Article 27, paragraph 2 of the Convention;

As regards Article 8

WHEREAS the Applicant's complaint is that the alleged violation of his right to a fair hearing of his petition for a right of access to his son also constitutes a violation of his right under Article 8 of the Convention to respect for his private and family life; whereas this complaint is

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dependent upon his complaint under Article 6, paragraph 1, being first held to be well-founded; and whereas, therefore, the Commission does not find it useful to enter further into this ground of complaint at the present stage of the case;

As regards Article 26

WHEREAS the proceedings in the Applicant's case before the Court of First Instance at Stockholm were adjourned on 11th November, 1958, and no judgment has yet been pronounced upon the merits of the Applicant's petition for a right of access to his son; whereas, moreover, on 30th May, 1959, the Applicant's Counsel made an application to the Court on his behalf, asking that a date should be fixed for the continuation of the proceedings and at the same time asking for an order, prescribing the personal appearance of the Applicant in the proceedings; whereas at the request of the Applicant's Counsel the proceedings before the Court of First Instance have thus been resumed at a time when the Commission is seized of the present Application;

WHEREAS the Commission may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law; whereas, however, the generally recognised rules of international law with respect to the exhaustion of local remedies lay down that a complainant is relieved of the obligation to pursue the available domestic remedies when in the special circumstances of the case these remedies appear to be ineffective or obviously futile; and whereas the Applicant contends that in the proceedings before the Court of First Instance at Stockholm he has been denied a fair hearing of his petition for a right of access to his son and that this is a special circumstance rendering his remedy in the Swedish Courts ineffective and futile.

WHEREAS, if it were established that the Applicant's requests with respect to his personal appearance at the hearing of his petition for a right of access to his son had been finally rejected by the Swedish Courts and the Aliens Commission, it would be a matter for serious consideration as to whether the generally recognised rules of international law did require him to pursue his remedies in the Swedish Courts any further before seising the Commission of the matter; whereas, however, the Swedish Government has represented to the Commission that under the Swedish Law of Procedure there is a right of appeal from a decision of the Court of First Instance at Stockholm to the High Court, that this appeal takes the form of a rehearing of the case and that the Applicant, if he appealed to the High Court, would have a fresh

right to ask for a ruling that his personal appearance in the proceedings is necessary; and whereas, at the oral hearing of 29th June the Agent of the Swedish Government, although without entering into any commitment upon the point, expressed the view that, if the Court made an order prescribing the personal appearance of the Applicant, the Aliens Commission would grant an entry visa to the Applicant for the purpose of his personal appearance in the proceedings;

WHEREAS, therefore, the Commission does not find it to be yet established that the Applicant has finally exhausted the domestic remedies available to him in Sweden with respect to his personal appearance at the hearing of his petition for a right of access to his son;

DECIDES accordingly to declare inadmissible on the ground of non-exhaustion of domestic remedies, in conformity with Article 26 of the Convention, that part of the Application which relates to the alleged violations of Article 6, paragraph 1, and Article 8 of the Convention;

DECIDES at the same time to declare that, if hereafter the Applicant should finally exhaust the local remedies available to him in Sweden and should then file a fresh Application with the Commission with respect to the same complaints the proceedings in the present Application will be treated as forming part of the proceedings in the new Application.

Done at Strasbourg,
30th June, 1959

The Director of
Human Rights
Secretary to the Commission

The President of the Commission

(C.H.M. Waldock)

(P. Modinos)