AS TO THE ADMISSIBILITY OF

Application No. 19178/91
by John BRYAN
against the United Kingdom

The European Commission of Human Rights sitting in private on 14 October 1993, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
F. ERMACORA
G. JÖRUNDSSON
Mrs. G.H. THUNE
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 29 October 1991 by John Bryan against the United Kingdom and registered on 9 December 1991 under file No. 19178/91;

Having regard to

- the report provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 4 November 1992 and 29 July 1993 and the observations submitted by the applicant on 29 December 1992;

- the submissions of the parties at the hearing held on 14 October 1993;

Having deliberated;

Decides as follows:

THE FACTS

The particular circumstances of the case

The applicant is a British citizen born in 1931. He is represented before the Commission by Mr. R. M. Napier, of Messrs. Albinson Napier and Co., Warrington. The facts of the application, as submitted by the parties, may be summarised as follows.

On 4 December 1989 an enforcement notice was issued and was served on the applicant by the Vale Royal Borough Council ("the Council") requiring the demolition of two brick buildings on land which the applicant had bought in 1987. The enforcement notice recited that there appeared to the Council to be a breach of planning control in

that the two brick buildings had been erected without the required planning permission. The notice required the applicant to demolish the buildings and remove the building materials within three months.

The applicant appealed to the Secretary of State for the Environment under Section 174 (2) (a),(b),(g) and (h) of the Town and Country Planning Act 1990 (TCPA), which consolidated and amended the earlier legislation. On 1 October 1990 an inspector, appointed by the Secretary of State to determine the appeal, dismissed the appeal. He held, inter alia, as follows:

[The appeal on ground (b)]

"12. What I need to decide in respect of this ground of appeal is whether, as a matter of fact and degree, the buildings could, from their appearance and layout, be considered to have been designed for the purposes of agriculture. I conclude, from examination of photographs taken during construction and from noting the alterations made since, that the Council were right to be concerned that the appeal buildings had the appearance of large detached houses. The size, layout, and original external appearance of the buildings and their detailing did little to change that view.

13. In my opinion, as originally constructed, the buildings would have led any reasonable person to have concluded that he or she was looking at the start of a small new detached housing estate. Indeed, that appeared to be the widely held view of many local people, supported by the local Member of Parliament, who were concerned to see what was being built on the edge of the village. The more recent constructing of an, as yet, uncompleted but similar building close to the 2 appeal buildings serves to compound the effect.

14. But is the original appearance of the 2 appeal buildings and particularly the first assessment of the Ministry of Agriculture Fisheries and Food which convinces me that the buildings were not requisite or reasonably necessary for the purposes of agriculture. Numerous features of the buildings were more suited to houses than barns. The original openings in building No. 1 were said to be doorways for a veal calf unit. But this building did not incorporate internal drainage considered necessary for such stock. The doorways appeared to have been more likely to have been useful as window openings, none reached ground level as built; one was almost waist high above outside ground level measured from the lower edge of the unbonded brickwork added later. Other features in both buildings include the extensive use of Georgian style windows and other windows made for domestic use. I understand that Mr Bryan's contacts allowed him to buy these windows cheaply. But whatever their source, they contribute to an impression that the buildings look more like houses than barns. There are other features which add to that view. The use of domestic style eaves and gable barge boarding. The residential look of the "porch" to No 1 building. And the MAFF view about the uneconomic layout of both buildings as originally built all add to the impression that these buildings were not designed for agricultural purposes, albeit they have since been modified and adapted for such a use.

15. You said that the buildings looked like many local old barns. But it is my view that, as originally built, the appeal buildings would have looked much more like houses. They did not look as if they had been designed for the purposes of agriculture. My opinion is not altered by my finding them now being use for storing hay. The appeal on ground (b) fails.

The appeal on ground (a)

16. The appeal buildings lie in part of the green belt ... They also lie within the High Whitley Conservation Area but outside the village policy area or High Whitley shown on the draft Vale Royal Borough Local Plan. In my opinion, the decision turns on the following main issues. Whether, if the development is inappropriate to the green belt, there are any special circumstances to justify the granting of planning permission; secondly, whether the appeal buildings enhance or preserve the character or appearance of the Conservation Area. I shall also consider the effect of the development on the countryside surrounding the village.
...

17. The appeal buildings have neither enhanced nor preserved the appearance of this part of the Conservation Area, rather the reverse. Much of the pleasant nature of the Area is derived from the grouping of the older housing around the centre and from its rural and agricultural setting. The 2 appeal buildings look like part of a small estate of detached houses with access roads and suitable garden areas. The third building, not subject of this appeal, exacerbates this impression.

19 These objections amount to sound and clear cut reasons why planning permission should be withheld. The fact that other buildings or buildings of a broadly similar nature, if considered to be designed for agricultural purposes, could be built under the provisions of the Town and Country Planning General Development Order 1988, does not affect my decision. The appeal on ground (a) fails.

The appeal on ground (g)

20. You said that demolition of the buildings and the removal of the materials was an excessive requirement. I do not agree. Harm to the purpose of the green belt has been caused. The appearance and character of the Conservation Area has not been either enhanced or preserved. Encroachment on the countryside has occurred. Making the buildings look more like those which might have been permitted development as you suggested could mitigate a little of the harm I have identified. But this is not just a matter of cosmetics. The main objections would remain. In my opinion, the proper and necessary course of action is that required by the notice. That includes removal of materials. Such a requirement would not preclude their re-use on site for any possible future permitted development. The appeal on ground (g) fails.

The appeal on ground (h)

21. ... Mr. Bryan wanted more time in order to erect a replacement or replacements before demolition. I see no need to insist on a period which would make undue difficulty for him. I will increase the period to 6 months. ...

22. I have taken account of all the other matters raised, including the possibility of your client putting up a large steel clad building under permitted development rights, but find they do not affect my decision."

The applicant appealed against the inspector's / Secretary of State's decision under Section 289 TCPA. The appeal was dismissed by the High Court on 8 March 1991, the judge, Mr Lionel Read, Q.C., finding inter alia as follows:

"In my judgment ... it cannot be said that the inspector failed to take into account the fact that the applicant

might, within his General Development Order rights, erect buildings of a broadly similar nature. He addressed that very consideration in terms at paragraph 19 of his decision letter. Because the applicant had those rights and wanted more time to erect a replacement or replacements, the inspector extended the applicant's time for complying with the enforcement notice under ground (h).

Whether the existence of these General Development Order rights provided sufficient reason for the inspector to grant planning permission for the buildings in fact erected, whether or not conditioned as suggested by the applicant, was a matter for judgment - the inspector's judgment. Whether another decision-maker would have reached the same conclusion as did this inspector is not to the point. Nor is the view of this court, which does not sit on appeal from the judgment of inspectors, relevant. I am unable to say that there was anything irrational in the inspector's decision. In particular, the question whether the alterations proposed to a building were, as he evidently thought, a 'matter of cosmetics' and would not meet the main objections was entirely a matter of planning judgment for him. It is to be remembered that, in order to stay within his General Development Order rights, the applicant must erect replacement buildings which, by their appearance and layout, could be considered as designed for the purposes of agriculture. If they are, their effect on the Green Belt, the countryside and the Conservation Area is irrelevant to the exercise of that right. That does not, however, in my judgment mean that the inspector acted irrationally in concluding that the buildings in fact erected without permission under the General Development Order were objectionable and should be demolished. In the result, I find no error of law and I dismiss the application."

Leave to appeal to the Court of Appeal was refused. On 11 June 1991 the Court of Appeal also refused leave to appeal.

The relevant domestic law

By reason of Article 3 and Class A of Part 6 of Schedule 2 to the General Development Order 1988, planning permission is granted for the following development:

"A. The carrying out on agricultural land comprised of an agricultural unit of -

(a) works for the erection, extension or alteration of a building, or

(b) any excavation or engineering operations, reasonably necessary for the purposes of agriculture within that unit."

Planning permission granted by the General Development Order is known as deemed planning permission. Development is not permitted by Class A by reason of paragraph A.1(c) if "a building, structure or works not designed for the purposes of agriculture would be provided on the land".

Section 64 TCPA provides that application may be made to the local authority for a determination of whether planning permission is required for proposed operations on land.

Section 174 (2) TCPA provides that an appeal against an enforcement notice may be made to the Secretary of State on any of the following grounds:

"(a) that planning permission ought to be granted for the development to which the notice relates or, as the case may be, that a condition or limitation alleged in the enforcement notice not to have been complied with ought to be discharged:

(b) that the matters alleged in the notice do not constitute a breach of planning control;
...

(g) that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control or to achieve a purpose specified in Section 173 (4);

(h) that the period specified in the notice as the period within which any step is to be taken falls short of what should reasonably be allowed."

Section 289 TCPA provides for appeals against a decision of the Secretary of State under Section 174. An appeal may be made to the High Court on a point of law, or the Secretary of State may be required to state a case for the opinion of the High Court (Section 289 (1) TCPA).

COMPLAINTS

The applicant complains of the fact that the domestic authorities considered that planning permission had not been granted by virtue of the General Development Order on the ground that the buildings he erected were not designed for agriculture. He considers that the enforcement notice in his case was arbitrary because he could have constructed unsightly steel-clad buildings which would have had a far more detrimental environmental effect than the buildings he did erect. He also complains that the High Court and the Court of Appeal did not decide the facts of his case, so that he was deprived of a court with full jurisdiction.

The applicant alleges violations of Article 1 of Protocol No. 1 and Article 6 para. 1 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 October 1991 and registered on 9 December 1991. On 6 July 1992 the Commission decided to communicate the application to the respondent Government for observations on the admissibility and merits of the issues arising under Article 6 of the Convention. The Government submitted their observations on 4 November 1992 and the applicant's observations in reply were submitted on 29 December 1992. On 29 July 1993 the Government submitted further information.

On 2 April 1993 the Commission decided to hold an oral hearing on the admissibility and merits of the issues arising under Article 6 of the Convention. At the hearing, which was held on 14 October 1993, the parties were represented as follows:

For the Government: Mr. I. Christie, Agent, Mr. D. Pannick Q.C., Counsel, Mr. D. Anderson, Counsel, and Ms. V. Harrison, Department of the Environment, Adviser.

For the Applicant: Mr. R. Drabble, Counsel, Mr. E. Owen, Counsel, and Mr. R. M. Napier, Solicitor, Messrs. Albinson, Napier & Co.. The applicant and Mrs. Bryan were also present.

THE LAW

1. The applicant alleges violation of Article 1 of Protocol No. 1 (P1-1) to the Convention. Article 1 of Protocol No. 1 (P1-1) provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Commission notes that the aim of the enforcement notice which was served on the applicant was to limit the user of the property to that which was permitted under domestic law. There must, accordingly, be some doubt as to whether the applicant's right to the peaceful enjoyment of his possessions has at all been interfered with. However, assuming that there is such an interference, any limitation on use requires justification in the public interest if it amounts to a deprivation of possessions, or in the general interest if it constitutes the control of property.

The Commission recalls that the Convention organs have found on several occasions that Contracting States enjoy a wide discretion in regulating planning matters (cf. Eur. Court H.R., Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 26, para. 69, and, in the context of United Kingdom legislation, Chater v. the United Kingdom, No. 11723/85, Dec. 7.5.87, D.R. 52 p. 250, 256).

The Commission finds that the requirement on the applicant to demolish the two brick buildings which he had erected, although it involved him in some considerable expenditure, does not amount to a deprivation of possessions, but a control of the use of property. Accordingly, the Commission must supervise the lawfulness, purpose and proportionality of the restrictions (cf, for example, Eur. Court H.R., Allan Jacobsson judgment of 25 October 1989, Series A no. 163, pp. 17 - 18, paras. 56-64). The Commission must determine whether, whilst recognising the wide margin of appreciation afforded to States in planning matters, a fair balance was struck between the general interest of the community and the protection of the individual's fundamental rights (cf. Chater v. the United Kingdom, No. 11723/85, referred to above).

The Commission accepts that planning controls are necessary and desirable in modern society in order to preserve and improve town and country landscapes. The applicant does not regard the issue, service and enforcement of the enforcement notice as in any way unlawful. The Commission finds that the lawfulness and purpose of the interference are established.

As to proportionality, the Commission would first note that, as a general rule, the rights secured by Article 1 of Protocol No. 1 (P1-1) cannot be invoked in order to extend property rights in domestic law by requiring planning permission for purposes which have never been permitted. It notes that the inspector who held the enquiry into the enforcement notice considered in some detail (at para. 14 of his decision, pp 2-3 above) specific features of the buildings which, in his opinion, led to the conclusion that they did not comply with the requirements of the General Development Order. In deciding not to grant express planning permission, the inspector noted that the buildings were within both a green belt and a Conservation Area, and that they neither enhanced nor preserved the appearance of the relevant part of the Conservation Area.

The Commission further notes that if there had been doubt as to whether the buildings complied with the general development order or not, the applicant could have asked the local authority for a determination of whether express permission was needed.

The inspector permitted an extension of the period permitted for demolition of the buildings as he saw "no need to insist on a period which would make for undue difficulty". He also canvassed the possibility that the demolition of the buildings and removal of the materials was an excessive requirement. He pointed out that harm to the purpose of the green belt had been caused, and accepted that making the buildings look more like the type of development which would have been permitted could have mitigated a little of the harm he had identified. He considered, however, that the main objection to the building, that the buildings did not look as if they had been designed for the purposes of agriculture, would remain.

The Commission notes the existence of an appeal to the High Court on a point of law.

Whilst it is true, as the applicant states, that he could have erected buildings which were designed for the purposes of agriculture within the meaning of the planning legislation, and that those buildings may have had a far more detrimental effect on the visual amenity of the countryside, it is not for the Commission to determine whether a decision, expressed in legislation, to provide for deemed planning permission in one type of case rather than another, violates Article 1 of Protocol No.1 (P1-1) as such. The Commission must determine whether, in the case before it, the control of use struck a fair balance between the conflicting interests.

In the light of the balancing exercise undertaken by the inspector, together with the possibility of a limited review by the High Court and the discretion accorded to the domestic authorities in this type of case, the Commission finds that a proper balance has been struck between the applicant's interests and the general interest.

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

2. The applicant also alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention, contending that the review undertaken by the High Court of the decision of the inspector was not of sufficient scope to comply with the requirements of that Article. Article 6 para. 1 (Art. 6-1) provides as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law ..."

The Government consider that no Article 6 (Art. 6) rights were determined by the proceedings, but that even assuming Article 6 (Art. 6) is applicable, it was complied with in that the proceedings before the inspector fully observed its requirements, and that the subsequent review by the High Court was of sufficient scope to satisfy Article 6 (Art. 6). The Government had initially contended that the applicant could have made an appeal under Section 288 TCPA, or that he could have applied for judicial review of the inspector's / Secretary of State's decision. This argument was withdrawn at the hearing before the Commission.

The applicant points to the fact that the inspector is a salaried employee of the Secretary of State for the Environment and that he can

be removed at any time. He further alleges that the High Court, which is limited in its consideration of a case to points of law, is not in general able to, and did not in this particular case, deal with the central factual inferences which the inspector drew from the primary facts.

The Commission finds that this part of the application raises serious issues of law and fact under the Convention which can only be resolved by an examination of the merits. It cannot therefore declare it manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been contended or established.

For these reasons, the Commission,

by a majority, DECLARES INADMISSIBLE the applicant's complaints relating to the peaceful enjoyment of his possessions;

unanimously, DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaints relating to the proceedings at issue in the case.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)