AS TO THE ADMISSIBILITY OF

Application No. 22237/93
by John BRYAN
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 12 April 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

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

Having regard to the application introduced on 1 July 1993 by John BRYAN against the United Kingdom and registered on 16 July 1993 under file No. 22237/93;

Having regard to:

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

- the observations submitted by the respondent Government on 26 May 1994 and the observations in reply submitted by the applicant on 21 July 1994;

Having deliberated;

Decides as follows:

THE FACTS

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. This is the applicant's second application to the Commission. His first application, No. 19178/91, gave rise to a judgment of the European Court of Human Rights (judgment of 22 November 1995, Series A no. 335-A). The facts of the present case, as submitted by the parties, may be summarised as follows.

The particular circumstances of the case

On 14 November 1990 an enforcement notice was issued and was served on the applicant by the Vale Royal Borough Council ("the Council") requiring the demolition of a brick building 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 building had been erected without the required planning

permission. The notice required the applicant to demolish the building and remove the building materials within six months.

The applicant appealed to the Secretary of State for the Environment under Section 174 (2) (a),(b), and (g) of the Town and Country Planning Act 1990 (TCPA), which consolidated and amended the earlier legislation. On 24 February 1992 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)]
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> In my opinion ..., I need to examine two separate questions. One, arising from GDO Class A., is whether the building was when erected reasonably necessary for the purposes of agriculture within the unit. The other, arising from GDO Class A. 1 (c), is whether a building not designed for the purposes of agriculture was provided on the land ...
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> In my opinion the keeping of horses did not amount to an agricultural use, but the appellant himself at least sowed hay crops which amounted to agricultural business use. It appears that much of the hay was taken off by contractors, with other hay later bought in for the horses as needed. Matters could have been different had the appellant had more opportunity to crop and store his hay. However, I am not satisfied that the use at or prior to the erection of the appeal building brought about a need for agricultural storage in the form of a hay barn or other building ...
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> On the second question, relating to design, the impression gained on first seeing the appeal building is of a house under construction. Closer inspection reveals that the building has been furnished with a concrete ramp to facilitate vehicular access, otherwise there is little in the way of features rather than use to change the initial view. To my mind the building is essentially similar to those subject to the previous notice. It is very similar in its general form and size. No dissimilarity in terms of detail - apertures, doors, windows etc - satisfies me that this building was, any more than the others, designed for agriculture in terms of physical appearance or layout ...
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> If the appeal building failed to satisfy either of the tests suggested by the above questions, it is not in my opinion to be regarded as having been erected as permitted development. I have concluded that neither test is satisfied. This being the case the ground (b) appeal fails.
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> [The appeal on ground (a)]
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> ... If the other 2 brick buildings were demolished the appeal building would stand alone, well set back from the road, affecting and to an extent obstructing views towards the north-west. If the other buildings remained the appeal building would remain part of a group with even greater effect. The view through the gap in development in this part of the Conservation Area is in my opinion an important consideration. The building is also very prominent from other aspects, notably from Lime Lane and Raddel Lane. I note that the area around Higher Whitley is not identified in the unadopted Vale Royal Local Plan as one for special protection, but my opinion on the importance of views across the appeal site remains.
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> On the above basis I consider that the appeal building represents an intrusion on the countryside, inappropriate to the Green Belt. Nor does it preserve or enhance the qualities of the Conservation Area.

> It has been claimed that the appeal building has, or could be adapted to have, an appearance superior to the normal modern agricultural building, qualities long sought through County Council design guides. It has also been claimed that it would be satisfactory for the purposes of the individual user. However, if the appeal building has some of the features found in old barns, such buildings are commonly being declared redundant on grounds of their inefficiency for modern farming. It does not appear to me that the building would provide a convenient or efficient farm store. A fork lift truck could enter it, but it would not be convenient to work a conventional tractor inside. The relatively weak inner leaf would restrict storage. In any event the main point is that the building in this location is inappropriate per se ...
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> I thus conclude not only that the building is inappropriate, but that there are no special circumstances to justify a departure from Green Belt policy in its normal application. Accordingly, the appeal on ground (a) fails, and I do not intend to grant planning permission in accordance with the application deemed to have been made."

The applicant applied for leave to appeal to the High Court against the decision of the Inspector / Secretary of State under Section 289 TCPA (as amended). The applicant's gave the following grounds of appeal:

> "1. That the ... inspector erred in law in that he wrongly concluded that ... the building ... was not designed for the purposes of agriculture within the applicant's agricultural unit. ..."

At the leave hearing before Mr. Justice Henry on 8 June 1992, the applicant's counsel added a further ground of appeal, namely that the inspector erred in law in concluding that "the building had to be demolished and that it could not be adapted in design terms to reflect the agricultural norm. The ... decision was disproportionate to the objective sought and/or illogical and/or irrational and/or unreasonable". Leave was refused. The judgment provides, inter alia, as follows:

> "This case arises out of the erection of a building without planning permission in the Green Belt and in a conservation area. It was sought to justify the erection of that building under the parts of the General Development Order relating to the question as to whether a building not designed for the purposes of agriculture was provided on the land.
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> The decision letter is a clear document on which it seems to me the Inspector correctly directs himself as to the law in question and reaches a conclusion which it was fairly open for him to reach. There, in the ordinary course of events, is where matters would end.
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> However, Mr. Owen for the applicant ... seeks to introduce the European concept of proportionality.
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> It seems to me to matter not whether such a concept comes in wearing its European colours or under some Wednesbury head in relation to irrationality or matters of that kind. It seems to me to matter not for this reason, because here two overlapping appeals were brought, first, under Section 174 (2) (a) that planning permission ought to be granted for the offending building, i.e. that it should be left in situ and not demolished, and second under (g) that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning

control, the breach of planning control here being the erection of the unauthorized building in the Green Belt and in a conservation area.

It seems to me that effectively those two overlapping grounds serve to introduce the element of proportionality into the law the inspector was applying, and I proceed on that basis. It seems to me that there is nothing on the point that ground (g) was dealt with very shortly and simply in a short seven-line paragraph, because the Inspector had gone into some detail in relation to ground (a).

The conclusion that he arrived at was that the appeal building represented an intrusion on the countryside inappropriate to the Green Belt and that it did not preserve or enhance the qualities of the conservation area. That was a conclusion that he was quite entitled to reach and it seems to me that, even if there was a wider concept of proportionality (beyond his powers under (a) and (g) in our law), it would not be offended by what this inspector did on the facts before him.

Accordingly I see no arguable case for leave in this case."

Mr. Justice Henry also refused leave to appeal to the Court of Appeal, as did a single judge of the Court of Appeal after consideration of the papers on 31 October 1992, and the full Court of Appeal on 9 March 1993.

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 deemed 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."

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 174 (2) TCPA provides that an appeal against an enforcement 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, with the leave of a High Court judge, 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) and (6) TCPA, as amended by Section 6 Planning and Compensation Act 1991).

COMPLAINTS

The applicant complains that the requirement of demolition was disproportionate and was not taken to enforce a law in accordance with the general interest. He alleges a violation of Article 1 of Protocol No. 1 to the Convention in this respect.

He also complains under Article 6 para. 1 of the Convention about the introduction of the requirement of leave to appeal. He complains that the High Court refused leave to appeal to it with the result that he did not even have the benefit of the limited review envisaged by Section 289 TCPA, a review which itself would not have complied with the requirements of Article 6 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 1 July 1993 and registered on 16 July 1993.

On 2 March 1994 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 26 May 1994, after an extension of the time-limit fixed for that purpose. The applicant replied on 21 July 1994.

THE LAW

1. The applicant alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention. Article 6 para. 1 (Art. 6-1) provides, so far as relevant, as follows.

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

The Government refer to their observations in the applicant's first case in contending that the inspector does comply with the requirements of Article 6 (Art. 6) as to an "independent and impartial tribunal". They point out that the rules on procedure before inquiries provide clear procedural safeguards.

As to the possibility, in appropriate cases, of an appeal on a point of law, the Government recall that the change in the law gave effect to a recommendation to introduce a leave requirement following judicial criticism of the pre-existing position (R. v. Kuxhaus (1988 2 WLR 1005)). In that case, the court had considered that an offender could gain extra time at very little cost, even if his legal grounds for appeal were tenuous. The Government state that the criteria according to which the judge is to grant leave have not been laid down, but are treated by analogy with the leave criteria for judicial review applications. The judge asks himself whether the case is one that should be allowed to get through the sieve which the necessity to obtain leave has now created in order to weed out hopeless frivolous appeals doomed inevitably to failure. In short, the judge has to be satisfied that the applicant has an arguable case, and the test has been called "the threshold of arguability".

The Government point out that there remains a further appeal, again with leave, to the Court of Appeal and (if leave is granted) to the House of Lords.

The Government underline that questions of fact can be reviewed by the courts if an inspector reaches a conclusion on the facts for which there is no evidence, fails to take into account relevant considerations or if a finding is absurd, perverse or irrational. An error of law will not, however, arise where the allegation on appeal is that the person or body entrusted with the responsibility to find the fact has failed to give adequate weight to evidence, or has failed to give adequate or sufficient consideration to a particular circumstance.

The applicant, too, refers to submissions made in the course of his first application, and underlines the limited nature of an appeal on a point of law. He points out that the leave requirement limits the nature of the review still further.

The Commission first notes that the proceedings in the present case involved the determination of the applicant's "civil rights" (cf. Eur. Court H.R., Bryan judgment of 22 November 1995, Series A no. 335, para. 31, "Bryan judgment").

If the proceedings before the domestic authorities and courts are to satisfy the requirements of Article 6 (Art. 6) of the Convention, either the adjudicatory body itself must comply with those requirements, or the proceedings before that body must be "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1 (Art. 6-1)" (Bryan judgment, para. 40 with further reference).

As to the inspector in the present case, the Commission recalls that in the Bryan judgment, the European Court of Human Rights held that the inspector in the proceedings there lacked the requisite appearance of independence and impartiality and so could not be considered to fulfil the requirements of Article 6 (Art. 6) of the Convention (para. 38). There is no reason to consider the position to be different in the present case.

Accordingly, the Commission must decide whether the review of the inspector's decision by the High Court and the Court of Appeal satisfied the requirements of Article 6 para. 1 (Art. 6-1) of the Convention as far as the scope of its jurisdiction is concerned.

The Commission recalls that in the Bryan judgment, the European Court of Human Rights held as follows:

> "44. The Court notes that the appeal to the High Court, being on "points of law", was not capable of embracing all aspects of the Inspector's decision concerning the enforcement notice served on Mr. Bryan. In particular, as is not infrequently the case in relation to administrative-law appeals in the Council of Europe member States, there was no rehearing as such of the original complaints submitted to the inspector; the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited ...
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> However, apart from the classic grounds of unlawfulness under English law (going to such issues as fairness, procedural propriety, independence and impartiality), the inspector's decision could have been quashed by the High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the inspector

was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no inspector properly directing himself would have drawn such an inference ... .

45. Furthermore, in assessing the sufficiency of the review available to Mr. Bryan on appeal to the High Court, it is necessary to have regard to matters such as the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.

46. In this connection the Court would once more refer to the uncontested safeguards attending the procedure before the Inspector: the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality ... . Further, any alleged shortcoming in relation to these safeguards could have been subject to review by the High Court.

47. In the present case there was no dispute as to the primary facts. Nor was any challenge made at the hearing in the High Court to the factual inferences drawn by the Inspector, following the abandonment by the applicant of his objection to the Inspector's reasoning under ground (b) ... . The High Court had jurisdiction to entertain the remaining grounds of the applicant's appeal, and his submissions were adequately dealt with point by point ... . These submissions, as the Commission noted, went essentially to questions involving "a panoply of policy matters such as development plans, and the fact that the property was situated in a green belt and a Conservation Area".

Furthermore, even if the applicant had sought to pursue his appeal under ground (b), the Court notes that, while the High Court could not have substituted its own findings of fact for those of the Inspector, it would have had the power to satisfy itself that the Inspector's findings of fact or the inferences based on them were neither perverse nor irrational ... Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 para. 1 (Art. 6-1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member States. Indeed, in the instant case, the subject-matter of the contested decision by the Inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning."

In the present case the applicant had to apply for leave before he could have the review he had - as of right - in his first application. This raises the question of whether this limitation on access to court is compatible with the provisions of Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission recalls that limitations on access to court may be compatible with Article 6 para. 1 (Art. 6-1) of the Convention, but they must not restrict the access in such a way or to such an extent that the very essence of the right is impaired, they must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (cf. Eur. Court H.R., Fayed judgment of 21 September 1994,

Series A no. 294-B, pp. 49 - 50, para. 65, with further references).

As to the first of these criteria, the question whether the very essence of the right was impaired, the Commission notes that the "very essence" of the right remains intact: access to court is limited by the requirement of leave, but remains possible.

As to the legitimacy of the aim, the Commission notes that the ground put forward for introducing the requirement of leave is the increased effectiveness of statutory provisions for enforcement of planning control: by requiring leave, unmeritorious cases can be dealt with more quickly. The Commission accepts that this aim - which should not involve any reduction in the number of the cases which are successful as it only affects unmeritorious claims - is compatible with Article 6 para. 1 (Art. 6-1) which, itself, enjoins States to deal with cases "within a reasonable time".

As to the relationship of proportionality between the aim itself and the means sought to achieve it, the Commission again notes that access to court in meritorious cases is unaffected by the leave to appeal requirement. Moreover, the question of access is decided by a High Court judge and is accompanied by a number of the procedural guarantees of Article 6 (Art. 6): an applicant for leave to appeal has the opportunity to address the judge, and the proceedings are in open court.

In the present case Mr. Justice Henry dealt with the principal issues on the leave to appeal very briefly (see the two paragraphs set out above, beginning with "This case arises ..." and ending with "There, in the ordinary course of events, is where matters would end"). He nevertheless referred to the argument of the applicant which comes nearest to a question of fact - namely the question whether the barn at issue was a building "designed for the purposes of agriculture". In his finding that the inspector correctly directed himself and reached a conclusion which it was "fairly open to him to reach" he was giving in an abbreviated form substantially the same reasons as the High Court did in the applicant's first case (see Bryan judgment, para. 12).

Moreover, Mr. Justice Henry then went on to deal with an additional point the applicant had raised at the hearing, namely a question dealing with proportionality. In effect, he considered that even if a proportionality test was part of domestic law, the way in which the inspector balanced the different interests met it.

In the light of all the above circumstances, the Commission therefore accepts the Government's contention that the scope of review afforded the applicant in the proceedings he brought for leave to appeal the inspector's decision was sufficient to comply with Article 6 para. 1 (Art. 6-1) of the Convention.

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 1 of Protocol No. 1 (P1-1) to the Convention in connection with the enforcement order.

The Commission recalls that in its decision on the admissibility of the applicant's first application, it had to consider substantially the same complaints in respect of the applicant's first and second barns (No. 19178/91, Dec. 14.10.93).

The Commission sees no material difference between the allegations under Article 1 of Protocol No. 1 (P1-1) in the applicant's first case, and those in the present application. It therefore applies

its earlier reasoning mutatis mutandis to the present application.

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

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)