AS TO THE ADMISSIBILITY OF

Application No. 28981/95
by Anthony and Elizabeth CHILD
against Ireland

The European Commission of Human Rights (First Chamber) sitting in private on 16 October 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ

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 14 February 1995 by Anthony and Elizabeth CHILD against Ireland and registered on 26 October 1995 under file No. 28981/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are Irish nationals. They were born in 1929 and are currently resident in London. The facts of the case, as submitted by the applicants, may be summarised as follows.

In 1976 the applicants bought a 25 acre site in County Wicklow and on 13 October 1986 they applied to the relevant County Council for planning permission to build a house on the site. Further to representations from the applicants, five members of the County Council tabled a motion that a resolution be passed by the County Council directing the County Manager to grant planning permission.

At a meeting of the County Council on 10 November 1986 the County Manager recommended refusal of planning permission due to the site's location in an elevated position in an area adjoining a main tourist route designated by the County Plan as an area of high amenity, because the entrance to the house would constitute a traffic hazard and endanger public safety and due to the serious danger of septic tank effluent gaining access to a nearby reservoir which was a major source of public water supply. A decision was deferred pending an on-site meeting between the relevant five members of the County Council who supported the motion, the County Manager and the County Engineer. After

that meeting further information was requested from the applicants by letter dated 27 November 1986 in relation to sewage disposal and this information was submitted on 12 December 1986. The applicants were also required to sink a trial hole on the site and, having inspected this hole (with a view to assessing percolation on the site), the County Medical Officer reported that development on the site would create a serious danger of septic tank effluent entering the nearby river which led into a reservoir.

At the County Council meeting on 12 January 1987, the County Engineer also spoke against granting planning permission due to insufficient percolation and proximity to the river feeding the reservoir. The County Manager stated that three separate reports indicated that the application should be refused and that he would be acting irresponsibly if he made an order granting planning permission. The Director of Community Care and Dublin Corporation were also against granting planning permission and these opinions were also outlined to the meeting. The County Council members had the reports of the County Engineer and the County Medical Officer before them. However, the County Council members resolved, by 10 votes to 7, to direct the County Manager to grant planning permission.

Having taken legal advice, the County Manager in a letter dated 29 January 1987 notified the County Council members of his refusal to give effect to their resolution. He referred to the technical reports and advice all of which were against granting planning permission and to the fact that no competent technical advice offering an alternative view was brought before him. He again pointed out that he would be acting irresponsibly if he allowed planning permission. The applicants did not appeal the decision of the County Manager to An Bord Pleanála, the Irish planning appeals board and they claim that they did not receive the registered letters notifying them of the decision of the County Manager.

The applicants then engaged their own expert engineer whose report dated 25 May 1987 stated that the site was suitable for septic tank effluent. Correspondence between the applicants' engineer and the County Council ensued in an effort on the applicants' part to obtain planning permission but this correspondence ceased in or around the end of 1989 without any change in the planning position.

The applicants then commenced building a house on the site and they informed the County Manager by letter dated 17 May 1990 that they had started building. The County Manager replied confirming that such building was unauthorised in light of his previous decision. Since the building continued, proceedings were issued in 1990 by the County Council as a result of which the applicants were obliged to stop construction. The applicants' application for an order from the County Council to retain the building, which building had been already largely completed, was refused on 27 August 1991. The applicants' appeal to An Bord Pleanála against the refusal of the retention order was rejected on 25 March 1992. The reasons given for the refusal of the appeal were the scenic nature of the area, the proximity of the septic tank percolation area from the river (which river fed into an important reservoir for the area) and the traffic hazard which would be caused by an entrance from a residence with limited visibility onto a narrow road.

On 19 February 1993 the applicants issued judicial review proceedings in the High Court claiming that the County Manager's decision to refuse planning permission was invalid as he failed to implement the County Council members' resolution. In May 1994 the County Manager offered to settle the matter, inter alia, by granting planning permission but the applicants would be responsible for their own legal costs to date. The applicants refused the offer.

While the applicants were legally represented from at least late

1989 until April 1993 (including for the drafting of the Statement of Claim in the judicial review proceedings), they represented themselves during the hearing before the High Court. The High Court gave its judgment on 20 January 1995. The court rejected the applicants' claim that they had not received any registered notices of the County Manager's decision of 29 January 1987. The court went on to state that, according to the jurisprudence, the County Manager was entitled to ignore an invalid resolution of the members of the County Council without applying to court to have the relevant resolution quashed. Accordingly, the question to be decided was the validity of the members' resolution of 12 January 1987. The High Court noted that, while County Council members are not bound by the advices of the County Engineer and Medical Officer, they must have some clear basis for not following such persons' advice by way of, for example, an expert's opinion supporting their position.

The High Court found that the members had acted ultra vires and that the resolution of the County Council was invalid because the County Council members did not have any such clear basis for ignoring the advice against granting planning permission given by, inter alia, the County Council's technical experts and because they did not take into account the proper planning and development of the site. In addition, the court found that the members had also not taken the four previous refusals of planning permission for the same site into account (two of which refusals had been upheld on appeal by An Bord Pleanála and all of which refusals would have been a matter of public record). The County Manager's decision was accordingly upheld. The High Court granted the Council an injunction restraining further building but allowing the applicants to complete the roof of the house. On 20 February 1995 the applicants lodged an appeal against the High Court decision to the Supreme Court which appeal does not yet appear to have been heard.

COMPLAINTS

The applicants complain about the refusal of planning permission, about the actions and motivations of the County Manager and about the High Court judge whom they claim did not take any notice of their evidence and submissions. They invoke Article 8 of the Convention.

THE LAW

The applicants complain about the refusal of planning permission. They submit that the County Manager had no power to overrule the decision of the members of the County Council, that, in refusing the application for planning permission, the County Manager was motivated by hostility towards the applicants and that he would not therefore appear in court to answer the allegations against him. They also submit that the High Court judge did not take any notice of their evidence during the High Court hearing.

Although the applicants did not appeal the County Manager's decision of 29 January 1987 to An Bord Pleanála and that their appeal to the Supreme Court has not yet terminated, the Commission does not find it necessary to consider whether the applicants have exhausted domestic remedies as required by Article 26 (Art. 26) of the Convention, because the application is, in any event, inadmissible for the reasons set out below. Though the applicants invoke Article 8 (Art. 8) of the Convention, the Commission is of the opinion that the applicants' complaints (apart from the complaint in relation to the High Court judge) are more appropriately considered under Article 1 of Protocol No. 1 (P1-1) and more specifically under the second paragraph of that Article. Article 1 of Protocol No. 1 (P1-1), insofar as relevant, reads 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 ... .

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 ... ".

The Commission recalls that a prohibition on building a house on a plot which one owns constitutes a control of the use of property within the meaning of the second paragraph of Article 1 of Protocol 1 (P1-1) and that in order for such control to be justified it must be lawful, it must pursue a legitimate aim in the public interest and the means employed must be proportionate to the aim pursued (see, for example, No. 10911/84, Dec. 7.7.86, D.R. 48 p. 191).

The Commission considers that the refusal of planning permission by the County Manger amounted to a control of the use of the applicants' property within the meaning of Article 1 of Protocol 1 (P1-1). As to the lawfulness of the County Manager's refusal of planning permission, the Commission notes the applicants' claim that the County Manager was not entitled to take the action he did. However, the Commission also notes that the purpose of the judicial review proceedings before the High Court was precisely to challenge the validity of the County Manager's action. The High Court clearly indicated that there was a basis in law for the County Manager's refusal to comply with the resolution of the members of the County Council, that the decision of the members was invalid and that the action of the County Manager was, accordingly, valid.

As to the legitimacy of the aim of the refusal, the applicants submit that the reason for the County Manager's refusal was hostility against them. However, the Commission notes the expert technical advice, opinions and reports from the County Engineer, the County Medical Officer, Dublin Corporation and from the Director of Community Care against granting planning permission. Though the rejection by An Bord Pleanála of the appeal against the refusal of a retention order took place after the County Manager's decision on 29 January 1987, the Commission notes that the reasons for that board's decision mirrored the objections of the County Manager which he outlined to the County Council meeting on 10 November 1986.

The Commission also recalls that four previous applications made by others for planning permission for the same site had been refused before the applicants bought the site and that appeals against two of those refusals were also rejected by An Bord Pleanála. While it is noted that the County Manager appears to have offered to settle the matter by granting planning permission in May 1994, the Commission does not consider this indicative of bad faith on the part of the County Manager - the County Manager would still have been in a position to attach specific construction conditions to that offer and, in any event, it is appreciated that the County Manager was faced with a situation which had been ongoing for almost eight years, with the existence of a house on a site which had been practically completed and with a further set of expensive legal proceedings ahead.

Accordingly, the Commission considers that aims of the control were the maintenance of a scenic environment, public health (percolation of effluent into a reservoir) and public safety (traffic hazards) and that those aims are legitimate within the meaning of Article 1 of Protocol 1 (P1-1). Insofar as the applicants argue that the County Manager's refusal to "come to court" demonstrates his alleged hostility and reluctance to account for his adopted position and even assuming that the County Manager was so reluctant, the Commission notes that the applicants did not apply at any time to the court, either during the proceedings commenced against them in 1990 or

by them in November 1993, for a witness summons in order to ensure the County Manager's appearance to give evidence.

As regards the proportionality of the means employed, the Commission notes that it was only after the refusal of planning permission by the County Manager that the applicants commenced construction on the site. Insofar as the applicants submit that they commenced building because of non-receipt of the registered notices of the County Manager's decision in January 1989, the rejection by the High Court of the claim by the applicants of such non-receipt is noted. The Commission also notes the applicants' engagement of an expert engineer in 1987 and the purpose of the correspondence between that engineer and the County Council from 1987 and 1989 none of which would have been necessary had the applicants been granted planning permission. Accordingly, the Commission considers that the applicants were aware of the refusal by the County Manager of planning permission well in advance of their decision to commence building in May 1990. Furthermore, since the four previous refusals of planning permission for the site were a matter of public record, the applicants were in a position to assess their chances of being granted planning permission even before they decided to buy the site. In such circumstances, the Commission considers that the refusal to grant planning permission to the applicants was proportional to the legitimate aims involved.

Accordingly, the Commission concludes that the refusal of planning permission to the applicants is justifiable under Article 1 of Protocol 1 (P1-1).

The applicants also complain that the High Court judge did not listen to their evidence or submissions during the High Court hearing. While the applicants do not invoke any particular Article of the Convention in this respect, the Commission has considered this complaint under Article 6 (Art. 6) of the Convention. However, in light of the contents of the judgment of the High Court of 20 January 1995, the Commission does not consider that the applicants have substantiated this submission, the High Court judge referring as appropriate to the applicants' positions on the matters at issue.

In such circumstances, the Commission considers that the applicants' complaints are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
Acting President
of the First Chamber