AS TO THE ADMISSIBILITY OF

Application No. 15141/89
by Joseph McDONNELL
against Ireland

The European Commission of Human Rights sitting in private on 15 February 1990, the following members being present:

MM. C.A. NØRGAARD, President
E. BUSUTTIL
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

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 6 March 1989 by Joseph McDONNELL against Ireland and registered on 19 June 1989 under file No. 15141/89;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a sand and gravel contractor born in 1929. He lives in Kilcullen, Co. Kildare.

The applicant owns, inter alia, a parcel of land with an area of some 11.76 acres (approximately 4.75 hectares) from which he intended to extract sand and gravel. The land adjoins an existing sand and gravel pit. The Electricity Supply Board (ESB) served a notice dated 22 November 1983 of intention to run electric lines over the applicant's land, work which included the erection of two pylons, erected on 1 July 1985. A second notice, dated 16 April 1986, related to the taking down of one of the pylons and its re-erection on a different part of the applicant's land.

On 18 January 1989, an arbitrator gave his award in a dispute between the applicant and the ESB over compensation to be paid by the ESB to the applicant following the notices of 22 November 1983 and 6 April 1986. The arbitrator awarded £15,835 in respect of the notice of 22 November 1983 and £12,250 in respect of the notice of 16 April 1986.

On 14 April 1989 the applicant's counsel, after a consultation with the applicant, his solicitor and senior counsel, wrote an opinion in which he pointed out that the statutory basis for compensation was roughly "the measure of the reduction in the open market value on the

sale of the free-hold estate" at the date of the statutory interference. The ESB had, at an earlier stage, offered compensation on the basis of quantities and tonnages, but the arbitrator was not bound by that and made his award on the basis of the reduction in market value. As to the options available to the applicant, counsel wrote, inter alia, as follows:

"In regard to [the possibility of a constitutional appeal] what we are suggesting is no more and no less than the ESB Act 1985, by incorporating the 1919 Act, has not compensated our client to the full extent to which he is constitutionally entitled. In other words, the Act is unconstitutional. It is our contention that the open market valuation based on the price that could be achieved for the land in a sale between the Purchaser and the Vendor is not the true reflection of the worth of the land to be produced for the benefit of the landowner when the sand and gravel is excavated and sold by the ton. There are dicta by one or two of the Judges in the Supreme Court in the Bula Case which are supportive of this view but dicta, supportive though they might be, are not the basis for a confident prediction of success.

...

It is the marketplace which is supposed reliably to take into account, when it fixes the market value of the land, the sum of money which a reasonable purchaser would be prepared to pay therefor, having regard to all its potentials and drawbacks. If a prospective purchaser would have been prepared to pay no more than, say, £6,000 an acre for [the applicant's] land in 1982, why should the ESB be then required to compensate him on the basis of £50,000 per acre, or more? Is compensation to be assessed only on the basis of future profitability? If so, compensation for a road-widening scheme in an urban area would be payable at the

rate of nil, since no householder could contend that he was expecting to make a profit from the small piece of garden which he now has to give up for the purposes of the scheme. Obviously, therefore, some property has value although it does not have an underlying profit potential. Conversely, the underlying profit potential of certain land need not necessarily be reflected in the market value thereof. Where will we be asking the Court to draw the line? To be constitutionally sound, we will have to be putting forward the bones of a scheme which meets the requirements, not only of [the applicant's] case but of all cases. The marketplace provides a mechanism to meet the requirements of all cases and for that reason I would not rate our chances of succeeding in this application at any better than 15%."

Counsel's opinion, bearing in mind all the circumstances, was the applicant should try to find a "commercial option", that is, to find somebody who would work the site as it was.

COMPLAINTS

The applicant states that he and his family are now unable to realise the commercial market value of their 11.75 acre field, with its substantial sand and gravel deposits. He says that the very low "quantities and tonnages" offer by the ESB drove him into applying for arbitration, the ESB knowing that the basis for calculation of compensation would produce a low value.

THE LAW

The Commission has considered this application under Article 1

of Protocol No. 1 (P1-1) to the Convention, which 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 applicant argues that the statutory basis for compensation applied by the arbitrator was wrong in that he is now unable to realise the commercial market value of his land.

However, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of Article 1 of Protocol No. 1 (P1-1) as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

In the present case the applicant failed to bring proceedings in the High Court seeking a declaration that the relevant provisions of the Electricity (Supply) (Amendment) Act 1985 are unconstitutional. In this regard, the applicant could have challenged the constitutionality of the Act by reference to his property rights on the basis that it had not compensated him to the extent to which he was entitled under the Constitution. The Commission notes that a declaratory action before the High Court with the possibility of an appeal to the Supreme Court constitutes the most appropriate method under Irish law of seeking to assert and vindicate constitutional rights (cf. No. 9596/81, Dec. 12.12.83, unpublished). Indeed the 1985 Act itself was passed subsequent to a successful constitutional challenge to the previous legislation in the case of E.S.B. v. Gormley (1985 IR 129). The applicant has not, therefore, exhausted the remedies available to him under Irish law. Moreover, an examination of the case as it has been submitted does not disclose the existence of any special circumstances which might have absolved him, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal.

The Commission notes that the applicant's counsel put the chances of success of such an appeal at not "any better than 15%". The potential effectiveness of the remedy under discussion was not challenged by the applicant's counsel; doubts as to whether a potentially effective remedy will, in the event, prove successful, do not constitute such a special circumstance (cf. No. 9559/81, Dec. 9.5.83, D.R. 33 p. 158).

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies and his application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the Commission President of the Commission

(H.C. KRÜGER) (C.A. NØRGAARD)