AS TO THE ADMISSIBILITY OF

Application No. 26889/95
by John F. PANVERT
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 12 March 1995 by John F. PANVERT against the United Kingdom and registered on 23 March 1995 under file No. 26889/95;

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 applicant is a British citizen born in 1946. He lives in Hildenborough in Kent. The facts of the case as submitted by the applicant can be summarised as follows.

In mid-1988, the applicant purchased a ruined oast house (a building used for the drying of hops), about 60% of which he claims remained standing. He started to restore and renovate the building. On seeking a grant for this work, he was advised by Sevenoaks District Council that the building's state of disrepair was such that in planning terms the building did not exist and restoration would be considered to constitute the erection of a new building, which would require planning permission. The applicant claims that he was advised that planning permission would not be granted in any case. His own advisers, John Little Associates, advised him that the building was agricultural and that it could never lose its title so that no planning permission was necessary for its restoration or development. Pursuant to this advice he started to restore the oast house.

On 21 February 1989 the Council issued an enforcement notice ("the first enforcement notice") relating to work undertaken on the construction of a structure above one of the two kilns at the oast house. The applicant was required to "demolish the building operations

involving roof construction". On 28 June 1989, the inspector allowed his appeal against the first enforcement notice. He found that there had been a breach of planning control, in that the applicant had changed the appearance of the structure without consent, but further found that the development was not so harmful that its removal was justified. He therefore granted consent for retention of the works which were "nothing more than those required to protect the structure from the elements".

On 17 March 1989 the applicant submitted an application for planning permission for the conversion of the oast house into a dwelling, which was refused in early June of the same year on the grounds of conflict with Green Belt, rural settlement and landscape policies.

The applicant continued to restore the property and on 21 May 1991 was issued with a further enforcement notice ("the second enforcement notice") relating to alleged further breaches of planning control in respect of a series of building operations at the oast house. The second enforcement notice required the demolition, within one month, of building operations which affected the appearance of the structure.

The applicant appealed, relying on grounds (a), (b) and (h) of Section 174 (2) of the Town and Country Planning Act 1990, that is, that planning permission should have been granted (ground (a)), that there was no breach of planning control (ground (b)), and that the period for taking the required measures was too short (ground (h)). On 25 and 26 February 1992 a public inquiry was held and the inspector visited the site on 26 February 1992. On 27 March 1992 the inspector dismissed the appeal stating:

In connection with the ground (b) appeal.

> "6. From the photographic and other evidence before me, my own view is that in 1987 Kettleshill Oast was so dilapidated and derelict that, as a matter of fact and degree, it no longer constituted a building, in that the first floor superstructure and flooring, roof, and western wall of the stowage were missing, and the roundels were truncated with missing brickwork and no roofs. The works carried out by the time of the 1989 appeal were in my view of such limited nature that the oast could still not be regarded as a building. In this situation I am firmly of the opinion that, as a matter of fact and degree, the works carried out since 1989 are properly regarded as new building works .... Consequently, these works require planning permission and, as such permission has not been obtained, a breach of planning control has occurred."

The inspector stated that he considered the building to have no present use and that the applicant had provided no evidence regarding future use. He therefore considered that there were no special circumstances which justified what, in planning terms, was the construction of a new building.

The inspector accepted that the building as it now stood was attractive, that oasts were a typical feature of the Kent countryside and that the oast did not harm the appearance of the landscape and could even be said to have effected some visual improvement. However, he concluded, in connection with the ground (a) appeal:

> "16. ... On balance, however, ... I have decided that the objections to the development in the Green Belt in particular and the countryside in general, outweigh the benefits to the landscape. I conclude therefore, that in the particular circumstances of this case an exception is not justified to policies of restraint on inappropriate development in the

countryside, having particular regard to the fact that the site lies within an area designated as Green Belt, an Area of Outstanding Natural Beauty and a Special Landscape Area. I have decided that the development is thereby unacceptable. Accordingly ... I shall refuse to grant planning permission in respect of the deemed application.

17. ... In my view if I were to allow this appeal it is probable that my decision would be cited as a precedent making it more difficult for the Council to resist similar development elsewhere ... I am satisfied that if this appeal succeeded the objectives of longstanding policies of restraint would be undermined.

19. You laid great stress at the inquiry on your view that the use of the building is not a matter before me, and that I should concern myself only with the effect of the building's physical fabric on its surroundings. I take the point you are making but consider that, in view of the highly sensitive location of the site, the likely future use of the building is a material, though not an overriding, consideration. Given the nature of the works carried out, and the limited extent of your client's landholding, in the vicinity of the site, I find it difficult to envisage the building being used for agricultural purposes. I am also aware that planning applications for conversion of the building to residential use were submitted in 1987 by your client's predecessor, and by your client himself in 1991 [in fact 1989]. I feel it is a reasonable assumption that if I were to allow the present appeal it would be virtually impossible for the Council to resist conversion of the building to a dwelling, and in my view this would be the most likely future use. I emphasise that considerations of future use of the building have had no direct influence on my decision. However, I feel the Council is justifiably concerned about your client's intentions, and this is a matter which strengthens me in my view that the development is unacceptable."

The inspector granted an extension of 6 months for the demolition of the building works.

On 24 April 1992 the applicant applied for leave to appeal to the High Court. His grounds of challenge were that the decision was not within the powers conferred by the Town and Country Planning Act 1990, and that the requirements of the Town and Country Planning (Enforcement) (Inquiries Procedure) Rules 1981 had not been complied with. The applicant contended inter alia that the inspector had erred in law (i) in that he had found that the works to the oast house improved the landscape but nevertheless concluded that the relevant landscape policies counted against the grant of planning consent; (ii) in that he had referred to guidance on re-use of agricultural buildings whereas the case was concerned not with change of use development but with "operational development"; (iii) in that the consideration of the precedent effect of a grant of planning permission was tainted by taking into account an irrelevant factor, namely the "unlawful conclusion that to grant planning permission would be contrary to the applicable policies", and (iv) in that there was no evidence that granting permission would have an undesirable precedent effect.

Leave to appeal was granted on 9 June 1992. On 27 May 1993 the appeal was dismissed. The judge noted that he was not concerned with the inspector's decision on the ground (b) appeal, and found in connection with the ground (a) appeal (that is, the refusal of planning permission) inter alia the following:

"In my judgment, the process of the inspector's reasoning is clear and reasonable, and reveals no error of law ...

... [the inspector] attached more weight to the policies of

restraint. That was a matter of planning judgment which was entirely for him. It is impossible to say that in so doing he acted unreasonably or failed to have regard to his own conclusion on the effect on the Area of Outstanding Natural Beauty and Special Landscape policies. He did so in terms, and then reached a balanced judgment. ...

It cannot, in my judgment, be said that the effect of granting permission on these policies of restraint was not a material consideration ... I would only add that it is clear from his decision letter that this question of precedent was not the inspector's reason for dismissing the appeal. It was very much a top-up point, which he did not need to have made."

The applicant's appeal to the Court of Appeal was dismissed on 23 June 1994. The Court of Appeal noted that the question whether planning consent was needed at all - the ground (b) appeal to the inspector - had not been pursued before the first instance judge, and that the Court had refused to permit it to be raised on the appeal. It nevertheless noted:

"[Counsel for the applicant] submits that ... the inspector misdirected himself by making the finding that the work, the subject matter of the enforcement work, was new building work. He contends that that was a matter of law as opposed to a matter of fact. With respect, having seen the material photographs and the degree of dilapidation that this building suffered from, I am quite unable to accept that submission. I take the view that indeed it was a matter of fact and degree for the inspector to determine whether the work about which complaint was made amounted to new building work, and he was certainly at liberty on the facts as found by him to make that affirmative finding. For my part even if the inspector had been mistaken, and I do not for one moment acknowledge that he was, in planning terms the result would have been no different."

As to the remainder of the appeal, the Court noted that:

"...at the heart of this appeal lies the proper planning approach to the development which has taken place and whether that development constituted an exception justifying permission despite the policies inherent in the Green Belt concept.

[Those policies are:]

'The general policies controlling development in the countryside apply with equal force in green belts but there is, in addition, a general presumption against inappropriate development within them.
... Inside a Green Belt, approval should not be given, except in very special circumstances, for the construction of new buildings or for the change of use of existing buildings for purposes other than agriculture and forestry, outdoor sport, cemeteries, institutions standing in extensive grounds, or other uses appropriate to a rural area'.

I pause to note that ... in the report of the appellant's expert to the inspector, it was made abundantly plain that the ultimate intention here was to convert this oast house to a private dwelling. ...

In my view, the photographs demonstrate plainly that this oast house was indeed a building which had become so derelict that it could only be brought back into use by complete or substantial reconstruction. That brings us back to the point ... as to whether this was indeed a new building operation or something

> less than that. ... How did the inspector approach the facts of this case? First, he reminded himself of the policy considerations ... The inspector went on to deal with the precedent, and acknowledged that if planning permission were granted here it might create an undesirable precedent rendering the refusal of similar applications in the future undesirable from the point of view of the planning authority. The inspector did not forget that there was local support for the development and then finally he commented ... upon the ultimate use to which this oast house might well be put. ... [T]he inspector exercised what in my view, reflecting the words of the [first instance] judge, was no more and no less than a 'planning judgment'. He asked himself the right question. Was there material upon which he could provide the answer? There plainly was. Can this Court, can the [first instance] judge, interfere with the planning judgment? Was there any material to indicate that the inspector misdirected himself - that he took into account material that he was not entitled to take into account, or failed to have regard to material to which he should have attached importance? I can detect no affirmative answer to any of those questions, and in agreement with the [first instance] judge I think this inspector was not only entitled, but was right to come to the conclusion that he did."

By letter dated 19 July 1994, the applicant applied for leave to present a petition of appeal on a point of law to the House of Lords from the Order of the Court of Appeal. On 26 July 1994, that application was dismissed. On 21 July 1994 the appellant petitioned the House of Lords directly. His petition for leave was heard on 4 October 1994 and dismissed on 13 December 1994.

COMPLAINTS

The applicant complains of a violation of Article 1 of Protocol No. 1, claiming that the demolition of the building is excessive and disproportionate and does not serve any legitimate policy objective of the Government.

The applicant further complains that he was deprived of the right to a fair and impartial hearing to determine his civil rights, the inspector being a salaried civil servant employed by the Secretary of State's Department. He claims that because the determination of his case depended predominantly on factual findings, namely:

> (a) whether the repair and restoration had been reasonably necessary for the purposes of agriculture within the unit of agricultural land at the time the repair and restoration was carried out;
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> (b) whether the building was by design an agricultural building; and
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> (c) whether the policies relating to the countryside relate to conversion of agricultural buildings and not restoration of existing buildings where no change of use is before the inspector,

the availability of an appeal from the decision of the inspector was insufficient to meet the requirements of Article 6 of the Convention.

THE LAW

1. The applicant complains that the requirement that he demolish part of the oast house which he built without planning permission serves no legitimate purpose and is disproportionate within the meaning of Article 1 of Protocol No. 1 (P1-1) to the Convention.

Article 1 of Protocol No. 1 (P1-1) provides:

"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 use 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 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 building works that he had carried out - despite the fact that it may involve 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 (cf. Bryan v. the United Kingdom, Dec. 14.10.93). It notes that the inspector who held the enquiry into the enforcement notice considered it in some detail and determined that the restoration works, under planning law, constituted the construction of a new building with no specific use. He concluded that planning permission was required and had not been granted. In deciding not to deem planning permission granted for the purposes of overturning the enforcement notice, the inspector noted that the buildings were within the Green Belt, an Area of Outstanding Natural Beauty and a Special Landscape Area. Although he did not consider that the building works had spoiled the natural

landscape and indeed considered that they had effected some visual improvement, he took into account other factors including the policy of planning restraint in the area and the need to preserve that policy except in very special circumstances.

The applicant chose to ignore the Council's advice given in 1989, that the restoration of the oast would be viewed as "development" and would therefore require planning permission. His contention that it did not require planning permission because it was an agricultural building was, by implication, not accepted by the inspector who granted planning permission rather than allowing the applicant's ground (b) appeal against the first enforcement notice. The applicant cannot therefore contend that his subsequent development of the oast was done under a misapprehension as to planning requirements.

The inspector permitted an extension of the period permitted for demolition of the buildings as he considered "it reasonable, given the extent of the works to be carried out and the desirability of salvaging materials".

The fact that this case involved the development and restoration of a ruined old building does not in the Commission's view mean that it should be treated in a different way from any other building work that is controlled by planning legislation. Nor can subjective factors such as the fact that the oast has been restored in an attractive way influence the Commission's approach. The Commission must determine whether, in the case before it, the control of use struck a fair balance between the conflicting interests. In doing so it recognises the considerable consequences of the decision for the applicant.

The Commission notes that the High Court considered the applicant's complaints about the inspector's decision, and found that he "attached more weight to the policies of restraint" than to questions of whether the applicant's case would be used as a precedent for other development in the future. The Court of Appeal noted that the applicant's expert had "made abundantly plain that the ultimate intention here was to convert this oast house to a private dwelling".

In the light of the balancing exercise undertaken by the inspector, the review of that exercise carried out by the High Court and the Court of Appeal, and the discretion accorded to the domestic authorities in this type of case, the Commission finds that a fair 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 complains that he was deprived of his right to an independent and impartial tribunal in the determination of his appeal against the second enforcement notice, in violation of Article 6 para. 1 (Art. 6-1) of the Convention.

Article 6 para. 1 (Art. 6-1) of the Convention 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 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 ... .
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> 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.
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> 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.
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> 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".
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> 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, there was a dispute as to the facts before the inspector which was not taken up before the High Court on the applicant's appeal - namely, the question whether the applicant had built a new building, which required planning permission, or whether he had merely undertaken works of improvement or maintenance, for which no planning permission was needed. The point was raised before the Court of Appeal, however. The Court of Appeal ruled that the point could not be pursued before it, but nevertheless considered the question. In the context of its comments on the applicant's (late) challenge to the ground (b) reasoning, the Court found that the question of whether new building work had been undertaken was a "matter of fact and degree for the inspector to determine". These comments could be interpreted as the Court of Appeal declining jurisdiction in respect of a particular point (cf., Eur. Court H.R., Fischer judgment of 26 April 1995, Series A no. 312, p. 18, para. 34). However, in the context of its discussion of the policy implications of the case, the Court of Appeal also found that "this was indeed a building which had become so derelict that it could only be brought back into use by complete or substantial reconstruction", and then went on to consider the way the inspector had approached the question.

Accordingly, the only factual aspect of the case before the Court of Appeal was in the event considered and rejected on its merits - that is, the Court of Appeal did not in the end decline to deal with the point (even though the applicant had not raised it before the High Court) but found that the inspector was right when he decided that the applicant had undertaken work which amounted to development and therefore needed planning permission.

As to the remainder of the matters before the High Court and the Court of Appeal, the Commission considers, as did the European Court of Human Rights in its Bryan judgment (para. 47), that the applicant's submissions were adequately dealt with point by point.

In the light of the above considerations, and the general considerations made by the European Court of Human Rights in the Bryan judgment, in particular 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 actual and desired grounds of appeal, the Commission finds that the scope of review of the High Court and the Court of Appeal 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.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)