AS TO THE ADMISSIBILITY OF

Application No. 30294/96
by Selina Caroline TURNER
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 26 February 1997, the following members being present:

Mrs. J. LIDDY, President
MM. E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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 26 September 1995 by Selina Caroline TURNER against the United Kingdom and registered on 26 February 1996 under file No. 30294/96;

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 citizen of the United Kingdom, born in 1972. She is a gypsy and lives in her own caravan on a plot of land - the former British Telecom depot in Ibsley - which she has occupied since 1993. She is represented before the Commission by Messrs. Ellis Jones, solicitors, of Bournemouth.

The particular circumstances of the case

The site occupied by the applicant lies within the area covered by the Avon Valley Local Plan. This plan was adopted on 17 June 1988 by the New Forest District Council ("the council"), acting under Section 14 of the Town and Country Planning Act 1971. Besides the other provisions, this Plan contains also policy H11 (Caravans):

"PERMISSION WILL NOT NORMALLY BE GRANTED FOR RESIDENTIAL CARAVANS AND MOBILE HOMES."

On 25 February 1994 the applicant applied for planning permission to site her caravan on the land. On 22 April 1994, the Council refused

the application, giving three reasons for the refusal:

1. the proposed development would introduce a new dwelling into an isolated position within the open countryside which forms part of the New Forest Heritage Area, and was contrary to the local plan and the structure plan;

2. new dwellings must be resisted in order to protect the countryside; the existing structures on the site were dilapidated or abandoned, and the proposed development would be detrimental to the character and appearance of the rural area;

3. the applicant's supporting information was not sufficient to justify an exception to the strong policies designed to resist inappropriate development in the Heritage Area.

The applicant appealed against the refusal under Section 78 of the Town and Country Planning Act 1990 ("the 1990 Act"). The Secretary of State referred her appeal to one of his inspectors for determination under Schedule 6 of the 1990 Act. The inspector referred to the various policy considerations, and also to the general provision of gypsy sites in the area. He did not consider that the possible need for more private gypsy sites was so special as to outweigh the conflict with general and local policies. He rejected the appeal on 17 October 1994.

The applicant applied to the High Court under Section 288 of the 1990 Act to quash the inspector's decision on several grounds. She claimed:

1) that policy H11 is a blanket policy against the provision of sites for gypsies;

2) that therefore it is partial and unequal and discriminatory against a national minority;

3) that the policy is contrary to common law and to Circular 1/94;

4) that the Council should not have adopted such a partial and discriminatory policy and therefore the policy H11 should be interpreted as not applying to gypsy caravans;

5) that the case should be decided by reference to Article 8 of the Convention.

The judge found that the inspector had been concerned and motivated by policies applying in the New Forest Heritage Area, i.e. preserving the landscape. He found no error in the inspector's interpretation of policy H11. As to the alleged discriminatory consequences of the application of policy H11, the judge noted that this question had not been raised before the planning authorities and the inspector and therefore it would not be appropriate for the High Court to consider it either. The judge also noted that the validity of local or development plans which emerge pursuant to statutory procedures and are statutorily adopted (like the Avon Valley Local Plan, of which the Policy H11 is a part) may not be questioned in any legal proceedings whatsoever. He also considered that the Policy H11 applies to all caravans and that the question of alleged discriminatory effects should have been raised before. As to the argument under the Convention, the judge noted that the Convention, not being incorporated into domestic law, may be deployed only for the purpose of resolving an ambiguity in English primary or subordinate legislation and that there was no ambiguity in any of the relevant statutory provisions arising in this case. The judge made reference to the Commission's Report in the case of Buckley (No. 20348/92, at that time still pending

before the Court). The judge considered that the factual circumstances of the cases were different and that the question whether the applicant would have a remedy under the Convention did not arise at that stage.

The High Court dismissed the applicant's application on 14 September 1995.

The applicant did not appeal to the Court of Appeal, following advice from her barrister that such an appeal would be hopeless.

On 13 April 1995 the Council had written to the applicant to inform her that enforcement action was being considered.

Relevant domestic law

A summary of the relevant domestic law and policies is included in the Buckley judgment (Eur Court HR, Buckley v. the United Kingdom judgment of 22 November 1996, to be published in Reports 1996, paras. 28-43).

The Town and Country Planning Act 1990 provides various ways of appealing the Secretary's of State decisions to the High Court, depending on the type of decision to be appealed. In the case of Bryan (Eur Court HR, Bryan v. the United Kingdom judgment of 22 November 1995, Series A no. 335-A) the appeal against an enforcement notice was based on section 289 of the Town and Country Planning Act. Section 289 provides for an appeal on a point of law.

In the present case, the applicant based her appeal against the refusal to grant planning permission on Section 288 of the 1990 Act which reads, so far as relevant, as follows:

"1. If any person -

(a) is aggrieved by any order to which this Section applies and wishes to question the validity of that order on the grounds -

(i) that the order is not within the powers of this Act, ...

he may make an application to the High Court under this section."

According to Halsbury's Statutes,

"An order or action will be beyond the powers of this Act, if (i) the Secretary of State has come to a conclusion to which he could not reasonably have come; (ii) if he has taken into account matters which he ought not to have taken into account; (iii) if he has failed to take into account matters which he ought to have considered; or (iv) if he has otherwise gone wrong in law. ... Where the jurisdiction to make an order depends on particular facts, the order may be quashed if there is no evidence to support those facts. ... An order or action will also not be within the powers of the Act where in the decision-making process there has been such a degree of unfairness as to amount to a departure from a rules of natural justice ..." (Halsbury's Statutes, 1990 Reissue, Vol. 46 Town and Country Planning, p. 834)

COMPLAINTS

The applicant alleges a violation of her right to lead her traditional gypsy lifestyle. She sees it as a part of the right to respect for her private and family life and her home and alleges violation of Article 8 of the Convention.

The applicant considers that the circumstances of the case have resulted in a violation of her right to the peaceful enjoyment of her possessions, her caravan in particular. For this reason she invokes Article 1 of the Protocol No. 1.

The applicant also alleges that policies of the public authorities, policy H11 in particular, have adverse, discriminatory effects on gypsies in general and the applicant's family in particular, as they prevent them from living in the area in which they have traditionally resided. She alleges that while some 80 percent of all planning applications are granted, the refusal rate for gypsies who have applied for permission is extremely high, perhaps 90%. In this connection she alleges a violation of Article 14 of the Convention in conjunction with Article 8 and Article 1 of the Protocol No. 1.

The applicant also complains that gypsies - being by tradition nomadic and often illiterate - are particularly prejudiced by the fact that there are no circumstances whatsoever in which Local Plan Policy can be challenged unless a challenge is made within 6 weeks of the formal adoption of the Plan. She alleges violation of Article 13.

Finally, the applicant alleges that she had no right or possibility of access to an independent tribunal of the issues of fact in her case, as the inspector who took a decision in her case is a civil servant and the High Court has jurisdiction to determine only the questions of law. She alleges a violation of the Article 6 para. 1 of the Convention in this respect.

THE LAW

1. The applicant claims that the circumstances of her case show a lack of right of access to an independent tribunal. She alleges a violation of the Article 6 para. 1 (Art. 6-1). This provision reads as follows:

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

It is not clear whether the applicant actually owns the land she lives on, but the use to which she can put her caravan is undoubtedly determined by the planning measures. The right to free enjoyment of possessions is a "civil" right within the meaning of the Article 6 para. 1 (Art. 6-1) of the Convention, and the Commission will assume that the proceedings before the planning authority and the subsequent appeals determined the applicant's civil rights and obligations.

As to compliance with Article 6 para. 1 (Art. 6-1) of the Convention, the Commission recalls where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6 para. 1 (Art. 6-1) in some respect, no violation of the Convention can be found if the proceedings before that body are 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) (Eur. Court HR, Bryan v. the United Kingdom judgment of 22 November 1995, Series A no. 335-A, paras. 39-47). In Bryan, the Court found that "the review by the Inspector does not of itself satisfy the requirements of Article 6 (Art. 6) of the Convention" (above, para. 38), and the Commission considers that the same structural lack of independence is present in the same case.

As to the appeals against the decisions of the Secretary of State, the Commission notes that in the case of Bryan, the statutory appeal was based on Section 289 of the 1990 Act, that is it was an appeal "on a point of law". In the present case, the statutory appeal

was based on Section 288 of the 1990 Act, that is, an appeal could be made on the ground that the order challenged was not within the power of the Act. Subsequent cases have established, as the note to Section 288 in Halsbury's Statutes indicates, that an order is not within the power of the Act when it is unreasonable, when irrelevant factors have been taken into account or relevant factors ignored, or if the order is otherwise wrong in law. Further, an order is not within the power of the Act if on the facts there is no evidence to support it or the proceedings are tainted by a such degree of unfairness as to depart from the rules of natural justice.

In terms of the scope of High Court's review of the inspector's decision, these grounds are indistinguishable from those in Bryan. Moreover, the comments the Court made in the case of Bryan on the safeguards available before the inspector and the subject matter of the decision appealed against apply mutatis mutandis to the present case.

As to the content of the dispute and the actual and desired grounds of appeal, the Commission notes that in the Bryan case, questions of fact had been raised but were not proceeded with. In the present case, the challenge to the inspector's (the Secretary of State's) decision was purely on grounds of the application of established policy to the uncontested facts of the case.

In these circumstances, and having regard to the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, the Commission considers that the scope of review of the High Court 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 further alleges violation of her right to respect for her private and family life and her home, invoking Article 8 (Art. 8) of the Convention. This provision reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The applicant was refused the planning permission which would allow her to live in the caravan on the land in question. She has also been warned about the possibility of enforcement action requiring removal of the caravan. The Commission accepts that there has been an "interference by a public authority" with the applicant's exercise of her right to respect for her home.

This interference was "in accordance with the law", namely Town and Country Planning Act 1990 and pursued the "legitimate aim" of preservation of the rural landscape.

As to the necessity for the interference, the Commission notes that whilst States have a margin of appreciation in assessing the necessity for measures which affect Convention rights, their discretion remains subject to review by the Convention organs for conformity with the requirements of the Convention. The margin in planning matters is wide (see Eur. Court HR, Buckley v. the United Kingdom judgment of

25 September 1996, Reports 1996, paras. 74-76).

In the present case, the procedural requirements of Article 8 (Art. 8) were met by the inspector in the case and the subsequent review by the High Court (see the above-mentioned Buckley judgment, para. 79).

It is not clear whether the applicant owns the land she lives on, but if she does not, the refusal of planning permission is more clearly justifiable than in the Buckley case. Even if the applicant does own the land, the land in question in the present case formed part of the New Forest Heritage Area, in which landscape considerations are likely to be of even more weight than in an area which has not been specially designated.

Further, the inspector had due regard to the problems for gypsies in finding suitable accommodation, but concluded (as did the inspector in the Bryan case) that those considerations could not outweigh the planning aspect.

Finally, and subsidiarily, the Commission notes that it does not appear that enforcement measures have in fact been brought against the applicant.

Taking all the circumstances of the case together, the Commission finds that the interference with the applicant's rights under Article 8 (Art. 8) of the Convention must be accepted as "necessary within a democratic society" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

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.

3. The applicant claims that gypsies are adversely affected by the policies and practices of the authorities in the field of planning. She alleges violations of Article 14 in conjunction with Articles 8 (Art. 14+8) of the Convention and 1 of Protocol No. 1 (P1-1), and of Article 13 (Art. 13) of the Convention.

The Commission cannot examine questions of a general policy nature. It finds, as the Court found in the Buckley case (para. 88), no appearance of the applicant being penalised or subjected to any detrimental treatment for attempting to follow a traditional gypsy lifestyle. Indeed, to the extent that gypsies are referred to in the various circulars, gypsies are treated better than other applicants for planning permission, as the authorities are exhorted to give special consideration to their needs. If the applicant's statistics on grants of planning permission are correct, the large number of refusals in gypsy applications is likely to be explained by the fact that (like the applicant) the request for permission is often for development in an area in which development is restricted.

The Commission finds that the applicant has not made out her allegation of discrimination.

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.

4. The applicant considers that her right to peaceful enjoyment of her possessions has been violated, and alleges a violation of Article 1 of Protocol No. 1 (P1-1).

The applicant has not substantiated that she has property rights to the land in question. Even if the land in question belongs to her, the Commission recalls that it has previously found that Article 1 of the Protocol No. 1 (P1-1) does not entitle a person to claim planning

permission to extend the permitted use of property (No. 20490/92, Dec. 8.3.94, D.R. 76-A, pp. 90, 108). As far as the caravan is concerned, the Commission considers that the applicant's freedom to enjoy possession of her caravan does not depend on the location of this caravan.

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.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber