CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 37538/97
by Dirk Jan VAN NUS
against the Netherlands

The European Court of Human Rights (First Section) sitting on 28 September 1999 as a Chamber composed of

Mrs E. Palm, *President*,
Mr J. Casadevall,
Mr L. Ferrari Bravo,
Mr C. Bîrsan,
Mr B. Zupančič,
Mrs W. Thomassen,
Mr T. Pantiru, *Judges*,

with Mr M. O'Boyle, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 8 July 1997 by Dirk Jan Van Nus against the Netherlands and registered on 28 August 1997 under file no. 37538/97;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Netherlands national, born in 1939 and living in The Hague. He is unrepresented.

The facts of the case, as submitted by the applicant, may be summarised as follows.

A. Particular circumstances of the case

The applicant was formerly resident in Rotterdam and employed as a civil servant in The Hague. He owns a small house in a rural part of the municipality of Anloo (province of Drenthe) which until the events complained of he used for recreational purposes. In 1991 he made arrangements with his then employer, the Ministry of Finance, which would enable him to take up residence there on a permanent basis and work from there.

Extensive rebuilding was required to make the house in Anloo fit for permanent habitation. The applicant sold his house in Rotterdam and rented a house near Anloo so as to be able to supervise the work.

The first plan

In early 1992 the applicant submitted a plan for extensive modifications to the municipal authorities of Anloo, who, having given their provisional approval, on 1 June 1992 forwarded it to the Provincial Executive (*Gedeputeerde Staten*) of Drenthe for their approval.

By letters of 16 July 1992 the Provincial Executive informed the applicant and the municipal authorities that they had decided to withhold their approval. It was noted that the house in its existing state had a surface area of some 136 m2 and a volume of approximately 350 m3, including its annexes (garage and storage area); according to the plan submitted it was to cover a surface of some 178 m2 and have a volume of approximately 800 m3, not including annexes. The local area development plan (*streekplan*), however, admitted of the extension of small houses to a surface area of no more than 100 m2 or a volume of no more than 450 m3; in other cases an increase in the surface area of no more than approximately 10% could be accepted.

In the subsequent objection proceedings, which will be described in greater detail below, the applicant stated that in actual fact the surface area covered by the house in its unmodified state was 154 m2 and its volume was 540 m3. This was accepted as established fact by the Provincial Executive.

The second plan

In the summer of 1992, even while the objection proceedings against the refusal of the first plan (see below) were still pending, the applicant submitted a second plan. It was based on the first plan, which had been modified somewhat in an attempt to make it more acceptable to the authorities. The difference was that a bay window provided for in the first plan was omitted, so that the surface area and volume were slightly reduced. The municipal authorities, having given their provisional approval, forwarded it to the Provincial Executive for approval. However, the Provincial Executive found that the reduction was quite

insufficient to meet the standards set by the local area development plan and took the view that the municipal authorities had forwarded it to them informally; that being so the Provisional Executive considered that no formal decision was required.

The third plan

Also in the summer of 1992 the applicant submitted a third plan to the municipal authorities. This plan provided for an extension of the surface area from 154 m2 to 165 m2. The municipal authorities gave their provisional approval and forwarded it to the Provincial Executive, which likewise gave its approval.

This plan was never carried out as the applicant found that it was, for financial reasons, not realisable. It was, however, never formally withdrawn either.

The fourth and fifth plans

After discussions with provincial officials the applicant submitted two further plans in 1993. These were apparently not formally decided on, the Provincial Executive taking the view that to do so was undesirable as long as the proceedings relating to the first plan had not been brought to a conclusion; in any case, they did not meet the standards set by the provincial Executive's local area development plan.

Proceedings before the Provincial Executive

On 11 August 1992 the applicant lodged an objection (*bezwaarschrift*) against the decision of the Provincial Executive to withhold approval of the first plan. He stated, *inter alia*, that the actual surface of the unmodified house was 154 m2 and the volume was 580 m3; the increase in the surface and volume of the house according to the plan was therefore, in relative terms, much less than had been assumed in the decision of 16 July 1992. It was in any event unreasonable, given the applicant's needs, to allow an increase of the surface area of only 10%: the applicant required office space sufficient to enable him to work at home.

The applicant wrote to the Provincial Executive on 10 September 1992 noting that he had received no formal decision as to the second plan. As to the third plan, which the Provincial Executive was prepared to approve, the applicant stated that the expense involved in carrying out this third plan was much higher than the value added to the house after modification would be; it would consequently be impossible to finance the work by means of a loan secured by a mortgage on the finished house.

On 28 September 1992 the applicant again wrote to the Provincial Executive, noting that he was living with his family in rented housing the lease of which was due to expire towards the end of the year. He asked for his objection to be dealt with as an urgent matter.

The Provincial Executive held a hearing on 9 November 1992. On 10 December 1992 they notified the applicant in writing of their decision. The applicant's objection against the rejection of his first plan was rejected on the ground that that plan exceeded the maximum allowed by the local area development plan. The Provincial Executive further

observed that the applicant's third plan had in the meanwhile been approved, and accepted that the applicant found that plan unsuitable and financially prohibitive. Although the applicant's difficulties were appreciated, they did not, in the Provincial Executive's opinion, justify a deviation from its policy as laid down in the local area development plan.

Proceedings before the Council of State

On 7 January 1993 the applicant lodged an appeal to the Judicial Division (*Afdeling Rechtspraak*) of the Council of State (*Raad van State*) against the rejection by the Provincial Executive of his first plan and the implied refusal of his second plan. He argued that the policy rule limiting the extension of existing houses in rural areas to no more than 10% was unreasonable and arbitrary and that his personal circumstances and needs had not been taken into account. He further stated that he had never received an official decision from the Provincial Executive concerning his second plan, he had only been told orally that the second plan had been considered as an informal submission; his letter of 10 September 1992 should therefore be considered an objection against an implied refusal and the decision of the Provincial Executive was therefore also to be seen as a rejection of the second plan.

The Provincial Executive submitted a written reply on 13 September 1993. They relied on their policy and on the fact that they had approved the applicant's third plan. This latter plan had not been realised, nor had it been withdrawn. They further considered it undesirable that there should be such a large number of concurrent planning proceedings.

On 1 January 1994 the General Administrative Law Act entered into force. The functions of the Judicial Division, which thereby became defunct, were vested in a new division of the Council of State, the Administrative Jurisdiction Division (*Afdeling bestuursrechtspraak*).

By a letter dated 27 December 1994 the registry of the Council of State informed the applicant that he had until 19 January 1995 to submit any further evidence or argument in writing.

A hearing took place on 13 May 1996 before a single-member Chamber of the Administrative Jurisdiction Division. The judge was a person known to the applicant. Their relationship had always been somewhat cool. The applicant did not challenge the judge, fearing that he would by so doing jeopardise his position, and the judge did not withdraw of his own accord. The applicant restated his arguments aforementioned. He further stated that, although he had in the meanwhile submitted further plans (the fourth and fifth plans), he wished to proceed on the basis of the first and second plans.

The Administrative Jurisdiction Division gave its decision on 11 February 1997. This decision was transmitted to the applicant two days later, on 13 February.

The Administrative Jurisdiction Division rejected the applicant's appeal in its entirety. It considered the appeal to be directed against the rejection of the first plan only, the second plan having merely been submitted informally. It found that the policy rule applied, that an extension of existing housing should not lead to an increase of more than 10% of the surface area covered by the building in question, was not unreasonable *per se*. Nor had the Provincial Executive acted unreasonably by not considering the applicant's personal needs and circumstances sufficiently cogent to override existing policy. The fact that the municipal

authorities had approved the applicant's first and second plans could not be decisive as the Provincial Executive had a responsibility of its own in planning matters. On the other hand, the applicant could not be blamed for submitting further plans, or for failing to act on the third plan, which had proved impracticable.

Relevant domestic law

According to Article 40 of the Housing Act (*Woningwet*), it is not allowed to build without planning permission of the municipal authorities (Mayor and Aldermen, *burgemeester en wethouders*) of the municipality concerned or to deviate from the terms under which such permission is granted.

Section 4a of the Planning Act (*Wet op de ruimtelijke ordening*) makes it possible for the provincial council (*provinciale staten*) to draw up local area plans (*streekplannen*). Such a plan sets out guidelines for development. Its execution is supervised by the Provincial Executive.

The local area plan is laid open for public inspection in the offices of the Provincial Executive and of the municipalities concerned (section 4a (5)).

According to section 10 of the Planning Act, the municipal authorities of municipalities have competence to draw up municipal land use plans (*bestemmingsplannen*) for the territory within their jurisdiction; they are required to do so for rural areas. Such plans must be approved by the Provincial Executive (section 11 (2)). The municipal area plan can include a provision according to which planning permission cannot be granted except with the approval of the Provincial Executive (sections 15 (2), 16).

Where a new municipal land use plan is being prepared, the municipal authorities may exempt applicants for planning permission from the requirement to conform to the existing municipal area plan; such exemption, however, cannot be granted without the prior approval of the Provincial Executive (section 19 (1)). The Provincial Executive has eight weeks to decide whether or not to grant approval (section 19 (2)).

At the relevant time, before the entry into force of the General Administrative Law Act, the relevant procedure was laid down in the Administrative Decisions (Appeals) Act (*Wet administratieve rechtspraak overheidsbeschikkingen*).

It was possible to file an objection (*bezwaar*) against a decision of an administrative body (section 7 (2)). If the administrative body had failed to give a decision within the time-limit specified for that purpose by law, or within a reasonable time if no time-limit was specified, it was possible to file an objection on the basis of an implied refusal (section 3). Such an objection was lodged in writing with the competent body (section 13). An appeal against the decision on the objection lay to the competent administrative tribunal (the Judicial Division of the Council of State, section 7 (1)).

If the Judicial Division received an appeal against a decision which could be objected against, the Judicial Division had to forward it to to the competent administrative body; it would then be dealt with as an objection (section 15 of the Administrative Decisions (Appeals) Act).

COMPLAINTS

The applicant complains, firstly, under Article 6 § 1 of the Convention that the Administrative Jurisdiction Division did not decide his case within a "reasonable time".

He complains, secondly, under Article 6 § 1 that he had no "access to a court" to contest the rejection of his second plan.

He complains, thirdly, under Article 6 § 1 that the single-judge Chamber of the Administrative Jurisdiction Division was not an "impartial tribunal".

He complains, fourthly, under Article 1 of Protocol No. 1 to the Convention that the rejection of his building plans constituted an unjustified interference with his right to the peaceful enjoyment of his possessions.

He complains, fifthly, under Article 6 § 1 of the Convention of the failure by the national authorities to give any formal decision on his fourth and fifth building plans, thereby denying him the possibility to submit any eventual refusal to the scrutiny of the competent judicial authority.

THE LAW

Article 6 of the Convention, in so far as it is relevant, provides as follows:

"**Article 6 – Right to a fair trial**

1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by an ... impartial tribunal ...

..."

Article 1 of Protocol No. 1 provides as follows:

"**Article 1 – Protection of property**

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."

1. The Court notes at the outset that the case concerns the determination of "civil rights and obligations" and that Article 6 § 1 is therefore applicable (see, among many other authorities, the Mats Jacobsson v. Sweden judgment of 28 June 1990, Series A no. 180-A, § 34).

The applicant appealed to the Jurisdiction Division of the Council of State on 7 January 1993. A decision was given only on 11 February 1997, that is more than four years later. No explanation for this lapse of time is apparent from the documents available to the Court.

The Court finds that it cannot, on the basis of the file, determine the admissibility of this complaint at this stage and considers that it is therefore necessary, in accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of this complaint to the respondent Government.

2. The applicant's complaint that he had no "access to a court" to contest the rejection of his second building plan is based on the Provincial Executive's decision to view this plan as having been submitted to merely "informally" by the municipal authorities. The view of the Provincial Executive was followed by the Administrative Jurisdiction Division of the Council of State.

The Court finds that it cannot, on the basis of the file, determine the admissibility of this complaint at this stage and considers that it is therefore necessary, in accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of this complaint to the respondent Government.

3. The applicant's complaint that the single-judge Chamber of the Administrative Jurisdiction Division was not an "impartial tribunal" is based on the fact that the judge in question knew the applicant personally and that their relationship had always been very cool.

The applicant did not challenge the judge, as he might reasonably have been expected to do if he had any real fears as to his impartiality. The Court therefore finds that the applicant has not exhausted the available domestic remedies on this issue (see the Barberà, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, § 59).

4. The applicant complains under Article 1 of Protocol No. 1 of what he considers the excessive rigidity with which the standards laid down in the local area development plan were applied in his case. The Provincial Executive had had insufficient regard for his personal needs. As regards protection of the general interest, he noted that local government officials had every opportunity to examine building plans for possible problems, and that moreover such plans were laid open for public inspection before a building permit was granted. It had to be assumed that criteria such as the one applied in the present case were in no way related to the particular circumstances of the persons concerned, but were based on "politically inspired ideas" of how individuals were to be housed and how much housing space was to be allotted them.

The Court considers that the withholding of approval for the applicant's first and second building plans amounts to "control of the use of property" and falls to be considered under the second paragraph of Article 1 of Protocol No. 1 (see the Allan Jacobsson v. Sweden (No. 1) judgment of 25 October 1989, Series A no. 163, § 54). For the requirements of that

Article to be satisfied, such an interference must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, among other authorities, the Velosa Barreto v. Portugal judgment of 21 November 1995, Series A no. 335, § 36).

As is well established in the Court's case-law, it is for the national authorities to make the initial assessment of the "necessity" for an interference, as regards both the legislative framework and the particular measure of implementation. Although a margin of appreciation is thereby left to the national authorities, their decision remains subject to review by the Court for conformity with the requirements of the Convention.

Town and country planning schemes involve the exercise of discretionary judgment in the implementation of policies adopted in the interest of the community. It is not for the Court to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases. By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation (*see, mutatis mutandis, the Buckley v. the United Kingdom judgment of 25 September 1996, Reports of Judgments and Decisions 1996-IV, § 75*).

The Court observes that as a matter of national law the applicant could have expected that approval of his building plans would be refused. Netherlands legislation provides for a local area development plan to be available for public inspection in the provincial capital and in the municipalities concerned; the Court therefore considers that the applicant could reasonably have been aware of the policy followed by the provincial authorities before deciding to move to the municipality of Anloo (*see, mutatis mutandis, the above-mentioned Allan Jacobsson (No. 1) judgment, loc. cit., § 61*).

It cannot make any difference in this regard that the municipal authorities had previously given their provisional approval to the applicant's plan, given that in planning matters they are subordinate to the provincial authorities.

It does not appear that the applicant's legitimate interests were overlooked. The Provincial Executive in fact considered the applicants personal needs and circumstances, but found them insufficiently cogent to override existing policy.

The Court is satisfied that in these circumstances the refusal of planning permission cannot be regarded as disproportionate.

In sum, the Court does not find that in the present case the national authorities exceeded their margin of appreciation. It follows that this complaint is manifestly ill-founded.

5. The applicant alleges that a formal decision regarding his fourth and fifth building plans was purposely withheld in order to compel him to withdraw the appeal against the refusal of his first plan. In his contention the absence of any formal decision made it impossible for him to exercise his procedural rights.

The Court notes that already at the time of the events complained of the procedural law in force equated a refusal to give a decision to a negative decision, so that effective legal remedies were in fact available. The applicant has not availed himself of these legal remedies and consequently has not exhausted them.

For these reasons, the Court, unanimously,

DECIDES TO ADJOURN the examination of the applicant's complaints that his "civil rights and obligations" were not determined within a "reasonable time" and that he was denied "access to a court" with regard to his second plan;

DECLARES INADMISSIBLE the remainder of the application.

Michael O'Boyle
Registrar

Elisabeth Palm
President