

In the case of Pullar v. United Kingdom (1),

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention (art. 43) for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr F. Gölcüklü,
Mr A. Spielmann,
Mr N. Valticos,
Sir John Freeland,
Mr M.A. Lopes Rocha,
Mr L. Wildhaber,
Mr J. Makarczyk,
Mr K. Jungwiert,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 24 January and 20 May 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

1. The case is numbered 20/1995/526/612. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court on 1 March 1995 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 22399/93) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by a British national, Mr Robert Pullar, on 26 May 1993.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 of the Convention (art. 6).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio

Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 5 May 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr A. Spielmann, Mr N. Valticos, Mr M.A. Lopes Rocha, Mr L. Wildhaber, Mr J. Makarczyk and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 29 September 1995 and the Government's memorial on 2 October 1995.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 January 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Ms S.J. Dickson, Foreign and Commonwealth Office, Lord Mackay of Drumadoon, Lord Advocate, Ms S. O'Brien, Advocate, Mr J.L. Jamieson, Scottish Office, Mr C. Baxter, Scottish Office,	Agent, Counsel, Advisers;
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(b) for the Commission

Mrs J. Liddy,	Delegate;
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(c) for the applicant

Mr D. Batchelor, Mr R. Carr, solicitor,	Counsel, Adviser.
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The Court heard addresses by Mrs Liddy, Mr Batchelor and Lord Mackay of Drumadoon.

AS TO THE FACTS

I. Particular circumstances of the case

6. The applicant, Robert Pullar, is a British citizen who was born on 9 October 1949. Prior to his conviction on 17 July 1992 he was an elected member of Tayside Regional Council, a local authority in Scotland.

A. The trial

7. On 13 July 1992 Mr Pullar and another member of the Council were brought before the Perth Sheriff Court for trial on a charge under section 1 (1) of the Public Bodies Corrupt Practices Act 1889. It was alleged that they had offered, in exchange for money, to vote for and to use their influence on the Council in favour of an application for planning permission made by Mr John McLaren, a partner in a firm of architects, and Mr Alastair Cormack, a partner in a firm of quantity surveyors. The latter two were the key prosecution witnesses.

8. One of the members of the public called for jury service at Perth Sheriff Court on the day of Mr Pullar's trial was Mr Brian Forsyth, a junior employee in Mr McLaren's firm, which employed fifteen people in total. He had started working there on

30 April 1990 and had been given notice of redundancy on 10 July 1992 to take effect on 7 August 1992.

9. Mr Forsyth and Mr McLaren walked to the court house together. Neither of them knew that Mr Forsyth might be selected to sit on the jury in Mr Pullar's trial, although they both knew that Mr McLaren was to give evidence in it.

When Mr Forsyth realised that he was in a pool of potential jurors who might be selected for the Pullar trial he informed the clerk of the court that he was employed by Mr McLaren's firm. The clerk asked him whether he knew Mr Pullar or the co-accused, or anything about the circumstances of the case. When Mr Forsyth replied that he did not, the clerk allowed his name to go forward for selection, and did not inform either the sheriff who was to preside over the trial, the Procurator-fiscal who was to prosecute, or the defence lawyers, about his conversation with Mr Forsyth.

10. Mr Pullar and his co-accused both pleaded not guilty, and the clerk accordingly selected a jury by random ballot in open court (see paragraph 19 below). Mr Forsyth's was one of the names picked and he was empanelled and sworn in with the rest of the jurors. The defence was presented with a list of the names, addresses and occupations of the jurors, but this did not include details of their employers (see

paragraph 19 below). The sheriff did not ask the empanelled jurors whether they knew of any reason why they ought not to serve in the trial. In 1992 there was no general rule of practice to that effect (see paragraph 21 below).

11. About an hour after the trial had commenced Mr McLaren looked into the courtroom and saw Mr Forsyth on the jury. He then informed the clerk about his connection with the latter. The clerk told him that Mr Forsyth had earlier disclaimed any knowledge of the defendants or of the circumstances of the case. The clerk then returned to the courtroom, again without informing the sheriff, Procurator-fiscal or defence lawyers about what had happened.

12. Mr McLaren and Mr Cormack both testified that the two defendants had solicited money from them, and their's was the only evidence to that effect. In his closing speech, counsel acting for Mr Pullar's co-accused asked the jurors to tell the court if they had any personal knowledge of Mr McLaren or Mr Cormack, but Mr Forsyth did not say anything at that stage.

13. At the end of the trial the sheriff directed the jury that it was their duty to assess dispassionately the credibility of all the witnesses whom they had heard. They were told that an accused is presumed to be innocent, and that the prosecution must prove the charge beyond all reasonable doubt. In addition, they were directed that conclusive evidence from two or more sources was necessary for a conviction.

On 17 July 1992 both defendants were convicted by a majority of the fifteen jurors. On 6 August 1992 they were sentenced to twelve months' imprisonment and found incapable of holding any public office for five years from the date of conviction.

B. The appeal

14. Mr Pullar's lawyers became aware of the connection between Mr Forsyth and Mr McLaren after the verdict. They wrote about it to the prosecuting authorities on 22 July 1992 and subsequently lodged an appeal against conviction and sentence in the High Court of Justiciary, on the grounds, inter alia, that the sheriff ought to have directed the jury at the start of the trial to inform the court if they had any personal knowledge of anyone named in the indictment, and that

Mr Forsyth's participation in the deliberations and verdict of the jury amounted to a miscarriage of justice.

15. When they received the letter of 22 July, the prosecuting authorities took a statement from Mr McLaren, part of which read:

"I can confirm that Brian Forsyth hadn't worked on the A85 related development (i.e. the subject of the trial) nor had I any reason to discuss it with him ... I had discussed the work with my colleagues but there would have been no reason why they would discuss this with Brian Forsyth who was a junior member of my firm.

I did not discuss my knowledge of the allegation against [Mr Pullar and the co-accused] with Brian Forsyth although a certain amount had been in the papers and I have no doubt that it would have been the topic of conversation within the office."

The prosecuting authorities did not originally intend to lay this statement before the High Court. However, on the first day of the hearing of the appeal it became apparent that the statement contained more details than were known by Mr Pullar's counsel. The decision was therefore taken to make the statement available to the High Court judges. A copy was also supplied to counsel for Mr Pullar and his co-accused on the first day of the appeal hearing. The latter had no opportunity to cross-examine Mr McLaren during the course of the appeal, but made no objection to the statement being used or challenge to its accuracy (see paragraph 23 below).

16. The appeal was heard on 5 and 12 February 1993, and dismissed on 26 February 1993.

Lord Hope, the Lord Justice General, commented that the clerk ought to have informed the sheriff about the connection between Mr McLaren and Mr Forsyth, and that if he had done so Mr Forsyth would probably have been excused under section 133 of the Criminal Procedure (Scotland) Act 1975 because there would have been cause for an objection to have been made by the defence under section 130 (4) of the same Act (see paragraph 20 below). However, a mere suspicion that a juror was biased was insufficient to justify quashing a verdict; it was necessary to prove that a miscarriage of justice had in fact taken place. There was no evidence to show that Mr Forsyth knew anything about the circumstances of the alleged offences, and in any case it could not be assumed that he would have ignored the evidence and the sheriff's directions and voted, in defiance of his oath, on the basis of any personal prejudice held by him.

Nonetheless, Lord Hope made a number of practice recommendations in order to avoid recurrence of this situation (Pullar v. Her Majesty's Advocate [1993] Scots Criminal Case Reports 514 - see paragraph 21 below).

17. Mr Pullar was taken immediately to Saughton prison and was obliged to forfeit his position on the Council. He was released on 1 October 1993.

II. Relevant domestic law and practice

A. The jury

18. In Scots criminal trials, a jury of fifteen non-legally qualified men and women have the role of deciding all issues of fact, including whether evidence is credible and reliable. The primary duty of the presiding sheriff (judge) is to direct the jury on the applicable law. The jury may give its verdict by a simple majority.

19. Section 3 of the Jurors (Scotland) Act 1825 provides for lists to be maintained of men and women who appear to be qualified and liable to serve as jurors.

For each day at which trials are due to take place at a Sheriff Court, the sheriff clerk prepares from these lists a "list of assize", containing the names, addresses and occupations of prospective jurors. The people on the list are then asked to attend court at the start of the session.

On that day, in accordance with section 129 of the Criminal Procedure (Scotland) Act 1975 ("the 1975 Act"), the sheriff clerk types on to a separate slip of paper the name of each person on the list of assize who is present in court. He then places all the slips of paper in a glass jar or box and, if the accused pleads not guilty, selects fifteen names at random by drawing the slips out of the jar. This procedure is carried out in open court in the presence of the accused and the defence and prosecution lawyers, and the defence is provided with the details from the list of assize in respect of each juror selected.

20. Section 130 (1) of the 1975 Act enables the defence and the prosecution in any trial to challenge three jurors, at the time of selection, without giving reasons. In addition, each side may challenge the selection of a juror by showing special cause, and the court on its own initiative may also excuse any juror at any time during the course of the trial (section 133 of the 1975 Act).

The High Court of Justiciary has ruled that a juror can be excused on limited personal grounds only, for example if he was personally concerned in the facts of the case, or closely connected with a party to the proceedings or with a witness (M. v. Her Majesty's Advocate [1974] Scots Law Times (Notes) 25).

By virtue of section 134 of the 1975 Act, a trial can continue with less than fifteen jurors, provided the number does not fall below twelve.

21. Prior to Mr Pullar's appeal, there was no standard procedure in Scots law or practice to assist in establishing whether there were any grounds on which a person selected for jury service ought to be excused. In its decision in Pullar v. Her Majesty's Advocate [1993] Scots Criminal Case Reports 514, the High Court of Justiciary gave guidance as to the steps which in future should be taken to avoid risk of prejudice to the accused. In particular, it suggested that potential jurors arriving at court ought to be told the names of the accused, the complainant and anyone else named in the indictment; that it should be open to the trial judge to ask jurors to inform him if they were aware of any reason why they ought not to serve; and that court staff who became aware of circumstances suggesting that a juror had personal knowledge of the case or might be suspected of being prejudiced, ought to draw this to the attention of the presiding judge immediately.

B. The prohibition of investigation into the workings of the jury

22. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 provides in section 8 (1):

"... it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings ..."

C. The admissibility of written witness statements

23. It is a general principle of Scots criminal law that a written

statement recording the evidence of a witness ("a precognition"), being hearsay evidence, is not admissible as evidence of that witness's testimony except in limited circumstances, none of which applied in this case. However, at an appeal hearing before the High Court of Justiciary the court can proceed on the basis of a written statement relating to matters of fact, if the contents of the statement are not disputed by any party to the proceedings and if they throw light on the subject-matter of the appeal.

PROCEEDINGS BEFORE THE COMMISSION

24. In his application of 26 May 1993 (no. 22399/93) to the Commission Mr Pullar complained that he did not receive a fair trial by an impartial tribunal, in violation of Article 6 para. 1 of the Convention (art. 6-1), and that he was not able to challenge witness evidence put before the High Court, in violation of Article 6 para. 3 (d) (art. 6-3-d).

25. The Commission declared the application admissible on 29 June 1994. In its report of 11 January 1995 (Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been a violation of Article 6 para. 1 of the Convention (art. 6-1) and concluded by twelve votes to one that it was not necessary to consider whether there had been a violation of Article 6 para. 3 (d) (art. 6-3-d). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment (1).

Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-III), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS MADE TO THE COURT

26. At the hearing on 22 January 1996 the Government, as they had done in their memorial, invited the Court to hold that there had been no violation of Article 6 paras. 1 or 3 (d) of the Convention (art. 6-1, art. 6-3-d).

27. On the same occasion, the applicant reiterated his request to the Court, stated in his memorial, to find that there had been a breach of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) and to award him just satisfaction under Article 50 (art. 50) of the Convention.

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 6 (art. 6) OF THE CONVENTION

A. Article 6 para. 1 (art. 6-1) taken alone

28. Mr Pullar complained that the presence in the jury of Mr Forsyth, an employee of one of the two key prosecution witnesses, meant that his case was not heard by "an independent and impartial tribunal" within the meaning of Article 6 para. 1 of the Convention (art. 6-1), which, in so far as it is relevant, provides:

"In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law ..."

This claim was contested by the Government but accepted by the Commission.

29. The Court notes, first, that it was not disputed that the present case concerned the determination of a "criminal charge", and that Article 6 para. 1 (art. 6-1) was therefore applicable. Similarly, it was common ground that the jury which convicted Mr Pullar formed part of a "tribunal" within the meaning of the same Article (art. 6-1) (see the Holm v. Sweden judgment of 25 November 1993, Series A no. 279-A).

It therefore remains only to be decided whether the jury constituted an "independent and impartial" tribunal. Like the Commission, the Court considers that the concepts of independence and impartiality are closely related, but that in this case it is more appropriate to examine the applicant's complaints in relation to impartiality.

30. It is well established in the case-law of the Court that there are two aspects to the requirement of impartiality in Article 6 para. 1 (art. 6-1). First, the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is to be presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see, for instance, the Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, p. 12, para. 28).

31. With regard to the first aspect, the applicant conceded that there was no available evidence of personal partiality on the part of the juror, Mr Forsyth. However, he asked the Court to abandon the presumption of subjective impartiality in this case because of the combined effects of section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, which, he claimed, prohibits any investigation into matters which occurred in the jury-room (see paragraph 22 above) and the fact that juries in the United Kingdom, as in other countries, give no reasons for their verdicts. As a result, there were no practicable or legal means open to him by which to adduce any evidence in rebuttal of the presumption.

The Government submitted that the presumption of personal impartiality should apply equally in this case. The Commission agreed, but observed that additional emphasis should be placed on the existence of objective guarantees in cases, such as the present, where it would not generally be possible to adduce evidence with which to counter the presumption.

32. The principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long established in the case-law of the Court (see, for example, the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, p. 25, para. 58). It reflects an important element of the rule of law, namely that the verdicts of a tribunal should be final and binding unless set aside by a superior court on the basis of irregularity or unfairness. This principle must apply equally to all forms of tribunal, including juries (see the above-mentioned Holm judgment).

Although in some cases, not least the present, it may be difficult to procure evidence with which to rebut the presumption, it must be remembered that the requirement of objective impartiality provides a further important guarantee.

33. With regard to the second requirement, the applicant argued that the circumstances surrounding the selection of Mr Forsyth as a juror in his case would have caused an objective observer to doubt the impartiality of the tribunal.

In support of this proposition he referred to the facts that both Mr Forsyth and Mr McLaren were sufficiently concerned about their

relationship to bring it to the attention of the sheriff clerk (see paragraphs 9 and 11 above), and that the High Court confirmed that, had the connection become known to the sheriff in the course of the trial, Mr Forsyth would probably have been discharged from the jury (see paragraph 16 above). Thus, the defence was deprived of its right to object to Mr Forsyth's presence by the failure of the sheriff clerk to inform the appropriate persons.

Furthermore, it was reasonable to suppose that Mr Forsyth had formed a view about the credibility of Mr McLaren prior to the trial, as a result of working in the same firm as him. In addition, Mr McLaren testified in his statement that the allegations against Mr Pullar "would have been the topic of conversation within the office" (see paragraph 15 above).

34. The Commission was also of the opinion that there were justifiable grounds on which to doubt the impartiality of the tribunal.

It found it significant that Mr Forsyth would probably have been discharged from the jury if the sheriff had known of his connection with Mr McLaren. It also agreed with the applicant that an objective observer would have presumed that Mr Forsyth had more than a casual acquaintance with Mr McLaren after working in the same small firm as him for over two years. Although Mr Forsyth was only one of fifteen jurors, his influence might have been decisive, and he could have taken the sheriff clerk's failure to act as a tacit permission to rely upon his prior knowledge.

35. The Government submitted that the fact that Mr Forsyth worked in the same firm as Mr McLaren would not in itself have been sufficient to give rise to a legitimate doubt about the tribunal's impartiality. It had to be borne in mind that Mr Forsyth held a junior position in the firm, had not worked on the project in question and, as he told the sheriff clerk, had no personal knowledge of the two defendants or of the circumstances of the case (see paragraph 9 above).

Furthermore, Mr Forsyth was only one of fifteen jurors. Each of these jurors swore an oath to give a verdict in accordance with the evidence led at trial. At the close of the trial, the sheriff directed them that they had to reach verdicts based on the evidence that they had heard, and that evidence from two or more sources must implicate the accused beyond reasonable doubt before a verdict of guilty could be returned (see paragraph 13 above). There was no reason to believe that either Mr Forsyth or any of the other jurors would have disregarded their oath or the sheriff's directions.

36. In the view of the Court it is by no means decisive that, as the High Court of Justiciary observed (see paragraph 16 above), the sheriff would probably have dismissed Mr Forsyth from the jury had he known about the connection between the latter and Mr McLaren. It is natural that a presiding judge should strive to ensure that the composition of the jury is beyond any reproach whatsoever, at a time when this is still possible, before or during the course of the trial. However, once the trial was over and a verdict had been given, it became material whether Mr Forsyth's continued presence on the jury constituted a defect grave enough to justify setting aside that verdict. It remains therefore to be considered whether his presence constituted a defect sufficient to raise a legitimate doubt as to the impartiality of the tribunal.

37. It is recalled that Mr Pullar's misgivings as to the impartiality of the tribunal were based on the fact that one member of the jury, Mr Forsyth, was employed by the firm in which the prosecution witness, Mr McLaren, was a partner. Understandably, this type of connection might give rise to some anxiety on the part of an accused (see, *mutatis mutandis*, the *Sramek v. Austria* judgment of 22 October 1984, Series A no. 84, pp. 19-20, paras. 41-42). However,

the view taken by the accused with regard to the impartiality of the tribunal cannot be regarded as conclusive. What is decisive is whether his doubts can be held to be objectively justified (see, for example, the Remli v. France judgment of 23 April 1996, Reports of Judgments and Decisions 1996-II, p. 574, para. 46).

38. The principle of impartiality is an important element in support of the confidence which the courts must inspire in a democratic society (see the above-mentioned Sramek judgment, p. 20, para. 42). However, it does not necessarily follow from the fact that a member of a tribunal has some personal knowledge of one of the witnesses in a case that he will be prejudiced in favour of that person's testimony. In each individual case it must be decided whether the familiarity in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal.

39. In the present case, Mr Forsyth, a junior employee within Mr McLaren's firm, had not worked on the project which formed the background to the accusations against Mr Pullar and had been given notice of redundancy three days before the start of the trial (see paragraphs 8 and 15 above). On these facts, it is by no means clear that an objective observer would conclude that Mr Forsyth would have been more inclined to believe Mr McLaren rather than the witnesses for the defence.

40. In addition, regard must be had to the fact that the tribunal offered a number of important safeguards. It is significant that Mr Forsyth was only one of fifteen jurors, all of whom were selected at random from amongst the local population. It must also be recalled that the sheriff gave the jury directions to the effect that they should dispassionately assess the credibility of all the witnesses before them (see paragraph 13 above), and that all of the jurors took an oath to a similar effect.

41. Against this background, Mr Pullar's misgivings about the impartiality of the tribunal which tried him cannot be regarded as being objectively justified.

There has therefore been no violation of Article 6 para. 1 of the Convention (art. 6-1) so far as the applicant's first complaint is concerned.

B. Article 6 paras. 1 and 3 (d) taken together (art. 6-1, art. 6-3-d)

42. The applicant also complained that the statement of Mr McLaren which was prepared by the prosecution before the hearing of the appeal (see paragraph 15 above), was produced to the High Court of Justiciary without his being afforded the opportunity to test its veracity by examination or cross-examination, in violation of Article 6 para. 3 (d) of the Convention (art. 6-3-d). This paragraph (art. 6-3-d) provides:

"Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"

The Commission decided that it was not necessary to examine this complaint in view of its finding of a violation of Article 6 para. 1 (art. 6-1).

43. The Government explained that, when the statement was produced,

there were a number of options open to Mr Pullar's counsel. He could have objected to the statement being seen by the High Court judges; he could have agreed that they should see it whilst reserving his position as to its accuracy; he could have asked for Mr McLaren and other witnesses to be called to give evidence before the court; or applied to have a reporter appointed, who could have taken evidence from Mr McLaren and others. Since his counsel elected to take none of these steps, the applicant could not complain that he had been denied his Convention right to examine witnesses (see paragraph 15 above).

44. The applicant, however, submitted that the statement was produced to the High Court before he was given the opportunity either to read it or to object to it (see paragraph 15 above).

45. The Court observes that the guarantees in paragraph 3 of Article 6 (art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1). For this reason, it considers it appropriate to examine this complaint under the two provisions taken together (art. 6-1, art. 6-3-d) (see the *Artner v. Austria* judgment of 28 August 1992, Series A no. 242-A, p. 10, para. 19).

Although the High Court did not hear Mr McLaren in person, he should, for the purposes of Article 6 para. 3 (d) (art. 6-3-d), be regarded as a witness - a term to be given an autonomous interpretation - because his written statement was produced to the court which took account of it (*ibid.*).

46. Mr McLaren's statement was not taken by the prosecuting authorities with the intention of placing it before the High Court. This step was only taken when it became apparent that the information contained in it might be helpful to the judges hearing Mr Pullar's appeal (see paragraph 15 above). This procedure was in accordance with the domestic law which provides that, at an appeal hearing before the High Court, the court can rely upon a written witness statement if its contents are not disputed by a party to the proceedings (see paragraph 23 above).

Most importantly, the Court has regard to the fact that a number of courses of action were open to the applicant's counsel when the statement was produced. For example, he could have objected to it being seen by the judges; reserved his position as to its accuracy; or called for Mr McLaren and other witnesses to give oral evidence either before the High Court or a reporter appointed by it (see paragraphs 23 and 43 above). However, Mr Pullar's counsel chose, at the material time, not to take any step to prevent the statement being accepted at face value by the High Court (see paragraph 15 above). In these circumstances, it cannot be said that the applicant was denied his rights under Article 6 para. 3 (d) (art. 6-3-d) as a consequence of the manner in which the appeal hearing was conducted (see, *mutatis mutandis*, the *Stanford v. the United Kingdom* judgment of 23 February 1994, Series A no. 282-A, p. 11, para. 31).

Accordingly, the Court finds that there has been no violation of Article 6 paras. 1 and 3 (d) taken together (art. 6-1, art. 6-3-d).

FOR THESE REASONS, THE COURT

1. Holds by five votes to four that there has been no violation of Article 6 para. 1 (art. 6-1) in relation to the composition of the jury;
2. Holds unanimously that there has been no violation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) in relation to the witness evidence produced to the High Court of Justiciary.

Done in English and in French, and delivered at a public

hearing in the Human Rights Building, Strasbourg, on 10 June 1996.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the partly dissenting opinion of Mr Ryssdal and Mr Makarczyk, joined by Mr Spielmann and Mr Lopes Rocha is annexed to this judgment.

Initialed: R.R.

Initialed: H.P.

PARTLY DISSENTING JOINT OPINION OF JUDGES RYSSDAL AND MAKARCZYK,
JOINED BY JUDGES SPIELMANN AND LOPES ROCHA

In our view, there has been a violation of Article 6 para. 1 of the Convention (art. 6-1).

The main issue here is not the impartiality of the juror, Mr Brian Forsyth, but the conduct of the judicial organs and their failure to secure the obligation to ensure the proper selection of the jury.

When proposed for selection as a juror in this case, Mr Forsyth did what could be expected of him by informing the sheriff clerk about the fact of his employment by the Crown witness, Mr McLaren. Here the clerk committed his first error, which probably determined his further conduct: he asked Mr Forsyth whether he personally knew the accused or anything about the circumstances of the case and when Mr Forsyth answered that he did not, he was in fact deciding that the latter was qualified to serve as a juror. However, as the appeal court clearly indicated, the decision on such a vital issue should have been left to the presiding judge (the sheriff). The clerk did not inform either the sheriff, the Procurator-fiscal who was to prosecute, or the defence lawyers of his conversation with Mr Forsyth, thus depriving the defence of their right to object to his serving on the jury. Later on, the sheriff clerk again failed to inform anyone when told by the Crown witness, Mr McLaren, of his connection with Mr Forsyth.

These problems would not have arisen if the list of names of potential jurors, which was provided to the parties, had contained details of their employment, or if the sheriff had asked the empanelled jurors whether they knew of any reason why they ought not to serve in the trial.

On appeal, Lord Hope, the Lord Justice General, recognised that the clerk ought to have informed the sheriff about the connection between Mr McLaren and Mr Forsyth and that, had he done so, Mr Forsyth would almost certainly have been excused under section 133 of the Criminal Procedure (Scotland) Act 1975. In addition, the court gave guidance as to the steps which should be taken in future to avoid such a risk of prejudice to the accused. One of these steps was the obligation imposed on court staff to inform the presiding judge of any circumstances suggesting that a juror might have personal knowledge of the case. In our view this amounts to an implicit recognition that in the instant case the sheriff clerk failed in his duties.

It is important to note that the jury convicted Mr Pullar by a majority, rather than unanimously. The applicant could reasonably have considered that Mr Forsyth's role was central to the formation of that majority.

Consequently, we consider that the applicant was objectively justified in having doubts as to the impartiality of the jury which convicted him, and the requirements of Article 6 para. 1 of the Convention (art. 6-1) regarding an impartial tribunal were not met.

On the other hand, for the reasons given by the majority of the Court, we do not consider that there has been a violation of paragraph 3 of Article 6 (art. 6-3).