COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

EUROPEAN COMMISSION OF HUMAN RIGHTS

Or. English

Application No. 7598/76

Joseph KAPLAN

against

The United Kingdom

Report of the Commission

(Adopted on 17 July 1980)

Strasbourg

Strasbourg, 6 February 1981

Application N° 7598/76

by

Joseph KAPLAN

against

the United Kingdom

68.580
06.2

This publication contains the report of the European Commission of Human Rights drawn up in accordance with Article 31 of the Convention for the Protection of Human Rights and Fundamental Freedoms, relating to the application (N° 7598/76) lodged with the Commission by Mr. Joseph KAPLAN against the United Kingdom.

This report was transmitted to the Committee of Ministers on 1st September 1980.

As the case was not referred to the European Court of Human Rights, it was for the Committee of Ministers to decide, under the provisions of Article 32, paragraph 1 of the Convention "whether there has been a violation of the Convention".

The decision of the Committee of Ministers was taken by Resolution DH (81) 1 of 23 January 1981, the text of which is reproduced at page 91 of the present publication.

The Committee of Ministers also authorised publication of the Commission's report on this case.

I. REPORT OF THE COMMISSION

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I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

The substance of the application

2. The applicant, Mr. Joseph Kaplan, is an Israeli citizen born in 1932. He has his permanent residence in Tel Aviv, Israel but at the time of submitting his application was living in London. By profession he is a managing director of insurance companies. He is represented by MM. Stilgoes, solicitors, of London.

3. Early in 1974 the applicant acquired control of an insurance company in the United Kingdom, Indemnity Guarantee Assurance Limited. On 4 November 1975 the Secretary of State for Trade served notices on the applicant and the company under S.38 of the Insurance Companies Act 1974 to the effect that he was considering exercising his powers under S.29 of the Act to impose restrictions on the company's business. The ground was that it appeared that the applicant was not a fit and proper person to be a controller of the company. Particulars of this ground were set out. Essentially it was alleged that the applicant had misrepresented the value of some property in the company's accounts. After written and oral representations had been made on behalf of the applicant, the applicant was advised that the Secretary of State found him not to be a fit and proper person to be a controller of the company. On 13 February 1976 the Secretary of State served a notice on the company under S.29 of the Act imposing restrictions on its ability to enter into or vary insurance contracts.

4. The applicant maintains that the matters in issue should, under Art. 6 (1) of the Convention, have been decided by a court. He submits that the civil rights and obligations of himself and the company were determined without a public hearing before a court and also maintains that the allegations against him amounted in substance to a criminal charge. He alleges that Art. 6 was thus applicable and was breached. He also invokes Art. 13 of the Convention.

Proceedings before the Commission

5. The application was introduced with the Commission on 25 July 1976 and registered on 26 July 1976. On 19 May 1977 the Commission decided in accordance with Rule 42 (2) (b) of its Rules of Procedure to give notice of the application to the respondent Government and invite them to submit written observations on its admissibility. The

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observations of the Government were submitted on 2 August 1977 and the applicant's observations in reply were submitted on 30 September 1977. By letter of 31 October 1977 the respondent Government requested the opportunity to make further submissions at a hearing on admissibility and merits after judgment had been delivered by the European Court of Human Rights in the König Case. The Commission decided to adjourn the application pending judgment in the König Case. On 13 July 1978, following the said judgment, it decided in accordance with Rule 42 (3) of its Rules of Procedure to invite the parties to appear before it at a hearing on admissibility and merits.

6. The hearing took place on 14 December 1978. The applicant was represented by Sir Frederick Corfield Q.C., Mr. Nigel Murray, barrister-at-law and Mr. C.C.K. Grainger, solicitor, of MM. Stilgoes. He was also present in person. The respondent Government were represented by Mr. D.H. Anderson, Legal Counsellor at the Foreign and Commonwealth Office as their Agent, Mr. H.K. Woolf, barrister-at-law, Mr. N.D. Bratza, barrister-at-law, MM. G.E. Gammie and J.H. Wilkinson of the Treasury Solicitor's Department and MM. R.F. Fenn and M.J. Starforth of the Department of Trade. Having considered the parties' submissions the Commission decided, on the same date, to declare the case admissible since it considered that it raised important and complex issues under Art. 6 of the Convention (1).

7. Written observations on the merits of the case were submitted on behalf of the applicant on 3 May 1979 and on behalf of the respondent Government on 7 August 1979.

The present Report

8. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. G. SPERDUTI, Acting President (Rule 7 of the Rules of Procedure)
C.A. NØRGAARD
F. ERMACORA
E. BUSUTTIL
B. DAVER
R.J. DUPUY
S. TRECHSEL
B.J. KIERNAN
N. KLECKER
M. MELCHIOR
J.A. CARRILLO

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(1) See Decision on Admissibility, Appendix II.

9. The text of the Report was adopted by the Commission on 17 July 1980 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2).

10. A friendly settlement of the case has not been reached and the purpose of the present Report, pursuant to Art. 31 of the Convention, is accordingly:

(1) to establish the facts; and

(2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

11. A Schedule setting out the history of proceedings before the Commission and the Commission's Decision on Admissibility in the case are attached hereto as Appendices I and II. An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document (Appendix III).

12. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

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II. ESTABLISHMENT OF THE FACTS

13. The facts of the case are not generally in dispute between the parties.

A. Domestic law and practice

14. Insurance business in the United Kingdom is regulated primarily by the Insurance Companies Act 1974 ("the 1974 Act"). This Act consolidated relevant provisions of the Insurance Companies Act 1958, the Companies Act 1967 and the Insurance Companies (Amendment) Act 1973. The 1967 Act had introduced provisions empowering the Board of Trade to impose restrictions on the conduct of business by an insurance company if one of its officers or controllers appeared not to be a "fit and proper person" to be associated with the Company. The relevant powers of restriction and control were extended and strengthened by the 1973 Act. The 1967 and 1973 Acts were passed in the wake of the collapse of a number of insurance companies. Two of these collapses (the Fire, Auto and Marine Insurance Company in 1967 and the Vehicle and General Insurance Company in the early 1970s) had affected very substantial numbers of policy-holders.

15. S.2 of the 1974 Act provides that only certain specified classes of body or person may carry on insurance business in Great Britain. These include a body corporate authorised by the Secretary of State (for Trade) to carry on insurance business in accordance with S.3 (1) (b) of the Act. SS. 4-7 of the Act provide that in certain circumstances the Secretary of State may not issue such an authorisation. Thus under S.4 certain conditions concerning the company's margin of solvency must be met. S.5 provides for a minimum share capital and under S.6 the Secretary of State must be satisfied as to the adequacy of reinsurance arrangements. S.7 (1) of the Act provides as follows:

> "The Secretary of State shall not issue an authorisation in respect of any body ('the relevant body') if it appears to him that any director, controller or manager of that body is not a fit and proper person to be a director, controller or manager of that body, as the case may be."

Sub-sections (2) - (6) of S.7 define the terms "controller" and "manager". In particular under sub-section (2) the term "controller" includes a managing director or chief executive of either the relevant body or an insurance company of which it is a subsidiary.

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It also includes a person in accordance with whose instructions the directors of the body or a parent body are accustomed to act (1) and any person able to control the exercise of one-third or more of the voting power at a general meeting of the body or its parent (2).

16. Part II of the 1974 Act (SS.12 - 61) contains extensive and detailed provisions for the regulation of insurance companies carrying on business in Great Britain. In particular S.13 of the Act provides that certain accounts must be prepared with respect to each financial year of the company, including a balance sheet and profit and loss account. Under S.18 copies of such accounts must be deposited with the Secretary of State within a prescribed period. Under S.61 (1) of the Act, any person who "(c) causes or permits to be included in (i) any document ... required to be deposited with the Secretary of State ... a statement which he knows to be false in a material particular or recklessly causes or permits to be so included any statement which is false in a material particular, shall be guilty of an offence". Under S.62 (2) a person guilty of such an offence is liable on conviction on indictment to imprisonment for up to two years or to a fine or to both, and on summary conviction to a fine up to £400. Under S.81 of the Act the Secretary of State is empowered to institute prosecutions and in practice he acts as the prosecuting authority for offences under the Act.

17. Regulations made under the Insurance Companies legislation contain detailed provisions as to the content of company accounts. Regulation 3 of the Insurance Companies (Accounts and Forms) Regulations 1968, provided that there should be annexed to the balance sheet a certificate signed by the secretary or manager and at least two directors of the company stating inter alia:

> "(a) whether or not, in the opinion of those signing the certificate, the value of the company's assets at the end of the financial year was in the aggregate at least equal to the aggregate of the amounts thereof shown in the balance sheet and, if for the purpose of giving this opinion any of the assets dealt with in the statement or report prepared in pursuance of paragraph 10 of Schedule 1 hereto have been valued at other than their market value, the basis on which each such valuation was made."

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(1) S.7 (2) (c) (i).
(2) S.7 (2) (c) (ii).

18. The Companies Act 1948 also contains provisions governing directors' responsibilities in connection with company accounts. Under S.148 the directors must cause a balance sheet to be made out every year and laid before the company general meeting. S.149 provides that this "shall give a true and fair view of the state of affairs of the company as at the end of its financial year". The Eighth Schedule to the Act contains detailed provisions as to the contents of such accounts. Under S.149 (6), a director commits an offence, punishable on summary conviction, if he "fails to take all reasonable steps" to secure compliance with the requirements of the Act. It is a defence to show that he reasonably believed that some other competent and reliable person was charged with, and in a position to discharge, the duty.

19. Also contained in Part II of the 1974 Act are various powers of intervention by the Secretary of State (SS.28 - 41). In particular S.29 of the Act empowers him to impose restrictions on a company's ability to enter into new business, and is in the following terms:

> "Restrictions on new business
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> 29.- (1) The Secretary of State may require a company
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> (a) not to effect any contracts of insurance or contracts of insurance of a specified description;
> (b) not to vary any contracts of insurance of a specified description, being contracts effected in the course of carrying on general business and in force when the requirement is imposed;
> (c) not to vary in such a manner as to increase the liabilities of the company any contracts of insurance of a specified description, being contracts effected in the course of carrying on long term business and in force when the requirement is imposed.
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> (2) A requirement under this section may apply to contracts of insurance whether or not the effecting of them falls within a class of insurance business which the company is for the time being authorised to carry on."

This power is exercisable where grounds specified in S.28 of the Act are present. In particular under S.28 (1) (e) the Secretary of State may exercise it where "... there exists a ground on which he would be prohibited, by section 7 above, from issuing an authorisation with respect to the company if it were applied for". Thus restrictions

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on new business may be imposed under S.29 where it appears to the Secretary of State that a controller of the company is not a "fit and proper person" to hold that position. There are a variety of other grounds on which the power is exercisable, including for instance the ground that it appears desirable to protect policy-holders against a risk that the company will be unable to meet its liabilities (S.28 (1) (a)).

20. S.38 of the Act lays down certain procedures which must be followed by the Secretary of State in the exercise of his powers under S.29. Where he is considering exercising the power on the ground that a controller of the company is not a "fit and proper person", he must, by virtue of sub-sections (1) and (2) of S.38, serve on both the company and the controller concerned, written notices stating the following:

- that he is considering exercising the power and the ground on which he is considering exercising it;

- that written representations may be made (by the company or controller as the case may be) within a period of one month to the Secretary of State and, if so requested, oral representations to an officer of the Department of Trade appointed for the purpose by the Secretary of State.

By virtue of S.38 (3) such notices must also "give particulars of the ground on which the Secretary of State is considering the exercise of the power".

21. S.40 (1) of the Act empowers the Secretary of State in certain circumstances to rescind or vary requirements made under inter alia S.29 of the Act. S.40 (4) provides that notice of the imposition, rescission or variation of any requirement made under S.29 "shall be published by the Secretary of State in the London and Edinburgh Gazettes and in such other ways as appear to him expedient for notifying the public". The Secretary of State is not required to, and in practice apparently does not, publish details of the grounds for making such requirements (e.g. that he has found a particular individual not to be "fit and proper").

22. Requirements imposed on a company under S.29 of the Act only affect the ability of the company to enter into new business. Although the company may by virtue of S.29 (1) (b) and (c) be required not to vary existing contracts, the Secretary of State has no power under the section to annul or himself to vary such contracts or to require the company to cease business.

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23. Where he exercises his powers under S.29 on the ground that a controller of the company is not a "fit and proper person", the position of the controller is not as such affected, although under S.69 (1) (a) of the Act it is an offence not to comply with such a notice. However, the Secretary of State has no power in law to require a person to give up his position as controller, or to give up any office or employment he may hold in the company or any shareholding or other position of influence. Nor does the making of such a requirement as such prevent the individual concerned from taking up a different position in the insurance business. However the appointment of a new managing director or chief executive of an insurance company is subject to the approval of the Secretary of State under S.52 of the 1974 Act and he also has powers, under S.53, to object to a person becoming controller of an insurance company. The powers of objection in SS.52 and 53 are exercisable on the ground that the person concerned appears not to be "fit and proper". In practice in deciding the matter the Secretary of State would take into account previous findings concerning the individual's fitness, although they would not necessarily be decisive. The question in each case is whether he is "fit and proper" to hold the particular post in question.

24. No statutory definition is given of the term "fit and proper". The respondent Government have stated (1) that it is difficult to generalise on the factors which make a person fit and proper. Primary factors are honesty, integrity, knowledge and experience. Other special factors related to insurance business generally or the particular post may come into account. Generally for a person to be found unfit, his defects should threaten prejudice to the policyholders' interest.

25. The Secretary of State is also empowered to impose a variety of other requirements on companies. He may impose requirements concerning the investments a company may make (S.30). He may require that a specified proportion of its assets (up to the amount of its domestic liabilities) be maintained in the United Kingdom (S.31). He may require that assets subject to such a requirement be held by an approved person as trustee for the company. He may impose limits on premium income (S.33), require actuarial investigations to be made (S.34) and require the company to furnish various information (SS.35 and 36). The powers to impose such requirements are exercisable on the grounds specified in S.28. They are not subject to the procedural provisions of S.38 of the Act, which applies only to requirements made under S.29. They are subject to rescission, variation etc. under S.40.

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(1) Written observations on admissibility.

26. There is no statutory right of appeal against a decision of the Secretary of State to impose requirements on a company under S.29 of the Act or otherwise. Nor is there any right of appeal against any finding of an individual's "unfitness" where this is the basis on which the requirement is imposed. However a decision to impose requirements (under S.29 of the Act in particular) would be subject to judicial review by the High Court in the exercise of its general supervisory jurisdiction. In particular it could be challenged in an application to the Divisional Court for the prerogative order of certiorari. This would, if successful, result in its being quashed.

27. In such proceedings the Court exercises a limited power of review. It does not act as a court of appeal on the merits of the impugned administrative decision and has no power to substitute its own decision for that of a Minister conferred with power to decide. There is a considerable body of case-law concerning the grounds on which the Court may intervene when reviewing administrative decisions. Broadly speaking it has power to quash a decision on the ground that the Minister has acted in excess of his lawful powers, that he has erred in law or has acted in breach of the rules of natural justice, which have been interpreted as requiring a Minister to act "fairly".

28. The parties are agreed that the following is an accurate statement of relevant law:

> "The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and it must not act arbitrarily or capriciously." (1)

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(1) S.A. de Smith, Judicial Review of Administrative Action, 3rd Edition, p. 252.

Breach of these principles would afford grounds for intervention by the court. If the court considers that the Minister has come to a decision which he could not reasonably have come to on the basis of the material before him, it can quash it.

29. The quashing of a ministerial decision does not prevent the Minister from taking a new decision to the same effect provided he does so in accordance with law.

The factual basis of the applicant's complaint

30. The applicant has been involved with the insurance industry for some years. From 1954 to 1959 he worked in the Budget Bureau of the Israel Ministry of Finance, being in charge of the budget of the Ministry of Finance and, later, that of another Ministry. He studied insurance in London in 1959. In 1960-61 he headed the Insurance Department of the Government of Israel. In 1962 he was appointed Managing Director of the Yuval Insurance Co. of Israel Ltd. and, in 1974, its Chairman.

31. At about the beginning of 1974 the applicant acquired a controlling interest in M. Benady & Company (Gibraltar) Ltd. ("Benady"), which company at the same time acquired a majority shareholding in Castle Reinsurance Co. Ltd. of Gibraltar ("Castle"). Castle had a wholly owned subsidiary, Indemnity Guarantee Assurance Ltd. ("IGA") which in turn had a wholly owned subsidiary, Valbrey Holdings Ltd. ("Valbrey").

32. The applicant's investment interest in IGA as at February 1976 arose through his holding 82% of the shares of Benady (17% in his own name and 65% through a nominee company, Haslev Nominees Ltd.). Benady, according to the applicant, held over 90% of the shares in Castle, which holding was subsequently increased to 99%. Castle owned IGA. The applicant was also chairman and managing director of IGA. He has at all material times been a "controller" of IGA for the purposes of the 1974 Act.

33. A number of requirements were imposed on IGA by the Secretary of State in a notice dated 7 December 1973 in view apparently of the change of control. These included restrictions on the investments the company could make and on the premium income it could receive. The notice also imposed requirements that assets to a value of not less than 40% of the amount of the company's domestic liabilities were to be maintained in the United Kingdom and that all such assets should be held by an approved trustee.

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34. In early 1974 a decision was taken to buy an office building at 64 Clifton Street, London, for the use of IGA. The property was the only substantial asset of a company called H. Costa & Co. Ltd. It was decided that IGA's subsidiary Valbrey should acquire the share capital of Costa at a price related to the value of the property. Consent of the Secretary of State was required for this transaction in order to comply with the requirements imposed on the company.

35. A report and valuation by a firm of chartered surveyors, M. & Son, dated 14 February 1974, valued the property at £300,000. Consent to the transaction was given by the Secretary of State subject to certain conditions including a requirement that a further valuation of the property be made shortly before contracts were exchanged. The same firm of surveyors on 2 July 1974 valued the property at £275,000. A copy of this valuation was supplied to the Department of Trade. In July 1974 the share capital of Costa was acquired by Valbrey for some £220,000, which price took into account a contingent capital gains tax liability of £55,000 payable by Costa on any realisation of the office premises at £275,000.

36. On 27 November 1974 the applicant wrote to the Department of Trade on various matters concerning IGA. He stated in this letter (which was mainly concerned with other matters) that IGA was going to ask a surveyor to give a further valuation of the Clifton Street premises as at the end of 1974, though he did not believe that this would be much different from the valuation submitted on purchase of the property.

37. In February 1975 the applicant had a discussion with the company secretary of IGA and other persons concerning the information required to complete the year-end accounts and balance sheet of IGA. The company secretary stated that a valuation of the Clifton Street premises was still awaited. The applicant expressed surprise at this and suggested that it was unnecessary since a valuation had been obtained less than six months previously. There was discussion as to whether such a valuation was required under requirements issued by the Secretary of State in December 1973 or under new regulations (the Insurance Companies (Valuation of Assets) Regulations 1974) which had been published but were not yet in force. The applicant considered that a new valuation was not required. He had no recollection of having undertaken to have a valuation made. It is explained that he did not have the letter of 27 November 1974 in mind at the relevant time. In the end it was agreed that instructions which had been given to M. & Co. for a new valuation should stand, although the applicant thought the exercise unnecessary and did not expect any material change in value.

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38. Subsequently M. & Son gave a verbal valuation of the property to representatives of IGA. They stated that it was worth £125,000 or £140,000 depending on which of two alternative bases of valuation was used. They finally adopted the figure of £140,000. The applicant was unable to understand how the value could have dropped to this extent. The major fall in property values had occurred prior to the purchase. He gave instructions that M. & Son should be asked not to issue a written valuation until he had had an opportunity to meet them. On 13 March 1975 a meeting was held between the applicant and other representatives of IGA and M. & Son. Questions were raised concerning the quality of the comparative evidence said to have been used in reaching the valuation. After the meeting the applicant instructed his solicitors to write putting certain questions to M. & Son, and also to consider the possibility of legal action against them.

39. On 16 April 1975 a meeting of the board of IGA was held. No written response had been received from M. & Son and the position regarding the valuation was thus still in the air. Discussion took place as to what value for the property should be inserted in the accounts to the end of 1974. The applicant was firmly of the view that the correct value was the value at which the property had been acquired. M. & Son had assured IGA that the July valuation had been carefully carried out and that the comparative evidence they had used had been full and appropriate. There was no indication of any further catastrophic drop in property values during the second half of 1974. The valuation was sufficiently recent to comply with the 1974 Regulations. The applicant therefore expressed himself willing to sign the relevant certificate to the accounts, to the effect that in his opinion the value of IGA's assets as at 31 December 1974 was in the aggregate at least equal to the aggregate of the amounts thereof shown in the Balance Sheet, on the basis that the value of the property was stated as £220,000.

40. The applicant's fellow directors and IGA's auditors were uneasy about thus certifying the accounts without some qualification. There was then discussion as to whether the position could be adequately covered by a notice in the accounts. IGA's Secretary then suggested that the matter might be covered by a contingency insurance policy which would protect the building against any loss in value from its acquisition worth of £220,000. It was finally agreed that cover should be taken out to run from a date a month or two before the Balance Sheet date to cover the premises for loss in value up to a maximum of £80,000 from the acquisition value of £220,000. The representative

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of IGA's auditors indicated that this was satisfactory from an accounting point of view and that the auditors would be able to sign the required certificate to the effect that it was reasonable for IGA's directors to have given their certificates concerning the aggregate value of the Company's assets. The applicant suggested that IGA's parent company, Castle, should offer to reinsure the risk, though there was no proposal that the primary insurer should be bound to effect such reinsurance.

41. The suggestion that cover should run from a date prior to the balance sheet date was not the applicant's although he considered this perfectly proper. The applicant was unaware of any intention that the date of issue of the policy should itself be backdated. From 20 April to 1 May 1975 the applicant was away. On his return he was told that the policy had been issued, but he did not see it, relying on the responsible officers of the company to have dealt with the matter correctly. On 8 May 1975 there was a further Board Meeting at which the company's accounts and balance sheet were unanimously approved and signed. The value of the Clifton Street property was inserted as £220,000 and the applicant signed a certificate under the 1968 Regulations (see para. 17 above) in the following terms:

> "We certify that in our opinion the value of the company's assets as at 31 December 1974 was in the aggregate at least equal to the aggregate of the amounts thereof shown in the balance sheet."

42. In September 1975 the Department of Trade wrote to IGA asking for valuations of the open market value of the Clifton Street property as at 31 December 1974, 31 March 1975 and 31 July 1975. On 3 October 1975, M. & Son supplied valuations showing the property to be worth £140,000 at each of the first two dates and £145,000 on the third. These valuations were passed to the Department with an explanation that there was a contingency policy to cover the risk of loss of value.

43. After the start of the Department's investigation the applicant learned that the policy was dated as being issued on 17 December 1974. He also learned, at a meeting on 15 October 1975, that a letter had been written by an officer of IGA on 5 May 1975 purporting to state that the policy had been issued in December 1974. He had never seen this before and found it difficult to understand why it was written, since he did not know of any proposal that it should be dated with any date other than the one when it was issued, i.e. April or early May 1975.

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44. On 4 November 1975 the Department of Trade served notices on the applicant and IGA under S.38 of the 1974 Act stating that the Secretary of State was considering exercising his power under S.29 of the Act in respect of IGA. The ground on which he was considering doing so, and particulars of that ground, were set out in similar terms in both notices. The relevant parts of the notice to IGA were in the following terms:

> "2. The ground on which the Secretary of State is considering exercising the power referred to in paragraph 1 of this notice is that there exists a ground on which he would be prohibited by section 7 of the Act from issuing an authorisation with respect to the Company if it were applied for, namely that it appears to him that Mr. Joseph Kaplan a controller of the Company is not a fit and proper person to be a controller of the Company.
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> 3. Particulars of the ground referred to in paragraph 2 of this notice are
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> (a) that as Managing Director of the Company Mr. Kaplan signed the accounts of the Company for the financial year ending 31 December 1974 knowing, or having reason to believe, that the value assigned therein to certain freehold property, namely, 64 Clifton Street, London EC2, on the basis of a valuation as at 2 July 1974, was misleading or inaccurate as a valuation of that property at 31 December 1974;
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> (b) that consequent upon a decision of a meeting of directors held under Mr. Kaplan's chairmanship on 16 April 1975 a contract of insurance in respect of the aforesaid property, purporting to be effective from 31 October 1974 and purporting to be entered into on 17 December 1974, was arranged when Mr. Kaplan knew, or had reason to believe that such insurance was improperly to be made effective from October 1974 for the purpose of representing that the value of the aforesaid property as at 31 December 1974 was, by virtue of such insurance, higher than its true value as at 31 December 1974."

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45. On 3 December 1975 solicitors acting for IGA and the applicant wrote to the Secretary of State making written representations relative to the notices and stating their desire to make oral representations. The written observations indicated inter alia that the applicant was willing to answer the allegations against him in the criminal courts. The covering letter asked for details of how the Secretary of State intended to proceed in the matter, in the light of the written representations.

46. By letter of 11 December 1975 the Department of Trade replied to the applicant's query concerning the procedure as follows:

> "The question in issue when the fitness of a person is considered under the Insurance Companies Act 1974 is solely whether that person is not fit and proper in relation to the particular company and, if he is not fit and proper, whether restrictions ought to be imposed on the company. Where circumstances which cast doubt on the fitness of a person as a director, controller or manager of an insurance company come to the attention of the Secretary of State he is under a duty to consider those circumstances and to take such action under the Act as he may consider appropriate. The Secretary of State's present advice is that that duty is not affected by the fact that those circumstances may also give rise to criminal proceedings. But he will, of course, give due consideration to any further representations you may wish to make on this point.
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> The Secretary of State must make a fair and proper assessment in accordance with the Act of the matters before him. A determination by him is not in the nature of criminal proceedings and the rules of evidence and the burden of proof pertaining to criminal proceedings are not applicable to his determination. In order to arrive at a proper and fair assessment he will ensure that the substance of any allegations, whether arising out of the investigation conducted by the Department or out of any statement made by persons other than your clients or out of representations made by other persons served with similar notices, on which

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> your clients ought properly to be allowed to comment will be disclosed to your clients and their representations thereon will be considered. The procedure prescribed in the Act for considering the fitness of a person does not allow for the testing of "evidence" by cross-examination. I confirm that your clients are at liberty to call other persons to speak on their behalf at the oral representations and that questions may be put to these persons by your clients."

47. On 17 December 1975 oral representations were made on behalf of IGA and the applicant. They were heard by a Mr. Morris, head of the Insurance Division at the Department of Trade who was the officer appointed to hear them under S.38 of the 1974 Act. He was accompanied by three other officials of the Department. The representations were made by counsel acting on behalf of the applicant and company and a statement was also made by an associate of the applicant's as to his general business integrity. Written statements by IGA's Secretary and Auditor were submitted. The hearing took place in private.

48. The applicant's counsel made various observations on the form of the proceedings, including the lack of opportunity to examine or cross-examine witnesses. He suggested that since the matters alleged against the applicant were criminal offences, under S.61 of the 1974 Act and S.149 of the Companies Act 1948 (see paras. 16 - 18 above) the applicant should first be tried in a criminal court. As to the substance of the allegations the case for the applicant was, in summary, that he had acted entirely properly in the matter having followed the advice of respectable and trustworthy persons expert in both the insurance and accounting fields. He had not been involved (and was not alleged to have been involved) in the backdating of the insurance policy (as opposed to the cover - which was proper). The officer hearing the representations put a number of points to the applicant's counsel, concerning various matters including the applicant's experience in the property market, the validity of the insurance policy and other matters.

49. On 11 February 1976 the Department of Trade officer advised the applicant at a meeting that the Secretary of State found him to be an unfit and improper person to be a controller of an insurance company.

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50. By notice dated 13 February 1976 the Secretary of State, acting under S.29 of the 1974 Act, imposed the following requirements on IGA:

"(a) not to effect any contracts of insurance, other than contracts of reinsurance to which the Company is the insured party;

(b) not to vary any contracts of insurance being contracts effected in the course of carrying on general business and in force when this Requirement is imposed;

(c) not to vary in such a manner as to increase the liabilities of the Company any contracts of insurance, being contracts effected in the course of carrying on long term business and in force when this Requirement is imposed."

51. The manner in which the applicant's case was dealt with was described in a letter dated 16 August 1976 from the then Secretary of State for Trade to a Member of Parliament who had corresponded with him on behalf of the applicant. This stated inter alia as follows:

"The comprehensible submissions made by Mr. Kaplan's counsel included certain legal points, all of which were very carefully considered. After the hearing a detailed report was prepared which, together with our transcript of the hearing and the written representations, was submitted to Ministers who took the final decision in the light of the representations that had been made. I should emphasise that the statutory procedure applicable in these cases only provides for the making of oral and written representations by the person concerned and does not envisage anything in the nature of legal proceedings in a court of law with evidence on oath, cross-examination and burden of proof. It can, of course, be held that matters of this kind ought to be argued out in court and should not be subject to administrative decision; that is not what the Act provides - and as you will know, Lord Hailsham, when Lord Chancellor expressed the view that this 'is not a justiciable issue of any kind ... it is a subjective judgment made by an instructed person upon a question of experience'(HL Hansard 22 March 1973, Col. 907)."

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The report prepared for the Secretary of State was not disclosed to the applicant. According to the applicant it has also been made clear by the Department of Trade that the Secretary of State did not find it necessary to decide on the validity or effectiveness of the contingency insurance policy when reaching his conclusion as to the applicant's fitness.

52. According to information submitted on behalf of the applicant, legal proceedings were instituted by IGA against M. & Son in connection with their valuation of the Clifton Street property. The proceedings were settled on payment of £80,000 by M. & Son to IGA.

53. At about the same time as the above-mentioned requirement was made under S.29 of the 1974 Act, the Secretary of State also made certain variations, under S.40 of the Act, of the requirements imposed in December 1973. In particular by notice dated 11 February 1976 the amount of assets required to be maintained by the Company in the United Kingdom was increased from a minimum of 40% to a minimum of 100% of the amount of the Company's domestic liabilities. This amount was subsequently reduced to 50% by notice dated 26 February 1976. A requirement was made that the whole of the assets in question should be held by an "approved trustee", Abchurch Nominees Ltd. for IGA, in accordance with S.32 of the 1974 Act.

III. SUBMISSIONS OF THE PARTIES

54. The parties' submissions concerning the facts of the case and the relevant domestic law are, for the most part, incorporated in the preceding section of the Report. The substance of the remaining written and oral submissions made by them in the course of the proceedings before the Commission is set out below.

A. Preliminary submissions concerning evidence and procedure

1. The applicant

55. In his written observations on the merits the applicant stated that he wished the opportunity to place further evidence before the Commission relating to the merits of his case in the widest sense, including matters relating to the manner in which the Secretary of State's decision was reached. However access to the report made by the officials to the Secretary of State was denied him. Being unaware of its contents he was prejudiced in making appropriate submissions to the Commission. In considering whether "civil rights and obligations" within the meaning of Art. 6 (1) of the Convention had been at stake, not only was the relevant legislation of importance but also the administrative practice of the State. It was thus incumbent on the Commission to investigate the report to see whether the respondent Government were themselves treating the matters complained of as affecting his civil rights and obligations.

56. The applicant therefore asked the Commission to direct the Government to produce copies of the report together with related correspondence and memoranda. He further requested that following the Commission's ruling and the production of documents (if so directed), he should be granted leave to place further evidence and observations on the merits before the Commission.

2. The respondent Government

57. The Government submitted that the principal issue in the case, as formulated by the Commission in its decision on admissibility, was an issue of law concerning the proper construction of Art. 6 (1). The relevant facts and domestic law were not generally in dispute.

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It was thus unnecessary for the Commission to require the production of further evidence. No clear indication was given by the applicant as to the issues to which the material whose production he sought might be relevant, or as to how its production would assist the Commission in performing its functions under the Convention. The "merits" of the Secretary of State's decision were irrelevant to the question whether Art. 6 (1) was applicable or not. So also were any views held by officials as to whether the applicant's "civil rights and obligations" were affected. The applicant's request for the production of this material should therefore be rejected.

B. Submissions concerning the effects of the Secretary of State's action and the position of the applicant

1. The applicant

58. The finding of "unfitness" against him, and the notice of requirements in respect of IGA had, in the applicant's submission, extensive practical effects. He faced what was tantamount to a bar to his practising in the insurance market.

59. The notice of requirements, by prohibiting IGA from taking on new business, made it impossible for the applicant to carry on insurance business through the medium of the company. The effect of the notice was that all policies renewable on an annual basis came to an end within a year. There would thus be a complete run-down of that side of the business. The company had had little long-term business. It was thus put in the position of retaining its liabilities in respect of claims arising from existing policies, whilst being denied the opportunity of obtaining any further premium income.

60. The applicant's credibility in the insurance industry was also grievously affected and his reputation damaged. Even if (as here) the Secretary of State did not publish his reasons for making the notice of requirements, it would be inferred either that the company lacked satisfactory financial resources or that its controller was guilty at least of moral turpitude. The only grounds on which such action could be taken were highly uncomplimentary to the management, i.e. the applicant. The imputation cast by the issue of a notice could only be alleviated by the company giving publicity to the reasons for it, since business in the insurance world depended on trust and reputation.

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61. It was unrealistic to suggest that the applicant would find any position in the insurance industry that was not subject to the approval of the Secretary of State. It was also difficult to see what he could do to remove the finding of unfitness. Whilst he could remain as controller of IGA, it was not helpful to stay in charge of a company subject to requirements such that it was bound to run down and eventually wind up.

62. It was not accepted that the notice had had no effect on property since in another notice the company had been obliged to increase the amount of assets in the hands of a trustee (see para.53 above).

63. The finding of unfitness against the applicant, which had had to be made before the notice of requirements was issued, in itself involved imputations as to his conduct and reputation. It meant that the Secretary of State considered him to have been guilty of malpractice in the conduct of IGA. This would be assumed by the public to be criminal, subject only to possession of the necessary criminal intent. The only alternative inference would be gross incompetence.

2. The respondent Government

64. The Government observed that "fitness" of a controller or officer was only one ground on which the powers of intervention were conferred. An examination of the other grounds showed that they were all directed to secure the protection of the public against the improper conduct of insurance business.

65. The powers conferred on the Secretary of State did not extend to the revocation of licence to conduct business as an insurance company. Restrictions under S.29 did not affect existing contractual relations. The company would, and in this case had, continued to trade. The exercise of the powers did not seal the company's fate in view of the power to rescind or vary requirements contained in S.40 of the Act. Where restrictions were imposed on "fitness" grounds and the management of the company changed, there might be a strong prospect that they would be lifted or relaxed.

66. No restriction was imposed directly on the individual controller. He was entitled to retain his position as such and to conduct insurance business through the company, subject to the restrictions imposed on it. He could seek a position elsewhere in the industry.

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If he sought a position subject to the approval of the Secretary of State, the latter would have to take into account the facts relating to his previous controllership, but his application would not necessarily fail. Each case would have to be considered on its merits and with regard to all the circumstances relating to the new appointment.

67. The Secretary of State's powers relating to the "fitness" of individuals were restricted to specified senior positions. He had other powers of control over appointments. His powers under the Act also related only to insurance companies, not to other aspects of insurance business such as insurance-broking and loss adjusting.

68. The applicant's suggestion that he had been rendered virtually unemployable in the industry was unfounded in law or in practice. In law he was entitled to remain a controller and managing director. He was entitled, subject to authorisation, to take up a similar position in another company. He could also take up any other position free from control of the Secretary of State. As to the practical effects, the only publicity as to the grounds for the notice had come from the applicant himself.

C. The applicant's position as a "victim" under Art. 25 of the Convention

69. When the case was first communicated to the respondent Government for observations on its admissibility, the Commission requested the Government to comment on the question whether the applicant could claim to be an indirect victim of any violation of the company's rights under Art. 6 in the course of the relevant proceedings.

70. In their observations on admissibility the respondent Government observed that the applicant was not claiming expressly to be an indirect victim of any violation of IGA's rights under Art. 6. It might be that a violation of the company's rights (which they denied) could have repercussions for him as the director and as a major shareholder in companies which in turn owned shares in IGA, directly or indirectly. The Commission had previously held that an individual who owned 91% of a company's shares could bring an application in respect of an alleged violation of the company's

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rights (1). The applicant's interest in IGA appeared to be less than this and the Government therefore reserved their position on this issue under Art. 25 of the Convention.

71. The applicant, in his observations on admissibility, submitted that he could claim to be the indirect victim of a violation of IGA's rights.

72. Neither party has made any further submissions on this question at subsequent stages in the procedure.

D. Submissions concerning Art. 6 of the Convention

1. The applicant

(a) General submissions on compliance with Art. 6 (1)

73. The applicant submitted that in the relevant proceedings there was a determination of his civil rights and/or obligations and that there was also, in substance, a criminal charge against him. However he did not receive a public hearing before an independent and impartial tribunal established by law.

74. In deciding whether to exercise his powers under the 1974 Act the Secretary of State had to rely on the advice of officials whose duty encompassed considering whether the powers should be invoked, making the requisite investigations and deciding whether a prima facie case for issuing the statutory notice existed. The officials who heard the representations here had included the official who signed the preliminary notice, who was inevitably virtually in the position of prosecutor, and the head of the insurance division, who was responsible for advising the Secretary of State. The officials did not decide the matter themselves. They could not be said to be either impartial or independent or to constitute a tribunal. The Secretary of State never saw or heard the applicant. The only material available to him was derived from his advisers' report, which was not made available to the applicant. He could not be described as independent or impartial or a tribunal either.

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(1) Application No. 1706/62, 21 Collection of Decisions, p. 34.

(b) "Determination of civil rights and obligations"

75. The applicant submitted that his position was essentially the same as that of the applicant in the König Case (1).

76. The concept of "civil rights and obligations" was, as the Court had held, an autonomous one (2). Just as Dr. König had done, the present applicant had been claiming the right to continue professional activities, running an insurance company, for which the necessary authorisations had been obtained. The proceedings had therefore concerned private rights (3). Whilst the Court had said (para. 89) that the legislation of the State concerned was not without importance in deciding whether civil rights and obligations were in issue, this remark was relevant only to extending the rights given under the Convention. It could not limit the operation of the Convention. The autonomous character of the protection extended by Art. 6 (1) overrode the deficiencies of United Kingdom law in failing to provide protection granted under legal systems of other States party to the Convention. The König Judgment showed that such protection was extended in the Federal Republic of Germany. If the scope of protection under the Convention could be cut down by domestic legislation, it would become worthless.

77. The Government had submitted that there was no right in domestic law to operate an insurance business. However SS.2 & 3 of the 1974 Act preserved rights to continue to carry on such business where this was enjoyed prior to the introduction of the authorisation procedure. The placing of questions of fitness with the Secretary of State could not transform the nature of the entitlement to carry on such business.

78. The conduct of insurance was the carrying on of a lawful business which created rights inter partes falling within the "rights and obligations" envisaged under the Convention. Both the continuance and commencement of such a business fell within the scope of the Convention..

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(1) Eur. Court of Human Rights, Judgment of 28 June 1978, Series A, Vol. 27; Report of the Commission adopted on 14 December 1976.

(2) König Case, Judgment, para. 89.

(3) Ibid., paras. 91 and 92.

79. The right to carry on the practice of medicine in England was similarly circumscribed by legislation. Part IV of the Medical Act 1956 conferred privileges on registered medical practitioners. Under S.28 (1) entitlement to hold certain appointments was confined to fully registered practitioners. Part V of the Act governed loss of the status of registration and provided for an enquiry before a Disciplinary Committee and appeal to the Privy Council. This amounted to recognition of the status of medical practitioner as equating with rights and obligations. The applicant's position as controller of an insurance company was analagous and he sought not to be deprived of it without similar safeguards. It was irrelevant that a "notice of requirements" under the 1974 Act acted on the company, whereas medical disciplinary proceedings were taken directly against the doctor.

80. By contrast, the position under the Gaming Acts was different since they concerned the grant of licences to do something that was generally illegal. It was conceded that conducting a casino would not amount to a right or obligation recognised under domestic law. However carrying on an insurance business did since it was an inherently legal activity.

81. So far as domestic law had any role to fulfil in the characterisation of rights under the Convention, it was convenient to regard "rights and obligations" as equating with "rights and obligations to carry on an activity not prohibited under the general law". So far as "rights and obligations" were an autonomous concept, then under the Convention case-law the applicant's rights and obligations had been affected. The Commission should therefore conclude that "rights " and/or "obligations" of the applicant and/or IGA were affected.

82. The applicant did not dispute that only those rights and obligations which were directly affected by a decision fell within the scope of Art. 6 (1). However, the Court's Judgment in the Ringeisen Case (1) was no authority for the Government's argument that only pre-existing rights and relationships were relevant. Referring to para. 94 of the Judgment he submitted that the entering into of future contracts was a right within the protection of Art. 6 as much as the protection of existing contracts. Alternatively, as a person authorised to be a controller of an insurance company he had acquired a "status" which carried a civil right. Removal of this status affected the civil right of the applicant, namely the status itself.

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(1) Judgment of 16 July 1971, Series A, No. 13.

83. The Government's suggestion that since existing contracts were not affected by a S.29 notice no civil right was affected was disingenuous. Continuance of premium income was essential to the continued operation of any insurance undertaking. Being denied the opportunity of obtaining it, the company could not be said to be able to continue professional activities for which the necessary authorisation had been obtained.

84. The Government's argument that Art. 6 did not apply to the right to continue in business and enter into new contracts appeared to be on the basis that where such rights were controllable in the public interest by administrative action, i.e. the State was acting jure imperii, they took on the character of public rights. But this was the precise argument raised by the German Government in the König Case and rejected by both the Commission and Court. This case was an almost exact parallel to König, save that it was even stronger in that the special responsibilities attending to the practice of medicine were not involved. The Court's observations in paras. 91 and 92 of the König Judgment concerning the rights to continue to practise medicine and run a clinic could be directly applied mutatis mutandis to the facts of the present case, concerning the applicant's rights to continue to run an insurance company and continue to exercise the insurance profession.

85. The applicant further submitted that his reputation had been adversely affected. His position in this respect was the same as that referred to in the first majority opinion of the Commission in the König Case (Report, para. 78), namely that there had been not only an administrative decision in the public interest but also a finding as to his professional ability or good conduct, an essential part of his reputation. Art. 6 (1) was applicable for this reason also.

86. "Obligations" had also been in issue here as in König, although no clear distinction had been drawn there between rights and obligations. Authorisation of the company had involved the right to take on obligations in insurance contracts. These had been affected by the decision. Statutory obligations were also inherent in the grant of authorisation. The Insurance Companies (Accounts and Forms) Regulations 1968 (S.I. 1968 No. 1408) imposed certain obligations concerning the certification of accounts. It could not be disputed that there had been a technical breach of the provisions (Regulation 3 (a)) dealing with certificates relating to the value of assets. The issue was not therefore whether there had been a breach of the obligations but whether the breach had been committed in good faith and in the belief that it was justified in the circumstances.

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87. No statutory obligation had been referred to in the grounds which the Secretary of State gave in the notice of 4 November 1975 for believing the applicant not to be fit and proper. However the conduct complained of would have amounted to a breach of such an obligation. In the absence of reasons for his decision, which he was not obliged to give, it was not clear whether he had purported to find the applicant guilty of a breach of the accounts regulations or whether his decision had been based solely on the view that the insurance device was in some way too devious for him to continue to have confidence in the applicant. However the inference must be that the grounds had been held established in toto and insofar as the decision was based on the first ground (signature of the accounts) in the notice, there was a clear inference that the Secretary of State had held that the relevant regulation had not been complied with.

88. The rights in issue had been "civil" for the reasons given. They were partly contractual and partly property rights. The applicant and IGA had been prevented from entering into further insurance contracts. The company had been forced to make further deposits with trustees. Further the rights in issue had been akin to property rights in the same way as the Court had held Dr. König's rights to be.

89. As to the question whether there had been a "determination" of civil rights or obligations, the Government's argument based on the fact that the case related to a decision of administrative authorities (rather than a court as in the König Case or "regional commission" as in the Ringeisen Case) must fail. The very fact that the United Kingdom did not possess administrative courts and that there was no hearing by an independent and impartial tribunal established by law, was the gravamen of his complaint. Not only did he contend that this was in breach of Art. 6 (1) but also that the absence of a domestic remedy capable of affording him redress for this breach (as found in the Commission's decision on admissibility) was contrary to Art. 13. The Government's submission did not take sufficient account of the autonomous nature of "determination" and attempted to pray in aid the very breach of the Convention complained of. The lack of a domestic tribunal could not change the characterisation of what was clearly a "determination".

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(c) "Determination of any criminal charge"

90. The allegations in the notice of 4 November 1975 had been of criminal offences, in particular under S.61 of the 1974 Act. The notice alleged "knowledge" or "reason to believe" the impropriety of what had been done. Had it not been intended to allege criminal offences, it could have been framed otherwise, for instance on the basis that the inaccuracy or misleading nature of the accounts had resulted from negligence or incompetence. It was irrelevant that criminal proceedings would be a separate matter. What was relevant was the reality of the situation. The only issue had been whether the applicant knew or had reason to believe that what was done was wrong. Because no charge had been brought he had had no chance to clear his reputation and his civil rights and obligations had been drastically curtailed.

91. Overall the Secretary of State's supervisory powers were of a disciplinary nature, as in the Engel Case. As the Court had held in Engel (Judgment, para. 91), States could not by treating the criminal as disciplinary avoid the application of Art. 6 (1). The offence here was a mixed offence. By treating it as a disciplinary offence the Secretary of State was bringing a criminal charge without going through a procedure which would enable guilt or innocence to be proved.

(d) Conclusion under Art. 6

92. The applicant submitted for these reasons that Art. 6 (1) had been applicable and had not been complied with in the present case.

2. The respondent Government

(a) "Determination of civil rights and obligations"

93. The Government submitted (i) that no "rights" or "obligations" were affected, (ii) that any rights or obligations which were affected were not "civil" in character and (iii) that in any event there was no "determination" of rights or obligations. In support of these submissions they advanced the following arguments:

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- i. "Rights" and "obligations"

94. The concept of "civil rights and obligations" was autonomous and not to be interpreted exclusively by reference to domestic legislation. Nevertheless such legislation was not without importance in deciding whether "civil rights" were involved (König Judgment, para. 89). The same applied when the question was whether the "rights" or "obligations" claimed to have been determined were rights or obligations at all. This was confirmed by the König Judgment where it was emphasised that the rights to practise medicine and run a clinic were guaranteed by Art. 12 of the Basic Law and it was not contested that the proceedings had concerned "rights" under domestic law (paras. 22 and 87).

95. The substantive content and effects under domestic law of an alleged "right" or "obligation" were of general relevance to the determination of the issues under Art. 6, and the limitation sought to be placed by the applicant on ghe generality of the Court's observations (to the effect that they were only relevant to extending Convention rights) was unjustified.

96. Insofar as the applicant appeared to rely on a "right" or "entitlement" to operate or carry on an insurance business, the Government submitted firstly that, subject to certain statutory exceptions not relevant here, no right or entitlement in the sense of a claim enforceable in law was vested in a company to establish and carry on insurance business. Companies were (generally) prohibited from carrying on such business except pursuant to an authority granted by the Secretary of State. The grant of such authority was discretionary. No enforceable right to such grant was conferred by the legislation on companies satisfying criteria as to financial standing, probity or competence. The position of the medical profession was different. There an individual holding the relevant qualifications and satisfying the relevant statutory requirements had an enforceable right to be registered and carry on his profession. An individual (subject to immaterial exceptions) was not entitled to carry on insurance business or capable of being authorised to do so. The carrying on of insurance business by an individual or company not satisfying the requirments of the 1974 Act and holding the relevant authority was illegal and an offence under S.11 of the 1974 Act. The position as to the licensing of casino operators was not distinguishable. In either case the relevant licence or authority rendered legal what would otherwise be illegal.

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97. In the absence of any relevant enforceable claim, a refusal by the Secretary of State to authorise a company could not give rise to an issue under Art. 6. No relevant "right" would have been affected. There was no difference in principle between such a case and a case in which authorisation was granted subject to limitations or in which its scope was subsequently restricted or otherwise altered by a notice of requirements.

98. No relevant "right" of the individual applicant was affected. He had no right to (and did not) carry on insurance business. Only IGA did so. Any "right" to act as controller of an insurance company was not affected as the applicant was free to, and did, remain as controller. Similarly no relevant "obligations" of the applicant in relation to the conduct of the business of IGA were in issue. There was no legal obligation on a controller to act in a "fit and proper" manner. Such enforceable legal obligations as were imposed on the applicant as controller of IGA were neither determined nor otherwise affected by the Secretary of State's decision.

99. Accordingly no relevant "right" or "entitlement" was vested in the applicant or in IGA to establish or carry on insurance business and no relevant "obligation" was imposed on the applicant or on IGA which was, or could have been determined or affected by the Secretary of State.

- ii. "Civil rights and obligations"

100. In the König Case the Court had found that the applicant's rights to continue to run a clinic and practise medicine were of a private character and thus "civil" rights for the purposes of Art. 6. It had found it unnecessary to decide whether "civil rights and obligations" included rights under public law. It was necessary to draw a distinction between rights under private law which attracted the protection of Art. 6 and those under public law, which did not. This distinction was not affected by the König Judgment and was supported by the Commission's jurisprudence including the opinions of the first majority group and the minority in the König Case itself. Relying on those opinions, the Government made the following submissions:

- (1) The words "de caractère civil" showed that Art. 6 covered not only rights and obligations arising between individuals in their mutual relations, but also those analagous to rights and obligations of "droit civil" in the strict sense;

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- (2) Corporate bodies, the State and public agencies could thus have rights and obligations "de caractère civil", e.g. under a contract of purchase and sale;

- (3) The State in addition to acting jure gestionis as in (2) could also act jure imperii, i.e. in the exercise of legislative or administrative or public powers. It did so where it applied or imposed the law in relation to individuals or took other decisions in the public interest;

- (4) In general the relationship between the individual and the State acting jure imperii did not give rise to civil rights and obligations. Nor did decisions or acts by the State in such capacity involve such rights or obligations: the exercise of State or governmental powers in the public interest deprived the right in question of its civil character;

- (5) If Art. 6 applied to any decision of the State using its supervisory powers in the public interest, it would come close to guaranteeing judicial control of State action if any individual rights were thereby affected. The majority of States would be placed in an irregular position under Art. 6 since its requirements as to public hearing and judgment would not be satisfied in numerous cases where governmental powers were exercised in the public interest.

- (6) Such a conclusion would be inconsistent with the intentions of the Contracting Parties and incompatible with the practice of States in the exercise of administrative powers. In this respect the Government recalled observations by the majority of the Commission in the Ringeisen Case concerning common limits to the scope of judicial review of administrative decisions in the Council of Europe member States (Report, p. 72);

- (7) Those observations were reinforced by the practice of States in the insurance field. A survey showed that in 19 Council of Europe States provision was made for control of insurance companies by administrative authorities beyond that existing over other companies. In 17 States there were powers of direct intervention in the form of

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licensing or authorising companies to operate and (apparently) revoking the authorisation if the company failed to comply with relevant legislation. It appeared that in 11 countries (out of 15 surveyed) the powers of the courts were limited to a review of the legality of the decision and not a complete review of its merits. In the remaining 4 it appeared that there was recourse to a court but it was unclear whether the court could substitute its own decision;

- (8) The distinction between rights of a public and private character was supported by the French text of Art. 6 and had been given effect to by the Commission in decisions concerning a variety of forms of administrative action taken in the public interest and directly affecting the interests of private citizens. For example the Commission had held that decisions concerning the widening of a street (1), taxation matters (2), social security contributions (3), release from detention (4) and admission to the public service (5), fell outside the protection of Art. 6.

- (9) Similarly laws and regulations by virtue of which administrative authorities granted authorisations or issued prohibitions in the public interest, belonged to the field of public law and no "civil rights" or "droits de caractère civil" were affected by administrative action taken under such laws.

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(1) Application No. 5428/72, Collection of Decisions 44, p. 49.

(2) Application No. 1094/64, Yearbook IX, p. 268; Application No. 2145/64, Yearbook VIII, p. 282.

(3) Application No. 2248/64, Yearbook A, p. 170.

(4) Application No. 609/59, Yearbook IV, p. 340.

(5) Application No. 1931/63, Yearbook VII, p. 212; Application No. 3987/69, Collection of Decisions 32, p. 61,

101. In the König Case the first majority group of the Commission and also the Court had drawn a distinction for the purposes of Art. 6 between the position of an existing licence holder and that of an applicant for a licence (Judgment, para. 91). The Court appeared to have based it on the grounds that when an individual held a licence to practise a trade or profession, private law rights normally arose in connection with that practice. The determination of an existing licence automatically affected those rights and the rights to continue to practise medicine or run a clinic were thus "civil" rights under Art. 6. The Court's decision was based on its reasoning in the Ringeisen Case where it had regard to the effects of the administrative decision on the pre-existing, private contractual rights and relationships of the applicant (Ringeisen, Judgment, para. 94).

102. The Ringeisen and König Judgments did not decide that all decisions of public authorities affecting private law rights and obligations were subject to Art. 6, and required a full review by a tribunal satisfying Art. 6 and capable of substituting its own decision for that of the administrative authorities. That would be inconsistent with the practice of Contracting States, the jurisprudence of the Commission and the intention of the authors of the Convention. The Judgments suggested two limitations. Firstly regard should be had only to rights and obligations directly affected by the decision. This was accepted by the applicant and supported by the Commission's decision in Application No. 7902/77 (1) and the dissenting opinion of Judge Matscher in the König Case. Secondly only pre-existing rights and obligations were relevant. In the Ringeisen Case the Court had made it clear that at the date of refusal of approval by the District Commission, the applicant was already in contractual relations with the Roth couple (para. 94). If the present applicant's submission to the contrary were correct, the distinction drawn in the König case between admission to the practice of medicine and its continuance would lose its validity. A refusal to admit a person to the practice of medicine would, if the applicant were right, equally affect civil rights and obligations since it would deprive the individual of the prospect of entering into future contracts.

103. The Secretary of State's decision had not affected pre-existing private rights, obligations or relationships of either the applicant or IGA. As to IGA, a requirement under S.29 only affected the writing of new business. It did not affect existing contractual rights and obligations vis-à-vis its policy holders, nor its relationships with its directors and employees, including the controller, nor any property rights. Nor were the applicant's civil rights and obligations affected. His position as controller was unaffected.

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(1) X. v. the United Kingdom, 7 Decisions and Reports, p. 224.

104. As to the question of reputation, the conclusion of the first majority of the Commission in the König Case to the effect that the revocation of the applicant's licence had constituted a finding as to his professional ability or good conduct, an essential part of his reputation, had not been followed by the Court. The Judgment contained no suggestion that the right to reputation had been relevant. Similarly in the Ringeisen Case the Court had not found that the applicant's civil right to reputation had been determined even though the refusal of authorisation was based on doubts as to his integrity. The reasons in each case were that the effects on reputation had been too remote. Similarly, here there had been no direct effect on the applicant's right to reputation. Whilst his fitness had been at the basis of the decision (as in the König and Ringeisen Cases) the effect of the decision on his reputation was not sufficiently direct or immediate to make the right to reputation a relevant civil right for the purposes of Art. 6.

105. Accordingly no relevant civil right or obligation of the applicant or of IGA for the purposes of Art. 6 was affected by the Secretary of State's decision.

- iii. "Determination of civil rights and obligations"

106. The Court's Judgment in the Ringeisen Case (para. 94) highlighted two features relevant to the interpretation of Art. 6, and in particular the words "determination", "décidera", "cause" and "contestation". Firstly the reference to a "contestation" indicated that it was intended to relate only to a "case" or "proceeding between parties" (Ringeisen) or a "dispute" (König Judgment, para. 87) concerning civil rights. Similarly the reference to a "cause" implied the existence of a dispute between parties justiciable in a court of law or tribunal.

107. Secondly the word "décidera" connoted a decision on the merits, the finality of which characterised the judicial process. This was confirmed by the use of the word "jugement" which conveyed a judicial determination of a dispute. This interpretation was further confirmed by the Commission's early case-law where Art. 6 (1) was held to apply only to proceedings before courts of law (1).

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(1) Application No. 1329/62, Collection of Decisions 9, p. 28.

108. The guarantees of Art. 6 might be extended to cover proceedings before administrative tribunals which, while not courts in the strict sense, performed functions closely corresponding to those of a court. It could not be extended to cover any administrative decision which might have an effect on private rights. That would bring within Art. 6 the large range of powers conferred on administrative authorities in every field, both in the United Kingdom and elsewhere, if their exercise affected private rights. Art. 6 only regulated the conduct of proceedings for the determination of disputes between parties concerning civil rights and obligations which were justiciable in the courts or tribunals of the State concerned. The Secretary of State's decision here did not constitute such a determination as (i) there was no "cause" nor a "contestation" between parties and (ii) the decision did not purport to determine finally the rights or obligations of parties to such a "cause" or "contestation".

109. This argument was consistent with the König and Ringeisen Judgments. In the König Case (in contrast to the present one) the decision of the administrative authority (i.e. the Regierungspräsident who revoked the licences) had not been in issue. It had never been suggested that his decision, or the disciplinary proceedings before professional tribunals, attracted the Art. 6 guarantees. Only the action before the administrative court had been in issue (paras. 18 and 85 of the Judgment). The decision of the Regierungspräsident did not give rise to an Art. 6 issue since when it was taken there was no "contestation" or "cause" in which Dr. König's civil rights could arise for determination. Further, the decision to revoke Dr. König's licences, although based on findings as to his reliability, diligence, knowledge and fitness, did not purport to determine any civil rights arising in such a "cause" or "contestation". The relevant "contestation" arose only when he took proceedings to challenge the legitimacy of the revocation and seek a judicial determination of the dispute between him and the Regierungspräsident.

110. Similarly in the Ringeisen Case, the Art. 6 complaint related not to the decision of the District Commission responsible for refusing approval of the contract, but that of the Regional Commission where the refusal was challenged, which was found by the court to be a tribunal (para. 95).

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111. Here the guarantees of Art. 6 applied (if at all) not to the decision of the Secretary of State but to any proceedings brought to challenge its legitimacy. Had the applicant challenged it by applying for judicial review, the procedural guarantees of Art. 6 would have been satisfied.

112. The applicant's submission concerning the lack of administrative courts and a hearing before a tribunal (para. 89 above) was misconceived. The Divisional Court was an "administrative court" in the sense that it could review the legality and legitimacy of administrative decisions. The fact that its powers of review did not extend to substituting its own decision for that of the Secretary of State did not give rise to a breach of Art. 6. As the majority of the Commission in the Ringeisen Case had observed, one common feature of the widely divergent systems of judicial review was that there were certain elements of administrative discretion which could not be reviewed by a judge and if the authority had acted properly and lawfully the judge could rarely, if ever, decide whether its decision was well-founded in substance (Ringeisen Report, p. 72). In the field of insurance business the position in the United Kingdom did not differ materially in this respect from that in many other member States.

113. Requirements under S.29 might be imposed on solvency grounds. In that respect the Secretary of State had a wide discretion, not accompanied by any of the procedural guarantees of Art. 6 (1). However such a decision would not contravene Art. 6 since it would not constitute a final and binding determination of a "contestation" involving the company's civil rights. Such a "contestation" would arise only when the Secretary of State's decision was challenged in the courts.

114. The fact that the applicant here had had an opportunity of making oral representations did not alter the position. In the case of Ireland v. the United Kingdom the Commission had held that the introduction of quasi-judicial features in detention proceedings did not alter the nature of the proceedings under the Convention (Report, p. 94). The same reasoning applied here. The right to make representations did not alter the nature of the Secretary of State's decision or render it a determination of the applicant's civil rights for the purposes of Art. 6 (1).

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- iv. Conclusion

115. In conclusion the Government therefore invited the Commission to find that the Secretary of State's decision had not constituted a determination of the civil rights or obligations of the applicant or IGA and that Art. 6 (1) was thus inapplicable to the facts of the case.

(b) Determination of a criminal charge

116. The Commission should reject the complaint that the applicant had been facing a criminal charge, as it had rejected the similar complaint in the König Case.

117. Whilst it was debatable how far the criteria referred to by the Court in the Engel Case (1) were applicable here, they provided some guidelines as to whether a criminal charge was in issue. Firstly, whilst there was a similarity between the grounds set out in the notice served on the applicant and the facts constituting a criminal offence under S.61 of the 1974 Act, the two were not identical. The facts on which the finding of unfitness were based were wider and less specific than those constituting an offence and the elements of falsity and recklessness were not necessarily present. Secondly, criminal proceedings and fitness procedures served different purposes, the purpose of the latter being solely to protect the public against mismanagement. Finally, no penalty had been imposed. The contention that there had been a determination of a criminal charge should therefore be rejected. Art. 6 was not therefore applicable on this ground either.

E. Submissions concerning Art. 13 of the Convention

1. The applicant

118. In the course of the proceedings before the Commission the applicant has made various submissions based on Art. 13 of the Convention. In his written observations on admissibility he submitted that Art. 6 must be construed in conjunction with Art. 13. By reason of Art. 13, the domestic law ought to provide for a

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(1) European Court of Human Rights, Engel and others, Series A, No. 22.

procedure whereby he might complain that Art. 6 (1) had not been complied with. The supervisory jurisdiction of the High Court did not enable him to rely on a breach of Art. 6 (1). At the hearing before the Commission he gave a number of references (1) concerning the relationship between Arts. 6 (1) and 13 and submitted that the absence of an effective remedy in the case made them applicable. In his written observations on the merits he submitted that the absence of a domestic remedy (as found by the Commission in its admissibility decision) capable of affording him redress for a breach of Art. 6 (1), was contrary to Art. 13 (see para. 89 above).

2. The respondent Government

119. The Government have made no submissions specifically under Art. 13 of the Convention. In their observations on the merits they requested the opportunity to do so should any issue under Art. 13 become material to the determination of the application.

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(1) "Human Rights in National and International Law", ed. Robertson, 1965, pp. 196-197; Robertson, "Human Rights in Europe", second edition 1977, p. 105; Jacobs, "The European Convention on Human Rights", pp. 215-216.

IV. OPINION OF THE COMMISSION

A. Points at issue

120. The following are the principal points at issue:

- i. whether the applicant was the victim of a breach of Art. 6 (1) of the Convention insofar as it guarantees a right to a fair and public hearing before an independent and impartial tribunal in the determination of "civil rights and obligations" because:

  (a) the finding of unfitness and imposition of requirements were made by the Secretary of State and not by a tribunal satisfying Art. 6 (1); and/or

  (b) no form of appeal procedure was available in which the full merits of the Secretary of State's decision could be reconsidered by a Court.

- ii. whether the applicant was denied the right, under Art. 6 (1), to a fair and public hearing before an independent and impartial tribunal in the determination of any "criminal charge" against him;

- iii. whether in the circumstances of the case the applicant was denied the right to "an effective remedy before a national authority" as guaranteed by Art. 13 of the Convention.

B. Article 6 (1)

121. The applicant complains that, in the exercise ofthe powers conferred on him by the 1974 Act, the Secretary of State made a finding that he was not a fit and proper person to control IGA and, on the basis of that finding took a decision imposing restrictions on the company's ability to conduct business, without either he or the company having been afforded a hearing satisfying the requirements of Art. 6 (1) of the Convention.

Art. 6 (1), so far as relevant, is in the following terms:

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

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The French text is as follows:

"Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartiel, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien fondé de toute accusation en matière pénale dirigée contre elle ..."

122. The applicant first submits that the finding of unfitness against him and the decision to impose restrictions on the company's business were decisive of "civil rights and obligations" of himself and the company. Secondly he submits that the allegations made against him amounted, in substance, to a criminal charge. Art. 6 (1) was thus applicable and entitled him and the company to a hearing before an independent and impartial tribunal, which they did not receive.

123. The respondent Government submit that Art. 6 (1) was not applicable on either basis put forward by the applicant. They do not seek to maintain that, in the procedures which were followed, the applicant and company in fact received a hearing before a tribunal satisfying the substantive requirements of Art. 6 (1). They submit that in the circumstances they were not entitled to one because this provision had no application.

124. It is thus not in dispute, and is also in the Commission's opinion evident, that neither the Secretary of State nor the officials who heard the representations made by the applicant and company, constituted a "tribunal" for the purposes of Art. 6 (1). Nor was there any "public hearing" in the matter. The essential question concerns the way in which, and the extent to which, Art. 6 applies (if at all) in relation to administrative procedures of this nature. In particular the Commission must consider whether Art. 6 was applicable at all and if so whether it was applicable to the proceedings which actually took place, so as to entitle the applicant to have the relevant decisions taken in the first place by a judicial body in accordance with procedures satisfying Art. 6 (1). If not, the question still remains whether it entitled the applicant to have the full merits of the relevant decisions reconsidered by a court with power to substitute its decision for that of the Secretary of State.

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125. The Commission emphasises at the outset that it is not itself concerned with the merits of the Secretary of State's decisions and in particular with the question whether he was right or wrong to make the finding of unfitness against the applicant. The case is concerned with the procedures which were followed or were available. Furthermore the Commission does not consider it relevant whether or not the Secretary of State or his officials were treating the matters complained of as affecting the applicant's civil rights and obligations. The questions at issue under Art. 6 must, in the Commission's view, be resolved in the light of an objective examination of the relevant facts and domestic law, and not by reference to any attitude or views the domestic authorities may have held on those questions. The relevant facts and law have been rehearsed in detail by the parties and are largely undisputed. The Commission does not therefore find it necessary to obtain any further evidence, including in particular a copy of the officials' report to the Secretary of State, as requested by the applicant.

126. The Commission will examine the issues arising under Art. 6 (1) from the point of view first of "civil rights and obligations" and then of a "criminal charge".

"Determination of civil rights and obligations"

127. The applicant has submitted that his position was essentially the same as that of the applicant in the König Case, where the Court held that Art. 6 (1) was applicable to proceedings concerning rights to continue to run a private clinic and exercise the medical profession (Judgment of 28 June 1978, Series A, No. 27, paras. 91-94). He relies on the Court's statement in the Ringeisen Case, which it repeated in the König Case, that Art. 6 (1) "covers all proceedings the result of which is decisive for private rights and obligations" (Series A, No. 13, p. 39, para. 94). He submits that the "proceedings" in question here were decisive of various private rights of himself and/or IGA (see paras. 75-89 above) and that Art. 6 (1) therefore applied.

128. The Government contest this and submit firstly that no "rights or obligations" of either the applicant or IGA were affected. Secondly they maintain that even if any rights or obligations were affected, they were not "civil" in character. Finally they submit that there was in any event no "determination" of rights or obligations.

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129. As a preliminary matter the Commission notes that the company (IGA) is not itself a party to the present proceedings, although the notice of requirements issued by the Secretary of State was addressed to it and not to the applicant in person. At the admissibility stage the Commission accordingly raised with the parties the question whether the applicant was entitled to claim to be an indirect victim of any violation of the company's rights under Art. 6. The respondent Government reserved their position on this point at that stage (see paras. 69-72 above). Throughout the subsequent procedure they have argued the case on the basis that there has been no determination of civil rights and obligations of either the applicant personally or the company, but have not disputed the applicant's title, under Art. 25 of the Convention, to complain of the proceedings insofar as their result may have affected "civil rights or obligations" of the company as opposed to himself personally.

130. The Commission notes that, apart from any effect the proceedings may have had on the applicant's personal rights or obligations, he also had a clear interest in their outcome insofar as it affected the company. This arose from his investment interest in the company and his position as an officer.

131. In a previous case the Commission has held that a majority shareholder was entitled to claim to be a "victim", for the purposes of Art. 25 of the Convention, of a decision affecting the company's property rights (Application No. 1706/62, X. v. Austria, Collection of Decisions 21, p. 34). It considers that the applicant in the present case also has a sufficiently direct interest to claim, under Art. 25 of the Convention, to be a "victim" insofar as IGA's rights may have been affected in the present case as well as his own. Accordingly, in considering the question whether there was a determination of civil rights and obligations, it has not confined itself solely to examining the effect of the proceedings on rights and obligations personal to the applicant in domestic law. It has also taken into account effects on rights and obligations of the company.

132. As to the issue of substance, the first question which the Commission has examined is whether "civil rights" or "obligations" of the applicant or IGA were affected by the relevant administrative acts. For the purpose of considering the applicability of Art. 6 (1)

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it considers that the direct legal effects of those acts are relevant. It is thus relevant to consider whether their direct effect was to create, modify or annul legal rights or obligations of a "civil" character. However, the Commission does not regard indirect or incidental consequences, or consequences of a purely factual nature, as material in this context (c.f. Application No. 7902/77, X. v. the United Kingdom, Decisions and Reports 7, p. 224).

133. The Court has held that the concept of "civil rights and obligations" is an autonomous one under the Convention which cannot be interpreted solely by reference to domestic law (König Case, sup. cit. paras. 88-89). The principal question at issue in that case was whether rights which were admittedly at issue in administrative appeal proceedings were "civil" in character for the purposes of Art. 6(1). In considering that question the Court pointed out that the domestic legislation was not without importance. It said:

> "Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned. In the exercise of its supervisory functions the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States". (ibid. para. 89)

134. In the Commission's opinion, as the Government suggest, similar considerations apply, at least to some extent in relation to the question whether any "rights" or "obligations" are involved at all. These concepts are in themselves autonomous to some degree. Thus it is not decisive that a given privilege or interest which exists in a domestic legal system is not classified or described as a "right" by that system. However in deciding whether it is a "right" for the purposes of Art. 6 (1), account should be taken to its "substantive content and effects", the object and purpose of the Convention and the national legal systems of other Contracting States.

135. The Commission has first considered whether, as the applicant maintains, a "right" to conduct insurance business was affected. The Government maintain that no right to establish or carry on such business was vested in the applicant or IGA and that no such "right" was thus affected. Essentially their position appears to be that under the relevant domestic law a company authorised to conduct insurance business does so by virtue of a privilege granted by the Secretary of State and not as a matter of right.

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136. There is no doubt that until the Secretary of State issued the notice of requirements, IGA was entitled by law to carry on insurance business within the limits imposed by its existing authorisations and the general law. In particular it was entitled to do so by entering into certain forms of insurance contract. Unless and until the Secretary of State removed that entitlement by exercising the appropriate powers under the Act, no one could lawfully prevent IGA from thus conducting its business. In the Commission's opinion, IGA thus had a "right", within the ordinary meaning of the word, to conduct insurance business. It had initially been conferred by the Secretary of State when he authorised the company and he was entitled, under certain conditions, to interfere with it, or even effectively to remove it as he did here. However, these factors do not, in the Commission's opinion, alter its character as a "right" for the purposes of Art. 6(1) at least.

137. The direct legal effect of the Secretary of State's action was that the existing "right" of IGA to conduct insurance business was restricted in the manner set out in the notice under S.29 of the 1974 Act. Effectively IGA was prohibited from entering into new business. Its "right" to conduct insurance business was thus affected.

138. As to whether the right to conduct insurance business was "civil" in character, the Commission considers it essentially similar in character to the rights in question in the König Case in that it was a right to carry on a commercial activity in the private sector, albeit subject to administrative authorisation and supervision in the public interest (König Case, paras. 92-93). Following the Court's approach in the König Case the Commission concludes therefore that the right in question here was of a private nature and therefore a "civil" right for the purposes of Art. 6(1).

139. Apart from a right to conduct insurance business, the applicant has referred to a number of other "rights and obligations" which he suggests were affected. He suggests there was an affect on property rights (para. 88 above). However the Commission does not agree with this. Whilst, as the applicant points out, the company had to increase the amount of assets on deposit with a trustee (see para. 53 above) this was not a legal consequence of the "fitness" procedures and S.29 requirements which are the subject of the present case. The requirement as to deposits arose from a separate notice and procedure under S.40 of the 1974 Act. This procedure has not been made the subject of any complaint in the present application.

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140. The applicant has also suggested that contractual rights or obligations inter partes were affected. However, again the Commission does not agree. There was no legal effect on existing contractual rights and obligations. These continued unaffected for the duration of the relevant contracts. Of necessity no rights or obligations existed under future or contemplated contracts and they could not be affected. It was merely the company's right to enter into such contracts which was affected as the Commission has already found.

141. As to the applicant's personal position, this was inevitably affected in so far as his activities as managing director and controller of the company were restricted. He came under an obligation to comply with the restrictions on the company. In a sense he lost a right to conduct insurance business through the company. However these were in reality inherent features of the restrictions on the company's right to conduct business. These features merely illustrate the applicant's interest in the matter. In law his position as controller was not otherwise affected. Any difficulties which may have arisen for him in finding other positions in the insurance industry, as also any effects on his reputation, were in the Commission's opinion incidental consequences of a factual nature and not legal consequences of the relevant finding and decision. In substance the applicant does not appear to suggest otherwise. Legal rights of the applicant in these fields were not therefore affected.

142. The question has also arisen as to whether there was a determination of "obligations" incumbent on the applicant in relation to the running of IGA, in particular in so far as the Secretary of State appears to have found implicitly that the applicant had failed to comply with legal requirements concerning the content of the company's accounts. However in the Commission's view any such finding was of an incidental nature (cf Application No 8600/77, X. v. Switzerland, Decisions and Reports 13, p. 81). There was no legal effect on the relevant obligations. In the circumstances, while the question whether there was a determination of a criminal charge remains to be considered separately, the Commission does not consider that any such finding is material to the question of the applicability of Art. 6 (1) on the basis of a possible determination of "civil rights and obligations".

143. To sum up, therefore, from the point of view of Art. 6 (1), the Commission considers that the administrative procedures in question did have a direct effect on "civil rights" in so far as an existing right to conduct insurance business was restricted. It does not consider that any other rights or obligations were affected or indeed liable to be affected in the relevant procedures.

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144. Nevertheless whilst the Secretary of State's action thus affected a "civil right", it must be emphasised that the applicant does not suggest that it was contrary to domestic law. This was made clear in his submissions at the admissibility stage on the question of domestic remedies (1). He thus does not allege that his civil rights were affected in the sense that they were unlawfully infringed or interfered with. If he had done so he could have challenged the measures taken by applying to the High Court for certiorari (cf. paras. 26-29 above). However he disagrees with the decision which the Secretary of State took in the exercise of his discretionary powers. He considers it wrong but not unlawful. It is not in dispute that such a claim would not afford grounds for review by the High Court. However the applicant maintains that because the decision affected his civil rights, it should either have been taken in the first place by a tribunal satisfying Art. 6 (1) or at least that he should have had the possibility of having had the full merits of the decision reconsidered by a tribunal in appeal proceedings.

145. In these circumstances the Commission considers that two questions arise. The first is whether Art. 6 (1) applies directly to all procedures whereby decisions affecting "civil rights" are taken. In other words does it confer a right to have such decisions taken in the first place by a tribunal satisfying Art. 6 (1) and not by an administrative authority at all? If not, the second question arises, namely whether, once such a decision has been taken by an administrative authority exercising a discretionary power, the right of access to court guaranteed by Art. 6 (1) implies that there must be access to a tribunal with full jurisdiction to re-examine the whole matter and to substitute its own discretion for that of the administrative authority.

146. In considering these questions, the Commission first recalls that in the Ringeisen Case the Court said:

> "For Article 6, paragraph (1), to be applicable to a case ("contestation") it is not necessary that both parties to the proceedings should be private persons, which is the view of the majority of the Commission and of the Government. The wording of Article 6, paragraph (1), is far wider; the French expression "contestations sur (des) droits et obligations de caractère civil" covers all proceedings the result of which is decisive for private rights and obligations. The English text "determination of ... civil rights and obligations", confirms this interpretation.
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> The character of the legislation which governs how the matter is to be determined (civil, commerical, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence."
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> (Series A, No. 13, para. 94)

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(1) See Decision on Admissibility, Appendix III, pp. 67, 76, 77 and 87-88.

147. In the König Case it repeated this statement and said furthermore:

> "If the case concerns a dispute between an individual and a public authority, whether the latter had acted as a private person or in its sovereign capacity is therefore not conclusive.
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> Accordingly, in ascertaining whether a case ("contestation") concerns the determination of a civil right, only the character of the right at issue is relevant."

148. The applicant relies on these statements and submits that because the Secretary of State's decision had a decisive effect on civil rights, Art. 6 (1) was applicable and required that the whole matter at issue between himself and the Secretary of State, namely the questions whether he was a fit and proper person to control IGA, and whether restrictions should be imposed on the company, should have been decided by a court.

149. However, the Court's remarks in the above-mentioned cases must be read in the context in which they were made. In both cases the Court was concerned essentially with the applicability of Art. 6 (1) to administrative appeal proceedings available in the domestic system. In the Ringeisen Case the substance of the applicant's complaint was that members of the administrative appeal body (the Regional Real Property Sales Commission) had been biased and the Constitutional Court had failed to deal with his complaint to that effect. In the König Case the applicant complained of the length of proceedings before the administrative courts before which he was challenging the lawfulness and expediency of the acts of the competent administrative authorities. In both cases the Court was thus deciding on the applicability of Art. 6 (1) to cases before appeal bodies which had the function of determining disputes arising out of the acts of the administrative authorities. In neither case was it called upon to decide whether Art. 6 (1) required that the initial acts of administrative authorities comparable to those at issue in the present case should themselves be taken in accordance with a procedure complying with Art. 6 (1) whenever they affected private rights. Nor was it called upon to examine any question related to the scope of review available in the existing appeal procedures. However these questions lie at the heart of the present case.

150. The Commission notes that it is a feature of the administrative law of all the Contracting States that in numerous different fields public authorities are empowered by law to take various forms of action impinging on the private rights of citizens. The majority of the Commission pointed this out in the Commission's Report on the Ringeisen Case in the following terms:

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"It is characteristic of the modern European State that the rights and obligations of the individual in many respects are not determined exhaustively by abstract rules of law, but depend upon the determination by administrative decision in each specific case. The use of land is one important field. Very rarely has the owner an unlimited right to use the land as he pleases. If he wants to convert it from one use to another, if he wants to build on his land or to demolish a house, or if he wants to divide the land or the site he owns, his right to do so may be subject to a permission by a public authority. Such permission may in some circumstances be granted him as of right, but in other circumstances the public authority may exercise a certain measure of administrative discretion.

The contractual rights and obligations of private individuals may likewise be subject to public control and approval in each particular case. Import and export licences are still an important element in the regulation of international trade. The exercise of certain trades or professions may also be subject to approval by a public authority.

Even interference with private property, such as expropriation of land for public use, demolition orders in case of slum clearance, orders relating to urban development etc. is decided by administrative bodies or authorities.

These examples, to which numerous others could be added, seem to indicate that it is a normal feature of contemporary administrative law that the rights and obligations of the citizen, even in matters which relate very closely to his private property or his private activities, are determined by some public authority which does not fulfil the conditions laid down in Article 6 (1) with respect to independent and impartial tribunals." (See Series B, Vol. 11, pp. 71-72)

151. As the Court has held in the Ringeisen and König Cases, Art. 6 (1) may be applicable in cases concerning the exercise of such public powers. Nevertheless, Art. 6 does not, in the Commission's opinion, prohibit the conferment on public authorities of powers to take action affecting the private rights of citizens. It does not go so far as to provide that all acts, decisions or measures which affect private rights must themselves be taken by a tribunal. Such a conclusion, apart from

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being in conflict with the common position in the Contracting States both today and when the Convention was drafted, would also not be warranted, in the Commission's opinion, by a proper interpretation of Art. 6 (1).

152. It is plain from the text of Art. 6 (1) that it does not directly protect the individual's "civil rights" as such against acts or decisions which modify, annul or otherwise interfere with them. In many circumstances the private rights of an individual are liable to be affected not only by the lawful acts of public authorities but also by those of other individuals or entities exercising countervailing private rights of their own, and indeed by circumstances of a purely factual nature such as the effluxion of time. The mere fact that an individual's private rights are adversely affected by the acts of another party, whether a public authority or not, does not therefore involve a violation of Art. 6 (1).

153. The Commission has thus to some extent recognised in its previous case-law that Art. 6 (1) is not necessarily applicable to all stages of an administrative process affecting "civil rights". Its minority in the Ringeisen Case, which considered Art. 6 (1) applicable to the appeal proceedings in question there, made clear that it did not consider it directly applicable to the process whereby administrative decisions affecting civil rights are themselves taken (see Series B., Vol. 11, pp. 73-75 and 242). The Commission has held that where Art. 6 (1) applies to an administrative process, it may be sufficient that a court procedure is available at some stage after the initial administrative decision (Application No. 6837/74, X. and others v. Belgium, Decisions and Reports 3, p. 135). It has left open the question whether Art. 6 (1) would apply both to the administrative and the judicial part of restitution proceedings in the Federal Republic of Germany, or whether it covers only the proceedings in court (Applications Nos. 5573/72 and 5670/72, Decisions and Reports 7, p. 8 and pp. 27 and 28). It recalls that it has also held that proceedings concerning the registration of patents fall outside the scope of Art. 6 (1) on the ground that this is an "essentially administrative" matter (Application No. 8000/77, X. v. Switzerland, Decisions and Reports 13, p. 81; Application No. 7830/77, X. v. Austria, Decisions and Reports 14, p. 200).

154. In the Commission's view the essential role of Art. 6 (1) in this sphere is to lay down guarantees concerning the mode in which claims or disputes concerning legal rights and obligations (of a "civil" character) are to be resolved. A distinction must be drawn between the acts of a body which is engaged in the resolution of such a claim or dispute and the acts of an administrative or other body purporting merely to exercise or apply a legal power vested in it and not to resolve a legal claim or dispute. Art. 6 (1) would

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not, in the Commission's opinion, apply to the acts of the latter even if they do affect "civil rights". It could not be considered as being engaged in a process of "determination" of civil rights and obligations. Its function would not be to decide ("décidera") on a claim, dispute or "contestation". Its acts may, on the other hand, give rise to a claim, dispute or "contestation" and Art. 6 may come into play in that way.

155. As to the present case, the Commission notes that the Secretary of State was not engaged in the resolution of a dispute between parties concerning civil rights. He proposed to take action affecting (as the Commission has found) the company's private rights. He considered the objections put forward and then acted. He took action in the exercise of his legal powers which affected "civil rights" but was not engaged in the "determination" of a dispute or "contestation" concerning civil rights and obligations. In the Commission's opinion, the procedures leading to the finding of unfitness against the applicant and the imposition of restrictions on IGA did not therefore themselves have to comply with Art. 6 (1). The fact that the relevant decisions were not taken by a tribunal after a fair and public hearing does not therefore involve a breach of this provision.

156. The question remains whether there was an infringement of the applicant's, or the company's, right of access to court. The Court held in the Golder Case that:

> "... Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the right to a court, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 § 1 as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing."
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> (Series A., Vol. 18, p. 18, para. 36)

The equivalent part of the French text of the Judgment described this as "le droit à ce qu'un tribunal connaisse de toute contestation relative à ses droits et obligations de caractère civil".

157. Where an individual's private rights have been adversely affected by action taken by a public authority, Art. 6 (1) plainly entitles him, in the Commission's opinion, to obtain access to such court remedies as exist within the domestic system for the purpose of asserting the rights affected. This follows from the Court's case law in the Golder Case. The Commission also refers to the judgment in the Airey Case where the Court indicated that any legal remedy provided for by domestic law (for the determination of civil rights and obligations) should, under Art. 6 (1), be available to anyone who satisfies the conditions prescribed by such law (Series A., Vol. 32, para. 23).

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158. However there is no question of the present applicant having been denied access to the existing court remedies in which he could seek judicial review of the Secretary of State's decisions. His complaint is that these remedies were inadequate in scope because the courts could not go fully into the merits of the Secretary of State's decision and substitute their decision for his if they disagreed with him. The question arises therefore whether he had a "right to a court" with jurisdiction to determine the full merits of the matter.

159. The Commission has already noted that in the Contracting States discretionary powers are frequently conferred on public authorities to take actions affecting private rights. It is also a common feature of their administrative law, and indeed almost a corollary of the grant of discretionary powers, that the scope of judicial review of the relevant decisions is limited. In the Ringeisen Case the majority of the Commission drew attention to this. They observed as follows:

> "It is true that there is in all countries a legitimate concern to protect the citizen against arbitrary administrative action. This concern may result in the adoption of legislative or other rules concerning administrative procedure. It may result in the introduction of judicial review of administrative action, and the States members of the Council of Europe have for historical and other reasons adopted widely divergent systems of such judicial review. One common feature, however, seems to be that there are certain elements of administrative discretion which cannot be reviewed by the judge. If the administrative authority has acted properly and within the limits of the law, the judge can very rarely, if ever, decide whether or not the administrative decision was well-founded in substance. To that extent, there is no possibility of bringing the case before an independent and impartial tribunal, even if there is a dispute ("contestation") between the citizen and the public authority."
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> (Series B., Vol. 11, p. 72)

160. Following the Court, the Commission does not conclude that Art. 6 is therefore altogether inapplicable. However this factor cannot be left out of account in considering the content or scope of the rights which Art. 6 guarantees. The Commission also recalls that its minority in the same case considered that it guaranteed only a right to judicial control as to the "lawfulness" of administrative decisions affecting civil rights (ibid. pp. 73-75). It notes further that the limited scope of judicial review in many Contracting States is also reflected in the scope of the jurisdiction afforded to the European Court of Justice under Art. 173 of the Treaty establishing the European Economic Community. Under that provision the Court has jurisdiction to review the legality of acts of the Council and Commission of the European Communities only on grounds of "lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers". These limited grounds of action appear fairly typical of those existing in a number of the Contracting State.

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161. An interpretation of Art. 6 (1) under which it was held to provide a right to a full appeal on the merits of every administrative decision affecting private rights would therefore lead to a result which was inconsistent with the existing, and long-standing, legal position in most of the Contracting States.

162. Nevertheless in interpreting Art. 6 (1) the Commission must bear in mind the importance of the principle of the "rule of law" referred to in the Preamble to the Convention, (cf Golder Case, Series A., Vol. 18, para. 34). It also recalls the following observations of the Court in the Golder Case:

> "The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 (1) must be read in the light of these principles.
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> Were Article 6 (1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook."
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> (Ibid. para. 35)

These principles suggest that the jurisdiction of the courts cannot be removed altogether or limited beyond a certain point.

163. In substance the principle laid down by the Court in the Golder Case is that any civil claim, "contestation" or dispute (concerning civil rights and obligations) must be capable of being submitted to a court. Art. 6 thus requires that there should be a court with jurisdiction to determine the matter. The right to a court arises with the claim or dispute in question. However, it is plain that not every grievance or dispute, even arising from an act which has affected "civil rights", gives rise to a right of access to court. In the Commission's opinion there must be a legal element. A person may be aggrieved by action affecting his private rights whether taken by a public authority or a private individual. However if he accepts that the opposing party was fully entitled to act as he did, by virtue for instance of powers or rights conferred by statute or by contract, then he would have no claim to bring before a court under the applicable domestic law.

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164. In deciding whether a right of access to court arises, the nature of the claim or dispute under the relevant domestic law is thus of critical importance. This is not to say that the right can only arise where there is a formal right of action in domestic law. To hold that the Convention right was thus restricted would be to open up precisely the possibility referred to by the Court that a State could, without breaching Art. 6 (1), remove the jurisdiction of its courts in this field. The question whether there is a "contestation" or civil claim or dispute must therefore be examined as one of substance. Where an individual objects to action affecting his private rights, the test must be whether he is in substance claiming that the adverse party has acted in a way he was not entitled to act under the applicable domestic law.

165. It is therefore necessary in the present case to examine the substantive nature of the applicant's complaint or grievance concerning the Secretary of State's actions. The Commission first notes that there is no material dispute between the applicant and the Secretary of State as to the facts on which the administrative action was based. It has already pointed out that the applicant does not dispute the lawfulness of the measures taken. In particular he accepts that the procedural requirements of domestic law were complied with. Whilst he considers the Secretary of State's decision concerning his fitness to have been wrong, it appears from his submissions that he accepts that there was or may have been a failure fully to comply with the legal provisions concerning the company's accounts. He maintains that the course followed (in taking out the insurance policy) was honest and proper and was followed in good faith on professional advice. Any breach of the regulations was at most a technicality in his view, and not such as to justify the action taken. However he accepts that the Secretary of State could reasonably have taken a different view and might reasonably have considered (for instance) that the accounts had been rendered "misleading of inaccurate", and that scrupulous accuracy in such matters was a fundamental requirement of a controller (1).

166. The applicant thus differs from the Secretary of State on questions of judgment concerning such matters as the propriety of his conduct and the importance to be attached to a strict compliance with the accounting regulations. However he makes no claim to the effect that the Secretary of State acted in a manner he was not legally entitled to act in.

Conclusion

167. The Commission therefore concludes by a unanimous vote that the applicant has not been the victim of any breach of Art. 6 (1) insofar as it guarantees a right to a fair and public hearing before a tribunal in the determination of civil rights and obligations.

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(1) Verbatim record of the hearing on admissibility and merits, p. 52

"Determination ... of any criminal charge against him"

168. The applicant maintains that, in substance, the Secretary of State's action amounted to the determination of a criminal charge, and that Art. 6 was therefore applicable on this basis also. The respondent Government deny that the allegations in the notice of 4 November 1975 were allegations of criminal conduct and maintain that in any event Art. 6 (1) was not applicable on this basis even if they were.

169. The Commission notes that in the notice of 4 November 1975 the applicant was accused of having signed the company's accounts "knowing, or having reason to believe," that the value assigned to the property was "misleading or inaccurate" (see para. 44 above). It further notes that under S. 61 (1) of the 1974 Act it is an offence for any person to cause or permit the inclusion in such a document of a statement which he "knows" to be false in a material particular. It is also an offence if he "recklessly" causes or permits the inclusion of a statement which is false, (see para.16 above). In the Commission's opinion the allegation of knowledge made against the applicant in the notice suggests an offence under S. 61. The alternative allegation of "having reason to believe" also appears substantially similar to the concept of "recklessness" in S. 61, even if it is not exactly the same. There is also a substantial area of common ground between the notion of a "misleading or inaccurate" statement and one which is "false in a material particular", in the Commission's view. The Commission concludes that in substance this allegation was one of conduct contrary to S. 61. It also appears implicit in the notice that the accounts did not give a "true and fair view" of the state of affairs of the company and that the applicant had failed to take "reasonable steps" to ensure that they did. The allegations in the notice therefore also involved, in substance, allegations of an offence under S. 149 of the Companies Act 1948 (see para. 18 above).

170. Both parties have referred to the criteria laid down by the Court in the Engel Case for determining the applicability of Art. 6 to military disciplinary proceedings. The Commission recalls that one factor the Court took into account was "the degree of severity of the penalty that the person concerned risks incurring" (Series A., Vol. 22, p. 35, para. 82). In the present case the proceedings were not concerned with the imposition of any penalty on the applicant. The restrictions imposed on the company cannot, in the Commission's opinion, be regarded as equivalent to a penalty and in its view the proceedings in question did not therefore fall into the category of penal proceedings covered by Art. 6 (1), despite the nature of the allegations made.

Conclusion

171. The Commission therefore concludes by a unanimous vote that the applicant has not been the victim of any breach of Art. 6 (1) insofar as it guarantees the right to a hearing before a tribunal in the determination of a "criminal charge".

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C. Article 13

172. The applicant has also invoked Art. 13 of the Convention in the course of his submissions. It appears that the basis of his complaint is that no remedy was available whereby he could raise his complaint that Art. 6 (1) had not been complied with.

Art. 13 of the Convention reads as follows:

"Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

173. The Commission has already held that Art. 6 (1) was not applicable to the administrative process in issue and that the applicant's resulting dispute with the Secretary of State was not one to which it applied either. The Court has held in the Klass Case that Art. 13 guarantees an effective remedy "to everyone who claims that his rights and freedoms under the Convention have been violated" (Series A, Vol. 28, p. 29, para. 64). However, in the Commission's opinion it can only apply to claims which fall within the scope of one of the substantive provisions of the Convention. Where, as here, the Commission does not find any of those provisions applicable, it follows that Art. 13 is not applicable either.

174. The Commission also refers to its Report under Art. 31 of the Convention in the case of Young, James and Webster v. the United Kingdom (Applications Nos. 7601/76 and 7806/77, Report adopted on 14 December 1979) where it has expressed the opinion that Art. 13 does not go so far as to require judicial review of legislation. The present applicant's complaint under Art. 6 (1) concerns the procedures provided for in United Kingdom law, the 1974 Act in particular. He could have challenged them effectively only if there had been some means of challenging the relevant legislation. Even if it were applicable, Art. 13 has not therefore been breached in the Commission's opinion.

Conclusion

175. The Commission concludes by a unanimous vote that the applicant has not been the victim of a breach of Art. 13.

Secretary to the Commission — Acting President of the Commission

(H.C. KRÜGER) — (G. SPERDUTI)

SEPARATE OPINION OF MR. TRECHSEL ON ARTICLE 13 JOINED BY MR. CARRILLO

I agree with the finding of the Commission that the present case does not disclose a violation of Art. 13 of the Convention. However, I would prefer to base that finding on a different line of argument.

The majority of the Commission is of the opinion that, in the present case, Art. 13 does not apply because the applicant did not even claim that "rights and freedoms as set forth in this Convention" were violated, the Commission having found that Art. 6 (1) did not apply. The decision on Art. 6 (1) is thus implicitly interpreted to mean, in the terminology used when deciding on admissibility, that his application was incompatible ratione materiae. I do not find it necessary to decide this difficult question for the following reasons.

Art. 6 (1) - inasmuch as it guarantees access to a court - and Art. 13 have certain common features. Both are concerned not with a substantive right, but rather with a specific form of protection, on the national level, of rights set out elsewhere. The same, by the way, is true for Art. 5 (4).

While Art. 6 (1) gives a right to a fair and public hearing before an "independent and impartial tribunal established by law", Art. 13 merely refers to an "effective remedy before a national authority". Thus, the protection offered in the former Article is considerably stronger than that provided for in the latter.

The applicant's allegation in respect of Art. 13 would therefore imply that a "national authority" ought to have the competence to examine, in specific cases, whether courts are competent and obliged to hear certain claims. Indeed, the remedy under Art. 13 could not be considered as "effective" if this possibility did not exist. On the other hand, however, a court would cease to be "independent" if a national authority not itself an independent and impartial court were to exercise that kind of control (Schiesser Case, Series A, Vol. 34, p. 13, para. 31).

This analysis, in my opinion, leads to the conclusion that Art. 13 with respect to Art. 6 (1) would require a double degree of jurisdiction or at least the institution of a constitutional court competent to decide whether other courts are under an obligation to hear cases concerning civil rights and obligations. In the end this would lead to a considerable extension of the scope of Art. 6 (1) itself, which is covered neither by its wording nor by its scope.

These considerations, in my opinion, inevitably lead to the conclusion that, where the primary allegation under the Convention concerns access to a court or tribunal, Art. 13 does not require an additional remedy.

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