AS TO THE ADMISSIBILITY OF

Application No. 35095/97
by Peter Alexander AINSWORTH
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 22 October 1998, the following members being present:

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

Mrs M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 18 July 1996 by Peter Alexander AINSWORTH against the United Kingdom and registered on 26 February 1997 under file No. 35095/97;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 1 May 1998 and the observations in reply submitted by the applicant on 19 August 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1966 and resident in Cumbria. He is represented before the Commission by Patrick Langrishe, a solicitor practising in Exeter. The facts as submitted by the parties may be summarised as follows.

A. Particular circumstances of the case.

On 1 December 1993 the applicant, who was a lieutenant in the Royal Marines at the Commando training centre, was charged with two counts of conduct to the prejudice of good order and military discipline contrary to section 69 of the Army Act 1955. He was accused as Troop Commander, of neglecting to supervise adequately, as his duty required him to do, the Troop Party by failing to ensure that proper safeguards were imposed to prevent consumption of alcohol by under-age recruits in his troop and by failing to ensure that under-age recruits in his troop did not at that function consume alcohol contrary to the law. One of the under-age recruits had died from an excessive intake of alcohol at the Troop Party held in June 1992.

The Convening Officer convened a general court-martial and on 15 December 1993 the applicant was found guilty. He was sentenced to be dismissed from service. During his court-martial, the applicant accepted that he had read and was aware of the Commando Training Centre Royal Marines Standing Orders and the Commando Training Wing Standing Orders.

On 2 February 1994 the applicant presented a petition to the Confirming Officer against conviction and sentence. The petition was rejected and the findings and sentence of the court-martial were promulgated on 15 February 1994. The applicant's subsequent appeal to the Defence Council was rejected by the Army Board on 3 June 1994. On 29 June 1994 the applicant applied to a single judge of the Courts-Martial Appeal Court for leave to appeal to that court. On 10 November 1994 this application was refused. The applicant's subsequent renewal of his application, for leave to appeal against conviction to the full Courts-Martial Appeal Court, was rejected on 29 January 1996.

B. Relevant domestic law and practice.

The principal law and procedures applicable are contained in the Army Act 1955 ("the 1955 Act") prior to its amendment by the Armed Forces Act 1996 ("the 1996 Act"), which latter Act came into force on 1 April 1997. Accordingly, and apart from section (g) below, the following is an outline of the pre-1996 Act law and practice.

(a) General

Section 69 of the 1955 Act reads as follows:

"Any person subject to military law who is guilty, whether by any act or omission or otherwise, of conduct to the prejudice of good order and military discipline shall, on

conviction by court-martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act."

Royal Marine commando training is specifically regulated by the Commando Training Centre Royal Marines ("CTC RM") Standing Orders and by the Commando Training Wing ("CTW") Standing Orders. CTC RM Standing orders provide, insofar as relevant, as follows:

"21. Intoxicating Liquor ...

(b) Ranks under the age of 18 are not permitted to purchase or drink intoxicating liquor in the centre or while on exercise or training. Non-alcoholic drinks are to be made available whenever alcohol is on sale or available to recruits both in or outside the Centre.

(c) Each recruit is to be clearly briefed on paragraph, inter alia, (b) above and warned before being allowed ashore that:
(i) It is illegal for anyone under the age of 18 to purchase alcohol from licensed premises ashore.
(ii) It is illegal to purchase alcohol for consumption by anyone under the age of 18."

Sections 13 and 14 of the CTW Standing Orders provide, insofar as relevant, as follows:

"13. Drinking and the Under-aged. Under-age drinking is illegal by common law and is not condoned. Arrangements have been made to ensure that those who are under-age have non-alcoholic drinks more readily available in the NAAFI and other canteens used by recruits.

14. The Troop Party The Troop Party ... is a natural way to let off steam and can make a good contribution to Troop unity and 'esprit de corps'. The training team must steer it within the bounds of decency and reasonable respect for institutions.... The ruling on under-age drinking still strictly applies at Troop Parties and non-alcoholic drinks are to be available."

Depending on their gravity, charges under the 1955 Act could be tried by district, field or general court-martial. These were not standing courts: they came into existence in order to try a single offence or group of offences.

At the time of the events in question, a general court-martial consisted of a President (normally a brigadier or colonel in the army), appointed by name by the Convening Officer, and at least four other officers, either appointed by name by the Convening Officer or, at the latter's request, by their commanding officer.

Each member of the court-martial had to swear the following oath:

"I swear by almighty God that I will well and truly try the accused before the court according to the evidence, and that I will duly administer justice according to the Army

Act 1955, without partiality, favour or affection, and I do further swear that I will not on any account at any time whatsoever disclose or discover the vote or opinion of the president or any member of this court-martial, unless thereunto required in the due course of law."

(b) The Convening Officer

Before the coming into force of the 1996 Act, a Convening Officer of a general court-martial had to be a "qualified officer" or an officer not below the rank of Colonel to whom the qualified officer had delegated his or her powers. To be a "qualified officer", an officer had to be not below the rank of Field Officer or corresponding rank who was in command of a body of the regular forces or of the command within which the person to be tried was serving.

The Convening Officer assumed responsibility for every case to be tried by court-martial. He or she would decide upon the nature and detail of the charges to be brought and was responsible for convening the court-martial.

He would draw up a convening order, which would specify, inter alia, the date, place and time of the trial, the name of the President and the details of the other members all of whom he could appoint. He ensured that a judge advocate was appointed by the Judge Advocate General's Office and failing such appointment, could appoint one. He also appointed, or directed a commanding officer to appoint, the prosecuting officer.

Prior to the hearing, the Convening Officer was responsible for sending an abstract of the evidence to the prosecuting officer and to the judge advocate, and could indicate the passages which might be inadmissible. He procured the attendance at trial of all witnesses to be called for the prosecution. When charges were withdrawn, the Convening Officer's consent was normally obtained, although it was not necessary in all cases, and a plea to a lesser charge could not be accepted from the accused without it. He had also to ensure that the accused had a proper opportunity to prepare his defence, legal representation if required and the opportunity to contact the defence witnesses, and he was responsible for ordering the attendance at the hearing of all witnesses "reasonably requested" by the defence.

The Convening Officer could dissolve the court-martial either before or during the trial, when required in the interests of the administration of justice (section 95 of the 1955 Act). The Convening Officer usually also acted as Confirming Officer.

(c) The Judge Advocate General and judge advocates

The Judge Advocate General was appointed by the Queen in February 1991 for five years. He was answerable to the Queen and was removable from office by her for inability or misbehaviour. He had the role of adviser to the Secretary of State for Defence on all matters touching and concerning the office of Judge Advocate General, including advice on army law and the procedures and conduct of the court-martial system. He was

also responsible for advising the confirming and reviewing authorities following a court-martial.

Judge advocates are appointed to the Judge Advocate General's Office by the Lord Chancellor. They must have at least seven and five years experience respectively as an advocate or barrister.

At the time of the events in question, a judge advocate was appointed to each court-martial, either by the Judge Advocate General's Office or by the Convening Officer. He or she was responsible for advising the court-martial on all questions of law and procedure arising during the hearing and the court had to accept this advice unless there were weighty reasons for not doing so. In addition, in conjunction with the President, he was under a duty to ensure that the accused did not suffer any disadvantage during the hearing. At the close of the hearing, the judge advocate would sum up the relevant law and evidence.

Prior to the coming into force of the 1996 Act, the judge advocate did not take part in the court-martial's deliberations on conviction or acquittal, although he could advise it in private on general principles in relation to sentencing. He was not a member of the court-martial and had no vote in the decision on conviction or sentence.

(d) The court-martial hearing

At the commencement of the trial, the accused could object to individual members of the court-martial, such objection being considered in closed court.

The accused was then asked to plead in respect of the charge. If a plea of not guilty was entered the procedure was similar to that followed in the (civilian) Crown Court. After the prosecution had made its case, the defence could enter a submission of no case to answer. If this submission was not accepted, the judge advocate would advise the accused on the alternatives open to him and the defence would proceed with its case. Witnesses could be called for the prosecution and the defence and both sides could make a closing submission, the defence submission being the last. During the trial the court-martial could adjourn to consult the Convening Officer on points of law; the latter then had to take legal advice from the Judge Advocate General. The members of the court-martial retired (without the judge advocate) to deliberate on their findings, returned and pronounced those findings. Their votes and opinions were private and it was not disclosed whether the decision had been by a majority.

In the event of a conviction or a plea of guilty, the prosecuting officer put in evidence the defendant's service record and other evidence having a bearing on the sentence to be imposed. The defence made a plea in mitigation and could call witnesses in support. The members of the court-martial then retired (with the judge advocate) to consider the sentence. The sentence was announced in open court. There was no provision for the giving of reasons by the court-martial for its decision on guilt or

sentence.

(e) Confirmation and post-hearing reviews

Until the amendments introduced by the 1996 Act, the findings of a court-martial were not effective until confirmed by a "Confirming Officer". Prior to confirmation, the Confirming Officer used to seek the advice of the Judge Advocate General's Office, where a judge advocate different from the one who acted at the hearing would be appointed. The Confirming Officer could withhold confirmation or substitute, postpone or remit in whole or in part any sentence.

Once the sentence had been confirmed, the defendant could present a petition of appeal against conviction and/or sentence to the "reviewing authority", which was usually the Army Board in cases involving army personnel. It had the power to quash a finding and to exercise the same powers as the Confirming Officer in relation to substituting, remitting or commuting the sentence.

A petitioner was not informed of the identity of the Confirming Officer or of the reviewing authority. No statutory or formalised procedures were laid down for the conduct of the post-hearing reviews and no reasons were given for decisions delivered subsequent to them. Neither the fact that advice had been received from the Judge Advocate General's Office nor the nature of that advice was disclosed.

(f) Courts-Martial Appeal Court

The Courts-Martial Appeal Court ("CMAC") was established by the Courts-Martial (Appeals) Act 1951 and was confirmed by the Courts-Martial (Appeals) Act 1968. The CMAC had the same status and, in essence, the same procedure as the (civilian) Court of Appeal, Criminal Division. Its judges included ordinary and ex officio judges of the Court of Appeal and judges of the High Court nominated by the Lord Chief Justice.

If an appeal petition was rejected by the Army Board, an appellant could apply to a single judge of the CMAC (and, if necessary, also to the full court) for leave to appeal against conviction. There was no provision for an appeal against sentence only, although certain powers of revising sentences, pursuant to an appeal against conviction, were available to the CMAC.

The hearing of the substantive appeal did not constitute a full rehearing on all points of fact and law. However, the CMAC was empowered to consider any question required for the doing of justice and could order a retrial. It also had power, inter alia, to order the production of documents or exhibits connected with the proceedings, order the attendance of witnesses, receive evidence, obtain reports from members of the court-martial or from the judge advocate and order a reference of any question to a special commissioner for inquiry.

The CMAC had to allow an appeal against conviction if it considered that the finding of the court-martial was, in all the circumstances, unsafe or unsatisfactory or involved a wrong decision on a question of law. The appeal had also to be allowed if there was a material irregularity in the course of the trial. In any other case, the appeal had to be dismissed.

An appellant required the leave of the CMAC to attend any hearing in relation to the appeal. Leave would only be granted where the CMAC considered that his presence would serve some useful purpose or was necessary in the interests of justice. Legal aid for an appeal to the CMAC was available under certain conditions and the appellant could obtain an order for costs in his favour if his appeal was allowed.

A further appeal, on a point of law of general public importance, could be made to the House of Lords with the leave of the CMAC or of the House of Lords itself.

(g) The Armed Forces Act 1996

Under the 1996 Act, the role of the Convening Officer ceases to exist and its functions are split among three different bodies: the higher authority, the prosecuting authority and court administration officers (the 1996 Act, Schedule I).

The higher authority, a senior officer, decides whether any case referred to him by the accused's commanding officer should be dealt with summarily, referred to the new prosecuting authority, or dropped. Once the higher authority has taken this decision, he has no further involvement in the case. The prosecuting authority is the legal branch of the relevant Service. Following the higher authority's decision to refer a case to it, the prosecuting authority has an absolute discretion, applying similar criteria to those applied in civilian cases by the Crown Prosecution Service, to decide whether or not to prosecute, what type of court-martial would be appropriate and what charges should be brought. It also conducts the prosecution (the 1996 Act, Schedule I, Part II). Under the new legislation, court administration officers have been appointed in each Service. They are independent of both the higher and the prosecuting authorities and are responsible for making the arrangements for courts-martial, including arranging venue and timing, ensuring that a judge advocate and any court officials required are available, securing the attendance of witnesses and selection of members. Officers under the command of the higher authority will not be selected as members of the court-martial (the 1996 Act, Schedule I, Part III).

Each court-martial now includes a judge advocate as a member. His advice on points of law is binding on the court and he has a vote on sentence (but not on conviction). The casting vote, if needed, rests with the president of the court-martial, who gives reasons for the sentence in open court. The Judge Advocate General no longer provides general legal advice to the Secretary of State for Defence (the 1996 Act, Schedule I, Part III).

Findings by a court-martial are no longer subject to confirmation or revision by a Confirming Officer (whose role is abolished). A reviewing authority has been established in each Service to conduct a single review of each case. Reasons are now given for the decision of the reviewing authority. As part of this process, post-trial advice received by the reviewing authority from a judge advocate (different from the one who officiated at the court-martial) is disclosed to the accused. A right of appeal against sentence to the CMAC has been added to the existing right of appeal against conviction (the 1996 Act, section 17 and Schedule V).

COMPLAINTS

The applicant complains under Article 6 para. 1 of the Convention that he was denied a fair and public hearing by an independent and impartial tribunal established by law. He also alleges that he was presumed guilty throughout the hearing contrary to Article 6 para. 2.

He further challenges the unforeseeable nature of his conviction under section 69 of the Army Act 1955 invoking Article 6 paras. 2 and 3(a) and Article 7.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 18 July 1996 and was registered on 26 February 1997.

On 3 December 1997 the Commission decided to communicate the application.

The observations of the respondent Government were submitted on 1 May 1998 and those of the applicant in response were submitted on 19 August 1998;

THE LAW

1. The applicant complains under Article 6 para. 1 of the Convention that he was denied a fair and public hearing by an independent and impartial tribunal established by law. Referring to the Findlay and Coyne judgments (Eur. Court HR, Findlay v. the United Kingdom judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I and Coyne v. the United Kingdom judgment of 24 September 1997, Reports of Judgments and Decisions 1997-V), he mainly argues that the court-martial lacked independence and impartiality and that the proceedings against him were consequently unfair. The applicant also submits that there was no appeal against sentence only the Courts-Martial Appeal Court and that the sentence he received was too severe, that the Judge Advocate's summing up was lacking and that the court-martial failed to establish a necessary element of the offence under section 69 of the 1955 Act.

The applicant further complains under Article 6 para. 2 of the Convention that he was presumed guilty throughout the court-martial proceedings. Article 6 of the Convention, insofar as relevant, reads as follows:

"1. In the determination ... 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. ....

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Government accept that this case raises issues similar to those in respect of which the Court found a violation of Article 6 para. 1 in the Findlay and Coyne judgments (Eur. Court HR, Findlay v. the United Kingdom judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I and Coyne v. the United Kingdom judgment, loc. cit.). Accordingly, the Government have no observations on the admissibility of these aspects of the application, although they reserve their position on the merits. The Government deny, however, that there was any presumption of the applicant's guilt.

The Commission recalls that the Court found, in the above-cited Findlay and Coyne cases, that an army general court-martial and an air force district court-martial, respectively did not constitute independent or impartial tribunals. The Commission also concluded in its Reports in those cases that a court-martial found to lack independence and impartiality could not, consequently, guarantee a fair trial (Eur. Court HR, Findlay v. the United Kingdom judgment, loc. cit., Comm. Report 5.9.95, para. 108 and Coyne v. the United Kingdom judgment, loc. cit., Comm. Report 26.6.96, para. 80).

The Commission notes that, in the present case, an army general court-martial was convened pursuant to the Army Act 1955 to try the applicant. He was found guilty of conduct contrary to section 69 of the 1955 Act which section provided for a potential sentence of 2 years imprisonment.

Accordingly, the Commission considers that the applicant's complaints raise complex and serious issues under Article 6 of the Convention which require determination on the merits. It follows that these complaints of the applicant cannot be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention. No other ground for declaring the complaints inadmissible has been established.

2. The applicant also challenges the vague and unforeseeable nature of his conviction under section 69 of the Army Act 1955 invoking Article 6 paras. 2 and 3(a) together with Article 7 in that respect. The Commission considers that this complaint is more appropriately considered under Article 7 of the Convention, which Article, insofar as relevant, reads as follows:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Government essentially submit that the requirement of legal certainty is upheld as long as a general definition of the offence is provided by law namely, "conduct to the prejudice of good order and military discipline". The manner in which the behaviour is improper is apparent from the particulars of the charge sheet.

The applicant argues that section 69 of the 1955 Act was not sufficiently precise for him to know in advance that his conduct would constitute an offence under that section. He points out that, in accordance with CTC RM Standing Order 21, his troop had been briefed by a member of his training team to the effect that consumption of alcohol by under-age recruits was illegal and that the venue of the Troop Party served no alcoholic drinks. The details in the charge sheet are not relevant since the charge sheet is served after the behaviour alleged to have constituted the offence. The applicant points out, in the alternative, that for "many years before" June 1992 senior officers adopted a "blind-eye" policy as regards the consumption of alcohol by under-age recruits and that he could not therefore have foreseen an obligation on him in June 1992 to prevent such consumption. In this latter respect, the applicant refers to 40 statements he submitted to the court-martial from former and serving Royal Marine officers to the effect that "the consumption of alcoholic drinks by junior marines at Troop Parties and generally was accepted by senior officers in the Royal Marines".

Given the potential sentence under section 69 of the 1955 Act (two years imprisonment) and the nature of the charges against the applicant, the Commission considers that he was found guilty of a "criminal offence" within the meaning of Article 7 of the Convention (Eur. Court HR, Garyfallou AEBE v. Greece judgment of 24 September 1997, Reports of Judgments and Decisions 1997-V, no. 49, pp. 1830-31, paras. 32-34, with further references; No. 25937/94, Comm. Report 4.3.98, unpublished; and No. 10600/83, Dec. 14.10.85, D.R. 44, p. 156).

The Commission recalls that the criminal offence in question must be clearly defined in the law and that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (Eur. Court HR. Cantoni v. France judgment of 15 November 1996, Reports of Judgments and Decision 1996-V, no. 20, p. 1627, para. 29). In the present case, it is the foreseeability element that is in issue.

The Commission observes that the applicant does not dispute that he was responsible for the troop which attended the relevant Troop Party. It is also noted that the

applicant also accepted during his court-martial that he had read and was aware of the contents of the CTC RM and CTW Standing Orders. The Commission considers that the text of section 69 of the 1955 Act, read in the light of the detailed and precise provisions of the Standing Orders, satisfied the requirement of foreseeability under Article 7 of the Convention. In addition, the Commission does not consider that the applicant's alternative submission as regards a "blind-eye" policy by "senior officers" as regards under-age alcohol consumption demonstrates an "implicit abrogation" of the relevant provisions of the 1955 Act or of the CTC RM and the CTW Standing Orders (No. 7721/76, Dec. 12.12.77, D.R. 11, p. 209) which provisions the applicant does not dispute were in force in June 1992.

In such circumstances, the Commission considers this complaint of the applicant inadmissible as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without pre-judging the merits, the applicant's complaints that he did not have a fair and public hearing by an independent and impartial tribunal established by law and that he was presumed guilty during the proceedings against him; and

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber