AS TO THE ADMISSIBILITY OF

Application No. 35580/97
by Kevin ALLEN
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 1 April 1997 by Kevin ALLEN against the United Kingdom and registered on 9 April 1997 under file No. 35580/97;

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 letter in reply submitted by the applicant on 14 May 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1973 and resident in Aberdeen. He is represented before the Commission by Mr John Mackenzie, a solicitor practising in London. The facts as submitted by the parties may be summarised as follows.

A. Particular circumstances of the case.

On 29 March 1996 the applicant, who was a soldier in the regular forces in the British army was charged (pursuant to section 70 of the Army Act 1955) with two counts of possession of controlled drugs contrary to the Misuse of Drugs Act 1971.

The Convening Officer, by order dated 16 July 1996, convened a district court-martial and on 24 July 1996 the applicant pleaded guilty to both charges. He was sentenced to eight months detention and to be dismissed from the army. On 25 July 1996 the applicant appealed to the Confirming Officer against conviction, citing the "public" element of Article 6 para. 1, and against sentence.

On 25 July 1996 the applicant's representative wrote to the Convening Officer's staff officer pointing out that, although he had been fortunate to have met the Guard when he arrived and to have been accompanied by the applicant's defending officer on the day of the court-martial, members of the public would encounter difficulties in accessing military barracks and in locating court-martial centres in such barracks. This meant that court-martial proceedings in military installations (as in the present case) could not be considered to be held in public. The response from the Directorate of Personal Services (Army) in the Ministry of Defence dated 3 September 1996 noted, inter alia, that section 94 of the 1955 Act and paragraph 6.101 of the Queen's Regulations had been complied with, that if a member of the public had requested to attend he/she would have been given the appropriate directions to the court-martial centre by the Guard and that units had been reminded of the importance of briefing the Guard on duty in the barracks on the relevant day on all courts-martial taking place in the barracks. The letter pointed out that, in any event, not all courts-martial take place in military installations.

By letter dated 27 August 1996 the applicant petitioned the Defence Council agian against his conviction and sentence. By letter dated 29 October 1996 the applicant's representatives were informed of the decision (taken by the Army Board) to reject the petition against conviction and to reduce the sentence of detention to 6 months.

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

Many civilian offences were also offences under the 1955 Act (section 70(1)). Although the final decision on jurisdiction lay with the civilian authorities, army personnel who were accused of such offences were usually tried by the army authorities unless, for example, civilians had been in some way involved.

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 district court-martial consisted of a President, who could not be under the rank of Field Officer and was appointed by name by the Convening Officer, and at least two other officers, appointed either 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, the Convening Officer of a district 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 and 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 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 at the time of the events in question was appointed by the Queen in February 1991 for five years. He was answerable to the Queen and 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 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 (this time 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 (Schedule I to the 1996 Act).

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, sections 35, 41 and 43).

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).

Section 94 of the 1955 Act provides that a court-martial will be an open trial. Paragraph 6.101 of the Queen's Regulations provides that members of the press and public are to be permitted to attend a court-martial and trial listings are to be posted beforehand in a place accessible to the public.

COMPLAINTS

The applicant complains under Article 6 para. 1 of the Convention that he was denied a fair hearing by an independent and impartial tribunal established by law. He mainly argues that the court-martial lacked independence and impartiality and that, consequently, the proceedings against him were unfair.

He also complains under Article 6 para. 1 that the proceedings were not "public" referring to difficulties the public would have had in accessing the military installation and in locating the court-martial centre in the installation where his court-martial took place.

He further complains under Article 13 of the Convention that the United Kingdom have not incorporated the Convention into domestic law so as to provide him with an effective domestic remedy for a breach of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 1 April 1997 and registered on 9 April 1997.

On 3 December 1997 the Commission decided to communicate the application and to request the Government's observations on the admissibility and merits.

The Government's observations were submitted on 1 May 1998 after one extension of the time-limit fixed for that purpose. The applicant did not submit observations in reply.

THE LAW

1. The applicant complains under Article 6 para. 1 of the Convention that he was denied a fair hearing by an independent and impartial tribunal established by law. He mainly argues that the court-martial lacked independence and impartiality and that, consequently, the proceedings against him were unfair.

Article 6 para. 1 of the Convention, insofar as relevant, reads as follows:

"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. ..."

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 applications (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). Accordingly, the Government have no observations on the admissibility of these aspects of the application, although they reserve their position on the merits.

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).

In the present case, the applicant pleaded guilty but, nevertheless, petitioned against his conviction relying on the "public" element of Article 6 of the Convention. However, the Commission does not consider that the applicant had an effective domestic remedy to pursue before the CMAC - the provisions of the Convention cannot be directly invoked before the courts of the United Kingdom and an appeal against sentence only to the CMAC does not lie. Secondly, the Commission notes that, in the present case, an army district court-martial was convened pursuant to the Army Act 1955, that the applicant pleaded guilty to two possession charges contrary to the Misuse of Drugs Act 1971 and that his sentence included six months imprisonment.

In such circumstances, the Commission considers that these complaints of the applicant raise complex and serious issues under Article 6 para. 1 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 complains that court-martial proceedings were not "public" within the meaning of Article 6 para. 1.

He points out that, although there was a Guard on duty when his legal representative arrived to attend the court-martial, that was fortuitous. It was also fortunate that the defending officer was present to accompany his legal representative to the court-martial centre in the barracks. The applicant therefore argues that members of the public would not have had easy access to his court-martial because the presence of the Guard is not specifically foreseen, no specific steps were foreseen to ensure easy access of the public and the public would have had difficulty in locating the court-martial centre in the barracks. Such obstacles to the public's attendance means that his court-martial proceedings were not "public" within the meaning of Article 6 para. 1 of the Convention.

The Government dispute the applicant analysis of the "public" nature of the court-martial proceedings. They refer to the information outlined in the letter dated 3 September 1996 from the Ministry of Defence and add that for security reasons any person visiting a military installation (whether to attend a court-martial or not) is required to "book-in" at the guardroom giving their personal details and stating the purpose of their visit. The applicant makes no observations in reply.

The Commission recalls that the object pursued by the publicity requirement in Article 6 para. 1 is to ensure scrutiny of the judicial process by the public with a view to safeguarding the right to a fair trial and that security reasons can justify the exclusion of the public from proceedings (Eur. Court HR, Pretto v. Italy judgment of 8 December 1983, Series A no. 71, p. 13, para. 27 and Campbell and Fell v. the United Kingdom judgment of 28 June 1984, Series A no. 80, p. 42, paras. 87-88).

The Commission notes that the applicant does not dispute that section 94 of the 1955 Act and paragraph 6.101 of the Queen's Regulations were complied with in the present case. In addition, it does not consider that the applicant has demonstrated that any member of the public attempted but was unable to attend his court-martial proceedings. The Government's submissions as to the reporting requirements on arrival at a military installation are noted and the Commission does not consider that such requirements would amount to a deterrent to the public or press from attending a court-martial. Even assuming that certain members of the armed forces may thereby be deterred from attending court-martial proceedings, the Commission considers that the Government's reasonable security and safety concerns would justify the reporting requirements (see, for example, No. 17265/90, Dec. 21.10.93, D.R. 75, p. 76, at p. 125).

Accordingly, the Commission considers the complaint of the applicant as regards the public nature of the proceedings to be manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

3. Finally, the applicant complains under Article 13 of the Convention in conjunction with Article 6 para. 1 that the United Kingdom has not incorporated the Convention into domestic law so as to provide him with a domestic remedy for a breach of the Convention. The Government argue that any complaint under Article 13 is subsumed within any complaint under Article 6 where admissibility is conceded.

Article 13 provides as follows:

"Everyone whose rights and freedoms as set forth in this 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".

The Commission recalls that the requirements of Article 13 are less strict than, and are absorbed by, those of Article 6 para. 1 of the Convention, Article 6 para. 1 being the lex specialis (see, for example, No. 24142/94, Dec. 6.4.95, D.R. 81, p. 108). In such circumstances, the Commission considers it unnecessary to examine the complaint of the applicant under Article 13 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint that he did not receive a fair hearing by an independent and impartial tribunal established by law; and

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber