AS TO THE ADMISSIBILITY OF

Application No. 30976/96
by Andrew BALFOUR
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 2 July 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
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 16 September 1994 by Andrew Balfour against the United Kingdom and registered on 10 April 1996 under file No. 30976/96;

Having regard to the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1950 and living in Weybridge. Before the Commission, he is represented by Mr. P. Leach, a lawyer with Liberty, London.

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

A. Particular circumstances of the case

In 1969 the applicant began his career with the Foreign and Commonwealth Office ("FCO").

In 1986 the applicant was posted to Dubai as vice-consul and visa officer. There he had dealings with a man called A. In early 1989 the applicant provided Mr. A. with the number of a bank account in the name of the applicant's brother-in-law, a Mr. A.B., in the United Kingdom. On 16 April 1989 the applicant issued a visa to Mr. A. and in May 1989 Mr. A. transferred £5,000 into Mr. A.B.'s account.

On 27 May 1989 the applicant was instructed to return to London and he did so the following day. There he was interrogated and for a time was detained pursuant to the Prevention of Terrorism (Temporary Provisions) Act 1984. No criminal proceedings were brought.

On 16 March 1990 disciplinary proceedings against the applicant were commenced. The principal complaint was in the following terms:

> "[The applicant] approached an Iranian businessman in Dubai with a request to borrow £20,000. The businessman agreed to lend [to the applicant] £5,000. Subsequently £5,000 was paid into [Mr. A.B.'s] bank account. [The applicant] subsequently induced [Mr. A.B.] to write three fictitious letters to the businessman purporting to show that the £5,000 was payment for a transaction between [his] brother-in-law and the Iranian businessman, Mr. A. ... It cannot be proved why these considerable sums of money and gifts were received by [the applicant]. But their receipt, unreported, and in one instance with an elaborate attempt at concealment, amounts ... to breaches of the following diplomatic service regulations ("DSR"): - (a) DSR 8 (General Principles of Conduct) and (b) DSR 9 (Acceptance of Gifts and Advantages)."

On 12 September 1990, the disciplinary board found, inter alia, that a sum of £5,000 had been transferred from Mr. A.'s account to that of Mr. A.B. and that the applicant was aware that three fictitious letters had been written by Mr. A.B. in an endeavour to show that the £5,000 was paid pursuant to a legitimate commercial transaction. The board noted that no invoices had been issued for the £5,000 and concluded that the applicant had breached DSR 8 and 9 para. 2. Certain other disciplinary charges were found not to have been made out. The applicant's dismissal was recommended.

On 10 October 1990 the applicant wrote to the Foreign Secretary enclosing a notice of appeal. On 16 October 1990, he was suspended without pay.

On 30 October 1990 the applicant sent detailed grounds of appeal to the FCO. On 4 December 1990 the FCO convened a disciplinary appeal board which heard and considered the applicant's appeal. Mr. A.B. declined an invitation to appear. The applicant's appeal was rejected, and the applicant was dismissed with effect from 15 February 1991.

Meanwhile, on 11 January 1991, the applicant submitted an application to the London (South) Industrial Tribunal claiming, inter alia, that his grounds for appeal had been classified "secret" under the Official Secrets Act, that he was not able to provide details and that the grounds for his dismissal were wrong and unfair.

The FCO answered that the applicant's conduct in question was obtaining the transfer of £5,000 from an official contact, namely an Iranian businessman, to the account of the applicant's brother-in-law in breach of DSR 8 and 9, which, inter alia, require officers not to use their official position to further their private interests and not to accept gifts or advantages. The FCO further observed that the applicant, in his grounds of appeal had included certain material of a secret nature, disclosure of which would be contrary to the public interest. For that reason the whole document was given a "secret" classification.

In amended grounds of application the applicant contended that he had been requested by the United Kingdom security services to maintain contact with Mr. A. and that the transfer of £5,000 was a legitimate business transaction between Mr. A. and Mr. A.B. The applicant said that he did not know that the money had actually been

transferred, and, insofar as he was involved in the writing of fictitious letters, that was only an error of judgment on his part.

On 26 June 1991 the Secretary of State for Foreign and Commonwealth Affairs signed the first of two certificates claiming public interest immunity. His second certificate was dated 26 January 1992. A third certificate signed by the Secretary of State for the Home Department was signed on 27 January 1992. The three certificates were in similar terms. Each raised objection to the production of any evidence, documentary or otherwise, about the organisation of the security and intelligence services, their theatres of operation or their organisations and the threat to national security of disclosure. It has not been suggested that the certificates lacked particularity either as to the nature and content of the material which attracted immunity or as to the reasons for the claim.

On 6 October 1991, following a directions hearing by the London (South) Industrial Tribunal, listed for 26 September 1991, the regional office of the industrial tribunals wrote to the applicant:

> "... the Secretary of State has issued a certificate that certain parts of the material submitted to the disciplinary hearing ought not in the public interest to be disclosed. For reasons stated in the certificate the chairman will require cogent evidence before he is able to take any steps to decide that the interests of justice outweigh the Secretary of State's objections.
>
> The applicant is accordingly required ... to send to the Treasury Solicitor ... particulars of all facts and matters relied upon in support of his allegation that his dismissal was unfair. Treasury Solicitor is within 14 days thereafter to indicate to the Tribunal whether and if so what parts are in conflict."

The applicant then submitted more detailed grounds of application, a list of documents of which he requested disclosure, and a list of witnesses whom he wished to call at the Industrial Tribunal. The list contained eleven documents and fifteen witnesses.

By letter of 15 November 1991 the Treasury Solicitor passed the applicant's material (but not the documents requested therein) on to the London (South) Industrial Tribunal, having deleted those parts which the FCO felt fell within the scope of the Foreign Secretary's public interest immunity certificate. The letter added that the application for discovery would be resisted on grounds of public interest immunity and relevance.

On 29 January 1992 the chairman of the London (South) Industrial Tribunal conducted an interlocutory hearing and ordered disclosure by the FCO of documents 3, part of 7 and 8 while refusing to order disclosure of those documents referred to in the public interest immunity certificates. The applicant's representative's note of the decision reads inter alia:

> "... documents 1, 2, 4, 5, 7 (part of), 9, 10 (part of) were cited in the public interest certificates and the chair believed that she had no jurisdiction to order their disclosure. She accepted that disclosure would cause unquantifiable damage to the functions of the security and intelligence operations and the safety and security of personnel involved. ... She also accepted that Conway v. Rimmer [1968] AC 910 and Council of Civil Service Unions v. Minister for the Civil Service [1985] 1 AC 374 were authority for the propositions that the court was not competent to weigh up the risks involved in disclosure as it was not privy to all the relevant background material

and therefore it could not go behind the decision of the ministers exemplified by the public interest certificates.

Chair reluctantly accepted that document 6 was covered by Section 9 of the Interception of Communications Act 1985 and that therefore the court could not order disclosure that might reveal the existence (or non-existence) of a warrant authorising a telephone interception."

On 9 March 1992 the applicant sent a notice of appeal to the Employment Appeal Tribunal. He claimed that the chairman of the Industrial Tribunal erred in law in her order for discovery in that: (i) the contents of documents 1, 2, 4, 5, 7 and 9 were relevant in considering whether he was unfairly dismissed and that the interests of justice were served by such discovery, and (ii) the contents of documents 10 and 11 materially assisted him in establishing his case and it was in the interests of justice that they were discovered.

On 29 January 1993 the Employment Appeal Tribunal dismissed the applicant's appeal. It stated that though the chairman's reference to the industrial tribunal "not having jurisdiction" was incorrect, the principles applied in her decision not to order disclosure were fundamentally correct. The Appeal Tribunal concluded:

"We would, for our part, prefer to describe the process involved in deciding whether there should be discovery of documents in respect of which public immunity is claimed and it is shown by ministerial certificates that their disclosure would or might endanger national security as one where the scale against disclosure is decisively the heavier rather than as one where there is no balancing exercise at all. We accept that since Conway v. Rimmer [1968] AC 910 it is the court that has to decide. But, in the vast majority of cases raising issues of national security, this is more a question of phraseology than of principle because the end result is the same.

There also remains the need for evidence to link the documents in question to the reasoning in support of the claim to public interest immunity. It is for the court or tribunal deciding on the question of discovery to be satisfied as to this. But that does not lead to the conclusion that in all cases the court must itself inspect the document concerned.

For these reasons, we concluded that the principles applied by the chairman were fundamentally correct if one interprets the reference to absence of jurisdiction in the wide sense of the tribunal not being qualified to evaluate the strength or validity of the national security reasons advanced in the ministerial certificates, and on that basis we dismiss this appeal."

On 19 January 1993 the applicant appealed to the Court of Appeal. On 9 December 1993 the Court stated, upholding the decision of the Employment Appeal Tribunal, that:

"... counsel for the applicant, whose basic submission was that we should direct the industrial tribunal to inspect the material in respect of which public interest immunity is claimed so that the tribunal could thereafter rule on its admissibility in the applicant's claim, referred to and cited from a large number of authorities.
...
Further in the Council of Civil Service Unions case [1985] ICR 1 Lord Diplock said, at p. 39: 'National security is the responsibility of the executive government; what action

is needed to protect its interests is ... a matter upon which those on whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.'

In this appeal [the applicant's counsel] boldly invites this court to depart from these powerful dicta, contending that they were obiter and that in the society in which we now live, the time is ripe for what he described as a more open approach when issues of national security are raised by the appropriate ministers. Even if not constrained by authority we firmly decline to accept that invitation, for it seems to us to be contrary to principle and to good sense. In this case the court has not abdicated its responsibility, but it has recognised the constraints placed upon it by the terms of the certificates issued by the executive. There must always be vigilance by the courts to ensure that public interest immunity of whatever kind is raised only in appropriate circumstances and with appropriate particularity, but once there is an actual or potential risk to national security demonstrated by an appropriate certificate the court should not exercise its right to inspect. We recognise the importance of this case to the [applicant] but, in our judgment, the uninhibited prosecution of his claim for unfair dismissal cannot prevail. We do not accept, as counsel submitted we should, that in such a situation a defendant should abandon his defence just as the Crown will abandon a prosecution where there exists a risk of the innocent being convicted."

The Court of Appeal refused to give leave to appeal to the House of Lords. The applicant made a petition for leave to appeal to the House of Lords, in which he set out his grounds for appeal and the principal questions of law that arose in his case.

On 24 March 1994 the applicant's petition was refused by the House of Lords.

On 20 September 1995 the London (South) Industrial Tribunal found that the applicant had not been unfairly dismissed. It stated inter alia:

"40. The difficulty we find in accepting the applicant's argument, based upon this matrix of possibilities, is the lack of evidence to provide any credible explanation as to why the Intelligence Services, or the Security Department of the [FCO], would seek to achieve the dismissal of the applicant. By his own evidence he acted throughout in close co-operation with the Friends [MI6] working in Dubai and there is no apparent reason for any lingering hostility towards the applicant because of the events which had taken place a few years earlier in Syria ...

41. Whilst there was concern about the applicant's work and associations in Dubai independent of the specific charges he later faced - he would hardly have been brought back to the United Kingdom as he was had there not been - we are satisfied, that the reason for the applicant's dismissal was his conduct in relation to the transfer of £5,000 by Mr. A. to the account of Mr. A.B., and the breach of the Diplomatic Service Regulations it was believed to entail. ...

...

48. We turn to the question whether the [FCO] had reasonable grounds for its belief as to the applicant's

conduct, having carried out as much investigation as was reasonable in circumstances of the case. There was a notable consistency in the account of the transfer of the £5,000 as given by Mr. A. and by Mr. A.B. and, as far as it went, by Mr. G. ... It is clear, however, from [Mr. A.B.'s] statement that he knew nothing of a prospective printing order. There is, moreover, no credible explanation of why Mr. A. should advance a substantial sum of money before he had asked for even a quotation as to the cost of printing work or, if he had done so, why he should not say so. ...
...
50. ... There was, in the opinion of the Tribunal, evidence ... on which the disciplinary board could have formed an honest belief, this on the balance of probabilities as they expressed it to be, that the applicant had contravened DSR 8(1)(b)(f)(g) and 9(2) by accepting for himself or a member of his family 'gifts or advantage' from someone with whom he had dealings in his official position as entry clearance officer in Dubai. ...
51. ... The applicant raised, in the matrix of possibilities, a number of matters that he contends should have been further investigated, such as regularity in the issue of visas, the activities of the Friends [MI6], the circumstances of his recall to the United Kingdom, and his arrest under the Prevention of Terrorism Act. ... The applicant had given a single explanation of how the £5,000 came to be paid into the account of Mr. A.B. and we consider that the investigation by the board into that, and also into the other two matters before it which were less serious, was both sufficient and reasonable. The disciplinary board, and the appeal board would have wished to have carried the investigation further by interviewing Mr. A.B. and Mr. A. but there was no power to compel the attendance of either. How matter involving national security impinged on the issues which the board had to consider, in view of the explanations for the payment given by the applicant, was not clearer to us than it was to the Court of Appeal when it earlier considered an application for disclosure. Thus it was not alleged that a member of the Friends [MI6] solicited the applicant to seek a loan of money from Mr. A. or to discuss business matters with him - on his own evidence he was asked only to effect an introduction. It was not necessary for the disciplinary board to find the existence of corruption on the part of the applicant, for example in the issue of visas, to sustain a complaint under DSR 9(2).
...
54. ... We are satisfied that the applicant would, as an experienced diplomat, have appreciated fully that, occupying the position he did, he would be regarded by outsiders as an influential person and that he would be more likely to be the subject of approaches than officers holding less obviously prominent positions. ..."

COMPLAINTS

The applicant complains that he has suffered through the use of public interest immunity certificates in relation to classes of documents relevant to proceedings concerning his dismissal. He submits that denial of access to these documents greatly hindered his action for unfair dismissal and resulted in that action being dismissed by the industrial tribunal. He invokes Article 6 para. 1 and Article 14 of the Convention.

THE LAW

1. The applicant alleges a violation of Article 6 para. 1 (Art. 6-1)

of the Convention, which provides, so far as relevant, as follows.

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

The Commission must determine whether Article 6 para. 1 (Art. 6-1) of the Convention is at all applicable to the proceedings by which the applicant challenged his dismissal.

The Commission first notes that the issue before the Industrial Tribunal was the question whether the applicant had been unfairly dismissed. The proceedings therefore determined, in an immediate and conclusive manner, whether the termination of the applicant's employment had been lawful, and whether, if it was not, he was entitled to compensation. There was accordingly a dispute over a "right" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

The next matter for the Commission is whether that "right" was a "civil" one.

The Commission recalls that in the case of Neigel v. France (Eur. Court HR, judgment of 17 March 1997, Reports 1997, paras. 43 and 44), the Court noted that the law of many member States of the Council of Europe discloses a basic distinction between civil servants and employees governed by private law, which had led it to hold that "disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 para. 1 (Art. 6-1)" (para. 43, with further reference). In that case, the Court found that the applicant's request for reinstatement to the permanent post of shorthand typist which she had previously held related to her "'recruitment', her 'career' and the 'termination of [her] service'. It did not therefore concern a 'civil' right within the meaning of Article 6 para. 1 (Art. 6-1)."

The Commission, too, has held that the dismissal of a high ranking soldier was a matter where the State acted in the field of public law such that no "civil rights" were at issue (see, for example, E.S. v. Germany, No. 23576/94, Dec. 29.11.95).

It is true that in the present case, the domestic rules make no special provision for civil servants: although the applicant was an entry clearance officer, and therefore a member of the diplomatic staff, he was nevertheless entitled to bring his allegation of unfair dismissal before an industrial tribunal in the ordinary way. Further, he could have brought an action for breach of contract had the occasion arisen.

However, the Commission considers that in the light of the Court's judgment in the Neigel case, the manner in which domestic law treats employees of the State cannot be the prime consideration in determining whether a dispute over a right is "civil": the question is one for the Convention organs to determine.

Accordingly, the Commission finds that the dispute between the applicant, a civil servant, and his employer, the State, did not determine his "civil" rights within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

Article 6 para. 1 (Art. 6-1) therefore does not apply in the present case.

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the

meaning of Article 27 para. 2 (Art. 27-2).

2. The applicant also alleges a violation of Article 14 of the Convention, taken together with Article 6 (Art. 14+6).

The Commission recalls that where Article 1 of Protocol No. 1 (P1-1) proves to be inapplicable, Article 14 (Art. 14) of the Convention cannot be combined with it (Eur. Court HR, Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 23, para. 50).

The Commission has found that Article 6 (Art. 6) of the Convention does not apply to the proceedings in the present case. It follows that the Commission cannot deal with the complaint under Article 14 (Art. 14) in combination with it.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber