AS TO THE ADMISSIBILITY OF

Application No. 24266/94
by Roman CYBULSKI
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 16 October 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ

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 29 March 1994 by Roman CYBULSKI against the United Kingdom and registered on 3 June 1994 under file No. 24266/94;

Having regard to:

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

- the respondent Government's letter of 13 September 1996 by which they informed the Commission that they did not intend to submit observations on the admissibility of the application;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a United Kingdom citizen born in 1957. He is a shop assistant and lives in Thorpe-le-Soken in Essex. He is represented before the Commission by Messrs Wilson Barca, solicitors, of London. The facts of the case may be summarised as follows.

The particular circumstances of the case

On 2 December 1992 police officers seized a quantity of magazines and some videos from the bookshop where the applicant works. He was subsequently charged with four offences, one of which eventually proceeded to trial. That was an allegation that the applicant had had an obscene article for gain, namely the video, contrary to Section 2 (1) of the Obscene Publications Act 1959 (as amended).

The applicant was tried on 28 and 29 March 1994 before a judge, Mr. Assistant Recorder Crowther ("the Recorder") and a jury. The

defence was that the video was not obscene. The jury unanimously acquitted the applicant.

The applicant's counsel applied to the Recorder for a defendant's costs order pursuant to the Prosecution of Offenders Act 1985. The Recorder refused the application, the following exchange taking place between the applicant's counsel, Mr. Salter, and the Recorder:

> Mr. Salter: ... The effect of denying [the applicant] his costs would be that he would have been exposed to expense and punished indirectly, notwithstanding that he was not guilty. It is, of course, the view of the jury, not your Honour's view or my view or anybody else's view of this material which undoubtedly counts. ... In a broad sense, of course he has brought the prosecution upon himself because everybody knows that if you publish pornography, you do so at peril of a prosecution, but on this occasion this jury who, representing the democratic opinion in this country, have come to the conclusion that Mr. Cybulski was right and the prosecution were wrong in their assessment of this material ... as the court knows there is no avenue of appeal in this country and if your Honour has in mind to find against me on this application notwithstanding the verdict of the jury, I would ask in the circumstances, since I do not know what I will have to meet, that if your Honour has reasons for refusing this man his costs, then I would like to know what they are or provisionally what they are so that I can deal with them.
>
> The Recorder: You shall know what they are because you can take this case along with the other ones to the European Court and it can be recoursed by the fact that you have two cases against me in the European Court, as I understand. I am sorry I am not going to grant costs here. You said in the course of your address to the jury that most ordinary people would say that this video was obscene.
>
> Mr. Salter: Well ...
>
> The Recorder: Just let me finish please. Those who deal in this kind of material do so at their peril, he has brought it on himself and he will not have his costs from me.
>
> Mr. Salter: Your Honour, I am sure [that] you mis-quoted me in my summing up to the jury. Of course, ... what I said ... was that they [the jury] were not required to apply [the word "obscene"] in the ordinary sense of the word, but, to apply it in that set out in the Obscene Publications Act 1959 ... I would ask your Honour ...not to punish [the applicant] financially for publishing material which the jury - this is a free country your Honour and the only restriction on the publication of this material is if the jury say it is obscene. ... They have not done so ...
>
> The Recorder: He has brought it upon himself and he is not going to have his costs.
>
> Mr. Salter: I am very grateful to you for listening to me, and that makes three, not two [applications to Strasbourg].
>
> The Recorder: Very well, three.

Relevant domestic law and practice

Section 16 of the Prosecution of Offences Act 1985 provides, so far as relevant, as follows:

> "(2) Where -
> (a) ...

(b) any person is tried on indictment and acquitted on any count in the indictment;
the Crown Court may make a defendant's costs order in favour of the accused."

On 3 May 1991 Lord Lane gave a Practice Direction of the Court of Appeal (Criminal Division) which is binding on the Crown Court and which included the following:

"In the Crown Court.

2.2 Where a person ... has been acquitted on any count in the indictment, the court may make a defendant's costs order in his favour. Such an order should usually be made ... unless there are positive reasons for not doing so. Examples of such reasons are: (a) the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case is stronger than it is; (b) there is ample evidence to support a conviction but the defendant is acquitted on a technicality which has no merit." (Practice Direction (Crime: Costs) [1991] 1 WLR 498).

Section 29 (3) of the Supreme Court Act 1981 provides that the High Court has the same powers of judicial review over the Crown Court as over an inferior court save in respect of the Crown Court's "jurisdiction in matters relating to trial on indictment".

In the case of Re Sampson [1987] 1 WLR 194, a case concerning a legal aid contribution order at the end of a trial on indictment, Lord Bridge of Harwich said:

"... certain orders made at the conclusion of a trial on indictment are excluded from judicial review as 'relating to trial on indictment' not because they affect the conduct of the trial, but rather because they are themselves an integral part of the trial process."

In that case, the question of the judge's order could not, therefore, be judicially reviewed.

In the case of Re Ashton and Others ([1993] 2 WLR 846 the House of Lords rejected a suggestion that the above proposition in Re Sampson was wrong.

COMPLAINTS

The applicant alleges violation of Articles 6 and 10 of the Convention.

He considers that Article 6 para. 2 of the Convention is violated where domestic law provides for costs to be paid to an acquitted defendant unless there are good reasons for not doing so, and the judge, as here, refuses costs without good reasons.

He also contends that the refusal to give reasons, and the fact that the Recorder had evidently resolved to punish the applicant by not making a defendant's costs order, violates Article 6 para. 1 of the Convention.

Under Article 10 of the Convention, the applicant considers that the refusal to make a costs order in his favour can only, in the circumstances of this case, be seen as a penalty - or at least a formality - imposed on him by the Recorder. He considers that the penalty or formality was not prescribed by law, and that given his acquittal on the charge which it was the court's function to consider, it was not necessary in a democratic society.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 March 1994 and registered on 3 June 1994.

On 11 January 1995 the Commission decided to communicate the application.

On 23 March 1995, the time-limit for submissions of the Government's observations was suspended as the parties had entered into settlement discussions in the present case and in two other cases (Nos. 22613/93 and 22614/93).

On 13 September 1996 the Government informed the Commission that they did not intend to submit observations on the admissibility of the case.

THE LAW

The applicant alleges violation of Articles 6 and 10 (Art. 6, 10) of the Convention.

Article 6 (Art. 6) of the Convention provides, so far as relevant, as follows:

> "1. 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. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Article 10 (Art. 10) of the Convention provides, so far as relevant, as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the prevention of disorder or crime, for the protection of health or morals, ... or for maintaining the authority and impartiality of the judiciary."

The applicant considers that the refusal to make a defendant's costs order in his favour violated Article 6 para. 2 (Art. 6-2) of the Convention, Article 6 para. 1 of the Convention and Article 10 (Art. 10) of the Convention.

The Government have informed the Commission that they do not intend to make observations on the admissibility of the case.

The Commission, recalling that it has declared admissible cases similar to the present case (No. 22613/93 and No. 22614/93, Dec. 11.1.95), finds that the application raises complex issues of fact and law which must be examined on the merits. The application cannot therefore be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber