AS TO THE ADMISSIBILITY OF

Application No. 15058/89
by Royce DARNELL
against the United Kingdom

The European Commission of Human Rights sitting in private on 10 April 1991, the following members being present:

MM. F. ERMACORA, Acting President of the First Chamber
E. BUSUTTIL
J.-C. SOYER
H. DANELIUS
Sir Basil HALL
MM. C.L. ROZAKIS
L. LOUCAIDES
B. MARXER

Mr. M. de SALVIA, Secretary to the First 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 2 December 1988 by Royce Darnell against the United Kingdom and registered on 29 May 1990 under file No. 15058/89;

Having regard to :

- the observations submitted by the respondent Government on 24 May 1990 and the reply submitted by the applicant on 20 July 1990;

- the submissions of the parties at the hearing on 10 April 1991;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1929 and resident in Derby. He is represented by Ms. Françoise Hampson, a senior lecturer in law at the University of Essex.

The facts as submitted by the parties may be summarised as follows.

In 1975, the applicant became acting director of the Public Health Laboratory in Derby and consultant microbiologist to Trent Regional Health Authority (hereafter R.H.A.). Differences arose between the applicant and the Principal Medical Scientific Officer and in October 1979 the Association of Scientific, Technical and Managerial Staff (A.S.T.M.S.) initiated a grievance procedure before the Area Health Authority (A.H.A.) concerning the dispute. On 15 December 1980, the A.H.A. held a meeting at which it resolved to make a formal complaint to the R.H.A. alleging the applicant's non-compliance with staff appointment procedure.

On 9 February 1981, the R.H.A. set up a committee to investigate the complaint.

From February to 16 July 1981, investigations were carried out by the Regional Solicitor culminating in the decision that the situation was sufficiently serious for action under Circular

H.M. (61)112 (the disciplinary procedure for medical staff). From August 1981 to March 1982, the Regional Solicitor pursued further investigations, obtaining statements from 23 witnesses and collecting hundreds of pages of documents.

The Regional Solicitor's report was submitted to the R.H.A. in April 1982, and on 14 June 1982 the R.H.A. authorised disciplinary proceedings under H.M. (61)112.

By letter dated 25 June 1982 the R.H.A. suspended the applicant from duty pending disciplinary proceedings.

Particulars of the allegations against the applicant were settled by counsel in June-July 1982 and the schedule of allegations with supporting documents served on the applicant on 10 August 1982. The applicant was requested to submit his representations by 11 October 1982.

On 13 October 1982, the applicant's solicitor requested an extension of time to 25 October 1982.

On 2 December 1982, the applicant's solicitor forwarded his representations to the R.H.A.

On 9 December 1982, there were informal discussions between the applicant's solicitor and the Regional Solicitor with a view to settling the case.

Between December 1982 and February 1983, the R.H.A. delayed setting up the Inquiry in view of the possibility of settlement, which was being discussed, and the Regional Solicitor undertook further enquiries.

On 5 May 1983, the R.H.A. appointed the chairman of the Inquiry and fixed the commencement of the Inquiry for 6 June 1983.

On 11 May 1983, the R.H.A. served a supplemental statement of complaints and a further bundle of documents. The applicant's request for postponement of the Inquiry until 13 June 1983 was granted.

On 13 June 1983, the Inquiry commenced. It sat for 32 days. The applicant was represented by counsel at the hearing at which witnesses gave evidence orally and were cross-examined.

On 1 December 1983, the panel reported, in a document of 100 pages, to the R.H.A. finding the applicant at fault in certain respects. A sub-committee was appointed to consider the report and hear representations from the applicant in mitigation. The sub-committee recommended that the applicant's appointment as consultant microbiologist be terminated and on 14 May 1984 the Trent R.H.A. decided to dismiss the applicant with three months' notice.

On 23 May 1984, the applicant appealed to the Secretary of State in accordance with the "Paragraph 190" procedure.

On 7 September 1984, the Department of Health and Social Security (D.H.S.S.) forwarded the applicant's statement of the case to the R.H.A. On 17 December 1984, the R.H.A.'s answer was sent to the D.H.S.S. and the applicant.

On 14 May 1985, a Professional Committee appointed by the Secretary of State in accordance with the "Paragraph 190" appeal procedure, consisting of five senior doctors, held a hearing at which the applicant and the R.H.A. were represented.

On 25 July 1985, the Professional Committee sent its report to the Family Practitioner Services Division of the D.H.S.S., which on

14 August 1985 made its submissions to the Secretary of State. The Secretary of State sought further information on 17 September 1985 and a further submission was made on 30 September 1985.

On 16 October 1985, the applicant was sent a letter from the D.H.S.S. stating that the Secretary of State on the recommendation of the Committee had decided to direct the R.H.A. to offer the applicant another post in the region without managerial responsibility. The letter also commented that the Committee had been very critical of the handling of the dispute, in particular, in the failure to give the applicant a verbal or written warning or to ask his comments before initiating the Inquiry.

On 6 January 1986, the R.H.A. made representations to the Secretary of State challenging his direction on legal grounds.

The applicant was not offered another post by the R.H.A., and by letter dated 21 February 1986 he was informed by the D.H.S.S. that the Secretary of State was not bound by the Committee's recommendation to uphold the applicant's appeal and, considering that the findings justified dismissal, confirmed the termination of the applicant's employment.

The applicant later discovered that the R.H.A. had made representations to the Secretary of State concerning the Committee's report. Neither these representations nor the report had been disclosed to the applicant.

On 24 April 1986, the applicant instituted judicial review proceedings in respect of the Secretary of State's decision. On 21 July 1986, the Divisional Court found that the Secretary of State had failed to act with procedural fairness. It granted a declaration that this decision was invalid and indicated that the Secretary of State should reconsider the matter.

On 27 August 1986, the Secretary of State wrote to the applicant and the R.H.A. informing them that he would not appeal and setting out details about the future conduct of the case. He requested written representations to be made by 22 October 1986 and stated that it was not proposed to reconvene a Professional Committee under the "Paragraph 190" procedure.

On 18 September 1986, the applicant's solicitors replied stating that they intended to consult counsel. By telex of 9 October 1986 they asked for the deadline to be extended.

On 25 October 1986, the applicant informed the D.H.S.S. that he was now represented by the British Medical Association (B.M.A.) and that he wished a further Paragraph 190 appeal.

On 31 December 1986, the D.H.S.S. wrote to the applicant requesting written representations by 30 January 1987.

On 27 January 1987, the R.H.A. submitted written representations.

On 12 February 1987, a meeting between the D.H.S.S., the B.M.A. and the R.H.A. was held to discuss procedure.

On 13 February 1987, the D.H.S.S. wrote to the B.M.A. seeking comments on the proposed procedure by 12 March 1987.

On 23 March 1987, the D.H.S.S. wrote to the B.M.A. pointing out that no reply had been received.

On 7 April 1987, the B.M.A. wrote to the D.H.S.S. informing them that they would not press for a Paragraph 190 or similar hearing.

On 15 April 1987, the D.H.S.S. wrote to the B.M.A. stating that there would be no Paragraph 190 hearing and asking for representations to be sent within 14 days.

On 29 April 1987, the B.M.A. informed the D.H.S.S. that they could not respond at that time.

On 6 May 1987, the applicant wrote that he did not consider that the ad hoc Committee proposed by the D.H.S.S. was within the terms of the judgment and that he would, in compliance with Paragraph 190, send a confidential statement of his position within a fortnight.

On 13 May 1987, the applicant submitted a statement of his position to the Secretary of State. At the same time, the B.M.A. informed the D.H.S.S. that the applicant had not accepted their advice and they were no longer representing him.

On 1 June 1987, the D.H.S.S. wrote to the applicant sending a copy of the R.H.A.'s representations and requesting any observations in reply within 21 days.

On 19 June 1987, the R.H.A. sent the D.H.S.S. their response to the applicant's representations.

On 25 June 1987, the D.H.S.S. informed the applicant that they had not received any further observations from him and would continue with the procedure. On 31 July 1987, they consulted him concerning dates for a meeting before the ad hoc Committee.

On 2 August 1987, the applicant proposed 23 September 1987 and this date was fixed.

On 26 August 1987, the applicant's new solicitors informed the D.H.S.S. that they had advised the applicant not to attend the meeting and would be referring the matter back to the Divisional Court for directions.

On 30 September 1987, the D.H.S.S. informed the applicant that the meeting had accordingly been cancelled and that the Minister would proceed to a decision on the basis of the written material. An opportunity to submit further observations before 7 October 1987 was offered.

On 7 October 1987, the applicant's solicitor made further representations to which the R.H.A. responded on 9 November 1987.

On 23 December 1987, the D.H.S.S. forwarded its submissions to the Secretary of State with the additional documents.

On 12 January 1988, the Secretary of State sought further advice from the Medical Officer of the Department. On 22 January 1988, he sought advice from the chairman of the previous Professional Committee. The chairman replied on 1 February 1988.

On 29 February 1988, the Secretary of State decided to confirm the applicant's dismissal.

By letter dated 18 March 1988, the D.H.S.S. informed the applicant that on the basis of the written representations, the Secretary of State had decided that re-employment was not a possibility and confirmed the decision to terminate the applicant's appointment.

On 30 March 1988, the applicant again instituted judicial review proceedings. Following a hearing on 3 November 1988, the Divisional Court accepted the procedure adopted by the Secretary of

State and dismissed the application.

The applicant had applied for re-instatement and re-engagement to the Industrial Tribunal on 10 August 1984. The proceedings were stayed at intervals of approximately six months at the applicant's request, pending the results of the appeal to the Secretary of State and the judicial review proceedings. The Industrial Tribunal proceedings were reactivated on 9 November 1988 by the Trent R.H.A., which sought an order for the dismissal or withdrawal of the applicant's application.

On 6 February 1989, a pre-hearing assessment took place before the Tribunal which determined that a hearing could take place with no cost consequences to the applicant. The applicant's claim before the Industrial Tribunal was that he was unfairly dismissed since he was given no or no sufficient warning prior to dismissal and that the matters relied upon did not justify his dismissal.

On 24 April 1989, the Tribunal ordered the R.H.A. to produce certain documents and on 6 June 1989, the Tribunal ordered the R.H.A. to produce further and better particulars of its defence.

The Industrial Tribunal's hearing of the applicant's claim took place on 15-16 January 1990. In its decision of 23 February 1990, the Tribunal held that the dismissal of the applicant was not unfair. As regards the applicant's complaints of the length of the proceedings, the Tribunal stated:

> "This Tribunal, however, is not persuaded that the applicant has in any way been prejudiced by the time which lapsed until a decision was finally reached. The applicant was paid his salary in full until March 1988."

On 6 April 1990, the applicant appealed to the Employment Appeal Tribunal before whom proceedings are still pending.

COMPLAINTS

The applicant complains that the proceedings against him took an unreasonable length of time. He submits that the proceedings concerned his "civil rights" since they ended his employment.

He also complains of unfairness of the procedure followed by the Trent R.H.A. and by the Secretary of State, who heard representations from the R.H.A. without giving the applicant an opportunity to respond. The direction by the Divisional Court to reconsider the matter did not in the applicant's opinion constitute adequate redress, since the Secretary of State was already inclined to the viewpoint of the R.H.A. The applicant further complains that the Secretary of State was not independent or impartial and that the proceedings were not public. He accordingly alleges a violation of Article 6 para. 1 of the Convention in respect of the proceedings before the Trent R.H.A. and the Secretary of State.

He also complains that he has no effective remedy for his complaints contrary to Article 13 of the Convention. He submits that judicial review does not provide a remedy in respect of his complaints against the Secretary of State or the unreasonable length of time of the procedure. He also argues that the Industrial Tribunal proceedings, which deal only with the fairness of his dismissal as regards lack of a proper warning, do not provide a remedy for his complaints.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 2 December 1988 and registered on 29 May 1989.

On 11 October 1989, the Commission decided to communicate the application to the respondent Government and to invite them to submit written observations on the admissibility and merits of the complaint concerning the length of the proceedings.

The Government's observations were submitted on 24 May 1990 after three extensions of the time-limit and the applicant's observations in reply were submitted on 20 July 1990 after one extension of the time-limit.

On 7 September 1990, the Commission decided to grant the applicant legal aid.

On 7 December 1990, the Commission decided to refer the application to the First Chamber.

On 10 April 1991, the First Chamber held a hearing at which the parties were represented as follows:

For the Government

Mr. N.D. Parker, Foreign and Commonwealth Office, Agent
Mr. M. Baker Q.C., Counsel
Mr. G. Berry, Department of Health, Adviser
Mr. M. Evans, Department of Health, Adviser
Mr. J.D. Evans, Trent Regional Health Authority, Adviser

For the Applicant

Ms. F.J. Hampson, Senior Lecturer in Law, University of Essex

The applicant, Dr. R. Darnell

THE LAW

1. Article 6 (Art. 6) of the Convention

The applicant complains that the disciplinary proceedings took an unreasonable length of time and were unfair. He invokes Article 6 para. 1 (Art. 6-1) of the Convention which provides in its first sentence:

> "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."

a) Applicability of Article 6 para. 1 (Art. 6-1) of the Convention

The parties disagree on the applicability of Article 6 para. 1 (Art. 6-1) of the Convention to the proceedings complained of.

The Government contend that the proceedings did not involve the determination of "civil rights" since the applicant, although not a civil servant, was in employment analogous to the public service and the proceedings did not affect his right to practise (as he was not struck off the medical register) nor his professional reputation. They further submit that Article 6 para. 1 (Art. 6-1) cannot apply to internal disciplinary proceedings.

The applicant submits that the proceedings concerned his "civil rights" since they ended his employment, affected his professional reputation and effectively ended his right to practise as a consultant microbiologist.

The Commission recalls that Article 6 para. 1 (Art. 6-1)

applies only to disputes over "rights and obligations" which can be said at least on arguable grounds to be recognised under domestic law. The claim or dispute must also be "genuine and of a serious nature" (see e.g. Eur. Court H.R., Benthem judgment of 23 October 1985, Series A no. 97, p. 14, para. 32). Moreover, for Article 6 para. 1 (Art. 6-1) to be applicable to the present case, the claim or dispute must involve the determination of "civil rights and obligations". If the case concerns a dispute between an individual and a public authority, only the character of the right at issue is relevant (see Eur. Court H.R., König judgment of 28 June 1978, Series A no. 27, p. 30, para. 90).

In the present case, the proceedings concerned the dismissal of the applicant from his contractual employment with the Trent Regional Health Authority, his appeal against this dismissal, and judicial review applications challenging the fairness of the procedure as well as an application to the Industrial Tribunal challenging the fairness of the dismissal.

The Commission notes that the applicant, although employed by a public authority, was not a civil servant. His employment and dismissal were based on a written contract setting out the terms of his employment (as to the relevance of the contractual element cf. Eur. Court H.R., Deumeland judgment of 29 May 1986, Series A no. 100, p. 25, para. 72). Moreover, the applicant's contract and conditions of employment gave him access to the ordinary courts to determine his claims as to the legality and fairness of his dismissal. In the latter respect his position, as regards the applicability of Article 6 (Art. 6) of the Convention, shows similarities to the Preikhzas case, where Article 6 was held to apply (Comm. Report 13.12.78, D.R.16 p. 5; C.M. Res. DH(79)8, ibid. p. 18). The Commission therefore does not find the case analogous to public service cases in general.

In these circumstances, the Commission concludes that there existed a "serious" and "genuine" dispute over the applicant's "civil rights" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

b) As to the length of the proceedings complained of

aa) The relevant period

The applicant submits that the period should run either from the date on which a formal complaint was made against him, i.e. 15 December 1980, or the date on which he was suspended from duty, i.e. 25 June 1982. The Government argue that, if Article 6 para. 1 (Art. 6-1) were to apply, the starting point should be the date when the Secretary of State confirmed the decision to terminate the applicant's employment, i.e. 18 March 1988.

The Commission recalls that the applicant was dismissed from his post on 14 May 1984. The period before this concerned the internal inquiry and disciplinary hearing carried out by the applicant's employer. This period cannot be taken into account for the purposes of Article 6 para. 1 (Art. 6-1) of the Convention. Until the dismissal occurred, there was no "dispute" as to the legality or fairness of that dismissal. The Commission has therefore taken the date of the applicant's "Paragraph 190" appeal as the starting point of the dispute. The period in question therefore runs from 23 May 1984 until the unfair dismissal proceedings have been concluded. On 23 February 1990, when the Industrial Tribunal rendered its decision the period was already 5 years and 9 months. The case continues before the Employment Appeal Tribunal.

bb) Compliance with Article 6 para. 1 (Art. 6-1) of the Convention

According to the constant case-law of the Convention organs the reasonableness of a delay in civil proceedings must be considered according to the circumstances of the particular case. Regard must

be had to the conduct of both the applicant and the competent authorities, the complexity of the case, what is at stake in the proceedings for the applicant and the period of delay itself (see Eur. Court H.R., Buchholz judgment of 6 May 1981, Series A no. 43, pp. 15-16, para. 49). Only delays attributable to the State may justify the finding of a failure to comply with the "reasonable time" requirement concerning the period to be taken into consideration.

As regards the complexity of the case, the Commission notes that by the time the "Paragraph 190" appeal was lodged the compilation of the documentary evidence and the hearing of witnesses had already been concluded.

Concerning the conduct of the parties, the Commission notes that the proceedings before the courts and the Industrial Tribunal were relatively quick and the applicant has made no complaint of these stages of the procedure. As for the "Paragraph 190" appeal proceedings, the Commission recalls that a period of approximately 21 months (from 23 May 1984 to 21 February 1986) elapsed between the appeal and its determination by the Secretary of State. During this period, both parties were given the opportunity to submit representations and a hearing took place before a Professional Committee. After the Committee had made its recommendations on 25 July 1985, a further seven months elapsed before a decision was taken. There was another period of approximately 23 months (from 24 April 1986 to 18 March 1988) from the decision of the High Court to the reconsideration of the appeal by the Secretary of State.

The Commission has also had regard to the importance of what was at stake for the applicant. The proceedings were decisive for the applicant's continued employment with the R.H.A., even though he continued to receive his salary until the conclusion of the proceedings. Although his right to practise his profession remained unaffected, his dismissal effectively made it difficult, if not impossible, to work as a consultant microbiologist.

Having weighed all the relevant circumstances of the case, the Commission therefore considers that the applicant's complaint with regard to the length of the proceedings raises complex issues of fact and law which cannot be resolved without an examination of the merits. It cannot therefore be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

c) As to the alleged unfairness of the proceedings

The applicant complains of unfairness of the proceedings before the R.H.A. and the Secretary of State. He also complains that the latter was not independent or impartial and that the proceedings were not public.

The Commission notes that the case is still pending before the Employment Appeal Tribunal and that, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.

However, it does not find it necessary to determine whether this rule has been complied with as the above complaint is in any case manifestly ill-founded and therefore inadmissible under Article 27 para. 2 (Art. 27-2) of the Convention.

The Commission notes in this respect that the applicant was legally represented and able to make representations in all stages of the "Paragraph 190" procedure. Moreover, he was able to challenge, and in fact did challenge, the fairness of the proceedings before the Divisional Court and the fairness of the dismissal before the Industrial Tribunal and the Employment Appeal Tribunal. The

Commission finds in these circumstances that the applicant had access to judicial bodies, which had jurisdiction over questions of fact and law arising in the applicant's case and which satisfied the guarantees of Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission therefore finds that the proceedings, considered as a whole, do not disclose any appearance of a violation of this provision, as regards the requirements of fairness, impartiality and publicity.

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

2. Article 13 (Art. 13) of the Convention

The applicant also complains that he does not have an effective remedy in respect of his complaints. He invokes Article 13 (Art. 13) of the Convention, which provides:

> "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 notes that the applicant, whose case is pending before the Employment Appeal Tribunal, was able to challenge both the fairness of the proceedings before the Divisional Court and the fairness of his dismissal before the Industrial Tribunal. It follows that he had "an effective remedy before a national authority" within the meaning of Article 13 (Art. 13) of the Convention.

The Commission therefore finds no appearance of a violation of Article 13 (Art. 13) and concludes that this complaint is also 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 ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint concerning the length of the proceedings;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber — Acting President of the First Chamber

(M. de SALVIA) — (F. ERMACORA)