AS TO THE ADMISSIBILITY OF

Application No. 34199/96
by Graham Ernest GALLOWAY
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 9 September 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
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIČ
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 22 July 1996 by Graham Ernest GALLOWAY against the United Kingdom and registered on 17 December 1996 under file No. 34199/96;

Having regard to the report 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 1945 and currently a prisoner at HM Prison, Swaleside. The facts of the application, as submitted by the applicant, may be summarised as follows.

The Applicant was convicted of murder in 1987 by Bristol Crown Court and sentenced to life imprisonment.

The applicant was chosen to take part in a random mandatory drug test. Mandatory drug tests (MDTs) are regulated by Section 16A of the 1952 Prison Act (power to test prisoners for drugs) and Rules 8A, 46A and 47A of the Prison Rules 1964. On 5 March 1996 he was taken from his cell to a TV room where he was told to wait. Suddenly the applicant, who suffers from "irritable bowel syndrome" felt a strong urge to defecate and as soon as an officer opened the door the applicant ran in the direction of the toilet and then to his room where he relieved himself. The officer reminded him that he needed to take a sample of the applicant's urine and that an act contrary to this order would result in failure to do so. As the applicant continued to relieve himself, the officer locked the door of his cell and left the applicant there.

On 18 March 1996 the applicant was found guilty of disobeying an order to go to the MDT room to provide a urine sample as part of the random drug testing programme. In the course of the disciplinary proceedings, there was discussion as to whether the applicant told the prison officers of his bowel complaint before he ran to his cell: the applicant denied that he had time to tell the officer immediately before leaving, but it was not suggested that he had mentioned the problem when the testing procedure began, earlier on 5 March. The applicant was fined £10 and forbidden to use the canteen for three weeks. He had no access to cigarettes during that time.

In May 1996 the applicant applied for legal aid in order to apply for judicial review of the Governor's decision of 18 March 1996. The grounds for this action were that he considered himself to be subject to illegal procedures that had inflicted unjust punishment on him, that disclosure of confidential medical matters were in breach of his right to private life (no involvement of medical staff while urine samples were taken) and that a procedural error had occurred during the adjudication following his failure to comply with officer's order to provide a urine sample. He alleged that the authorities had charged him with one offence, but stated at the adjudication that he had been charged with another. Thus he had no chance of defending himself as he did not know the real charge until it was read out to him at the hearing.

The application for legal aid was refused on 23 May 1996 as not showing reasonable grounds for taking proceedings. The refusal added that the applicant has not shown that the decision was illegal, irrational or procedurally improper. The applicant's appeal against the refusal of legal aid was dismissed on 11 July 1996 as he had not shown that the decision was illegal, irrational or procedurally improper, and in any event there appeared to be alternative remedies.

On 31 May 1996 the applicant had again been found to be in breach of the MDT procedure.

On 4 June 1996 the applicant filed a complaint against the adjudication of 18 March and 31 May 1996. On 16 October 1996 he was informed that the adjudication he was complaining about had been thoroughly reviewed. The conclusion of that review was that the findings of guilt reached against him should be quashed. The punishment imposed had been remitted and the finding of guilt deleted from his record.

Relevant domestic law and practices

Section 16A of the 1952 Prison Act reads as follows:

"... the prison, any prison officer may, at the prison, in accordance with prison rules, require any prisoner who is confined in the prison, to provide a sample of urine for the purpose of ascertaining whether he has any drug in his body..."

Rule 46A of the Prison Rules provides as follows:

"(1) This rule applies where an officer, acting under the powers conferred by section 16 A of the Prison Act 1952 (power to test prisoners for drugs), requires a prisoner to provide a sample for the purpose of ascertaining whether he has any controlled drug in his body.

(2) In this rule "sample" means a sample of urine or any other description specified in the authorisation by the governor for the purposes of section 16A.

(3) When requiring a prisoner to provide a sample, an officer shall, so far as reasonably practicable, inform the prisoner:

(a) that he is being required to provide a sample in accordance with section 16A of the Prison Act 1952; and
(b) that a refusal to provide a sample may lead to disciplinary proceedings being brought against him.

(4) An officer shall require the prisoner to provide a fresh sample, free from adulteration.

(5) An officer requiring a sample shall make such arrangements and give the prisoner such instructions for its provision as may be reasonably necessary in order to prevent or detect its adulteration or falsification.

(6) A prisoner who is required to provide a sample may be kept apart from other prisoners for a period not exceeding one hour to enable arrangements to be made for the provision of the sample.

(7) A prisoner who is unable to provide a sample of urine when required to do so may be kept apart from other prisoners until he has provided the required sample, save that a prisoner may not be kept apart under this paragraph for a period of more than 5 hours.

(8) A prisoner required to provide a sample of urine shall be afforded such degree of privacy for the purposes of providing a sample as may be compatible with the need to prevent or detect any adulteration or falsification of the sample; in particular a prisoner shall not be required to provide such a sample in the sight of a person of the opposite sex."

COMPLAINTS

The applicant complains about the way the mandatory drug tests are performed in prisons. He believes that to demand a sample of urine from a prisoner to test for possible drug abuse is degrading and humiliating within the meaning of Article 3 of the Convention, particularly given that such a sample must given in the presence of two prison officers and other prisoners. The effect of the regime is that a prisoner is required to expose his private parts to third persons who are not doctors and whose sexual orientation is unknown.

Furthermore, the applicant considers that enforced exposure of his private parts to anyone is an abomination, and strictly against the teachings of his church and the principles of his belief and therefore in violation of his Article 9 rights.

Under Article 7 of the Convention the applicant complains that Section 16A of the 1952 Prison Act does not apply nationally or internationally.

Under Article 8 he complains that his medical condition is private and protected by the law of confidentiality and that the implementation of the test for medical examination is done under compulsion.

Under Article 6 para. 1 and Article 13, the applicant believes that his right to access to court in respect to his claims and by refusing to grant him legal aid has been violated.

THE LAW

1. The applicant complains that the MDT that he was randomly chosen to undergo in 1996 violated Articles 3 and 8 of the Convention.

Article 3 of the Convention provides as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8 of the Convention, in so far as relevant, reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime..."

The Commission notes that the applicant was ordered to undergo an MDT. It appears that the disciplinary penalty which was imposed for "refusing" to take part in the test has now been removed, and the question therefore arises whether the applicant may claim to be a victim of a violation of the Convention in this respect. However, the procedures for mandatory drug testing are laid down by law, principally by statute, which could not be challenged by the applicant. It therefore remains open to the applicant to claim to be a victim of a violation of the Convention as regards the existence of such testing.

The Commission recalls that it has already held that a requirement to produce urine samples in the presence of a supervisor does not attain the minimum level of severity required in order to fall within the scope of Article 3 of the Convention (No. 21132/93, Peters v. the Netherlands, Dec. 6.4.94, D.R. 77-A, p. 75). The applicant in the present case has not submitted any information which could affect the position in the present case.

In respect of Article 8 of the Convention the Commission recalls that in the above-mentioned case of Peters v. the Netherlands, it found that even a minor medical intervention, such as a urine test, may constitute an interference with an individual's right to respect for his private life. The mandatory drug test which was applied in the present case must therefore also be considered by reference to the second paragraph of Article 8 of the Convention.

The Commission first notes that the interference with the applicant's right to respect for his private life was "in accordance with the law" in that Section 16A of the Prison Act 1952 clearly provides for samples of urine to be taken for the purposes of drug tests. Section 16A is complemented by Rules 8A, 46A and 47A of the Prison Rules 1964.

As to whether the interference was "necessary in a democratic society" for one of the purposes set out in Article 8 para. 2 of the Convention, the Commission recalls that in the above-mentioned Peters v. the Netherlands case, it found that the "necessity for an interference with the rights of a convicted prisoner must be appreciated with reference to the ordinary and reasonable requirements of imprisonment", and it accepted the urine test in that case as "necessary ... for the prevention of disorder or crime". The principle is the same in the present case: the availability of drugs in prison is a considerable problem for

the authorities, and random tests are a valid way of combatting it. As to the particular circumstances of the case, the Commission again notes that the disciplinary penalty which was initially entered against the applicant was subsequently quashed and the finding of guilt was deleted from his record. It appears that this decision was taken because the procedures were not properly observed in that the Senior Officer had not been heard at the adjudication. To this extent, therefore, the applicant was vindicated in his claim that the test was not properly carried. As to the remainder of the claim, that the applicant was particularly embarrassed by the drug test because of his irritable bowel syndrome, the Commission notes that in the disciplinary proceedings, it appeared that the applicant had not informed the prison officers about this complaint at any time before he ran back to his cell. Accordingly, it was not possible for the officers to make any allowance for it. Finally, the Commission notes that Rule 46A of the Prison Rules provides for a number of safeguards for prisoners, such as maximum time limits for separation of prisoners from other prisoners, and express reference to the prisoner's privacy in Rule 46A (8).

The Commission finds that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The applicant also complains that the manner in which he was required to give a urine sample constituted a violation of his freedom of religion and was against the teachings of his church and principles of his belief. Article 9 of the Convention provides as follows:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The Commission recalls that the state has a responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines (Eur. Court HR, Otto-Preminger-Institut v. Austria judgment of 24 November 1994, Series A no. 295, p. 18, para. 47). However, the applicant was under no pressure to change his religious views nor was he prevented from manifesting his religion or belief by the drug test.

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

3. Under Article 7 of the Convention, the applicant complains that Section 16A of the Prison Act does not apply nationally or internationally.

The Commission notes that the drug test which the applicant underwent did not involve a criminal charge, such that Article 7 of the Convention is not applicable. In any event, it is clear that Section 16 of the Prisons Act was in force before the applicant was required to give a sample.

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

4. The applicant also complains that he was unable to pursue his appeal against his disciplinary punishment as he was unable to obtain legal aid. He alleges a violation of Article 6 para. 1 and Article 13 of the Convention in this respect.

The Commission notes that, subsequent to and independently of the applicant's unsuccessful attempt to challenge the disciplinary penalty in court proceedings, the penalty was remitted, and the finding of guilt was removed from the applicant's prison record.

It follows that the applicant may not claim to be a victim of a violation of Article 6 or 13 of the Convention in respect of the proceedings he attempted to bring.

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

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber