AS TO THE ADMISSIBILITY OF

Application No. 26165/95
by David Simon LICENCE
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 9 April 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
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 December 1994 by David Simon LICENCE against the United Kingdom and registered on 10 January 1995 under file No. 26165/97;

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 1957 and resident in Warminster. He is represented before the Commission by Mr. John MacKenzie a solicitor practising in London. The facts as submitted by the applicant may be summarised as follows.

A. Particular circumstances of the case

On 14 April 1993 the applicant, then a sergeant in the army stationed in Germany, was charged with drunkenness contrary to section 43(1) of the Army Act 1955 and (pursuant to section 70(1) of the Army Act 1955) with grievous bodily harm contrary to the Offences Against the Person Act 1861.

The Convening Officer, by order dated 14 April 1994, convened a district court-martial to try the applicant on the charges. The court-martial took place on 21-28 April 1994 and the applicant was found guilty of drunkenness, was acquitted on the charge of grievous bodily harm and was sentenced to be reduced by two ranks to lance corporal.

By petition dated 29 April 1994 the applicant petitioned the

Confirming Officer against conviction and sentence. He submitted that there had been a material irregularity in the conduct of the Judge Advocate, that the Judge Advocate had been wrong in law in relation to his directions to the court-martial and that the sentence, for various reasons, was too severe. On 27 May 1994, the applicant's conviction and sentence were confirmed by the Confirming Officer.

On 11 July 1994 the applicant petitioned the Defence Council against conviction and sentence making the same submissions to that body as before the Confirming Officer. By letter dated 9 September 1994 the applicant's legal representative was informed of the decision, taken by the Army Board, to reject this petition.

B. Relevant domestic law and practice

The Commission refers to the "Relevant domestic law and practice" contained in the judgment in the Findlay case (Eur. Court HR, Findlay v. the United Kingdom judgment of 25 February 1997, to be published in Reports of Judgments and Decisions 1997) and in its report on the Coyne application (No. 25942/94, Comm. Report 25.6.96, unpublished).

The Commission also notes the following as regards the Courts-Martial Appeal Court ("CMAC"). The CMAC has the same status and, in essence, the same procedure as the Court of Appeal, Criminal Division. The judges of this court include ordinary and ex officio judges of the Court of Appeal and such judges of the High Court as are nominated by the Lord Chief Justice.

If an appeal petition is rejected by the Army Board an appellant may apply to a single judge of the CMAC (and, if necessary, also to the full court) for leave to appeal against conviction to that court.

The CMAC must allow the appeal against conviction if it considers that the finding of the court-martial is, under all the circumstances of the case, unsafe or unsatisfactory or involves a wrong decision on a question of law. The appeal must also be allowed if there was a material irregularity in the course of the trial. In any other case the CMAC must dismiss the appeal.

If the CMAC allows an appeal against conviction it must quash the conviction, although, on the quashing of a conviction, the CMAC's power to authorise a new trial may come into operation.

COMPLAINTS

The applicant complains under Article 6 of the Convention that he was denied a fair and public hearing by an independent and impartial tribunal established by law.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 16 December 1994 and was registered on 10 January 1995.

On 28 February 1995 the Commission decided to communicate the application.

On 2 July 1996 the Commission decided to request the Government's observations. In their letter received on 7 November 1996 the Government stated that they have no observations on the admissibility of the application.

THE LAW

The applicant complains under Article 6 (Art. 6) of the Convention that he was denied a fair hearing by an independent and impartial tribunal established by law. The Government have no

observations on the admissibility of the applicant's complaints.

The Commission recalls that, pursuant to Article 26 (Art. 26) of the Convention, it is only competent to consider complaints after all domestic remedies have been exhausted according to the generally recognised rules of international law.

In this respect the Commission notes that after the rejection of his petition to the Defence Council the applicant did not then proceed to apply for leave to appeal to the CMAC. In this respect, the Commission considers that the grounds, upon which the applicant's petitions to the Confirming Officer and to the Defence Council were based, constituted grounds of appeal which the CMAC is competent to consider. It further notes that the CMAC can, if it finds in the appellant's favour on such grounds, quash the conviction. In addition, the Commission recalls that a similar application was declared inadmissible where the applicant failed to make any application for leave to appeal to the CMAC (No. 32821/96, Dec. 17.1.97, unpublished).

In such circumstances, the Commission considers that, by failing to apply to the CMAC for leave to appeal to that court, the applicant failed to exhaust domestic remedies within the meaning of Article 26 of the Convention and the Commission must therefore declare the application inadmissible pursuant to Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber