AS TO THE ADMISSIBILITY OF

Application No. 24399/94
by Raymond MENNIE
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
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 15 August 1993 by Raymond MENNIE against the United Kingdom and registered on 15 June 1994 under file No. 24399/94;

Having regard to:

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

- to the Government's comments contained in their letter of 14 June 1996 regarding the implications of the judgment of the European Court of Human Rights of 10 June 1996 in Pullar v. United Kingdom;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is a British citizen, born in 1950, who resides in Tayside. He is represented before the Commission by Mr. Ronald Tough, a solicitor practising in Tayside.

A. Particular circumstances of the case

The applicant was an elected member of Tayside Regional Council.

By petition dated 11 June 1991 the applicant and a fellow member of the Council, Mr. Pullar, were charged, pursuant to section 1 of the Public Bodies Corrupt Practices Act 1889, with corruptly soliciting money from Mr. McLaren, a partner in a firm of architects, and from

Mr. Cormack, a partner in a firm of quantity surveyors, in exchange for the applicant and his co-accused exerting their influence in favour of an application for planning permission for a proposed development.

The trial commenced on 13 July 1992 and both the applicant and his co-accused, Mr. Pullar, pleaded not guilty. The Sheriff Clerk proceeded to ballot the jury which included a Mr. Forsyth who was an employee in the firm of Mr. McLaren who was a principal prosecution witness. Mr. Forsyth was also acquainted with Mr. Cormack, another principal prosecution witness. The juror, Mr. Forsyth, was one of fifteen employees in the architects firm. He began employment in the firm on 30 April 1990 and was given notice of redundancy on 10 July 1992, to take effect on 7 August 1992.

At the trial in the Sheriff's Court the evidence of Mr. Cormack and Mr. McLaren, concerned a meeting held with the applicant and his co-accused, and was to the effect that the applicant and Mr. Pullar were seeking money in exchange for using their influence to bring about the success of a planning application. The applicant gave evidence denying that money was solicited by him or anyone else. Mr. Pullar did not give evidence.

On 17 July 1992 the applicant and Mr. Pullar were found guilty by a majority of the jury, though the jury made some changes to the text of the charge in the indictment relating to the identity of the land in respect of which planning permission had been sought. The applicant and his co-accused were sentenced to 12 months' imprisonment.

The applicant and his legal advisers did not discover the connection between Mr. Forsyth (the juror) and Mr. McLaren (his employer) until after the five day trial. The applicant's appeal against conviction and sentence was heard before the High Court between 5-12 February 1993. The applicant appealed, inter alia, on the basis that the presence of Mr. Forsyth on the jury had resulted in a miscarriage of justice and that the Sheriff should have and had failed to direct the jury that jurors should bring to the attention of the court the existence of any personal knowledge of the subject matter of the charge or of any of the persons named in the indictment.

The High Court had before it a statement of Mr. McLaren explaining Mr. Forsyth's employment history and the involvement of both men at the trial. This statement had not been disclosed to the applicant before 12 February 1993 and he had no opportunity to cross-examine the employer as to its contents. However, neither the applicant's counsel, nor counsel for Mr. Pullar asked that Mr. McLaren be called to give evidence, or took any other steps to prevent the statement being accepted by the Court.

The applicant's appeal was dismissed on 26 February 1993 by the High Court. Certain textual amendments were made to the verdict because the jury had amended the wording of the charge but had erroneously failed to remove certain words. The applicant's counsel did not raise anything other than a passing comment as to these amendments and indeed the lack of comment by the defence in this regard was also noted in the judgment of the High Court.

In its judgment, the High Court noted that Mr. McLaren had noticed Mr. Forsyth on the jury on the first day of trial and had brought the matter to the attention of a Sheriff Clerk. The Clerk had already been informed by Mr. Forsyth of his position as an employee in the firm of Mr. McLaren. This Clerk had asked Mr. Forsyth if he knew the circumstances of the case or the accused and, when he had replied in the negative, the Clerk had allowed Mr. Forsyth's name to go forward for selection as a juror. The Clerk had not informed the Sheriff.

The High Court considered that there was no evidence that the juror, an architectural technician, had been involved in any work on

the proposed development or that he knew anything of the alleged transaction between his employer and the applicant. The court commented that, if the Sheriff or the parties had been informed, it was probable that the juror would have been excused by the court under section 133 of the Criminal Procedure (Scotland) Act 1975 ("the 1975 Act") or, subject to a valid objection by the defence, under section 130 (4) of the 1975 Act and that the Sheriff's Clerk had been in error in not bringing the matter to the notice of the Sheriff himself.

However, the High Court found on the basis of authorities that the mere suspicion that a juror is biased is insufficient to justify quashing a verdict. It was not to be assumed that prejudice or the juror's knowledge would have led him to ignore the evidence and the directions by the trial judge and to vote only on the basis of personal prejudice in defiance of his oath. The High Court did, however, make a number of recommendations as to future practice in order to avoid a recurrence of the situation (see "Relevant domestic law and practice" below).

The applicant says that after his release from prison he became aware of the fact that another juror, Mr. M, was closely connected to a woman who had been making false and injurious allegations against the applicant before and during the trial, relating to certain of the applicant's past financial dealings. The applicant claims that it is impossible that Mr. M was not aware of the allegations this woman was making although he also states that Mr. M has claimed that he only became aware of the allegations after the trial.

B. Relevant domestic law and practice

Section 130(1) of the Criminal Procedure (Scotland) Act 1975 ("the 1975 Act") enables an accused and the prosecutor to challenge three jurors without giving any reasons. The challenge must be made when the juror is balloted. A juror may also be challenged "on cause shown" before he has been sworn to serve (section 130(4) and (6)).

Pursuant to section 133 of the 1975 Act, "the court shall have power to excuse any juror from serving on any trial, the grounds of such excuse being stated in open court."

Section 1(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 provides that the fact that any person serving on a jury for a particular trial was ineligible, not qualified for or disqualified from jury service shall not of itself affect the validity of any verdict returned by the jury.

In their decision in Pullar v. HMA (1993 SCCR 514), the High Court gave guidance, as to the steps which in future should be taken to avoid risk of prejudice to the accused, as follows:

> i. when potential jurors arrived at court they should be told the names of the accused, complainer or anyone else sufficiently important to the case to have been named in the charge or charges on the indictment;
>
> ii. it should be open to the trial judge in his discretion to ask the jury to let him know if they think there is any particular reason why they should not serve, reminding them that they should take this step if they know the accused or anyone named in the indictment;
>
> iii. it is the duty of all those in attendance on the court who become aware during the trial of circumstances, which might suggest that a juror has personal knowledge of a case or might be suspected of being prejudiced, to draw this at once to the attention of the presiding judge.

COMPLAINTS

The applicant invokes Article 6 para. 1 of the Convention. He complains of the presence on the jury in his criminal trial of an employee of a principal prosecution witness who was also acquainted with another prosecution witness. The applicant also complains that since release from prison he has become aware of the fact that a second juror had knowledge of false and injurious allegations made against the applicant before and during the trial. He claims that those jurors cannot be considered impartial and their presence on the jury cast doubts on the verdict and amounted to a miscarriage of justice and that the failure of the Sheriff to warn jurors to inform the court of such personal knowledge was a shortcoming in the proceedings.

The applicant also complains under Article 6 para. 3 (d) of the Convention that a statement from the juror's employer was accepted by the appeal court without his being afforded the opportunity to fully prepare his defence to the statement or attack such evidence in cross-examination.

He further complains under Article 6 para. 3 (b) of the Convention about inadequate time to prepare a defence to the charges that were substantially amended in the course of the trial and by the Lord Justice General in the appeal proceedings.

The applicant also complains under Article 13 of the Convention that, as an accused before a Scottish High Court, he had no right to a further appeal to the House of Lords.

The applicant further complains under Article 5 para. 5 of the Convention in that he was precluded from obtaining compensation and reparation by the domestic courts.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 15 August 1993 and registered on 15 June 1994.

On 11 January 1995, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

On 11 April 1995 the Commission decided to adjourn further consideration of the application pending the outcome of the proceedings before the European Court of Human Rights in the case of Pullar (No. 22399/93) v. United Kingdom.

THE LAW

1. The applicant complains that he did not receive a fair trial by an impartial tribunal since one of the jurors was an employee of one of the two the principal Crown witnesses and knew the other. He further claims that since release from prison he has become aware that another juror had knowledge of false allegations relating to him and therefore believes that that juror was also biased.

He further complains of being unable to challenge the statement of the juror's employer before the appeal court. He invokes Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d).

The applicant further complains under Article 6 para. 3 (b) (Art. 6-3-c) that he was not given sufficient time to prepare his defence to the charges that were substantially amended in the course of the trial and by the Lord Justice General in the Appeal proceedings.

Article 6 (Art. 6), insofar as relevant provides 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..."

3. Everyone charged with a criminal offence has the following minimum rights:

b. to have adequate time and facilities for the preparation of his defence;...

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

a. As regards the applicant's complaint that the tribunal was not impartial, the Commission recalls the established case law of the Convention organs that there are two aspects of the requirement of impartiality in Article 6 para. 1 (Art. 6-1). First, the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is to be presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective view point, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see, for instance, (see e.g. Eur. Court HR, Pullar v. United Kingdom, judgment of 10 June 1996, para. 30 (to be published), Piersack v. Belgium, judgment of 1 October 1982, Series A no. 53 p. 14 para. 30).

In its judgment in Pullar v. United Kingdom the European Court of Human Rights held that the claim of the applicant's co-accused, Mr. Pullar, as to the alleged bias of Mr. Forsyth did not amount to a violation of Article 6 para. 1 (Art. 6-1). Specifically, the Court found that because, in the circumstances of the case, it was by no means clear that an objective observer would conclude that the juror who knew the witness for the prosecution would have been more inclined to believe him than the witnesses for the defence, and because the jury system provided certain inherent safeguards, such as the random selection of jurors and the oath sworn by them, Mr. Pullar's misgivings as to the impartiality of the tribunal that tried him could not be regarded as objectively justified (cf. para. 41).

The Commission does not consider the applicant's additional claim of bias in respect of another juror constitutes grounds on which to distinguish Pullar, that claim being entirely unsubstantiated, such that impartiality must be presumed. The Commission is therefore of the view that there is nothing in the present application that would lead to a different conclusion from that reached by the European Court of Human Rights referred to above.

b. As regards the applicant's claim under Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d), that the applicant was not able to challenge the statement of Mr. McLaren made for the purposes of the appeal proceedings, the Commission recalls that the European Court of Human Rights in its judgment in Pullar v. United Kingdom (see above) had particular regard to the fact that counsel for Mr. Pullar did not choose to take any of a number of courses of action that were open to him to prevent the court from accepting the statement at face value and that in these circumstances it could not be said that Mr. Pullar had been denied his rights under Article 6 para. 3 (d) (Art. 6-3-d).

The Commission notes that the applicant's counsel also failed to take any steps to prevent the Court taking the statement of Mr. McLaren at face value and therefore also finds in respect of this complaint that there is nothing which would lead the Commission to a different

conclusion from that reached by the European Court of Human Rights in Pullar v. United Kingdom (see above).

c. As regards the applicant's complaint under Article 6 para. 3 (b) (Art. 6-3-b) of the Convention that he had inadequate time to prepare a defence to the charges that were substantially amended in the course of the trial and by the Lord Justice General in the Appeal proceedings, the Commission recalls that the specific guarantees under Article 6 para. 3 (Art. 6-3) cannot be looked at in isolation but must be looked at in the light of the overriding purposes of fairness laid down in Article 6 para. 1 (Art. 6-1) of the Convention (see Eur. Court HR, Edwards v. United Kingdom, judgment of 16 December 1992, Series A no. 247-B, paras. 33-34 and other references there quoted).

The Commission observes that the changes to the indictment related to an error in respect of the identity of the land in relation to which planning permission was sought. Further changes, of a textual nature which were consequent on the trial court's changes, were made to the verdict by the High Court at the appeal stage. There is no evidence that, during the trial, the applicant's counsel raised anything other than a passing comment on this error and indeed the lack of comment by the defence in this regard was also noted in the judgment of the High Court. In addition, the substantive issue, namely that the applicant and his co-accused had solicited bribes at a particular meeting in exchange for favouring a planning application, did not change and thus the Commission considers that the changes to the text of the indictment and the consequent changes to the verdict by the High Court did not prejudice the applicant.

It follows that the above complaints must be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains under Article 13 (Art. 13) of the Convention that, as an accused before a Scottish High Court, he had no right to a further appeal to the House of Lords. Article 13 (Art. 13) provides as follows.

> "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 is effectively seeking a second appeal court and that there is no such entitlement under the Convention (see Eur. Court HR, Delcourt v. Belgium, judgment of 17 January 1970, Series A no. 11 pp. 14-15, para. 25 relating to the right to a first court of appeal, No. 10153/82, Dec. 13.10.86, D.R. 49 p. 67).

This part of the application must therefore be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Finally the applicant invokes Article 5 para. 5 (Art. 5-5) of the Convention in that he was precluded from obtaining compensation and reparation by the domestic courts.

The Commission recalls that the right to compensation under Article 5 para. 5 (Art. 5-5) of the Convention presupposes that a violation of one of the other paragraphs of Article 5 (Art. 5) has been established, either by a domestic organ or by the Convention organs (cf. No. 10801/84, Comm. Report 3.10.88, D.R. 61 p. 62).

The Commission notes that the applicant has not shown that the case raises any matters under Article 5 (Art. 5) so that Article 5 para. 5 (Art. 5-5) is not applicable to the circumstances of the case.

It follows that this part of the application must be dismissed as 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