AS TO THE ADMISSIBILITY OF

Application No. 25277/94
by Kevin PERKS
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 2 July 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
N. BRATZA
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 26 April 1994 by Kevin PERKS against the United Kingdom and registered on 23 September 1994 under file No. 25277/94;

Having regard to:

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

- the observations submitted by the respondent Government on 8 November 1996 and the observations in reply submitted by the applicant on 10 March 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a United Kingdom citizen, born in 1953. Before the Commission he is represented by Clyde, Chappell and Botham, solicitors practising in Stoke-on-Trent.

The facts, as presented by the parties, may be summarised as follows.

A. Particular circumstances of the case

As a result of childhood meningitis, the applicant suffers from a number physical and learning difficulties including severe illiteracy. He requires continuous medication following the removal of a tumour from his heel and experiences severe difficulty in walking. At all relevant times he has lived on Invalidity Benefit.

On 5 June 1991, the Wolverhampton Magistrates' Court ordered the issue of a liability order in respect of the applicant's unpaid community charge (poll tax).

On 15 January 1993, in answer to a summons issued on the application of Wolverhampton Metropolitan Borough Council, the applicant appeared before a stipendiary magistrate for an inquiry to be made into his means and the reasons for his failure to pay the poll tax. The applicant, who was not represented, gave evidence that:

(a) his income consisted of benefit of £56.70 per week;

(b) he lived with his elder sister, who was also in receipt of benefit, and to whom he paid £15 per week plus contributions toward fuel costs. He had no expenditure on loans or goods ordered on credit;

(c) he had no personal savings;

(d) he had not paid his community charge because he had not received an instalment book (he conceded that he had not in fact requested one). He had not contacted the Council because he did not have the money to make a telephone call. Enquiries had, however, been made with a view to direct deductions from his benefit towards payment of the arrears.

On the basis of this evidence, the magistrate concluded that the applicant's failure to pay the community charge was due to his culpable neglect. The applicant offered to pay £10 per week towards the arrears. The magistrate fixed a term of imprisonment of 30 days but postponed its operation against weekly payments of £10.

The applicant paid only two instalments and appeared before the Wolverhampton magistrates on 12 May 1993 on the Council's further application. He was again unrepresented. He informed the court that he had been unwell and had spent at least one week in hospital during February 1993. However, the magistrates concluded that the applicant's circumstances had not changed materially since imposition of the suspended term of imprisonment. They issued a warrant committing him to prison for 28 days.

The applicant spent six days in custody before release on bail pursuant to an order made on 18 May 1993 by a High Court judge, who also granted leave to move for judicial review. The application included a claim for damages.

The application for judicial review was heard in the High Court on 26 October 1993.

Mr. Justice Harrison held that the mention made by the applicant on 12 May 1993 of a spell in hospital should have prompted the magistrates to make proper enquiries as to his state of health and its effect on his ability to pay. The absence of inquiry meant that they had failed to take into account a consideration relevant to the exercise of their discretion; had they made adequate inquiry and elicited the facts surrounding the nature of the applicant's illness and disability, it was unlikely that they would have imposed a term of imprisonment, immediate or suspended.

The judge quashed the magistrates' decision of 12 May 1993, but considered that their conduct was not so outrageous as to justify an award of costs against them. The judge did not address the claim for damages. The applicant has not pursued his claim for damages on the basis of counsel's opinion that it would be impossible to establish the requisite element of "bad faith" on the part of the magistrates.

B. Relevant domestic law and practice

Regulation 41 of the Community Charges (Administration and Enforcement) Regulations 1989 ("the 1989 Regulations") provides:

> "41. (1) Where a charging authority has sought to levy an amount by distress under Regulation 39, the debtor is an individual, and it appears to the authority that no (or insufficient) goods of the debtor can be found on which to levy the amount, the authority may apply to a Magistrates' Court for the issue of a warrant committing the debtor to prison.
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> 41. (2) On such application being made, the court shall (in the debtor's presence) inquire as to his means and inquire whether the failure to pay which led to the liability order concerned being made against him was due to his wilful refusal or culpable neglect.
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> 41. (3) If (and only if) the court is of the opinion that his failure was due to his wilful refusal or culpable neglect it may if it thinks fit - (a) issue a warrant of commitment against the debtor, or (b) fix a term of imprisonment and postpone the issue of a warrant until such time and on such conditions (if any) as the court thinks just."

In Re McC [1985] AC 528, the House of Lords held that magistrates acted without jurisdiction or in excess of jurisdiction and would be liable in damages where an individual could show that the magistrates had no jurisdiction over the cause at all, that they exercised their powers in a procedural manner that involved a gross and obvious irregularity, or that the order of the court was not based on any proper foundation of law because of failure to observe a statutory condition precedent.

In a case concerning rates, the predecessor to the community charge (R. v. Manchester City Magistrates' Court, ex parte Davies [1989] 1 All ER 90), the Court of Appeal found that the magistrates' discretionary power to imprison a debtor was "limited and circumscribed" by their obligation to make proper inquiry as to whether failure to pay rates was due to wilful refusal or culpable neglect. The magistrates' deficient inquiry meant that they had failed to observe a statutory condition precedent and therefore acted outside or in excess of their jurisdiction. The magistrates were liable in damages for the applicant's unlawful imprisonment. On 1 January 1991 Section 108 of the Courts and Legal Services Act 1990 entered into force. The Act replaces Sections 44 and 45 of the Justices of the Peace Act 1979 providing, inter alia, that an action lies against a magistrate who acts beyond jurisdiction if, and only if, it is proved that he acted in bad faith.

Neither the civil nor the criminal legal aid scheme provides for full representation before the magistrates in community charge commitment proceedings. The "Green Form" scheme provides two hours' worth of help from a solicitor, and can include preparation for a court case, but does not provide for representation. An extension of the costs limit can be granted by the Legal Aid Board. Assistance by way of Representation ("ABWOR") enables the court, in limited circumstances, to appoint a solicitor who happens to be within the court precincts for purposes other than the provision of ABWOR to represent a party who would not otherwise be represented. The appointment may be made either of the court's own motion or on application by a solicitor. The court is under no obligation to advise a party of the possibility of an appointment. The Duty Solicitor Scheme, which provides representation to accused in criminal cases before magistrates, does not extend to community charge proceedings.

COMPLAINTS

The applicant considers that the courts which imprisoned him did not have power to commit him to prison, so that his detention was unlawful. He considers it to have been in violation of Article 5 para. 1 of the Convention. He also considers that, by virtue of Section 108 of the Courts and Legal Services Act 1990, he was deprived of the "enforceable right to compensation" guaranteed by Article 5 para. 5 of the Convention.

The applicant also alleges a violation of Article 6 para. 1 and/or para. 3 (c) of the Convention on the ground that legal aid should have provided for his representation before the magistrates.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 26 April 1994 and registered on 23 September 1994.

On 30 November 1994 the Commission decided to communicate the application to the respondent Government. On 28 February 1995 the Commission decided to adjourn the examination of the application pending the outcome of Benham v. the United Kingdom before the Court. On 2 July 1996 the Commission invited the respondent Government to submit written observation on the admissibility and merits of the application.

The Government's written observations were submitted on 8 November 1996. The applicant replied on 10 March 1997, after an extension of the time-limit.

THE LAW

1. The applicant complains under Article 5 paras. 1 and 5 (Art. 5-1, 5-5) of the Convention that his detention was unlawful and that he could not obtain compensation.

Article 5 (Art. 5) of the Convention, insofar as relevant, provides as follows.

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
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> ...
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> b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
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> ...
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> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The Government submit that the present application bears a close resemblance of Benham v. the United Kingdom (Eur. Court HR, judgment of 10 June 1996), the existing factual differences being immaterial as regards the legal outcome. Consequently, in the Government's submission, the applicant's detention was lawful and in accordance with a procedure prescribed by law and, therefore, compatible with Article 5 para. 1 (Art. 5-1) of the Convention. As a result Article 5 para. 5 (Art. 5-5) of the Convention was not applicable.

The applicant replies that the facts in the case of Benham v. the United Kingdom were not sufficiently clear to give rise to a finding of a violation of Article 5 para. 1 (Art. 5-1), the present cases being distinguishable.

The applicant agrees that the mere fact that a domestic judge erred in making a detention order will not necessarily render the resulting detention unlawful. However, referring to para. 43 of the Court's judgment in Benham, the applicant states that a detention ordered by a Magistrates' Court will be unlawful where the court acted outside its jurisdiction. Furthermore, it has been accepted that under United Kingdom law a Magistrates' Court would act in excess of jurisdiction if it commits a person to prison without first complying with a statutory condition precedent to its jurisdiction to commit. The question is, therefore, in the applicant's view, whether in his case there has been a failure on the part of the domestic court to observe a statutory condition precedent.

The applicant recalls that the domestic court did not rule directly on the legality of his detention because under United Kingdom law there is no right to compensation for unlawful detention (save in cases of bad faith) and it was therefore irrelevant to distinguish between an unlawful detention and a detention pursuant to an order which was wrong. In these circumstances the Commission should examine the issue itself, using the indications given in the domestic courts' rulings as one element, as the Court did in Benham in paras. 44 - 46 of that judgment.

The applicant submits that under Regulation 41(2) of the 1989 Regulations an inquiry into the defendant's wilful refusal or culpable neglect to pay is clearly a condition precedent to the magistrates' power to commit to prison. The applicant relies on the text of the statute and also on the Court of Appeal's decision in R. v. Manchester City Magistrates' Court ex parte Davies (see above, Relevant domestic law and practice). The applicant alleges that in his case the Magistrates' Court failed to conduct the inquiry which the 1989 Regulations prescribe and that that can be seen from the findings in the High Court's decision. Thus, the Magistrates' Court did not conduct a fresh inquiry into his personal and financial circumstances although it had evidence that these circumstances had changed.

Therefore, in the applicant's view, there has been a breach of Article 5 para. 1 (Art. 5-1) of the Convention. Paragraph 5 of this provision, consequently, was also violated, there being no possibility to obtain compensation for the unlawful detention.

Having examined the applicant's complaints under Article 5 paras. 1 and 5 (Art. 5-1, 5-5) of the Convention, the Commission finds that they raise serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. This part of the application cannot, therefore, be regarded as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other grounds for declaring it inadmissible has been established.

2. The applicant complains under Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention that legal aid was not provided before the Magistrates' Court.

The parties agree that the present case is similar in this respect to the case of Benham v. the United Kingdom and agree that there has been a breach of Article 6 paras. 1 and 3 (Art. 6-1+6-3) taken together.

Having examined these complaints, the Commission finds that they cannot be regarded as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and that no other

ground for declaring them inadmissible has been established. The Commission considers that the determination of these complaints should depend on an examination of the merits.

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