AS TO THE ADMISSIBILITY OF

Application No. 30237/96
by Gary William ROBERTS
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 17 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

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 1 November 1995 by Gary William ROBERTS against the United Kingdom and registered on 16 February 1996 under file No. 30237/96;

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 1970 and resident in Wolverhampton. He is represented before the Commission by Mr. John MacKenzie, a solicitor practising in Middlesex.

A. Particular circumstances of the case.

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

Between October 1990 and April 1991 the applicant served with his regiment in the Gulf War during the course of which the applicant was injured and experienced several traumatic incidents involving the death and serious injury of other soldiers. The applicant claims that as a result he developed Post Traumatic Stress Disorder ("PTSD") and he submits supporting documents in this respect including a psychiatric report. He also submits that as a result of his illness, he began smoking cannabis on his return with his battalion from the Gulf to Germany.

On 3 October 1991 the applicant was stopped by the military police who found a small quantity of cannabis in the car. The applicant

admitted that the cannabis was his. In early 1992 the applicant's battalion was moved to Northern Ireland. By charge sheet dated 16 June 1992 the applicant was charged, pursuant to section 70 of the Army Act 1955, with unlawful possession of a controlled drug contrary to the Misuse of Drugs Act 1971.

A district court-martial was convened by the Convening Officer. The applicant was detained in close arrest for six days before the court-martial hearing. The applicant, who was represented by an army officer, pleaded guilty at the court-martial on 17 June 1992 and he was sentenced to seven months imprisonment and to be dismissed from the army. In June 1992 the applicant himself submitted a petition against sentence to the Confirming Officer. This petition was rejected. Accordingly, on 24 July 1992 the applicant's sentence was confirmed and the sentence was promulgated on 27 July 1992.

In August 1992 the applicant consulted a civilian solicitor. On 4 September 1992 that solicitor submitted a petition against sentence on behalf of the applicant to the Defence Council arguing that the sentence was too severe in light of the applicant's diagnosed PTSD. On 28 September 1992 this latter petition was rejected. In November 1992 the applicant was released from prison.

In June 1994 the applicant consulted his current solicitor who, having learnt about the circumstances of the applicant's court-martial, submitted in July 1994 another petition to the Defence Council, but this time against conviction, contending that the applicant had been improperly deprived of legal representation for his court-martial, had not had a proper opportunity to prepare his case or to consult with his army representative and had not been provided with a copy of the charge sheet. On 14 November 1994 the applicant's representative was notified that this latter petition had been rejected by the Army Board but no reasons were given for its rejection. On 9 December 1994 a further petition was presented to the Defence Council against sentence based on a further psychiatric report (dated 4 December 1994) in relation to the applicant's PTSD. On 13 January 1995 the Defence Council notified the applicant's representative that this petition had also been rejected.

In the meantime on 1 December 1994 the applicant applied for leave to appeal against conviction to the single judge of the Courts-Martial Appeal Court ("CMAC"), for a direction under section 8(3) of the Courts-Martial (Appeals) Act 1968 ("the 1968 Act") and/or for an extension of time in which to appeal to the CMAC. The single judge refused the application on 20 December 1994. He noted, inter alia, that the pertinent petition of July 1994 against conviction had been 711 days out of time and that, in addition, an extension of ten weeks was required for the application for leave to appeal to the CMAC. In considering the relevant criteria contained in section 8(3) of the 1968 Act for the giving of such a direction, the single judge noted that the applicant clearly accepted that, if granted leave, it would in any event not be part of his case that he would not have pleaded guilty at the court-martial had he been represented by a civilian lawyer. In addition, there was no suggestion that the applicant's admissions in a recorded interview were other than accurate. Therefore, the single judge was not prepared to make a direction under section 8(3) of the 1968 Act nor, consequently, to extend time for the application for leave to appeal (pursuant to section 9(3) of the 1968 Act).

The applicant renewed his application for leave to appeal (which included a request for a direction under Article 8(3) of the 1968 Act) to the full CMAC, which court rejected the application on 8 June 1995. That court considered that there was no reasonable explanation for the applicant's failure to present the petition against conviction to the Defence Council on time (despite the applicant's PTSD) and that the interests of justice did not require a direction to be given under section 8(3) of the 1968 Act.

B. Relevant domestic law and practice.

Pursuant to section 8(2) of the Courts-Martial (Appeals) Act 1968 ("the 1968 Act"), a person's right of appeal to the Courts-Martial Appeal Court ("CMAC") shall not be exercisable unless, inter alia, a petition against conviction is made to the Defence Council within the prescribed period.

Section 8(3) of the 1968 Act provides that if a person presents a petition to the Defence Council against conviction for the purposes of section 8(2) but fails to do so within the prescribed period and subsequently applies for leave to appeal, the CMAC (namely, both the single judge and the full court) may, nevertheless, direct that the appellant be treated as not having lost his right of appeal if the CMAC considers that there is a reasonable explanation for the delay and that it is in the interests of justice that the appellant should be treated as not having lost the right of appeal.

Section 9 of the 1968 Act provides that the CMAC (again meaning the single judge and the full court) may extend the period within which an application for leave to appeal to that court must be lodged.

COMPLAINTS

The applicant complains under Article 5 para. 3 of the Convention that he was held in close arrest prior to his court-martial without being brought before a judge or other officer authorised by law to exercise judicial power and under Article 5 para. 4 of the Convention that there were no proceedings which he could have taken to have the lawfulness of his detention decided.

He also complains under Article 6 para. 1 that he was denied a fair and public hearing by an independent and impartial tribunal established by law and makes numerous and detailed submissions in this respect. He also complains under Article 6 para. 3 (b) that he did not have adequate time and facilities for the preparation of his defence, under Article 6 para. 3 (c) that he was not enabled to defend himself through legal assistance and under Article 13 that no effective domestic remedy was available in respect of all of the above.

THE LAW

The applicant has a number of complaints about his pre-trial detention and about his trial by court-martial and he invokes Articles 5, 6 and 13 (Art. 5, 6, 13) of the Convention in these respects.

As regards the applicant's complaints under Article 5 (Art. 5) of the Convention, the Commission notes that the applicant's pre-trial detention ended with his conviction on 17 June 1992. It considers that, even assuming that the applicant had no effective domestic remedy to exhaust in these respects, the six-month time-limit set down by Article 26 (Art. 26) of the Convention began to run on that date, being the end of the situation of which he complains (see, for example, No. 14807/89, Dec 12.2.92, D.R. 72, p. 148). However, since the complaints were introduced on 1 November 1995, the Commission finds that they have been introduced outside the time-limit set down by Article 26 (Art. 26) of the Convention.

The Commission recalls that, despite the fixed nature of the six-month time-limit, there may exist certain special circumstances whereby the failure to comply with that time-limit cannot be held against the applicant (cf., No. 10416/83, Dec. 17.5.84, D.R. 38, p. 158 and No. 9833/82, Dec. 7.3.85, D.R. 42, p. 53). In this context, the Commission notes the psychiatric evidence presented by the applicant that he suffered from PTSD as a result of his Gulf War experiences.

However, despite this condition, the Commission notes that the applicant was in a position in August 1992 to consult with and instruct a solicitor to file a further petition against sentence to the Defence Council and that this was less than six months after the end of the applicant's pre-trial detention. The Commission considers that the applicant could equally have instructed his lawyer to introduce on his behalf the complaints within the time-limit set out in Article 26 (Art. 26) of the Convention.

The Commission does not therefore find that the application discloses any "special circumstances" to justify the failure of the applicant to respect the six-month time-limit and finds that the complaints under Article 5 (Art. 5) of the Convention have been introduced out of time and must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

The applicant also complains under Article 6 para. 1 (Art. 6-1) of the Convention submitting that he did not receive a fair hearing by an independent and impartial tribunal established by law. He also complains under Article 6 para. 3 (b) (Art. 6-3-b) that he did not have adequate time and facilities for the preparation of his defence and under Article 6 para. 3 (c) (Art. 6-3-c) that he was not allowed legal assistance for the court-martial.

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 addition, the Commission recalls that domestic remedies are not considered to have been exhausted where a domestic appeal is not admitted because of a procedural mistake, including the failure to respect a domestic time-limit, unless the competent domestic authority has, nevertheless, examined the substance of the appeal (No. 12794/87, Dec. 9.7.88, D.R. 57, p. 251).

The Commission notes that the applicant lodged a petition to the Defence Council against conviction on 8 July 1994 which was rejected on 14 November 1994. The letter notifying the applicant's representative of this rejection did not indicate why the petition had been rejected and, in particular, did not state that the petition had been rejected as being out of time.

The Commission recalls that on 1 December 1994 the applicant applied to the single judge of the CMAC for leave to appeal against conviction. However, because the petition to the Defence Council of July 1994 against conviction was 711 days late (which petition is a necessary precursor to an appeal to the CMAC pursuant to section 8(2) of the 1968 Act) it was also necessary to apply for a direction under section 8(3) of the 1968 Act that the applicant had not, as a result of this delay, lost his right of appeal to the CMAC. Furthermore, since the applicant was also late in making the application for leave to appeal to the CMAC, it was necessary to apply for an order for an extension of time (under section 9(3) of the 1968 Act) for the leave application itself. On 20 December 1994 the single judge found that neither criteria under section 8(3) of the 1968 Act had been demonstrated and he refused to give the direction under section 8(3) of the 1968 Act. Consequently, it was not relevant to extend the time for the leave application. Equally, on 8 June 1995 the full CMAC ruled that, since the criteria in section 8(3) of the 1968 Act had not been met, it could not give a direction under section 8(3) of the 1968 Act. It was not, therefore, relevant to consider an extension of time for the leave application itself.

In addition, the Commission notes that neither the single judge nor the full court pronounced on the substance of the applicant's appeal against conviction apart from commenting on the grounds of appeal for the purposes of considering the criteria set out in

section 8(3) of the 1968 Act. Accordingly, the Commission finds that the applicant's appeal to the CMAC was not admitted because of a failure to respect a domestic time-limit before the Defence Council. The Commission therefore considers, insofar as the applicant argues that petitions to the Defence Council and an appeal to the CMAC are effective domestic remedies, that the applicant has not properly exhausted those remedies within the meaning of Article 26 (Art. 26) of the Convention.

The Commission recalls that certain special circumstances can, in accordance with the generally recognised rules of international law, absolve an applicant from the obligation to exhaust a domestic remedy (see, for example, No. 24196/94, Dec. 22.1.96, D.R. 84-A, p. 72). While the Commission has also in this context considered the psychiatric evidence presented by the applicant as regards his PTSD, it is again noted that the applicant was in a position to brief a solicitor in August 1992, after which that solicitor lodged an appeal against sentence based on the applicant's diagnosis of PTSD. The Commission considers that the applicant could equally have instructed his solicitor to lodge a petition against conviction and that no special circumstances have been shown to justify his failure to do so.

Accordingly, the Commission considers that the complaints under Article 6 (Art. 6) of the Convention must be declared inadmissible pursuant to Article 27 para. 3 (Art. 27-3) of the Convention.

In light of the above conclusions of the Commission in relation to the applicant's complaints under Articles 5 and 6 (Art. 5, 6) of the Convention, his complaint under Article 13 (Art. 13) of the Convention must also be declared 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