AS TO THE ADMISSIBILITY OF

Application No. 25373/94
by Paul SMITH
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 29 November 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 12 August 1994 by Paul SMITH against the United Kingdom and registered on 5 October 1994 under file No. 25373/94;

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 6 April 1995 and the observations in reply submitted by the applicant on 30 May 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a United Kingdom citizen, born in 1950. He is represented by Mr. G. Dangerfield of Messrs. Ferguson & Forster, Solicitors, Stranraer. The facts of the case, as submitted by the parties, may be summarised as follows.

The particular circumstances of the case

On 23 February 1994, Strathclyde Regional Council ("the Council") submitted to Glasgow Sheriff Court an application for a summary warrant against some 300 persons, including the applicant, in respect of alleged arrears of community charge (poll tax) for the financial year 1992/93. The application certified that the statutory requirements for a summary warrant had been met, and requested a summary warrant authorising recovery of the amount due (£71.67 in the case of the applicant) and a surcharge of 10%. It did not give any details as to whether or when the applicant was actually served with a demand notice,

or whether or when an appeal had been determined. The applicant was not informed of the application.

On 25 February 1994, the sheriff, sitting in private, granted the application. The applicant was given no opportunity to attend at the sheriff court or to submit representations or evidence before the warrant was issued.

The background to the summary warrant is contested between the parties, but it is agreed that he received at least a demand notice dated 9 July 1993 in the sum of £71.67 for the period 28 April 1992 to 31 March 1993 - the period was less than a full year because the applicant had moved house -, a reminder notice dated 7 October 1993 in the same sum, and a final notice dated 24 November 1993. The final notice of 24 November 1993 provided, amongst other things, that "unless payment in full is made within 14 days, application will be made to the sheriff for a summary warrant for recovery of any balance due, together with the statutory addition of 10 per cent".

The applicant became aware of the warrant on receipt of a letter dated 14 July 1994 from Messrs. Charles Anderson, Sheriff Officers, demanding payment of "outstanding community charge and penalty" within 3 days and warning the applicant that the warrant authorised the arrestment of his wages and bank account and the poinding (seizure) and sale of his possessions. By letter of 22 July 1994, Messrs. Charles Anderson requested a copy of the applicant's benefit book so that arrangements could be made for deductions from his benefit towards the amount due under the warrant.

No sums have been recovered from the applicant under the summary warrant.

(b) Relevant domestic law and practice

The poll tax was introduced in Scotland by the Abolition of Domestic Rates Etc. (Scotland) Act 1987 ("the 1987 Act"). It replaced domestic rates as a means of funding local government. An individual is liable to pay the personal community charge fixed by a local authority (the "levying authority") where that person is registered by the levying authority as a chargepayer and has been served with a demand notice specifying the amount due.

A levying authority may bring proceedings in a sheriff court against persons who allegedly owe arrears of poll tax. Schedule 2, para. 7 to the 1987 Act provides:

> "7. (1) ... arrears of community charges may be recovered by the levying authority by diligence -
>
> a) authorised by a summary warrant granted under sub-paragraph (2) below; or
>
> b) in pursuance of a decree granted in an action for payment.
>
> (2) ... [T]he sheriff, on an application by the levying authority accompanied by a certificate by them -
>
> a) stating that the persons specified in the application -
>
> i) have each been issued with a demand notice and that in each case the time limit for appealing against a demand notice... has expired without an appeal being made or... where an appeal has been made it has been finally determined in favour of the levying authority; and
> ii) have not paid the community charges specified in

the application;

b) stating that the authority have given written notice the each such person requiring him to make payment of the amount due... within a period of 14 days...; and

c) specifying the amount due and unpaid by each such person,

shall grant a summary warrant... authorising the recovery, by any of the diligences mentioned in sub-paragraph 3 below, of the amount of the community charges remaining due and unpaid by each such person along with a surcharge of 10 per cent... of that amount."

The diligences (i.e. methods of enforcement) authorised by a summary warrant (Schedule 2, para. 7 (3) to the 1987 Act) are:

- "poinding and sale", i.e. a power to enter the debtor's home, if need be by force, and seize and sell moveable goods (but not money) to realise the amount due;

- earnings arrestment;

- "arrestment and action of furthcoming or sale", i.e. a power to attach, in the hands of a third party, moveable property or money and then to sell any moveable property or pay the arrested sum to the creditor, for example by `freezing' the debtor's bank account and directing payment to the authority.

Deductions may be made from sums due by way of income support where a levying authority has obtained a summary warrant.

If a levying authority brings an action for payment, the proceedings are treated as an ordinary civil case.

Where a levying authority opts to proceed by summary warrant, the application is considered by the sheriff in private and in the debtor's absence. The levying authority establishes its case by `certifying' that the grounds for the application (para. 7 (2) of Schedule 2 to the 1987 Act, above) are satisfied. The debtor receives no advance notice of the application. A single application may be made in respect of a number of charge-payers, in which case the authority presents a single certificate in respect of the entire application and obtains a single summary warrant. Where such an application with certificate is presented to the sheriff, the sheriff is required to grant a warrant. The sheriff has no discretion.

The warrant recites the formal matters referred to in the certificate but contains no further reasoning. It is given to the levying authority; no copy need be sent to the debtor.

A summary warrant entitles the levying authority to enforce the debt by any of the specified diligences, immediately and without further judicial authorisation.

There is no right of appeal as such against the grant of a summary warrant. However, various procedures have been referred to by the parties in this connection:

a) an action for reduction offers a challenge to a court order on the ground that it is an inherent nullity;

b) an action for interdict, or suspension and interdict, is a form of action which can give rise to a stay of execution of diligence;

c) an action for damages for wrongful diligence could also lie.

Before the summary warrant stage is reached, a chargepayer may appeal under Schedule 2, para. 3 of the 1987 Act against, inter alia, the amount specified in the original demand notice. The appeal must be lodged within 28 days of issue of the demand and is heard initially by the levying authority itself, with a further right of appeal to the sheriff.

COMPLAINTS

The applicant complains of a violation of Article 6 para. 1 of the Convention. He states that had he had an opportunity to defend the Council's application, he could have contested the Council's assertions that the requisite notices had been served and that any sum due from him remained unpaid. A summary warrant having been issued, there is now no court before which the Council can be put to proof of its claim.

The applicant accepts that the procedure applicable to an action for payment in the sheriff court complies with the requirements of Article 6 para. 1, in particular as to advance notice of the proceedings, adversarial treatment of evidence and submissions and provision of a public hearing followed by a reasoned decree. None of these features is present in the summary warrant procedure. According to the applicant, the procedure neither complies per se with Article 6 nor is the outcome susceptible to review by a court complying with this provision. The applicant alleges that the proceedings against him violated his right under Article 6 para. 1 of the Convention to a "fair and public hearing by a... tribunal established by law" following which "judgment shall be pronounced publicly".

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 August 1994 and registered on 5 October 1994.

On 11 January 1995 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 6 April 1995 and the applicant submitted his observations in reply on 30 May 1995.

On 24 May 1995 the Commission granted the applicant legal aid.

THE LAW

The applicant alleges a violation of Article 6 (Art. 6) of the Convention. He considers that the summary warrant procedure did not give him a fair chance to put his arguments that he had not been properly served with the various notices, and that, indeed the warrant was obtained entirely without his knowledge. Article 6 (Art. 6) of the Convention provides, so far as relevant, 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 ..."

The Government consider that the proceedings for the issue of the summary warrant did not determine anything, as they were merely administrative steps following the determination of the applicant's liability to pay the community charge, and that they had nothing to do with any civil rights of the applicant's. They consider that the proceedings as a whole fall outside the scope of Article 6 (Art. 6), as they relate to taxation, but that even if Article 6 (Art. 6) were to apply to the whole or any part of the proceedings, the requirements

of that provision were met as the matters contained in the initial demand notice may be challenged at that stage, and the making of a summary warrant may be challenged in various ways before the Scottish courts. The Government refer in this respect to the actions of reduction and interdict (or suspension and interdict), and to an action for damages for wrongful diligence. They consider that by not appealing against the entry relating to him in the Community Charges Register (which established his liability to pay the personal community charge for 1992/3), by not appealing against the demand notice which was served on him, and by not challenging the lawfulness of the summary warrant or the diligence, he has not exhausted domestic remedies within the meaning of Article 26 (Art. 26) of the Convention.

The applicant considers that it cannot be right that the proceedings leading to a summary warrant do not determine anything, and points in particular to the possibility of an application for diligence by court action, and to the case of Lothian Regional Council v. Brown (Edinburgh Sheriff Court, 2 November 1992), where the sheriff in a case brought by action felt obliged to establish each of the matters which, in a case such as the present one, would have been dealt with by way of certificate from the levying authority. The applicant states that he could not challenge the lawfulness of the demand notice dated 9 July 1993 because since the right of appeal only arises where a demand notice has been issued, that right is not available to someone who claims that he has not had a demand notice.

The Commission recalls its long-established case-law to the effect that civil rights and obligations are not determined by assessments to tax (see, for example, No. 13013/87, Dec. 14.12.88, D.R. 58, p. 163, 189, and No. 11189/84, Dec. 11.12.86, D.R. 50, p. 121, 140, and the further cases referred to there). This case-law was not challenged in a case in which the European Court of Human Rights found that Article 6 (Art. 6) of the Convention did apply to a dispute, even though the Government had alleged that taxation was at the centre of the issues (see Eur. Court H.R., Éditions Périscope judgment of 26 March 1992, Series A no. 234-B, pp. 64, 65, paras. 36-39).

The Commission further recalls that there may be circumstances in which a dispute as to a civil right or obligation may arise in the context of enforcement proceedings. In such a case the guarantees of Article 6 (Art. 6) must be provided in the enforcement proceedings, regardless of the subject matter of the main proceedings (see No. 10757/84, Dec. 13.7.88, D.R. 56, p. 36 and, in a case where the main proceedings concerned - at least in part - taxation, No. 13800/88, Dec. 1.7.91, D.R. 71, p. 105).

Finally in connection with the applicability of Article 6 (Art. 6) in the field of taxation in the present case, the Commission recalls that where penalties are at issue, the same criteria will be applied in ascertaining whether a "criminal charge" is at stake as in any other case - namely, the nature of the matter in domestic law, the nature of the "offence", and the severity of the penalty (see No. 19380/92, Benham v. the United Kingdom, Comm. Rep. 29.11.94, with reference to, inter alia, Eur. Court H.R., Bendenoun judgment of 24 February 1994, Series A no. 284, pp. 19, 20, paras. 45-47). The Commission has considered that tax sanctions of 30% and 50% of the amount due - imposed by the French revenue under Article 1729 of the Tax Code for the tax offence ("infraction fiscale") of displaying bad faith - were penalties the imposition of which attracted the guarantees of Article 6 of the Convention (cf. also No. 18656/91, Dec. 1.12.92, Perin v. France, unpublished).

The community charge, or poll tax, was a local tax imposed by local authorities. The tax was calculated by reference to a complicated set of criteria including grants from central Government and local expenditure, but was levied as a flat rate per charge payer within each levying authority. With few exceptions, every adult in the

area therefore paid the same amount of community charge. There is no indication in the present case that the imposition of the community charge on the applicant was anything other than an "assessment" to tax, which had been shorn of any aspects personal to him (or other charge payers) other than his name and address. The way in which the applicant became liable for his community charge therefore falls outside the scope of Article 6 (Art. 6), and cannot be considered by the Commission.

The applicant complains specifically about the summary warrant procedure, by which the community charge was enforced.

The procedure in Scotland for enforcing payment of the community charge was apparently designed with a view to leaving as little scope for dispute as possible. It was for this reason that two methods of enforcement were envisaged. Where there was no dispute as to the existence or address of a charge payer, the legislation provided for certification that the charge payer was liable (on the basis that he had had the opportunity to show that he was not liable), and the warrant was then issued ex parte and with no discretion on the part of the sheriff. Some further action may be possible in the case of a fundamental error on the part of the sheriff making the order, but in the ordinary course of events - such as the present case - the liability to charge has been so precisely defined by the statutes and the regulations that there will be nothing left to challenge. The Commission does not accept that it was not open to the applicant to challenge the demand notice because he claimed that it was not valid.

Where there was a dispute, the regime provided for recourse to the ordinary courts.

The Commission considers that the documents in its possession indicate that both the imposition of the liability to community charge and its enforcement in the present case fall outside the matters which the Commission is able to consider.

The sole remaining issue is whether the 10% surcharge which the applicant was required to pay when the summary warrant was granted is capable of constituting a "penalty" within the meaning of the case-law, and if so, whether the guarantees of the criminal limb of Article 6 (Art. 6) should have been present (as in the above-mentioned case of Benham, where the applicant was imprisoned for non-payment of his community charge).

The 10% surcharge is imposed automatically when an application for a summary warrant is made. It is imposed in addition to costs, but is similar in that it is an additional amount required to be paid because the liability to tax has not been met when it was due. The surcharge is not imposed for anything which is assimilable to the concept of "wilful refusal or culpable neglect" (see above-mentioned Benham case, para. 30), or to the concept of "displaying bad faith" (above-mentioned Perin case). The amount involved in the applicant's case - £7.17 - was very small, and could not possibly exceed a figure of that magnitude for one year's arrears. Neither the liability to the charge nor the surcharge could be converted into a term of imprisonment.

The imposition of the surcharge on the applicant did not therefore amount to the determination of a "criminal charge" within the meaning of Article 6 (Art. 6) of the Convention and was therefore not a penalty within the meaning of that provision.

It follows that Article 6 (Art. 6) of the Convention does not apply to the proceedings at issue in the present case, such that the application is incompatible ratione materiae with that provision within the meaning of Article 27 para. 2 (Art. 27-2).

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

| Secretary to the First Chamber | President of the First Chamber |
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| (M. BUQUICCHIO) | (C.L. ROZAKIS) |