AS TO THE ADMISSIBILITY OF

Application No. 35578/97
by Kevin Anthony THWAITES
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 22 October 1998, the following members being present:

MM M.P. PELLONPÄÄ, President
N. BRATZA
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
B. MARXER
I. BÉKÉS
G. RESS
A. PERENIČ
C. BÎRSAN
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 March 1997 by Kevin Anthony THWAITES against the United Kingdom and registered on 9 April 1997 under file No. 35578/97;

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 1 May 1998 and the observations in reply submitted by the applicant on 7 June 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1955 and resident in Essex. He is represented before the Commission by Mr Gilbert Blades, a solicitor practising in Lincoln. The facts as submitted by the parties may be summarised as follows.

A. Particular circumstances of the case.

In 1994 the applicant was a warrant officer in the British army stationed in Scotland. Following an incident in mid-November 1994 during which a serviceman was assaulted, the applicant was advised in late November 1994 by the Unit Adjutant to seek legal advice in relation to that incident. The Adjutant gave the applicant the name of a firm of solicitors whom the applicant was unable to contact. The Adjutant then provided the applicant with a list of Scottish solicitors, one of whom the applicant contacted. He was advised by that solicitor to cooperate with the army authorities and that the forthcoming interview with the service police could be stopped at any time to consult with that solicitor should the applicant be unhappy about a particular question.

On 1 December 1994 the applicant was interviewed by the service police in relation to the assault. At the beginning of the interview he was given a document entitled 'Notice to Suspect at Interviews with Service Police'. On 8 January 1996 the applicant was charged (pursuant to section 70 of the Army Act 1955) with assault occasioning actual bodily harm contrary to the Offences Against the Person Act 1861.

The Convening Officer, by order dated 8 January 1996, convened a general court-martial to sit in Edinburgh, Scotland. By this date the applicant was being advised by his current representative, an English solicitor. On 10 January 1996 the court-martial found the applicant guilty. The applicant agreed during the court-martial that he had had ample opportunity to obtain legal advice before his interview on 1 December 1994, that he was content with the advice he had received, that the questions put at the interview were fair and that he considered he had answered them fairly. He was sentenced to 112 days imprisonment, to dismissal from the army and to be reduced to the ranks. On 15 February 1996 the Confirming Officer revoked the sentence of imprisonment but otherwise confirmed the conviction and sentence, the latter of which were promulgated on 19 February 1996.

On 26 February 1996 the applicant petitioned the Defence Council against conviction and, on 15 March 1996, against sentence submitting, inter alia, that the Judge Advocate should have excluded from evidence the interview of 1 December 1994. He argued that, since the Police and Criminal Evidence Act 1984 ("the 1984 Act") only applied to proceedings in England and Wales and to British courts-martial proceedings (regardless of where the latter proceedings were actually held), he should have been provided with an English solicitor for the purposes of the interview. He claimed that his Scottish solicitor was not qualified to advise on the 1984 Act since it did not apply in

Scotland. By letter dated 19 April 1996 the applicant's representative was informed of the decision (taken by the Army Board) to reject this petition.

On 6 June 1996 a single judge of the Courts-Martial Appeal Court gave leave to appeal to the full court on the matter relating to the applicant's initial representation by a Scottish solicitor. On 28 November 1996 the Courts-Martial Appeal Court rejected the appeal. The court accepted that advice given in ignorance of the 1984 Act could, in principle, justify the exclusion by the court-martial pursuant to section 78 of the 1984 of evidence of an interview given pursuant to such advice. However, and having reviewed the law in the area, the court found no evidence to suggest that the Scottish solicitor's advice, even accepting the applicant's account of that advice, was based on a misunderstanding of the applicant's right to silence or the ingredients of the offence. The Judge Advocate was therefore, according to the Courts-Martial Appeal Court, correct in finding that the applicant had suffered no prejudice by his initial representation by the Scottish solicitor.

B. Relevant domestic law and practice

The principal law and procedures applicable are contained in the Army Act 1955 ("the 1955 Act") prior to its amendment by the Armed Forces Act 1996 ("the 1996 Act"), which latter Act came into force on 1 April 1997. Accordingly, and apart from section (g) below, the following is an outline of the pre-1996 Act law and practice.

(a) General

Many civilian offences are also offences under the 1955 Act (section 70(1)). Although the final decision on jurisdiction lay with the civilian authorities, army personnel who were accused of such offences were usually tried by the army authorities unless, for example, civilians had been in some way involved.

Depending on their gravity, charges under the 1955 Act could be tried by district, field or general court-martial. These were not standing courts: they came into existence in order to try a single offence or group of offences.

At the time of the events in question, a general court-martial consisted of a President (normally a brigadier or colonel in the army), appointed by name by the Convening Officer, and at least four other officers, either appointed by name by the Convening Officer or, at the latter's request, by their commanding officer.

Each member of the court-martial had to swear the following oath:

> "I swear by almighty God that I will well and truly try the accused before the court according to the evidence, and that I will duly administer justice according to the Army Act 1955, without partiality, favour or affection, and I do further swear that I will not on any account at any time whatsoever disclose or discover

the vote or opinion of the president or any member of this court-martial, unless thereunto required in the due course of law."

(b) The Convening Officer

Before the coming into force of the 1996 Act, a Convening Officer of a general court-martial had to be a "qualified officer" or an officer not below the rank of Colonel to whom the qualified officer had delegated his or her powers. To be a "qualified officer", an officer had to be not below the rank of Field Officer or corresponding rank who was in command of a body of the regular forces or of the command within which the person to be tried was serving.

The Convening Officer assumed responsibility for every case to be tried by court-martial. He or she would decide upon the nature and detail of the charges to be brought and was responsible for convening the court-martial.

He would draw up a convening order, which would specify, inter alia, the date, place and time of the trial, the name of the President and the details of the other members all of whom he could appoint. He ensured that a judge advocate was appointed by the Judge Advocate General's Office and failing such appointment, could appoint one. He also appointed, or directed a commanding officer to appoint, the prosecuting officer.

Prior to the hearing, the Convening Officer was responsible for sending an abstract of the evidence to the prosecuting officer and to the judge advocate, and could indicate the passages which might be inadmissible. He procured the attendance at trial of all witnesses to be called for the prosecution. When charges were withdrawn, the Convening Officer's consent was normally obtained, although it was not necessary in all cases, and a plea to a lesser charge could not be accepted from the accused without it. He had also to ensure that the accused had a proper opportunity to prepare his defence, legal representation if required and the opportunity to contact the defence witnesses, and he was responsible for ordering the attendance at the hearing of all witnesses "reasonably requested" by the defence.

The Convening Officer could dissolve the court-martial either before or during the trial, when required in the interests of the administration of justice (section 95 of the 1955 Act). The Convening Officer usually also acted as Confirming Officer.

(c) The Judge Advocate General and judge advocates

The Judge Advocate General was appointed by the Queen in February 1991 for five years. He was answerable to the Queen and was removable from office by her for inability or misbehaviour. He had the role of adviser to the Secretary of State for Defence on all matters touching and concerning the office of Judge Advocate General, including advice on army law and the procedures and conduct of the court-martial system. He was

also responsible for advising the confirming and reviewing authorities following a court-martial.

Judge advocates are appointed to the Judge Advocate General's Office by the Lord Chancellor. They must have at least seven and five years experience respectively as an advocate or barrister.

At the time of the events in question, a judge advocate was appointed to each court-martial, either by the Judge Advocate General's Office or by the Convening Officer. He or she was responsible for advising the court-martial on all questions of law and procedure arising during the hearing and the court had to accept this advice unless there were weighty reasons for not doing so. In addition, in conjunction with the President, he was under a duty to ensure that the accused did not suffer any disadvantage during the hearing. At the close of the hearing, the judge advocate would sum up the relevant law and evidence.

Prior to the coming into force of the 1996 Act, the judge advocate did not take part in the court-martial's deliberations on conviction or acquittal, although he could advise it in private on general principles in relation to sentencing. He was not a member of the court-martial and had no vote in the decision on conviction or sentence.

(d) The court-martial hearing

At the commencement of the trial, the accused could object to individual members of the court-martial, such objection being considered in closed court.

The accused was then asked to plead in respect of the charge. If a plea of not guilty was entered the procedure was similar to that followed in the (civilian) Crown Court. After the prosecution had made its case, the defence could enter a submission of no case to answer. If this submission was not accepted, the judge advocate would advise the accused on the alternatives open to him and the defence would proceed with its case. Witnesses could be called for the prosecution and the defence and both sides could make a closing submission, the defence submission being the last. During the trial the court-martial could adjourn to consult the Convening Officer on points of law; the latter then had to take legal advice from the Judge Advocate General. The members of the court-martial retired (without the judge advocate) to deliberate on their findings, returned and pronounced those findings. Their votes and opinions were private and it was not disclosed whether the decision had been by a majority.

In the event of a conviction or a plea of guilty, the prosecuting officer put in evidence the defendant's service record and other evidence having a bearing on the sentence to be imposed. The defence made a plea in mitigation and could call witnesses in support. The members of the court-martial then retired (with the judge advocate) to consider the sentence. The sentence was announced in open court. There was no provision for the giving of reasons by the court-martial for its decision on guilt or

sentence.

(e) Confirmation and post-hearing reviews

Until the amendments introduced by the 1996 Act, the findings of a court-martial were not effective until confirmed by a "Confirming Officer". Prior to confirmation, the Confirming Officer used to seek the advice of the Judge Advocate General's Office, where a judge advocate different from the one who acted at the hearing would be appointed. The Confirming Officer could withhold confirmation or substitute, postpone or remit in whole or in part any sentence.

Once the sentence had been confirmed, the defendant could present a petition of appeal against conviction and/or sentence to the "reviewing authority", which was usually the Army Board in cases involving army personnel. It had the power to quash a finding and to exercise the same powers as the Confirming Officer in relation to substituting, remitting or commuting the sentence.

A petitioner was not informed of the identity of the Confirming Officer or of the reviewing authority. No statutory or formalised procedures were laid down for the conduct of the post-hearing reviews and no reasons were given for decisions delivered subsequent to them. Neither the fact that advice had been received from the Judge Advocate General's Office nor the nature of that advice was disclosed.

(f) Courts-Martial Appeal Court

The Courts-Martial Appeal Court ("CMAC") was established by the Courts-Martial (Appeals) Act 1951 and was confirmed by the Courts-Martial (Appeals) Act 1968. The CMAC had the same status and, in essence, the same procedure as the (civilian) Court of Appeal, Criminal Division. Its judges included ordinary and ex officio judges of the Court of Appeal and judges of the High Court nominated by the Lord Chief Justice.

If an appeal petition was rejected by the Army Board, an appellant could apply to a single judge of the CMAC (and, if necessary, also to the full court) for leave to appeal against conviction. There was no provision for an appeal against sentence only, although certain powers of revising sentences, pursuant to an appeal against conviction, were available to the CMAC.

The hearing of the substantive appeal did not constitute a full rehearing on all points of fact and law. However, the CMAC was empowered to consider any question required for the doing of justice and could order a retrial. It also had power, inter alia, to order the production of documents or exhibits connected with the proceedings, order the attendance of witnesses, receive evidence, obtain reports from members of the court-martial or from the judge advocate and order a reference of any question to a special commissioner for inquiry.

The CMAC had to allow an appeal against conviction if it considered that the finding of the court-martial was, in all the circumstances, unsafe or unsatisfactory or involved a wrong decision on a question of law. The appeal had also to be allowed if there was a material irregularity in the course of the trial. In any other case, the appeal had to be dismissed.

An appellant required the leave of the CMAC to attend any hearing in relation to the appeal. Leave would only be granted where the CMAC considered that his presence would serve some useful purpose or was necessary in the interests of justice. Legal aid for an appeal to the CMAC was available under certain conditions and the appellant could obtain an order for costs in his favour if his appeal was allowed.

A further appeal, on a point of law of general public importance, could be made to the House of Lords with the leave of the CMAC or of the House of Lords itself.

(g) The Armed Forces Act 1996

Under the 1996 Act, the role of the Convening Officer ceases to exist and its functions are split among three different bodies: the higher authority, the prosecuting authority and court administration officers (Schedule I to the 1996 Act).

The higher authority, a senior officer, decides whether any case referred to him by the accused's commanding officer should be dealt with summarily, referred to the new prosecuting authority, or dropped. Once the higher authority has taken this decision, he has no further involvement in the case. The prosecuting authority is the legal branch of the relevant Service. Following the higher authority's decision to refer a case to it, the prosecuting authority has an absolute discretion, applying similar criteria to those applied in civilian cases by the Crown Prosecution Service, to decide whether or not to prosecute, what type of court-martial would be appropriate and what charges should be brought. It also conducts the prosecution (the 1996 Act, Schedule I, Part II). Under the new legislation, court administration officers have been appointed in each Service. They are independent of both the higher and the prosecuting authorities and are responsible for making the arrangements for courts-martial, including arranging venue and timing, ensuring that a judge advocate and any court officials required are available, securing the attendance of witnesses and selection of members. Officers under the command of the higher authority will not be selected as members of the court-martial (the 1996 Act, Schedule I, Part III).

Each court-martial now includes a judge advocate as a member. His advice on points of law is binding on the court and he has a vote on sentence (but not on conviction). The casting vote, if needed, rests with the president of the court-martial, who gives reasons for the sentence in open court. The Judge Advocate General no longer provides general legal advice to the Secretary of State for Defence (the 1996 Act, Schedule I, Part III, sections 35, 41 and 43).

Findings by a court-martial are no longer subject to confirmation or revision by a Confirming Officer (whose role is abolished). A reviewing authority has been established in each Service to conduct a single review of each case. Reasons are now given for the decision of the reviewing authority. As part of this process, post-trial advice received by the reviewing authority from a judge advocate (different from the one who officiated at the court-martial) is disclosed to the accused. A right of appeal against sentence to the CMAC has been added to the existing right of appeal against conviction (the 1996 Act, section 17 and Schedule V).

The document entitled 'Notice to Suspect at Interviews with Service Police' sets out, inter alia, the rights of suspects to legal advice. The reverse side of the notice is entitled "Explanation of Rights" and it explains the right to legal advice in the following words:

> "You may at any time consult and communicate privately, either in person, in writing or on the telephone, with legal advisers. The legal adviser may be either:
> ...
>
> C. A legal adviser selected by you from a list of legal advisers who have indicated that they are available for the purpose of providing legal advice. ...

Option C will be free of charge unless you otherwise agree with the legal adviser."

COMPLAINTS

The applicant complains under Article 6 para. 1 of the Convention that he was denied a fair and public hearing by an independent and impartial tribunal established by law. He mainly contests the independence and impartiality of the court-martial and the fairness of the proceedings against him. He also complains under Article 6 para. 1 that he was denied free legal advice from an English lawyer for an interview with the service police.

He further complains under this Article that he had no say in whether he would be tried by the military or civilian authorities.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 26 March 1997 and registered on 9 April 1997.

On 3 December 1997 the Commission decided to communicate the application and to request the Government's observations on the admissibility and merits.

The Government's observations were submitted on 1 May 1998 after one extension of the time-limit fixed for that purpose, and the observations in reply were submitted by the applicant on 7 June 1998.

THE LAW

1. The applicant complains under Article 6 para. 1 of the Convention that he was denied a fair and public hearing by an independent and impartial tribunal established by law.

Article 6 para. 1 of the Convention, insofar as relevant, reads as follows:

> "In the determination ... 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. ..."

Referring to the Coyne application before the Commission (Eur. Court HR, Coyne v. the United Kingdom judgment of 24 September 1997, Reports of Judgments and Decisions 1997-V, Comm. Report 26.6.96), he mainly argues that the court-martial lacked independence and impartiality and that the proceedings against him were consequently unfair. The Government accept that this case raises issues similar to those in respect of which the Court found a violation of Article 6 para. 1 in the Findlay and Coyne applications (Eur. Court HR, Findlay v. the United Kingdom judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I and Coyne v. the United Kingdom judgment, loc. cit.). Accordingly, the Government have no observations on the admissibility of these aspects of the application, although they reserve their position on the merits.

The applicant further complains under Article 6 para. 1 that he was denied free legal advice from an English solicitor for his interview with the service police. The applicant points out that the Police and Criminal Evidence Act 1984 applies in England and Wales and not in Scotland. Accordingly, the applicant contests the admission into evidence during his court-martial of that interview. The Government submit, in this respect, that the Scottish solicitor who initially advised the applicant was qualified to represent him and they refer to the conclusion of the Courts-Martial Appeal Court in this respect.

The Commission recalls that the Court found, in the above-cited Findlay and Coyne cases, that an army general court-martial and an air force district court-martial, respectively did not constitute independent or impartial tribunals. The Commission also concluded in its Reports in those cases that a court-martial found to lack independence and impartiality could not, consequently, guarantee a fair trial (Eur. Court HR, Findlay v. the United Kingdom judgment, loc. cit., Comm. Report 5.9.95, para. 108 and Coyne v. the United Kingdom judgment, loc. cit., Comm. Report 26.6.96, para. 80).

The Commission notes that, in the present case, an army general court-martial was convened pursuant to the Army Act 1955 and the applicant was found guilty of assault occasioning actual bodily harm contrary to the Offences Against the Person Act 1861.

In such circumstances, the Commission considers that these complaints of the applicant raise complex and serious issues under Article 6 para. 1 of the Convention which require determination on the merits. It follows that these complaints of the applicant cannot be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention. No other ground for declaring the complaints inadmissible has been established.

2. Finally, the applicant complains under Article 6 para. 1 that he had no voice in the decision as to whether he would be tried by the military or by the civilian authorities.

The Government submit that the case was properly dealt with by a service jurisdiction given the purely military nature of the offence and because the victim and accused were both servicemen, the witnesses were army personnel and the offence took place on service premises. The applicant makes no observations in reply.

The Commission notes that the applicant does not dispute the lawfulness in domestic terms of his trial by the army authorities. The Commission also recalls that Article 6 para. 1 of the Convention does not prohibit the trial of an individual by court-martial but rather provides that any court-martial hearing to which Article 6 applies must comply with the minimum requirements set out in that Article. The compliance with Article 6 para. 1 of the court-martial proceedings against the applicant is considered by the Commission at paragraph 1. above.

In such circumstances, the Commission considers this complaint to be manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint that he did not receive a fair and public hearing by an independent and impartial tribunal established by law; and

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber