AS TO THE ADMISSIBILITY OF

Application No. 31503/96
by Kenneth Conrad WICKRAMSINGHE
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 9 December 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 22 December 1995 by Kenneth Conrad WICKRAMSINGHE against the United Kingdom and registered on 16 May 1996 under file No. 31503/96;

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 4 May 1997 and the observations in reply submitted by the applicant on 30 June 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a citizen of Sri Lanka, permanently resident in the United Kingdom. Before the Commission he is represented by Messrs. Pillai & Jones, solicitors, of London. The facts of the application, as submitted by the parties, may be summarised as follows.

The applicant is a medical doctor. A complaint against him was brought by the General Medical Council ("the GMC"). It was alleged that:

On 18 June 1992 the applicant behaved indecently towards a patient, whilst purporting to offer her medical advice and treatment;

On two further occasions, in December 1992 and November 1993, the applicant behaved indecently towards female patients.

The applicant was interviewed with regard to the November 1993 incident prior to the end of that month (in the event no evidence was submitted before the Conduct Committee in relation to this charge). With regard to the June 1992 incident, the applicant was interviewed on 7 January 1994. On 26 January 1994 the applicant was interviewed in respect of the December 1992 incident.

On 8 December 1994 the Professional Conduct Committee of the GMC ("the Conduct Committee") held that the facts alleged against the applicant in connection with the incident on 18 June 1992 had been proved to the Committee's satisfaction. The Conduct Committee ordered the erasure of the applicant's name from the register.

The Conduct Committee found the facts relating to the alleged incident in December 1992 not proven, and no evidence was submitted as to the allegations relating to November 1993.

The applicant appealed to the Privy Council. His appeal was heard on 26 June 1995. The applicant alleged:

(1) that he did not receive a fair hearing because of a delay of 18 months in notifying him of the complaint against him;

(2) that he did not receive a fair hearing as he was denied access to the medical records related to the alleged incident;

(3) that he did not receive a fair hearing due to various failures by his legal representatives;

(4) that the penalty imposed was excessive.

The Privy Council dismissed the applicant's appeal on 25 July 1995. It noted that the case concerned a health care assistant employed at a hospital which the applicant visited one day a week: in examining her for pain in her neck, he touched parts of her body in ways which, it was accepted by the applicant, would have been seriously improper if true. It further noted that the Committee had accepted the evidence of the health care assistant and rejected that of the applicant.

The bulk of the Privy Council's decision, which runs to six pages, deals with the applicant's complaints concerning the fairness of the proceedings. The Privy Council noted first that the delay between the incident and the date on which the applicant was accused was regrettable, but had to be considered in the light of what actually happened in the course of the investigations by the Committee, and was coupled with the complaints about his representatives, who had allegedly not requested sufficient information at an appropriate moment.

Relevant domestic law and practice

The jurisdiction of the Conduct Committee to hear allegations of serious professional misconduct is founded upon Section 36 of the Medical Act 1983:

"(1) Where a fully registered person - ...

(b) is judged by the Professional Conduct Committee to have been guilty of serious professional misconduct, whether while so registered or not;

the Committee may, if they think fit, direct -

(i) that his name shall be erased from the register ..."

The Conduct Committee is elected annually by the GMC and consisted in December 1994 of 34 members comprising: the President of the GMC (or some other member of the GMC appointed by him); a member of the GMC appointed by the President; 22 elected members, two appointed members and eight lay members (who are nominated for appointment to the GMC by Her Majesty on advice of her Privy Council and who do not hold a qualification registrable under the Medical Act 1983). Members of the Conduct Committee normally serve for a term of one year. The quorum for the Conduct Committee is five, although eight members of the Conduct Committee are invited for any one hearing, comprising six medical members and two lay members. No member may sit on a case if that person has previously considered the same case, either as a member of another committee or in preliminary stages of the proceedings before the Conduct Committee. The Conduct Committee is advised on questions of law by a legal assessor, who must be a barrister or solicitor of not less than ten years' standing. An oral hearing is held in public during which the practitioner may be legally represented. At the hearing, the rules of evidence in criminal cases are applied, and evidence is given on oath. The practitioner may cross examine witnesses and call his own witnesses at the hearing. The Committee does not give reasons for its decision.

An appeal against the decision of the Conduct Committee to the Privy Council lies of right by Section 40 of the Medical Act 1983. The Privy Council may on any such appeal recommend in its report to Her Majesty in Council: (1) that the appeal be dismissed; (2) that the appeal be allowed and the direction or variation questioned by the appeal quashed; (3) that such other direction or variation as the Conduct Committee could have given or made be substituted; or (4) that the case be remitted to the Conduct Committee to dispose of the case in accordance with the directions of the Privy Council.

In Libman v. GMC ([1972] AC 217) Lord Hailsham of St. Marylebone, the Lord Chancellor, reviewed the authorities and summarised them as follows:

> "(1) The appeal lies of right by the statute and the terms of the statute do not limit or qualify the appeal in any way, so that the appellant is entitled to claim that it is in a general sense nothing less than a rehearing of his case and a review of the decision: ...
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> (2) Notwithstanding the generality of the above language, the actual exercise of the jurisdiction is severely limited by the circumstances in which it can be invoked. The appeal is not by way of rehearing in the sense that the witnesses are heard afresh or the evidence gone over again .... . This amongst other things, means that there is a heavy burden upon an appellant who wishes to displace a verdict on the grounds that the evidence alone makes the decision unsatisfactory.
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> (3) Beyond a bare statement of its findings of fact, the [Conduct Committee] does not in general give reasons for its decision as in the case of a trial in the High Court by judge alone from which an appeal by way of rehearing lies to the Court of Appeal ... . It follows from this that the only circumstances in which an appellate court can reverse a view of facts taken by the [Conduct Committee] would be a case, where, on examination, it would appear that the committee had misread the evidence to such an extent that they were not entitled to make a finding in the state of the evidence presented before them.
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> (4) The legal assessor who assists the committee at its hearing is not a judge, and his advice to the committee is not a summing up, and no analogy with a criminal appeal against a conviction before a judge and jury can properly be drawn. The legal

assessor simply advises the committee in camera on points of law and reports his advice in open court after he has given it. The committee under its president are masters both of law and of the facts and what might amount to misdirection in law by a judge to a jury at a criminal trial does not necessarily invalidate the decision ..."

For the purposes of English administrative law, an appeal to a court on a "point of law" or a "question of law" includes a review as to whether a decision or inference based on a finding of fact is perverse or irrational. The court will also grant a remedy if the impugned decision was such that there was no evidence to support a particular finding of fact, or the decision was made by reference to irrelevant factors or without regard to relevant factors; or made for an improper purpose, in a procedurally unfair manner or in a manner which breached any governing legislation or statutory instrument. The court of review cannot substitute its own decision on the merits of the case for that of the decision-making authority.

COMPLAINTS

The applicant complains that the procedure laid down by the Medical Act 1983 for the hearings of complaints of serious professional misconduct, as applied in his case, did not constitute a fair trial by an independent and impartial tribunal as required by Article 6 para. 1 of the Convention.

The applicant claims that the seriousness of the charges against him, the seriousness of the consequences for his reputation, livelihood and finances are such that he should be treated as having faced a criminal charge. He alleges a series of violations of his procedural rights, including that he was denied a fair hearing because of the delay in informing him of the allegations against him.

The applicant invokes Article 6 paras. 1, 2 and 3 (a), (b) and (d).

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 22 December 1995 and registered on 16 May 1996.

On 17 January 1997 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 4 May 1997, after an extension of the time-limit fixed for that purpose. The applicant replied on 30 June 1997.

On 28 May 1997 the Commission granted the applicant legal aid.

THE LAW

1. Article 6 para. 1 (Art. 6-1) of the Convention provides, in so far as relevant, as follows:

"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..."

The applicant claims that the disciplinary proceedings determined charges which were so serious (and could have been brought before the criminal courts), and which had such serious consequences for his reputation, livelihood and finances, that they should be treated as criminal charges for the purposes of Article 6 para. 1 (Art. 6-1) of the Convention. He underlines that in Le Compte (Eur. Court HR, Le

Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43) the Court left open the question of whether the professional disciplinary proceedings in that case determined criminal charges, as in any event the same guarantees applied to both civil and criminal matters.

The applicant alleges violations of 6 para. 3 (Art. 6-3) of the Convention. Article 6 para. 3 (Art. 6-3) of the Convention applies to criminal cases but not to civil cases. The Commission therefore considers that it should first ascertain whether in fact a criminal charge was determined by the proceedings against the applicant.

The Commission recalls that in order to determine whether an offence qualifies as "criminal", "it is first necessary to ascertain whether or not the provision defining the offence belongs, in the legal system of the respondent State, to criminal law; next the 'very nature of the offence' and the degree of severity of the penalty risked must be considered" (see, as a recent example with further references, Eur. Court HR, Schmautzer v. Austria judgment of 23 October 1995, Series A no. 328, p. 13, para. 27).

As to the first of these criteria, the classification of the offence in domestic law, the Commission notes that the applicant was accused of professional misconduct. Findings of professional misconduct are made, in England and Wales as in many other Convention States, by the peers of the professional concerned, at least in the first instance. The "offence" is thus classified as disciplinary within the domestic system.

As to the nature of the offence, the Commission observes that professional disciplinary matters are essentially matters which concern the relationship between the individual and the professional association to which he or she belongs, and whose rules he or she has agreed to accept. They do not involve the State setting up a rule of general applicability by which it expresses disapproval of, and imposes sanctions for, particular behaviour, as is generally the case with "criminal" charges. The Commission recalls that in the case of Campbell and Fell (Eur. Court HR, Campbell and Fell v. the United Kingdom judgment of 28 June 1984, Series A no. 80, p. 36, para. 71) the Court accepted that the possibility of proceedings being brought before the prison disciplinary authorities and the criminal courts could give the proceedings a "certain colouring which [did] not entirely coincide with that of a purely disciplinary matter". It is true, as the applicant points out, that the facts underlying the proceedings against the applicant, namely allegations of sexual indecency, could also have been the subject of criminal charges before the criminal jurisdictions. However, it is frequently the case that the factual allegations in professional disciplinary proceedings could also be pursued in ordinary criminal proceedings: in the present context, the possibility of parallel criminal proceedings does not make the nature of the offence inherently criminal.

Finally, the Commission must have regard to the degree of severity of the penalty risked. In this connection, the Commission notes that the most severe sentence that the applicant risked was that which was in fact imposed: erasure of his name from the register. Alternative sanctions would have been directing registration to continue subject to conditions, or suspension for a period of up to 12 months. Each of these sanctions is essentially disciplinary and directed to protecting the public and the reputation of the medical profession. The fact that erasure is likely to have far-reaching consequences for the individual concerned does not render the penalty "criminal".

It follows that the proceedings against the applicant did not determine a "criminal charge".

The applicant also alleges violation of the civil "limb" of Article 6 para. 1 (Art. 6-1) of the Convention. He contends that the proceedings against him determined his civil rights, and that they did not comply with the requirements of Article 6 para. 1 (Art. 6-1) because the proceedings before the Conduct Committee were not before a court with the requisite guarantees of independence, and because the Privy Council, although independent, does not have an adequate scope of review.

The Government submit that the Conduct Committee constituted an independent and impartial tribunal and that the hearing before it was conducted with all due expedition and with proper regard to the need for the applicant to have time to prepare his defence. The Government also note that the applicant was provided with a full transcript of the hearing before the Conduct Committee prior to his appeal.

The Government further submit that the applicant enjoyed a right of appeal to the Judicial Committee of the Privy Council which was unrestricted by statute as to its scope of review and had the power to quash or vary the direction of the Conduct Committee or remit the case for reconsideration by the Committee. The Government contend that, having regard to the proceedings as a whole, the applicant received a hearing that was in conformity with 6 para. 1 (Art. 6-1) of the Convention.

The applicant contends that the hearing before the Conduct Committee was not a hearing before an independent and impartial tribunal. In particular, he notes that the members of the Conduct Committee were all members of the GMC - the majority directly elected members - and that the GMC was also charged with the investigation and "prosecution" of the applicant. He adds that the role of the legal assessor is purely advisory. The applicant claims that the GMC not only provides all members of the tribunal, but is also charged with functions central to the doctor's professional future and reputation and to the conduct and progress of the proceedings before the Conduct Committee. He points out expressly that the GMC maintains the register of medical practitioners, that it is responsible for the receipt of complaints and their investigation and initial assessment, and that in the proceedings before the Conduct Committee, the GMC's barrister acted just as a prosecutor would in a criminal trial, namely to present the "prosecution" evidence to the tribunal.

In particular the applicant submits that the present case should be distinguished from the case of Bryan (Eur. Court HR, Bryan v. the United Kingdom judgment of 22 November 1995, Series A no. 335-A), a case concerning the refusal of planning permission after a review by a government planning inspector whose decision was then reviewed by the High Court. In the case of Bryan, the Court, although agreeing with the applicant that the determination by the inspector did not satisfy the requirements of Article 6 para. 1 (Art. 6-1) of the Convention, found that there was no violation of Article 6 para. 1 (Art. 6-1) due to the sufficiency of the scope of review by the High Court. The applicant contends that the present case should be distinguished from Bryan as, unlike Bryan, there was no carefully reasoned decision by the Conduct Committee which could be considered on appeal, and the issue of the professional conduct of the applicant did not involve a "specialised area of law". Rather, the substance of the hearing turned on a simple conflict of factual evidence relating to the behaviour of the applicant on a certain occasion.

The applicant further considers that the review carried out by the Privy Council did not remedy the defects of the hearing before the Conduct Committee such as to justify a finding that the proceedings as a whole were in conformity with Article 6 para. 1 (Art. 6-1).

The Commission notes that the proceedings against the applicant were conclusive for his ability to continue practising as a doctor, and

the contested nature of the proceedings leaves no doubt as to the existence of a "contestation" as to whether the applicant had or had not behaved in an unprofessional manner. The Commission considers that the proceedings determined the applicant's "civil rights and obligations" (see Eur. Court HR, Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, pp. 20-22, paras. 44-50).

The Commission will first consider the question of the independence and impartiality of the Conduct Committee.

The Commission recalls that in order to establish whether a body can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence (see above mentioned Bryan judgment at p. 15 para. 37 referring to Eur. Court HR, Langborger v. Sweden judgment of 22 June 1989, Series A no. 155, p. 16, para. 32). There is no indication in the case-law of the European Court of Human Rights that the mere fact that disciplinary proceedings against professional persons are determined by members of the profession amounts to a lack of "independence", even when the professional body concerned regulates a number of functions of the profession (as was the case in Eur. Court HR, H. v. Belgium judgment of 30 November 1987, Series A no. 127-B, p. 35, paras. 50, 51).

It is true that problems of impartiality may arise if the members of the determining body have personally been involved in prosecuting the disciplinary proceedings at an earlier stage (see Gautrin and others v. France, Nos. 21257/93 to 21260/93, Comm. Report 26.11.96, pending before the European Court of Human Rights, where the Commission found a violation of Article 6 (Art. 6), and Eur. Court HR, Diennet v. France judgment of 26 September 1995, Series A no. 325-A, pp. 16-17, paras. 36-39 where, on the facts of the case, the Court found no violation of Article 6 (Art. 6)), but those problems do not necessarily impinge on the independence of the determining body. There has been no allegation of personal bias or lack of impartiality on the part of the members of the Conduct Committee in the present case.

As to the proceedings before the Conduct Committee in the present case, the Commission notes the presence of a number of procedural guarantees of a type frequently met before tribunals: no individual members of the GMC who had previously been involved with the case could sit on the Conduct Committee; legal representation was available; extensive disclosure of the documents took place: the applicant could call his own witnesses and cross-examine GMC witnesses; and evidence would only be admitted if it would be admissible in a criminal case.

There remain, however, areas in which the independence of the Conduct Committee may be seen to be open to doubt. In particular, there is no indication that any attempt is made to ensure that the members of the Conduct Committee determine cases independently of the GMC's general policies, and members of the Conduct Committee generally serve for the limited term of one year. Moreover, the President of the GMC plays an extensive, though not necessarily direct and personal, role in the investigation of complaints at the earlier stages of proceedings. Further, the sole legal advisor in the case - the legal assessor - is given no role whatever in the deliberations of the Committee. Given these factors, the Commission does not consider that the guarantees of independence which do exist - principally the limitation on individual members sitting where they have had personal previous contact with the case - suffice to ensure the required appearance of independence.

However, "even where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6 para. 1 (Art. 6-1) in some respect, no violation of the Convention can

be found if the proceedings before that body are 'subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1 (Art. 6-1)'" (Eur. Court HR, Bryan v. the United Kingdom judgment of 22 November 1995, Series A no. 335-A, p. 16, para. 40).

The Commission must therefore examine whether the Privy Council had adequate jurisdiction in the present case. The Commission first notes that although the jurisdiction of the Privy Council is not limited by statute in any way, it is clear from the case of Libman v. GMC ([1972] AC 217) that in practice the jurisdiction is limited as if the appeal were on a point of law.

In the case of Bryan, the Court gave examples of the types of matters which were relevant to assessing the adequacy of the review on a point of law in that case: "the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal" (above-mentioned Bryan judgment, p. 17, para. 45).

As to the subject matter of the decision appealed against, the Commission again notes that the determining of professional misconduct by the peers of the professional concerned does not, on its own, give rise to doubts as to the independence of the professional body concerned. It is, indeed, of the nature of a self-regulating profession that questions concerning the internal discipline of the profession should be determined, in the first instance, by the profession itself, even where the Convention requires subsequent judicial control because the disciplinary proceedings also determine civil rights.

In connection with the manner in which the decision in question was arrived at, the Commission observes, as it noted above, that a number of procedural guarantees were available to the applicant in the proceedings before the Conduct Committee, such as the safeguards against personal bias, the availability of legal representation, the public nature of the hearings, the timetable to ensure adequate notice of the inquiry, and the way in which evidence is taken (on oath, and generally only if it would be admissible in criminal cases). Moreover, the legal assessor must be a barrister or solicitor of at least ten years' standing.

It is true that the Conduct Committee did not give reasons for its decision, and that the Privy Council in the case of Libman v. GMC considered that there was a difference between the advice given to the Conduct Committee by its legal assessor and the summing up in a criminal trial. However, the applicant was furnished with a full transcript of the three day hearing before the Conduct Committee, and it must have been apparent that, as the Privy Council later held, the Committee had accepted the evidence of the health care assistant and rejected that of the applicant.

With regard to the content of the dispute, the Commission notes that in his case to the Privy Council, the applicant summarised the issues as being:

(1) that he did not receive a fair hearing because of the delay of 18 months in notifying him of the complaint against him;

(2) that he did not receive a fair hearing as he was denied access to the medical records related to the alleged incident;

(3) that he did not receive a fair hearing due to the various failures by his legal representatives;

(4) that the penalty imposed was excessive.

The Privy Council, in the words of the European Court of Human Rights, "considered these submissions on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining various facts" (Eur. Court HR, Zumtobel v. Austria judgment of 21 September 1993, Series A no. 268-A, p. 14, para. 32). It was thus able to, and did, deal with each of the applicant's complaints.

The Commission considers that, given the procedural guarantees before the Conduct Committee and the complaints the applicant was making, the scope of review of the Privy Council was sufficient to comply with Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant further contends that the proceedings were not fair because he was not informed promptly of the allegations made against him, and that by the time the matter had come before the Conduct Committee, it was no longer possible to recall his movements during the day in question, and the person(s) he had been with on the particular occasion.

The Commission observes that these complaints, which relate to the proceedings before the Conduct Committee, were examined and rejected by the Privy Council under a procedure which in this instance was in conformity with Article 6 para. 1 (Art. 6-1) (see the above-mentioned Zumtobel judgment, p. 14, para. 35, with further references).

It follows that this part of the application is 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	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber