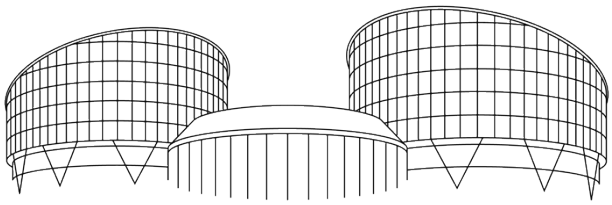

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 35863/10
by Thomas JUDGE
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 8 February 2011 as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Ljiljana Mijović,
Sverre Erik Jebens,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. de Gaetano, *judges,*

and Lawrence Early, *Registrar,*

Having regard to the above application lodged on 11 June 2010,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Thomas Judge, is a British national who was born in 1951. He is currently detained at HMP Glen Ochil.

A. The circumstances of the case

1. The applicant's trial

2. On 17 September 2007, the applicant was convicted after trial in the High Court of Justiciary at Kilmarnock of seven offences of a sexual nature.

3. The victims (complainers) were three girls, N, C and J. The offences were alleged to been committed between 1996 and 2005 when the three girls had been in the foster care of the applicant and his wife. N and J were sisters who entered the applicant's care in 1995. C and her brother and sisters came into the care of the applicant in 1998.

4. Section 274 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") prohibits the admission of evidence or questioning as to the character or sexual history of a complainer in sexual offences unless the evidence or questioning falls within one of the exceptions provided for in section 275. Those exceptions require: (i) that the evidence or questioning relate only to a specific occurrence or occurrences of sexual or other behaviour (section 275(1)(a)); are relevant to whether the accused is guilty (section 275(1)(b)); and the probative value of the evidence is significant and likely to outweigh any risk of prejudice to the proper administration of justice (section 275(1)(c)) (see relevant domestic law and practice below).

5. On 30 August 2007, before the trial started, a preliminary hearing was held to consider *inter alia* an application by the defence under section 275 to admit evidence at trial that:

(i) in December 2005 (around the same time she made her own allegations to the police) the complainer C had a conversation with a defence witness, M, in which C indicated that she did not believe the allegations that had been made against the applicant by the other girls (issue 5(b) in the application); and

(ii) that the applicant had made two allegations of theft against C, which had been investigated by the police and led to reports to the Procurator Fiscal (the prosecution authority) (issue 6 in the application).

6. The preliminary hearing judge decided to exclude the evidence in issue 5(b) on the grounds that, as a general rule, evidence of facts affecting the credibility of a witness, apart from the evidence of the witness herself, was inadmissible unless the facts were also relevant to the questions at issue; a witness should not be asked to express an opinion as to the credibility of another witness. He excluded the evidence in issue 6 on the grounds that the test of relevance in section 275(1)(b) had not been met.

7. In their evidence at trial all three complainers gave evidence as to the offences which they alleged had been committed against them. J also gave evidence that she had observed one incident of abuse involving N. The jury also heard evidence that, in November 2005, following a discussion between N and J, the applicant's conduct was reported to the authorities and all three complainers were removed from his household. All three

complainers gave evidence that the reason they had delayed in reporting the abuse was that they feared that they would be separated from their respective siblings. Evidence was also led by the prosecution from a brother of N and J. The brother testified that he had seen a different instance of sexual activity between N and the applicant from that observed by J.

8. Each complainer was cross-examined to the effect that nothing of an inappropriate manner had ever occurred and that they had fabricated aspects of their evidence. N and J were examined as to differences between the statements they gave to the police and their testimony in court. C was examined as to why she had denied anything had happened to her at all, when first interviewed by the police in December 2005. A suggestion was put to J that she had colluded with N as to what she said she had seen the applicant doing to N. It was also put to N and C that the applicant's alleged erectile dysfunction rendered him incapable of certain of the activities of which each of them had testified.

9. The applicant gave evidence denying any inappropriate conduct had ever occurred involving any of the complainers. He gave evidence as to his alleged erectile dysfunction, which, he said, meant the conduct described in particular by N and C could not have occurred. He gave evidence of a number of arguments between him and N just before they reported his conduct to the authorities in November 2005. He suggested J had misunderstood the incident she had observed between him and N. He also suggested that the three complainers had lied, possibly out of self-interest. Nine character witnesses gave evidence in his defence. The applicant's general medical practitioner gave evidence that the applicant had sought help for erectile dysfunction. The applicant's wife gave evidence as to the general circumstances in the house, the applicant's character and her impression of the relationships he had with the complainers.

10. The applicant was convicted by a majority verdict of the jury as charged. As is the normal practice in Scots criminal law, when convicting the applicant, the jury did not give reasons for their verdict.

2. The appeal against conviction

11. The applicant appealed against his conviction. He submitted that first, the preliminary hearing judge had erred in excluding the evidence set out in issues 5(b) and 6 of the defence application. Second, he submitted that the verdict of the jury was a miscarriage of justice because it had been taken in ignorance of evidence that C was motivated to tell lies about him because he had reported her to the police for theft. He argued that this evidence would have been of high probative value. It was particularly relevant because in his charge (summing up) to the jury the presiding judge had advised the jury that the evidence of C might be essential to the other charges.

12. The appeal was dismissed by the High Court of Justiciary sitting as a court of criminal appeal ("the Appeal Court") on 18 December 2009. The Appeal Court accepted that the preliminary judge had erred in excluding the evidence regarding issue 5(b) since the proposed line of questioning would not have been prohibited by section 274 of the 1995 Act. He had been in error in thinking that the proposed line of questioning would have been to invite the defence witness M to comment on the credibility of C. Instead, it had been to question C's credibility by proving that she had made two contradictory statements: one to M and another to the police. However, the Appeal Court concluded that the fact that this evidence was not before the jury did not amount to a miscarriage of justice. Whether evidence had been wrongly excluded was not the same question as whether the trial was fair; the issue of miscarriage of justice depended on the materiality of that evidence. The question was whether, had the evidence been before the jury, there would have been any real possibility that the verdict of the jury would have been different. The Appeal Court observed:

> "In the present case, the jury had before them undisputed evidence that when C was interviewed by police officers in December 2005 she denied that she had been sexually abused. The jury had no basis for rejecting that evidence. Notwithstanding that evidence, the jury must have accepted C's evidence that she had in fact been abused by the [applicant], in the manner outlined in the two charges relating to her. It is a well-known phenomenon for individuals who have been victims of abuse when they were children to be unwilling or reluctant to disclose such abuse, or to delay in doing so. Evidence that C had also, during December 2005, indicated to defence witness M that she did not believe allegations of abuse made by the other two complainers would, at its highest, merely have provided another instance of the same phenomenon. In our opinion it would not have added anything significant to the jury's consideration of the case. On the contrary, the jury was liable to have regarded those two chapters of evidence as consistent manifestations of reluctance on the part of C to disclose abuse which she herself had suffered, a reluctance which common sense and experience of life indicated was understandable and one she subsequently overcame.
>
> The jury's verdicts were returned after they had heard evidence from all three complainers and the [applicant] himself. That involved their accepting that the other two complainers had been sexually abused by the [applicant] while they were in his care in similar circumstances to complainer C. It is also reasonable to assume that the jury must have accepted the evidence of the eye-witness to one instance of abuse against complainer N. When all these factors are taken into account, there appears to be no real possibility that the exclusion of evidence about what complainer C may have said to defence witness M would have affected the jury's verdicts, whether in relation to the charges involving C or any of the other charges."

13. The Appeal Court also considered that the evidence in regard to issue 6 (the alleged thefts) had been properly excluded. None of three requirements contained in section 277(1)(a)-(c) had been met. In particular, the two allegations of theft did not make it more or less likely that the applicant had been guilty of sexual abuse, nor did the making of those allegations by the applicant in 2002 or 2003 make it more or less probable that C had fabricated allegations of sexual abuse in January 2006. The

probative value of that evidence was insignificant and would have been calculated to blacken by innuendo the character of C by evidence relating to matters unconnected with the charges faced by the applicant.

B. Relevant domestic law and practice

1. Jury trials in Scotland

14. Scots criminal law distinguishes between summary and solemn procedure. In the former the trial takes place before a judge sitting alone. In the latter, which is reserved for more serious offences, the trial takes place before a judge and a jury of fifteen members on the basis of an indictment. Section 64 and Schedules 2 and 3 to the 1995 Act provide for the form and content of the indictment.

15. The admission of evidence is a matter either for the presiding judge or, as occurred in this case, if an application is made before the start of the trial, a preliminary hearing judge.

16. By section 97(1) of the Criminal Procedure (Scotland) Act 1995, immediately after the close of the evidence for the prosecution, the accused may intimate to the court his desire to make a submission that he has no case to answer both: (a) on an offence charged in the indictment; and (b) on any other offence of which he could be convicted under the indictment. Subsections 97(2)-(4) provide:

> "(2) If, after hearing both parties, the judge is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused being convicted of the offence charged in respect of which the submission has been made or of such other offence as is mentioned, in relation to that offence, in paragraph (b) of subsection (1) above, he shall acquit him of the offence charged in respect of which the submission has been made and the trial shall proceed only in respect of any other offence charged in the indictment.
>
> (3) If, after hearing both parties, the judge is not satisfied as is mentioned in subsection (2) above, he shall reject the submission and the trial shall proceed, with the accused entitled to give evidence and call witnesses, as if such submission had not been made.
>
> (4) A submission under subsection (1) above shall be heard by the judge in the absence of the jury."

17. If the trial judge rejects a submission of no case to answer, the defence case is presented. The prosecution and defence then address the jury. By section 98 of the 1995 Act, the defence has the right to speak last. The presiding judge then charges the jury. The role of the presiding judge in charging the jury was restated by the Lord Justice General in *Hamilton v. HM Advocate* (1938) JC 134:

> "The primary duty of the presiding judge is to direct the jury upon the law applicable to the case. In doing so it is usually necessary for him to refer to the facts on which questions of law depend. He may also have to refer to evidence in order to

> correct any mistakes that may have occurred in the addresses to the jury, and he may have occasion to refer to the evidence where controversy has arisen as to its bearing on a question of fact which the jury has to decide. But it is a matter very much in his discretion whether he can help the jury by resuming the evidence on any particular aspect of the case."

18. The "utmost care" should be taken to avoid trespassing upon the jury's province as masters of the facts (*Simpson v. HM Advocate* (1952) SLT 85) and a presiding judge should always be slow to express his own views on questions of fact in case he thereby influences the jury whose task it is to determine all questions of fact (*Brady v. HM Advocate* (1986) JC 68). A conviction will be quashed if the Appeal Court finds that the presiding judge unduly impressed his own views on the evidence upon the jury. This may be the case even if the presiding judge attempts to cure this defect by later emphasising that the evidence is entirely a matter for the jury (*McArthur v. HM Advocate* (1990) SLT 451).

19. The jury may return one of three verdicts: one of guilty and two alternative acquittal verdicts of not guilty or not proven. No reasons for any of the three verdicts are given by the jury. However, by section 106(3)(b) of the 1995 Act, there is a right of appeal in respect of any alleged miscarriage of justice, which includes a miscarriage based on the jury having returned a verdict which no reasonable jury, properly directed, could have returned. Thus a conviction may be quashed or varied when the jury's verdict is logically inconsistent or lacking in rationality, for example, when they cannot logically acquit on certain counts in an indictment and convict on others (see, for example, *Ainsworth v. HM Advocate* (1997) SLT 56; *Rooney v. HM Advocate* [2007] HCJAC 1).

20. The compatibility of the jury system with Article 6 of the Convention was considered in *Beggs v. HM Advocate* [2010] HCJAC 27, judgment of 9 March 2010. The Appeal Court considered the Second Section's judgment in *Taxquet v. Belgium*, no. 926/05, 13 January 2009 (in which the Grand Chamber has subsequently given judgment: *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010). It also considered a judgment of the Norwegian Supreme Court in *A. v. the Public Prosecution Authority*, 2009/397, 12 June 2009, in which Judge Indreberg, giving the lead judgment of the court, considered that the Second Section in *Taxquet* had not intended to establish a principle that a jury had to give reasons for its decisions. The Appeal Court concluded (at paragraphs 206 and 207):

> "We find Judge Indreberg's full and careful analysis of the *Taxquet* judgment and the earlier Strasbourg jurisprudence highly persuasive and we respectfully agree with her that the judgment is not to be read as imposing a requirement that a jury supply reasons for its verdict.
>
> Just as in any other jury trial in Scotland, the verdict returned by the jury in the present case is not returned in isolation. It is given within a framework which includes, in particular, the speeches to the jury by those advocating the prosecution and the defence and the directions given to the jury by the trial judge. It is not

suggested that the address by the trial Advocate depute in this case did not set out clearly the nature of the Crown case and the evidence which the Crown invited the jury to accept and acceptance of which was necessary if the jury were to return a guilty verdict. Nor is it suggested that the address by defence counsel did not clearly present to the jury the basis upon which it was contended that guilt was not established and that the appellant should be acquitted. It is also not suggested that the trial Judge's charge to the jury did not adequately identify all the matters which the Crown had to establish, or fail to analyse or describe the necessary elements or ingredients in the offence. Accordingly, from that framework and also from the evidence in the case, the basis of the conviction is discernable. With a jury verdict thus placed in such a framework, we do not consider, having regard to the case law of the ECtHR to which we were referred, that the fact that a jury does not supply reasons involves an infraction of the fair trial requirements of Article 6 of the Convention."

2. Restrictions on evidence relating to sexual offences

21. The current versions of sections 274 and 275 of the 1995 Act were introduced by the Scottish Parliament by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. They provide as follows:

"**274 Restrictions on evidence relating to sexual offences**

(1) In the trial of a person charged with an offence to which section 288C of this Act applies, the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer—

(a) is not of good character (whether in relation to sexual matters or otherwise);

(b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;

(c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer—

(i) is likely to have consented to those acts; or

(ii) is not a credible or reliable witness; or

(d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.

275 Exceptions to restrictions under section 274.

(1) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) of section 274 of this Act if satisfied that—

(a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating—

(i) the complainer's character; or

(ii) any condition or predisposition to which the complainer is or has been subject;

(b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and

(c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.

(2) In subsection (1) above—

(a) the reference to an occurrence or occurrences of sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature;

(b) 'the proper administration of justice' includes—

(i) appropriate protection of a complainer's dignity and privacy; and

(ii) ensuring that the facts and circumstances of which a jury is made aware are, in cases of offences to which section 288C of this Act applies, relevant to an issue which is to be put before the jury and commensurate to the importance of that issue to the jury's verdict..."

22. The 2002 Act was preceded by a public consultation and a Policy Memorandum, which was published by the Scottish Ministers. The Policy Memorandum stated that evidence as to the sexual history and character of a complainer in sexual offences was rarely relevant and, even where it was, its probative value was frequently weak when compared with its prejudicial effect. It involved invasion of the complainer's privacy and dignity and diversion from the issues which required to be determined at trial.

23. Sections 274 and 275 were considered to be compatible with Article 6 of the Convention by the High Court of Justiciary in *Moir (Mitchell John) v. HM Advocate* (also known as *MM v. HM Advocate*) (2005) 1 JC 102, where the appellant faced trial on charges of rape and sexual assault. The Lord Justice Clerk, giving the opinion of the court, referred first to the "twin myths" that, in a rape case, a complainer's previous sexual experience or adverse sexual reputation made it more likely that she consented to intercourse and made it less likely that she was a credible witness. His Lordship continued:

"The embarrassment and humiliation of a complainer in a rape trial is a genuine social problem. Counsel agree that the protection of the complainer from unfair and intrusive attacks on her sexual history or character and the exclusion of evidence tendered in pursuit of the twin myths to which I have referred are, in general, legitimate legislative aims that recognise the complainer's rights to privacy under article 8 (cf *R v A (No 2)*, [2002] 1 AC 45, L Hope of Craighead at paras. [1], [29]-[33]; *SN v Sweden*, No. 34209/96, 2 July 2002, unrepd, at para 47).

[30] But the protection of the complainer cannot be seen apart from the basic principles of fairness in Scottish criminal procedure which entitle everyone accused of a crime to defend himself, to confront his accusers and to have a fair opportunity to put his own case. These principles underpin a value that is fundamental to criminal jurisprudence in a free society, namely the protection of the citizen from being wrongly convicted.

[31] The difficult problem of reform in this emotive branch of the law is to reconcile the legislative aims to which I have referred with the basic principles of fairness (*SN v Sweden*, *supra*, at para [47]). Although article 6 expresses the right to a fair trial in

unqualified terms, what is required for fairness may vary according to context (cf *International Transport Roth GmbH v Home Secretary*, [2002] 3 WLR 344, Laws LJ at para 84). Individual evidential or procedural rules may be devised to take account of rights and interests other than those of the accused. Such interests include respect for the complainer's rights under article 8 (cf *Doorson v the Netherlands*, *supra*, at para 70), and the public interest in the detection and prosecution of crime. The protection of such interests is a clear and proper public objective that justifies a legislature in qualifying to a limited extent the constituent rights comprised within article 6 (*Brown v Stott*, *supra*, Lord Bingham of Cornhill at p 60A); but the legislature cannot qualify them to such an extent that the overall fairness of the trial is compromised (*Brown v Stott, supra*; *Rowe and Davis v United Kingdom*, *supra*, at para 61).

[32] In my opinion, the primary aim of the 2002 legislation and the subordinate and specific aim set out in paragraph 36 of the Policy Memorandum (*supra*), are both legitimate legislative aims. The balancing exercise by which those aims are to be achieved without prejudice to the overall fairness of the trial lies in the first instance within the province of the legislature. The underlying aim of section 274 involves a sensitive social issue that is more appropriate for the consideration of the legislature than that of the courts. In my opinion, the enactment of sections 274 and 275 was within the legitimate area of discretion of the Scottish Parliament. The Parliament had an evidential basis on which to exercise its judgment in the matter, namely the research evidence referred to in the Policy Memorandum, supported by the evidence of two of its authors to the Justice 2 Committee. The underlying policy was fully considered and tested during the legislative process. The policy justification was, in my view, coherent.

[33] But although the legislation is directed to legitimate aims, there remains the question whether the restrictions that it imposes on the defence are greater than are strictly necessary for the achievement of those aims (cf *Rowe and Davis v United Kingdom*, (2000) 30 EHRR 1, at para 61; *Doorson v The Netherlands*, (1996) 22 EHRR 330; *Brown v Stott*, *supra*).

[34] If section 274 had imposed an absolute prohibition on the questioning or evidence to which it refers, there would have been a violation of article 6 (cp *R v Seaboyer*, *supra*, McLachlin J at pp 264-267; *Sporrong and Lonnroth v Sweden*, (1982) 5 EHRR 35). But in sections 274 and 275 there are safeguards for the accused. The legislation recognises that there may be circumstances in which such questioning or evidence is necessary for the proper conduct of the defence. Instead of prohibiting such questioning or evidence, it places the question of its admissibility under judicial control, recognising that the relevance of evidence on the matters mentioned in section 274(1) will vary according to the circumstances of the case. Section 275 reserves to the discretion of the judge the allowance of such cross-examination and evidence where the circumstances of the case require it in the interests of a fair trial. The exercise of that discretion will depend, in general, on the apparent relevance of the proposed line of cross-examination or evidence, the disadvantage, if any, to which the accused will be put if it is not allowed, and the overall consideration of the interests of justice (*eg Cumming v HM Adv*, 2003 SCCR 261, at paras [10], [16]).

[35] The decision of the court under section 275 will in every case depend on the nature of the prosecution case and of the proposed questioning or evidence. The probative value of evidence that the complainer had a sexual experience with another man may be much less than that of evidence that she had a sexual relationship with the accused; and there may be strong reasons for the court's allowing reference to a matter affecting the complainer's character that has no conceivable sexual

connotations; for example, a previous conviction of the complainer for perjury or for perverting the course of justice, or some mental condition of the complainer that predisposes her to fantasise or to exaggerate.

[36] Section 275, in my view, is a reasonable and flexible response to the problem and a legitimate means of achieving the legislative objective (*R v A (No 2)*, *supra*, Lord Hope of Craighead at paras 90-96, 99, 102-103). It lies within the discretionary area of the judgment that is confided to the Parliament (*R v DPP, ex p Kebilene*, [2002] 2 AC 326, at p 381; *International Transport Roth GmbH v Home Secretary*, *supra*, Laws LJ at paras 80-87) and in my view meets the requirements of proportionality (*De Freitas v Minister of Agriculture*, [1999] 1 AC 69, Lord Clyde at p 80)."

24. The accused in that case was subsequently convicted and appealed (*Moir v. HM Advocate* 2007 SLT 452). The conviction was quashed on different grounds. However, in respect of section 274, the Appeal Court confirmed that "behaviour" in that section should not be given a restrictive meaning; it would also include acts or omissions of the complainer and statements made by him or her, provided that they were relevant to whether the complainer was likely to have consented to the sexual acts alleged or reflect upon his or her credibility or reliability.

COMPLAINTS

25. The applicant complains under Article 6 of the Convention that his trial was unfair. First, he complains that refusal of his application under section 275 of the 1995 Act was in breach of Article 6 § 1 when read in conjunction with Article 6 § 3(d). Second, relying on the Court's judgments in *Taxquet*, cited above, he complains that the jury failed to provide reasons for their decision and, as such, he could not challenge their decision. Third, the length of the proceedings was in breach of his right to a fair trial within a reasonable time. Fourth, the applicant complains that the failure to provide reasons and the test of "a miscarriage of justice" which was applied by the Appeal Court meant he was deprived of an effective remedy, in violation of Article 13 of the Convention.

THE LAW

26. Articles 6 and 13, where relevant, provides as follows:

Article 6

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

...

"3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Evidence about the complainers' character

27. As the Court has frequently stated, the admission of evidence is a matter for domestic courts. It is also for domestic courts to decide what evidence is relevant to criminal proceedings and thus to exclude evidence which is considered to be irrelevant. The same is true for witnesses. Article 6 § 3(d) does not guarantee the accused an unlimited right to secure the appearance of witnesses in court: it is for the domestic courts to decide whether it is appropriate to call a witness (*Ubach Mortes v. Andorra* (dec.), no. 46253/99, ECHR 2000-V (extracts). *A fortiori*, an accused does not have an unlimited right to put whatever questions he wishes to a witness; it is entirely legitimate for domestic courts to exercise some control of the questions that may be put in cross-examination to a witness and an issue would only arise under Article 6 § 3(d) if the restrictions placed on the right to examine witnesses were so restrictive as to render that right nugatory.

28. This is not the case for sections 274 and 275. The statutory scheme enacted by the 2002 Act was the result of careful deliberation by the Scottish Parliament ("the Parliament"). The Parliament was fully entitled to take the view that, in criminal trials, evidence as to the sexual history and character of a complainer in sexual offences was rarely relevant and, even where it was, its probative value was frequently weak when compared with its prejudicial effect. It was also entitled to find that a number of myths had arisen in relation to the sexual history and character of a complainer in sexual offences and to conclude that these myths had unduly affected the dignity and privacy of complainers when they gave evidence at trial. Having reached these conclusions, it was well within the purview of the Parliament to take action to protect the rights of complainers and, in doing so, to prohibit in broad terms the introduction of bad character evidence of complainers, whether in relation to their sexual history or otherwise.

29. The statutory scheme which the Parliament enacted is careful and nuanced. It does not place an absolute prohibition on the admission of such evidence but allows for its admission when that history or character is relevant and probative. As such the scheme gives appropriate weight, on the one hand, to the public interest in excluding irrelevant questioning of

complainers and, on the other, a defendant's right to a fair trial. As the High Court of Justiciary observed in *Moir,* the legislation recognises that there may be circumstances in which such questioning is necessary for the proper conduct of the defence; instead of prohibiting such questioning, it places it under judicial control and accords a margin of discretion to the presiding judge in allowing such questioning. In this Court's view, it is quite proper for the presiding judge to be given that margin of discretion, subject to guidance given in *Moir* as to how that discretion should be exercised. Admittedly, the prohibition in section 274 is not limited to matters relating to the complainer's sexual history but, as in the present case, will exclude other forms of evidence which are intended to cast doubt on the character of the complainer. However, in giving the guidance he did in *Moir*, the Lord Justice Clerk recognised that there may be strong reasons for allowing such evidence. The examples given at paragraph 35 of *Moir* (see above) clearly indicate that, subject to a test of relevancy, the prohibition should not be applied without due regard for the right of the defence to challenge effectively the evidence of a complainer.

30. In short, the Court agrees with the conclusion of the Lord Justice Clerk in *Moir* that sections 274 and 275 are a reasonable and flexible response to the problem of questioning of complainers in sexual offences cases and is a legitimate means of achieving the objectives pursued by the legislature when it enacted this provision.

31. The Court is also satisfied that this scheme was applied in the present case in a manner which was compatible with the applicant's Article 6 rights for the following reasons.

32. First, the applicant's defence was essentially that none of the incidents had taken place and that the complainers were either mistaken or lying. It was a further part of his defence that his erectile dysfunction made certain of the offences impossible. The applicant was able to put all those points to the complainers in cross-examination and to suggest further that there had been collusion between J and N. He was able to give evidence in his own defence and to lead evidence as to his erectile dysfunction. It is clear to the Court that, notwithstanding the refusal of his section 275 application, the applicant remained able to examine the witness against him and to present his defence.

33. Second, in the opinion of the Court the fairness of the applicant's trial was not prejudiced by the exclusion of the evidence contained in issue 6 of the applicant's pre-trial application. It was entirely legitimate for the preliminary judge to conclude that this evidence was not relevant and for the Appeal Court to further conclude that the probative value of this evidence was insignificant and calculated to blacken by innuendo C's character. Even accepting that the exclusion of that evidence amounted to a restriction on the rights of the defence, it did not do so to a point incompatible with the applicant's right to a fair trial.

34. Third, for the evidence contained in issue 5(b) of the defence application, the Court accepts the Appeal Court's conclusion that, even though the evidence should not have been excluded, this had no bearing on the fairness of the trial. In the Court's view, the Appeal Court was entitled to conclude that the admission of that evidence would not have added anything significant to the jury's consideration of the case. It was also entitled to observe that the jury's verdicts were returned after they had heard evidence from all three complainers and the applicant himself and that the jury had accepted C's evidence as to the incident she had witnessed between the applicant and N. That conclusion provided an appropriate basis for the Appeal Court's further conclusion that the exclusion of the evidence in issue 6 would not have affected the jury's verdict on the charges concerning C or the other charges of which the applicant was convicted. Therefore, even accepting that the refusal to allow cross-examination of C as to the evidence in issue 6 was a restriction on the rights of the defence, the Court is satisfied this was not such as to render the applicant's trial unfair. The Court therefore considers that this part of the application must be rejected as manifestly ill founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

B. The absence of reasons in the jury's verdict

35. In *Taxquet*, cited above, the Grand Chamber observed that the jury existed in a variety of forms in different States and that the institution of the lay jury could not be called into question (paragraphs 83 and 84). Having reviewed the relevant case-law of the Commission and Court, it concluded that the Convention did not require jurors to give reasons for their decision and that Article 6 did not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict. Nevertheless, it found that the accused, and indeed the public, must be able to understand the verdict that had been given (paragraph 90). At paragraph 92 of its judgment the Grand Chamber also observed that:

> "In the case of assize courts sitting with a lay jury, any special procedural features must be accommodated, seeing that the jurors are usually not required – or not permitted – to give reasons for their personal convictions (see paragraphs 85-89 above). In these circumstances likewise, Article 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction (see paragraph 90 above). Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced (see paragraphs 43 et seq. above), and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers (see [*Papon v. France* (dec.), no. 54210/00, ECHR 2001-XII]). Lastly, regard must be had to any avenues of appeal open to the accused."

The Grand Chamber found that these requirements had not been met in Taxquet's case, particularly when he had been tried with seven co-defendants and the questions put to the jury had been identical for all the defendants. Thus the applicant had been unable to make a clear distinction as to his culpability, his role in relation to that of his co-defendants, and any mitigating or aggravating factors which were present for each defendant (paragraphs 96 and 97 of the judgment).

36. The Court considers that, in the present case, none of the features which led the Grand Chamber to find a violation of Article 6 in *Taxquet* are present in the Scottish system. On the contrary, as the Appeal Court observed in *Beggs*, see above, in Scotland the jury's verdict is not returned in isolation but is given in a framework which includes addresses by the prosecution and the defence as well as the presiding judge's charge to the jury. Scots law also ensures there is a clear demarcation between the respective roles of the judge and jury: it is the duty of the judge to ensure the proceedings are conducted fairly and to explain the law as it applies in the case to the jury; it is the duty of the jury to accept those directions and to determine all questions of fact. In addition, although the jury are "masters of the facts" (*Simpson*, cited above) it is the duty of the presiding judge to accede to a submission of no case to answer if he or she is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused's conviction (see section 97 of the 1995 Act, cited above).

37. These are precisely the procedural safeguards which were contemplated by the Grand Chamber at paragraph 92 of its judgment in *Taxquet*. In the present case, the applicant has not sought to argue that these safeguards were not properly followed at his trial. Nor has he suggested that the various counts in the indictment were insufficiently clear. Indeed, the essential feature of an indictment is that each count contained in it must specify the factual basis for the criminal conduct alleged by the prosecution: there is no indication that the indictment upon which the applicant was charged failed to do so. It must, therefore, have been clear to the applicant that, when he was convicted by the jury, it was because the jury had accepted the evidence of the complainers in respect of each of the counts in the indictment and, by implication, rejected his version of events.

38. Lastly, in contrast to the Belgian appeal provisions considered in *Taxquet*, the Court is also satisfied that the appeal rights available under Scots law would have been sufficient to remedy any improper verdict by the jury. Under section 106(3)(b) of the 1995 Act, the Appeal Court enjoys wide powers of review and can quash any conviction which amounts to a miscarriage of justice; in particular, *Ainsworth* and *Rooney*, cited above, make clear that the Appeal Court may quash or vary any jury verdict which is logically inconsistent or lacking in rationality.

39. Therefore, in contrast to *Taxquet*, there were sufficient safeguards for the present applicant to understand why he was found guilty and there is

no basis for his submission that the failure of the jury to given reasons rendered his trial unfair. The Court therefore considers that this part of the application must also be rejected as manifestly ill founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

C. The length of proceedings

40. The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of it to the respondent Government.

D. Article 13

41. The applicant has relied on Article 13 when read in conjunction with his Article 6 complaints as to section 275 of the 1995 Act and the failure of the jury to give reasons. The Court considers that, since these substantive complaints are manifestly ill-founded and not arguable, his ancillary complaints under Article 13 are also manifestly ill-founded and must be rejected, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaint concerning the length of the proceedings;

Declares the remainder of the application inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President