COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

(Or. English)

EUROPEAN COMMISSION
OF HUMAN RIGHTS

Applications Nos. 9562/81 and 9818/82

Brian Arthur MONNELL and Neville MORRIS
against
UNITED KINGDOM

Report of the Commission

(Adopted on 11 March 1985)

STRASBOURG

CONTENTS

9562/81
and 9818/82

I. INTRODUCTION

1. The following is an outline of the case as it has been submitted to the European Commission of Human Rights by the respective parties.

2. The first applicant, Brian Arthur MONNELL, is a United Kingdom citizen, born in 1945, who at the time of lodging his application was detained at HM Prison Exeter. The second applicant, Neville MORRIS, is a United Kingdom citizen, born in 1939, who at the time of lodging his application was detained at HM Prison Oxford.

The substance of the applications

(a) The first applicant

3. The first applicant was arrested on 15 May 1981 and charged with burglary; his trial was listed for 2 September 1981. On 4 September 1981 he was convicted of burglary and sentenced to three years nine months' imprisonment. On the same day the applicant was advised by his counsel that there was "no prospect whatsoever of appealing the conviction successfully".

4. The first applicant nevertheless sought leave to appeal against conviction and sentence and his application was considered by a single judge, who on 2 December 1981 refused leave to appeal and the ancillary applications on the ground that the first applicant had been "convicted by the jury upon ample evidence after a full and correct summing up by the judge".

5. The first applicant renewed his application to the Full Court of Appeal. On 20 May 1982 the Full Court of Appeal refused the applicant's application in his absence and ordered that 28 days spent in custody by him awaiting the determination of his application for leave to appeal should not count towards his sentence.

(b) The second applicant

6. On 28 August 1980 the second applicant was convicted by the Reading Crown Court of conspiracy to supply heroin and was sentenced to three and a half years' imprisonment. Following this conviction the second applicant was advised by his counsel that the Court of Appeal would be unlikely to interfere with the exercise of the trial judge's discretion since he had applied the law correctly.

7. The second applicant nevertheless drafted his own grounds of appeal, which were then rendered more comprehensible by his solicitor. On 20 May 1981 the second applicant's application for leave to appeal was refused, together with the ancillary applications, by a single judge, who observed that there were "no reasons to justify granting

(the applicant) leave to appeal". The second applicant renewed his application to the Full Court of Appeal. On 27 October 1981 the Full Court of Appeal refused the application in the second applicant's absence and ordered that 56 days of the period spent by him awaiting the determination of his application for leave to appeal should not count towards his sentence.

8. Both applicants complain that the loss of time orders made by the Court of Appeal resulted in a deprivation of liberty contrary to Art. 5 of the Convention and that the proceedings were unfair because they were not permitted to be present before the Court. They also complain that the loss of time procedure is discriminatory, contrary to Art. 14 of the Convention.

Proceedings before the Commission

9. The first applicant's application was introduced on 5 August 1981 by his representatives, Messrs Clarke, Willmott and Clarke, solicitors, of Taunton and registered on 3 November 1981. On 7 July 1982 the Commission decided in accordance with Rule 42 (2) (b) of the Rules of Procedure to bring the application to the notice of the respondent Government and to request them to submit written observations on its admissibility and merits. The respondent Government are represented in the proceedings by Mr. M.R. Eaton of the Foreign and Commonwealth Office as Agent and Ms S. Brooks as Acting Agent. Their observations are dated 15 December 1982. On 10 January 1983 the President of the Commission decided to grant the first applicant legal aid for his representation before the Commission. The first applicant's observations in reply are dated 18 February 1983. On 4 May 1983 the Commission decided to invite the parties to a hearing on the admissibility and merits of the application pursuant to Rule 42 (3) (b) of the Rules of Procedure. On 14 July 1983 the Commission decided pursuant to Rule 42 (3) (a) of the Rules of Procedure to invite the parties to submit supplementary written observations prior to the proposed hearing on the admissibility and merits of the first applicant's application with reference to Art. 14 of the Convention read in conjunction with, in particular, Art. 6 of the Convention. The respondent Government's observations are dated 2 November 1983 and those of the first applicant in reply are dated 21 December 1983.

10. The second applicant's application was introduced on 13 March 1982 and registered on 23 April 1982. On 5 October 1982 the Commission decided to bring the application to the notice of the respondent Government and to invite them pursuant to Rule 42 (2) (b) of the Rules of Procedure to submit written observations on its admissibility and merits before 20 December 1982. The respondent Government requested an extension of this time limit until 31 January 1983, which was granted by the President on 19 January 1983, and the respondent Government's observations were submitted on 2 February 1983. The second applicant was invited to submit observations in reply before 23 March 1983 and on 22 February 1983 the President of

the Commission decided that he should be granted legal aid for his representation before the Commission. The second applicant appointed Messrs Marlows, solicitors of Kingston upon Thames, to represent him. On 7 March 1983 the President of the Commission granted an extension until 13 April 1983 of the time limit for the submission of the observations in reply, a limit which was further extended until 29 April 1983, on which date the observations were received. On 14 July 1983 the Commission decided to invite the parties to appear before it to make oral submissions at a hearing on the admissibility and merits of the second applicant's application, pursuant to Rule 42 (3) (b) of the Rules of Procedure.

11. On 17 January 1984 the Commission decided to join the first applicant's and the second applicant's applications for the purposes of the hearing of both applications on 18 January 1984.

12. At the joint hearing the parties were represented as follows:

For the Government:

Ms. S. Brooks, Foreign and Commonwealth Office	Acting Agent
Mr. A. Moses, Barrister	Counsel
Mr. C. Osborne, Home Office	Adviser
Mr. R. Jackson, Treasury Solicitor's Department	Adviser
Mr. Venn, Court of Criminal Appeal	Adviser

For the applicants:

Mr. A. Pendlebury, Solicitor for the first applicant

Mr. M. J. B. Marlow, Solicitor for the second applicant

13. On 18 January 1984, the Commission examined the admissibility of the applications in the light of the submissions it had received, and on 20 January 1984 it declared the first applicant's application admissible in part and inadmissible for the remainder and the second applicant's application admissible. The text of the Commission's decisions on admissibility is Appendix II and III to the present Report. The parties were informed of the Commission's decision concerning their respective applications on 25 January 1984, and were further informed that on 20 January 1984 the Commission had resumed its examination of the applications and decided to invite the parties simultaneously to submit such further written observations on the merits as they wished, pursuant to Rule 45 (2) of its Rules of Procedure. On 28 May 1984 a copy of the relevant decision on admissibility was sent to the parties, who were also informed that the further written observations should be submitted before 6 July 1984.

14. The first applicant requested an extension of this time limit until 27 July 1984 and this request was granted by the President of the Commission. On 6 July 1984 the respondent Government stated that they did not wish to make any further observations at that stage, although they reserved their right to do so subsequent to any friendly settlement negotiations. On 24 July, after further consideration, the first applicant declined to make any further observations.

15. The second applicant requested an extension of the time limit until 13 July 1984 and this request was granted by the President of the Commission. On 6 July 1984 the respondent Government stated that they did not wish to make any further observations at that stage, although they reserved their right to do so subsequent to any friendly settlement negotiations. The second applicant's further observations are dated 10 July 1984. The respondent Government has not submitted a reply thereto.

16. After declaring the case admissible the Commission, acting in accordance with Art. 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis upon which such a settlement can be effected.

The present Report

17. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in the plenary session, the following members being present:

MM. C. A. Nørgaard, President
G. Sperduti
E. Busuttil
G. Jörundsson
G. Tenekides
S. Trechsel
B. Kiernan
J. A. Carrillo
A. S. Gözübüyük
H. G. Schermers
H. Danelius

18. The text of the Report was adopted by the Commission on 11 March 1985 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2) of the Convention.

19. A friendly settlement of the cases having not been reached, the purpose of the present Report, pursuant to Art. 31 of the Convention, is accordingly:

i. to establish the facts; and

ii. to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

20. A schedule setting out the history of the proceedings before the Commission and the Commission's decisions on admissibility in the cases are attached hereto as Appendix I, II and III respectively. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers if required.

II. ESTABLISHMENT OF THE FACTS

The first applicant

21. The facts as found by the Commission are set out below:

22. On 15 May 1981 the first applicant was arrested on suspicion of burglary, although he alleges that he was arrested and released on several previous occasions relating to other alleged offences, when he had a perfect alibi. The police refused to grant him bail and he appeared on 18 May 1981 before the City of Exeter Magistrates' Court, when bail was refused on the grounds that the first applicant might fail to surrender to it, or might commit further offences. The Court took into account the nature and seriousness of the offence with which the applicant was charged and the probable method of dealing with it, the applicant's character and his antecedents.

23. The first applicant was remanded in custody until 17 June 1981, when he was committed to trial before Exeter Crown Court. The trial, with a co-accused, was listed for 27 July 1981, but the co-accused failed to surrender to bail, and the prosecution therefore applied for and were granted an order that the trial be adjourned sine die, in the light of the co-defendant's absence and the absence of certain prosecution witnesses. The trial was relisted for 2 September 1981, and on 4 September 1981 the applicant was convicted and sentenced to three years nine months' imprisonment.

24. On the same day the first applicant was advised by his counsel that, bearing in mind that he "had disputed every aspect of the evidence against him and chosen to run his defence on the basis that everybody except him was lying", there was "no prospect whatsoever of appealing the conviction successfully". The jury had chosen not to believe the first applicant and "there was a wealth of evidence against him upon which any jury could properly have come to the

conclusion that this jury did". In addition, in view of the seriousness of the offences and the first applicant's substantial criminal record "a further prison sentence was inevitable and the length of sentence passed was equally inevitable". There were no grounds to appeal against sentence.

25. The first applicant nevertheless sought leave to appeal against conviction and sentence and legal aid to pursue his allegations that the police had mishandled his case, and had deliberately harassed his wife, who was expecting their fourth child at the time of the trial, and who had failed to appear as a witness on his behalf. The applicant submits that his wife was arrested and taken into custody on an unspecified date shortly before his own trial, on a charge of conspiracy, and was held for some hours in detention before being granted police bail, to appear at Exeter Magistrates' Court on 8 September 1981. However, she was informed on 7 September 1981 that she need not appear before the Magistrates on the following day. The first applicant also claimed that witnesses that should have been called in his defence were not called.

26. The first applicant applied to the Registrar of Appeals to postpone the hearing of his application for leave to appeal, pending the outcome of the inquiries commenced by his fresh solicitors. These inquiries were terminated by the expiry of the first applicant's certificate of legal aid in March 1982, which was not renewed.

27. The first applicant also lodged a complaint to the Police Complaints Board, concerning the alleged corruption of the police in the handling of his case, and the alleged intimidation of his wife. On 4 March 1982 the Secretary to the Board informed the first applicant that their investigation did not reveal any evidence to justify disciplinary proceedings against any police officers.

28. The Registrar of Criminal Appeals approached the first applicant's former solicitors, whom he had dismissed, to establish whether they had advised him on his application for leave to appeal. The solicitors were also invited to comment upon the first applicant's allegation that various other witnesses should have been called at his trial. The solicitors informed the Registrar of the terms of counsel's advice to the first applicant, and of their attempts to trace a large number of witnesses whom he had initially sought to call in his defence. The first applicant later decided that it would not be necessary to call in his defence at the trial most of those witnesses that had been traced by the solicitors.

29. The first applicant's application for leave to appeal, his former solicitor's letter and the relevant court papers (eg witness statements, a social enquiry report and a psychiatric report) were put before the single judge who, on 2 December 1981, granted the request for the application to be considered out of time, but refused leave to appeal and the ancillary applications (legal aid, bail, leave to be present, leave to call witnesses).

30. The reasons given for refusing the application were:-

> "You were convicted by the jury upon ample evidence after a full and correct summing up by the judge. The many witnesses you now say you wish to call were not required to be called by you at your trial. There is no ground for interference with the verdict of the jury.
>
> The total sentence passed upon you was not excessive or wrong in principle."

31. On 9 December 1981 the first applicant renewed his application for leave to appeal against sentence and conviction, leave to call evidence and leave to be present at the hearing before the full Court of Appeal. The form SJ on which this application was made contained the following warning:-

> "LOSS OF TIME. A renewal to the Court after refusal by the Judge may well result in a direction for the loss of time should the Court come to the conclusion that there was no justification for the renewal. If the Judge has already directed that you lose time the Court might direct that you lose more time."

32. On 20 May 1982 the full Court of Appeal refused the first applicant's application for leave to appeal and ordered that 28 days spent in custody by him awaiting the hearing of his application should not count towards his sentence, since his application for leave to appeal had been pursued against his counsel's advice and was without merit.

33. The Court held:-

> "He had no conceivable reason to approach this Court for leave to appeal against either conviction or sentence. His learned counsel, in a very careful opinion on conviction, said: 'In my opinion no prospect whatsoever exists of appealing the conviction successfully', and further that in relation to sentence a further prison sentence was inevitable and the length of sentence passed was equally inevitable. When a person in the light of advice of that kind (that an appeal is hopeless) and clearly without any ground whatsoever for challenging a conviction properly made and a sentence properly passed, wastes the time of the court by pressing on with his applications for leave to appeal as this applicant has done, it is right that the Court should consider whether or not his time in prison should be extended. We have come to the conclusion that it should be."

The second applicant

34. The facts as found by the Commission are set out below.

35. On 4 August 1980 the second applicant appeared before the Reading Crown Court charged with two others with conspiracy to supply heroin during a period of two years up to 20 February 1980. The trial lasted more than three weeks and on 28 August 1980 the second applicant was found guilty, as were his two co-defendants, and was sentenced to three and a half years' imprisonment.

36. At his trial the second applicant was represented, under the legal aid scheme, by a solicitor and by counsel. Following his conviction he was advised by counsel as to the prospects of an appeal against conviction. This advice reviewed the second applicant's defence that at the time of one of his alleged admissions he had been withdrawing from the effects of diacoral, and noted that the trial Judge had evaluated this submission in a "voir dire" procedure, following which he had ruled the second applicant's statement voluntary, and admissible in evidence. Counsel recognised that there was "strong evidence" that any admissions made by the second applicant were involuntary, but that the Judge had applied the law correctly and that in counsel's view the Court of Appeal would not interfere with his exercise of his discretion to admit the evidence for evaluation by the jury. Counsel added that, in the light of the length of the jury's deliberations (over six hours) and the majority verdict which they reached, it was "permissible to conject" that some of the jury were rejecting some of the police evidence, and also some of the evidence given by the second applicant. In these circumstances counsel advised that the Court of Appeal would not allow an appeal and he therefore did not advise the second applicant to lodge an application for leave to appeal.

37. The second applicant nevertheless drafted his own grounds of appeal, which his solicitor then rendered into a "more comprehensible form" and had typed. The application for leave to appeal was received on 22 September 1980 by the Criminal Appeal Office. The application contained typographical errors with regard to the precise description of the offence contained in the indictment against the second applicant and the location of his trial. On 26 February 1981 the Criminal Appeal Office received correspondence from the second applicant's wife in support of his grounds of appeal against sentence.

38. On 2 April 1981 the Criminal Appeal Office sent the second applicant and his solicitor copies of the short transcript of his trial. The second applicant has contended that he only received the short transcript after the decision of the single judge relating to his application for leave to appeal. On 13 April 1981 the second applicant submitted further grounds in support of his appeal,

including a copy letter, allegedly written by a co-accused, which the second applicant contended cleared him of involvement in the offence for which he had been convicted.

39. The second applicant's application for leave to appeal was considered by a single judge on 20 May 1981, and included applications for leave to appeal against conviction and sentence, an application for legal aid, and an application for leave to be present. The application was refused, and in the form sent to the second applicant notifying him of this, the judge recorded his observation that there were "no reasons to justify granting (the second applicant) leave to appeal".

40. The form SJ which was returned to the second applicant notifying him of the decision also stated that he could renew his application to the full Court of Appeal and contained a warning in the following terms:

> "LOSS OF TIME A renewal to the Court after refusal by the judge may well result in a direction for the loss of time should the Court come to the conclusion that there was no justification for the renewal. If the judge has already directed that you lose time the Court might direct that you lose more time."

41. On 12 June 1981 the second applicant renewed his application to the full Court, which was received on 17 June 1981. He indicated on his renewal that he was awaiting full trial transcripts, but he was informed on 24 June 1981 that the registrar had not ordered any such transcripts. On 9 October 1981 the second applicant supplemented his application by pointing out the mistakes in the original application for leave to appeal concerning the location of the trial court and the description of the offence with which he was charged and convicted. He added that, "being a layman" he did not know what effects these mistakes would have had on the single judge if they had been properly pointed out by his counsel. On 19 October 1981 the Criminal Appeal Office informed the second applicant that these matters had already been noticed and would not affect the outcome of the case.

42. On 27 October 1981 the full Court of Appeal, presided over by the Lord Chief Justice, refused the applications made by the second applicant. The Court concluded that there were "no possible grounds for giving leave to appeal against conviction", after examining the applicant's principal contention that compromising evidence had been obtained against him under duress. The Court also recognised that the trial judge had had an ample opportunity to evaluate the degree of responsibility which the second applicant bore for the offences in question and hence to grade the sentences imposed on him and his co-defendants. Having rejected both these applications, and the subsidiary applications for leave to be present and for legal aid, the Court continued as follows:

> "This man has seen fit to renew this application after refusal by the single judge. The application is refused and he must pay the penalty for renewing this hopeless application. He will lose 56 days."

43. Accordingly 56 days of the period spent by the second applicant awaiting the outcome of his application for leave to appeal were discounted from service of his sentence.

III. SUBMISSIONS OF THE PARTIES

44. The parties' submissions are set out below.

SUBMISSIONS OF THE RESPONDENT GOVERNMENT

Application No. 9818/82

a) The facts

45. The respondent Government point out that, despite the applicant's assertion to the contrary, he received a short transcript of the trial before the date on which the single judge considered his application for leave to appeal. Since he had also received a copy of his retyped application for leave to appeal, he had ample opportunity to correct the typographical errors to which he referred in his subsequent renewal of his application before the full Court of 9 October 1981. In addition the respondent Government note that the applicant was advised as to the prospects of success of an application for appeal by counsel who had represented him at his trial. Nevertheless he chose to ignore this advice in making an application for leave to appeal on his own behalf.

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b) Relevant law and practice

46. Under Section 1 of the Criminal Appeal Act 1968, a person convicted of an offence on indictment may appeal to the Court of Appeal against his conviction. Where the appeal is not on a question of pure law, the appellant must first seek leave to appeal. Under Section 9 of the Criminal Appeal Act 1968, a person convicted of an offence on indictment may appeal to the Court of Appeal, but is required first to seek leave to appeal. Section 18 of the Act sets out the procedure and a time limit of 28 days for the lodging of an appeal, although the time for lodging the appeal may be extended, as it was to the applicant. An application for leave to appeal is normally considered by a single judge of the Court of Appeal, under Section 31 of the Act. According to Rule 11 (1) of the Criminal Appeal Rules 1968, the single judge may deal with applications for leave to appeal otherwise than in open court, which permits large numbers of applications to be dealt with quickly.

47. No notice is given to the appellant of the date on which his application would be considered by the single judge, but he may request the Registrar of Appeals not to refer his case before a specific date. The object of the single judge procedure is to identify those cases where the grounds of appeal are substantial and arguable. Applications are normally dealt with by a single judge in the light of all the papers in the case, including the grounds of appeal, but without hearing oral argument. Where a single judge refuses an application the applicant is informed of the name of the judge and of the reasons for the refusal. If he wishes to pursue his application, he must so notify the Registrar within 14 days, whereupon it will be considered by the full Court of Appeal.

48. Legal aid may be granted under Section 28 (8) or Section 30 (8) of the Legal Aid Act 1974 for advice by counsel or a solicitor on whether there appear to be reasonable grounds for an appeal or, if there are such grounds, for drafting them. In the present cases the applicants were advised by the counsel who represented them at their trials, under the grant of legal aid made to them for the trials, of the availability of an appeal. The majority of applications for leave to appeal heard either by a single judge or the full Court are heard without oral representation of the parties.

49. Under Section 22 of the Criminal Appeal Act 1968 appellants are in general entitled to be present at the substantive hearings of their appeals. However if the appellant is in custody he is not entitled to be present unless the Court of Appeal gives leave, where his appeal is on a question of law alone, or where he is in custody in consequence of a verdict of not guilty by reason of insanity or of a finding of disability. The presence of the appellant on applications for leave to appeal is always subject to the leave of the Court, and such leave will only be given in exceptional circumstances, and never where the application is being considered by a single judge.

50. Section 29 of the Criminal Appeal Act 1968 provides that the time during which an appellant is in custody pending the determination of his appeal shall, subject to any direction which the Court of Appeal may make to the contrary, be reckoned as part of the term of any sentence to which he is for the time being subject. Thus the Court of Appeal may direct that any such time, or part of it, shall not count towards an appellant's sentence and a similar power may be exercised by the single judge by virtue of Section 32 (2) (h) of the 1968 Act. Where such a direction is made, the reasons for it must be given to the appellant. There is no appeal from such a direction, but where it is made by a single judge, and the appellant renews his application to the full Court, the full Court may overrule any direction made for loss of time, and replace it by a direction for a loss of a greater or lesser number of days.

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c) Historical background of the power in Section 29

51. The purpose of this power may be illustrated by its historical background. Under Section 14 (3) of the Criminal Appeal Act 1907, the period awaiting the determination of an appeal was not counted as part of sentence, unless the Court of Criminal Appeal gave directions otherwise. The increasing number of appeals and the length of time necessary in order to determine them, necessitated a limitation being placed on the amount of time that could be lost in this way, which was set at 8 weeks in 1940. Under an amendment in 1948, the loss of time was fixed at 42 days, unless the Court made a direction otherwise, which it seldom did.

52. The original reasons for the loss of time provision were twofold, first the need to provide a deterrent against frivolous appeals, and second the idea that a convicted prisoner ought not to be regarded as serving his sentence so long as he was enjoying the special privileges accorded to an appellant by virtue of the Prison Rules. The general amelioration of conditions in prisons has removed the significance of the second justification.

53. In 1965 an interdepartmental committee of the Court of Criminal Appeal recommended that a period spent awaiting appeal should be reckoned as part of any term of imprisonment, subject to a power for the Court of Criminal Appeal to make a direction to the contrary. The object of the proposed amendment was to avoid the operation of a more or less automatic rule, whilst retaining the power to penalise an appellant whose appeal was totally devoid of merit. The committee recommended that reasons should be given for the refusal. These recommendations were implemented initially in 1966 and subsequently by the Criminal Appeal Act 1968.

54. After this change in the regulations, it was in practice almost unknown for a single judge to give directions for loss of time. In 1969 the number of applications for leave to appeal to the Court of Appeal had risen to 9,700, and by March 1970 applications were made at the rate of over one thousand per month. The volume of applications led to unacceptable delays, which could not be tolerated in respect of applications with merit. Therefore on 17 March 1970 the Lord Chief Justice announced that, because facilities for advice on appeals were now available to appellants, under the legal aid scheme, the single judge should have no reason to refrain from directing that time should be lost. Within a fortnight of the announcement the number of applications for leave to appeal fell from approximately one thousand to five hundred cases per month.

55. On 14 February 1980 the Lord Chief Justice issued a further Practice Direction reminding those whom it concerned of the existence of this power, this being necessary as "meritorious appeals (were) suffering serious and increasing delays due to the lodging of huge numbers of hopeless appeals". The Direction continued:

> "In order to accelerate the hearing of those appeals in which there is some merit, single judges will give special consideration to the giving of directions for loss of time .... (which will be normal) ... unless the grounds are not only settled and signed by counsel, but also supported by the written opinion of counsel. Advice on appeal is of course often available to prisoners under the legal aid scheme. Counsel should not settle grounds or support them with written advice unless he considers that the proposed appeal is properly arguable. It would therefore clearly not be appropriate to penalise the prisoner in such a case even if the single judge considered that the appeal was quite hopeless."

56. During 1981, 6,097 applications for leave to appeal were made. Precise figures regarding the number of cases in which loss of time was ordered were not available, but it would appear that they were made in respect of 60 to 65 applications only and that the loss of time ranged from 7 to 64 days. In approximately 75% of these cases the loss of time ordered was 28 days or less.

d) Art. 5 of the Convention

57. In the respondent Government's submission, it is well established (eg Christinet v. Switzerland, Comm. Report 1.3.79, DR 17 p. 35) that Art. 5 (1) (a) of the Convention requires three conditions to be fulfilled, namely that:

> 1. A person should have been deprived of his liberty in accordance with the procedure prescribed by law.
>
> 2. The detention should have been "lawful".
>
> 3. The detention should have been after conviction by a competent court.

58. The respondent Government contend that the loss of time ordered by the Court of Appeal represents a continuation and extension of the detention ordered by the Exeter Crown Court on 4 September 1981 (re Application No. 9562/81) or that ordered by the Reading Crown Court on 28 August 1980 (re Application 9818/82) and therefore these periods of detention satisfy the requisite conditions contained in Art. 5 (1) (a) of the Convention, as did the remainder of the sentences of imprisonment imposed on the applicants as a result of their convictions on those dates.

59. The respondent Government point out that the Court of Appeal has no power to increase the overall term of imprisonment when considering a case on appeal, and that its power to order loss of time is not unlimited, since it is necessarily circumscribed by the time spent by the appellant in detention during his appeal. Furthermore the power to order loss of time is exercised with care and caution.

60. In the respondent Government's submission there is thereby a clearly established "close and direct connection" between the conviction of the applicant by the Crown Court and the subsequent jurisdiction of the Court of Appeal in the exercise of which it ordered that he "lose time" (cf para. 36 of the Commission's Report in the Christinet case referred to in para. 57).

61. The principal object of Art. 5 is to prevent arbitrary detention, which aim is achieved by the law and procedure applicable in the English courts. Not only is there an inherent limitation in the period which a Court may order to be lost (ie the period spent pending appeal), but Art. 6 guarantees that the conduct of proceedings, including appeals, be concluded within a reasonable time. Moreover only a Court may order loss of time, and reasons must be given for such an order. Nor can such an order be made where leave to appeal has been granted, and thus the power of the Court to order loss of time is closely fettered and its exercise is not arbitrary.

62. The Commission has recognised that an acquittal on appeal does not itself render unlawful the earlier detention of the appellant, if that earlier detention was justified under the terms of Art. 5 (1) of the Convention. The respondent Government submit that it follows that where a system of appeal enables the Court to extend, by reference to the conviction or sentence appealed against, the period for which an appellant may be detained, that extended period ought also to be capable of being regarded as lawful for the purposes of Art. 5 (1) of the Convention. In both instances detention follows a lawful conviction by a competent court in accordance with the law and the order for loss of time is simply a continuation and execution of the same legal process. In paragraph 37 of the Commission's report in Christinet v. Switzerland, the Commission found that there was "a sufficient and direct connection" between the decision of a Court on convicting that applicant and the decision of an administrative authority to order detention eleven years later, to bring the latter decision within the scope of Art. 5 (1) (a). The Commission regarded the administrative authority's decision as a measure for the execution of the previous court decision and therefore considered the detention ordered by that authority to be a continuation of the detention ordered by the Court. In the respondent Government's submission in the present case the connection is stronger and the continuity greater than that which existed between the two decisions in the Christinet case.

63. Finally the respondent Government point out that in Member States where a conviction only takes effect as res judicata when all appeals have been terminated, or the opportunity for them has passed, detention pending appeal falls under Art. 5 (1) (c) rather than Art. 5 (1) (a) of the Convention. Hence in these jurisdictions there is no practical difficulty in relating a period spent in detention pending appeal to a conviction, since the "conviction" comes at the end of the appeal process. Thus in the Wemhoff case, no reference was made to the fact that three months spent by the

applicant in detention pending appeal did not count towards his ultimate sentence. In the respondent Government's submission the substantive question whether periods spent in detention pending appeal which are not counted towards any sentence ultimately imposed can be regarded as lawful for the purposes of Art. 5 (1) of the Convention, should be given a uniform interpretation in all the Member States of the Council of Europe, and should not depend upon the "accident" of whether such period is regarded as forming part of detention on remand, or whether the conviction is regarded as having been established by the court of first instance.

e) Art. 6 of the Convention

64. The respondent Government point out first that the object of the direction that time be lost is not principally to penalise appellants but to deter hopeless applications for leave to appeal, which inevitably delay those which are more deserving. It was a central aspect of the Practice Direction of the Lord Chief Justice that as a result of the Criminal Justice Act 1967 (concerning legal aid) "no prisoner need be without advice" as to whether grounds exist to support an application for leave to appeal. Under the Legal Aid Act 1974 Section 30 (7) defendants tried on indictment, as the applicants were, may be granted legal aid for representation at their trial and such a legal aid order would include facilities to advise and settle the grounds to be stated in the application for leave to appeal, if any. In this respect the Government refer to a pamphlet issued by the Registrar of Criminal Appeals with the approval of the Court, the introductory sentence of which reads:-

> "No one should be without reasonable facilities for advice on appeal, and for the preparation for grounds of appeal if there are any. Such facilities are included in the trial legal aid order, but if this fails, the facilities will be available through supplementary arrangements for legal aid."

65. In the present case the applicants were advised by counsel that there were no prospects for their appeals, a view which was confirmed by the rejection of their applications for leave to appeal by the single judge. Nevertheless they renewed their applications to the full Court of Appeal.

66. The Commission has previously considered whether the proceedings for an application for leave to appeal fall within the scope of Art. 6 of the Convention (eg. Application No. 3075/67, Yearbook 11, p. 466) and has held Art. 6 both applicable and satisfied by the strict observance of the principle of equality of arms throughout the proceedings, arising from both the absence of the applicant and the prosecution. In the Government's submission the same considerations apply to the present cases, with the important added aspect that the present applicants weres given legal aid and advice on the question of whether there were grounds on which to appeal. The Commission's reliance on the principle of equality of arms was repeated in Application No. 7413/76 (DR 9 p. 100).

67. The respondent Government submit that the fact that the applicants "lost time" as a result of pursuing their applications before the full Court of Appeal, should not alter the Commission's previous assessment of the fairness of the procedure, and its conformity with Art. 6 of the Convention. Considering the "proceedings as a whole" therefore the respondent Government submit that, in the light of the advice that the applicants received, and the reasons given by the single judges, who did not order "loss of time", and taking account of the object and purpose of the "loss of time" provision as well as the way in which it is operated the applicants' "loss of time" did not result in any unfairness for the applicants.

f) Art. 14 of the Convention

68. The respondent Government point out that the concept of discrimination necessarily imports the notion of disparate treatment, but that where there is no disparate treatment there can be no discrimination. Under English law the entitlement to appeal against conviction and sentence and the procedures relevant thereto are the same whether or not the conviction in question has resulted in the imposition of a custodial sentence and it makes no difference whether the person seeking leave to appeal is in custody or not. Hence no question of a violation of Art. 14 taken in conjunction with Art. 6 arises.

69. With regard to the combination of Art. 14 and Art. 5 of the Convention, the Government acknowledge that since time may be ordered lost in respect of an applicant who is in custody pending the determination of his application, but cannot be so ordered against an applicant who is at liberty, there is at least a difference of treatment to be considered.

70. The Commission held in the Grandrath case (Yearbook 10 p. 626 at p. 680) that discrimination implied a comparison between two or more different groups or categories of individuals, resulting in the finding of one group or category being treated less favourably than another on grounds which are not acceptable. Whether such differential treatment is acceptable depends on whether there is an "objective and reasonable justification" for the difference.

71. The Government contend that such a justification exists in that in one case an applicant for leave to appeal will have been sentenced to a term of imprisonment and will therefore be in custody pending the determination of his application, and in the other the applicant will have received a non-custodial sentence. It is clear that these two situations justify different treatment when the results of failing to distinguish between them is considered. To treat a person at liberty in the same way as a person detained would enable the Court to order that he be deprived of his liberty. This would clearly be wrong and is not allowed for under the appeal procedures in England. Indeed such an order of loss of time would be tantamount to

the imposition of a heavier sentence on the applicant than he received following his conviction. This is equally impossible under English law, since a Court of Appeal on hearing an appeal against sentence may not deal with the appellant more severely than he was dealt with in the Court below.

72. On the other hand to equate the position of a detained appellant with that of one at liberty, would be to do away altogether with the power to order loss of time. Experience shows that in such circumstances deserving cases of detained appellants would, along with all other applications, be the subject of an inordinate and intolerable delay, with the consequence that some appellants would in fact be detained for longer periods than they would be under the present system. The present system is designed for the direct benefits of appellants who would succeed on appeal and does not in any way prejudice those appellants, other than in utterly hopeless cases where they have been so advised. These benefits cannot be obtained without the existence of a power to order loss of time in respect of hopeless applications.

73. The object of the system of applications for leave to appeal, including the loss of time possibility, is to expedite the process of hearing applications and so to reduce the period during which an applicant in custody who has a meritorious appeal will be detained. The power is exercised with considerable care and caution so that only detained applicants who pursue truly hopeless applications, almost without exception after having been advised against doing so, lose time. The Government therefore contend that there is a reasonable and objective justification for the different powers which apply to the two categories of applicants for leave to appeal and the means sought to realise the aim are not disproportionate.

SUBMISSIONS OF THE APPLICANTS

The first applicant (Application No. 9562/81)

a) The facts

74. The applicant's solicitors point out first that they are the third firm of solicitors acting for the applicant, the first having withdrawn after discovering a conflict of interest, and the services of the second having been terminated because the applicant was dissatisfied with the manner in which they had conducted his defence at his trial. The applicant's application for leave to appeal was lodged before the applicant instructed his present solicitors (on 4 November 1981), at which stage the applicant's representatives understood that the Registrar of Criminal Appeals would in all probability be taking over the handling of the appeal, for which they understood no legal aid was in existence. They point out in this connection that although a prisoner may thereby be entitled to advice on the merits of an appeal, it may be considered unjustified that the conduct of the appeal hearing itself should be out of the hands of the independent solicitors and dealt with by a Court Official.

75. The applicant's representatives sought legal aid under the "green form" system to investigate the possibility of a claim in negligence against the applicant's former solicitors, the possibility of a complaint against a police officer in Exeter, and investigations to consider an application to the Court for a retrial because of additional evidence that could be obtained.

76. A limited grant of legal aid was made, which enabled the applicant to be visited on 8 December 1981, whereupon his solicitors were informed on 9 December 1981 that a single judge had refused the applicant's application for leave to appeal. A request to extend legal aid was refused at the end of January 1982, and the solicitors therefore advised the applicant that they were unable to carry out any further investigations on his behalf, and that the results of the investigations which they had carried out were inconclusive and that they were therefore not in a position to advise the applicant whether he should pursue his application for leave to appeal or not. The applicant's solicitors point out in addition that it appears likely that the letter to the Criminal Appeal Office was written at a time when the applicant's previous solicitors knew that their instructions had been terminated.

77. The applicant maintained and still maintains that there was collusion between witnesses to obtain benefit for themselves, and therefore felt that he had reason to approach the Court of Appeal for leave to appeal against both his conviction and the sentence imposed.

b) The domestic law and practice

78. The applicant recognises that it would not necessarily be appropriate for every appellant to be present when a single judge or indeed the full Court deals with his application for leave to appeal.

79. Nevertheless it was or should have been clear in the present case that the applicant had no confidence in the solicitors and counsel who had represented him at the trial and that he was unprepared to accept their advice. It is relevant to recall that they had replaced other solicitors at short notice, who had withdrawn owing to a conflict of interest. No offer of legal aid was made to the applicant to have advice from different solicitors and counsel.

80. In the applicant's submission his circumstances were those of an unrepresented applicant for leave to appeal, where the application should have been adjourned for legal aid to be granted.

81. While it is accepted that the risk of "loss of time" is drawn to the attention of prospective appellants for leave to appeal, such an appellant is given no opportunity to make observations or representations to a single judge or the full Court as to whether or not any loss of time should be ordered in his case. It may be noted from the statistics submitted by the respondent Government that the number of applications in which additional time is ordered is approximately one per cent. This very low figure, which is undoubtedly known to many prisoners, clearly leads to an expectation

that any award by the Court that additional time should be served is exceptional and therefore worthy of special consideration. In this respect the general principle that appellants are in general entitled to be present at the substantive hearing of their appeal should be noted.

82. In all these circumstances, it is strongly submitted that it would be within the rules of natural justice as well as within the terms of the Convention that an appellant should be present and entitled to make representations with the legal aid of solicitors and of counsel if there is any danger of what in effect would be an additional custodial sentence being imposed.

c) Art. 5 of the Convention

83. The applicant submits that the imposition of a further sentence of 28 days' imprisonment was a penalty for pursuing an appeal in respect of the conviction which the applicant believed to have been wrong and against the weight of the evidence which could have been put before the Court. This period of detention cannot be regarded as "lawful" within the terms of Art. 5 (1) (a) of the Convention, it was made in the absence of the applicant, and without giving him the opportunity to make any representations to show why a judicial sentence should be imposed.

84. The respondent Government have stressed that the Court does not have unlimited power to make a further order for the deprivation of liberty, but in the applicant's view the extent of this power to imprison is immaterial. Injustice lies in the fact that a convicted and imprisoned defendant is not given an opportunity of attending before the Court to show cause why he should not be sentenced to a further term of deprivation of liberty.

85. Nor can the applicant accept the respondent Government's contention that there was a clearly established "close and direct connection" between the conviction of the applicant by the Crown Court and the subsequent jurisdiction by the Court of Appeal in ordering loss of time. In fact the applicant was ordered by a different Court, in his absence, to serve a further term of imprisonment for having doubted the verdict of the original Crown Court. It is submitted that it is not a connection which would justify any variations from the normal principles set out in Art. 5, ensuring the right to liberty and security of person.

86. Nor can it be contended that the procedure for loss of time avoids the possibility of arbitrary detention, which Art. 5 is aimed at preventing. The inherent limitation on the time which can be lost is immaterial, because arbitrary detention for even a matter of a few hours without just cause within the meaning of para. 1 of Art. 5 would clearly be a breach of the Convention. Furthermore, the fact

that the reason for the loss of time is given to the applicant is of no avail to him. He does not have the opportunity of arguing to the contrary and thus participating in the prevention of arbitrariness. Furthermore, the respondent Government seek to derive an absurd conclusion from the fact that an acquittal on appeal does not render unlawful an otherwise legal prior detention of an appellant. This surprising conclusion is that an increased period of detention after an appeal must be justified without reference to Art. 5. In this respect the Commission's reasoning in Christinet v. Switzerland may be distinguished since there no additional sentence was imposed.

87. The applicant submits that the Commission must accept that under English law a conviction is established, and a sentence starts to run immediately after the conviction at a trial of first instance. In addition under English law, any period spent awaiting a subsequent appeal will be taken into account as forming part of sentence, subject to any order for loss of time as is at issue in the present application. The position, while the applicant waits for the outcome of his application for leave to appeal, is not that he is detained on reasonable suspicion that he has committed an offence (under Art. 5 (1) (c), but that he has been convicted of an offence. However, where an order of loss of time is made, the applicant is being punished for appealing when it was thought to be an unnecessary appeal, although this is not itself a criminal offence under United Kingdom law. Hence the practical effect of the loss of time is to impose an additional sentence of 28 days' deprivation of liberty and it is pointed out that one of the two justifications originally put forward (in 1948) that justify the loss of time procedure, has by the respondent Government's own admission lost its force.

d) Art. 6 of the Convention

88. The applicant submits that the objective of this Article is to ensure that in the determination of civil rights and criminal charges, the party concerned be entitled to be present at a fair and public hearing so that he may have legal assistance, may be able to cross examine witnesses and in effect prepare his case for hearing. Although the justification for the loss of time procedure as a deterrent in hopeless applications which cause delays for applications with more merit may have administrative attractions, such an arrangement effectively deprives a citizen of the opportunity to present to an appeal court his concern about apparent injustice. In addition an appeal which on paper may appear to be hopeless can be shown to have much greater merit when an appellant who believes in his case is able to argue it forcibly.

89. Doubtless for good administrative and cost reasons, although "no prisoner need be without advice", he is only given advice in practice by those who represented him in the original hearing, and in whom, as in the present case, he may well have lost confidence. In addition an appellant "represented" by the Registrar of Criminal Appeals may have counsel appointed to represent him, but does not have any advice or any personal attendance on him by a legally qualified person.

90. Nor was the principle of equality of arms respected in this case, when the full Court of Appeal had the opinion of the judge in the Court of first instance in pronouncing sentence, the comments of solicitors who were probably no longer instructed by the applicant, and to whose comments the applicant had no opportunity to reply, and when the applicant himself does not have the benefit of any legal argument put forward on his behalf, but only the arguments outlined to him by solicitors and counsel in whom he has lost confidence. There is a further question as to whether equality of arms can possibly be respected, where the order of loss of time is made by the Court of Appeal, in practice imposing sentence as prosecutor and judge in the same cause. It should be pointed out that it is not the police as the prosecuting authority who are seeking to impose the period of sentence, since the imposition of the loss of time is on the Court's own motion.

e) Art. 14 of the Convention

91. The applicant points out that the respondent Government had contended that the justification for the difference in treatment which arises in the operation of the loss of time power, which the respondent Government equally recognise is in the case of an applicant at liberty "tantamount to the imposition of a heavier sentence ... than he received following his conviction", is based on the grounds of expediency. The expediency is that the present system is of advantage to those applicants who succeed on appeal. However this argument totally ignores the inevitable situation that, in any system of appeal, some appeals are successful and some will fail.

92. The respondent Government equally rely upon the risk of intolerable delay which may be caused by poorer appeals. Nevertheless this question is within the control of the United Kingdom Government, by the appointment of sufficient judges and court staff to allow the expedition of all appeals. The applicant submits that neither costs, nor expediency, should deprive an appellant of the right to appeal enshrined in English law and to exercise that right in the knowledge that the appeal tribunal will consider the appeal with an open mind.

93. Furthermore, the respondent Government's justification is heavily dependent upon the advice given to a prospective appellant by his legal adviser. This view fails to take account of the possibility that the advisers may themselves, in some cases, be influenced by an apparent weight of evidence and that an appellant who genuinely believes in the justice of his case may well be unjustly inhibited from appealing in the face of contrary advice on grounds of expediency. Thus the respondent Government fail to acknowledge that a convicted person at liberty may without restriction attend his

application for leave to appeal before the Court, whereas a convicted person in custody, whose appeal is judged unmeritorious, has no such right of attendance. The respondent Government also acknowledge that a convicted person who has not suffered a custodial sentence is in no danger of a heavier sentence being imposed upon the termination of his unsuccessful appeal, although the corollary of this system is that convicted person in custody is in effect liable to a heavier sentence through the imposition of loss of time provisions and is thus necessarily inhibited from pursuing an appeal although no such inhibition applies to a convicted person at liberty. In addition, such a convicted person in custody is by reason of his absence also deprived of the opportunity of presenting to the appellant tribunal the reasons why he should not be further sentenced.

f) Conclusions

94. It is submitted that the imposition of the loss of 28 days' sentence constitutes a violation of the fundamental right to liberty and security and cannot be included within the exceptions to Art. 5 because it is imposed not as a conviction by a competent Court, but as penalty for pursuing an appeal which the Court believed to be unjustified.

95. Furthermore, on imposing the loss of time, the Court is effectively prosecutor in its own charge, deciding to impose the additional 28 days' sentence without the applicant being present and without giving him any opportunity to show cause why he should not serve the extra 28 days. In the light of the role of the Court, the absence of the original prosecutor is irrelevant.

96. In reliance upon the principle that justice must not only be done, but must be seen to be done, and the principle identified in Nielsen v. Denmark (Yearbook 4 p. 490) that the fairness of the proceedings before the Court must be judged in the light of each particular case taken as a whole, it is submitted that in this case the imposition of an additional sentence was in breach of both Arts. 5 and 6 of the Convention, alone and read in conjunction with Art. 14 of the Convention.

The second applicant (Application No. 9818/82)

a) The facts

97. The applicant points out that in the light of counsel's advice on a possible appeal against conviction, it can be concluded that the applicant was led to believe that his case was not frivolous, and that any application for leave to appeal would not be totally lacking in merit.

98. In addition it would seem possible that the Court of Appeal erred in concluding that the applicant's application for leave to appeal was "hopeless". The case involved a total of five defendants, of whom one was clearly the "ringleader", who was sentenced to a total

of five years' imprisonment. The part allegedly played by the applicant in the conspiracy was to assist in the distribution of the heroin once it had been brought into the United Kingdom and his part was therefore very much secondary to that of the principal offender. Nevertheless the tenor of the decision of the Court of Appeal was that the serious trading in heroin had to be stopped by very heavy deterrent sentences and it seems that they made little distinction in this respect between the ringleader and the applicant. Furthermore, one of the applicant's co-defendants was not present at the trial and it was therefore impossible for the judge to form an opinion of her involvement, which would have been necessary for grading these sentences imposed on each of the conspirators.

b) Domestic law and practice

99. The applicant points out that an applicant for leave to appeal is seldom if ever represented, and never present, before the single judge.

100. The original reasons relied upon by the respondent Government for this loss of time machinery, which related to the favourable conditions of detention of appellants in prison in comparison with other convicts, have long since ceased to apply in fact. A prisoner awaiting the determination of his application for leave to appeal no longer receives any special privileges and is treated in all respects as a convicted prisoner.

101. From the figures cited by the Government for 1981 it may be seen that time was ordered lost in just over one per cent of the total number of applications for leave to appeal. In three quarters of these cases the time lost was 28 days or less. In the quarter of one per cent of applications remaining the applicant lost more time, and in the present case the applicant lost 56 days, despite the advice of counsel, which was clearly not to the effect that an appeal was utterly hopeless in this case.

c) Art. 5 of the Convention

102. The applicant does not dispute that the detention following the sentence imposed on him at Reading Crown Court was in accordance with Art. 5 (1) (a). However he does dispute that the loss of time ordered by the Court of Appeal represented a continuation or extension of that detention. Subject to the operation of parole, the applicant would have been imprisoned for three and a half years from the date of his sentencing. Effectively however the decision of the Court of Appeal imposed a further period of imprisonment, or "detention" in the terms of Art. 5 of the Convention, on the applicant.

103. Nor is the limitation of the total amount of time which can be ordered lost, or the caution and discrimination with which the Court of Appeal exercises its powers to order loss of time, relevant under Art. 5. What is apparent is that the applicant was sentenced in

August 1980, and a further period of detention was ordered by the Court of Appeal on 27 October 1981, more than one year later. Indeed there would have been nothing to stop the Court of Appeal from ordering that the whole of this period of 14 months should have been lost by the applicant.

104. The facts of the Christinet case (Application No. 7648/76) are clearly distinguishable from the present case and cannot justify the argument that there is a "close and direct connection" between the applicant's sentence and the order of loss of time by the Court of Appeal. The order of the Cantonal Administrative Authority in the Christinet case was in response to continuing offending by a petty criminal and was an example of the operation of an administrative decision based upon a law providing for dealing with habitual offenders. In the present case the additional period of detention was imposed as a punishment not for any offence prescribed by the criminal law, but for seeking to appeal against a conviction and sentence. Indeed the imposition of such a loss of time and therefore penalty, after the Court of Appeal recognised that the "learned trial judge had spent a long time grading this man's sentence according to his assessment over a period of time", seems to be oppressive and illogical.

105. Furthermore, as is recognised in paragraph 33 of the Commission's report in the Christinet case, the Commission regarded the decision of the Cantonal Administrative Authority as "merely the means of executing the original detention order made by the trial court". The order made by the Court of Appeal cannot be subjected to the same legal analysis.

106. Although a principal object of Art. 5 is to avoid the arbitrary detention or deprivation of liberty of an individual, it is clear that liberty shall only be removed in cases described in Art. 5. Detention pursuant to Art. 5 (1) (a) must result from a sentence passed by the convicting court, or some other competent court after conviction, but only in respect of the conviction itself. Thus legitimate delays may arise, for example where sentencing is deferred, or in cases similar to the Christinet case, where periods of probation can be imposed or some form of licence imposed, which is subsequently interrupted by a further offence. Nevertheless the circumstances in which the applicant lost his liberty for a further fifty-six days do not fall within the scope of Art. 5. Nor can it be contended that the protection of Art. 5 (4) exists in a system which requires that the applicant wait a year before the imposition of a further penalty takes place, allegedly in respect of the same conviction.

107. The fundamental distinction between the applicant's case and the Christinet case is that the authority for the decision of the administrative body in the Christinet case was triggered by some further intervening offence recognised under domestic criminal law. No such offence for which a specific penalty of loss of liberty is envisaged by the criminal law exists in the United Kingdom, such as the "offence" of lodging a frivolous application for leave to appeal.

In the present case the procedure in respect of which the applicant complains is not part of a continuing procedure initiated at his trial. The very essence of his complaint is that an additional period of deprivation of liberty is imposed upon the application for leave to appeal, not at the hearing of an appeal itself.

d) Art. 6 of the Convention

108. As the respondent Government's observations clearly recognise, the object of the directions with regard to loss of time and their operation is to impose a penalty, and such a penalty was imposed on the applicant. Nor can reliance be placed upon the fact that the applicant had access to legal advice before deciding whether to apply for leave to appeal. If an applicant declined to be represented by a lawyer at his trial, and subsequently sought leave to appeal and time was ordered lost against him, such an argument would result in his being penalised not only for seeking to appeal, but also for failing to employ a lawyer.

109. The applicant submits that the proper question for the Commission to consider is whether a defendant, convicted and sentenced to a period of imprisonment, which is not subject to affirmation by any higher authority, should be sentenced to a further period of deprivation of liberty by virtue of exercising his right to appeal in the context of the determination of a criminal charge within the terms of Art. 6 of the Convention.

e) Art. 14 of the Convention

110. The respondent Government concede that there is indeed a difference of treatment between those detained pending the outcome of their application for leave to appeal, and those at liberty. The basis of their attempt to justify this difference in treatment is essentially empirical, the alternative is said to result in inordinate and intolerable delay. Nevertheless the applicant's representative points out that they have experience of preparing cases where leave to appeal has been granted and legal aid has been granted not merely for counsel, but also for solicitors to prepare the case, where the existing delays, taking account of the operation of the loss of time system as applied to the applicant, were such that the appellant in question did not have his appeal heard until after he had been released from prison. In such circumstances he could clearly not be ordered to lose time because he had already been released.

111. This example illustrates that the present system of loss of time operates in an arbitrary fashion, both in respect of persons detained who are subsequently released before the hearing of their application for leave to appeal, and in regard to persons who are at liberty at that stage, because they have never been sentenced to imprisonment.

FURTHER SUBMISSIONS

112. On 20 January 1984 the Commission decided to invite the parties pursuant to Rule 45 (2) of its Rules of Procedure to submit such written observations on the merits of the respective applications as they considered appropriate. The Government and the first applicant declined to submit any further observations.

Submissions of the second applicant

113. The second applicant emphasises that there is no logical or causal connection between applying for permission to appeal and losing one's liberty. Art. 5 implies that the trigger for the loss of liberty is the conviction for a criminal offence. Applying for leave to appeal against either conviction or sentence would not appear to be consistent with that type of triggering mechanism. The loss of liberty stemming from the loss of time order cannot be seen as taking effect from the date of conviction by the trial judge. However, if the Commission accepts the Government's submissions in this respect there must have been a breach of Art. 5 (4).

114. Persons in custody are discriminated against as compared to persons who have not received a custodial sentence. The latter category are protected by the provision that on an appeal to the Court of Appeal no increase in the sentence can be made. Thus a fortiori no increase in sentence can be imposed on an application for leave to appeal. In contrast, a loss of time order has the effect that a person in custody serves a longer period of imprisonment after an unsuccessful application for leave to appeal.

IV. OPINION OF THE COMMISSION

Points at issue

115. The following are the principal points at issue in the present case which arise in respect of the first and the second applicant:

I. In respect of Art. 5 of the Convention

The question whether the applicants' detention pursuant to the orders of loss of time made by the Court of Appeal was in conformity with their right to liberty guaranteed by Art. 5 (1) of the Convention.

II. In respect of Art. 6 of the Convention

a) The applicability of Art. 6 of the Convention to the proceedings before the Court of Appeal.

b) The application of Art. 6 of the Convention to the proceedings in question.

- The powers of the Court of Appeal.

- The presentation and protection of the applicants' interests at the hearings in question.

III. In respect of Art. 14 of the Convention

The question whether the applicants were discriminated against on the ground of their being detained at the time of applying for leave to appeal against conviction and sentence.

I. Art. 5 of the Convention

116. The applicants have complained that their detention pursuant to the orders of loss of time made by the Court of Appeal was contrary to their right to liberty guaranteed by Art. 5 (1), since it was not covered by any of the exceptions to that right set out in paragraphs (a) - (f). Art. 5 (1) provides as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

117. The respondent Government have contended that the increase in the period of the applicants' detention which resulted from the loss of time orders, falls to be considered as part of the applicants' lawful detention following their conviction by a competent court, authorised by Art. 5 (1) (a) of the Convention. They submit that the sentences imposed by the trial judges on the applicants were to be served subject to any subsequent order which might be made by the Court of Appeal under Section 29 of the Criminal Appeal Act 1968 for loss of time. In addition they point out that, in a jurisdiction such as that of England and Wales, a convicted person starts to serve his sentence immediately on his conviction and is not regarded in domestic law as being, during any appeal proceedings, in detention on remand. They consider it inappropriate if, in such a system, a period of time ordered by a judge not to form part of the service of sentence should be considered to fall outside the terms of Art. 5 (1) of the Convention. Given that the Convention does not require that all periods of detention on remand must be counted towards service of sentence, it would not be appropriate to consider a system such as that which operates under Section 29 of the Criminal Appeal Act 1968 as being in conformity with the Convention in those countries where domestic law regards appellants as still in detention on remand, but to regard the operation of the same system as contrary to the Convention in countries where an appellant is considered in domestic law to serve his sentence and, consequently, to be detained under Art. 5 (1) (a) of the Convention.

118. With regard to the latter argument, the Commission recalls the judgment of the Court in the Wemhoff case, (Eur. Court HR, Wemhoff case, judgment of 27 June 1968, Series A, p. 23, para. 9), where it was recognised that the detention of a person convicted at first instance is to be regarded under the Convention under Art. 5 (1) (a), notwithstanding that, under domestic law, such a convicted person who lodges an appeal may be regarded as in detention on remand. The Commission has confirmed this case-law in its decision on the admissibility of Application No. 9132/80 N. v. the Federal Republic of Germany (D.R. 31, p. 154 at p. 173) and finds no reason to depart from it in the present case. The Commission must therefore consider whether the period of detention effectively imposed by the loss of time order made by the Court of Appeal was "the lawful detention of (the applicants) after (their) conviction by a competent court" within the terms of Art. 5 (1) (a) of the Convention.

119. The respondent Government have recognised that the word "after" in this provision cannot be interpreted simply to mean "following in time" but that, as the Commission established in its report in the case of Christinet v. Switzerland (Report 1.3.79, para. 34, D.R. 17, p. 35 at p. 54) there must be a direct and sufficient connection from the point of view of the guarantee of individual rights between the decision of the "competent court" and the deprivation of liberty complained of.

120. In the present case the applicants were sentenced to periods of imprisonment at their trials, and were detained pursuant to these sentences. Both applicants sought leave to appeal, but both these applications were refused, and the applicants' sentences were not expressly altered. Nevertheless the Court of Appeal in both cases made orders as to the loss of time which resulted in removing a period of 28 days in the case of the first applicant and 56 days in the case of the second applicant from being regarded as due service of the sentence imposed by the trial judge.

121. The respondent Government have stressed that the loss of time orders were not imposed by way of an increase in the sentences imposed on the applicants, but as a penalty and a deterrent measure to discourage the lodging of hopeless applications for leave to appeal.

122. It appears therefore that the period of time ordered not to count towards the applicants' sentences imposed by the trial judge cannot be regarded as forming part of their detention after their conviction at first instance, since the express terms of the loss of time orders was to exclude these periods of detention from being so regarded. In these circumstances, and bearing in mind the purpose for which the loss of time orders were made, which was unconnected with the original sentences imposed on the applicants or with the offences for which they were convicted, the Commission finds that the periods of detention which were ordered not to count towards the service of their sentences cannot be regarded as detention under Art. 5 (1) (a) of the Convention.

123. The Commission has considered whether these periods of detention are justified under any of the other paragraphs of Art. 5 (1) of the Convention, but does not find any of them applicable. In particular, the Commission observes that Art. 5 (1) (c) was only applicable to the applicants' detention prior to the dates on which they were convicted and sentenced by the Crown Court.

124. The Commission concludes, by ten votes to one, that there has been a breach of Art. 5 (1) of the Convention in regard to both applicants.

II. Art. 6 of the Convention

a) The applicability of Art. 6 of the Convention

125. The Commission must first consider whether Art. 6 of the Convention was applicable to the applicants' hearings of their applications for leave to appeal by the full Court of Appeal. Art. 6 (1) of the Convention provides:

> "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. Judgment shall be pronounced publicly but the press

and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Art. 6 (3) (c) further provides:

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

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

126. In its judgment in the Delcourt case, the European Court of Human Rights pointed out that Art. 6 (1) of the Convention does not compel the Contracting States to set up courts of appeal or of cassation but that, nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Art. 6 (Eur. Court H.R. Delcourt case, judgment of 17.1.1970, para. 25, Series A, pp. 13-15).

127. Thus, the Commission considers that, although Art. 6 does not guarantee an appeal in criminal proceedings, where the opportunity to lodge an appeal in regard to the determination of a criminal charge is provided under domestic law, the guarantees of Art. 6 continue to apply to the appeal proceedings, since those proceedings form part of the whole proceedings which determine the criminal charge at issue (Dec. No. 9315/81, 15.7.83, to be published in D.R. 34).

128. In the present cases, the proceedings before the Court of Appeal related to the examination of applications for leave to appeal against conviction and sentence. These proceedings were closely related to the appeal proceedings as such and, as appears from the present cases, the Court of Appeal had the competence not only to accept or reject the application for leave to appeal, but also to prolong the appellant's sentence by ordering "loss of time" (see below in paras. 137-139). In these circumstances, the Commission considers that the guarantees of Art. 6 were applicable to the applications for leave to appeal which were made by the applicants to the Court of Appeal.

b) The application of Art. 6 to the proceedings in question

129. The Commission must therefore consider whether, in the circumstances of the present cases, the guarantees of Art. 6 (1) and (3) (c) required that the applicants be present for the determination of their applications for leave to appeal.

130. The Commission has recognised (Dec. No. 1169/61, 24.9.63, Yearbook 6, p. 520 at p. 570) that "in certain classes or in certain sets of circumstances a "fair" hearing is scarcely conceivable without the presence in person of the party concerned". However, the extent to which such presence is actually required will depend upon the nature of the hearing in question, and in particular upon the scope of the powers enjoyed by the Court before which the hearing is held, and the significance of this hearing in the context of the proceedings as a whole. In the above mentioned application the applicant had been concerned with his non-appearance in what amounted to an application for review on cassation and not an appeal. The Commission found that the task of the Berlin Kammergericht in that case was not "to decide the material facts, nor the degree of culpability or criminal liability of the party concerned" and the "applicant's personal character and manner of life would not have been directly relevant to the formation of the Court's opinion".

131. Similarly, in its decision on the admissibility of Application No. 9728/82 (unpublished), the Commission considered that in order to examine the fairness of the appeal proceedings in the context of the proceedings as a whole, it should consider first the powers of the Court of Appeal and the scope of the hearing for leave to appeal, including the question whether it is a review of a lower court's decision, or whether it is a full rehearing. In addition, the Commission considers it necessary, in the light of the answer to this first question, to examine how the applicants' actual interests were presented and protected in the proceedings in question.

The powers of the Court of Appeal

132. As far as the powers of the Court of Appeal are concerned, the Commission notes first that, under the terms of Section 11 (3) Criminal Appeal Act 1968 (as amended by Section 56 and Schedule 8 of the Courts Act 1977 and Schedule 3 of the Powers of the Criminal Courts Act 1973), in determining an appeal the Court of Appeal shall:

> "so exercise their powers ... that taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below".

133. Furthermore, where leave to appeal is granted, the Court of Appeal has no power to order that any period spent awaiting the hearing should not count towards sentence under Section 29 Criminal Appeal Act 1968.

134. The position is materially different, however, in relation to the hearing of an application for leave to appeal where the application is refused. In such a case, the terms of Section 11 (3) Criminal Appeal Act 1968 are apparently overridden, since they apply to the exercise of the powers of the Court of Appeal where an appeal is actually heard, and the relevant provisions which regulate the powers of the Court of Appeal include Section 29 of the Criminal Appeal Act 1968. This section allows, in certain circumstances, the Court of Appeal to order part or all of the time spent awaiting the determination of the application for leave to appeal not to count towards the prospective appellant's service of sentence.

135. The proceedings concerning an application for leave to appeal do not involve a full rehearing of the case, but an examination by the Court of Appeal of the grounds for appeal drafted by the prospective appellant's counsel, or the prospective appellant in person, together with such parts of the transcript of the trial as the Court of Appeal requires. The nature of the hearing is therefore to determine whether or not a prospective appellant has shown grounds which would justify hearing an appeal, and not to determine the outcome of any such appeal, where leave is granted. In those cases where the Court of Appeal refuses leave to appeal and considers that the application for leave to appeal has been brought on a hopeless basis, and, especially where such applications are brought after the prospective appellant has had advice from counsel as to the existence of grounds for an appeal, or their absence, the Court of Appeal has the power to order "loss of time" as provided for under Section 29 Criminal Appeal Act 1968.

136. The respondent Government have contended that the effect of any order made that time be lost pursuant to Section 29 Criminal Appeal Act 1968 does not constitute an increase in the sentence served by the applicant, which has been finally determined in such a case by the trial court. Thus, in the Government's opinion, the order of loss of time merely amounts to a direction as to the manner in which sentence will be served by the applicant.

137. The Commission notes however that under English law a convicted person, who has not been detained on remand starts serving his sentence from the moment of his conviction at his trial. Thus in the case of the present applicants the first applicant's sentence of three years and nine months commenced on 4 September 1981, the date of his conviction for the burglary offence in question, subject to the deduction of any period spent in detention on remand from the total length of that sentence. Similarly, the second applicant's sentence of three and a half years started on 28 August 1980, once again subject to deduction of the period spent in detention on remand prior to conviction. Had neither applicant made an application for leave to appeal from his conviction and sentence, this calculation would in no way have been altered, save to take account of any remission which is due to them in the service of their sentences.

138. The position of both applicants was nevertheless expressly altered by virtue of the decision of the full Court of Appeal to order periods of time which the applicants had already spent in prison serving sentence not to count towards the service of their sentences. As a result, at the moment that the orders were made by the full Court of Appeal, the dates upon which the applicants could expect to be released from prison at the end of their sentences changed, with the result that the periods to be spent in prison by each of the applicants was increased.

139. It follows therefore that, although the applicants' actual sentences were not formally altered by the order made by the Court of Appeal, the result for both applicants was that they would spend a longer period in prison as a result of the order made, and that their interests were therefore deleteriously affected by the orders which were made.

The presentation and protection of the applicants' interests at the hearings in question

140. In the light of the above, the Commission must consider the actual protection which was afforded to the applicants at the hearings of their applications for leave to appeal, and whether this protection allowed the applicants a fair hearing in the determination of their criminal charges, viewed as a whole.

141. The Commission recalls first that one of the principles of a fair hearing which has been identified in its case-law is that of the equality of arms of the parties at the hearing. In the present case both applicants had requested leave to be present at the hearing of their application for leave to appeal and at any subsequent hearings if their applications were granted, although in both cases these requests were refused. The applicants were not otherwise represented by a barrister or by a solicitor before the Court. Similarly, however, the prosecution was not represented in relation to the applicants' leave to appeal applications, and thus, as between the prosecution and the defendants, equality of arms was formally respected.

142. The Commission must nevertheless consider whether the special circumstances of the hearing, and in particular the risks for the applicants implied by the power which the Court of Appeal decided to exercise to order loss of time against the applicants, did not require that they be present before such an order was made. The Commission recalls in this respect its partial decision on the admissibility of Application No. 9315/81 (see above para. 127), where it recognised that there was no overriding right for an appellant to be present before a Court of Appeal in a criminal case where there was no power

for the Court of Appeal to increase the appellant's sentence. In that case, in the absence of an appeal by the prosecution, and in accordance with Art. 294 (2) of the Austrian Code of Criminal Procedure, the Supreme Court was not empowered to impose a more severe sentence on the accused than that imposed by the Court of first instance. The Commission nevertheless considered whether, even in such circumstances, the applicant's presence, which he had requested, at the determination of his appeal was not required by the provisions of Art. 6.

143. The Commission concluded in that case that the reasons given for the Supreme Court's rejection of the applicant's appeal were objective conclusions, which were derived from an examination of the case-file which was before them, and did not involve a direct assessment of the applicant's personality and could not adversely affect the applicant's witnesses and that, in these circumstances, the applicant's right to a fair determination of the criminal charge against him was not prejudiced by his absence from the proceedings before the Supreme Court.

144. In the present case, however, the applicants' circumstances were significantly different from those in the above-mentioned application in that, although there was no power for the Court of Appeal to increase the sentences which had been imposed on conviction if an appeal was actually heard, where leave to appeal was refused as in the present cases, the Court of Appeal was empowered to make loss of time orders, which resulted in the applicants' period of imprisonment being increased. The Commission considers that where orders are made by a Court which affect the liberty of the subject, in the context of the process of a determination of a criminal charge, and the length of loss of liberty is increased, Art. 6 of the Convention requires that the accused person must normally be present and be able to be heard.

145. The Commission must therefore consider whether the particular circumstances of the power of the Court of Appeal, and the reasons for its exercise in the present cases, can justify any exception to this general principle.

146. The respondent Government have contended that the existence of the power to order loss of time is a vital deterrent to discourage hopeless applications for leave to appeal, launched where legal advice has been given to the prospective appellant to the effect that there are no arguable grounds of appeal. Such hopeless cases clog the process of sifting worthwhile appeals, and may thereby delay the hearing of meritorious appeals in criminal cases. Furthermore the respondent Government have stressed that prospective appellants, such as the applicants, are expressly put on notice of the power of the Court of Appeal to order loss of time by a reference in Form SJ, and that, in fact, this power is used very sparingly and only in those cases which are truly hopeless. In practice the existence of this power, and its sparing use, has significantly reduced the volume of querulant and worthless applications for leave to appeal lodged in criminal cases.

147. The Commission recognises the desirability of the aim pursued by the existence of the loss of time power, in attempting to avoid a backlog and delay in the determination of applications for leave to appeal. It is also highly significant that, under normal circumstances, no prospective appellant in the United Kingdom need be without legal advice as to the likely outcome of an application for leave to appeal.

148. However the Commission must also recognise the potentially extensive nature of the risk which a prospective appellant may run if a loss of time order is made against him. In particular the prospective appellant will have little or no control over the length of time which has elapsed since his original conviction until the determination of his application for leave to appeal. Nevertheless, it is this period which determines the length of time which may be ordered "lost", albeit that it appears from the submissions of the respondent Government that orders of loss of time are usually made for a restricted period of seven to 64 days.

149. From the present applicants' point of view however, the power which the Court of Appeal had to order the loss of time related to a period from 4 September 1981 to 20 May 1982 (in the first applicant's case) and from 28 August 1980 to 27 October 1981 (in the second applicant's case), ie a period of respectively more than eight months and fourteen months. These periods represented a significant proportion of the total sentences which had been imposed on the applicants.

150. The Commission takes into account, by way of analogy, that if the applicants had run the risk of such significant periods of loss of remission being imposed upon them in the course of prison disciplinary proceedings, they would have had the opportunity to be present and to be heard in relation to the allegations made against them. In the present cases, however, the orders were made in the context of a procedure which formed part of the determination of the criminal charges against the applicants.

151. In these circumstances the Commission finds that it is a requirement of fairness that where a significant power of this kind may be exercised against an applicant, in the context of proceedings which form part of the determination of a criminal charge against him, he should be allowed to be present at the proceedings in question.

152. The Commission therefore finds that the applicants' absence from the determination of their applications for leave to appeal, which resulted in the making of orders that they lost time in the calculation of their service of sentence, deprived them of a "fair hearing" in the determination of the criminal charges against them as guaranteed by Art. 6 (1) and of the right to defend themselves in person as guaranteed by Art. 6 (3) (c) of the Convention.

153. The Commission concludes, by nine votes to two, that there has been a breach of Art. 6 of the Convention in regard to both applicants.

III. Art. 14 of the Convention

154. The applicants have contended that the fact that they were imprisoned at the time of lodging their applications for leave to appeal and therefore had to seek leave to be present at the hearing of these applications, and were subject to the power in respect of loss of time exerciseable by the Court of Appeal, constitutes a difference in treatment with applicants for leave to appeal at liberty and that this difference is discriminatory contrary to Art. 14 read in conjunction with Art. 5 (as to the power exercised by the Court of Appeal) and Art. 6 (as to their presence before the Court of Appeal).

155. The Commission considers, in view of its conclusions in respect of Arts. 5 and Art. 6 above, and in view of the fact that the situation examined in relation to these Articles can only arise for detained persons, that no separate issue arises in regard to Art. 14 in conjunction with Arts. 5 and 6 of the Convention.

156. The Commission concludes

a) unanimously that it is not necessary to examine separately whether there has been a breach of Art. 14 in conjunction with Art. 5 of the Convention, and
b) by seven votes to four, that it is not necessary to examine separately whether there has been a breach of Art. 14 in conjunction with Art. 6 of the Convention.

IV. Summing up of the conclusions

157. The Commission concludes, by ten votes to one, that there has been a breach of Art. 5 (1) of the Convention in regard to both applicants.

158. The Commission concludes, by nine votes to two, that there has been a breach of Art. 6 of the Convention in regard to both applicants.

159. The Commission concludes

a) unanimously that it is not necessary to examine separately whether there has been a breach of Art. 14 in conjunction with Art. 5 of the Convention, and
b) by seven votes to four, that it is not necessary to examine separately whether there has been a breach of Art. 14 in conjunction with Art. 6 of the Convention.

Secretary to the Commission

(H.C. KRUGER)

President of the Commission

(C.A. NØRGAARD)

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Partially Dissenting Opinion of Mr. Nørgaard

1. In my opinion the facts of the present cases cannot give rise to violations of both Art. 5 and Art. 6 of the Convention.

2. With regard to Art. 5, it is significant that in the national legal systems of a number of Convention countries any period of detention between conviction at first instance and the hearing of an appeal constitutes detention on remand. The question whether such detention on remand should be counted towards sentence is normally then decided by the Court of Appeal when it considers the matter, and in such cases no issue could arise under Art. 5 of the Convention, even though such detention would be regarded under the terms of the Convention as authorised under Art. 5 (1) (a).

3. As the facts of the present case illustrate, the position is technically different under English law, in that detention prior to the hearing of an appeal application is not regarded as detention on remand but I find it difficult to conclude that this technical difference makes any substantial difference with regard to Art. 5 of the Convention. The decision to order loss of time was taken by a court and was lawful under domestic law. It was also taken after the applicants' convictions, albeit that it arose in a disciplinary context, which resulted from the nature of their appeals. Nevertheless, this disciplinary award was necessarily dependent upon the prior existence of the applicants' convictions in the same proceedings to which their applications for leave to appeal applied. I therefore consider that there was sufficient link between the loss of time orders made by the Court of Appeal and the applicants' original sentences for the detention which resulted from the loss of time orders to be considered justified under Art. 5 (1) (a) of the Convention. I therefore find no violation of this provision.

4. It follows, in my opinion, that the central issue in the present cases is whether the sanction imposed on the applicants in criminal proceedings (the loss of time spent serving sentence) was imposed in accordance with the procedural guarantees of Art. 6 of the Convention. Hence the question is whether the applicants had an opportunity of making representations in proceedings which formed part of the determination of criminal charges against them, taking account of the fact that the outcome of those proceedings resulted in their detention for increased periods.

5. On the facts of the present cases the procedural guarantees of Art. 6 were not provided to the applicants and I therefore agree with the majority's opinion in finding this provision violated.

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Partly dissenting opinion of Mr. Trechsel

1. As far as Art. 5 is concerned, I fully agree with the majority of the Commission that there has been a violation of the applicants' right to personal liberty. There is nothing I would add to the reasoning in this Report.

2. However, I disagree with the finding that Art. 6 has also been violated. I do not find it necessary to discuss the question of whether the right to a fair trial applies fully to proceedings for leave to appeal. Nor do I base my argument on any general appreciation of the right of a defendant to be personally present at such a hearing. The majority rests its conclusion on the fact that, by deciding not to count the time spent in detention pending the hearing of an application for leave to appeal, the Court of Appeal in fact made a determination of the applicant's right to liberty of person. This reasoning might perhaps be sound if it were established that the detention in question was to be regarded as a punishment within the meaning of Art. 5 (1) (a). However, this is not what has been established.

If, as the majority finds, Art. 5 has been violated due to the fact that the detention in question does not fall under any of the exceptions exhaustively enumerated in Art. 5 (1), then there is no basis for finding that the detention ought to have been imposed in proceedings respecting Art. 6. In fact, by deciding otherwise, the same shortcoming would be taken into account twice. I therefore cannot find that Art. 6 was violated in the present case.

3. I now turn to the question as to whether there was a violation of Art. 6 read in conjunction with Art. 14 of the Convention. Here, contrary to the majority of the Commission, I answer in the affirmative for the following reason.

The power of the Court of Appeal to decide that a period spent in detention awaiting the outcome of an application for leave to appeal should not be counted towards sentence is motivated by a desire to discourage unmeritorious applications for leave to appeal. Applicants for leave to appeal who are detained thereby incur a particular risk when deciding to apply for leave to appeal, a risk not imposed upon prospective applicants who are not detained. While I have left open the question of whether in proceedings for leave to appeal themsleves Art. 6 applies or not, I have no doubt that access to those proceedings is to be regarded as access to court, insofar as proceedings for leave to appeal do exist. I would refer, in this context, to what the Court said in the Belgian Linguistic Case at p. 33, para. 9.

In the present case, I can see no reason which could justify a special obstacle to access to proceedings for leave to appeal brought by a person in detention as opposed to a person not detained. This leads me to conclude that there has been a violation of Art. 6 read in conjunction with Art. 14 of the Convention.

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Partly dissenting opinion of Messrs Tenekides and Schermers

Although we are in agreement with the majority of the Commission on most aspects of the report, we nevertheless share Mr. Trechsel's view on Art. 14 read in conjunction with Art. 6 (para. 3 of Mr. Trechsel's partly dissenting opinion).

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APPENDIX I

HISTORY OF THE PROCEEDINGS

Application No. 9562/81

Item	Date	Participants
Examination of the Admissibility		
Introduction of the application	5 August 1981	
Registration of the application	3 November 1981	
Preliminary examination by the Rapporteur pursuant to Rule 40 of the Rules of Procedure	May and July 1981	
Commission's deliberations and decision to communicate the application to the respondent Government and to invite them pursuant to Rule 42 (2) (b) of the Rules of Procedure to submit written observations on its admissibility and merits	7 July 1982	MM Nørgaard, President Sperduti Fawcett Busuttil Tenekides Trechsel Kiernan Melchior Carrillo Gözübüyük Weitzel Soyer Schermers
Observations of the respondent Government	15 December 1982	
Observations of the applicant in reply	18 February 1983	

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Item	Date	Participants
Commission's deliberations and decision to invite the parties to make oral submissions on admissibility and merits pursuant to Rule 42 (3)(b) of the Rules of Procedure	4 May 1983	MM Nørgaard, President Sperduti Frowein Fawcett Trechsel Kiernan Melchior Sampaio Carrillo Gözübüyük Weitzel Soyer Danelius
Commission's deliberations and decision to invite the parties to submit further written observations on the admissibility and merits of the application prior to the proposed hearing pursuant to Rule 42 (3)(a) of the Rules of Procedure	14 July 1983	MM Nørgaard, President Sperduti Frowein Busuttil Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Gözübüyük Weitzel Soyer Schermers Danelius
Observations of the respondent Government	2 November 1983	
Observations of the applicant in reply	21 December 1983	
Commission's deliberations and decision to join the present application to application No. 9818/82 for the purposes of the hearing	17 January 1984	MM Nørgaard, President Sperduti Frowein Busuttil Jörundsson Tenekides Trechsel Keirnan Melchior Sampaio Gözübüyük Weitzel Soyer Schermers Danelius

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Item	Date	Participants
Hearing of the parties pursuant to Rule 42 (2) (b) of the Rules of Procedure, followed by deliberations on admissibility.	18 January 1984	MM Nørgaard, President Sperduti Fawcett Busuttil Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Carrillo Gözübüyük Weitzel Schermers Danelius
Commission's deliberations, decision on admissibility and decision to invite the parties to submit simultaneously such further written observations as they wished.	20 January 1984	MM Nørgaard, President Sperduti Fawcett Busuttil Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Carrillo Gözübüyük Weitzel Soyer Schermers Danelius Batliner
Commission's further deliberations on the merits and adoption of the present report	11 March 1985	MM Nørgaard, President Sperduti Busuttil Jörundsson Tenekides Trechsel Kiernan Carrillo Gözübüyük Schermers Danelius

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Application No. 9818/82

Item	Date	Participants
Examination of the Admissibility		
Introduction of the application	13 March 1982	
Registration of the application	23 April 1982	
Preliminary examination by the Rapporteur pursuant to Rule 40 of the Rules of Procedure		
Commission's deliberations and decision to communicate the application to the respondent Government and to invite them pursuant to Rule 42 (2) (b) of the Rules of Procedure to submit written observations on its admissibility and merits	5 October 1982	MM Nørgaard, President Frowein Fawcett Triantafyllides Opsahl Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Gözübüyük Weitzel Schermers
Observations of the respondent Government	2 February 1983	
Observations of the applicant in reply	29 April 1983	
Commission's deliberations and decision to invite the parties to make oral submissions on admissibility and merits pursuant to Rule 42 (3) (b) of the Rules of Procedure	14 July 1983	MM Nørgaard, President Sperduti Frowein Fawcett Busuttil Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Gözübüyük Weitzel Soyer Schermers Danelius

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Item	Date	Participants
Commission's deliberations and decision to invite the parties to submit further written observations on the admissibility and merits of the application prior to the proposed hearing pursuant to Rule 42 (3)(a) of the Rules of Procedure	14 July 1983	MM Nørgaard, President Sperduti Frowein Busuttil Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Gözübüyük Weitzel Soyer Schermers Danelius
Observations of the respondent Government	2 November 1983	
Observations of the applicant in reply	21 December 1983	
Commission's deliberations and decision to join the present application to application No. 9562/81 for the purposes of the hearing	17 January 1984	MM Nørgaard, President Sperduti Frowein Busuttil Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Gözübüyük Weitzel Soyer Schermers Danelius
Hearing of the parties pursuant to Rule 42 (2) (b) of the Rules of Procedure, followed by deliberations on admissibility.	18 January 1984	MM Nørgaard, President Sperduti Fawcett Busuttil Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Carrillo Cözübüyük Weitzel Schermers Danelius

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Item	Date	Participants
Commission's deliberations, decision on admissibility and decision to invite the parties to submit simultaneously such further written observations as they wished.	20 January 1984	MM Nørgaard, President Sperduti Fawcett Busuttil Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Carrillo Gözübüyük Weitzel Soyer Schermers Danelius Batliner
Further observations of the applicant	10 July 1984	
Commission's further deliberations on the merits and adoption of the present report	11 March 1985	MM Nørgaard, President Sperduti Busuttil Jörundsson Tenekides Trechsel Kiernan Carrillo Gözübüyük Schermers Danelius