AS TO THE ADMISSIBILITY OF

Application No. 18711/91
by A.B.
against the United Kingdom

The European Commission of Human Rights sitting in private on 9 December 1992, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 4 April 1991 by A.B. against the United Kingdom and registered on 22 August 1991 under file No. 18711/91;

Having regard to

- the report provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 7 July 1992 and the observations in reply submitted by the applicant on 24 September 1992;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1960 and resident in Glasgow. He is represented before the Commission by Mr. Dermot Queen, solicitor, practising in Glasgow.

The facts, as submitted by the parties, may be summarised as follows.

Between 29 March and 10 April 1990, the applicant stood trial in the High Court of Justiciary sitting in Edinburgh. He was accused of five charges - three charges of offences concerning a firearm, a charge

of wilful damage and a charge of assault and armed robbery.

The applicant received legal aid for his trial and was represented by solicitor and counsel.

During the course of the trial a prosecution witness, a Mrs. G., entered the courtroom prior to giving evidence, to speak to a co-accused of the applicant against whom charges had been dropped. When the trial judge was made aware of this by counsel for the applicant, he adjourned the case and instructed the Advocate Depute, the prosecuting counsel, to make further enquiries into the matter. Upon receiving the report of the Advocate Depute, the trial judge concluded that Mrs. G.s' appearance in court for a period of 20 minutes had not been the result of culpable negligence on the part of the Crown and, moreover, in the light of the evidence being led at the time when Mrs. G. was in the court and the evidence which the Crown indicated she herself would be giving, no injustice would be done in admitting Mrs. G. as a witness. He therefore exercised his discretion to do so. Counsel for the applicant subsequently had the opportunity to cross-examine Mrs. G. on the matter of her attendance in court.

Mrs. G. subsequently provided evidence in support of the prosecution case.

The applicant was convicted of the charges and sentenced to eight years imprisonment.

The applicant indicated his intention to appeal to the Clerk of the High Court of Justiciary on 17 April 1990. A Note of Appeal was thereafter lodged by the applicant's solicitors on 13 June 1990. Two of the six grounds of appeal were concerned with the trial judge's decision to admit the witness.

The applicant made an application for legal aid in or about May or June 1990. The application to the Scottish Legal Aid Board was accompanied by a memorandum for legal aid, a copy of the note of appeal, a supplementary statement of the grounds of appeal and a copy of the judge's summing-up to the jury. The original indictment and a note of previous convictions were also lodged.

In their letter of 25 July 1990, the Scottish Legal Aid Board informed the applicant that the information it had received was insufficient and required the Opinion of Counsel as to the prospects of success of the appeal. The applicant had already obtained an Opinion dated 10 June 1990 and this was forwarded to the Scottish Legal Aid Board as was a Supplementary Opinion dated 6 September 1990. These opinions were inconclusive, counsel stating that he had been provided with insufficient material on which to assess the merits of the appeal. Counsel later informed the applicant's solicitors by telephone that he did not support the appeal. As the applicant and his solicitor disagreed with the advice of counsel, his solicitor also submitted a copy of a letter to his Edinburgh agents expressing this disagreement.

On 14 November 1990, the Scottish Legal Aid Board informed the applicant that his application for legal aid had been refused as the Board was not satisfied that the applicant had substantial grounds for making an appeal. By letter of 11 December 1990, the Board added that it was not satisfied that there was any merit in the appeal.

The applicant continued to receive the advice of his solicitor, but as solicitors have no rights of audience in the High Court of Justiciary and counsel could not be instructed because of the refusal of legal aid, the applicant had to present the case himself on 24 January 1991 in Edinburgh. The Crown was represented by counsel. The applicant had no legal knowledge and received no assistance with his submission to the court.

The appeal court considered the first two grounds of appeal relating to Mrs. G. and held that these were ill-founded and that the trial judge had approached the matter properly. As the applicant did not address the court on the remaining grounds of appeal, these were not considered by the court. The appeal was unanimously dismissed.

COMPLAINTS

The applicant complains that he did not receive legal aid to be represented at his appeal and that he had as a result to present his appeal in person.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 4 April 1991 and registered on 22 August 1991.

On 2 April 1992, the Commission decided to communicate the application to the respondent Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 7 July 1992 and the applicant's observations in reply were submitted on 24 September 1992.

On 2 September 1992, the Commission granted the applicant legal aid.

THE LAW

The applicant complains that he was refused legal aid for his appeal. The Commission has examined his complaint under Article 6 para. 3 (c) (Art. 6-3-c) which provides:

> "(3) 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;"

The Government have submitted that the applicant has failed to exhaust domestic remedies in respect of his complaint of a refusal of legal aid for his appeal since he did not re-submit his legal aid application to the Legal Aid Board for it to review its decision and also did not apply for judicial review of the decision.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute a remedy, do not in reality offer any chance of redressing the alleged breach (cf. No. 9248/81, Dec. 10.10.83, D.R. 34 p. 78). The burden of proving the existence of the available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., Deweer judgment of 27 February 1980, Series A no. 35, p. 15, para. 26; No. 9013/80, Dec. 11.12.82, D.R. 30 p. 96, at p. 102).

As regards the respondent Government's contention that the applicant failed to re-apply to the Legal Aid Board, the Commission -

onsiders that the possibility of requesting an authority to reconsider a decision taken by it will not generally constitute an effective remedy for the purposes of Article 26 (Art. 26) of the Convention (cf. No. 7729/76, Dec. 17.12.76, D.R. 7 p. 164) and that there is no indication in the present case that such a re-application to the Legal Aid Board would have done so. In particular, the Commission notes that there had been no material change of circumstances or relevant new information to submit.

As regards judicial review which allows decisions to be challenged on the grounds of illegality, irrationality or procedural impropriety, the Commission finds that the Government has not furnished the necessary proof that the limited scope of this remedy would provide an available or sufficient remedy within the meaning of Article 26 (Art. 26) of the Convention in this case.

The Commission is accordingly unable to accept that the application should be declared inadmissible for non-exhaustion of domestic remedies.

The Commission has made a preliminary examination of the parties' observations on the merits of the complaint under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention. It considers that this complaint raises serious issues of fact and law which can only be resolved by an examination of the merits. The complaint cannot therefore be declared manifestly ill-founded under Article 27 para. 2 (Art. 27-2) of the Convention, but must be declared admissible, no other ground of inadmissibility having been established.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits.

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NØRGAARD)