AS TO THE ADMISSIBILITY OF

Application No. 21437/93
by Francis DOUGAN
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 11 May 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

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

Having regard to the application introduced on 22 November 1992 by Francis DOUGAN against the United Kingdom and registered on 25 February 1993 under file No. 21437/93;

Having regard to :

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

- the observations submitted by the respondent Government on 21 September 1993 and the observations in reply submitted by the applicant on 15 December 1993;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1949 and resident at Stenhousemuir, Larbert, Scotland.

He is represented before the Commission by John Caroll, Solicitor, Glasgow.

The facts of the present case, as submitted by the parties, may be summarised as follows :

A. The particular circumstances of the case

On 22 May 1981 the applicant was arrested and charged with the attempted murder of his wife. He appeared before the sheriff in Glasgow on 26 May 1981 when he was remanded in custody for two weeks and then released on bail. A few weeks later he was re-arrested at his home for breach of bail as he was alleged to have contacted his wife. He was again imprisoned on 30 June 1981 for a further two weeks and then granted bail of £200.

The applicant failed to appear for trial on 6 November 1981 and a warrant was granted by the Glasgow High Court for his arrest. The

warrant was passed by the court to the Procurator Fiscal's office in Glasgow, but it was not until 14 November 1984 that the warrant was issued by the Procurator Fiscal to the police with instructions for execution.

In the meantime the Procurator Fiscal had written to the Strathclyde police on 9 November 1981 informing them of the situation and instructing them to arrest the applicant without warrant pursuant to section 3(7) of the Bail Etc. (Scotland) Act 1980. They made a few unsuccessful inquiries as to the applicant's whereabouts.

After the instructions received in November 1984, further unsuccessful inquiries were made in an attempt to trace the applicant.

In September 1987 the applicant's solicitors telephoned the Procurator Fiscal's office indicating that the applicant was abroad but was considering returning to Scotland. He wished to know beforehand whether he would be granted bail. The Procurator Fiscal's office replied in writing to the solicitors on 9 December 1987 that the applicant's position would be reviewed if and when he cared to return.

On 25 January 1990 the police reported that their inquiries had been continuing, but the best information which they had was that the applicant had moved to the United States some years before and no contrary information had come to light. They were later aware that in May 1990 the applicant was issued with a full British passport.

On 10 January 1991 the applicant wrote to the Procurator Fiscal's office in Glasgow to ascertain whether proceedings were still outstanding against him. In the reply dated 25 January 1991 he was informed that, so far as could be ascertained, there appeared to be no outstanding proceedings against him but that this information should be double checked with the police.

Acting on information received, the police executed the warrant on 26 May 1992 and arrested the applicant. Following his arrest he was released from custody on bail, granted by the High Court on 9 June 1992. A new indictment was served upon him, charging him with three separate offences of assault and attempted murder, breach of the peace and failing to appear at his trial.

The applicant challenged the proceedings because of their delay. At a preliminary hearing in the High Court on 22 April 1993 before Lord Weir, his objection was rejected as there had been no oppression and as it would be open to the trial judge to give appropriate directions to the jury on how they should take account of the delay when arriving at their verdict. The applicant did not appeal against this decision as he was entitled to do under section 76A(1) of the Criminal Procedure (Scotland) Act 1975.

The applicant's trial was set for 26 April 1993, but adjourned twice at the applicant's request until 20 August 1993. The applicant pleaded guilty to assaulting his wife, but not of attempting to murder her. He also pleaded guilty to the charge of failing to appear at his trial set for 6 November 1981, when he was on bail. These pleas were accepted by the Crown and the applicant was convicted.

During the sentencing proceedings the applicant's counsel explained that the applicant had been in Scotland for most of the time from 1981 to 1984. He had then gone abroad and could not explain why the police had been unable to find him on his return. The applicant was sentenced on 10 September 1993 to 240 hours of community service and a fine of £1000.

B. The relevant domestic law and practice

a) Warrants to apprehend

Where an accused fails to attend for trial, a warrant may be issued to apprehend him. Such a warrant should be executed as soon as possible because delay in the execution of the warrant may mean that proceedings cannot be brought to a speedy conclusion. Delay in the execution of a warrant is, therefore, a factor which may be taken into account in determining whether to uphold a plea in bar of trial on grounds of delay.

The Crown does regularly review the position of warrants which are not executed. In this connection, the following points may be noted :

(i) the Procurator Fiscal can at any stage instruct the police to return the warrant to him and mark the case "no further proceedings", ie to make a decision that the prosecution will proceed no further ;

(ii) if a time-limit is given for execution and the warrant returned to the Procurator Fiscal, he may decide to take no further proceedings at that stage or return it to the police to make further attempts to execute ;

(iii) if no time-limits are given, then the Procurator Fiscal will normally request regular reports from the police and the efforts made to execute the warrant ;

(iv) in serious matters it is likely that the warrant will remain with the police for execution for a much longer period and, in a High Court case, particularly where the accused has failed to appear for his trial, a warrant is likely to remain in existence for many years.

b) Effect of delay

There is no time bar in Scots law on common law crimes, such as the crime of attempted murder for which the applicant was charged on 22 May 1981. Subject to the following points, therefore, the Lord Advocate can bring a prosecution for any crime, no matter how long the delay may be between the date when the offence was alleged to be committed and the date of the commencement of the trial.

In case of undue delay it is possible for the accused to take what is called "a plea in bar of trial". If successful, the court will prevent the prosecution from proceeding any further. The only ground upon which the court can prevent the Crown from proceeding to trial is the ground of "oppression", ie that to continue would be oppressive to the accused. The test for oppression in all cases is whether there is a risk of prejudice to the accused so grave that no direction by a trial judge could be expected to remove it and that it would not be possible for the accused, therefore, to receive a fair trial. Accordingly, it has been held in the case of McFadyen v. Annan 1992 SCCR 186 at 193B that

> "the real question which the court has to consider in all cases where delay is alleged is whether the delay has prejudiced the prospect of a fair trial. This involves the court asking itself whether the risk of prejudice from the delay is so grave that no direction by the trial judge could be expected to remove it ..."

In the later case of Normand v. Rooney 1992 SCCR 336, it was stated at page 340C

> "In solemn proceedings the question is whether the risk of prejudice is so grave that no direction by the trial judge, however careful, could be expected to remove it. That formulation creates no difficulty, because it leaves open the question whether the appropriate direction is to ignore the events which are alleged to be prejudicial or to take them into account in the assessment of the evidence ..."

Since the effect of the delay will depend upon the individual circumstances of the case, if the court does not hold that, as a matter of law, the proceedings are oppressive and that the prosecution should not proceed further, it then becomes a question for the jury to decide whether they can accept the credibility and reliability of the witnesses, bearing in mind the delay and any instructions given to them by the trial judge in connection with the effect of that delay. In other words, if the effect of delay ceases to be a matter of law, it then becomes a matter of fact for the jury to decide.

A rejection of such a plea in bar of trial on the ground of delay may be open to appeal, in accordance with section 76A of the Criminal Procedure (Scotland) Act 1975, which provides that

> "(1) Without prejudice to any right of appeal under section 228 or 280A of this Act, a party may, with the leave of the court of first instance ..., appeal to the High Court against a decision at a preliminary diet ; but any such appeal must be taken not later than 2 days after such decision."

COMPLAINTS

The applicant complains that the delay in prosecuting him for attempted murder is in violation of the reasonable time requirement of Article 6 para. 1 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 22 November 1992 and registered on 25 February 1993.

On 5 May 1993 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 21 September 1993, after an extension of the time-limit fixed for that purpose. The applicant replied on 15 December 1993, also after an extension of the time-limit. On 18 January 1994 the Commission granted the applicant legal aid.

THE LAW

1. The applicant complains of the delay that has ocurred in prosecuting him for the attempted murder of his wife. He invokes Article 6 (Art. 6) of the Convention, the relevant part of which provides as follows :

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time ..."

The proceedings in the present case began with the applicant's arrest on 22 May 1981 when he was charged, inter alia, with the attempted murder of his wife. They ended on 10 September 1993 when the applicant was sentenced to 240 hours of community service and a fine of £1000. The period in question is, therefore, just over 12 years and 3 months.

2. As a preliminary point, the Government contend that the applicant has failed to exhaust domestic remedies, as required by Article 26 (Art. 26) of the Convention.

The Government submit that the main reason for the delay in the case is the fact that the applicant failed to appear at his trial, set for 6 November 1981. Furthermore when he was tried in 1993 it was open to him, as he did, to take a "plea in bar of trial" on the ground of delay, which, if upheld, would have prevented the prosecution from proceeding

any further. As the applicant's plea was unsuccessful, he could have appealed under section 76A(1) of the Criminal Procedure (Scotland) Act 1975. He did not do so.

The applicant, in reply, points out that there is no prescriptive period or "statute of limitations" in Scotland in respect of the common law offences with which he was charged. In addition, recent interpretation of the law concerning pleas in bar of trial on the grounds of prejudice occasioned by delay demonstrate that such a challenge is almost bound to fail. Notwithstanding, the applicant's solicitors lodged a plea pursuant to section 76 of the Criminal Procedure (Scotland) Act 1975 but alluding, in addition, to the general public interest. It was argued, on behalf of the applicant, that the public interest would not be properly served in the circumstances of this case if the prosecution were to be allowed to continue. The fault in bringing this matter finally to a court, more than eleven and a half years after the first trial date, lay with the prosecution and the applicant had led his life as averred. The plea was dismissed and the failure to pursue the matter further by way of a merely academic appeal should not, it is submitted, be seized upon by the Government as evidence of any failure to exhaust domestic remedies.

Despite the passage of time, provided there is a sufficiency of evidence which is accepted by a jury then a conviction must follow. No regard may be given, by the jury, to any question of the applicant's behaviour from the date of the offence, and last court date (6 November 1981), to the date of the trial. That is merely a matter to be taken into account on the question of sentence, which is a function of the trial judge alone.

The Commission recalls that the obligation to exhaust domestic remedies contained in Article 26 (Art. 26) of the Convention is limited to making normal use of those remedies which are likely to be effective. If it can be shown that a remedy does not present at least some minimal prospect of success then the individual is not required to pursue it (cf. eg. No. 8378/78, Dec. 14.5.80, D.R. 20 p. 168, at p. 170). The question in the present case, therefore, is whether an appeal under section 76A (1) of the Criminal Procedure (Scotland) Act 1975 could have been effective.

The Commission has examined the parties' submissions on the question of exhaustion of domestic remedies and finds that, in the circumstances of the case, an appeal against the decision that the delay had not been oppressive to the applicant, presented no prospects of success. The Commission considers it most unlikely that the appeal court would have interfered with the factual assessment at first instance that there was no risk of prejudice to the applicant so grave that a direction by the trial judge could not have removed.

The Commission concludes that the applicant has complied with Article 26 (Art. 26) of the Convention.

3. As regards the substantive issue under Article 6 (Art. 6) of the Convention, the Government submit that the applicant is mainly responsible for the delay as he absconded and was untraceable, removing himself from the jurisdiction. They do not consider that it can be attributed to the police or prosecuting authorities. It is stated that the police made regular and extensive inquiries, albeit unsuccessful. These inquiries were not delayed by the failure of the Procurator Fiscal's office to instruct the police to execute the warrant until 14 November 1984, because he had previously instructed them, on 9 November 1981, to arrest the applicant, without a warrant, under section 3(7) of the Bail Etc. (Scotland) Act 1980. Given the seriousness of the offence with which the applicant was charged, the competent authorities might reasonably have been expected to pursue the prosecution to its conclusion.

The Government believe that the trial judge reflected his view of the delay in the proceedings with the light sentence imposed on the applicant.

The applicant submits that the delay in his case was not his responsibility. He claims to have at no stage taken steps to avoid arrest on the warrant. He considers that the instructions sent by the Glasgow Procurator Fiscal's office on 9 November 1981 to the Strathclyde police were confusing and disclosed no sense of urgency. The letter which was sent made no mention of the serious nature of the substantive charge of attempted murder against the applicant and gave the impression that the case was of a summary, minor kind.

The applicant makes no admission in respect of alleged enquiries to trace him, and points out that he lived his life openly and lawfully until arrested on 26 May 1992. It is averred that even a cursory enquiry, if competently carried out, could not have failed to locate him. He states that he did not abscond or make himself unavailable. He carried on a high profile career in the entertainment industry using a stage name known to his wife, the complainant. That name is "Frankie Dee".

His passport uses his real name and records movement between the United Kingdom and elsewhere where appropriate. He submits that it is inconceivable that the name and his business would not have been known to the police. Given the nature of the entertainment industry, the applicant sought and was given publicity in newspapers in Scotland and other parts of the United Kingdom and Europe. His career required him to travel about Europe. Consequently, his leaving and re-entering the United Kingdom would have been known to the prosecuting authorities and the police who claim, according to the Government, to have made "extensive enquiries". The applicant passed freely through official channels out of and into the United Kingdom.

The applicant claims that he was always available or could have been contacted relatively easily had the police or prosecuting authorities made any reasonable attempt to do so.

In the light of the parties' observations, the Commission considers that the application raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The application cannot, therefore, be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other ground for declaring it inadmissible has been established.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE,
without prejudging the merits.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)