AS TO THE ADMISSIBILITY OF

Application No. 28884/95
by Graham GARFORD
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 26 February 1997, the following members being present:

Mrs. J. LIDDY, President
MM. E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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

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

Having regard to the application introduced on 10 April 1995 by Graham GARFORD against the United Kingdom and registered on 6 October 1995 under file No. 28884/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1959 and presently detained at HM Prison, Norfolk. He is represented before the Commission by Mr. Hugh Durston Tallamy, solicitor. The facts as submitted by the applicant may be summarised as follows.

The applicant was arrested on 13 October 1993 and accused of having indecently assaulted Mrs. W on 22 September 1993, in the course of a meeting with her at the Housing Association where she worked. The case was first listed for a plea and directions hearing on 10 March 1994. On 21 June 1994, the prosecution gave the defence copies of all Mrs. W's medical records and the case was stood out until 5 September 1994 to allow time for consideration of those records. On the application of the defence the trial was re-fixed on 2 July 1994 for 15 September 1994, to accommodate counsel. In August the applicant changed his solicitors and on 2 September 1994, the defence applied to break the fixture date for the hearing in order to seek medical evidence concerning Mrs. W. That application was refused and the trial commenced on 15 September 1994, as arranged.

A consultant psychiatrist, Dr. R attended at court on the day and

it appears that he wrote his report ("the report") there and then. The report was based on the case notes of Dr. E, (Mrs. W's doctor since 1974 and a main witness in the trial) taken between 1975 and 1994, together with various other letters and documents, including medical notes relating to psychiatric illnesses that Mrs. W had suffered between 10 and 16 years ago and it concluded with the following:

> "Opinion: In view of [Mrs. W's] previous history of mental illness, (psychotic depression), together with her early childhood experiences with an abusive Father and alcoholic Mother, as well as her very unhappy first marriage to an untrustworthy and deceitful man, I believe that her evidence concerning [the applicant] must be regarded with extreme caution.
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> [Mrs. W] has clearly been abused by men in the past and is likely to be sensitised and sensitive to men who are dominant and frankly abusive (which [the applicant] admits he was).
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> In my view it is possible, even probable, that [Mrs. W] exaggerated the degree, type and extent of the assault."

The trial judge refused either to admit the report as evidence, or to allow Dr. R to give evidence, or to allow the defence to cross examine Mrs. W about her previous medical history. He pointed out that the report was a report written by someone who had not examined Mrs. W, that Dr. R had given no reasons in support of his conclusions and that the report did not purport to identify any existing illness from which Mrs. W was suffering. It appears that following discussion, Dr. R was given the opportunity to examine Mrs. W but considered that at that stage, a year after the offence was alleged to have been committed, such an examination would be of little, if any value. The defence then sought to argue that the evidence of Mrs. W should be excluded under s. 78 Police and Criminal Evidence Act 1984 ("PACE 1984") since the prosecution had not taken steps to have her examined by a psychiatrist.The judge refused the application on the grounds that there was no basis under s. 78 PACE 1984 for excluding that evidence. He stated:

> "I further rule, because there was extensive argument to me this morning before the jury was sworn, that the matters disclosed in [Dr. R's] report are not admissible in the trial which is about to take place. Having regard to the authority of R v Toohey [1965] AC 595, there is no sufficient evidence of any medical condition in [Mrs. W], either at the date of the alleged assault or as at today, which would justify the admission of evidence designed to undermine her credibility upon medical records.
>
> It follows that since I ruled that Dr. R's evidence, as it stands, is not admissible, it would be impermissible for [counsel], on behalf of the defendant, to cross-examine Mrs. W about her medical history. It does not stop [counsel for the defence] asking Mrs. W whether she enjoys good health at the material time. In my judgment, she is bound by whatever answer she receives."

On 16 September 1994 the applicant was found guilty of indecent assault and sentenced to three years' imprisonment.

On 13 March 1995 the Court of Appeal Criminal Division heard the applicant's application for leave to appeal against his conviction and sentence. Counsel for the defence argued that the trial judge had wrongly :

i. excluded the report of Dr. R, which she claimed did identify an illness from which the complainant suffered, and insofar as it did not, the judge should have allowed the defence to call Dr. R to make good any deficiencies in his report;
ii. refused to allow the defence to cross-examine Mrs. W on her past

medical history;
iii. admitted the evidence of Mrs. W, having rejected her application under s. 78 PACE 1984 for that evidence to be excluded.

The Court of Appeal Criminal Division refused leave. As regards the first ground of appeal, they stated the following:

> "It seems to us, with respect to that argument, that it is plainly wrong. Nowhere in the report does Dr. R identify any illness from which the complainant is said by him to be suffering all he does is to state what looks like a forensic conclusion, to the effect that she is, in his opinion, someone unreliable.... ....Alternatively, [counsel for the defence] says it may be that in an addendum to his report he could have made those deficiencies good.
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> As to that, we would say simply this: that it is apparent that although there was an opportunity for that to be done, Dr. R did not feel it appropriate and certainly did not take the step of preparing a further report or amplifying the report which he had written in any way."

As to the second ground of appeal, the Court stated the following:

> "The difficulty here is that what the admission of cross-examination would have involved was that the jury were being invited to conclude, on the basis of mental illness which had existed ten or more years before, that [Mrs. W] was somehow deluded or was for some other reason unreliable or not to be believed on her oath. That is not, in our judgment, a legitimate course. [Counsel for the defence] was in effect submitting what she says Dr. R, had he written a fuller report, would have said: that once this sort of mental illness has afflicted someone they are always prone to recurrence or some sort of flare up. That is not a matter on which the jury could, unaided, form a view, and it seems to us that it would have been, had the learned judge admitted such cross-examination, entirely wrong, because it would have permitted questions to the witness about a topic which was of no relevance to the issues before the jury... We consider that the learned judge was entirely right in the conclusion to which he came and that it does, on the facts of this case, follow inexorably from the rejection of the medical evidence that the cross-examination on the same topic would not be permissible."

As to the applicant's third ground of appeal, the Court stated:

> "There was plainly no duty upon the Crown to go to any further lengths to verify the competence and reliability of the witness and the suggestion that, notwithstanding [Dr. E's] view, they should themselves have commissioned psychiatric evidence is, in our judgment fanciful."

COMPLAINTS

1. The applicant complains that he was refused leave to call Dr. R and to give evidence as to the mental state of Mr. W. He further complains that he was not permitted to cross-examine Mrs. W on her previous medical history. He invokes Article 6 para. 3 (d) of the Convention.

2. The applicant further complains that he was denied adequate time and facilities for the preparation of his defence contrary to Article 6 para. 3 (b) of the Convention.

THE LAW

1. The applicant complains that he was not allowed to examine Dr. R or have his report admitted as evidence in the trial and that he was not allowed to cross examine Mrs. W on her medical history. He also claims that he was not given adequate time and facilities for the preparation of his defence. He invokes Article 6 paras. 3 (d) and (b) (Art. 6-3-b, 6-3-d)which provide as follows.

> "3. Everyone charged with a criminal offence has the following minimum rights:
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> b. to have adequate time and facilities for the preparation of his defence;
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> ...
>
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;".

2. The Commission recalls that, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. More specifically, Article 6 (3) (d) (Art. 6-3-d) leaves it to the national courts, again as a general rule, to assess whether it is appropriate to call witnesses, and Article 6 (3) (d) (Art. 6-3-d) offers no absolute right in that respect (see Eur. Court HR, Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, p. 32, para. 33 with further references, see also Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, para. 46).

The Commission observes firstly, that the trial judge decided that Dr. R's report should not be admitted in evidence because he considered there was insufficient evidence of any medical condition in [Mrs. W], either at the date of the alleged assault or as at the date of the trial, to justify the admission of evidence designed to undermine her credibility upon medical records. This was in accordance with the principles laid down in R v Toohey [1965] AC 595 and was upheld by the Court of Appeal on fact and law.

Secondly, the Commission recalls that in refusing to admit the report, the trial judge took into account the fact that Dr. R had never examined Mrs. W, while Dr. E, one of the main witnesses in the case, had been treating Mrs. W since 1975 and was able to give an informed view on Mrs. W's present state of health. Thirdly, the Commission notes that from the judgment of the Court of Appeal it appears that Dr. R was in fact given an opportunity to amend his report or to examine Mrs. W but did not consider it appropriate to do so.

As regards the judge's refusal to call Dr. R as a witness, the Commission recalls that the trial judge considered the evidence of Dr. R irrelevant, it relating solely to Mrs. W's medical condition over ten years before the trial, which had not been shown to have a bearing on her medical condition on the day of the alleged assault or of the trial. Similarly, the judge refused to allow the defence to cross examine Mrs. W on her previous medical condition, since such cross examination would have been directed to an irrelevant matter.

The Commission does not consider that the applicant has shown any overriding factors that indicate that the reasoned decisions of the domestic courts as regards the admission of evidence relating to Mrs. W's medical condition over ten years before the offence prejudiced his rights of defence. Nor has he shown that it was necessary to hear Dr. R for the purposes of ascertaining the truth, or that the refusal to hear his him prejudiced his rights of defence (see No. 9000/80, Dec. 11.3.82, D.R. 28, p. 127).

It follows that this part of the application must be dismissed

as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. As regards the applicant's complaint that he was not given adequate time and facilities for the preparation of his defence as required by Article 6 para. 3 (b) (Art. 6-3-b), the Commission notes that the applicant did not raise the refusal of the court below to adjourn the hearing of 15 September 1994 as a ground of appeal such that he may not have exhausted his domestic remedies as required by Article 26 (Art. 26) of the Convention. However, even assuming that no effective appeal lay on this basis and that all domestic remedies have been exhausted, the Commission observes that the applicant was represented by a solicitor and counsel at his trial and application for leave to appeal. The Commission notes that an adjournment had already been granted by the trial judge on request of the applicant's representatives. While it appears that the medical consultant was only able to write his report on the first day of the trial, the applicant has failed to substantiate in what way he was prevented from producing further evidence in his defence by the lack of a further adjournment, in particular by way of Dr. R preparing any further report or amplification during the course of the proceedings. Insofar as the applicant refers to his counsel having only three weeks to prepare from her taking up the case, the Commission finds that it is not substantiated that this time was inadequate in the circumstances of this case for an effective preparation of his defence.

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

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber