AS TO THE ADMISSIBILITY OF

Application No. 24487/94
by Steven John GIVEN
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 12 April 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 28 December 1993 by Steven John GIVEN against the United Kingdom and registered on 28 June 1994 under file No. 24487/94;

Having regard to:

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

- the observations submitted by the respondent Government on 6 April 1995 and the observations in reply submitted by the applicant on 2 October 1995 and the further observations submitted by the Government on 22 November 1995;

Having deliberated;

Decides as follows:

THE FACTS

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

Particular circumstances of the case

The applicant, a British citizen born in 1970, is currently serving a prison sentence in Edinburgh. He is represented before the Commission by John McLaughlin, a solicitor practising in Perth, Scotland.

Having been tried on indictment before a judge and jury, the applicant (together with a co-accused) was found guilty on 18 May 1993 by the High Court of Justiciary in Scotland of attempted murder and breach of the peace. The trial judge had available to him a note of the applicant's previous convictions indicating four previous convictions for assault and one for theft, none of which convictions resulted in

a custodial sentence. The trial judge also had a social enquiry report on the applicant's personal circumstances available to him. The applicant was sentenced to six years imprisonment for the attempted murder and to three months imprisonment for breaching the peace, the sentences to run concurrently from the date of sentencing.

Counsel's opinion dated 2 May 1993 indicated that there was no realistic prospect whatsoever of a successful appeal. On 28 May 1993 the applicant lodged an intimation of intention to appeal against both conviction and sentence. The applicant applied for legal aid for the appeal but this was refused on the grounds that the applicant had not satisfied the Legal Aid Board that he had "substantial grounds for making the appeal".

On 6 August 1993 the applicant lodged a minute of abandonment of his appeal against conviction and indicated his intention to proceed with his appeal against sentence. On 13 August 1993 he also lodged an application for an extension of time for appealing in relation to sentence only and the High Court granted that extension on 16 August 1993.

On 17 August 1993 the applicant's solicitors lodged a notice of appeal against sentence only, which notice detailed the grounds of the applicant's appeal. Those grounds referred to the relatively minor nature of the applicant's previous convictions and to the facts that the applicant had been recovering from an injury at the time of the incident, that the trial judge had failed to differentiate between the actions of the applicant and his co-accused, that the evidence clearly showed that the victim was behaving in an aggressive and quarrelsome manner and that the evidence clearly showed that the assault was in no way premeditated.

The trial judge prepared, pursuant to section 236A of the Criminal Procedure (Scotland) Act 1975, a report giving his opinion on the grounds of appeal and pointed out that on the evidence it was not possible to distinguish between the applicant and his co-accused as regards the parts they had played in the offence itself and disagreed that the evidence indicated that the applicant took a much more restricted part in the assault than his co-accused. He also noted that, though the applicant had a relatively minor record of previous offences, four out of five of these convictions were for assault. The trial judge went on to state that the records of the two defendants were not markedly different and that, while the victim had made a nuisance of himself, the trial judge felt justified in describing the offence as "a brutal and highly destructive attack of a cowardly character on a seriously drunk man". Finally, the trial judge indicated that he agreed that there was no indication that the assault concerned was premeditated or that any weapon of any sort was used.

The applicant did not elect to present his appeal in writing instead of orally as he was entitled to do. However and since he had to represent himself at the appeal hearing, the applicant claims that he prepared, with the assistance of his legal representatives, a statement to be read by him at the appeal hearing together with copies of the statement for the appeal judges.

On 5 November 1993 the applicant's appeal hearing took place before three judges of the High Court. The judges had before them the applicant's notice of appeal, the report prepared by the trial judge and all the papers which had been available to the trial judge including the note of previous convictions and the social enquiry report.

The applicant submits that he had only begun his address to the High Court when he was informed by one of the judges that the court had already decided to reject the appeal and then, without hearing further from the applicant, the High Court dismissed his appeal. The Government

have submitted a written judgment of the High Court on the applicant's appeal (over three pages) dated 5 November 1993. That judgment referred to the points of appeal which the applicant set out in his notice of appeal and to the opinion of the trial judge and continued as follows:

> "When he appeared today to argue his appeal, the <applicant> drew attention again to his record of previous convictions. He reminded us that he had not received a custodial sentence on any previous occasion. He also took us through the trial judge's report, and pointed out that much of what had happened that night had been preceded by various acts of provocation on the complainer's part. ... . We were asked to take account of that background in deciding whether that sentence was excessive. The <applicant> also said that, although the trial judge had suggested that he had been jumping on the complainer's head, there was other evidence that the part which he played was restricted to kicking the complainer on the legs. ... We have considered these submissions with some care. We have regard to the fact that it was the trial judge who heard the evidence and not us. The charge was one which the jury accepted as involving an attempted murder, and it was on that charge that they decided to convict him. A charge of murder is always a very serious charge. The injuries which are described in the trial judge's report fully justified a conviction for that very serious offence. In our opinion the sentence which the trial judge imposed in this case cannot reasonably be said to be excessive, having regard to the part which the <applicant> played in the incident, the degree and severity of the injuries and the nature of the charge of which the <applicant> was convicted."

The applicant's appeal was dismissed.

Relevant domestic law and practice

1. Prior to the Criminal Justice (Scotland) Act 1995 ("the 1995 Act")

(a) Criminal Appeals - Solemn proceedings

In solemn proceedings in Scotland where the trial proceeds upon an indictment before a judge sitting with a jury, a person convicted of a criminal charge has an automatic right of appeal granted by statute (section 228 of the Criminal Procedure (Scotland) At 1975 - "the 1975 Act"). No leave to appeal is therefore required.

In an appeal, the appellant may ask the court to review an alleged miscarriage of justice in the proceedings in which he was convicted (section 228(2) of the 1975 Act). A miscarriage of justice is not defined by statute but the term includes such matters as misdirections by the trial judge, wrong decisions on the admissibility of evidence and breaches of natural justice. The nature of the alleged miscarriage of justice must be specified in the grounds of appeal which must be lodged within eight weeks of the date when sentence is imposed upon the appellant (section 233(1) and (2) of the 1975 Act). An appellant may not, at the appeal hearing, found any aspect of his appeal on a ground which is not contained in the notice of appeal unless, exceptionally and on showing cause, he obtains the leave of the court to do so (section 233(3) of the 1975 Act.

Pursuant to section 236A of the 1975 Act the trial judge must, as soon as is reasonably practicable after receiving a copy of the notice of appeal, furnish a report in writing giving the trial judge's opinion on the case generally and on the grounds contained in the notice of appeal. Section 234 of the 1975 Act provides that the appellant can opt to present his case in writing instead of orally. However, in practice appellants present their case orally.

While there is no statutory provision relating to the conduct of

the appeal hearing (other than defining the quorum of judges as being three), the practice is that an appellant is afforded an opportunity to make oral submissions at such a hearing in support of his appeal and is also permitted to lodge other documents in support of the appeal. It is also open to the judges at that hearing to ask questions, or to put points to, the appellant. In addition, where an appellant refers to a pre-prepared statement, the practice is for the court to ask the appellant to present that statement orally or to provide copies of the statement to the judges to read for themselves.

The Crown is always represented by counsel (the Advocate Deputy) at the hearing of criminal appeals. The duty of such counsel is to act solely in the public interest and not to seek to uphold a wrongful decision. Accordingly, they will only address the court if requested to do so or if it is necessary to bring to the attention of the court some matter relevant to the appeal, whether favourable or not to the prosecution.

The court may dismiss the appeal and affirm the verdict of the trial court. In addition, the trial court verdict can be set aside either by the appeal court either by quashing the conviction or by substituting an amended verdict of guilty or by authorising a new prosecution (section 254 of the 1975 Act).

(b) Legal Aid for Criminal Appeals - Solemn proceedings

Responsibility for the administration of legal aid in Scotland is vested in the Scottish Legal Aid Board which is an independent body whose members are appointed by the Secretary of State.

Legal aid, which has been available for the trial, extends normally to include consideration and advice (by a lawyer and by counsel previously involved in the case) on the question of an appeal. Where appropriate legal aid is also available to enable a solicitor to draft and lodge the statutory intimation of intention to appeal and the notice of appeal setting out the grounds of appeal.

To extend legal aid beyond this point a further application to the Legal Aid Board is required. This application will be granted on fulfilling two conditions. In the first place, the appellant must be financially eligible for legal aid. Secondly, the appellant must have substantial grounds for making the appeal and it must be reasonable that legal aid should be made available in the circumstances. In deciding on these issues the Legal Aid Board will take into account, inter alia, any opinion prepared by counsel as to the appeal's prospects the success.

If legal aid has been refused and the appellate court is of the view that, prima facie, the appellant may have substantial grounds for taking the appeal and that it is in the interests of justice that the appellant should have assistance with the costs of legal representation to argue these grounds, that court can adjourn the hearing and recommend that the Legal Aid Board review their decision. This practice was formalised by the circulation of a Practice Note to this effect in 1990 following the judgment of the Court in the Granger application (Eur. Court H. R., Granger judgment of 28 March 1990, Series A no. 174). Where such a recommendation is made, legal aid is automatically granted (paragraph 6.12 of the Manual of Procedure of the Scottish legal Aid Board).

2. The 1995 Act

The 1995 Act, which applies to appeals from convictions handed down on or after 26 September 1995, provides that an appellant must apply for leave to appeal and such leave will be granted when the appellant shows arguable grounds for appeal. In line with that new appeals system, the 1995 Act also provides that legal aid will be

granted for an appeal where the applicant is financially eligible for legal aid and where leave to appeal has been granted.

COMPLAINTS

The applicant complains under Article 6 para. 1 of the Convention about the unfairness of his appeal hearing. He claims that he was not allowed to make any submissions during the High Court appeal hearing because, as the judges indicated to him, they had already decided the appeal before the hearing.

He also submits that his appeal was rendered unfair by the refusal of legal aid for the proceedings.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 28 December 1993 and was registered on 28 June 1994.

On 6 April 1995 the Commission decided to communicate the application to the respondent Government and to request them to submit observations on the admissibility and merits of the applicant's complaints under Article 6 paras. 1 and 3(c) of the Convention.

The Government's observations were received on 10 August 1995 after one extension of the time-limit fixed for this purpose. The applicant's observations were received on 2 October 1995. The Government submitted further observations on 22 November 1995.

THE LAW

1. The applicant complains that he was not allowed to present his appeal at all before the High Court and he invokes Article 6 para. 1 (Art. 6-1) of the Convention in this respect which, insofar as relevant, reads 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 by an independent and impartial tribunal established by law. ..."

The applicant submits that he had only begun his address the High Court as regards his appeal when he was informed by one of the judges that the court had already decided to reject the appeal. According to the applicant, the High Court then dismissed his appeal without hearing any further submissions from him. He was not, therefore, allowed to make oral submissions during the hearing (including not being allowed to read out his prepared statement) and he was not allowed to, and therefore did not, submit copies of his written prepared statement to the High Court. By way of substantiation of his allegations in this respect, the applicant referred to the Advocate Deputy, who was present at the hearing, as being in a position to confirm this. The applicant states that he does not accept the terms of the opinion of the High Court dated 5 November 1993, claiming that that opinion was not made available to him at the end of the appeal hearing or subsequently.

The Government maintain that the applicant's allegations about the approach of the High Court to hearing his appeal are unsubstantiated, arguing that the facts indicate precisely the contrary.

The Government have identified the Advocate Deputy, consulted her and she has indicated that, since she took no active part in the appeal hearing, she is not therefore in a position to clarify the matter further. The Government have also consulted the three judges in question who have confirmed that the applicant addressed the High Court in support of his appeal. Their notebooks do not indicate any reference

to a written statement by the applicant. Those judges have confirmed that it is the practice of the High Court, when an appellant indicates that he has a prepared statement, to ask that appellant to read out the statement to the court or to pass it on to the judges to read. The High Court judges have also confirmed that they do not believe that any variation of the practice took place on the occasion of the applicant's appeal and that no decision on the applicant's case took place before he addressed the court. A search of the papers before the High Court conducted by the Government did not reveal any statement by the applicant. Finally, the Government refer to the terms of the High Court's judgment dated 5 November 1993 which indicate that the High Court heard the applicant's oral submissions and considered them before reaching a decision on the appeal.

As to the applicant's statement that he does not accept the terms of that decision of the High Court, the Government submit that, in practice, the High Court gives its views on the appeal orally at the time of the hearing and then subsequently in written form, on request, to the appellant free of charge.

The Government therefore submits that this complaint is inadmissible as manifestly ill-founded or, alternatively, that it does not disclose a violation of the Convention.

The Commission recalls the terms of the High Court's written judgment of 5 November 1993 which records the High Court's consideration of the written grounds of appeal which the applicant set out (with legal assistance) in his notice of appeal and of the opinion of the trial judge. That judgment also clearly refers to the subsequent consideration by the High Court of oral submissions of the applicant as to his record of previous convictions, as to the trial judge's report (through which the applicant took the High Court orally) and as to acts of provocation on the victim's part. That judgment notes that the High Court had been "asked to take account of that background in deciding whether that sentence was excessive". The applicant's oral submissions as to the allegedly limited part he had played in the assault were noted as having been also considered. That judgment went on to state that the judges "have considered these submissions with some care".

That judgment then noted that it was the trial judge who heard the evidence, that the applicant was convicted of attempted murder by the jury and that that charge and injuries were serious. The written judgment went on to record that it had been concluded that the sentence which the trial judge imposed could not reasonably be said to be excessive having regard to the part which the applicant played in the incident, the degree and severity of the injuries and the nature of the charge of which the applicant was convicted.

The Commission is therefore of the opinion that the text of the written judgment of the High Court of 5 November 1993 clearly indicates that the applicant had the opportunity to make, and made, oral submissions during the appeal hearing and that the High Court reached its decision having considered those submissions. Furthermore, the Commission considers that the approach of the High Court to the appeal hearing evidenced by the written judgment described above is not demonstrative of a refusal, as alleged, to allow the applicant to read out a prepared statement.

However, the applicant submits that he does not "accept the terms" of that written judgment and that he was never sent a copy of it. In the first place, the Commission notes that it is not disputed that an oral judgment was delivered on the day of the hearing or that the applicant failed to request the written judgment, as he was entitled to do without incurring any expense. Secondly and insofar as the applicant alleges that the written judgment, as approved by the High Court or as furnished by the Government, records the hearing of

oral submissions that were never made, the Commission finds no evidence to support this allegation. On the contrary, the Commission notes that this judgment records submissions which were contained only in the applicant's prepared written statement. It is the applicant's case that the High Court judges never had before them a copy of that statement. It follows, therefore, that the applicant must have been permitted to read his prepared statement or at least to make oral submissions incorporating the contents of that statement.

In such circumstances, the Commission considers the applicant's allegations about the failure of the High Court to allow him to make oral submissions during the appeal hearing unsubstantiated and, accordingly, considers this complaint of the applicant manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains about the refusal of legal aid for his appeal and the Commission is of the opinion that this complaint should be considered under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention which, insofar as relevant, reads as follows:

> "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 request that the application be struck out insofar as it relates to the applicant's complaint about the lack of legal aid for the appeal hearing. They argue that it is no longer justified to continue the examination of this complaint given the changes made to the criminal appeals and criminal legal aid systems in Scotland by the 1995 Act, which Act was enacted following the Boner and Maxwell judgments of the Court (Eur. Court H.R., Boner and Maxwell judgments of 28 October 1994, Series A no. 300-B and 300-C). The applicant points out that the provisions of the 1995 Act do not relate to him or to his appeal in any way since his appeal had been determined prior to 26 September 1995.

The Commission notes that the provisions of the 1995 Act apply to appeals from convictions handed down on or after 26 September 1995 only and clearly do not benefit the applicant in any way as regards his complaint under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention, his legal aid application and appeal having been determined pursuant to the 1975 Act (mutatis mutandis, Eur. Court H.R., Axen judgment of 8 December 1983, Series A no. 72, p. 11, para. 24). In such circumstances, the Commission cannot accede to the Government's request.

As regards the substance of the complaint under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention, the applicant submits that the refusal of legal aid prevented the proper presentation of his appeal (particularly in relation to certain complex grounds of appeal such as the extent of his involvement in the assault) and thereby led to his appeal hearing being unfair. The Government has no observations on the substance of this complaint in light of the Court judgments in the Boner and Maxwell cases (Eur. Court H.R., Boner and Maxwell judgments, loc. cit.).

The Commission considers that this complaint of the applicant raises issues of fact and law which are of such complexity that their determination should depend on an examination of the merits. This complaint cannot therefore be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE without prejudging the merits the applicant's complaints about the refusal of legal aid for his appeal;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber — President of the First Chamber

(M. F. BUQUICCHIO) — (C. L. ROZAKIS)