AS TO THE ADMISSIBILITY OF

Application No. 20075/92
by Mark LEECH
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 31 August 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
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 9 March 1992 by Mark LEECH against the United Kingdom and registered on 3 June 1992 under file No 20075/92;

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 4 May 1993 and the observations in reply submitted by the applicant on 15 July 1993;

- responses to the Commission's questions to the parties submitted by the Government on 4 February 1994 and by the applicant on 30 March 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1957. He is detained at H.M. Prison Glenochil, Scotland. Before the Commission he is represented by Mrs. D. Haigh of Messrs. Shepherd and Wedderburn WS, solicitors practising in Edinburgh.

The particular circumstance of the case

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

On 7 August 1987 at Inverness High Court, Scotland and on 25 November 1988 at Reading Crown Court, England respectively the applicant was convicted of a series of offenses of theft, fraud, housebreaking, criminal damage, public mischief, forgery and arson. He was sentenced to a total of 6 years` imprisonment. On 28 November 1992

at Kilmarnock High Court, Scotland he was convicted of assault and robbery and was sentenced to 7 years` further imprisonment (with effect from 28 November 1991). He has been variously detained in prisons in England and Scotland.

Facts relating to complaints arising in England

On 7 August 1988 the applicant complained via his Member of Parliament about a letter to his legal adviser which had been delayed. On 9 September 1988 the Government apologised for the delay.

On 23 February 1989 the applicant lodged a complaint concerning opening of his legal correspondence in his absence. The complaint related to a letter from his legal adviser. On 24 May 1989 the Secretary of State apologised declaring that this was an error on the part of the prison staff.

On 24 July 1989 the applicant lodged a further complaint about the delay in posting a letter to his legal adviser. However, it was explained to him that this was caused by his not having marked the envelope as legally privileged. It was returned to him marked accordingly and posted unopened.

In 1990 the following specific letters to the applicant from his solicitor were opened in English prisons without him being present:

7 July 1990
8 July 1990
17 August 1990
31 August 1990
5 September 1990
10 September 1990
11 September 1990
14 September 1990
5 November 1990

The applicant instituted judicial review proceedings and claimed that the Prison Rules relating to correspondence with legal advisers were ultra vires. On 22 October 1991 the application was dismissed by the High Court. Mr. Justice Webster held that "...(any) reasonable Secretary of State...would decide that the restriction in question was reasonably necessary in the interests of security and I accordingly dismiss the application." The applicant appealed.

On 19 May 1993 the Court of Appeal allowed the applicant`s appeal. It declared that Rule 33(2) and 33(3) of the Prison Rules were ultra vires Section 47(1) of the 1952 Prison Act on the ground that they permitted the reading and stopping of confidential letters between a prisoner and a solicitor on wider grounds than merely to ascertain whether they were in truth bona fide communications between a solicitor and a client.

Facts relating to complaints arising in Scotland

In or about 1990 the applicant instituted civil proceedings in Scotland against the Secretary of State. He challenged the relevant Scottish Prison Rules and claimed in general, without specifying any particular letters, that the prison authorities had no right to peruse and/or stop legal correspondence.

On 26 October 1990 his petition was dismissed by the Lord Ordinary, Lord Caplan. On 13 December 1991 his appeal to the Court of Session was refused.

On 5 February 1992 the applicant was advised by Senior Counsel: "Although I consider that a good argument could be put before the House of Lords, I am not able to say that such an argument would have

reasonable prospects of success or have a more than 50% chance of winning..."

On 13 August 1992 the applicant lodged a petition with the Secretary of State for Scotland complaining about the opening of his legal correspondence without him being present.

On 30 October 1992 the Secretary of State acknowledged receipt of the applicant`s complaint.

From October 1992 onwards the applicant`s legal correspondence remained subject to interference, his letters to and from his legal advisers often being opened out of his presence and/or delayed.

Relevant domestic law and practice

England

Section 47(1) of the Prison Act 1952 reads as follows:

> "The Secretary of State may make rules for the regulation and management of prisons ... and for the classification, treatment, employment, discipline and control of persons required to be detained therein."

Rules 33 of the Prison (Amendment) Rules 1989 reads as follows:

> "(2) Except as provided by statute or these Rules,a prisoner shall not be permitted to communicate with any outside person, or that person with him, without the leave of the Secretary of State.
>
> (3) Except as provided by these Rules, every letter or communication to or from a prisoner may be read or examined by the governor or an officer deputed by him, and the governor may, at his discretion, stop any letter or communication on the ground that its contents are objectionable or that it is of inordinate length."

Rule 37A(1) provides:

> "A prisoner who is a party to any legal proceedings may correspond with his legal adviser in connection with the proceedings and unless the governor has reason to suppose that any such correspondence contains matter not relating to the proceedings it shall not be read or stopped under Rule 33(3) on these Rules."

Until the judgment of the Court of Appeal of 19 May 1993 letters to and from solicitors relating to contemplated legal proceedings could therefore be read and/or stopped by the prison authorities.

Scotland

Section 39(1) of the Prison (Scotland) Act 1989 states:

> "The Secretary of State may make rules for the regulation and management of prisons ... and for the classification, treatment, employment, discipline and control of persons required to be detained therein."

Rule 74(4) of the Prison (Scotland) Rules 1952 reads as follows:

> "Subject to the provisions of Rule 50(4) every letter to or from a prisoner shall be read by the Governor or by an officer deputed by him for that purpose and it shall be within the discretion of the Governor to stop any letter if he considers that the contents

are objectionable."

On 12 October 1992 changes to the regulations concerning legal correspondence entered into force. Standing Orders Amendment Circular 6/92 states that prisoners` legal correspondence may only be opened if there is a reason to believe that it contains an illicit enclosure not detected by the normal means, but even such a letter should only be opened but not read and it must be opened in the prisoner`s presence. Legal correspondence may be read in exceptional circumstance if the authorities have reasonable cause to believe that the privilege is being abused. On 1 October 1993 an amended Rule 74 (4) of the Prison Rules came into force. It provides that correspondence with a legal adviser may only be opened if the Governor or an officer has cause to believe that it contains a prohibited article, and the prisoner is present. A letter may only be read in exceptional circumstance where the Governor has reasonable cause to believe that the contents of the letter endanger the security of the prison or the safety of any person, or relate to a criminal activity.

COMPLAINTS

The applicant complains of interference with his correspondence with his solicitor and invokes Article 8 of the Convention. He complains that since 1987 his correspondence with his solicitors in connection with pending and contemplated litigation has been delayed and/or opened without his being present. The applicant has referred to the seven specific letters listed above, but mainly refers to correspondence generally.

The applicant also complains of a violation of Article 13 of the Convention, alleging the lack of domestic remedies concerning the above complaint.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 9 March 1992 and registered on 3 June 1992.

On 14 October 1992 the Commission decided to communicate the application to the respondent Government and to request them to submit their written observations on admissibility and merits.

The Government`s observations were submitted on 4 May 1993. On 15 July 1993 the applicant submitted his observations in reply.

On 11 May 1993 the Commission decided to grant the applicant legal aid.

On 11 January 1994 the Commission decided to put further questions to the parties. The Government submitted their response on 4 February 1994 and the applicant submitted his on 30 March 1994.

THE LAW

The English complaints

1. The applicant complains under Article 8 (Art. 8) of the Convention that the prison authorities opened his legal correspondence without his being present.

Article 8 (Art. 8) of the Convention provides as follows:

"1. Everyone has the right to respect for ... his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with

the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission notes that the applicant instituted judicial review proceedings in order to challenge the prison rules relating to legal correspondence. On 19 May 1993 the Court of Appeal, declared ultra vires Rule 33 (2) and (3) of the Prison Rules, which had provided the legal basis for the interferences with the applicant's legal correspondence, so far as the Rule purported to apply to correspondence between prisoners and their legal advisers.

It follows that the applicant can no longer be considered a victim of the above interferences with his legal correspondence in English prisons and that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains about the lack of an effective remedy and invokes Article 13 (Art. 13) of the Convention.

Article 13 (Art. 13) of the Convention reads as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission finds that, in connection with the complaints concerning the interferences with the applicant's correspondence whilst he was in prison in England, the applicant did in fact have an effective remedy in that on 19 May 1993 the Court of Appeal allowed his appeal.

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

The Scottish complaints

3. The applicant complains about interferences with his legal correspondence in respect of Scotland prior to 12 October 1992, again invoking Article 8 (Art. 8) of the Convention.

The Government accept that between 7 August 1987 and 12 October 1992 the prison authorities in Scotland may have opened the applicant's legal correspondence. However, they have no specific records of such information, and state that they cannot confirm or deny that such letters were interfered with, nor can they give reasons for any such interference. In their response to the Commission's questions of 11 January 1994 the Government, for the first time, submitted that the applicant had failed to exhaust domestic remedies in that he had not appealed to the House of Lords against the Court of Session's decision of 13 December 1991. They pointed out that he could have appealed to the House of Lords within three months of the decision of 13 December 1991, and considered that he thereby lost the opportunity that the House of Lords might have taken a similar approach to that subsequently taken by the Court of Appeal in the applicant's English application for judicial review. Alternatively, he could have applied for leave to appeal to the House of Lords out of time once he knew the outcome of his English application, that is, after 19 May 1993.

In reply to the Government's arguments on non-exhaustion, the applicant considers that the rule on exhaustion of domestic remedies does not require an applicant to the Commission to "go through every

tier of appeal to the Highest Court in the UK ...".

The Commission recalls that mere doubts, expressed by counsel, as to the prospects of success of a remedy, do not form a sufficient basis for absolving an applicant from the strict requirement of exhaustion of domestic remedies under Article 26 (Art. 26) (see, also in the context of an appeal to the House of Lords, No. 10789/84, Dec. 11.10.84, D.R. 40, p. 298). Moreover, the Commission notes that in the applicant's own application for judicial review before the English courts, the Court of Appeal quashed the relevant part of the English equivalent of the Scottish Rule 74 (4). It cannot, therefore, be said in the context of this type of complaint that judicial review is inadequate - whether by reason of the scope of consideration of facts or by reason of the remedies available - to amount to a remedy within the meaning of Article 26 (Art. 26). It has not been submitted that the remedy of judicial review in Scotland is in any way narrower than in England.

The Commission considers, therefore, that the applicant has not exhausted the remedies available to him under Scottish law. Moreover, an examination of the case does not disclose the existence of any special circumstances which might have absolved him, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies in this respect, and this part of the application must therefore be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

4. The applicant also alleges a violation of Article 13 (Art. 13) of the Convention in connection with the interference with his legal correspondence in Scotland prior to 12 October 1992.

The Government submit that the remedy open to and taken by the applicant in this respect complied with Article 13 (Art. 13). In particular, they point out that Article 13 (Art. 13) does not guarantee an outcome favourable to an applicant.

In the light of the Commission's finding that the applicant failed to exhaust domestic remedies in connection with his complaint of interference with his legal correspondence in Scotland, the Commission finds that the complaint under Article 13 (Art. 13) is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant makes complaints concerning interference with his legal correspondence in the period subsequent to 12 October 1992, that is, the date when the Amendment to the Standing Orders entered into force.

However, the Commission is again not required to decide whether or not these complaints disclose any appearance of a violation of Article 8 (Art. 8) of the Convention. It notes that the applicant has failed to challenge the provisions of the Amendment Circular before the Scottish courts, either by way of the type of challenge he mounted in 1990 against the rules as such, or by way of a challenge to a specific incident in which a letter to or from a legal adviser was read or stopped in breach of the Circular.

It follows that the applicant has not complied in this respect either with the condition as to the exhaustion of domestic remedies and this part of the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

6. Finally, the applicant complains about the lack of an effective remedy in respect of his complaints concerning Scotland subsequent to

12 October 1992. He again invokes Article 13 (Art. 13) of the Convention.

In the light of the Commission's finding that the applicant failed to exhaust domestic remedies in connection with his complaint of interference with his legal correspondence in Scotland subsequent to 12 October 1992, the Commission finds that the complaint under Article 13 (Art. 13) is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

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

For these reasons the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)