AS TO THE ADMISSIBILITY OF

Application No. 15861/89
by P.M.
against the United Kingdom

The European Commission of Human Rights sitting in private on 9 December 1991 , the following members being present:

MM.J. A. FROWEIN, President
F. ERMACORA
E. BUSUTTIL
A. S. GÖZÜBÜYÜK
H. DANELIUS
SirBasil HALL
MM.C.L. ROZAKIS
MM.L. LOUCAIDES
A.V. ALMEIDA RIBEIRO
B. MARXER

Mr. M. de SALVIA, Secretary to the First 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 August 1989 by P.M. against the United Kingdom and registered on 4 December 1989 under file No. 15861/89 ;

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 14 March 1991 and the observations in reply submitted by the applicant on 26 April 1991;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1948 and is currently serving a prison sentence in H.M. Prison Saughton, Edinburgh. The facts as submitted by the parties may be summarised as follows.

The applicant, his son and elder brother were charged with a number of offences relating inter alia to assaults inflicting grave injuries with a sword and knife in an incident in a public house. The applicant pleaded guilty to two charges of attempted murder and on 27 July 1988 was sentenced to two terms of imprisonment of eight years to run concurrently. While it appears that legal aid for Senior Counsel was not granted by the Scottish Legal Aid Board since it considered that the case did not present such features as would justify employment of such counsel, the applicant was in fact represented by Senior Counsel at trial, Mr. I. Hamilton Q.C. In his letter of 11 February 1990 to the Scottish Legal Aid Board, the applicant stated:

"I was allowed a Junior Q.C. for my defence, but my solicitor said this would not do for the High Court and got a Q.C. for the same money as the Junior."

The charges against his son were dropped at the beginning of the trial, although his brother, who pleaded not guilty, was found guilty

of 3 charges and also sentenced to two terms of imprisonment of eight years, to run concurrently.

The applicant appealed against sentence on the ground that it was excessive in view of his previous good record, his personal circumstances and the circumstances of the offence. The Note of Appeal was prepared by his solicitors. His brother appealed against the conviction and sentence.

The applicant had applied for legal aid for his appeal, but legal aid had been refused by the Legal Aid Board on 28 November 1988, on the ground that it did not consider that he had substantial grounds for making the appeal or that it was reasonable in the particular circumstances of the case that legal aid should be made available to him. The Board noted that this appeal had not been supported by a counsel's opinion.

The appeal was heard by the High Court of Justiciary. While the Advocate Depute was present for the Crown, as in all appeals, he played no part in the appeal and was not requested by the court to assist it in any way. The applicant was present and submitted a written statement to the Court and made oral submissions concerning his past good record.

The High Court gave its judgment on 5 May 1989 and dismissed the applicant's appeal. The Court found that the sentence was not excessive since the applicant had taken the principal part in the assault and had been the person who inflicted the injuries with a sword. His brother's appeal was also dismissed.

COMPLAINTS

The applicant complains of pressure allegedly put on him by the Procurator Fiscal who offered to withdraw charges against his son, brother and himself. He complains of the conduct of his defence by his solicitor and counsel and of being unable to obtain the examination of witnesses. The applicant also complains that the indictment was not served within the required seven days. He further complains of being refused legal aid on appeal contrary to Article 6 para. 3 (c) of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 22 August 1989 and registered on 4 December 1989.

On 7 November 1990, the Commission decided to communicate the application to the respondent Government for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 4 March 1991 after one extension in the time-limit and the applicant's observations in reply were submitted on 26 April 1991.

On 2 September 1991, the Commission decided to refer the application to the First Chamber.

THE LAW

1. Article 6 para. 3 (c) (Art. 6-3-c) of the Convention

The applicant has complained that he was refused legal aid for representation of his appeal. He invokes Article 6 para. 3 (c) (Art. 6-3-c) of the Convention 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 rmedies 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.

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. Application 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; Application 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 considers 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. Application 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. 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 complex 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 grounds for inadmissibility having been established.

2. Remaining complaints

The applicant has also complained of a number of matters concerning his trial, in particular, the conduct of the Procurator Fiscal and of his solicitor and counsel, of being unable to obtain the examination of witnesses and of a failure properly to serve the indictment.

The Commission finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

It follows that they are 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 ADMISSIBLE the applicant's complaint under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber President of the First Chamber

(M. de SALVIA) (J. A. FROWEIN)