F I N A L

AS TO THE ADMISSIBILITY OF

Application No. 18949/91
by Peter MAXWELL
against the United Kingdom

The European Commission of Human Rights sitting in private on 9 December 1992 the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 25 March 1991 by Peter Maxwell against the United Kingdom and registered on 15 October 1991 under file No. 18949/91 ;

Having regard to

- the Commission's Partial Decision dated 2 April 1992;

- the report provided for in Rule 47 of the Rules of Procedure of the Commission

- the observations submitted by the respondent Government on 1 July 1992 and the observations in reply submitted by the applicant on 14 August 1992 ;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen. He was born in 1944. He is currently detained at H.M. Prison Perth, Scotland.

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

On 28 May 1990, the applicant, along with a co-accused, stood trial on an indictment of breaking into a house and assaulting the occupant to his severe injury. On 29 May 1990, he was convicted and sentenced to 5 years imprisonment. The applicant, who had been granted free legal aid, was represented at trial by a solicitor and counsel.

On 17 December 1990, the applicant's solicitors applied to the Scottish Legal Aid Board for legal aid for representation at his appeal against conviction. In a note dated 10 January 1991, counsel advised that the applicant had no grounds of appeal against conviction. The applicant's solicitors submitted to the Legal Aid Board that the applicant should nonetheless be given legal aid in view of the lengthy sentence which the applicant had received.

On 23 January 1991 the Scottish Legal Aid Board rejected the applicant's application for legal aid for an appeal against conviction. It did so because it did not consider that there were substantial grounds for such an appeal.

The applicant prepared and submitted his own grounds of appeal against conviction.

On 21 March 1991 the applicant addressed the High Court of Justiciary in its appellate function on his grounds of appeal.

The grounds of appeal were, inter alia, as follows:

1. He could not substantiate his contention that a crucial witness was giving false evidence against him because to do so would have involved revealing to the jury a previous conviction.

2. A number of witnesses were not called by the Crown or Defence.

3. Crucial evidence was fabricated.

4. The verdict of the jury was not supported by the evidence.

5. His legal advisers disregarded instructions which he gave them and did not defend him in accordance with his instructions.

On the same date the Court refused the applicant's appeal against conviction. It found that none of the grounds of appeal supported the suggestion that there was any miscarriage of justice in the case.

COMPLAINTS

The applicant complains of being denied legal aid for his appeal. He invokes Article 6 para. 3 (c) of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 25 March 1991 and registered on 15 October 1991.

On 2 April 1992 the Commission decided to communicate the applicant's complaints under Article 6(3)c of the Convention to the respondent Government and to ask for written observations on their admissibility and merits. The remainder of the application was declared inadmissible.

The Government's observations were submitted on 1 July 1992 and the applicant's observations in reply were submitted on 14 August

1992.

THE LAW

1. The applicant complains that he was refused legal aid for his appeal. He invokes Article 6 para. 3 (c) (Art. 6-3-c) in this respect.

Article 6 para. 3 (c) (Art. 6-3-c) 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 remedies 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 and also did not apply for judicial review of the 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. 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; 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. 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.

As regards judicial review, the Commission finds that the Government has not furnished the necessary proof that the limited scope of this remedy would provide an available or sufficient remedy within the meaning of Article 26 (Art. 26) of the Convention.

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 serious 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 ground of inadmissibility having been established.

For these reasons, the Commission, unanimously,

DECLARES THE REMAINDER OF THE APPLICATION ADMISSIBLE, without prejudging the merits.

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NØRGAARD)