AS TO THE ADMISSIBILITY OF

Application No. 23934/94
by Peter MIDDLETON
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 1 January 1994 by Peter MIDDLETON against the United Kingdom and registered on 21 April 1994 under file No. 23934/94;

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 12 October 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 1956, is currently resident in Newcastle Upon Tyne, England. He is represented before the Commission by Barry Robson, a solicitor practising in Newcastle Upon Tyne.

On 7 December 1992 the applicant was arrested and charged on indictment with housebreaking with intent to steal from a premises in Jedburgh, Scotland. The applicant received legal aid from the Scottish Legal Aid Board ("the S.L.A.B.") and he was represented by a solicitor for the purposes of preparing his defence prior to the trial and for representation at his trial.

By letter dated 5 March 1993 the applicant's solicitor confirmed

that he had received all the police statements in the case. The applicant submits that he then had two meetings with his solicitor before the trial each meeting lasting 10 to 15 minutes.

The trial commenced in Scotland on 15 March 1993 (being the date initially fixed for the hearing), continued until 17 March 1993 and the applicant was represented by his solicitor. A significant part of the Crown evidence was given by police officers. After each day of the applicant's trial, the Scotsman newspaper reported on the evidence that had been given in the trial the previous day. At the trial the applicant's solicitor argued that the newspaper articles were prejudicial. On 17 March 1993 the trial judge commenced his directions to the jury as follows:

> "... you are the masters of the facts and it is your function to consider the facts of the case as presented to you in the evidence and to arrive at a decision based on those facts. Now when we are speaking about facts established by the evidence and you have to decide the case on the basis of the evidence which has been properly placed before you and not on the basis of any speculation nor any comment made by mouth or indeed any article in any newspaper that you may have read over the last day or so and you should not be influenced by any of these factors."

After the judge's summing up, the jury retired at 10.27 a.m., returned at 11.19 a.m. and delivered a unanimous verdict of guilty. Having heard evidence as to the applicant's previous convictions, many of which resulted in sentences of imprisonment (ten convictions prior to 1987, a conviction for attempted burglary in 1987, a conviction in 1990 for handling stolen goods and a further conviction in 1992 for burglary), the trial judge sentenced the applicant to three years imprisonment backdated to the date of his arrest on 7 December 1992.

On 25 March 1993 the applicant's solicitor lodged an intimation of intention to appeal against conviction to the High Court. On 27 April 1993 the applicant's solicitor lodged a notice of appeal to the High Court. There were two grounds of appeal contained in the notice of appeal. In the first place, it was argued that the evidence against the applicant was circumstantial and insufficient to link him to the crime alleged in the indictment. Secondly, it was submitted that the trial judge failed to direct the jury on the concept of "accessory after the fact" when the applicant's solicitor had raised the concept in his speech to the jury indicating that the judge would advise the jury on this matter in due course.

The legal aid for the applicant's trial covered legal advice in connection with his appeal but did not cover legal representation at the appeal hearing. Accordingly, on 31 March 1993 an application was made to the S.L.A.B. for legal aid to cover the applicant's representation at the appeal hearing.

On 28 May 1993 the trial judge lodged his report on the trial in the High Court pursuant to section 236A of the Criminal Procedure (Scotland) Act 1975. On 25 June 1993 the applicant's counsel prepared a written opinion (also covered by the legal aid granted for the applicant's trial) to the effect that the applicant's appeal had no prospect of success.

The applicant submits that his solicitor informed him, during a consultation on 1 July 1993, that the application for legal aid for the appeal had been refused.

By letter dated 15 September 1993 the applicant's solicitor informed the applicant that counsel's opinion had been forwarded to the S.L.A.B.. In a letter dated 24 September 1993 to the applicant his solicitor stated that he was waiting to hear from the S.L.A.B. as to whether the S.L.A.B. "confirm" that legal aid has been refused. On

1 October 1993 the S.L.A.B. wrote to the applicant directly indicating that a decision on legal aid "was still pending" and that the S.L.A.B. awaited counsel's opinion.

The applicant's appeal was heard on 8 October 1993 and the applicant presented his appeal in person. His appeal was rejected, the court finding (in a five page judgment) that the trial judge's view on the evidence and his direction to the jury were correct. On the date of the appeal hearing the S.L.A.B. had neither refused nor granted the applicant further legal aid but the applicant submits that he was under the impression that legal aid had already been refused.

The S.L.A.B. notified the applicant, by letter dated 21 October 1993, that his solicitor had lodged counsel's opinion with the S.L.A.B. on 15 October 1993. Unaware that the appeal hearing had already taken place, the S.L.A.B. proceeded to consider the legal aid application and, by letter dated 3 November 1993, notified the applicant's legal representatives that the legal aid application had been refused. The reasons given by the S.L.A.B. for refusing legal aid were outlined (in a subsequent letter to the applicant dated 25 May 1994) as follows:

> ".... the Board was not satisfied that you had substantial grounds for making the appeal, nor was it reasonable, in the particular circumstances of the case that legal aid should be made available to you. In arriving at this decision, the Board noted that your appeal was not supported by counsel"

The applicant was released from prison on 6 June 1994.

Relevant domestic law and practice

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) Act 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

it 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 copy same 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 quashing the conviction, substituting an amended verdict of guilty or by authorising a new prosecution (section 254 of the 1975 Act).

Legal Aid for Criminal Appeals : Responsibility for the administration of legal aid in Scotland is vested in the Scottish Legal Aid Board ("the S.L.A.B.") 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 prepare and lodge the statutory intimation of intention to appeal and for the drafting and lodging of the notice of appeal setting out the grounds of appeal.

To extend legal aid beyond this point a further application to the S.L.A.B. 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 S.L.A.B. will take into account, inter alia, any opinion completed 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 S.L.A.B. 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).

The Criminal Justice (Scotland) Act 1995 ("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.

Access to Crown statements and precognition of Crown witnesses : While

there is no obligation on the Crown to provide a list of Crown witnesses to the defence, as a matter of practice the Prosecutor Fiscal provides a list of Crown witnesses on request on the basis that the defence will reciprocate by providing a list of their witnesses. Also as a matter of practice, defence solicitors can have a discussion with the Prosecutor Fiscal as to the nature of the Crown evidence in order that the defence may arrange, for example, the precognitions they find necessary or consider an appropriate plea. There is no entitlement to obtain copies of the Crown witness statements.

The defence may request precognition of Crown witnesses (ie. the witnesses may be requested to submit to questioning by the defence prior to the trial). There is no obligation on the Crown witness to give precognition although there is some authority for the view that it is part of that person's civic duty to do so. If a witness is reluctant, the defence can apply for precognition on oath. While there is some authority for the view that precognition on oath should only be allowed in exceptional circumstances, it has been held that the object of the statutory provision is to place the defence on equal terms with the Crown in the preparation of the case (Brady v. Lochart 1985 SCCR 349).

COMPLAINTS

The applicant complains under:

1. Article 6 para. 1 of the Convention that newspaper articles, published during the trial and describing the evidence presented during the previous days of the trial, had prejudiced the jury. He also complains that his solicitor did not adequately raise the issue of "accessory after the fact" in his speech to the jury.

2. Article 6 para. 3 (b) of the Convention that he did not have adequate time to prepare his defence prior to his trial. He submits, inter alia, that he had only two short pre-trial meetings with his solicitor and that he received the Crown witness statements only ten days prior to the trial. Despite this, no adjournment of the applicant's trial was sought by his solicitor or granted by the trial court.

3. Article 6 para. 3 (c) of the Convention that he was refused legal aid for his appeal and that he was obliged to present his own appeal though he was incapable of doing so.

4. Article 6 para. 3 (d) of the Convention that his solicitor did not call the applicant's wife and co-accused as defence witnesses to give evidence during the trial and did not interview Crown witnesses on the applicant's behalf prior to the trial.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 1 January 1994 and was registered on 21 April 1994.

On 12 October 1994 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 para. 3(c) of the Convention.

The Government's observations were received on 12 October 1995 pursuant to unsuccessful settlement negotiations and after one extension of the time-limit fixed for this purpose. No observations were received from the applicant within the time allowed. A request by the applicant's representatives for an extension of time was made more than two months after the expiry of the time-limit fixed and was, accordingly, denied.

THE LAW

1. The applicant complains, in the first place, that his trial was unfair because the publication of newspaper articles during the trial meant that the jury was prejudiced against him and because his solicitor did not adequately raise the issue of "accessory after the fact" in his speech to the jury. He invokes Article 6 para. 1 (Art. 6-1) of the Convention, 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. ... ."

As regards the applicant's complaint concerning jury prejudice, the Commission recalls that, according to the constant case-law of the Convention organs, the existence of impartiality must be determined according to a subjective test namely, on the basis of a personal conviction of a particular judge in a given case - personal impartiality being assumed until there is proof to the contrary (see, for example, Eur. Court H.R., Padovani judgment of 26 February 1993, Series A no. 257-B, p. 20, paras. 25-26).

In addition, an objective test must be applied. It must be ascertained whether sufficient guarantees exist to exclude any legitimate doubt in this respect. Even appearances may be important; what is at stake is the confidence which the court must inspire in the accused in criminal proceedings and what is decisive is whether the applicant's fear as to a lack of impartiality can be regarded as objectively justifiable (Eur. Court H.R., De Cubber judgment of 26 October 1984, Series A no. 86, p. 14, para. 26 and Padovani judgment, loc. cit., p. 20, paras. 25 and 27).

Furthermore, these principles apply equally to each juror as the sole arbiters of fact (Eur. Court H.R., Holm judgment of 25 November 1993, Series A no. 279-A, p. 14, para. 30 and, mutatis mutandis, No. 19874/92, Ferrantelli and Santangelo v. Italy, Comm. Report 2.3.95, unpublished). Moreover, given that juries in the United Kingdom deliberate in private, give no reasons for their decisions and that there is, at the very least, a strong inhibition on enquiring about the nature of juror discussions, it is not possible to adduce evidence as to the subjective impartiality on the part of one or more jurors. In such circumstances, additional importance would therefore attach to ensuring that the impartiality of the jury is, "by other means", objectively guaranteed (No. 14191/88, Holm v. Sweden, Comm. Report 13.10.92, Series A no. 279-A, p. 26, para. 64 and No. 22399/93, Pullar v. the United Kingdom, Comm. Report 11.1.95, p. 7 para. 39).

Finally, the Commission recalls that a careful redirection to the jury can, in certain circumstances, suffice to establish the objective impartiality of a jury in the United Kingdom (No. 22299/93, Gregory v. the United Kingdom, Comm. Report 18.10.95).

In the present case, the Commission finds no evidence of subjective bias on the part of any juror. As to whether the applicant's fears of bias on the part of the jurors due to the newspaper coverage can be said to be objectively justifiable, the Commission recalls that, in the present case, the trial proceeded over three days and considers that the trial judge was well placed to evaluate the jurors by his interaction with them over that period. Having been made aware of the issue concerning newspaper reports, the trial judge commenced his directions to the jury by carefully emphasising the necessity to decide the case on the facts placed before them during the trial and not on the basis of any speculation or comment made elsewhere including those in newspapers.

In addition, the newspaper articles submitted by the applicant were relatively short and the Commission considers that they simply recorded, without comment, the evidence that had been presented during the previous days of the trial by various witnesses including the applicant.

In the circumstances, the Commission considers that the applicant's fears of bias on the part of the juror's are not objectively justifiable. The Commission concludes that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

The Commission has considered at paragraph 3. below the applicant's complaints as to his solicitor's handling during the trial of the "accessory after the fact" issue.

2. The applicant further complains that his trial was unfair because he did not have adequate time to prepare his defence. In particular, he submits that he only had two pre-trial meetings with his solicitor each lasting 10 to 15 minutes and that he received the Crown witness statements ten days before the trial. He also complains that no adjournment was given by the trial court even in light of these circumstances. The applicant invokes Article 6 para. 3 (b) (Art. 6-3-b) of the Convention, which, insofar as is relevant, reads as follows:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> > b. to have adequate time and facilities for the preparation of his defence;..."

As regards the applicant's meetings with his solicitor, the Commission considers that there is no evidence that the applicant was prevented by the prison or other authorities from arranging any further meetings with his solicitor.

As regards the Crown witness statements, there is no evidence as to whether, and if so when, the Prosecutor Fiscal was requested for a list of all Crown witnesses. In addition, the applicant was entitled to take precognition of Crown witnesses (either voluntarily or on oath in the case of a reluctant witness) and the applicant confirms that this was not done. In any event, the applicant's solicitor's letter of 5 March 1993 confirms that that solicitor had by then received all of the police statements (which constituted a significant part of the case against the applicant). Furthermore, the applicant's solicitor would have had the opportunity to cross-examine all Crown witnesses during the trial and address the jury as to their evidence.

As to the failure by the trial court to adjourn the trial, there is no evidence that any application for an adjournment was made to the court.

In the above circumstances, the Commission concludes that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

Insofar as the matters raised by the applicant in this context give rise to complaints against his solicitor in relation to the preparation for and conduct of his trial, the Commission has considered this matter at paragraph 3. below.

3. In the context of some of the applicant's complaints, the applicant complains about his solicitor's preparation for and conduct of his trial. In particular, the applicant complains, inter alia, that his solicitor did not adequately raise the issue of "accessory after the fact" in his speech to the jury, did not apply for an adjournment of the trial, did not call the applicant's wife and co-accused as

defence witnesses to give evidence during the trial and did not interview Crown witnesses prior to the trial.

The Commission recalls that, as regards complaints about lawyers for whom the applicant has received legal aid, the responsibility of the State can only be engaged in relation to that lawyer's actions to the extent that the applicant is not provided with effective assistance by that lawyer (Eur. Court H.R., Artico judgment of 13 May 1980, Series A no. 37, p. 16, para. 33).

Having considered the matters raised by the application relating to the applicant's solicitor's preparation and conduct of his trial, the Commission does not consider that the applicant has demonstrated that his solicitor failed (as a result of, for example, his solicitor's absence or mistake) to exercise the defence rights prior to or during the trial. The Commission further considers that the fact that the applicant's solicitor may have resolved not to take certain available steps does not constitute less than "effective assistance" within the meaning of the afore-mentioned Artico judgment and does not, therefore, engage the responsibility of the State.

Accordingly, the Commission concludes that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. Finally, the applicant complains that his appeal hearing was unfair because he was refused legal aid for his appeal and that he was obliged to present his own appeal though he was incapable of doing so. He invokes 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 argue that it is no longer justified to continue the examination of this complaint given the changes made by the 1995 Act to the criminal appeals and criminal legal aid systems in Scotland. However, the Commission notes that the provisions of the 1995 Act apply to appeals from convictions handed down on or after 26 September 1995 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).

The Government also point out that the applicant had not, as a matter of fact, been refused legal aid at the time of his appeal but accept that, if the opinion prepared by the applicant's counsel had been submitted to the S.L.A.B. prior to the appeal hearing, it is likely that the decision of the S.L.A.B. would have been the same as that eventually given. From the correspondence submitted by the applicant, it is apparent that the information which the applicant received from his solicitor and from the S.L.A.B., in relation to the status of the application for legal aid for the appeal, was inconsistent. As a result the applicant represented himself at the appeal hearing because, according to the applicant, he was under the impression that legal aid for his appeal had already been refused.

The Commission does not consider that the fact that the applicant conducted his own appeal at a time when the decision on legal aid had not yet been given can affect the applicant's ability to claim to be a victim of a violation of the Convention. The Commission considers,

and it is not disputed by the Government, that had the decision of the S.L.A.B. been given before any appeal hearing took place, the decision of the S.L.A.B. was not likely to have been any different. Accordingly, the applicant would have had to represent himself at his appeal in any event and, in such circumstances, the Commission considers that the applicant can claim to be a victim of a violation of Article 6 para. 3 (c) (Art. 6-3-c) of the Convention.

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 as he found himself in a different legal system to that applicable where he resided at the relevant time) and thereby led to his appeal hearing being unfair. The Government have 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 of 28 October 1994, Series A nos. 300-B and 300-C).

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 complaint 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)