AS TO THE ADMISSIBILITY OF

Application No. 25523/94
by George MURDOCH
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.S. GÖZÜBÜYÜK
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 21 October 1993 by George MURDOCH against the United Kingdom and registered on 3 November 1994 under file No. 25523/94;

Having regard to:

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

- the Commission's decision of 6 September 1995 to communicate the application;

- the observations submitted by the respondent Government on 20 November 1995 and the observations of the applicant in reply submitted on 19 January 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a citizen of the United Kingdom, born in 1951 in Scotland. He is a student and is currently residing in Kirriemuir in Scotland. In the proceedings before the Commission the applicant is represented by Mr. J. Justice, a solicitor practising in Kirriemuir.

The facts of the case, as they have been submitted by the parties, may be summarised as follows:

A. Particular circumstances of the case

On 10 August 1991 the applicant was arrested in connection with drug-related offences.

On 28 September 1992 the applicant appeared before the High Court of Justiciary in Perth to be tried on four charges relating to the possession and supply of a controlled drug, namely cannabis resin, under the Misuse of Drugs Act 1971. He was represented by Senior and Junior Counsel, having been granted legal aid from the Scottish Legal Aid Board. In the course of the trial, which lasted until 2 October 1992, the court heard, among others, two police officers who from behind some bushes had observed the applicant visit a clearing in a wood where cannabis had been buried.

In a judgment pronounced on 2 October 1992, the court found the applicant guilty of having been involved in the supply of cannabis, contrary to section 4 par. 3 (b) of the Misuse of Drugs Act 1971, and not guilty of two other charges. The court considered the fourth charge not proven. It sentenced the applicant to two years imprisonment.

On 8 October 1992 the applicant gave to the High Court of Justiciary notice of his intention to appeal against his conviction and sentence. On 16 October 1992, however, the applicant abandoned his appeal against sentence.

On 28 October 1992 the applicant lodged with the High Court the note of his appeal against conviction on the grounds, first, that the trial judge had misdirected the jury on the law of corroboration and, secondly, that before giving evidence one of the prosecution witnesses, police officer F, had discussed his testimony with H, a private investigator acting for the applicant who had been cited as a witness for the defence. On 30 October 1992 the applicant was conditionally released pending the outcome of his appeal.

On 6 November 1992 the applicant applied to the Legal Aid Board for a further grant of legal aid to cover legal representation for his appeal. On 3 December 1992 the solicitors who had until then been representing the applicant informed the Legal Aid Board that they could no longer act for him, because of a conflict of interest. On 8 December the Legal Aid Board was informed that another firm of solicitors had taken up the applicant's case.

On 22 February 1993 the applicant's new solicitors advised him not to instruct new counsel for his appeal because his was "the type of case in which it (was) virtually impossible to fully comprehend the whole evidence and the various nuances arising from it without having been involved throughout." They also requested a written opinion from one of the two counsel who had represented the applicant before the first instance court on the prospects of success of the applicant's appeal. A hearing fixed for 4 March 1993 before the High Court of Justiciary was adjourned at the applicant's request.

In an opinion delivered on 14 April 1993, the applicant's counsel considered that the applicant's appeal did not have any prospects of success. By letter dated 15 April 1993, the applicant's solicitors informed him that, given the negative opinion delivered by counsel, it was inevitable that legal aid would be refused. Considering, moreover, that, even if he were to find private funding, it would be impossible for the applicant to persuade another lawyer to argue his case, they advised him either to abandon the appeal or to represent himself. The applicant claims to have received this letter on 19 April 1993.

On 18 April 1993 the applicant applied for a second adjournment. On 23 April 1993 he was informed that his request would be examined by the court in the course of the hearing of 30 April 1993. On the same day the Legal Aid Board refused the applicant's application for legal aid and orally informed the applicant's solicitors.

On 26 April 1993 the applicant wrote to the police asking them to provide him with a copy of a video recording which contained an interview taken by a police officer from a person immediately after the applicant's

arrest, in which the police officer in question allegedly affirmed that 2 1/2 kilos of cannabis had been discovered in the course of the operation which led to the applicant's arrest. On the same date the applicant also contacted the Royal Scottish Forestry Society with a view to finding an expert on woods.

On 27 April 1993 the applicant's solicitors informed him of the decision of the Legal Aid Board. By letter of 28 April 1993 the Legal Aid Board formally informed the applicant's solicitors that his application for legal aid had been refused, because "the Board was not satisfied that the applicant 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."

On 30 April 1993 the High Court of Justiciary held a hearing on the applicant's appeal. The applicant, who represented himself, informed the court that he did not pursue his first ground of appeal that there was a misdirection on the law of corroboration. He also applied for an adjournment, so as to be able to prepare the remaining ground of appeal, and for the court's permission to lodge three additional grounds. The applicant wished to argue the following: first, due to certain changes made by the jury in the charge of which he had been convicted, the quality, character and strength of the evidence as a whole was insufficient and his conviction had been, as a result, perverse and unreasonable; secondly, in his summing-up to the jury the trial judge had not given fair weight to the special defence of incrimination the applicant had lodged; thirdly, his counsel had erred in not informing the trial judge about the conversation between F and H.

Considering that the applicant had had ample time to obtain the information he needed to prepare his appeal, the court rejected his request for an adjournment. It also considered that the additional grounds of appeal were plainly without substance. The principal evidence on which the prosecution had relied related to the part of the charge of which the applicant had been found guilty. The judge had reminded the jury of the applicant's special defence of incrimination and explained their significance. As regards the third additional ground, the court considered that, if there was a miscarriage of justice, this would lie in the fact that the conversation had taken place and in the effect of that conversation on the evidence. This ground, however, already existed in the applicant's note of appeal.

The court further held that, even assuming that the applicant's version of facts regarding the conversation between F and H had been true, the conversation could not have had any material effect on the decision of the jury to convict the applicant. The incident had not influenced the defence in their decision not to use the evidence discussed between F and H. This consisted of a video recording of the undergrowth by the clearing in the wood where the cannabis had been found, which had been made by H one year after the applicant's arrest. The applicant's lawyers had considered that showing the video to the jury might be prejudicial to the applicant's defence. There was no indication that F's evidence had been tainted by what had occurred. Furthermore, the point that the applicant wished to establish on the basis of the video, namely that by reason of the undergrowth the police officers could not have a proper view of the clearing, would not undermine the prosecution's case. Finally, the court considered that the applicant should not be given permission to call expert evidence which the defence had had the opportunity to call at the trial hearing, but chose not to.

In the light of all the above, the court considered that there had been no miscarriage of justice. It rejected the applicant's appeal.

On 28 May 1993 the applicant wrote to the Lord Advocate to complain about the manner in which his defence had been conducted before the first instance court.

On 3 June 1993 the Procurator Fiscal's Office informed the applicant that the video recording he had requested on 26 April 1993 did not form part of the evidence against him and, as a result, he could not have access to it. In any event, the tape probably had been destroyed.

On 1 July 1993 the applicant was advised by the Crown Office that he should raise his complaints regarding the conduct of his counsel and solicitors with the Dean of the Faculty of Advocates and the Secretary of the Law Society of Scotland.

B. Relevant domestic law and practice

(i) Prior to the Criminal Justice (Scotland) Act 1995 ("the 1995 Act")

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 - 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 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 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 completed by counsel as to the appeal's prospects of 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).

(ii) 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 that he was not granted legal aid and, as a result, he had to defend himself before the court of appeal.

The applicant further complains that, as a result of the decision of the appeal court to refuse his request for an adjournment of the hearing of 30 April 1993, he did not have adequate time for the preparation of his defence.

The applicant also complains that the police had fabricated the evidence against him. He relies, in this connection, on a series of phrases which, although being rather uncommon, invariably figured in all the statements and testimony of certain prosecution witnesses. He submits that this constitutes proof of the existence of a "master statement" used by the police. The applicant further submits that the prosecution did not call three witnesses whom it had originally cited and who could have established that the police had fabricated the evidence against him. Moreover, the Procurator Fiscal refused to allow him access to a video-recording on the basis of which he could establish certain discrepancies

between the evidence given by the police in court and the allegations they had made against him immediately after his arrest. The applicant claims that the video in question contained an interview taken by a police officer from a person immediately after the applicant's arrest, in which the police officer in question affirms that 2 1/2 kilos of cannabis had been discovered in the course of the operation which led to the applicant's arrest, whereas the applicant was only charged with supplying 1 1/4 kilos.

Finally, the applicant complains that his legal representatives and the private investigator acted against his interests.

The applicant invokes, in general, Article 6 paras. 1 and 3 (b), (c) and (d) of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 21 October 1993 and was registered on 3 November 1994.

On 6 September 1995 the Commission decided to communicate the application to the respondent Government and to request them to submit observations on admissibility and merits.

The Government's observations were received on 20 November 1995. The applicant's observations were received on 19 January 1996.

THE LAW

1. The applicant complains that he was not granted legal aid for his appeal.

The Government request the Commission to strike the application out of its list of cases, insofar as it relates to the particular complaint. They argue that it is no longer justified for the Commission 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, pursuant to the judgments of the European Court of Human Rights in Maxwell and Boner (Eur. Court H.R., Maxwell judgment of 28 October 1994 and Boner judgment of the same date, Series A no. 300). The applicant considers that the examination of his complaint should continue, in order for him to receive sufficient financial compensation.

The Commission notes that the provisions of the 1995 Act apply to appeals from convictions handed down on or after 26 September 1995. They cannot benefit the applicant in any way as regards his complaint under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention, since his conviction was handed down on 2 October 1992 and his legal aid application and appeal were determined pursuant to the 1975 Act. In addition, the applicant has raised a claim for just satisfaction and continuing the examination of his complaint may be of relevance in this connection (see, mutatis mutandis, Eur. Court H.R., Guzzardi judgment of 6 November 1980, Series A no. 39, p. 31, para. 85; Silver judgment of 23 March 1983, Series A no. 61, pp. 31-32, para. 81; Axen judgment of 8 December 1983, Series A no. 72, p. 11, para. 24).

In the light of the above, the Commission considers that it cannot accede to the Government's request to strike the application out of its list of cases, insofar as it relates to this particular complaint.

2. The Commission further considers that the applicant's complaint concerning the refusal of the authorities to grant him legal aid for his appeal should be examined under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention which provides the following:

> "Everyone charged with a criminal offence has the following minimum rights:

...

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 submit that, in the light of the Maxwell and Boner judgments of the Court, they have no observations to make. The applicant submits that this amounts to acknowledging that his rights have been violated.

In the light of the parties' observations, the Commission considers that this part of the application raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. It cannot, therefore, be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other ground for declaring it inadmissible has been established.

3. The applicant complains of the decision of the appeal court to refuse his request for an adjournment of the hearing of 30 April 1993.

The Commission considers that the complaint should be examined under Article 6 para. 3 (b) (Art. 6-3-b) of the Convention which provides the following:

"Everyone charged with a criminal offence has the following minimum rights:

...

to have adequate time and facilities for the preparation of his defence;

..."

The Government submit that the applicant had adequate time for the preparation of his appeal. His note of appeal was lodged on 28 October 1992. A first adjournment was ordered on 4 March 1993. The applicant's solicitors delayed asking for counsel's advice on the prospects of the applicant's appeal. The applicant was informed that legal aid would be refused on 19 April 1993. The applicant, who took an active part in the preparation of his appeal, was in a position to present himself his arguments before the appeal court. The Commission should be reluctant to disturb the finding of the appeal court that the applicant had sufficient time to prepare for his appeal.

The applicant submits that the time he had at his disposal was not adequate given his lack of legal training and the extreme complexity of the case. In this connection with the latter he refers to his solicitors' letter of 22 February 1993.

In the light of the parties' observations, the Commission considers that this part of the application raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. It cannot, therefore, be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other ground for declaring it inadmissible has been established.

4. The applicant also complains that the police had fabricated the evidence against him, that the prosecution did not call three witnesses whom it had originally cited and that the Procurator Fiscal refused to

allow him access to a video-recording.

The Commission considers that an issue could arise under Article 26 of the Convention, which provides that the Commission may only deal with a matter after all domestic remedies have been exhausted, in that the applicant did not raise his complaints before the courts of first and second instance. It is not necessary, however, for the Commission to pronounce on this issue, because the applicant's complaints are in any event manifestly ill-founded.

The Commission has taken note of the applicant's submissions concerning the standard phrases allegedly used by the prosecution witnesses and the alleged content of the video-recording complained of. It does not find, however, any indication that the police fabricated the evidence against the applicant. As regards, moreover, the applicant's complaint concerning the three witnesses whom the prosecution had initially cited but eventually decided not to call, the Commission recalls that Article 6 (Art. 6) of the Convention does not guarantee a right for the accused to have examined as witnesses for the prosecution persons on whose statements the prosecution no longer wishes to rely. Moreover, the applicant does not deny that he had been made fully aware of the content of the statements of these witnesses. In the light of all the above, the Commission considers that no appearance of a violation of Article 6 (Art. 6) of the Convention is disclosed.

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.

5. Finally, the applicant complains that his legal representatives and the private investigator acted against his interests.

The Commission considers, however, that the actions of these persons do not incur the liability of the United Kingdom under the Convention.

It follows that this part of the application is incompatible ratione personae and must be rejected as incompatible within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaints concerning the refusal for legal aid for his appeal and the decision of the appeal court not to adjourn the hearing of 30 April 1993;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)