AS TO THE ADMISSIBILITY OF

Application No. 25648/94
by Timothy ROBSON
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 15 May 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 27 June 1994 by Timothy ROBSON against the United Kingdom and registered on 14 November 1994 under file No. 25648/94;

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 22 November 1995 and the observations of the applicant in reply submitted on 13 February 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1962 and resides in Argyll, Scotland.

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

Particular circumstances of the case

The applicant was questioned by police on 4 and 5 April 1992 and claims that he was, inter alia, assaulted and refused a solicitor during questioning. The standard form filled in by the police and entitled "Arrest-Rights of Accused" (submitted by the applicant to the Commission) noted that the applicant was informed of his right to have a solicitor present at 07.34 on 4 April 1992. The handwriting on the form notes that the applicant's then solicitor and the duty solicitor could not be contacted. At 15.50 on the same day it was again noted on

the form that the applicant's own solicitor could not be contacted and that the duty solicitor "attends".

The applicant, along with two others, was charged on indictment with eight offences under the Misuse of Drugs Act 1971 ("the 1971 Act") and with two charges of reset. The applicant appeared before a court on 6 and on 13 April 1992, on which latter date he was released on bail.

The applicant received legal aid from the Scottish Legal Aid Board ("S.L.A.B.") for the preparation of his defence and for legal representation at his trial.

The applicant was represented at his trial in the High Court in Scotland by a solicitor and by counsel. During the trial the prosecution relied on certain statements made by the applicant during his questioning by police. The defence argued, in the presence of the jury, that certain of those statements were obtained through, inter alia, assaults, intimidation and deprivation. The prosecution disputed this and submitted that the statements had been fairly obtained. In his summing up to the jury, the trial judge noted the submissions of the defence and the prosecution in this respect and directed the jury that before they could accept any such statements they must be satisfied of three matters: that the statements were in fact made, that any such statements were accurately recorded and that they were freely made and obtained. The trial judge continued as follows:

> "Whether it was <fairly obtained> or not is something you have to decide and in reaching that decision you should be guided by the following principles. Fairness in relation to the admissibility of statements really involves both sides of the case. On the one hand, it is in the public interest that crimes should be investigated and those who commit them brought to justice. On the other hand, those who are suspected or accused must be fairly dealt with. Information from them must be obtained fairly and it must be freely given by them. There should be no threats, inducements or intimidation ... If you thought that the ... statement was unfairly obtained then you should exclude it from your consideration ...".

On 5 April 1993 the jury found the applicant guilty on four of the charges under the 1971 Act and on one of the charges of reset. The judge sentenced the applicant to five terms of imprisonment to run concurrently - two sentences of 5 years, one sentence of 2 years, one sentence of 6 months and one sentence of 4 months. On the same day a forfeiture order was made in relation to the applicant's mother's car which the applicant had been using and in which certain quantities of drugs had been found.

On 8 April 1993 the applicant lodged an intimation of his intention to appeal together with a note of appeal against conviction and sentence. The grounds of appeal, outlined in the note of appeal, simply challenged the severity of the sentence and noted that the applicant wished to apply for an appeal against sentence or "possibly" for a retrial on the charges of which he had been found guilty.

On 4 May 1993 the transcript of the trial judge's summing up to the jury was filed. On 20 August 1993 the report of the trial judge on the trial was also filed pursuant to section 236A of the Criminal procedure (Scotland) Act 1974. In that report, the trial judge described the evidence against the applicant, the reasons for the sentences given, including his consideration of mitigation offered on the applicant's behalf, and as regards the applicant's request for a retrial, stated that "during the trial no objections were made to the admission of any evidence".

While the legal aid the applicant received for his trial would

have covered legal advice in connection with his appeal including obtaining the opinion of counsel as to the appeal's chances of success, it did not cover legal representation for the appeal hearing and, for this, the applicant made a further application for legal aid on 6 May 1993.

On 25 November 1993 the applicant's solicitors wrote to the S.L.A.B. requesting the granting of legal aid and advising that counsel was indisposed but had advised orally that counsel was of the opinion that the applicant's appeal was not stateable. That letter notified the S.L.A.B. of the date of the forthcoming appeal which was 3 December 1993. On the same day the applicant's solicitor wrote to the applicant indicating that counsel did not consider that he had any ground of appeal whatsoever and that it was likely that he would have to represent himself at the hearing of his appeal.

On 3 December 1993 the S.L.A.B. refused to grant legal aid on the basis that the S.L.A.B. did not consider that the applicant had shown substantial grounds for making the appeal and that it was not reasonable, in the circumstances of the case, that legal aid should be made available to the applicant. The S.L.A.B. indicated that, while they did not receive a written opinion from counsel in connection with the prospects of an appeal, the applicant's solicitor had informed S.L.A.B. that counsel had advised orally that the appeal was not stateable.

When the appeal came on for hearing, on 3 December 1993 the High Court granted the applicant's solicitors and counsel leave to withdraw from acting for the applicant. An adjournment of the appeal hearing was also granted to a later date on the basis that on that date the applicant would be in a position to represent himself. The High Court also suggested that, if the applicant wished to continue his appeal, he should lodge amended grounds of appeal.

Pursuant to complaints made by the applicant against the police who had interviewed him, the applicant was informed by letter dated 13 December 1993 that the Regional Prosecutor Fiscal did not intend initiating criminal proceedings against any of the police officers concerned.

On 6 January 1994, when the appeal again came on for hearing, the applicant obtained an adjournment for a month so that he could apply again for legal aid. On 3 February 1994 the case was again continued as the court had insufficient time to consider the appeal. The applicant had no success in obtaining legal aid and on the 2 March 1994 he presented his appeal in person. The applicant indicated that he had abandoned his appeal against conviction but that he wished to maintain his appeal against sentence. Having heard the applicant and considered the documents and information before it, the High Court refused the applicant's appeal.

On 28 June 1994 the Justiciary Office of the High Court confirmed to the applicant that, in order to challenge the forfeiture of her car, the applicant's mother should have made an application within a year of the forfeiture order for the return of the car.

On 1 December 1995 the applicant was released from prison.

Relevant domestic law and practice

1. Criminal trials - Solemn proceedings

It is open to the defence to make formal objections to the admissibility of evidence which objections require the judge to ask the jury to withdraw, to hear counsel's submissions on the point in the absence of the jury and to decide whether the evidence should be opened to the jury or not. The cases where this occurs are concerned almost

exclusively with the admissibility in evidence of statements made to the police.

2. Prior to the Criminal Justice (Scotland) Act 1995 ("the 1995 Act")

(a) 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 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 provide copies of the statement 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 either by quashing the conviction or by substituting an amended verdict of guilty or by authorising a new prosecution (section 254 of the 1975 Act).

(b) 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 draft and lodge the statutory intimation of intention to appeal and 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 prepared 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 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).

3. The 1995 Act - criminal appeals and legal aid for such appeals

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

1. The applicant complains that he was wrongly convicted and, in this respect, makes a number of complaints about irregularities surrounding the proceedings against him.

In the first place, the applicant complains about his treatment by the police while he was questioned by them and that he was refused a solicitor during that time.

Secondly, he complains about the prosecution witnesses at his trial, the failure to issue a fresh indictment sheet listing only the matters in respect of which he was charged and about mistakes made during his trial. He also complains that his solicitor had no interest in his case or the trial, was in collusion with the Procurator Fiscal and did not present the necessary defence evidence at trial. He further complains that the trial judge's report to the appeal court was unfair, untrue and inaccurate and that the appeal court relied on this report.

2. The applicant complains about the forfeiture order made on 5 April 1993 by the trial court in relation to his mother's car and alleges that the police have failed to return some of his property which was in the car when it was seized.

3. The applicant also complains under Article 6 para. 3(c) of the Convention that he was refused legal aid for his appeal claiming that he was therefore obliged to present his own appeal and to drop his appeal against conviction.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 27 June 1994 and was registered on 14 November 1994.

On 6 September 1995 the Commission decided to communicate the application to the respondent Government, to request the Government to submit observations on the admissibility and merits of the applicant's complaints under Article 6 para. 3(c) of the Convention and to request the applicant to provide further information in relation to his allegation of a refusal of access to a solicitor during questioning by police.

The Government's observations were received on 22 November 1995 and those of the applicant were received on 13 February 1996.

THE LAW

1. The applicant complains that he was wrongly convicted and, in this respect, he makes a number of allegations as to irregularities surrounding the proceedings against him.

At the outset the Commission would recall that, as regards the judicial decisions in the case and in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging errors of law or fact on the part of domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its established case-law (e.g. No. 12505/86, Dec. 11.10.88, D.R. 58 pp. 106, 110 with further references).

The Commission has therefore considered the applicant's allegations of irregularities in the proceedings against him and considers that those allegations can be considered under Article 6 para. 1 (Art. 6-1) of the Convention, which Article, insofar as relevant, provides 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..."

In this respect, the Commission must consider whether the proceedings as a whole were conducted in conformity with the provisions of Article 6 (Art. 6) of the Convention (see, for example, Can v. Austria, Comm. Report 12.7.84, Eur. Court H.R. Series A no. 96) and has concluded, in relation to the allegations of the applicant as regards the proceedings against him, as follows.

(a) In the first place, the applicant complains about his treatment by the police when he was questioned by them. In this latter respect, he alleges that he was assaulted, threatened and tricked by the police during his interviews with them, that he suffered during that detention due to lack of sleep for several days, lack of food and lack of medication for his migraines and that his interview tapes were tampered with.

The applicant also complains about his being refused a solicitor when he was questioned by the police.

As regards the applicant's allegations about his treatment by the police when questioned, the Commission notes the following. The applicant's counsel did raise such issues before the jury during his

trial (as a basis for challenging the evidentiary value of statements made by the applicant during questioning by the police) and the applicant also complained about such treatment to the police authorities. However, the applicant does not appear to have submitted any evidence whatsoever of any such treatment to the trial court or to the police authorities and he has not done so before the Commission.

In addition, the Commission finds it significant that there is no evidence that any formal objection was made to the trial judge, as to the admissibility of the statements made by the applicant when questioned by police, on the basis of such treatment. It is also noteworthy that the applicant has not commenced civil proceedings for assault against those police officers. Furthermore, such treatment by the police cannot be assumed from the applicant's allegations as regards a refusal of access to a solicitor, particularly in view of the findings of the Commission below as to the efforts made by the police to contact certain solicitors.

Accordingly, the Commission concludes that the applicant's complaints, as regards his treatment by the police during questioning, are unsubstantiated.

As to the applicant's complaints about a refusal of access to a solicitor when he was questioned by the police, the Commission finds that the applicant was informed of his right to have a solicitor present at 07.34 on 4 April 1992, that various attempts were made to reach the applicant's solicitor together with a duty solicitor and that those solicitors were, at least immediately, unavailable. The Commission also finds that the form submitted by the applicant in this respect admits of the possibility that the applicant was questioned for a period of time without a solicitor being present and the Commission's consideration below is based on this assumption.

However, the Commission recalls that the right of access to a lawyer can be subject to restrictions and the question to be considered is whether any questioning of the applicant without his solicitor is in conformity with the general principle of fairness laid down in Article 6 (Art. 6) of the Convention (see, for example, No. 11256/84, Dec. 5.9.88, D.R. 57 p. 47 and No. 12391/86, Dec. 13.4. 89, D.R. 60 p. 182).

Insofar as the applicant complains that the absence of his solicitor, of itself, led to the proceedings being unfair, the Commission considers that the period of time during which the applicant was deprived of access to his solicitor was relatively short (being 4 and 5 April 1992 at the longest). Furthermore, it is not alleged that the applicant's access to a solicitor was inhibited in any way after 5 April 1992 to the date of his trial in April 1993.

Insofar as the applicant complains that his proceedings were rendered unfair by the admission during his trial of statements made to the police in the absence of his solicitor, the Commission again notes that there is no evidence of any formal objection being made to the trial judge against the admissibility of such statements, the success of which objection would have meant that the statements would not have been even opened to the jury.

The defence did make certain submissions to the jury as to the evidentiary value of certain of the applicant's statements in light of the circumstances surrounding the applicant's questioning by the police. However, the Commission notes the trial judge's detailed and clear summing up to the jury in this respect. The trial judge noted the prosecution and defence submissions as regards the circumstances surrounding the making of those statements and clearly pointed out that the jury must be satisfied that the relevant statements were in fact made, that they were accurately recorded and that they were freely made and obtained. He went on to clarify that if the jury were not so

satisfied, then the applicant's statements to the police could not form part of the body of evidence against the applicant to be taken into account by the jury. The Commission also recalls that the applicant does not maintain that the jury were other than independent and impartial.

The Commission therefore concludes that, insofar as the applicant has substantiated his complaint about the absence of a solicitor when he was questioned, this complaint does not disclose a violation of the Convention.

(b) The applicant also complains about the failure to issue a fresh indictment sheet (separate to indictment sheets relating to his two co-accused) listing only the matters in respect of which the applicant was charged and about mistakes made during his trial. He further complains about the prosecution witnesses and that the necessary defence evidence was not produced at his trial. He also complains about his solicitor (claiming that he had no interest in the applicant's trial and that he was in collusion with the Procurator Fiscal) and about his counsel. Finally, the applicant complains that the trial judge's report to the appeal court was unfair, untrue and inaccurate and that the appeal court relied on this report.

In the first place, the Commission considers that the alleged failure to issue a fresh indictment sheet listing the charges against the applicant only, even if substantiated, does not disclose any procedural prejudice to the applicant. Secondly, the Commission also considers that the applicant's allegations of mistakes made during his trial and about the trial judge's report to the appeal court are vague and unsubstantiated.

Thirdly and as regards the applicant's complaint about the non-production of defence evidence during the trial and in relation to prosecution witnesses, the Commission notes that the applicant was represented by a solicitor and counsel during his trial and that his counsel would have had the opportunity to cross-examine prosecution witnesses and to introduce evidence and call witnesses on behalf of the defence during the trial.

Fourthly and as regards the applicant's complaints about his legal representatives, the Commission recalls that the State's liability is engaged, in relation to the actions of lawyers in respect of whom legal aid is granted, only to the extent that "effective assistance" be provided to the person represented (Eur. Court H.R., Artico judgment of 13 May 1980, p. 18, para. 36).

In the present case, the Commission does not consider that the applicant has substantiated his allegation that his solicitor conspired with the Procurator Fiscal or that his solicitor had no interest in the defence of the charges. In addition, the Commission considers that an examination of the file does not show that the applicant's legal representation as regards his trial constituted ineffective assistance within the meaning of the Artico judgment. The Commission finds therefore that the State's liability is not engaged in relation to the complaints relating to the applicant's legal representatives.

Accordingly, the Commission considers that the complaints listed above under (b) do not disclose a violation of the Convention.

In light of the Commission's conclusions above, that the applicant's submissions noted at (a) and (b) do not disclose a violation of the Convention, the Commission considers the applicant's complaint, as to the wrongfulness of his conviction, manifestly ill-founded pursuant to Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains about the forfeiture order made on 5 April 1993 by the trial court in relation to his mother's car which

he was in the habit of using and that the police have not returned certain of his possessions which were in the car, to which items the forfeiture order did not relate.

However and insofar as the applicant can claim to be a victim of a violation of the Convention in relation to the forfeiture order, the Commission notes that the applicant's mother did not petition the court for the return of the car, as she was entitled to do, within the time allowed for such a petition or at all. Neither has the applicant taken any action against the police for the return of his property. Accordingly, this complaint is inadmissible on grounds of non-exhaustion of domestic remedies as required by Article 26 (Art. 26) of the Convention. An examination of the application reveals no reasons why the applicant should be absolved from the requirement that domestic remedies should be exhausted, the Commission considering that the applicant's specific submission, that he fears arrest if he commences any proceedings against the police to recover his property, is not substantiated.

The Commission therefore finds this complaint inadmissible pursuant to Article 27 para. 3 (Art. 27-3) of the Convention.

3. The applicant further complains about the refusal of legal aid for his appeal and 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 request that the application be struck out insofar as it relates to the applicant's complaint about the lack of legal aid for the appeal hearing. They argue that it is no longer justified to continue the examination of this complaint given the changes made to the criminal appeals and criminal legal aid systems in Scotland by the 1995 Act, which Act was enacted following the Boner and Maxwell judgments of the Court (Eur. Court H.R., Boner and Maxwell judgments of 28 October 1994, Series A no. 300-B and 300-C). The applicant points out that the provisions of the 1995 Act do not relate to him or to his appeal in any way since his appeal had been determined prior to 26 September 1995.

The Commission notes that the provisions of the 1995 Act apply to appeals from convictions handed down on or after 26 September 1995 only 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). In such circumstances, the Commission cannot accede to the Government's request.

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 meant that he felt he had to drop his appeal against conviction and prevented the proper presentation of his appeal against sentence and thereby led to his appeal hearing being unfair. The Government has 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, loc. cit.).

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 complaints 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)