AS TO THE ADMISSIBILITY OF

Application No. 30539/96
by Michael John SMITH
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 17 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

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 10 November 1995 by Michael John SMITH against the United Kingdom and registered on 20 March 1996 under file No. 30539/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1948 and currently detained in HM Prison Full Sutton. Before the Commission, he is represented by Ms. Gareth Peirce, a lawyer practising in London.

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

The applicant was charged with four counts of espionage relating to periods between 1 January 1990 and 8 August 1992.

At the trial, the Crown's case was that while the applicant was employed by the General Electric Company (GEC) as an audit manager in the Quality Assurance Department (QAD) at the Hirst Research Centre (HRC), an establishment involved in Government defence contracts, he was an agent of the Russian Intelligence Services (RIS) and that between September 1990 and his leaving the HRC in July 1992, he communicated to his controllers of the Komitet Gasudarstvennoy Bezopasnosti (KGB) technical material and information from HRC relevant to the United Kingdom's defence capability, intending it to be useful to the Russians and acting for a purpose prejudicial to the interests of the State.

In addition to events occurring between 1990 and 1992, the Crown called evidence of events that took place in the 1970's. It was said that from 1972 to 1976 the applicant was a communist activist. At the time when he was a member of the Young Communist League (YCL) he was recruited in London as a Soviet agent by a KGB officer, Victor Oschenko, who was posted to the Russian Embassy in London to recruit agents with access to scientific and technological information. After his recruitment, the applicant, at the request of the KGB, severed his links with the Communist Party. In July 1976 he joined EMI (Feltham) as a test engineer and obtained a security clearance. He was working on a secret weapons project from then until 1978.

In August 1977 the applicant travelled to Oporto, Portugal, on a KGB training mission. Evidence was given on behalf of the Crown by a British Security Services (BSS) agent, Mrs C., and a KGB defector, Oleg Gordievsky, that a map of Oporto with some cross marks the applicant had used on his journey could be evidence of KGB instructions to an agent to follow a particular route. Another witness, Mr E., gave evidence that he had met Victor Oschenko in London in 1977 and had started to receive payments from him, having expressed interest in Oschenko's proposal of supplying information in return for money. In July 1979 the applicant was sent to Lisbon in Portugal either by Oschenko or by his successor, George, with instructions to deliver an envelope which he duly did.

In 1978 the applicant's communist past came to the attention of the authorities. He was therefore moved to a non-military branch of EMI and lost his security clearance. In November 1979, after a discussion with the head of security at EMI, he sought an interview with the Ministry of Defence (MOD) to discuss why he had lost his security clearance. In February 1980 he signed a security questionnaire denying his communist past. In June 1980 he was interviewed by a BSS agent, Mr D., and although he initially denied his communist past he admitted his background. In September 1985 the applicant was made redundant from EMI and in December 1985 he began to work for GEC at HRC. In July 1986 he was given clearance to confidential level on a need to know basis and signed an Official Secret Act 1911 declaration.

The Crown's case was that in September 1990 the applicant received a letter from a KGB source which re-activated his relationship with the KGB, which had commenced in the 1970's. The letter read as follows: "A lot of water has passed under the bridge since our latest appointment. I am sure we should have a chat in the nearest future. I would be happy to meet you, as previously, at the recreation in October. Williams."

On 31 July 1992, his last day at work, the applicant collected two files of documents: one contained processing plans, specification and other documentation concerning two surface acoustic wave filters, the other contained detailed plans, specifications and blueprints for a Delay-Line made for incorporation into the Operator's Confidence Facility of the Rapier missile system. The applicant also took documents concerning Silicon on Sapphire wafers, documentation for Gallium Arsenide Monolithic Microwave Integrated Circuits, a production flow chart for infra-red detectors to be used in thermal imaging equipment, and a process identification document for SAW filters.

It was the Crown's case that on 6 August 1992 the applicant drove to a place near Harrow with the intention of handing over those documents to a Russian handler. The handler, however, had been frightened off due to Victor Oschenko's defection on 25 July 1992 and his arrival in the United Kingdom on 31 July 1992.

On 8 August 1992 Mr B., a BSS officer, telephoned the applicant's home. The call was tape recorded. The caller spoke with an eastern European accent. He introduced himself as George and said, inter alia:

"... I am a colleague of your old friend Victor, do you remember him?" The applicant replied, "Yes". Mr B. then said it was very urgent for him to talk to the applicant and suggested that the applicant go to a nearby telephone kiosk where he would ring him. The applicant was kept under observation and photographed by Special Branch officers. For a time the applicant stayed in the area of and close to the telephone kiosk before setting off to go back home. On his return journey he was intercepted and arrested.

The applicant's car and home were searched. Some documents which were said to be KGB tradecraft documents and the Williams letter, together with an envelope postmarked 24 September 1990 were found at his home. In the boot of his car a holdall containing documents and some components was found. Under the carpet in the well of the car a handwritten list was found. The police also found maps of Portugal and a map of central Oporto with the four cross marks. On 9 August 1992 a "restricted document" was found at the applicant's home. It showed a name and address of a company to which it belonged, namely the Marconi Company in Stanmore. The applicant, he claims, knew nothing about its specific relevance or its implications for issues relating to national security.

The applicant gave evidence at his trial. He denied that he was involved in any form of spying for the Russians. He said that he was engaged in industrial espionage and had been handing over information to an Englishman called Harry Williams who was acting on behalf of a commerce competitor of GEC.

On 15 June 1993 defence counsel submitted that it would be unfair to admit into evidence the tape of the telephone conversation between the applicant and Mr. B., and requested that it be withheld. The trial judge rejected his request on the grounds that the parties were on equal terms, that there had been no pressure on the applicant during the telephone call, and that the caller was not holding himself out to be a person in authority. Accordingly the Codes of Practice under the Police and Criminal Evidence Act 1984 did not apply to this situation. Moreover, the applicant was under no obligation to answer questions, it was a brief conversation which did not go to the heart of the matter, and it had to be considered as a ruse in the public interest.

Evidence on the scientific subjects and concepts revealed in the material found in the boot of the applicant's car was provided by many witnesses. It emerged during the trial that much of the material in the scientific exhibits was already available from public sources.

On 7 October 1993 a prosecution witness, Dr. Lewis, gave evidence. He raised for the first time a specific relevance of the "restricted document" and its implications for issues relating to national security and about a link between this document and the British weapons system in which it was allegedly used. The defence was surprised and asked to be allowed three days for consulting an appropriate expert in the field. This was granted, but the defence was not able to obtain any standpoint on the matter as no expert in the field was willing to jeopardise links with the Ministry of Defence by providing information to the applicant's defence on an open attributable basis.

On 11 October 1993 (a morning) Dr. Lewis resumed giving his evidence. He produced a written statement which established for the first time a connection between the restricted document and a specific British weapon system. The defence was not equipped to conduct thorough questioning upon specific topics that required precise and researched questions. Dr. Lewis's evidence, linking the classified document with the British weapons system, relied on information obtained from a telephone conversation with a technical director of the Marconi Company.

The applicant submits that the defence's lack of knowledge of the issues raised by Dr. Lewis was further aggravated by permanent interferences, through prosecution counsel, from a Ministry of Defence official who was present at the trial. In fact, when defence counsel asked Dr. Lewis "How do you attack then the missile? How do you attack it; how do you destroy it?", prosecution counsel interrupted the cross-examination, and, after the jury had withdrawn, prosecution counsel submitted that "My instruction from [the Ministry of Defence official] are that we are going into some very secret areas. My assessment of it may not be entirely accurate but, with respect to my learned friend, if he knew exactly what questions to ask, to answer the questions accurately, we would not need to trespass into that area. So I am concerned that, because of the way the questioning is being put, we are needlessly going into areas that there is really no need to enter". Then, the defence continued its cross-examination.

On 18 November 1993 the Central Criminal Court convicted the applicant of three counts of espionage relating to periods between 1 January 1990 and 8 August 1992, and sentenced him to a total 25 years' imprisonment (the periods for each offence to run consecutively).

Following the conviction and sentence, defence counsel prepared grounds of appeal. It was submitted in particular that:

> "There was a material irregularity in the course of the trial as the learned judge was wrong to admit into evidence the tape of the telephone conversation between Mr B. and the appellant on 8 August 1992. The appellant's admission that he remembered an old friend Victor went to the heart of the case. This admission was obtained by an unfair trick. It was the cornerstone on which the Crown built their case that the appellant was recruited by Oschenko in the early 1970's and thereby made relevant (on the Crown's case) the EMI evidence; the trip to Portugal and the efforts to retrieve his security clearance. ...
>
> There was a material irregularity in the course of the trial as the learned judge was wrong in admitting evidence concerning Victor Oschenko's activities from 1972-1979 and his defection and subsequent movements in 1992 ... and concerning the applicant's employment on a secret weapons project at EMI from 1976-1985 and the linked evidence concerning his loss of and subsequent efforts to retrieve his security clearance. This evidence was irregular and wholly prejudicial. ...
>
> The learned judge by his admissibility rulings allowed the Crown to present to the jury a case based on the fundamental premise that the appellant was recruited as a KGB agent by Victor Oschenko in the 1970's and that his abrupt departure from the Communist Party before securing work on a secret weapons project at EMI was consequent to that recruitment. The totality of the evidence did not show any sufficient link to Oschenko for the whole of the Crown's case to be based on such a premise. In the absence of calling Oschenko this course was manifestly unfair, unjust and wholly prejudicial. ..."

On 8 June 1995 the Court of Appeal upheld the applicant's conviction but reduced the sentence to 20 years' imprisonment. The Court considered inter alia that:

> "... Where a suspect is questioned by or on behalf of the police in circumstances where, for the reasons expressed in R v. Christou and Wright (1992) 9 CR App R 264 at page 271 the PACE Code of Practice does not apply, the police should

not be allowed to use that fact so as to act unfairly. If they do act unfairly, then the trial judge will be entitled to exclude any evidence obtained as a result in the exercise of his discretion under Section 78 of the Police and Criminal Evidence Act 1984. It will be for the judge to consider all the circumstances of the case in arriving at his decision under Section 78. The circumstances in which he can properly conclude that it would be fair to admit the evidence will be infinitely varied, as will be the circumstances in which it will be right to exclude the evidence as having been obtained unfairly.

In this case we are satisfied that the judge was right to admit the evidence of the telephone conversation. Although the applicant's admission that he knew Victor became an important piece of evidence in the Crown's case, we are not persuaded that it resulted from a question directed at establishing an essential ingredient of the offences with which the applicant was later charged, nor did it form part of an interrogation about the offence. The contents of the conversation were not disputed and there was a full and accurate record. ...

In the present case a very important reason for the telephone call was to test and record the applicant's reaction to an apparent contact from his Russian handler. In the circumstances of this case we are satisfied that it was appropriate for the police to take steps to secure such evidence. In order to do so it was necessary for the undercover officer to maintain his cover and adopt a disguised identity and he did so accordingly. It was inevitable that the telephone conversation was initiated by the police but no pressure was placed upon the applicant to react as he did. He was not intimidated, he was in the security of his own home and was on equal terms with the person to whom he was speaking. In a sense, the admission by the applicant that he knew Victor came as a bonus to the investigation officer. Accordingly we have come to the firm conclusion that it was not unfair to admit the evidence of the telephone conversation and that the judge's decision to do so cannot be faulted.

... the evidence was both relevant and admissible. Each of the various matters established by that evidence had a contribution to make to an overall picture from which the Crown invited the jury to infer that the applicant was not an industrial spy as he claimed but a reactivated Russian spy who had been recruited in the early 1970's. In each case therefore we are satisfied that the judge's decision to admit the evidence cannot be faulted. ..."

COMPLAINTS

The applicant submits that his trial at the Central Criminal Court and the Court of Appeal violated Article 6 paras. 1, 2 and 3 (b) and (d) of the Convention in the following respects:

1. The applicant has been tricked into incriminating himself by admitting in the course of a telephone call that he knew Victor Oschenko. The incriminating material, which was obtained contrary to the Police and Criminal Evidence Act 1984 and the Codes of Practice, furnished a significant part of the evidence against the applicant which was in breach with paragraph 1.

2. The non-disclosure of the information about the implications and relevance of the "restricted document" to the defence before the trial - depriving the defence of the opportunity to refute adequately the

sensitive scientific arguments adduced against the applicant as it was necessary to consult with an expert in the field, which, consequently, left the defence at a disadvantage vis-à-vis the prosecution because its cross-examination of the prosecution witness Dr. Lewis was curtailed - violated the principle of equality of arms guaranteed by paragraph 1 and the right to adequate facilities for the preparation of the defence guaranteed by paragraph 3(b).

Moreover, the prosecution used the evidence of Dr. Lewis on technical issues related to missile technology and jamming, notwithstanding the fact he had admitted in court that he was not an expert to give the information the prosecution asked him for. The prosecution, through this evidence, established the link between the "restricted document" and the British weapons system without prior notice and relying on the testimony of that person who had no connection whatsoever with the company or project concerned and who acknowledged he was not an expert in the relevant matters, rather than proving it with direct evidence submitted from the company concerned which was responsible for the handling of the classified document. Moreover, there was the intervention (through counsel for the prosecution) of the official of the Ministry of Defence objecting to Dr. Lewis replying to relevant questions. Therefore, the right guaranteed by paragraph 3(d) was breached.

3. The United Kingdom, through a report of its Security Commission, has used the applicant's conviction to affirm that he is guilty of other crimes that took place in the 1970's, in spite of there having been no legal or judicial proceedings against him for such offences, contrary to Article 6 para. 2 of the Convention.

THE LAW

The applicant complains under Article 6 paras. 1, 3 (b) and 3 (d) (Art. 6-1, 6-3-b, 6-3-c, 6-3-d) of the Convention about an unfair trial and a violation of his defence rights.

He complains in particular of the admission as evidence of the tape of the telephone conversation, the non-disclosure of the information about implications and relevance of the "restricted document" to the defence before the trial and the interference in the course of the trial from the official from the Ministry of Defence, the circumstances of the cross-examination of Dr. Lewis and the use, through a report of the Security Commission, of the applicant's conviction to affirm that he is guilty of other crimes that took place in the 1970's.

Article 6 (Art. 6) of the Convention reads, so far as relevant, as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 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;
> ...
> (d) to examine witnesses of have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. ..."

1. The applicant claims to have been tricked into incriminating

himself by admitting during a telephone call that he knew Victor Oschenko. That incriminating material, which was allegedly obtained contrary to the Police and Criminal Evidence Act 1984 and the Codes of Practice, furnished a significant part of the evidence against him and thus breached paragraph 1.

The Commission recalls that the rules governing the admissibility of evidence are in the first place a matter for domestic law and that it is for the domestic courts, as a general rule, to assess the evidence before them. The Commission's task, under the Convention, is to ascertain whether the proceedings, considered as a whole, including the way in which the evidence was taken, were fair (cf. Eur. Court HR, the Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, p. 56, para. 43; the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, para. 34).

In the present case, the Commission notes that the trial judge, in the exercise of his discretion, ruled that the tape of the telephone conversation between the applicant and Mr B. could lawfully be used as evidence against the applicant on the grounds that there was no pressure on him and that the police caller was not holding himself out to be a person in authority. The applicant was under no obligation to answer questions, the telephone call was a brief conversation which did not go to the heart of the matter and as such had to be regarded as a ruse in the public interest. The Court of Appeal confirmed this decision. This situation is different from the Schenk case where the evidence - also a tape of a telephone call - had been obtained illegally (cf. Eur. Court HR, the Schenk v. Switzerland of 12 July 1988, Series A no. 140).

The Commission finds no evidence to indicate that the applicant, who was represented by his defence counsel, could not properly defend himself. The Commission notes in particular that the applicant had the opportunity to discuss the contents of the tape and to challenge its admissibility. The fact that his attempts were unsuccessful makes no difference. Besides, the tape of the telephone conversation was far from the sole evidence in the trial. The Central Criminal Court took evidence from several witnesses and experts, and it referred in its judgment to the scientific subjects and concepts revealed in the material found in the boot of the applicant's car.

The Commission considers, therefore, that the use of the tape of the telephone conversation between the applicant and Mr B. as evidence did not deprive the applicant of a fair trial, and, accordingly, was no appearance of breach of Article 6 para. 1 (Art. 6-1) of the Convention.

2. The applicant complains that the non-disclosure of the information about implications and relevance of the "restricted document" to the defence before the trial and the interference in the course of the trial from the official of the Ministry of Defence, alleging that relevant questions encroached on issues related to national security, left the defence at a disadvantage vis-à-vis the prosecution which curtailed the defence's cross-examination of the prosecution witness Dr. Lewis, and prevented the defence from uncovering decisive information.

He maintains that the prosecution, through Dr. Lewis's evidence, established the link between the "restricted document" and the British weapons system without prior notice and relied on his testimony although he had no connection with the company or project concerned and was not an expert in the relevant matters. He relies on paragraphs 1 and 3 (b) and (d) of Article 6 (Art. 6-1, 6-3-b, 6-3-d) of the Convention.

As the requirements of the third paragraph of Article 6 (Art. 6) are specific aspects of the right to a fair trial, guaranteed

by paragraph 1, the Commission will consider these complaints in the light of the two provisions taken together (cf. e.g., Eur. Court HR, the Melin v. France judgment of 22 June 1993, Series A no. 261-A, p. 11, para. 21; Eur. Court HR, the Hadjianastassiou v. Greece of 16 December 1992, Series A no. 252, p. 16, para. 31).

The Commission notes that the concept of a fair trial includes the fundamental right to adversarial procedure in criminal proceedings. That right means that each party must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other (cf. Eur. Court HR, the Brandstetter v. Austria judgment of 28 August 1991, Series A no. 211, p. 27, paras. 66-67).

The Commission observes that the "restricted document" in question was found by the police at the applicant's home on 9 August 1992; thus, the applicant must have been aware about its content and import, and might have expected that it could be used and discussed at the trial. He had ample time to prepare his defence.

The "restricted document" was discussed at the trial on 7 and 11 October 1992 during two cross-examinations of the prosecution witness Dr. Lewis. It is true that during the first cross-examination the witness raised for the first time the specific relevance of this document, its implications for issues relating to national security and its link with the British weapons system, and that at the beginning of the second cross-examination, he produced the written statement establishing a connection between this document and a specific British weapon system. The Commission notes that after the first cross-examination, three days were allowed to the defence for consulting an appropriate expert in the field. It was open to the applicant and his counsel to question the witness, and, if necessary, to specify their questions and discuss the contents of the witness's verbal and written statements.

As regards the instruction of the official of the Ministry of Defence to prosecution counsel in the course of the cross-examination, the Commission considers that this instruction was made on behalf of the national security. The intervention did not prevent the defence from cross-examining; the defence was only advised of the sensitive nature of the matter concerned. The Commission further notes that the applicant did not bring this point before the Court of Appeal.

As regards the applicant's claim that the prosecution used the evidence of Dr. Lewis on technical issues related to missile technology and jamming, notwithstanding the fact that he was not an expert on missile technology, the Commission recalls that it is not competent to deal with any application alleging errors of fact or law have been committed by 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 (cf., e.g., No. 21283/93, Dec. 5.4.94, D.R. 77 p. 81).

To the extent the Commission is nevertheless able to consider the applicant's complaint, it observes that the applicant and/or his counsel did not contest Dr. Lewis's ability to give evidence in the matter in any stage of the proceedings.

In these circumstances the Commission finds that there is no appearance that with regard the cross-examination of Dr. Lewis as it concerned the "restricted document", and the instruction of the official of the Ministry of Defence to prosecution counsel during this cross-examination the applicant's rights guaranteed by Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention had been infringed.

3. The applicant complains, under Article 6 para. 2 (Art. 6-2) of the Convention, that the United Kingdom, through a report of its Security Commission drafted after the applicant's conviction, used his

conviction to affirm that he was guilty of other crimes that took place in the 1970's, in spite of there having been no legal or judicial proceedings against him for such offences.

The Commission notes that the applicant has not adduced any evidence in support of this complaint and it does not appear from the file that this complaint is well-founded.

Consequently, the Commission does not discern any evidence that the principle of presumption of innocence, as guaranteed by Article 6 para. 2 (Art. 6-2) of the Convention, was breached in this case.

It follows that the application must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber