DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY OF

Application No. 14038/88
by Jens SOERING
against the United Kingdom

The European Commission of Human Rights sitting in private on 10 November 1988, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
C.L. ROZAKIS
Mrs. J. LIDDY

Mr. H.C. KRÜGER Secretary to the Commission

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

Having regard to the application introduced on 8 July 1988 by Jens Soering against the United Kingdom and registered on 21 July 1988 under file No. 10438/88;

Having regard to

- the report provided for in Rule 40 of the Rules of Procedure of the Commission;

- the written observations submitted by the respondent Government on 9 September 1988 and the observations in reply submitted by the applicant on 4 October 1988;

- the parties' oral submissions at the hearing before the Commission on 10 November 1988;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, Mr. Jens Soering, is a German citizen, born in Thailand on 1 August 1966. He has lived in the United States of America since he was 11 years old. The present application arises out of his pending extradition to the United States inter alia on charges of capital murder in respect of offences which were allegedly committed when he was 18 years of age. He is at present detained at HM Prison, Wormwood Scrubs, London, England.

The applicant is represented by Messrs. Powell Magrath and Spencer, solicitors, London, and Mr. Colin Nicholls, Q.C., and

Ms. Clare Montgomery of counsel.

The facts of the case as they appear from the parties' submissions may be summarised as follows:

On 13 June 1986 a grand jury of the Circuit Court of Bedford County, Virginia, United States of America, indicted the applicant on charges of murdering the parents of his girlfriend. The charges alleged capital murder of both of them and the separate non-capital murders of each.

On 31 July 1986 the Government of the United States requested the applicant's extradition under the terms of the Extradition Treaty between the United States and the United Kingdom of 1972. On 12 September 1986 a Magistrate at Bow Street Magistrates' Court was ordered by the Secretary of State for Home Affairs to issue a warrant for the applicant's arrest under the provisions of Section 8 of the Extradition Act 1870. The applicant was subsequently arrested on 30 December 1986 at HM Prison Chelmsford after serving a twelve months' prison sentence for cheque fraud. On 16 December 1986 and 30 January 1987 the applicant's then legal representative (Dr. Graupner), made representations to the Secretary of State that the Order to the Magistrate to proceed with the arrest of the applicant should have been made in respect of the offence of manslaughter and not the offence of murder. He referred, in particular, to the opinion expressed in medical evidence that the applicant was suffering from a mental condition which would warrant a verdict at his trial that he was not guilty of murder but guilty of manslaughter by reason of diminished responsibility. The Secretary of State rejected Dr. Graupner's submissions in letters dated 12 February 1987 and 9 April 1987.

On 11 February 1987 the local court in Bonn issued two warrants for the applicant's arrest in respect of the alleged murders. On 11 March 1987 the Government of the Federal Republic of Germany requested his extradition to the Federal Republic under the terms of the Extradition Treaty between the Federal Republic and the United Kingdom. The Secretary of State was then advised by the Director of Public Prosecutions that, although the German request contained proof that German courts had jurisdiction to try the applicant, the evidence submitted consisted solely of admissions made by the applicant to a representative of the German Government which did not, in the Director's view, amount to a prima facie case against him and that the magistrate would not be able to commit the applicant to await extradition to Germany on the strength of them.

In a letter dated 20 April 1987 to the Director of the Office of International Affairs, Criminal Division, United States Department of Justice, the Attorney for Bedford County, Virginia (Mr. Updike) stated that, on the assumption that the applicant could not be tried in Germany on the basis of admissions alone, there was no means of compelling witnesses from the United States to appear in a criminal court in Germany.

On 20 May 1987 the Government of the United Kingdom informed the Federal Republic of Germany of the United States request and indicated that they proposed to consider this request in the normal way. The United Kingdom Government further indicated that they had sought an assurance from the United States authorities on the question of the death penalty and that "in the event that the court commits Mr. Soering, his surrender to the United States' authorities would be subject to the receipt of satisfactory assurances on this matter".

On 1 June 1987 Mr. Updike swore an affidavit in his capacity as Attorney for Bedford County in which he certified as follows:

"I hereby certify that should Jens Soering be convicted of

the offence of capital murder as charged in Bedford County, Virginia ... a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out."

In a diplomatic note dated 17 May 1987 the Federal Government of the United States undertook to ensure that the undertaking given by the Attorney for Bedford County to make representations on behalf of the United Kingdom would be honoured.

On 16 June 1987 at the Bow Street Magistrates' Court committal proceedings took place before the Chief Stipendiary Magistrate. The Government of the United States adduced evidence that on the night of 30 March 1985 the applicant killed William Reginald Haysom (aged 72) and Nancy Astor Haysom (age 53) at their home in Bedford County, Virginia. Death in each case was the result of multiple and massive stab and slash wounds to the neck, throat and body. The applicant was then 18 years old and his girlfriend, Miss Haysom, was then 20 years old. Both were students at the University of Virginia.

In October 1985 the applicant and Miss Haysom travelled to Europe. They were subsequently arrested on 30 April 1986 in England on charges of cheque fraud. The Deputy Sheriff of Bedford County travelled to Richmond to interview the applicant and gave evidence that he admitted the killings. A similar admission was apparently made to a German Public Prosecutor who also interviewed the applicant. The applicant stated that he was in love with Miss Haysom and that her parents were opposed to the relationship and that they had planned to kill them. They rented a car in Charlottsville and travelled to Washington where they set up an alibi. The applicant then went to the parents' house, discussed the relationship with them and when they told him they would do anything to prevent it, a row developed during which he killed them with a knife.

At the committal proceedings, the applicant adduced inter alia psychiatric evidence from a consultant forensic psychiatrist (Dr. Bullard) that the applicant was immature and inexperienced and had lost his personal identity in a symbiotic relationship with his girlfriend - a powerful, persuasive and disturbed young woman. In Dr. Bullard's opinion the applicant was suffering from a "folie à deux" - a well recognised state of mind where one partner is so suggestible that he believes in the psychotic delusions of the other. She concluded that such a mental condition substantially impaired his responsiblity for his acts and, under United Kingdom law, would constitute a defence of diminished responsibility reducing the offence from murder to manslaughter.

The Chief Magistrate found that the evidence of Dr. Bullard was not relevant to any issue that he had to decide and committed the applicant to await the Secretary of State's Order for his return to the United States. On 29 June 1987 the applicant applied to the Divisional Court for a writ of habeas corpus in respect of his committal. On 11 December 1987 this application was refused. In the course of his judgment in the Divisional Court rejecting the application, Lord Justice Lloyd commented that an assurance under Article IV of the Anglo-United States Extradition Treaty "must mean an assurance by or on behalf of the Executive Branch of Government, which in this case would be the Governor of the Commonwealth of Virginia. The certificate sworn by Mr. Updike, far from being an assurance on behalf of the executive, is nothing more than an undertaking to make representations on behalf of the United Kingdom to the judge. I cannot believe that this is what was intended when the Treaty was signed."

On 30 June 1988 the House of Lords rejected the applicant's petition for leave to appeal against the decision of the Divisional

Court.

On 10 March 1988 the Department of Justice of the United States forwarded to the Government of the United Kingdom a further affidavit sworn by Mr. Updike, Attorney for Bedford County, in which he repeated the terms of the assurance previously given in the event of the applicant's conviction for capital murder.

On 14 July 1988 the applicant petitioned the Secretary of State, requesting him to exercise his discretion not to make an order for the applicant's surrender under Section 11 of the Extradition Act 1870.

This request was rejected, and on 3 August 1988 the Secretary of State signed a warrant ordering the Governor of HM Prison Wormwood Scrubs to surrender the applicant to the United States authorities.

Relevant domestic law and practice

The law relating to extradition between the United Kingdom and the United States of America is governed by the Extradition Acts 1870-1935, the Extradition Treaty signed by the two States on 8 June 1972, and an Exchange of Notes between the United Kingdom and the United States, dated 24 September 1987.

Extradition proceedings in the United Kingdom consist of an extradition hearing before a magistrate, and Section 11 of the Extradition Act 1870 provides that decisions taken in those proceedings may be challenged by way of application for habeas corpus. In practice, such application is made to a Divisional Court and, with leave, to the House of Lords. Section 12 of the 1870 Act provides for the release of a prisoner, if not surrendered, at the conclusion of such proceedings or within two months of committal unless sufficient cause is shown to the contrary.

In addition, it is established that the Secretary of State enjoys a discretion in the exercise of his powers under Section 11 of the 1870 Act not to sign the surrender warrant. This discretion may override a decision of the courts that a fugitive should be surrendered, and it is open to every prisoner who has exhausted his remedies by way of application for habeas corpus to petition the Secretary of State for that purpose. In considering whether to order the fugitive's surrender, the Secretary of State is bound to take account of fresh evidence which had not been before the magistrate.

Furthermore, it is open to the prisoner to challenge both the decision of the Secretary of State rejecting his petition and the decision to sign the warrant in judicial review proceedings. In such proceedings the court may review the exercise of the Secretary of State's discretion on the basis that it is tainted with illegality, irrationality or procedural impropriety (Council of Civil Service Unions and Others v. Minister for the Civil Service [1984] 3 All ER 935).

Under the rule of speciality a defendant cannot be tried on his return to the United States for any offence which is not disclosed by the facts on which his surrender has been based.

There is no provision in the Extradition Acts relating to the death penalty, but Article IV of the Anglo-United States Treaty provides that:

> "If the offence for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that

the death penalty will not be carried out."

The exercise of this discretion is incorporated in the general discretion vested in the Seretary of State by virtue of Section 11 of the 1870 Act.

Where extradition requests are received in respect of the same crime from two different States, priority is given to that which is first in time. If both are received at the same time, the Secretary of State decides which request is to be proceeded with, having regard to all the facts of the case, including the nationality of the fugitive and the place of commission of the offence.

COMPLAINTS

Article 3 of the Convention

The applicant submits that there is serious reason to believe that he will be subjected to inhuman and degrading treatment and punishment in contravention of Article 3 of the Convention. Such inhuman and degrading treatment and punishment arises from the exceptional and inordinate delay in carrying out the death penalty in Virginia, together with other aggravating conditions.

Article 6 of the Convention

The applicant submits that he is without the means to defend himself. In the legal proceedings in England he was defended on legal aid. His father has funded his application to the Commission and his Attorneys in the United States to the extent immediately necessary for his trial in the United States. The applicant has serious reasons to believe that his father will not be able to fund the voluntary appeals which he may require to pursue in order to avoid the imposition of the death penalty. Under the provisions of Virginia law the accused may be granted legal aid for the purpose of his automatic appeal to the Supreme Court of Virginia. There are eight other appeals he can make which will prolong his life by 6 to 10 years. However, for these appeals legal aid is not available, unlike the position in other States which have the death penalty. The applicant submits that this constitutes a breach of Article 6 para. 3 (c) of the Convention.

Article 13 of the Convention

The applicant submits that he has no effective remedy before a national authority as required by this provision. The courts, in reviewing the decisions of the Secretary of State are restricted to a consideration of whether it infringes the "Wednesbury principles" (i.e. that no authority properly directing itself on the relevant law and acting reasonably could have reached it). The Secretary of State's decision is not therefore effectively reviewable by the courts on the basis of the Convention. Moreover, the Secretary of State is not required to have regard to the Convention when exercising his discretion under Section 11.

It is further submitted that the Secretary of State in deciding whether the applicant should be extradited cannot be regarded as impartial or as enjoying the safeguards of judicial independence.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced before the Commission on 8 July 1988 and registered on 21 July 1988. On 11 August 1988 the President of the Commission decided, in accordance with Rules 28 para. 3 and 42 para. 2 (b) of the Rules of Procedure to give notice of the application to the respondent Government and to ask for their

observations on the admissibility and merits of the application insofar as it raised issues under Articles 3 and 13 of the Convention. No observations were requested in respect of the complaint under Article 6 of the Convention. The President of the Commission also decided on the same date to indicate to the Government of the United Kingdom, in accordance with Rule 36 of the Commission's Rules of Procedure, that it was desirable, in the interests of the parties and the proper conduct of the proceedings, not to extradite the applicant to the United States until the Commission had an opportunity to examine the application.

The Commission examined the application on 9 September 1988 and decided to prolong the above Rule 36 indication to the respondent Government until the Commission had an opportunity to examine the case in the light of the parties' observations during its October session (3 - 14 October 1988).

The respondent Government's observations were received on 9 September 1988. The applicant's observations in reply were received on 4 October 1988.

The Commission next considered the application on 13 October 1988 and decided to invite the parties to a joint hearing on the admissibility and merits of the case insofar as it raised issues under Articles 3 and 13 of the Convention.

The Commission also decided at this time to prolong the above Rule 36 indication to the respondent Government until the Commission had had an opportunity to examine the application in the light of the parties' submissions at the oral hearing.

The hearing before the Commission was held on 10 November 1988.

The parties were represented as follows:

Respondent Government

Mr. M. C. WOOD Foreign and Commonwealth Office, Agent

Mr. M. BAKER Counsel

Mr. C. OSBORNE Home Office)
) Advisers
Mr. N. PARKER Foreign and Commonwealth Office)

The applicant

Mr. Colin NICHOLLS, Q.C. Counsel

Ms. C. MONTGOMERY Counsel

Mr. R. SPENCER Solicitor

Following the hearing, the Commission, having declared the application admissible, decided on the same day to prolong the above Rule 36 indication to the respondent Government until the Commission had had a further opportunity to examine the application in the course of its forthcoming December session (5 - 16 December 1988).

SUBMISSIONS OF THE PARTIES

The respondent Government

Article 3 of the Convention

The Government indicated that, for purposes of the hearing on the admissibility and merits of the case, they accepted the Commission's case-law as set out in in the Kirkwood case (No. 10479/83), Dec. 12.2.84, D.R. 37, pp. 158-191) that an issue could arise under Article 3 of the Convention in a case of extradition.

1. Risk of imposition of the death penalty

The Government submit that the applicant does not run a serious risk of receiving the death penalty and being subjected to the "death row" phenomenon. They refer to the assurance they have received from the Attorney for Bedford County and the existence of important factors of mitigation likely to be taken into account by the sentencing judge and jury.

In the case of a fugitive requested by the United States who faces a charge carrying the death penalty in one of the States, the practice of the Secretary of State pursuant to Article IV of the Extradition Treaty is to secure an assurance from the prosecuting authorities of that State that a representation will be made to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should be neither imposed nor carried out. It would be a fundamental blow to the extradition arrangements between the United Kingdom and the United States if the death penalty were carried out on an individual who had been returned under those circumstances. No fugitive surrendered under the Treaty with the United States has been executed. The practice of the respondent Government of seeking assurances was described in the following terms by Mr. David Mellor, then Minister of State at the Home Office, during a parliamentary debate on the Criminal Justice Bill on 10 March 1987:

"The written undertakings about the death penalty that the Secretary of State obtains from the federal authorities amount to an undertaking that the views of the United Kingdom will be represented to the judge. At the time of sentencing he will be informed that the United Kingdom does not wish the death penalty to be imposed or carried out. That means that the United Kingdom authorities render up a fugitive or are prepared to send a citizen to face an American court on the clear understanding that the death penalty will not be carried out - it has never been carried out in such cases. It would be a fundamental blow to the extradition arrangements between our two countries if the death penalty were carried out on an individual who had been returned under those circumstances." (Col. 955 Hansard)

Although it is true that only the State authority can decide whether assurances about the death penalty can be given, the United States Government have recently assured the Government of the United Kingdom that if the State gives an assurance that the death penalty will not be imposed or carried out, the Federal Government can and will give the United Kingdom a formal and binding undertaking to that effect.

In the present case, the Attorney for Bedford County, Virginia, has provided an assurance that such a representation will be made to the judge and his affidavit to this effect was transmitted by the Governor of Virginia in support of the extradition request and certified by the United States Department of Justice. This assurance satisfies the United Kingdom Government of the unlikelihood of the death penalty being imposed and of the unlikelihood of the applicant being placed on death row. The seeking of such an assurance is an important and sensitive diplomatic matter between sovereign States. As such an ineffective assurance would have very serious consequences

for the extradition arrangements between the two countries. Furthermore, the present assurance is the most that would be permissible or acceptable under Virginian law, because neither the Government nor the Attorney General has the authority to dictate to either a prosecutor or to a trial court the charges to be tried or the sentence to be imposed, although it is true that a State prosecutor may in certain circumstances be prepared to undertake not to seek the death penalty. In the present case the State prosecutor has determined, on his assessment of the evidence, that a crime of capital murder has been committed and he is therefore bound under Virginian law to seek the death penalty. This is the only decision open to him.

The sentencing judge is under a legal duty to evaluate independently whether the death sentence is "appropriate and just" having regard to "any and all" relevant facts, including the representation made in the name of the United Kingdom (Virginia Code Section 19.2.264.5). It is thus not correct that the sentencing judge is precluded by Virginian law from taking the United Kingdom's representation into account. The representation by the Governor may also be considered in any application for clemency.

2. The proceedings in Virginia

Even if the applicant acknowledges his participation in the crime, the medical evidence already disclosed constitutes a strong argument for a defence of insanity, i.e. that at the time the offences were committed he was unable to distinguish right from wrong, or that although he knew that what he was doing was wrong, he was driven to do it by an irresistible impulse.

In a separate sentencing procedure, the jury can only impose the death penalty if they are satisfied beyond reasonable doubt and unanimous in their view either that there is a probability that the applicant would commit further criminal acts of violence that would constitute a continuing serious threat to society or that his conduct was "outrageously or wantonly vile, horrible or inhuman".

The jury must also consider any evidence put forward in mitigation and for this purpose, capital murder defendants are entitled under Virginian law to the appointment of a mental health expert to assist in the preparation and presentation of evidence relating to the defendant's mental condition. In addition, the jury is obliged to take into account certain specific matters, including the age of the defendant at the time of the commission of the offence, the lack of any previous criminal activity, the influence of extreme mental or emotional disturbance of the defendant and any impairment to his ability to conform to the requirements of the law. Even if these matters do not persuade the jury who set the sentence, they must also be taken into account by the judge who passes sentence. For this purpose, the trial judge must order the preparation of an investigative report detailing the defendant's history and other relevant facts. Upon presentation and review of the report, the court may set aside the sentence of death and impose a life sentence. The discretion of the court is thus narrowly channelled to avoid any arbitrary imposition of the death penalty and is subject to automatic appellate review by the Supreme Court of Virginia. That court is required by law to review the death penalty for arbitrariness and proportionality in addition to its consideration of any errors in the trial alleged by the defendant on appeal. In this respect the Supreme Court of Virginia in a capital case fully and exhaustively considers every claim raised by the appellant.

In the present case the court would be bound to take into consideration crucial mitigating factors in fixing sentence. The applicant was only 18 at the time of the offence. He had been in no difficulties with the police and had a high scholastic record. Furthermore, two eminent psychiatrists who examined the applicant in

England have attested that at the moment of the commission of the offence his mental responsibility for his acts was substantially impaired by an abnormality of the mind.

Against this background the Government submit that he was unlikely to be sentenced to death.

It has recently been established under Virginian law that all indigent prisoners who have been sentenced to death are entitled to lawyers to assist them to pursue collateral challenges to their death sentences in state habeas corpus actions (Giarratano v. Murray, 847 F.2d 1118 - 4th Cir. 1988) (en banc).

3. Extradition to the Federal Republic of Germany

The Government are not prepared to extradite or deport the applicant to Germany in the face of what they see as a legitimate prior request from the State where the offence was committed. It is supported in this conclusion by the fact that the place of commission of an offence is an important factor for choosing between simultaneous extradition requests.

Once the Secretary of State has issued the magistrate with an order to proceed in an extradition case, he has set in train a judicial process which he has no power to terminate. It follows that if, once an order to proceed has been given pursuant to a request from one State, a request from a second State is received, the order to the magistrate to proceed in relation to the first application cannot be revoked. It might be possible, once those proceedings were completed, for the Secretary of State to issue a further order to proceed in respect of the request from the second State. However, it may be that the magistrate would regard such a second request as being oppressive and therefore dismiss the extradition application.

In the present case, the extradition request from the Federal Republic of Germany was not received until some six months after the order to proceed had been issued in relation to the request from the United States of America. The Secretary of State was bound to give priority to the first request. Having regard to the uncertainties involved in the judicial proceedings in respect of the second request, the Secretary of State would not have been justified in proceeding with the German request once the judicial proceedings arising out of the American request were completed. Moreover, the evidence adduced in support of the German request would not have been sufficient to satisfy the requirements of Section 10 of the 1870 Act.

4. Severity of treatment

Central to the applicant's complaint is the length of time that will elapse between his being sentenced to death, and his execution if that sentence is carried out. The average time between trial and execution in Virginia is between six and seven years, that average being based on the seven executions which have been carried out following unsuccessful appeals, review and applications for clemency since the reinstatement of the death penalty in Virginia in 1977.

The delays in capital cases are not attributable to the post-conviction automatic appeal to the Supreme Court of Virginia, a process which is normally completed within six months of conviction and sentence. They are a result of successive collateral attacks in the State and Federal courts on the final judgment of conviction and sentence originally imposed by the trial court and affirmed by the Supreme Court of Virginia on automatic appeal.

The desire to afford the condemned man every possible avenue of appeal and review is consequently the cause of the delays.

Manifestly, delay rather than expedition serves the prisoner's interest when the death sentence has been imposed. It is the experience of the Virginia Attorney General's Department that attornies representing prisoners on death row use every available tactic to prolong the proceedings.

As regards the applicant's complaints concerning the prison conditions which an inmate on death row experiences, the Government note that inmates who have been sentenced to death are generally imprisoned at the Mecklenburg Correctional Center, an eight year old facility. The size of a prisoner's cell is 10 feet by 71/2 feet. Prisoners have an opportunity for approximately 71/2 hours' recreation per week in summer and approximately 5 - 6 hours per week in winter. Every inmate has a job, cleaning the common areas or cleaning the recreation yards. The conditions and facilities are governed by policies and rules which are set out in documentary form in Institutional Operating Procedures. These procedures cover all aspects of the regime on death row and allocate responsibility to particular prison officers for their implementation. They include very specific provisions on medical and psychiatric evaluation and treatment, on visiting rights and correspondence, on access to attornies and to reading material, and on the conditions governing the prisoners' work, food and recreation.

The Government note that the norms embodied in the Operating Procedures of the Commonwealth of Virginia constitute rights which may be enforced either by use of the grievance procedure under the Civil Rights of Institutionalised Persons Act or by mechanisms provided pursuant to a United States District Court Decree of 1985 which provides further standards for conditions of confinement. Alternatively, these rights may be enforced in separate legal proceedings against prison officials in the State or Federal courts.

As regards the method of execution itself, medical experts with experience of executions by electrocution agree that the subject is rendered unconscious and incapable of experiencing pain or suffering, if not actually dead, at the moment of the first electrical surge. Furthermore, the Eighth Amendment to the Constitution of the United States prohibits cruel or unusual punishment and the Supreme Court of Virginia has rejected the argument that the method of execution by electrocution in Virginia constitutes such a punishment. In fact the Virginia procedure is used as a model by other States.

Furthermore, there is no procedural obstacle or precedent which would prevent a challenge being made on appeal to the Supreme Court of the United States that the delays involved constituted cruel or unusual punishment under the Eighth Amendment. If such a case were brought, the Supreme Court would apply its normal standards to determine whether a writ of certiorari should issue for review of such a case.

The Government submit that for the reasons set out above there is no indication of any arbitrariness or unreasonableness either in the machinery of justice of the Commonwealth of Virginia or the United States of America or in the prison regime set up under the State legislation.

The fact that the death row phenomenon derives almost entirely from the fact that prisoners exercise all their collateral rights of appeal goes to the heart of the dilemma identified by the Commission in the Kirkwood case arising from the fact that Article 2 of the Convention expressly permits the death penalty (loc. cit.). In that case the Commission found that the delays inherent in death row in California did not constitute a breach of Article 3 of the Convention and the Government submit that insofar as the delays exist because of the availability of avenues of appeal following compulsory review, the delays in the present case similarly cannot constitute a violation of

Article 3. As regards the conditions in which prisoners sentenced to death in Virginia are detained, it appears that the facilities available for recreation, medical attention and contact with the outside world are at least as good as those in California.

In Kirkwood, the Commission noted that it is for individual High Contracting Parties to decide what conditions should govern their extradition arrangements with other States and on the manner in which they are to ensure compliance with the requirements of the Convention in the exercise of State responsibility in extradition matters. The Government accept that the assurance that they have obtained from the Attorney for Bedford County, Virginia, does not amount to a legal guarantee that the applicant, if sentenced to death, will have the sentence commuted. The Government are, however, satisfied that the assurance given is the best that can constitutionally be offered under the law of Virginia.

Finally, in the Kirkwood case, the Government pointed out that if the applicant could not be sent to the United States he would be effectively irremovable and would have to be released from custody and permitted to remain in the United Kingdom. If it were possible to extradite the present applicant to the Federal Republic of Germany, he would evidently not have to be permitted to remain in the United Kingdom. Nevertheless, the Government are of the view that the German extradition request has no relevance whatsoever to the issue under Article 3 of the Convention. Moreover, the availability of deportation as a practical means of resolving the problems raised by this application is one which has no relevance at all to any of the issues of principle or practice which the Commission is called upon to determine.

For the reasons given above, the Government submit that the applicant's complaint that his extradition to the United States of America will violate Article 3 of the Convention is manifestly ill-founded or, in the alternative, that there is no violation of the Convention.

Article 13 of the Convention

The inhuman or degrading treatment or punishment upon which the applicant's complaint is founded is an anticipated violation of the Convention, and if it occurs it will occur in the United States. For that violation he claims entitlement to an effective remedy in the United Kingdom. The Government submit that an obligation to provide a preemptive remedy in respect of a breach which may never occur is liable to create real practical difficulties under Article 13. These would relate both to the nature and the task of the domestic authority charged with responsibility for deciding whether a violation was likely and to the nature of the remedy required in order to avoid a violation of Article 3.

In any event, the applicant has not substantiated his claims under Article 3 of the Convention and in such circumstances the Government do not consider that the applicant's claim can be described as arguable. In this connection, the Government submit that it follows from the judgment of the Court in the case of Boyle and Rice (Eur. Court H.R., judgment of 27 April 1988, Series A No. 131) that the circumstances will have to be very exceptional for a complaint that is manifestly ill-founded to be nevertheless arguable. If, however, the Commission should conclude that there is an arguable claim in this case, the Government submit that the remedies available are in any event effective.

It is accepted that no court in the United Kingdom has power to review a discretionary decision by the Secretary of State to make an extradition order in the face of a claim by the person concerned that he would risk facing inhuman and degrading treatment if

extradited. However, it is submitted that the following remedies available to the applicant, taken on their own or in aggregate, are sufficient to satisfy the requirements of Article 13 in relation to a claim that the extradition of a person to a particular country is likely to lead to his being subjected to treatment that contravenes Article 3.

The 1870 Extradition Act provides that decisions taken in extradition proceedings may be challenged in the first instance before a magistrate and then by way of an application for habeas corpus. Such an application is made to the Divisional Court and, with leave, to the House of Lords. In habeas corpus proceedings the court is empowered to review all the evidence adduced in support of extradition and to assess the compatibility of the extradition with the provisions of the Extradition Act and the relevant Extradition Treaty between the United Kingdom and the requesting State. If habeas corpus applications are unsuccessful the prisoner may petition the Secretary of State. On a petition to the Secretary of State the case is considered afresh and all the matters that the petitioner chooses to adduce in support of his case are taken into account. In exercising his discretion under Section 11 of the 1870 Act, the Home Secretary is not acting as a judge in his own cause. The Court recognised in the Silver case (Eur. Court. H.R., judgment of 25 March 1983, Series A No. 61) that in certain circumstances a petition to the Home Secretary would be an effective remedy and having regard to the obligation of the Secretary of State to carefully consider all the applicant's representations, including the United Kingdom's obligations under the Convetion, it is submitted that the right to petition the Home Secretary affords an effective remedy for the purposes of Article 13.

Moreover, the availability of judicial review proceedings in respect of that decision provides a further safeguard against any illegal, irrational of improper exercise of discretion by the Secretary of State. An interim injunction may be granted against the Crown as a result of such proceedings (R. v. Licensing Authority ex parte Smith, Kline & French Laboratories Ltd., decision of the Court of Appeal dated 16 August 1988).

The applicant

Article 3 of the Convention

1. Risk of imposition of the death penalty

The applicant submits that Mr. Updike, the Attorney for Bedford County, has declared publicly that he is seeking the death penalty in the applicant's case and that he proposes to give no assurance to the United Kingdom Government further to that which he has already provided. He has also told the applicant's United States attorney that he will not negotiate a plea because it is his policy to take all death penalty cases to trial for determination by the court and jury.

The assurance which has been provided by Mr. Updike can have no effect in a Virginian court since it is not a factor to be considered by it under the relevant Virginian statute and its consideration would inevitably raise constitutional issues of profound importance. If the jury returns a death sentence verdict the judge must impose a death sentence unless good cause is shown that the death sentence should be set aside (Virginia Code, Section 19.2.264.5). Neither the wish of the United Kingdom Government nor the future foreign relations of the United States would constitute good cause as to the issue of proportionality of sentence under Virginian law. Nor is the Governor of Virginia required to have any regard to the wishes of the United Kingdom Government.

Moreover, the assurance given is not an assurance that the

death penalty will not be carried out, and the statement by Mr. David Mellor to the House of Commons on 10 March 1987 is not supported by the terms of the assurance. Nor is it the best assurance that the Attorney for Bedford County can provide. He could agree to reduce the charge to first degree murder and thereby avoid the death penalty. Equally, the Governor of Virginia could agree that if the jury returned a verdict of death, then the sentence would not be carried out or that he would commute the sentence to life imprisonment or grant a permanent reprieve to the applicant.

The supporting assurance given by the Federal Government of the United States similarly fails to amount to an adequate assurance that the applicant will not be sentenced to death. The statement that the death penalty has never been carried out following such an assurance is inappropriate since the circumstances have never arisen in previous extraditions and it is of no comfort to the applicant that his execution may be harmful to Anglo-United States extradition arrangements. In fact, the subsequent experience of both Errico (No. 12553/86, Dec. 7.7.87, to be published in D.R.) and Kirkwood (loc. cit.) indicates that the State authorities do not consider themselves inhibited by such an assurance.

The applicant refers to two recent cases concerning extradition from the United States where effective assurances have been given by the prosecution authorities that the death penalty will not be imposed, namely, the case of Hamadei under a Federal indictment on extradition from the Federal Republic of Germany and the case of Haake on extradition proceedings from Spain to the State of Florida. The applicant submits that if binding assurances could be given in those cases, there can be no reason why such an assurance cannot be given in his case. Although in Hamadei's case the indictment was Federal, in the Haake case the assurance given consisted of an undertaking by the State Attorney not to seek "the imposition of, or obtain the death penalty ...".

2. The proceedings in Virginia

In Virginia a plea of diminished responsibility or its equivalent is not a defence to a capital murder charge. In its discretion a jury may sentence a prisoner to life imprisonment on grounds of mental illness but it is not obliged to do so and there are cases where it has not done so. Neither State nor Federal law therefore prohibits the execution of persons who were mentally ill at the time of commission of an offence if they are otherwise mentally competent at the time of their execution. There is strong psychiatric evidence that the applicant was mentally ill at the time it is alleged he committed the offence. It is not contended, however, that the applicant was insane within the meaning of that concept as defined under Virginian law, rather that he suffered from an abnormality of the mind at the time the offence was committed.

The applicant has received psychiatric treatment in prison whilst awaiting extradition. Virginia has very recently proceeded with the execution of a man who was much more seriously mentally ill than the applicant (Morris Odell Mason). Moreover, extreme mental or emotional distress may, as in the case of Morris Odell Mason, become an aggravating factor as opposed to a mitigating factor when the jury or judge are considering the likelihood that a prisoner will commit further dangerous criminal acts.

There is consequently a serious risk that the applicant will also be executed and it is submitted in this respect that the execution of a person who was mentally ill at the time the offence was committed constitutes inhuman and degrading treatment and punishment and is prohibited by Article 3 of the Convention.

The judicial system in Virginia contains further

elements of arbitrariness not examined in Kirkwood. In particular, the applicant's age at the time of the offence would only be a factor to be weighed by the jury and would not constitute a bar to the imposition of the death penalty. Furthermore, the wounds sustained by Mr. and Mrs. Haysom, even considered alone, would constitute an aggravated battery sufficient to satisfy the requisite test of "vileness" for the imposition of the death penalty under Virginia law. As a matter of practice, therefore, the burden of proof will effectively have shifted to the applicant at the sentencing stage to submit evidence in mitigation in order that the death penalty should not be imposed. Moreover, the law of Virginia exempts Ms. Haysom from the death penalty on the basis of the "triggerman" principle but evidence as to the result of her trial for the same crime is irrelevant to the jury's determination of the appropriate sentence in the applicant's case.

Under Virginian law the defendant may be granted legal aid for the purpose of his automatic appeal to the Supreme Court of Virginia. There are, however, eight other appeals in respect of which it is not established under Virginian law whether legal aid is available.

The Virginia Supreme Court's review of the death sentence is limited to issues of arbitrariness and proportionality. It is also restricted to objections which have been taken at trial under the "contemporaneous objections rule". In its review, the Supreme Court is restricted under the Code in its comparison of the facts of the case on review to cases in which the death penalty was affirmed as opposed to those in which it has been overturned. If juries generally impose the death sentence for conduct similar to that of the defendant, then the sentence is not excessive or disproportionate. Since 1977 that court has affirmed all but six of the 53 death sentences it has reviewed, i.e. 88%, as compared with the national average of 50%. The Court has never found that a capital sentence was imposed "under the influence of passion, prejudice or any other arbitrary factor" or that a sentence of death was "excessive or disproportionate to the penalty imposed in similar cases".

The restricted nature of the automatic appeal to the Supreme Court of Virginia means that the applicant's case, unlike that of Kirkwood, is not one where the prisoner fails in a comprehensive automatic appeal system and chooses voluntarily to repeat his appeals in the hope of succeeding eventually. It is rather a situation in which he is denied a comprehensive right of appeal at an early stage and subjected to the death row phenomenon because of the limitations of the appeal system.

Since 1977 no Governor of Virginia has commuted a death sentence. Furthermore, Virginian law places restrictions on the Governor's exercise of that discretion which are not found in the laws of other States.

3. Extradition to the Federal Republic of Germany

The applicant submits that the existence of a competing extradition request in respect of the offence for which his extradition is sought from the Federal Republic of Germany is, contrary to the Government's submission, a highly relevant factor in the determination of the applicant's claims under the Convention. This factor was not present in the Kirkwood case.

The view of the Director of public prosecutions of the United Kingdom that the applicant's tape-recorded confession to a public prosecutor of the Federal Republic of Germany would not amount to a prima facie case against the applicant is incorrect. The decided cases in England relating to sufficiency of evidence in extradition cases make it clear that so long as there is some evidence, the

magistrate may commit the applicant for return (e.g. R. v. Domat [1986] 82 Cr App R 173). A confession statement would clearly constitute a prima facie case that the applicant had committed the offence. Moreover, the view of the Director of Public Prosecutions is inconsistent with that of the Government of the Federal Republic which clearly considers that there is sufficient evidence to support its warrant of arrest.

Although there is no means of compelling Government witnesses in the United States to give evidence in Germany, most of the relevant witnesses in the applicant's case appear to be United States officials. Moreover the applicant's admissions were also witnessed by various British police officers. It is inconceivable that witnesses would not be willing to give evidence in the Federal Republic if requested to do so and on receipt of an undertaking that they would be paid their expenses. In the Hamadei case, the German Government were able to secure the testimony of numerous United States citizens to establish the case against him. It is also inconceivable that a magistrate in the United Kingdom would regard German extradition proceedings as oppressive in the applicant's case in circumstances where they are based on humanitarian considerations and particularly if a decision to extradite to Germany had been taken in pursuance of an indication or decision of the Commission.

The applicant can also be deported to the Federal Republic of Germany, which is obliged to receive him as one of its citizens. The applicant is liable to such deportation as an illegal entrant or as an overstayer under United Kingdom law and he would be arrested immediately upon his return to Germany.

4. Severity of treatment

The rights guaranteed under Article 3 of the Convention are absolute rights which do not permit any margin of appreciation in the State authorities as to the scope of their application or as to the measures necessary to protect them. The concept of inhuman or degrading treatment is, however, capable of expansion with time and the applicant submits in this respect that it is the emerging State practice of European countries to secure an adequate assurance that the death penalty will not be carried out in the case of extradition to the United States. This is borne out by the cases of Haake and Hamadei described above.

The only relevant factor is whether there exists an objective danger of treatment contrary to Article 3 for the person extradited, and the applicant contends that an assessment of the situation existing in Virginia indicates that there is a "real" risk that his rights under Article 3 will be violated. He further contends that there are factors of unreasonableness and arbitrariness present in his case which were not present in Kirkwood. The applicant also points out that the conditions in the United States have not changed in the way anticipated by the Commission in Kirkwood.

Since 1976 seven people have been executed in Virginia. Currently thirty-six people are on death row, all men, eighteen black and eighteen white. The length of time between sentencing and execution depends on the number and complexity of appeals. Information available from the Capital Punishment Project in New York shows that the time has varied between 3.5 and 8 years and can possibly be as long as 12 years. The average is between six and eight years and the minimum, discounting the case of a person who waived his right to appeal, is 4.5 years. The applicant submits that both the greater frequency of execution in Virginia as opposed to California and the longer periods of delay in Virginia are reasons to distinguish the applicant's case from that of Kirkwood. As submitted above, it is a distinguishing feature of the present case that the delays in the appeal system of Virginia do not arise from a situation where the

prisoner chooses voluntarily to successively repeat a comprehensive appeal but rather one where the initial automatic appeal is inadequate and where the subsequent appeals may be seen as attempts to remedy that inadequacy. The death row phenomenon is further aggravated by delays in executions consequent upon the massive backlog of prisoners currently awaiting execution in the United States.

The treatment to which the applicant will be exposed is therefore not necessary to issue a full and just review. Furthermore, and having regard in particular to the applicant's age and mental disability, it is likely that in waiting for his execution over a substantial period of time his personality will develop and change so that although a sentence of death may have been appropriate at the time sentence was passed, it may no longer be so at the time of execution. The applicant will in effect be a different person. The cruel effect of the death row phenomenon in the applicant's case is further exacerbated in that the treatment to which he will be exposed may aggravate his mental disability.

As regards prison conditions on death row in Virginia, the actual livable area of a prisoner's cell is about 5 feet by 6 feet and the actual recreation time averages six hours per week when the prisoners are not locked down. A lock down occurs for the actual or imagined discipline violation of any death row inmate and non-offending inmates are locked down along with the offending ones. Irrespective of the provisions of the operating procedures, it is common practice that death row inmates are locked down for long periods each year. In 1987 the death row inmates were locked down for approximately five months, thus making the average recreation time for a death row prisoner less than three hours a week. During a lock down, the prisoners are not allowed out of their cells for any reason other than to eat.

Each inmate's job lasts only four to six weeks per year during which he is paid $27 per month. The actual administration of health care to an inmate is meagre. One death row inmate has died and two others have committed suicide since 1977. There is no physician-patient confidentiality and routine psychiatric treatment consists of 2-3 minute examination followed by medication. Over one half of all death row inmates are receiving large doses of thorazine, a psychotropic drug. Furthermore, a prisoner must petition the Governor of the prison in order to obtain a contact visit. Since 1977 the Governor has allowed only 2 contact visits, both of which have occurred the day before execution.

As regards the method of execution, the applicant notes that only twelve States of the 37 with the death penalty now use electrocution. In Virginia this process is achieved by administering a 55-second electric shock to the prisoner's body which has the effect of causing blisters to appear on the prisoner's legs, his skin to stretch and smoke to emanate from his body. There are hours of preparation beforehand including three hours during which the prisoner waits in a cell after his head and his leg have been shaved. This is a particularly horrifying and degrading form of punishment which has been held not to constitute cruel and unusual punishment under Virginia and United States law (Glass v. Louisiana, 105 S. Ct 2159 (1985)).

Article 13 of the Convention

Contrary to the submissions of the Government, it follows from the decision of the High Court in the Kirkwood case that the Secretary of State is under no obligation as a matter of domestic law to have due regard to the Convention in the exercise of his discretion under Section 11 of the 1870 Act (R. v. Secretary of State for the Home Department ex parte Kirkwood [1984] 2 ALL ER 390). The ruling of the High Court in the Kirkwood case reflects the "dualist" principle of

United Kingdom law that treaties which have been ratified do not confer rights on individuals (Republic of Italy v. Hambro's Bank [1950] 1 All E.R. 430).

Moreover, the mere fact that the Secretary of State in the applicant's case may have regard to the provisions of the Convention does not provide the applicant with a domestic remedy for a breach of the Convention. Nor can the Secretary of State be regarded as sufficienty impartial and independent in this respect. Judicial review does not provide a safeguard against such breach since, as in the case of Kirkwood, the court is only concerned as to whether the Secretary of State's decision was unreasonable within the meaning of the Wednesbury principles. Furthermore, although it is accepted on recent authority that a court may grant an interim injunction against the Crown, that fact is irrelevant to the court's jurisdiction to apply the provisions of the Convention.

In addition, there is no statutory right to petition the Secretary of State to exercise a general discretion not to order the return, although Kirkwood, Errico and the applicant have all adopted this procedure simultaneously with their applications to the Commission under the Convention. In this respect the applicant contests the assertion of the Government that the dismissal of the petition on the one hand and the making of an order for return on the other, i.e. the acts which constitute the breach of Article 3 of the Convention, are subject to judicial review.

THE LAW

The applicant complains under Article 3 (Art. 3) of the Convention of his imminent extradition to the Commonwealth of Virginia in the United States of America on a charge of capital murder. He also complains under Articles 6 para. 3(c) (Art. 6-3-c) and 13 (Art. 13) of the Convention.

Article 3 (Art. 3) of the Convention reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 6 para. 3 (c) (Art. 6-3-c) of the Convention 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;"

Article 13 (Art. 13) of the Convention reads as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The applicant first submits that there is serious reason to believe that he would, if extradited to Virginia, be subjected to inhuman and degrading treatment and punishment in contravention of Article 3 (Art. 3) of the Convention. He considers that there is a serious likelihood that he will be convicted and sentenced to death and subjected to the "death row phenomenon" while awaiting the outcome

of various State and Federal appeals against the death penalty. He points out that in Virginia the average period spent on death row awaiting the outcome of collateral State and Federal appeals is between six and eight years.

The applicant states that this likelihood exists notwithstanding the assurance that has been given to the respondent Government by the Attorney of Bedford County, Virginia, that should the applicant be convicted of the offence of capital murder as charged, a representation would be made in the name of the United Kingdom to the judge at the time of sentencing that it was the wish of the United Kingdom that the death penalty should not be imposed or carried out. In the applicant's submission, if a jury returns a death sentence verdict, the judge must impose a death sentence and is under no obligation under Virginian law to take such an assurance into account. Moreover, it is contended that the respondent Government could have secured a better assurance, namely that the Attorney of Bedford County agree to reduce the charge to first degree murder, or that the Governor of Virginia agree to commute a death sentence to life imprisonment.

The applicant also claims that he suffered from a mental abnormality at the time of the commission of the alleged offence such as to substantially impair his responsibility for his acts and that this circumstance is neither a defence to a charge of murder under Virginian law nor a ground on which the court is precluded from imposing the death sentence.

The applicant submits that, in such circumstances, the respondent Government should give priority to a later request for the applicant's extradition in respect of the same offences to the Federal Republic of Germany, of which he is a national.

The applicant complains further that although under Virginia law the accused may be granted legal aid for the purpose of his automatic appeal to the Supreme Court of Virginia, there are eight other voluntary appeal procedures for which legal aid is not available. The applicant has serious reason to believe that he will be unable to fund the voluntary appeals which he may require in order to avoid the imposition of the death penalty, and submits that the denial of legal aid in such circumstances constitutes a breach of Article 6 para. 3 (c) (Art. 6-3-c) of the Convention.

Finally, the applicant complains under Article 13 (Art. 13) of the Convention that there exists under United Kingdom law no effective remedy in respect of his Article 3 (Art. 3) complaint that he is likely to be subjected to the "death row phenomenon".

The respondent Government observe that it cannot be assumed that the applicant will actually be sentenced to death, having regard to important mitigating facts such as his age, mental condition and absence of criminal record. They point out that the automatic appeal to the Supreme Court of Virginia is normally completed within a six month period and that the length of time spent on death row in Virginia is determined by the exercise by prisoners of collateral rights of appeal to both State and Federal courts following the review by the Supreme Court. The Government submit that no issue under Article 3 (Art. 3) of the Convention can arise for delays that are derived substantially from the voluntary exercise of such appeal rights.

The Government accept that the assurance they have received does not amount to a legal guarantee that the applicant, if sentenced to death, will have the death sentence commuted. They are nevertheless satisfied that the assurance given is the best that can constitutionally be offered under the law of Virginia. Moreover, it is not open to the Federal authorities to compel a State to give a

stronger assurance. They point out that, within the diplomatic context of an extradition treaty, both the respondent Government and the United States are aware that an ineffective assurance could have very serious consequences for the extradition arrangements between the two countries. It is therefore likely that the assurance will have the desired effect.

Reference is also made to the existence of important safeguards against the arbitrary imposition of the death penalty in Virginia, namely, that the penalty may only be imposed if one of the statutory aggravating circumstances is proved to exist beyond reasonable doubt at a separate sentencing hearing. Moreover, a post-sentence investigative report concerning the accused's background is reviewed by the trial judge and an automatic review of the trial and sentencing proceedings is carried out by the Supreme Court of Virginia. In addition, an accused's mental condition can be taken into consideration at the separate sentencing procedure.

The Government contest the applicant's assertion that legal aid is not available under Virginian law for the purposes of voluntary appeals in cases of capital murder.

Finally, it is contended inter alia that the applicant's complaints are not arguable in terms of the Convention and that therefore no issue arises under Article 13 (Art. 13) of the Convention.

The Commission considers, in the light of the parties' submissions, that the application as a whole raises complex issues of law and fact under the Convention, the determination of which depends on an examination of the merits of the application.

It concludes, therefore, that the application cannot be regarded as 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.

For these reasons, the Commission

DECLARES THE APPLICATION ADMISSIBLE

without prejudging the merits of the case.

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NØRGAARD)