AS TO THE ADMISSIBILITY OF

Application No. 31700/96
by Kailash Shanke TRIVEDI
against the United Kingdom

The European Commission of Human Rights sitting in private on 27 May 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
MM. R. NICOLINI
A. ARABADJIEV

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 20 July 1995 by Mr. Kailash Shanke Trivedi against the United Kingdom and registered on 3 June 1996 under file No. 31700/96;

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 of Indian origin, born in 1950 and residing in Grimsby. He is a medical practitioner. Before the Commission, he is represented by Mr. P. Leach, solicitor of Liberty, London.

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

summarised as follows.

In 1976 the applicant arrived in the United Kingdom and was registered as a medical practitioner. By the end of 1992 he had some 1,300 patients on his list. One of them was Mr. C., an elderly man suffering from a whole range of different types of illness, including diabetes and chronic bronchitis. He frequently required medication and often called the applicant to his home to administer it.

On 2 November 1992 the applicant submitted a claim form for night visit fees to the Humberside Family Health Services Authority ("HFHSA"). The date on which he said he had visited Mr. C. and made a prescription for him was 28 October 1992. He did exactly the same the next day, on 3 November 1992 for a purported visit to Mr. C., at night on 30 October 1992.

On 3 December 1992 Mr. C. took five prescriptions to the local chemist. Each was separately dated. Mr. C. told the chemist that he had been given all the prescriptions on the same day. The local chemist became suspicious and contacted HFHSA. The prescriptions were exposed to forensic examinations which revealed that they had been written in three batches in reverse date order. On 17 December 1992 Mr. C. again went to the chemist's shop with six further prescriptions, each bearing a different date. The chemist reported the matter to HFHSA.

On 11, 17 and 29 December 1992 the applicant made further claims for night visits to Mr. C. on 26, 28 and 30 November, 4, 6, 9, 11, 13, 17 and 26 December 1992.

On 28 January 1993 a statement was taken from Mr. C. by an investigating officer, in the following terms:

> "... I have been a patient of [the applicant] ... for two years. He used to visit me regularly at my home but it was at my request. He always told me to ring him after 10.00pm. Sometimes he would call at midnight and once he came at 1.30am. ... I rang the doctor because I was always running out of tablets. He only gave me enough to last one week.
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> One day early in December 1992, [he] came to see me during the night. I had rung him because I was running out of tablets. When he came that night he gave me six prescriptions all with different dates on. I took these prescriptions to [the chemist] the next day. He gave me the medicines and I told him the doctor had given the six prescriptions at the same time.
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> I can remember the [applicant] doing this once before but I can't remember when. I cannot remember ringing the doctor or him calling on Christmas Eve. There was no reason I know of to ring him on Christmas Eve. On Boxing Day I went out shopping about 12.30pm and got back about 3.00pm. When I got back I found a prescription written by [the applicant] had been pushed through the letter box. I did not see the doctor on Boxing Day. I did not ring him up that day either."

On 31 March 1993 the applicant was arrested and interviewed about his visits to Mr. C.'s home, in the presence of his solicitor. He declined to answer any questions.

On 20 July 1993 a further statement was taken from Mr. C. by the investigating officer. It reads as follows:

> "[The applicant] has a system where I had to ring him up

after 10.00pm if I wanted to see him. ... He gave me 10 pence to pay for the call but that was reduced to 5 pence towards the end. I had to call him regularly because I was always running out of medicines. When I rang him it was always after 10.00pm. He always came sometimes quite late and once at 2.00am. I was in bed at the time.

Every time [the applicant] visited me he left me one or more prescriptions for me to take to the chemist. I did ask him to prescribe more medicines for me in greater quantities but he always told me that what he gave me was all I needed.

On Christmas Day 1992 ... I came home about 8.00pm ... I telephoned [the applicant] twice ... but all I got was an answerphone giving another telephone number for another doctor. I did not contact that other doctor. I wanted some more tablets from [him]. I did contact him on Boxing Day but I did not see him. He put a prescription through my letter box.

I can say that every time I took a number of prescriptions to [the chemist], it was always after [the applicant] had given me them in one go. So if I took 5 prescriptions it would be the day after [he] had given me the five all at once."

On 3 August 1993 the applicant was charged with twelve counts of false accounting under the Theft Acts of 1968 in respect of night visits of Mr. C. in October, November and December 1992.

On 7 November 1994, a report by a Dr. L., drafted on 5 July 1994, was served on the applicant. It contained the following information:

"Mr. C. is suffering from cerebral atrophy or thinning of the brain. His symptoms are mental confusion and unsteadiness leading to frequent falls, together with behaviour best described as disinhibited. His condition has developed over the last several months and is expected to become worse. Because of the deterioration in his intellect he will never be able to give evidence in court."

The trial started on 15 November 1994. The Crown's case was that the applicant had made claims for payments in respect of night visits to which he was not entitled and that the night visits in question had not in fact taken place. The prosecution said that on two occasions in December 1992, the applicant went to see Mr. C. in the night and that on one of those occasions he handed to Mr. C. five prescriptions at once and on the other occasion six. The prescription forms made by the applicant to Mr. C. were exposed to the forensic examination and shown to have been written in three groups in reverse order of date.

An important feature of the Crown's case consisted of Mr. C.'s two statements. At the trial, the prosecution made it clear that Mr. C. was unable to attend court to give oral evidence and sought leave of the court to read the statements to the jury. The applicant's counsel sought to exclude them on the ground that they were dangerous in the inferences which a jury despite any direction might draw from them, the conclusions they might face if they, in fact, considered them and read into them a certain scenario.

The judge admitted Mr. C.'s statements considering, inter alia:

"The basis for their admission is to be found in the Criminal Justice Act 1988. Section 23 of the Act provides the basis for the admission and Section 26 governs the way that the court ought to approach the question of admitting

such statements. It is conceded that the grounds required under Section 23 are satisfied, namely that Mr. [C.] is by reason of his bodily and mental condition unfit to attend. It is, however, Section 26 to which my attention has been drawn. By that section the statement shall not be given in evidence without leave and this court should not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice. In considering whether it is in those interests, it is the duty of this court to have regard, in particular, to whether it is likely to be possible to controvert the statement in the absence of the author, that its admission will result in unfairness to the accused. Finally, to any other circumstances that appear to the court to be relevant.

... In particular, I am satisfied that in considering the contents of the statement I must have particular regard to the quality of the evidence which it contains. I must have regard to whether or not, in the absence of any other evidence, the case would have to be withdrawn from the jury and I have to look at the circumstance in which it all came to be made: I have to have regard to the fact that if I admit it the defendant will not be able to cross-examine and will not have opportunity to test the recollection of the witness on particular points. In this case that includes testing, if it were so to be thought appropriate, when the witness has not himself ever mentioned any visit, that there were, in fact, visits. [The applicant's counsel] says that deprivation is of particular importance here.

All those matters determine the approach that I have taken in this case. The prosecution have put before me evidence from the general practitioner Dr. [L.] who, since January 1993, has had Mr. [C.] as his patient. I have also received evidence from the consultant physician at the local hospital to whom Mr. [C.] was referred in 1992 and 1993.

The extensive notes which are available have been referred to and all care taken to ensure that the full picture is brought out before me. The prosecution have further adduced evidence from the [investigating officer] ... who took the statement from Mr. [C.]. That is material, of course, when I consider the quality of the evidence, since it is alleged or asserted by the defence that at the material time the witness was, or may have been, suffering from such a degree of mental impairment that the contents of these statements, even as they are at present are fundamentally unreliable. To that end, the defence called two witnesses. The first was a neighbour who related one incident in 1992 or 1993. I am not entirely clear when, but I take it in the defendant's favour that it was in 1992 which showed a lapse of memory on behalf of Mr. [C.]. Further, and more significantly Professor [P.], a man of undoubted eminence in his field which is to do with the psychology of age and the many problems associated with ageing. [He] has not seen Mr. [C.] but gave an opinion based on the notes and the other evidence which he was in court to hear.

... The problems he diagnosed as a GP were not ones which included loss of memory and loss of other faculties, intellectual faculties of brain and mind which, had he seen any signs, he would certainly have cause to be investigated.

Doctor [L.] saw him in all, ... sixteen times over a period of four months and said: 'I saw no reason to test his

memory. He seemed to have purely mechanical problems. His memory seemed to be entirely reliable. He seemed to be a sensible chap.' ...

Doctor [J.] saw him in April 1993 ... He found him able to give a clear story as regards his problems though it was aided by his niece who filled in one or two extra details.
...
[The investigating officer] spoke to Mr. [C.] on these two occasions. He asked general questions and wrote down what Mr. [C.] said to him. He found no difficulty in understanding him. He described him as quietly spoken, able to recall details. A man who did not falter in what he said. The same was the position in July. ...

Professor [P.] ... says that this man has a well-established neurological disorder, severe movement disorder and now is showing signs of dementia. He believes that these stem from damage which first began to appear. Physical changes may be a better way of putting it than damage, in February 1992 which has progressed with the early signs of movement disorder ... He said that the one memory lapse is of some considerable significance and that overall in his experience which, as I say is distinguished and extensive, there is likely to have been some effect on intellect and memory.

Upon that basis [counsel for the applicant] asks me to say that I cannot be satisfied that at the time this witness made the statement and I refer particularly to the case of Dempsey [98, Criminal Appeal Reports] where a similar situation was encountered, there is material to say that the quality of the evidence contained in it is compromised and that I should therefore exercise the discretion against the prosecution.

It seems to me that there is a quite coherent and consistent picture of this man observed by those who were, in fact, on the ground seeing him face-to-face over a substantial period of time. I do not myself think that helpful, as it very often is that in cases of this kind, there is any substitute for such face-to-face observation. The general practitioner struck me as a cautious and careful practitioner. Doctor [J.] ... was also careful and thorough and I am satisfied their observations are, indeed, to be relied upon. I am satisfied that at the material time, though Mr. [C.] was handicapped and though he was as Doctor [J.] put it, 'at the lower end of the scale when one looks at the degree to which people are affected by the aging process', he nevertheless, was in a condition to make a statement that he knew he was making and that was to the best of his recollection at the time as accurate as he could make it, in response to the matters he was asked to consider. There is nothing, it seems to me, about the quality of this evidence which gives rise to such concern that would lead me to exercise the discretion I have to exclude the reading of that statement. ...

As to the arguments I think I need to look at the nature of them in order to deal with them. [Counsel for the applicant] has said that the defendant is deprived of the opportunity of cross-examining. Of course, that is true in this case, as in every case, but, in particular, of putting to Mr. [C.] the case which is the defendant's, to explain not Mr. [C.]'s evidence but the evidence of the examination of the documents.

> I pause to interject that that shows that a series of prescriptions were written beginning with the last date in time and going backwards. The plain inference to be drawn is they were concocted in that way to cover nonoccurring visits. Mr. [C.] does not say that on a particular day the doctor did or did not visit save for one instance and on that he said two separate things which is to the defendant's advantage.
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> The defendant has every opportunity to give uncontroverted evidence, therefore, about the reason for writing out prescriptions in that way on one day. About writing them in reverse order. It seems to me that the defence, though certainly not given the opportunity of raising matters with Mr. [C.], may well in any event be in a better, are in a better position than they would be if he were here to give evidence. Had that matter been put to him, were he able to deal with it, his answers might, in fact, be quite damaging to the defendant. One does not know, but one can foresee it happening, as one has seen it in other cases.
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> There is no particular direct evidence, as I say, on the question of dates and the number of prescriptions differed at any one time. All that seems to me to be matters which are not, on analysis, harmful to the defendant. There is therefore nothing that seems to me appropriate to take into account as raising risks of unfairness for the defendant. So for those reasons, I do not consider that there is substance in the objections [counsel for the applicant] makes along those lines.
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> In all the circumstances, therefore, it seems to me, that I can properly exercise the discretion I have under Section 26, having had in mind the risks and, of course, the risk of any injustice to allow the statement to be read, or statements to be read."

Mr. C.'s statements were then read to the jury.

The applicant gave evidence at the trial. He explained that Mr. C. lived by himself and he was not a well man. Apart from diabetes the applicant said he had high blood pressure, heart problems, a blood disorder, anaemia and asthma, and he often asked the applicant to come at night. Whenever he did so the applicant said he went. He recorded these visits, according to his account, on separate pieces of paper. He also took claim forms with him, and he gave evidence about specific occasions when he wrote prescriptions. He conceded in evidence that the entry for 30 October 1992 appeared before the one for 28 October 1992, but he said he might have made a mistake when he was filling in his records.

The applicant also gave evidence of particular visits to Mr. C. during November 1992. He said that it was on a visit on 2 December 1992 that Mr. C. told him that he had lost all the prescriptions that he had been given at the end of November 1992. The applicant said that he had made out duplicates. That point was no doubt of consequence since the prescriptions had apparently been given on various dates in the previous ten days or so, and yet the prescriptions were being replaced at the end of that period, when that period had expired for which the tablets were presumably being prescribed. He said that he also saw Mr. C. on various dates in the early part of December 1992, and on 16 December 1992. Mr. C. told him that he had once again lost all the earlier prescriptions, and so once again he made out duplicates of the six prescription forms from information in his records.

According to the applicant, he did see Mr. C. on Boxing Day. On that occasion he said he prescribed a pain killer for him. He carried

claim forms about with him and filled them in as required. He said that was why some of the forms had earlier dates towards the end than those at the beginning of the forms. He transferred the details onto his own patients' records and left his receptionist to fill in other details on the claim forms. Once that had been done he threw away the pieces of paper on which he had originally recorded his visits.

On the applicant's behalf, two of his patients were called. Both of them described the applicant as being a very good, caring, considerate and reliable doctor.

At the end of the prosecution case, the charges in relation to 30 October and 16 December 1992 were dismissed by the judge on the basis that even on the prosecution case it was clear that visits had been made on those days. An application by counsel for the applicant that the final charge relating to 26 December 1992 also be dismissed was rejected. The basis of that application was that the only evidence against the applicant in relation to this date came from Mr. C. who had not given oral evidence and whose statements were inconsistent one with the other on the question of whether he telephoned the applicant on that day or not. The judge rejected the application on the grounds that there was evidence from Mr. C. in respect of the final charge and it was up to the jury what they made of the inconsistency in his statements.

On 18 November 1994 the Grimsby Crown Court convicted the applicant on ten counts of false accounting. On 19 December 1994 the Court ordered him to perform 160 hours of community service on each count concurrent and in addition to pay the sum of £5,000 towards costs of the prosecution.

In July 1995 the applicant appealed to the Court of Appeal on the basis, inter alia, that Mr. C's evidence should not have been read to the jury.

On 13 July 1995 the Court of Appeal dismissed the applicant's appeal on the grounds that the trial judge had approached the question of Mr. C.'s evidence properly. The Court found inter alia:

> "The Crown applied for the statements to be read and there was a considerable amount of evidence given on the voir dire about Mr. [C.]'s state of mind at the time when the statements were made as well, of course, as evidence which related to his being unfit to attend court. The relevant cases were referred to the judge and he took account of them in giving his ruling. The judge concluded that there was nothing about the quality of the evidence which gave such concern as would lead the court to exercise its discretion to exclude the statements and accordingly he admitted them.
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> There was a submission of no case to answer made in relation to three counts, which succeeded in relation to two of them, but not in relation to count 12 which ... related to the visit which the [applicant] said he had made to Mr. [C.] on Boxing Day. The judge ruled that that matter should be left to the jury.
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> It is to be noted that his reference to Boxing Day in the second statement did differ in one respect from his reference to Boxing Day in the first statement, because whereas in the first he said he did not contact the doctor at all on that day, in the second he said that he did. But in both ... he said that he did not see the doctor on that day, in which case, if it were true, the doctor would not have qualified in respect of that date for any fee for visiting Mr. [C.].

What is said on behalf of the [applicant] is that the judge's account of why Mr. [C.]'s evidence should be admitted did not show a proper understanding of its significance or potential significance.

The criticism made is that although it might be true to say that the statements were not central to proof of dishonesty they did make some reference to it which, in the context of dishonesty, might have been prejudicial to the doctor. It was also contended that the comment on the vital issue 'whether or not a visit was made, they are silent', is subject to a qualification in relation to Boxing Day because, as we have just pointed out, both statements said that there was no visit made on Boxing Day, which was the direct subject of count 12 in the indictment.
The prosecution did indicate in opening what use they proposed to make of Mr. [C.]'s statements, and [counsel for the applicant] submits that even if one only considers them in relation to count 12 of the indictment, to the extent that they facilitated proof of that count, they might have told heavily against the [applicant] because if the jury found him guilty upon that count, why, they might the more readily find him guilty on the remaining counts.

The summing-up is criticised for the way in which the judge handled Mr. [C.]'s statements. He said ... that the jury had had no opportunity to see Mr. [C.] in the witness box, adding: 'When you do see a witness you often get a better idea of their reliability, their accuracy and their honesty. Secondly you have not seen him tested under cross-examination. Often you get an even clearer idea. ... So when you consider his statement you cannot pay as much attention to it as you would if it had been given from the witness box. The weight you attach to it is, therefore, less than would be the case in respect of evidence given by a witness who was here.'

[Counsel for the applicant] criticises those references because they were made without further reference to the burden of proof, as to which the judge had already directed the jury. He submits that references to weight may not be expected to mean much to a jury unless it is related to the question of burden of proof. It seems to us that the significance the jury was invited to place upon the fact that they did not have the opportunity of seeing Mr. [C.] for themselves was self-evident. Not only were they unable to assess him as a man, but also they were unable to see him tested in cross-examination. The judge then read the statements. It was plain that the evidence in relation to Boxing Day depended on Mr. [C.] and that his evidence as to that was not corroborated.

An important part of [counsel's for the applicant] submissions about Mr. [C.] is the medical evidence because the judge, as we have indicated, ruled in favour of the Crown that notwithstanding that evidence the statements should be admitted. The reason why his statements were read to the jury was the same as the reason given by the judge, to which we said we would refer, for Mr. [C.] not being called as a witness. It ... reads as follows: 'In January 1993 Mr. [C.] was suspected of having Parkinson's disease. Following a variety of falls he was admitted to Fairfield Lodge, an old people's home on March 25th, 1993 where he has remained until this day. It is now believed that he suffers from a degenerative condition called pseudo bipolar palsy rendering him unfit to travel.'

That is criticised, as we understand it, because it does not go far enough or tell the jury enough about Mr. [C.]'s medical condition. The purpose of it was, of course, to explain why he was not in court. It was not intended to go any further than that. No application was made to the judge, on behalf of the [applicant], to entertain evidence about Mr. [C.]'s medical condition at the time when he made the statements which were read to the jury, or at the time of the incidents referred to in those statements or at all.

The judge's conclusion about Mr. [C.]'s evidence not being open to criticism, because in the judge's phrase it was 'as accurate as he could make it', is made on the footing that that took no sufficient account of the real objection to his evidence, which was that his memory was defective at the time, at any rate by the time that the statements were taken from him, and that therefore they ought not to be allowed to be read in circumstance where his evidence could not be tested in cross-examination. Before reaching that or any such conclusion the judge had, in the course of a lengthy ruling, carefully reviewed the medical evidence.
...
After his review of the judge's ruling [counsel for the applicant], by way of reply, took us to the evidence actually given by Dr. [J.], Dr. [L.] and Professor [P.]. They made, whether in cross-examination or otherwise, from time to time various acknowledgements that in some respects Mr. [C.]'s memory might have been to some extent impaired. But that may be more or less true of many, if not most, witnesses, whether for physical or other reasons. The question was whether, at the time when the statements were taken from Mr. [C.], there was sufficient criticism available to be made of them as would make it unfair for them to be adduced in the absence of the man who had originally given them. The judge, in the exercise of his discretion, was entitled to conclude that the criticisms to be made of Mr. [C.] and his memory were not such as made it appropriate to exclude his evidence. The judge came to that conclusion after an exhaustive enquiry into Mr. [C.]'s condition, including his memory at the material time, and it was a discretion with which, in the circumstances, this court will not interfere. The discretion whether to admit that evidence was, in our judgment, properly taken by the judge after consideration not merely of the witnesses but, as we have remarked, of the authorities relevant to the introduction of statements in these circumstances. It is said that Mr. [C.]'s evidence was prejudicial, but none of it went directly to the allegation that the [applicant] had claimed for visits that he never made except in so far as it referred to the absence of a visit on Boxing Day, which we have already mentioned. As [prosecution counsel] has said in his written submissions, those statements did not specify how frequently the [applicant] visited Mr. [C.]'s house. They shed no light on how batches of prescriptions were written in reverse order of dates, as each was torn from the top of a pad of forms. It was necessary for the Crown to adduce the [C.] evidence, not so much in proof of dishonesty but in the light of the [applicant]'s largely 'no comment' police interviews, to describe the background in which prescriptions were written and then claims were made, whether legitimately or not.

The judge was right to reflect that if Mr. [C.] had been called he might, when cross-examined, have remembered matters adverse to the [applicant], although there was evidence from Professor [P.] that Mr. [C.] was suffering

> from severe episodic memory loss, which might affect the reliability of his statements. There was the evidence also, to which we have referred, from his general practitioner and another physician, as well as from the officer who took the statements, that Mr. [C.] was able to communicate effectively, answer questions and give a clear account of himself. With the decision to admit Mr. [C.]'s evidence, accordingly, we decline to interfere.
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> In a one-line submission [counsel for the applicant], in conclusion, contended that there was no sufficient evidence to leave to the jury on count 12. It seems to us quite plain that in both his statements Mr. [C.] was saying that he received no visit on Boxing Day from the doctor. The result of that was, as the judge declared when he ruled upon the submission of no case, that it was a matter for the jury whether, in the light of such explanations as the [applicant] saw fit to give, they were satisfied that he made no call upon that particular day in respect of which, however, he had seen fit to make a claim."

The applicant was advised by a leading and junior counsel that there was no basis upon which the case could be appealed to the House of Lords.

COMPLAINTS

1. The applicant complains that his rights under Article 6 paras. 1 and 3 (d) of the Convention have been violated in that the evidence of Mr. C. was not produced in his presence at a public hearing and, moreover, he was given no adequate and proper opportunity to question Mr. C. or challenge his evidence. Neither himself nor his representative was present when Mr. C.'s statements were made.

The applicant claims that at his committal for trial, no indication whatsoever had been given to him that Mr. C. would not be attending the trial to give oral evidence. Had any such indication been given, the applicant would have exercised his right to call on Mr. C. to give oral evidence at the committal proceedings.

The applicant also criticises the trial judge's ruling on the question of whether, at the time Mr. C.'s statements were taken, his memory was defective and whether for that reason alone, the statements ought not to be put before the jury.

2. The applicant also submits that he was given no opportunity to consider Dr. L.'s report when it was prepared (5 July 1994) because it was not disclosed to him until 7 November 1994, four months after it had been written and only eight days before the trial began. He argues that the unjustifiable delay by the prosecution in disclosing Dr. L.'s report to him deprived him of considering that possibility.

THE LAW

1. The applicant complains that he did not have a fair trial as he was convicted mainly on the basis of statements made by a witness who did not attend his trial. The statements of the witness were read out at the hearing and therefore the applicant was not given the opportunity to examine or have examined the witness against him. He invokes Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention which reads in so far as relevant:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...

...

3. Everyone charged with a criminal offence has the following minimum rights:
...
(d) to examine or 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; ..."

As the guarantees in paragraph 3 of Article 6 (Art. 6-3) of the Convention are specific aspects of the general concept of a fair trial set forth in paragraph 1, the Commission will consider the complaint under the two provisions taken together (cf. Eur Court HR, Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, para. 25).

The Commission recalls that the admissibility of evidence is primarily a matter for regulation by national law and that, as a rule, it is for the national courts to assess the evidence before them, the task of the Convention organs being to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (ibidem, p. 10, para. 26).

The Commission further recalls that, according to its own case-law and that of the European Court of Human Rights, all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that the statement of a witness must always be made in court and in public if it is to be admitted in evidence; in particular, this may prove impossible in certain cases. The use of statements obtained at a pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (Art. 6) of the Convention, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage of the proceedings (ibidem, p. 10, para. 27).

In the present case the Commission notes that before deciding to admit the statements of Mr. C. into evidence the trial judge conducted a detailed inquiry into Mr. C's condition, including his memory at the material time. After hearing oral evidence as well as submissions by both sides in the absence of the jury, the judge concluded that there was nothing about the quality of the statements of Mr. C. which gave such concern as would lead the court to exercise its discretion to exclude them from evidence.

The Commission further observes that Mr. C.'s statements were not the only evidence in the case to show that the applicant had claimed for visits to Mr. C. which had not occurred. In particular, strong support for the prosecution case was provided by the prescription forms made out by the applicant for Mr. C. which were subjected to forensic examination and which were shown to have been written in three groups in reverse order of date. Moreover, as the trial judge noted, in the absence of oral evidence from Mr. C., the applicant had the opportunity to give uncontroverted evidence about the reason for preparing the prescriptions in that form.

The Commission further notes that not only was counsel for the applicant given a full opportunity to comment on the statements of Mr. C. to the jury with a view to casting doubt on his credibility or reliability, but in his summing-up the trial judge expressly warned members of the jury that they should attach less weight to the statements of Mr. C., which had not been tested in cross-examination, than to the evidence of witnesses who had been heard orally before the court.

Having regard to the above the Commission is of the opinion that

the admission in evidence of Mr. C.'s statements did not fail to respect the rights of the defence and that the proceedings considered as a whole were fair within the meaning of Article 6 (Art. 6) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also claims that he was given no opportunity to consider Dr. L.'s report when it was prepared (5 July 1994) because it was not disclosed to him until 7 November 1994, four months after it had been written and only eight days before the trial began. He argues that the unjustifiable delay by the prosecution in disclosing Dr. L.'s report to him deprived him of considering that possibility.

The Commission is not required to examine the question whether the applicant exhausted domestic remedies in regard to this complaint as it is inadmissible for other reasons. The Commission notes that even if the report in question was drafted on 5 July 1994, the applicant received it on 7 November 1994, which was a week before the trial. In these circumstances, the applicant had a sufficient time to prepare his defence at the trial in this point.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

H. C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission