AS TO THE ADMISSIBILITY OF

Application No. 17440/90
by Peter WELCH
against the United Kingdom

The European Commission of Human Rights sitting in private on 12 February 1993, the following members being present:

MM. J.A. FROWEIN, Acting President
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G. H. THUNE
Sir Basil HALL
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. J.-C. GEUS
B. MARXER
G.B. REFFI

Mr. M. de SALVIA, Deputy 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 22 June 1990 by Peter Welch against the United Kingdom and registered on 19 November 1990 under file No. 17440/90;

Having regard to

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

- the observations submitted by the respondent Government on 20 February 1992 and the observations in reply submitted by the applicant on 28 May 1992;

- the observations submitted by the parties at an oral hearing on 12 February 1993;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1938 and is serving a prison sentence in HM Prison Long Lartin. He is represented before the Commission by Atter Mackenzie, a firm of solicitors practising in Evesham. The facts of the case, as submitted by the parties, may be summarised as follows:

The applicant was arrested on 3 November 1986 for suspected drugs offences. He was charged on 4 November 1986 in respect of offences concerning the importation of cannabis alleged to have

occurred between 1 January 1986 and 3 November 1986. On 24 February 1987, the applicant was charged with intent to supply cocaine and on 5 May 1987 a further charge was brought, relating to possession of cocaine, alleged to have been committed on 3 November 1986.

The applicant made some thirty appearances before magistrates in order to be remanded in custody pending trial. He alleges that no particular security measures were taken.

Between 1 June and 11 August 1987, the applicant's committal proceedings took place before Haverfordwest Magistrates' Court. The applicant alleges that the proceedings were attended by a high profile security operation, including dozens of armed policemen wearing bullet proof vests in the vicinity of the court and the closing of the roads into the town. The Government state that between November 1986 and April 1987 intelligence was received concerning a planned escape attempt involving the applicant and a number of his co-defendants. The customs authorities had learned from its sources that a large sum of money was available overseas to finance this escape and that those planning the escape had access to firearms and the possible use of a helicopter.

The Government states that the applicant was classified as a Category A prisoner on 3 April 1987. The applicant states that the prison records indicate that he was first reported as a potential Category A on 18 November 1986 but this was not confirmed when he moved to Cardiff Prison on 2 December 1986. He was noted as a potential Category A again on 14 April 1987, which was confirmed on 28 April 1987. He continued to be classified as high risk through his trial and re-trial.

On 23 February 1988 the applicant and nine co-defendants first appeared for trial at Swansea Crown Court in South Wales. The applicant alleges that security at the applicant's trial was intense, involving armed police and the handcuffing of the applicant and certain other defendants in the courtroom.

Some six weeks into the trial a juror alleged that he had been offered money to return a "not guilty" verdict. As a result of this allegation, the judge discharged the jury and ordered a retrial. There was a great deal of media interest in and coverage of these events.

At the pre-trial review counsel appearing on the applicant's behalf submitted that the media coverage was prejudicial to his client's case and argued that the applicant's trial should not take place in South Wales. This submission was rejected by the judge presiding at the review and the applicant's trial was listed to take place in Cardiff in August 1988 with the same judge presiding.

The re-trial began on 20 June 1988. The applicant alleges th intense security arrangements were, once again, put into effect, involving the surrounding of the courtroom by police in bulletproof vests and armed with shotguns and rifles. There was also a helicopter in use to survey the area from the air and the applicant alleges that there was a police marksman with a rifle on the roof who was clearly visible in silhouette through the glass window in the dome of the courtroom. The Government state that while the applicant was awaiting his re-trial, the master-key to part of the prison where the applicant was being held went missing and that also a number of prison officers' uniforms were found hidden in the vicinity. As a result, the applicant and the other co-defendants were moved to another prison. Shortly after the customs authorities received further intelligence that an associate of the prisoners had been approached to assist in a planned escape and had been requested to acquire a rope ladder, two-way radios and a vehicle. The Government confirms that the applicant was escorted to the court in a secured van with an armed escort and that a helicopter was used for surveillance. They submit however that in public the officers kept their weapons concealed and that the judge

ruled that none of them should be present in the courtroom.

The applicant was handcuffed throughout the proceedings following an application by the prosecution at the beginning of the trial which was granted by the judge.

On 24 August 1988 the applicant was found guilty on five counts and sentenced to 22 years' imprisonment in respect of two offences and 20 years' imprisonment in respect of three offences.

The judge also imposed on the applicant a confiscation order of £66,914 under the Drug Trafficking Offences Act 1986 ("the 1986 Act") in default of the payment of which the applicant would be liable to serve a consecutive 2-year prison sentence.

The applicant applied to a single judge of the Court of Appeal (Criminal Division) for leave to appeal against conviction and sentence. He was granted leave to appeal against sentence only. His application for leave to appeal against conviction was lodged outside the 28 day time-limit. On appearing before the full Court of Appeal on 11 June 1990 the applicant applied for an extension of time so as to apply for leave to appeal against conviction.

The applicant's reasons for his failure to apply within the proper time were that, although he had always been dissatisfied with his conviction, he did not appreciate, until the time-limit for an application had expired, that the reasons for his dissatisfaction constituted proper grounds for applying for leave to appeal.

On 11 June 1990, following a hearing at which the applicant was represented and present,the Court of Appeal held as follows:

> "[The applicant's] contention is that the second trial was conducted in circumstances of strict and, on his submissions unnecessarily strict, conditions of security.
>
> Both the original trial at Swansea and the subsequent trial at Cardiff were undoubtedly surrounded with circumstances of great precaution. There was a police escort to court. There were armed police around.There was, as we understand it, a helicopter, and [the applicant] himself was handcuffed in court as he sat in the dock. He complains that these matters cast such an aura of suspicion over the whole trial as to deny him, as he puts it, his presumption of innocence.
>
> The question of course whether a person shall be handcuffed during the trial is a matter for the discretion of the Judge, and that is not a discretion which will be exercised adversely to the defendant in very many cases. But it sometimes has to be done and sometimes has to be done even in the Court of Appeal when hearing appeals there.
>
> So far as the precautions outside the court are concerned, those are of course the responsibility of other authorities than the Judge and on those occasions no doubt likewise the matter is very carefully considered before these very expensive precautions are put into operation.
>
> To suggest that that sort of precaution renders the trial in any way unsafe or unsatisfactory seems to us to be a wholly wrong contention. If it were so, then of course the more dangerous the offender or the more dangerous the appellant, and the more likely he might be to escape, the less chance there will be of his being convicted or his appeal being dismissed. That cannot be right.
>
> We have considered this matter carefully. We have come to the conclusion that there is nothing in this application, nor is

there anything in the grounds that he puts forward for the extension of time. Consequently both the applications are refused."

In respect of the applicant's appeal against sentence, the Court of Appeal reduced the applicant's overall sentence by 2 years and reduced the confiscation order by £7,000 to £59,914.

RELEVANT DOMESTIC LAW AND PRACTICE

Security classification

Unconvicted or unsentenced prisoners remain unclassified except for a minority who are provisionally placed in category A. Prisoners are categorised according to the likelihood that they will seek to escape, their ability to do so and the risk that they would pose should an escape attempt succeed. A category A prisoner is defined as one whose escape would be highly dangerous to the public, the police or to the security of the state. The Governor of the prison refers the names of those prisoners he considers should be so classified to the category A section of the Prison Service Headquarters, which decides whether or not the prisoner should be provisionally categorised. Save for those prisoners who have committed very serious offences (in 1987 drug offences were not included in the list), the Governor has a discretion as to which prisoners should be referred.

The Drug Trafficking Act 1986

Section 1 of the 1986 Act provides as follows:

"(1) ... where a person appears before the Crown Court to be sentenced in respect of one or more drug trafficking offences (and has not previously been sentenced or otherwise dealt with in respect of his conviction for the offence or, as the case may be, any of the offences concerned), the court shall act as follows:

(2) the court shall first determine whether he has benefited from drug trafficking.

(3) For the purposes of this Act, a person who has at any time (whether before or after the commencement of this Section) received any payment or other reward in connection with drug trafficking carried on by him or another has benefited from drug trafficking.

(4) If the court determines that he has so benefited, the court shall, before sentencing ... determine ... the amount to be recovered in his case by virtue of this Section.

(5) The court shall then in respect of the offence or offences concerned -

(a) order him to pay that amount..."

The Act received the royal assent on 8 July 1986. Its provisions were brought into force by various orders of the Secretary of State. With the exception of Section 1(3) (which entered into force on 30 September 1986) Section 1 entered into force on 12 January 1987.

Section 38(4) of the 1986 Act provides:

"References in this Act to offences include a reference to offences committed before the commencement of section 1 of this Act; but nothing in this Act imposes any duty or confers any

power on any court in or in connection with proceedings against a person for a drug trafficking offence instituted before the commencement of that section."

Imprisonment in default

After a confiscation order has been made, the Crown Court decides upon the period of imprisonment which the offender has to serve if he fails to pay. This will not be activated until after such time within which the Court has ordered the offender to pay. The maximum periods of imprisonment are set down in Section 31 of the Powers of Criminal Courts Act 1973. The maximum period for an order between the sums of 50,000 and 100,000 pounds sterling is 2 years.

COMPLAINTS

The applicant complains that the imposition of the confiscation order in respect of offences which took place between 1 January 1986 and 3 November 1986 violates Article 7 of the Convention since the relevant provision of the 1986 Act did not enter into force until 12 January 1987. He further complains that the sentence of impri in default of payment of the sum concerned by the confiscation order is contrary to Article 7 of the Convention for the same reasons.

The applicant further complains of the security arrangements which were put into effect when he appeared in the Crown Court and the fact that he was handcuffed. In addition, he complains that the venue chosen for his re-trial was close to the place of the first trial and in light of the media attention given locally prejudiced him in his defence. He submits the these matters disclose violations of his right under Article 6 para. 1 to a fair trial and his right under Article 6 para. 2 to be presumed innocent until proved guilty.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 22 June 1990 and registered on 19 November 1990.

On 7 October 1991, the Commission decided to communicate the application to the respondent Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 20 February 1992 and the applicant's observations in reply were submitted on 28 May 1992.

On 10 April 1992, the Commission decided to grant legal aid to the applicant.

On 31 August 1992, the Commission decided to hold an oral hearing.

At the oral hearing, which was held on 12 February 1993, the parties were represented as follows:

For the Government:

Mr. Huw LLEWELLYN	Agent Foreign and Commonwealth Office
Mr. Alan MOSES, Q.C.	Counsel
Ms. Melanie CARTER	Adviser, Home Office
Mr. Peter VALLANCE	Adviser, Home Office

For the applicant:

Mr. Ben EMMERSON	Counsel

Mr. Jonathan COOPER Assistant

THE LAW

1. The applicant alleges that his rights under Article 7 (Art. 7) of the Convention were violated by virtue of the fact that the trial judge imposed upon him a confiscation order and, in default of compliance with the same, a prison sentence, under the provisions of the Drug Trafficking Offence Act 1986.

Article 7 (Art. 7) of the Convention provides as relevant:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Commission notes that the applicant was convicted of drugs offences committed between 1 January 1986 and 3 November 1986 and that a confiscation order, with a 2 year period of imprisonment in default of payment, was imposed on the applicant under Section 1 of the Drug Trafficking Offences Act 1986. That section entered into force on 12 January 1987. The parties are agreed that no provisions were in existence at the time of the offences which provided for the confiscation measures.

The Government however submit that neither the confiscation order nor the order for a period of imprisonment in default of payment are penalties for the purpose of Article 7 (Art. 7) of the Convention. They submit that the order was divorced from any measure of culpability and was not by its true nature or object a punishment. It pursued the purpose of depriving a drug trafficker of property which he ought never to have had, and of removing the value of the proceeds from possible future use in drug trafficking. Since the period of 2 years imprisonment will only be triggered if the applicant fails to pay, the Government submit it is not a response to criminal activity in the past and therefore not a penalty for the purposes of Article 7 (Art. 7) of the Convention.

The applicant submits that the 1986 Act introduced measures of acknowledged "draconian" effect. The imposition of a confiscation order constitutes a penalty or punishment within the meaning of Article 7 (Art. 7) of the Convention since it goes beyond depriving a convicted offender of alleged ill-gotten gains but provides, punitively, for the confiscation of all deemed drug-related proceeds that have passed through his hands. The applicant submits that the domestic courts have treated the measures as constituting a punishment since they apply the criminal standard for the burden of proof in the drug trafficking enquiry after conviction and the matter is dealt with on appeal by the Court of Appeal, Criminal Division. Further, the confiscation order is dependent on a criminal conviction and attracts, in default of payment, a period of imprisonment.

The Commission has taken cognizance of the parties' submissions. After a preliminary examination of the complaints under Article 7 (Art. 7) of the Convention the Commission finds that they raise complex issues of fact and law which must be examined on the merits. This part of the application cannot therefore be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

2. The applicant also complains that his rights under Article 6 paras. 1 and 2 have been violated as a result of the high visibility

security measures surrounding the applicant's appearance in court, including the handcuffing of the applicant and the decision of the judge presiding at the applicant's pre-trial review to hold the applicant's trial in Cardiff Crown Court notwithstanding the fact that the applicant's original trial in Swansea had had to be abandoned due to allegations of bribery.

Article 6 para. 1 (Art. 6-1) provides, so far as is relevant, as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

Article 6 para. 2 (Art. 6-2) of the Convention provides:

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

With respect to the applicant's complaint that his rights were violated by the decision of the judge presiding at the applicant's pre-trial review to order that the applicant's trial be held at Cardiff Crown Court after his original trial at Swansea Crown Court was abandoned, the Commission considers that the applicant has not shown that this decision in any way rendered the trial at Cardiff unfair. The applicant maintains that adverse publicity in Swansea after the abandonment of his trial there should have precluded his being tried in a town near Swansea. The Commission notes that it has taken the view in the past that in some cases a violent press campaign can adversely affect the fairness of a trial (cf. Nos. 7572/76 etc, Dec. 8.7.78, D.R. 14 p. 64).

The applicant has not however suggested that he has been the subject of a violent press campaign. Further, the Commission notes that the applicant has not provided any evidence as to the nature of the reporting of events at the trial in Swansea Court. He has at most alleged that the media coverage related to the security arrangements and to the reason for a re-trial. In these circumstances, the Commission finds that the applicant has not substantiated that the matters raised were such as to deprive him of a fair trial or of the benefit of the presumption of innocence.

With respect to the complaints concerning the various security arrangements which were put into effect both in and outside the courtroom, the Commission recalls that this complaint was raised before the Court of Appeal, which found that the precautions did not render the trial in any way unsafe or unsatisfactory. The Commission would agree that the implementation of necessary security arrangements at a trial cannot in itself be regarded as rendering the proceedings unfair. The Commission has found no indication on the facts of the case that the precautions were deliberately stage-managed in order to prejudice the applicant.

As regards, in particular, the handcuffing of the applicant, the Commission recalls that it has in previous cases found this to be an undesirable practice (eg. No. 12323/86, Dec. 13.7.88, D.R.57 p. 148).

The Commission notes however that the applicant, along with others, was being tried for a series of serious drugs offences. It also notes that the original trial at Swansea had to be abandoned due to an allegation from a juror that there had been an attempt to bribe him so that he could return a verdict of not guilty. Having taken the above circumstances into consideration, the Commission takes the view that although the measures complained of may have led the jury to infer that the applicant was considered by the police and the judge to be dangerous, it by no means follows, and the applicant has not

established that his right to be presumed innocent was thereby violated. The Commission recalls that it has already found that "the passing of a judgment concerning the dangerous character of a person does not in itself violate the presumption of innocence" (No. 9167/80, Dec. 15.10.81, D.R. 26 p. 248).

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

For these reasons, the Commission

by a majority
DECLARES ADMISSIBLE the applicant's complaint under Article 7 of the Convention without prejudging the merits;

unanimously
DECLARES INADMISSIBLE the remainder of the application.

Deputy Secretary to the Commission	Acting President of the Commission
(M. de SALVIA)	(J.A. FROWEIN)