AS TO THE ADMISSIBILITY OF

Application No. 18942/91
by Stephen WINDSOR
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 6 April 1993, the following members being present:

MM. J.A. FROWEIN, President of the First Chamber
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
MM. M. PELLONPÄÄ
B. MARXER
G.B. REFFI

Mrs. M.F. BUQUICCHIO, Secretary to the First Chamber

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

Having regard to the application introduced on 31 July 1991 by Stephen Windsor against the United Kingdom and registered on 11 October 1991 under file No. 18942/91;

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 12 August 1992 and the observations in reply submitted by the applicant on 27 November 1992;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a citizen of the United Kingdom, born in 1952 and detained in H.M. Prison Shotts, Lanarkshire. He is represented before the Commission by Messrs. C.A. Petrie & Co., Solicitors, Dunfermline.

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

During 1987 and 1988 a progressive series of disruptions and disturbances by prisoners took place within Shotts Prison, indicating a steady loss of basic control by the prison authorities. The most serious incident, which took place on 7 September 1988, involved assaults by prisoners on prison staff in the Textile Workshop. In the course of the disturbance the prisoners took over the workshop and caused £50,000 worth of damage.

In order to regain total control of the prison, the Governor immediately placed the whole prison on a lockdown regime. This involved a removal of normal association for the prisoners, who were confined to their cells. Food was delivered to cells and attendance of prisoners at work, recreation and education activities ceased. The prison authorities aimed to restore the prison to normal by instituting a system of progressive regimes in the different halls. The prisoners posing the least problems were placed in C Hall, where life was returned to normal as quickly as possible, with limited association introduced almost immediately. D Hall had a regime not quite as advanced as C, but was also being returned to normal, while in B Hall there was a more restricted regime for those prisoners about whose intents and behaviour there were still considerable doubts. A Hall was used to house those prisoners who had been involved in the disruption or who were suspected of incitement or other subversive activity. Within A hall there was a sub-division into 3 levels or "flats" with slightly differing degrees of restriction. Prisoners in A Hall were transferred between the flats and eventually to another more progressive hall as their behaviour or attitude were seen as improving.

The applicant had already been located in A Hall prior to the 7 September 1988 incident. Staff reported that the applicant had been heard inciting others to disruptive behaviour and for a month, from 13 September 1988, the applicant was placed in the Segregation Unit on the authority of the Secretary of State. The Segregation Unit had three exercise pens and during this period he was provided with his full exercise entitlement during which he could talk to prisoners adjacent.

On 13 October 1988, the applicant was returned to A Hall to the bottom flat (the most restrictive level of the Hall) where he remained until 15 November 1989.

During his period in A Hall, staff reported that he continued to attempt to intimidate and to make threats.

As regarded exercise, the lack of suitable facilities for exercising prisoners in small groups resulted in the authorities offering, at most, half an hour's indoor exercise in the wing corridor (an area of 29 by 2 metres) in groups of 2-3 per day to prisoners in A Hall. As the regime was relaxed, exercise was given in groups of 3-5 prisoners. No complete prison records remain of the exercise periods afforded to the applicant. A minute for the period 14 October to 19 December 1988 indicates that exercise was not available on a da basis (offered on 35 days out of 66), with gaps of up to 6 days without exercise. On three occasions the applicant is recorded as refusing exercise.

Outside exercise recommenced for A Hall in May 1989 and was offered on a daily basis. The Government allege, based on a record for the period from 22 May to 5 October 1989 (which omits the period 21 July-7 August), that, on the occasions when weather permitted outdoor exercise, the applicant made use of the opportunity approximately 55% of the time. As regards the period from January to May 1989 the applicant's own notes indicate that exercise was offered on 6 occasions in the first 3 weeks of January and then became more frequent, subsequently being increased to one hour offered on most days. The applicant also noted in July a period of nine days without exercise which coincided with a resurgence of disturbances in the prison.

During the lockdown period, food was delivered at meal times to the prisoners in their cells. The Government admit that there were initially many complaints about food arriving cold. Heated food trolleys arrived in late 1988 and the vast majority of complaints ceased. The applicant alleges that during July 1989 on occasion he was not provided with food at all for a period of some days. The Government submit that as a result of assaults on staff and disturbances special

arrangements were temporarily introduced at this time, but state that prisoners continued to be offered meals at normal times.

The Government state that in accordance with prison policy of lifting restrictions, the applicant was offered the possibility of moving to a more progressive hall. A minute, dated 23 November 1988 by one of the prison governors, recorded that the applicant stated that he preferred to remain in A Hall unless he could be transferred to Edinburgh. Manuscript notes by prison officers recorded that the applicant refused the offer of transfer to B Hall on 5 December 1988 and 4 January 1989. An undated record states that the applicant refused to progress through the system so that he could constantly complain about the regime. A minute, dated 28 September 1989 by the prison governor, refers to the applicant refusing a transfer on 7 occasions.

Prison records indicate that from 13 November 1988 the applicant enjoyed his statutory entitlement of two visits a month.

On 15 November 1989, the applicant was moved to Perth Prison.

A judicial inquiry was later held into the suicides in B Hall of two prisoners (one of whom was well known to the applicant) during the lockdown regime in Shotts prison. Sheriff Principal J.S. Mowatt found:

> "The evidence has failed to convince me that the continued lockdown situation in B Hall was justified after about December 1988... I am satisfied that the prison authorities failed to give proper consideration to the psychological effect on prisoners who were subjected to a lockdown situation for a period of weeks or months and the likelihood of an increase in states of depression and the risk of suicide;..."

and noted that:

> "it should have been obvious to (the prison authorities) that the isolation involved, particularly where the accommodation was on the basis of one man to a cell, would increase the tend depression amongst the prisoners and the consequent risk of suicide attempts."

A clinical psychologist's report on the applicant dated 8 July 1990 stated that he had seen the applicant on his arrival in Perth on transfer from Shotts and that he was sleeping badly, highly agitated and unable to associate with groups of people without feeling panic-stricken and highly anxious. During the period of lockdown he had developed "an obsessive compulsion" to help himself cope with the lockdown.

In a letter dated 18 June 1990, the clinical psychologist who was available to prisoners at Shotts recalled that he had 7 interviews with the applicant from August to December 1988. His impression in August 1988 was that the primary focus of the applicant's concern was external to the prison, i.e. his pending appeal and his contact with his children, although part of his distress could later be attributed to the restrictive regime. He had however experienced psychological difficulties before the lockdown and, while his psychological symptoms were exacerbated by it to some degree, his placement under these conditions might have been related in part to his own behaviour.

The applicant sought legal advice with regard to the prison conditions and in January 1990 was granted legal advice and assistance. In order to bring an action against the Secretary of State for Scotland in respect of alleged breaches of the Prisons (Scotland) Rules 1952, the applicant applied for civil legal aid to the Scottish Legal Aid Board.

On 8 August 1990, legal aid was refused on the basis that the

applicant had "no probable cause because the application does not reveal a valid case in law". The applicant's application for review of this decision was refused on 31 October 1990. The applicant then applied for an extension of authorised expenditure for legal advice and assistance in order to obtain the advice of Senior Counsel with a view to raising judicial review proceedings against the decision of the Scottish Legal Aid Board in refusing legal aid.

This application was also refused by letter from the Scottish Legal Aid Board dated 15 January 1991 which stated that the extension requested was "not considered a reasonable further expenditure of public funds". This letter contained an erroneous reference which was subsequently clarified by another letter dated 7 February 1991.

Without legal aid, the applicant did not have the private means to proceed with an action against the Secretary of State for Scotland in respect of the conditions in H.M. Prison Shotts.

RELEVANT DOMESTIC LAW AND PRACTICE

Rule 100 of the Prison (Scotland) Rules 1952 states that prisoners shall take one hour's daily exercise in the open air.

COMPLAINTS

The applicant complains that the system of lockdown to which he was subjected constitutes inhuman treatment and is therefore contrary to Article 3 of the Convention. He further complains that his inability to pursue the Secretary of State for Scotland in the domestic courts, due to the refusal of legal aid, deprives him of an effective remedy before a national authority and is therefore contrary to Article 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 31 July 1991 and registered on 11 October 1991.

On 2 April 1992, 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 12 August 1992 after two extensions of the time-limit and the applicant's observations in reply were submitted on 27 November 1992 after one extension of the time-limit.

On 8 September 1992, the Commission decided to grant legal aid to the applicant.

THE LAW

1. The applicant complains of the lockdown system to which he was subjected in prison. He invokes Article 3 (Art. 3) of the Convention in this respect, which provides as follows:

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

The Government submit that the applicant has failed to exhaust domestic remedies in respect of this complaint, as required by Article 26 (Art. 26) of the Convention, since he did not avail himself of the offer to move to another hall or apply for such a move through the

internal prison remedies, and also since his solicitors did not apply for legal aid to pursue an action themselves for judicial review of the decision refusing legal aid for an action in damages against the Secretary of State.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach (cf. No. 9248/81, Dec. 10.10.83, D.R. 34 p. 78).

It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., Deweer judgment of 27 February 1980, Series A no. 35, p. 15 para. 26, and No. 9013/80, Dec. 11.12.82, D.R. 30 p. 96, at p. 102).

As regards the Government's submission that the applicant failed to accept offers of a move to another Hall or to request such a move, the Commission considers that this cannot be relied on as a ground of non-exhaustion, although it is relevant to the substance of the applicant's complaints. If the treatment in A Hall was in violation of the requirements of Article 3 (Art. 3) of the Convention, the Government cannot rely on the applicant's possibly stress-induced obstinacy to justify their failure either to improve conditions in the Hall or to fulfil their responsibility for ensuring the well-being of prisoners by transferring him anyway.

As regards the Government's submission that the applicant failed to apply for legal aid for challenging by way of judicial review the refusal of legal aid for proceedings against the Secretary of State, the Commission recalls that the applicant's solicitors applied for legal aid for the purpose of obtaining counsel's opinion as to whether judicial review was feasible. The Commission notes that judicial review proceedings are conducted in the Court of Session where only counsel may appear and that the applicant submits that it is standard practice to seek legal aid for counsel from the outset. The Commission notes further that the Government have not submitted that there were in fact grounds on which an application for judicial review could have been made with any prospect of success.

In these circumstances, the Commission finds that the application cannot be declared inadmissible for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

The Commission must therefore examine the substance of the applicant's complaints regarding the conditions of his detention during the lockdown regime in light of the relevant Convention case-law.

In this regard, the Court has held that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3)", and that the "assessment of this minimum is, in the nature of things, relative ..." (Eur. Court H.R., Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65 para. 162). As regards degrading treatment the Court was of the view that "in order for a punishment to be 'degrading' and in breach of Article 3 (Art. 3), the humiliation or debasement involved must attain a particular level and must in any event be other than the usual element of humiliation" associated with imprisonment after a criminal conviction. An examination of such matters, being relative, "depends on all the circumstances of the case and, in particular, on the nature

and context of the punishment itself and the manner and method of its execution" (Eur. Court H.R., Tyrer judgment of 25 April 1978, Series A no. 26, p. 15 para. 30).

The Commission also recalls in this context that the segregation of a prisoner from the prison community does not in itself constitute a form of inhuman or degrading treatment. Whilst prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of Article 3 (Art. 3) of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned. Complete sensory isolation coupled with complete social isolation can ultimately undermine the personality and could in certain circumstances amount to inhuman treatment which could not be justified by the requirements of security (No. 10263/83, R. v. Denmark, Dec. 11.3.85, D.R. 41 p. 149, at p. 153 with further references).

The Commission recalls that the applicant was held in a lockdown regime from 7 September 1988 to 15 November 1989 (including a period of one month spent in the Segregation Unit) - a period of over 14 months. During this period it appears that the applicant was deprived of normal association or recreational facilities and was detained in his cell alone. While the applicant was entitled to one hour's exercise per day, prison records indicate that initially only half an hour per day in the company of one other prisoner was offered during the first three months of the lockdown and that this was not made available on 31 days out of 66 and involved periods of several days (on one occasion 6 days) without exercise and thereby without any association. This situation improved at the end of January 1989 save for a period in July when there was a period of nine days during which the applicant was confined to his cell without exercise. The Commission recalls that the applicant's complaints as to the food arrangements during the lockdown are to some extent substantiated, the Government acknowledging that there were complaints that the food was cold. It appears however that steps were taken to remedy this by the provision of heated food trolleys. The Commission accepts the submission of the Government that food was offered to prisoners throughout this period.

The Commission finds that the lockdown regime as described above was of a stringent nature. It notes however that it was necessitated by a series of disruptions in the prison, culminating in a riot on 7 September 1988 which posed grave problems of disorder and disruption and which resurfaced in July 1989. The prison instituted a progressive system aimed at bringing the prison back to a normal routine and the regime in A Hall improved during the applicant's detention there. The Government have placed weight on the fact that the applicant refused offers to move to other less restrictive parts of the prison. The applicant has not denied this, but submitted that this indicated in itself the effect that the conditions were having on him. The Commission has examined the reports by the two psychologists who had seen the applicant during and immediately after his detention under the lockdown conditions. It appears that the applicant was already showing signs of mental strain resulting from his private concerns before these events and that the lockdown may have, at most, exacerbated his symptoms. There is no indication of a degree of mental impairment resulting from the lockdown as to substantiate a claim that he was no longer responsible for his actions. The Commission notes that the applicant's complaints about the conditions are weakened by his own refusal to accept a move away from them.

The Commission finds, having regard to the above elements, that the lockdown regime did not amount to complete sensory and social isolation which could have undermined the applicant's personality. He continued to receive visits and was not deprived of association or exercise for excessively long periods. In these circumstances, the Commission concludes that the conditions which the applicant experienced did not attain the level of ill-treatment proscribed by

Article 3 (Art. 3) 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 complains that he has no remedy in respect of his alleged ill-treatment as required by Article 13 (Art. 13) of the Convention which provides:

> "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 Commission recalls however that the applicant was offered the opportunity to leave A Hall but refused on a number of occasions. In these circumstances the Commission finds that the applicant cannot complain under Article 13 (Art. 13) that he was not provided with an effective remedy in respect of the conditions in A Hall.

It follows that this complaint must be dismissed 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 THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M. BUQUICCHIO) — (J.A. FROWEIN)