AS TO THE ADMISSIBILITY OF

Application No. 17419/90
by Nigel WINGROVE
against the United Kingdom

The European Commission of Human Rights sitting in private on 8 March 1994, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
F. ERMACORA
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
M. C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
J. MUCHA
E. KONSTANTINOV
D. SVÁBY

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 18 June 1990 by Nigel WINGROVE against the United Kingdom and registered on 13 November 1990 under file No. 17419/90;

Having regard to :

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

- the observations submitted by the respondent Government on 24 July 1992 and 10 March 1993;

- the observations submitted by the applicant on 18 December 1992 and 10 May 1993;

- the pre-hearing brief and documents submitted by the applicant on 21 February 1994;

- the parties' oral submissions at the hearing on 8 March 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1957 and resident in London. He is a film director by profession. The applicant is represented before the Commission by Messrs. Stephens Innocent, Solicitors, London.

The facts of the present case as submitted by the parties may be

summarised as follows:

A. The particular circumstances of the case

The applicant wrote the shooting script for, and directed the making of, a video work entitled "Visions of Ecstasy" ("the video"). Its running time is approximately 18 minutes, and it contains no dialogue, only music and moving images. The idea for the video was derived from the life and writings of St. Teresa of Avila, the sixteenth century Carmelite nun and founder of many convents, who experienced powerful ecstatic visions of Jesus Christ.

The action of the video centres upon a youthful actress dressed as a nun and intended to represent St. Teresa. It begins with the nun, dressed loosely in a black habit, stabbing her own hand with a large nail and spreading her blood over her naked breasts and clothing. In her writhing, she spills a chalice of communion wine and proceeds to lick it up from the ground. She loses consciousness. This sequence takes up approximately half of the running time of the video. The second part of the video shows St. Teresa dressed in a white habit standing with her arms held above her head by a white cord which is suspended from above and tied around her wrists. The near naked form of a second female, said to represent the psyche of St. Teresa, slowly crawls her way along the ground towards her. Upon reaching her feet, the Psyche begins to caress her, first her feet and legs, then her midriff, then her breasts and finally to engage in passionate kisses with her. Throughout this sequence, St. Teresa appears to be writhing in exquisite erotic sensation. This sequence is intercut at frequent intervals with a second sequence in which one sees the body of Christ, fastened to the cross which is lying upon the ground. St. Teresa first kisses the stigmata of his feet before moving up his body and kissing or licking the gaping wound in his right side. Then she sits astride him, seemingly naked under her habit, all the while moving in a motion reflecting intense erotic arousal, and kisses his lips. For a moment, it appears that he responds to her kisses. This action is intercut with the passionate kisses of the Psyche already described. Finally, St. Teresa runs her hand down to the fixed hand of Christ and entwines his fingers in hers. As she does so, the fingers of Christ seem to curl upwards to hold with hers, whereupon the video ends.

Apart from the cast list which appears on the screen for a few seconds, the viewer has no means of knowing that the person dressed as a nun in the video is intended to be St. Teresa or that the other woman who appears is intended to be her psyche. No attempt is made in the video to explain its historical background.

The video was submitted to the British Board of Film Classification ("the Board"), being the authority designated by the Home Secretary under section 4 (1) of the Video Recordings Act 1984 (the 1984 Act) as

> "the authority responsible for making arrangements
>
> (a) for determining, for the purposes of (the) Act whether or not video works are suitable for classification certificates to be issued in respect of them, having special regard to the likelihood of video works in respect of which such certificates have been issued being viewed in the home
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> (b) in the case of works which are determined in accordance with the arrangements to be so suitable -
>
> (i) for making such other determinations as are required for the issue of classification certificates, and

(ii) for issuing such certificates ..."

The applicant submitted the video to the Board in order that it might lawfully be sold, hired out or otherwise supplied to the general public or a section thereof.

The Board rejected the application for a classification certificate on 18 September 1989 in the following terms:

> "Further to your application for a classification certificate for the above video work, you are already aware that under the Video Recordings Act 1984 the Board must determine first of all whether or not a video work is suitable for such a certificate to be issued to it, having special regard to the likelihood of video works being viewed in the home. In making this judgment, the Board must have regard to the Home Secretary's Letter of Designation in which we are enjoined to 'continue to seek to avoid classifying works which are obscene within the meaning of the Obscene Publications Acts 1959 and 1964 or which infringe other provisions of the criminal law.'
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> Amongst these provisions is the criminal law of blasphemy, as tested recently in the House of Lords in R v. Lemon (1979), commonly known as the 'Gay News' case. The definition of blasphemy cited therein is 'any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible ... It is not blasphemous to speak or publish opinions hostile to the Christian religion' if the publication is 'decent and temperate'. The question is not one of the matter expressed, but of its manner, i.e. 'the tone, style and spirit', in which it is presented.
>
> The video work submitted by you depicts the mingling of religious ecstasy and sexual passion, a matter which may be of legitimate concern to the artist. It becomes subject to the law of blasphemy, however, if the manner of its presentation is bound to give rise to outrage at the unacceptable treatment of a sacred subject. Because the wounded body of the crucified Christ is presented solely as the focus of, and at certain moments a participant in, the erotic desire of St. Teresa, with no attempt to explore the meaning of the imagery beyond engaging the viewer in an erotic experience, it is the Board's view, and that of its legal advisers, that a reasonable jury properly directed would find that the work infringes the criminal law of blasphemy.
>
> To summarise, it is not the case that the sexual imagery in VISIONS OF ECSTASY lies beyond the parameters of the '18' category; it is simply that for a major proportion of the work's duration that sexual imagery is focused on the figure of the crucified Christ. If the male figure were not Christ, the problem would not arise. Cuts of a fairly radical nature in the overt expressions of sexuality between St. Teresa and the Christ figure might be practicable, but I understand that you do not wish to attempt this course of action. In consequence, we have concluded that it would not be suitable for a classification certificate to be issued to this video work."

The applicant appealed against the Board's determination to the Video Appeals Committee ("the VAC"), established pursuant to section

4(3) of the 1984 Act. His Notice of Appeal contained the following grounds:

> "i) that the Board was wrong to conclude that the video infringes the criminal law of blasphemy, and that a reasonable jury properly directed would so find.
>
> ii) in particular, the appellant will contend that upon a proper understanding of the serious nature of the video as an artistic and imaginative interpretation of the 'ecstasy' or 'rapture' of the sixteenth century Carmelite nun, St. Teresa of Avila, it would not be taken by a reasonable person as contemptuous, reviling, scurrilous or ludicrous or otherwise disparaging in relation to God, Jesus Christ or the Bible. The appeal will raise the question of mixed fact and law, namely whether publication of the video, even to a restricted degree, would contravene the existing criminal law of blasphemy."

The Board submitted a formal reply to the VAC explaining its decision in relation to its functions under section 4 of the 1984 Act:

> "The Act does not expressly set out the principles to be applied by the authority in determining whether or not a video work is suitable for a classification certificate to be issued in respect of it. In these circumstances, the Board has exercised its discretion to formulate principles for classifying video works in a manner which it believes to be both reasonable and suited to carrying out the broad objectives of the Act. Amongst these principles, the Board has concluded that an overriding test of suitability for classification is the determination that the video work in question does not infringe the criminal law. In formulating and applying this principle, the Board has consistently had regard to the Home Secretary's Letter of Designation under the Video Recordings Act ...
>
> The Board has concluded on the advice of leading Counsel that the video work in question infringes the criminal law of blasphemy and that a reasonable jury properly directed on the law would convict accordingly. The Board submits and is advised that in Britain the offence of blasphemy is committed if a video work treats a religious subject (in particular God, Jesus Christ or the Bible) in such a manner as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented.
>
> The video work under appeal purports to depict the erotic fantasies of a character described in the credits as St. Teresa of Avila. The 14 minute second section of the video work portrays 'St. Teresa' having an erotic fantasy involving the crucified figure of Christ, and also a Lesbian erotic fantasy involving the 'Psyche of St. Teresa'. No attempt is made to place what is shown in any historical, religious or dramatic context: the figures of St. Teresa and her psyche are both clearly modern in appearance and the erotic images are accompanied by a rock music backing. The work contains no dialogue or evidence of an interest in exploring the psychology or even the sexuality of the character purporting to be St. Teresa of Avila. Instead, this character and her supposed fantasies about lesbianism

and the body and blood of Christ are presented as the occasion for a series of erotic images of a kind familiar from 'soft-core' pornography.

In support of its contentions, the Board refers to an interview given by the appellant and published in 'Midweek' magazine on 14 September 1989. In this interview, the appellant attempts to draw a distinction between pornography and 'erotica', denying that the video work in question is pornograhic but stating that 'all my own work is actually erotica.' Further on, the interviewer comments:

> 'In many ways, though, Visions calls upon the standard lexicon of lust found in down market porn: nuns, lesbianism, women tied up ("Gay nuns in bondage" could have been an alternative title in fact). <The film's director> flashes a wicked grin. 'That's right, and I'm not denying it. I don't know what it is about nuns, it's the same sort of thing as white stocking tops I suppose.' So why does he not consider Visions to be pornography, or at least soft porn? 'I hope it is gentler, subtler than that. I suppose most people think pornography shows the sex act, and this doesn't.'

It is clear from the Appellant's own admissions that, whether or not the video work can rightly be described as pornographic, it is solely erotic in content, and it focuses this erotic imagery for much of its duration on the body and blood of Christ, who is even shown to respond to the sexual attentions of the principal character. Moreover, the manner in which such imagery is treated places the focus of the work less on the erotic feelings of the character than on those of the audience, which is the primary function of pornography whether or not it shows the sex act explicitly. Because there is no attempt, in the Board's view, to explore the meaning of the imagery beyond engaging the viewer in a voyeuristic erotic experience, the Board considers that the public distribution of such a video work would outrage and insult the feelings of believing Christians. It is impossible therefore to accept the Appellant's contention in his Notice to Appeal ...

The Board ... submits that the appeal should be dismissed and its determination upheld."

The applicant then made further representations to the VAC, stating inter alia:

"The definition of the offence of blasphemy set out in ... the reply is too wide, being significantly wider than the test approved in the only modern authority - see Lemon & Gay News Ltd v. Whitehouse (1979) AC 617, per Lord Scarman at p. 665. For example, there is no uniform law of blasphemy in Britain; the last recorded prosecution for blasphemy under the law of Scotland was in 1843 - see Thos Paterson (1843) I Brown 629. Nor is any religious subject protected - the reviling matter must be in relation to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established.

In the Appellant's contention, these limitations are of the utmost significance in this case since the video is not concerned with anything which God or Jesus Christ did, or thought or might have approved of. It is about the erotic visions and imaginings of a 16th Century Carmelite nun - namely St. Teresa of Avila. It is quite

> plain that the Christ figure exists in her fantasy as the Board expressly accepts ... The scurrilous and/or erotic treatment of religious subject matter has received the Board's classification without attempted prosecution in recent years, eg Monty Python's 'Life of Brian' and Mr. Scorsese's 'Last Temptation of Christ'.
>
> ... The Board argues that the video is purely erotic or 'soft-core' pornographic, without historical, religious, dramatic or other artistic merit. The implication is that, had it possessed such merit the Board's decision might very well have been otherwise. The Appellant will seek to argue and call evidence to the effect that the video work is a serious treatment of the subject of the ecstatic raptures of St. Teresa (well chronicled in her own works and those of commentators) from a twentieth century point of view.
>
> The so-called 'rock music backing' was in fact specially commissioned from the respected composer, Steven Severin, after discussion of the Director's desired artistic and emotional impact. The Board has based its decision upon the narrowest, most disparaging, critical appreciation of the work. The Appellant will contend that a very much more favourable assessment of his aims and achievement in making 'Visions of Ecstasy' is, at the very least, tenable and that the Board ought not to refuse a certificate on a mere matter of interpretation.
>
> The Appellant takes objection to the Board's quotation ... of comments attributed to him from an article by one Rob Ryan published in 'Midweek' magazine 14 September 1989. The remarks are pure hearsay so far as the Board is concerned. That aside, the piece quoted is in large part the comments of the author of the article. An entirely misleading impression of what the Appellant said to the author is conveyed by the interpolation of the words attributed to him, and by taking this passage out of context.
>
> Above all, the Appellant disputes the key assertion by the Board that the video work is solely erotic in content."

The appeal was heard by a five member Panel of the VAC ("the Panel") on 6 and 7 December 1989; oral and affidavit evidence was submitted. By a majority of three to two, a written decision was given on 23 December 1989. The Panel also considered itself bound by the criteria set out in the Letter of Designation (p. 4 above). It had difficulty, however, in ascertaining and applying the present law of blasphemy. It commented as follows:

> "The authorities on this Common Law offence were reviewed by the House of Lords in the case of Lemon and Gay News Ltd v. Whitehouse which concerned a magazine called 'Gay News', the readership of which consisted mainly of homosexuals although it was on sale to the general public at some bookstalls. One edition contained a poem entitled 'The Love that Dares to Speak its Name' accompanied by a drawing illustrating its subject matter.
>
> In his judgment Lord Scarman said that it was unnecessary to speculate whether an outraged Christian would feel provoked by the words and illustration to commit a breach of the peace, the true test being whether the words are calculated to outrage and insult the Christian's religious feelings, the material in question being contemptuous, reviling, scurrilous or ludicrous matter relating to God,

> Jesus Christ, or the Bible or the formularies of the Church of England. It should perhaps be added that the word 'calculated' should be read in the dictionary sense of 'estimated' or 'likely' as it was decided that intent (other than an intent to publish) is not an element in the offence.
>
> In the same case Lord Diplock said that the material must be 'likely to arouse a sense of outrage among those who believe in or respect the Christian faith'.
>
> In the present case the Board's Director ... said in evidence that the Board's view was that the video was 'contemptuous of the divinity of Christ'. He added that although the Board's decision was based upon its view that the video is blasphemous (blasphemy being an offence which relates only to the Christian religion), it would take just the same stance if it were asked to grant a Certificate to a video which, for instance, was contemptuous of Mohammed or Buddha."

The Panel reviewed the contents of the video and accepted that the applicant had in mind St. Teresa, a nun, "who is known to have had ecstatic visions of Christ although, incidentally, these did not start until she was 39 years of age - in marked contrast to the obvious youthfulness of the actress who plays the part."

The Panel held as follows:

> "From the writings of St. Teresa herself, and the subsequent writings of others, there seems no reason to doubt that some of her visions were of seeing the glorified body of Christ and being shown his wounds but, even so, it seems clear that (the appellant) has taken considerable artistic licence with his subject. Apart from the age discrepancy - a comparatively minor matter - we were made aware of nothing which would suggest that Teresa ever did anything to injure her hand or that any element of lesbianism ever entered into her visions. More importantly, there seems nothing to suggest that Teresa, in her visions, ever saw herself as being in any bodily contact with the glorified Christ. As one author, Mr. Stephen Clissold, puts it 'Teresa experienced ecstasy as a form of prayer in which she herself played almost no part'. So, in view of the extent of the artistic licence, we think it would be reasonable to look upon the video as centering upon any nun of any century who, like many others down the ages, had ecstatic visions. There is also another reason for taking this stance: unless the viewer happens to read the cast list which appears on the screen for a few seconds, he or she has no means of knowing that the nun is supposed to be St. Teresa, nor that the figure of the second woman is supposed to be her Psyche. And he or she in any event may well be unaware that Teresa was a real-life nun who had ecstatic visions.
>
> It is true that (the appellant) says that it is intended that the sleeve or jacket for the video will provide 'basic historical information to assist the viewer', but we feel bound to regard this as irrelevant. Firstly because it by no means follows that every viewer will read any such description; and secondly because the Board's and the Appeal Panel's decision must be based solely upon the video itself, quite apart from the fact that at the time of making a decision the sleeve or jacket is usually - as in the present instance - not even in existence.

However, although we have thought it proper to dwell at some length with the 'St. Teresa' aspect, we are of the opinion that in practice, when considering whether or not the video is blasphemous, it makes little or no difference whether one looks upon the central character as being St. Teresa or any other nun. The appellant, in his written statement, lays stress upon the undoubted fact that the whole of the second half consists of Teresa's vision or dream. Hence he says the video says nothing about Christ, his figure being used only as a projection of St. Teresa's mind, nor was it his intention to make that figure an active participant in any overt sexual act. He goes on to say 'Rather the very mild responses are those of St. Teresa's conjecture: the kiss, hand clasp and ultimately the tears of Christ. To show no response to a creation of her own mind would be nonsense; no woman (nor man) whose deep love could cause such visions/ecstasies would imagine the object of that love coldly to ignore their caresses'. Although we quite appreciate the logic of this point of view, we have reservations about the extent to which a vision or dream sequence can affect the question of whether what is pictured or said is blasphemous. It would, for instance, be possible to produce a film or video which was most extremely contemptuous, reviling, scurrilous or ludicrous in relation to Christ, all dressed up in the context of someone's imaginings. In such circumstances we find it hard to envisage that, by such a simple device, it could reasonably be said that no offence had been committed. If in our opinion the viewer, after making proper allowance for the scene being in the form of a dream, nevertheless reasonably feels that it would cause a sense of outrage and insult to a Christian's feelings, the offence would be established.

We should perhaps also deal, albeit briefly, with a further submission made on behalf of the appellant, namely that the crime of blasphemy may extend only to the written or spoken word and hence that a Court might rule that no film or video, and perhaps nothing shown on television, could become the subject of such a charge. Suffice it to say that in our view this is too unlikely to cause it to be taken into account by the Board or a panel of the Appeals Committee when reaching a decision.

In the opinion of a majority of the Panel the video did not, as the appellant claims, explore St. Teresa's struggles against her visions but exploited a devotion to Christ in purely carnal terms. Furthermore they considered that it lacked the seriousness and depth of 'The Last Temptation of Christ' with which Counsel for the appellant sought to compare it. Indeed the majority took the view that the video's message was that the nun was moved not by religious ecstasy but rather by sexual ecstasy, this ecstasy being of a perverse kind - full of images of blood, sado-masochism, lesbianism (or perhaps auto-erotism) and bondage. Although there was evidence of some element of repressed sexuality in St. Teresa's devotion to Christ, they did not consider that this gave any ground for portraying her as taking the initiative in indulged sexuality. They considered the over-all tone and spirit of the video to be indecent and had little doubt that all the above factors, coupled with the motions of the nun whilst astride the body of Christ and the response to her kisses and the intertwining of the fingers would outrage the feelings of Christians,

who would reasonably look upon it as being contemptuous of the divinity of Christ. In these circumstances the majority were satisfied that the video is blasphemous, that a reasonable and properly directed jury would be likely to convict and therefore that the Board was right to refuse to grant a Certificate. Hence this appeal is accordingly dismissed.

It should perhaps be added that the minority on the Panel, whilst being in no doubt that many people would find the video to be extremely distasteful, would have allowed the appeal because in their view it is unlikely that a reasonable and properly directed jury would convict."

As a result of the Board's determination, as upheld by the Panel, the applicant would commit an offence under section 9 of the 1984 Act if he were to supply the video in any manner, whether or not for reward.

B. The relevant domestic law and practice

1. The regulation of video recordings

The Video Recordings Act 1984 (the 1984 Act) regulates the distribution of video recordings. Subject to certain exemptions, it is an offence under section 9(1) of that Act for a person to supply or offer to supply a video recording containing a video work in respect of which no classification certificate has been issued. Certain other offences relate to conditions contained in such certificates. For example, where a classification certificate issued in respect of a video work states that no video recording containing that work is to be supplied other than in a licensed sex shop, a person commits an offence under section 12 of that Act if he supplies such a recording in any other place (subject to certain exemptions). There is also an offence (in section 11) of supplying to a person who has not attained the age specified in the classification certificate.

Under section 4(1) of the 1984 Act the Secretary of State may by notice designate any person or body as the authority for making arrangements for determining whether or not video works are suitable for classification certificates to be issued in respect of them (having special regard to the likelihood of certified video works being viewed in the home). By a notice dated 26 July 1985 the British Board of Film Classification ("the Board") was so designated. In the case of works which are determined in accordance with the arrangements described above to be suitable for classification certificates, the Board is responsible under section 4(1) for making arrangements for the issue of certificates and making other determinations relating to their use (see pp.4-5 above). The Secretary of State's notice enjoined the Board "to continue to seek to avoid classifying works which are obscene within the meaning of the Obscene Publications Acts 1959 and 1964 or which infringe other provisions of the criminal law".

Pursuant to section 4(3) of the 1984 Act arrangements were made for the establishment of the Video Appeals Committee to determine appeals against decisions of the Board.

2. The law relating to blasphemy and blasphemous libel

Blasphemy and blasphemous libel are common law offences triable on indictment and punishable by fine or imprisonment. Blasphemy consists in speaking and blasphemous libel in otherwise publishing blasphemous matter. Libel involves a publication in a permanent form, but that form may consist of moving pictures.

In the case of Whitehouse v. Gay News Ltd. and Lemon [1979] A.C.

617 at 665 which concerned the law of blasphemy in England and Wales, Lord Scarman held that the modern law of blasphemy was correctly formulated in article 214 of Stephen's Digest of the Criminal Law, 9th ed. (1950). This states as follows:

> "Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves."

The House of Lords in that case also decided that the mental element in the offence did not depend upon the accused having an intent to blaspheme. It was sufficient for the prosecution to prove that the publication had been intentional and that the matter published was blasphemous.

3. The availability of judicial review as a remedy

Decisions of public bodies which have consequences which affect some person or body of persons are susceptible to challenge in the High Court on an application for judicial review. Amongst the grounds on which such a challenge may be brought is that the body in question misdirected itself on a point of law. The Video Appeals Committee is such a public body because it is established pursuant to an Act of Parliament (namely, section 4(3) of the 1984 Act). Furthermore, its decisions affect the rights of persons who make video works because confirmation of a decision that a video work cannot receive a classification certificate would mean that video recordings of that work could not be lawfully supplied to members of the public.

A court would not normally look on an application for judicial review at the merits of any decision made by such a body (except where the decision was so unreasonable that no reasonable body, properly instructed, could have reached it). However, where the decision is based on a point of law and it is alleged that the body has misdirected itself on that point, the decision could be challenged by an application for judicial review. In the case of C.C.S.U. v. Minister for the Civil Service [1984] 3 All E.R. at p. 950, a decision of the House of Lords, Lord Diplock classified under three heads the grounds on which administrative action is subject to control by judicial review. He called the first ground "illegality" and described it as follows :

> "By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the State is exercisable."

COMPLAINTS

The applicant complains that the refusal of the British Board of Film Classification, as upheld by the Video Appeal Committee, to grant a classification certificate for the applicant's video film, constituted an interference with his right to freedom of expression, including the right to receive and impart information and ideas, as guaranteed by Article 10 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 18 June 1990 and registered on

13 November 1990.

After a preliminary examination of the case by the Rapporteur, the Commission considered the admissibility of the application on 7 April 1992. It decided, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on admissibility and merits. The Government's observations were submitted on 24 July 1992 after an extension of the time-limit fixed for this purpose. The applicant replied on 18 December 1992 also after an extension of the time-limit. (On 23 October 1992 the Commission had granted the applicant legal aid.)

On 10 March 1993 the Government submitted comments on points raised in the applicant's observations, to which the applicant responded on 10 May 1993.

On 11 May 1993 the Commission decided to invite the parties to make oral submissions at a hearing. The hearing was fixed for 15 October 1993, but then adjourned until 8 March 1994 at the request of the applicant.

On 21 February 1994, prior to the hearing, the applicant submitted a pre-hearing brief and a document containing counsel's advice on remedies.

At the hearing on 8 March 1994 the parties were represented as follows:

For the Government:

Mr. H. Llewellyn, Foreign and Commonwealth Office, Agent
Mr. P. Havers, Counsel
Miss S. Dickson, Foreign and Commonwealth Office )
Mr. D. Evans, Home Office ) Advisers
Mr. R. Heaton, Home Office )

For the applicant:

Mr. G. Robertson, QC, Counsel
Mr. M. Stephens, Solicitor ) Messrs. Stephens Innocent,
Mr. P. Chinnery, Solicitor ) Solicitors

THE LAW

1. The applicant complains that the refusal of the competent British authorities to issue a classification certificate for his video film on grounds of blasphemy violated Article 10 (Art. 10) of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

2. The Government raise a preliminary point that the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention.

They assert that the applicant could have challenged the decision of the Video Appeals Committee, which upheld the refusal of the British Board of Film Classification to grant the applicant a classification certificate for his video film. They consider that the applicant should have sought judicial review before the High Court and that it is not for the Convention organs to speculate as to the outcome of any such application. It is contended that the applicant could have raised a point of law in these proceedings, namely whether the Committee misdirected itself in determining that a reasonable jury, properly directed, would have found that the video constituted the crime of blasphemous libel (cf. penultimate sentence of paragraph 3, p. 11 above).

The applicant replies that he did not pursue judicial review because he was advised by leading counsel that such a remedy presented no prospect of success and legal aid would therefore not have been available to him to pursue it.

The Commission recalls that the obligation to exhaust domestic remedies contained in Article 26 (Art. 26) of the Convention is limited to making normal use of those remedies which are likely to be effective. If it can be shown that a remedy does not present at least some minimal prospect of success then the individual is not required to pursue it (cf. eg. No. 8378/78, Dec. 14.5.80, D.R. 20 p.168, at p.170). The question in the present case, therefore, is whether an application for judicial review of the Committee's decision could have been effective.

The Commission notes that the parties do not dispute the fact that on an application for judicial review it is not open to the High Court to substitute its own view on the merits for that of the British Board of Film Classification or, more particularly, that of the Video Appeals Committee. Provided that the Committee applied the right test of what constituted blasphemy in the present case, it would not have been open to a court on a judicial review application to hold that the Committee was wrong in concluding that the video was blasphemous or that a jury would have found it to be blasphemous, unless that conclusion was one to which no Committee could reasonably have come. In the present case it is not asserted by the applicant that the Committee's decision was so unreasonable as to be perverse and the Government do not contend that the decision could have been challenged on this ground.

The only ground therefore on which the Committee's decision could have been challenged by way of judicial review would seem to be that the Committee applied the wrong test of what constitutes the offence of blasphemy. However the applicant has not criticised the Committee's decision on this basis. Indeed it would appear that such a criticism could not be made: the Committee expressly quoted and applied the definition of blasphemy approved by the House of Lords in the case of Lemon and Gay News Ltd v. Whitehouse (see p. 9 above) and explained why in their view the video fell within the definition.

In these circumstances, the Commission sees no ground on which the decision of the Committee could have been open to challenge by way of judicial review. This remedy, therefore, presented no prospect of success and could not be said to be effective for the purposes of the present case. Accordingly, the Commission concludes that the application cannot be rejected on the grounds of non-exhaustion of domestic remedies.

3. As regards the substantive issue under Article 10 (Art. 10) of

the Convention, the applicant submits that the refusal of a classification certificate for his video film constituted an unjustified interference with his freedom of expression, including the right to receive and impart information and ideas, as guaranteed by Article 10 (Art. 10) of the Convention. He contends that the interference was not "prescibed by law", in that the offence of blasphemy or blasphemous libel is not sufficiently accessible or precise. He further contends that the law of blasphemy in its present wide form does not demonstrably pursue a legitimate aim, and that the interference in his case was neither necessary nor proportionate to any of the exceptions enumerated in the second paragraph of Article 10 (Art. 10) of the Convention.

The Government concede that there has been an interference with the applicant's Article 10 (Art. 10) rights, but submit that it was prescribed by law, given the lawful authority conferred on the British Board of Film Classification by section 4 (1) of the Video Recordings Act 1984, combined with the Secretary of State's notice to the Board directing them to avoid issuing classification certificates in respect of obscene or other work infringing the criminal law. The Government contend that the Board's action pursued the legitimate aim of protecting the rights of others, was proportionate to that aim, well within the margin of appreciation afforded to States in such an area, and was therefore justified under Article 10 para. 2 (Art. 10-2) of the Convention.

The Commission considers that the application raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The application cannot, therefore, be regarded as being 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, by a majority,

DECLARES THE APPLICATION ADMISSIBLE,
without prejudging the merits.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)