AS TO THE ADMISSIBILITY OF

Application No. 22112/93
by John WOTHERSPOON
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 12 April 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, Secretary to the 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 8 February 1993 by John WOTHERSPOON against the United Kingdom and registered on 23 June 1993 under file No. 22112/93;

Having regard to:

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

- the observations submitted by the respondent Government on 13 October 1995 and the observations in reply submitted by the applicant on 14 February 1996;

Having deliberated;

Decides as follows:

THE FACTS

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

Particular circumstances of the case

The applicant is a British citizen born in 1964 and is currently serving a sentence of imprisonment in HM Prison Shotts. The applicant is represented before the Commission by Mr. Thompson, a solicitor practising in Dunfermline.

The applicant was charged on indictment with murder and received legal aid from the Scottish Legal Aid Board ("S.L.A.B.") for the preparation of his defence and for his representation at trial. The trial took place on 17-19 December 1990 and the applicant was represented by a solicitor and by counsel. On 19 December 1990 the jury found the applicant guilty, by a majority decision, and the trial judge sentenced the applicant to life imprisonment.

On 31 December 1990 the applicant's then solicitors lodged an intimation of intention to appeal in the High Court. On 9 September 1991 the applicant himself lodged the notice of appeal. The grounds of appeal contained in that notice claimed that the evidence given by the only Crown eye witness (who was fifteen years old at the time of the incident for which the applicant was convicted) was incorrect (alleging that it was not possible that the witness had seen what he said he had), that there was insufficient corroboration of prosecution evidence, that certain other evidence attempted to confirm an impossibility in relation to a bloodstain and that the applicant had never been in possession of witness statements made to the police or of precognitions. In those grounds the applicant also challenged the pathologist's evidence given at trial and indicated an intention to introduce certain video evidence.

In or around April 1991 the applicant changed solicitors. The legal aid granted to the applicant at trial covered the legal advice to the applicant in connection with his appeal but not his representation at the appeal hearing and therefore the applicant submitted an application for further legal aid on 4 October 1991.

On 12 and 13 December 1991 both senior and junior counsel for the applicant gave written opinions that there were no grounds for appeal but left open the possibility that certain video evidence might provide such grounds. On 20 December 1991 the S.L.A.B. refused to grant legal aid on the ground that it did not consider that the applicant had substantial grounds for making the appeal or that it was reasonable in the circumstances that legal aid be made available. It was noted that senior and junior counsel's opinions had been considered.

When the applicant appeared in the High Court on 20 December 1991, he obtained an adjournment in order to apply for a review of the refusal of legal aid. The applicant's solicitor did not subsequently request the S.L.A.B. to review its decision because senior counsel had further advised that the video evidence was of no use to the applicant's case - rather it strengthened the version of events given by the Crown eye witness whose evidence the applicant wished to challenge.

The applicant, however, obtained another adjournment on 19 March 1992 to allow him have his solicitors (who had been instructed by the applicant since March 1992) to obtain certain witness statements. On 27 March 1992 the applicant's solicitors obtained an acceptance from the legal advice and assistance scheme which allowed an initial expenditure of £80 and subsequently obtained an extension in the sum of £300. This was to be enable the applicant's solicitors to establish whether fresh evidence was available.

A letter dated 12 June 1992 from private investigators to the applicant's solicitors enclosed a statement of the applicant's aunt indicating, inter alia, that she had met the mother of the Crown eye witness and that the mother had said on two occasions to the applicant's aunt that her son had not seen anything. The private investigator's letter also recalled their unsuccessful attempts to locate the Crown eye witness.

On the 2 August 1992 the applicant's solicitors requested the Prosecutor Fiscal's office for a copy of the Crown's eye witness statement and stated that they were advised that the matter had been raised at the last appeal hearing and that the hearing had been adjourned for that purpose. The Prosecutor Fiscal responded that it was not appropriate to furnish a copy of that statement. Those solicitors subsequently confirmed that no useful evidence was found as a result of all of their enquiries.

On 24 September 1992, the High Court refused a further

adjournment and proceeded to hear the applicant's appeal which he presented in person. The applicant also presented to the High Court a written statement outlining the basis on which he felt a miscarriage of justice had occurred and challenging, in particular, the veracity of the evidence of the Crown eye witness.

In its judgment dated 24 September 1992, the High Court having heard the applicant and dealt with, inter alia, the grounds of appeal in the notice of appeal, concluded that the applicant had failed to demonstrate that there had been any miscarriage of justice in his case and dismissed his appeal. As regards the Crown eye witness, the High Court noted that that witness had been cross-examined carefully and at length, that photographs of the locus were before the jury and that the speech of the applicant's counsel to the jury was largely an attempt to persuade the jury that that eye witness' evidence was not reliable. It was noted that it was for the jury to assess that witness' evidence and that it must be assumed that they accepted that evidence.

On 27 September 1992, the applicant was accused by a prison officer of smuggling contraband out of the prison during a prison visit with the applicant's brother and friend. The following day the applicant appeared before the prison Governor who considered that the applicant had been in breach of prison regulations. The applicant was placed on closed visits and a weeks prison pay was forfeited. The closed visits continued for the following four and a half months.

On 1 December 1992 the applicant petitioned the nobil officium of the High Court in relation to his conviction but by letter dated 10 December 1992 the applicant was informed that his appeal had been refused.

Relevant domestic law and practice

Criminal Appeals - Solemn proceedings : In solemn proceedings in Scotland, where the trial proceeds upon an indictment before a judge sitting with a jury, a person convicted of a criminal charge has an automatic right of appeal granted by statute (section 228 of the Criminal Procedure (Scotland) Act 1975 - "the 1975 Act"). No leave to appeal is therefore required.

In an appeal, the appellant may ask the court to review an alleged miscarriage of justice in the proceedings in which he was convicted (section 228(2) of the 1975 Act). A miscarriage of justice is not defined by statute but the term includes such matters as misdirections by the trial judge, wrong decisions on the admissibility of evidence and breaches of natural justice. The nature of the alleged miscarriage of justice must be specified in the grounds of appeal which must be lodged within eight weeks of the date when sentence is imposed upon the appellant (section 233(1) and (2) of the 1975 Act). An appellant may not, at the appeal hearing, found any aspect of his appeal on a ground which is not contained in the notice of appeal unless, exceptionally and on showing cause, he obtains the leave of the court to do so (section 233(3) of the 1975 Act.

Section 234 of the 1975 Act provides that the appellant can opt to present his case in writing instead of orally. However, in practice appellants present their case orally.

While there is no statutory provision relating to the conduct of the appeal hearing (other than defining the quorum of judges as being three), the practice is that an appellant is afforded an opportunity to make oral submissions at such a hearing in support of his appeal and it is also permitted to lodge other documents in support of the appeal. It is also open to the judges at that hearing to ask questions, or to put points to, the appellant. In addition, where an appellant refers to a pre-prepared statement, the practice is for the court to ask the appellant to present that statement orally or to copy same to the

judges to read for themselves.

The Crown is always represented by counsel (the Advocate Deputy) at the hearing of criminal appeals. The duty of such counsel is to act solely in the public interest and not to seek to uphold a wrongful decision. Accordingly, they will only address the court if requested to do so or if it is necessary to bring to the attention of the court some matter relevant to the appeal, whether favourable or not to the prosecution.

The court may dismiss the appeal and affirm the verdict of the trial court. In addition, the trial court verdict can be set aside either by the appeal court quashing the conviction, substituting an amended verdict of guilty or by authorising a new prosecution (section 254 of the 1975 Act). The nobil officium of the High Court constitutes the ultimate residual power of the High Court to bring proceedings under review.

Legal Aid for Criminal Appeals : Responsibility for the administration of legal aid in Scotland is vested in the Scottish Legal Aid Board ("S.L.A.B.") which is an independent body whose members are appointed by the Secretary of State.

Legal aid, which has been available for the trial, extends normally to include consideration and advice (by a lawyer and by counsel previously involved in the case) on the question of an appeal. Where appropriate legal aid is also available to enable a solicitor to prepare and lodge the statutory intimation of intention to appeal and for the drafting and lodging of the notice of appeal setting out the grounds of appeal.

To extend legal aid beyond this point a further application to the Legal Aid Board is required. This application will be granted on fulfilling two conditions. In the first place, the appellant must be financially eligible for legal aid. Secondly, the appellant must have substantial grounds for making the appeal and it must be reasonable that legal aid should be made available in the circumstances. In deciding on these issues the S.L.A.B. will take into account, inter alia, any opinion completed by counsel as to the appeal's prospects of success.

If legal aid has been refused and the appellate court is of the view that, prima facie, the appellant may have substantial grounds for taking the appeal and that it is in the interests of justice that the appellant should have assistance with the costs of legal representation to argue these grounds, that court can adjourn the hearing and recommend that the S.L.A.B. review their decision. This practice was formalised by the circulation of a Practice Note to this effect in 1990 following the judgment of the Court in the Granger application (Eur. Court H. R., Granger judgment of 28 March 1990, Series A no. 174). Where such a recommendation is made, legal aid is automatically granted (paragraph 6.12 of the Manual of Procedure of the Scottish legal Aid Board).

The Criminal Justice (Scotland) Act 1995 ("the 1995 Act") : The 1995 Act, which applies to appeals from convictions handed down on or after 26 September 1995, provides that an appellant must apply for leave to appeal and such leave will be granted when the appellant shows arguable grounds for appeal. In line with that new appeals system, the 1995 Act also provides that legal aid will be granted for an appeal where the applicant is financially eligible for legal aid and where leave to appeal has been granted.

Access to Crown statements and precognition of Crown witnesses : While there is no obligation on the Crown to provide a list of prosecution witnesses to the defence, as a matter of practice the Prosecutor Fiscal provides a list of Crown witnesses on request on the basis that the

defence will reciprocate by providing a list of their witnesses. Also as a matter of practice, defence solicitors can have a discussion with the Prosecutor Fiscal as to the nature of the Crown evidence in order that the defence may arrange, for example, the precognitions they find necessary or consider an appropriate plea. There is no entitlement to obtain copies of the Crown witness statements.

The defence may request precognition of Crown witnesses (ie. the witnesses may be requested to submit to questioning by the defence prior to the trial). There is no obligation on the Crown witness to give precognition although there is some authority for the view that it is part of that person's civic duty to do so. If a witness is reluctant, the defence can apply for precognition on oath. While there is some authority for the view that precognition on oath should only be allowed in exceptional circumstances, it has been held that the object of the statutory provision is to place the defence on equal terms with the Crown in the preparation of the case (Brady v. Lochart 1985 SCCR 349).

COMPLAINTS

The applicant complains that his trial was unfair because he has been denied access to the original witness statements and to precognition of two Crown witnesses (an eye witness and a policeman) contrary to Article 6 para. 3 (b) and (d) of the Convention.

The applicant also complains that his appeal hearing was unfair due to the refusal of legal aid for his appeal and that he was obliged to present his own appeal though incapable of doing so and he invokes Article 6 para. 3 (c) of the Convention.

The applicant further complains of being penalised on the basis of an unfounded accusation of smuggling materials out of prison. He invokes Article 3, 7 and 8 of the Convention in this regard.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 8 February 1993 and was registered on 23 June 1993.

On 1 December 1993 the Commission decided to communicate the application to the respondent Government and to request them to submit observations on the admissibility and merits of the applicant's complaint under Article 6 para. 3(c) of the Convention.

On 8 March 1994 the Commission decided to adjourn consideration of the admissibility of the application pending the outcome of similar cases before the Court.

Once those judgments were delivered the Government's observations were received on 13 October 1995. The applicant's observations were received on 14 February 1996.

THE LAW

1. The applicant complains that he was denied access to the original witness statements and precognition of two Crown witnesses (the only eye witness and a policeman) contrary to Article 6 para. 3 (b) and (d) (Art. 6-3-b, 6-3-d) of the Convention and in this respect he submits that if he knew what the eye witness was going to say he could have had expert evidence to contradict that evidence ready for the trial. He also submits that if he had been granted legal aid for his appeal he could have pursued this point more profitably on appeal by obtaining relevant witness evidence prior to his appeal.

Article 6 (Art. 6) of the Convention, insofar as relevant, reads as follows:

"3. Everyone charged with a criminal offence has the following minimum rights: ...

b. to have adequate time and facilities for the preparation of his defence; ...

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 regards his submission about a denial of access to witness statements or to precognition of those witnesses, the Commission finds that the applicant has submitted no evidence to demonstrate that, prior to or during his trial (during which time the applicant was legally represented), any application was made for a list of the names of prosecution witnesses, that any request was made for an indication from the Prosector Fiscal as to the nature of the Crown evidence or that any such information, if requested, was refused. In addition, there is no evidence that the applicant attempted to take precognition of any Crown witness prior to his trial as he was entitled to do or to take precognition on oath for which he could have applied in the case of a reluctant witness.

Furthermore and as noted by the High Court on appeal, the Crown eye witness was cross examined at length and in detail by counsel for the applicant at the trial and the applicant's counsel's speech to the jury at the end of the trial concentrated on the credibility of this witness' evidence. The applicant would have had the same possibilities in relation to the police witness. Furthermore, the applicant's representatives, in their submissions to the Commission, accept that precognition, either voluntarily or on oath if the witness was reluctant, was an option open to the applicant prior to the trial and that the Crown eye witness' statement to the police would not necessarily have been of any great evidential value in view of that witness' cross examination at trial.

Finally, the Commission does not find any evidence to demonstrate that the lawyers, for whom the applicant received legal aid, did not provide effective assistance within the meaning of the Artico judgment (Eur. Court H.R., Artico judgment of 13 May 1980, Series A no. 37, p. 18, para. 36).

In such circumstances, the Commission considers this complaint manifestly ill-founded pursuant to Article 27 para. 2 (Art. 27-2) of the Convention.

The Commission considers that the applicant's submission, as to the refusal of legal aid for his appeal, which is made in the context of this complaint under Article 6 para. 3 (b) and (d) (Art. 6-3-b, 6-3-d), is a matter which should be considered below within the context of the applicant's complaint under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention.

2. The applicant also complains that his appeal hearing was unfair due to the refusal of legal aid for his appeal and he invokes Article 6 para. 3 (c) (Art. 6-3-c) of the Convention which, insofar as relevant, reads as follows:

"3. Everyone charged with a criminal offence has the following minimum rights: ...

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ..."

The Government argue that it is no longer justified to continue the examination of this complaint given the changes made by the 1995 Act to the criminal appeals and criminal legal aid systems in Scotland. However, the Commission notes that the provisions of the 1995 Act relate to appeals from convictions handed down on or after 26 September 1995 and clearly do not benefit the applicant in any way as regards his complaint under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention, his legal aid application and appeal having been determined pursuant to the 1975 Act (mutatis mutandis, Eur. Court H.R., Axen judgment of 8 December 1983, Series A no. 72, p. 11, para. 24).

As regards the substance of the complaint under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention, the applicant submits that the refusal of legal aid prevented the proper presentation of his appeal and thereby led to his appeal hearing being unfair. The Government has no observations on the substance of this complaint in light of the Court judgments in the Boner and Maxwell cases (Eur. Court H.R., Boner and Maxwell judgments of 28 October 1994, Series A nos. 300-B and 300-C).

The Commission considers that this complaint of the applicant raises issues of fact and law which are of such complexity that their determination should depend on an examination of the merits. This complaint cannot therefore be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

3. The applicant further complains of being penalised on the basis of an unfounded accusation of smuggling materials out of prison during a prison visit. He invokes Articles 3, 7 and 8 (Art. 3, 7, 8) of the Convention in this regard.

As to whether the applicant has exhausted domestic remedies as required by Article 26 (Art. 26) of the Convention, the Commission recalls that if there exists a mere doubt as to the chances of success or as to the effectiveness of a domestic remedy, Article 26 of the Convention requires that that remedy must be tried (No. 13669/88, Dec. 7.3.90, D.R. 65, p. 245 and No. 10148/82, Dec. 14.3.85, D.R. 42, p. 98). In addition, the Commission recalls that exhausting the applicable complaints procedures involving, inter alia, the Home Office, in relation to a complaint about the imposition of solitary confinement on a prisoner, constitutes compliance with the requirements of Article 26 (Art. 26) of the Convention (No. 7630/76, Dec. 6.12.79, D.R. 19, p. 113).

The Commission recalls that the applicant did not pursue the matter (either the finding of guilt or his punishment) further with the prison authorities or with the Home Office. The Commission also notes that the applicant claims that the prison video recordings of the relevant visit would support his case because those recordings confirm that the applicant did not smuggle anything to his visitors during the visit. In addition, the applicant accepts that he would have been entitled to petition the Secretary of State in relation to the closed visits but that he decided against doing so since other prisoners have similarly petitioned but to no avail. Furthermore the Commission considers that there exist no reasons in the present case for the applicant to be absolved from exhausting any such remedies.

In the circumstances, the Commission considers that the applicant has not exhausted domestic remedies as required by Article 26 (Art. 26) of the Convention and the complaint must be declared inadmissible pursuant to Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE without prejudging the merits the applicant's complaint about the refusal of legal aid for his appeal;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber — President of the First Chamber

(M. F. BUQUICCHIO) — (C. L. ROZAKIS)