



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF BONER v. THE UNITED KINGDOM

(Application no 18711/91)

JUDGMENT

STRASBOURG

28 October 1994

In the case of Boner v. the United Kingdom*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A**, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr R. MACDONALD,

Mr J. DE MEYER,

Mrs E. PALM,

Mr J.M. MORENILLA,

Mr F. BIGI,

Sir John FREELAND,

Mr A.B. BAKA,

Mr J. MAKARCZYK,

and also of Mr H. PETZOLD, *Acting Registrar*,

Having deliberated in private on 21 April and 21 September 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 12 July 1993 by the European Commission of Human Rights ("the Commission") and on 3 August 1993 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government"), within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 18711/91) against the United Kingdom lodged with the Commission under Article 25 (art. 25) on 4 April 1991 by a British citizen, Mr Anthony Boner.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the

* The case is numbered 30/1993/425/504. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

request and the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 3 (c) (art. 6-3-c).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. On 23 August 1993, the President of the Court decided that in the interests of the proper administration of justice this case and the case of *Maxwell v. the United Kingdom* (no. 31/1993/426/505) should be heard by the same Chamber (Rule 21 para. 6).

The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 25 August 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Macdonald, Mr J. De Meyer, Mrs E. Palm, Mr J.M. Morenilla, Mr F. Bigi, Mr A.B. Baka and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 31 December 1993 and the Government's memorial on 10 January 1994. On 5 April 1994 the Government submitted their written reply to the applicant's claims for just satisfaction under Article 50 (art. 50) of the Convention. On 15 April 1994 the Secretary to the Commission informed the Registrar that the Delegate would not submit written observations in reply.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 18 April 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr I. CHRISTIE, Foreign and Commonwealth Office, *Agent,*

Lord RODGER OF EARLSFERRY, QC, Lord Advocate,

Mr R. REED, *Counsel,*

Mr I. JAMIESON,

Mr A. DICKSON, *Advisers;*

- for the Commission

Mr L. LOUCAIDES, *Delegate;*

- for the applicant

Ms R. RAE, QC, *Counsel,*

Ms A.M. CHISHOLM, Solicitor.

The Court heard addresses by Mr Loucaides, Lord Rodger and Ms Rae as well as replies to its questions.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

6. The applicant, Mr Anthony Boner, is a British citizen born in 1960. He lives in Glasgow, Scotland.

On 14 December 1989 three masked men, armed with a shotgun and a knife, carried out a robbery at a post office in Glen Village, Falkirk, Scotland, in the course of which they assaulted three post-office employees. They also caused damage to a motor car.

Following investigations, Mr Boner and two other men were arrested and remanded in custody. The applicant was indicted on a charge of assault and armed robbery, a charge of wilful damage and three charges relating to firearms. Between 29 March and 10 April 1990 he stood trial in the High Court of Justiciary sitting in Edinburgh.

7. The applicant received legal aid for the preparation of his defence and for his representation by counsel at the trial.

8. During the trial a prosecution witness, Mrs G., entered the courtroom prior to giving evidence and spoke to one of the applicant's co-accused, against whom charges had been dropped. When Mrs G. was called to give evidence, the applicant's counsel objected on the basis of her earlier presence in court. The trial judge adjourned the case and instructed prosecuting counsel to make further inquiries into the matter so that it could be determined whether Mrs G.'s attendance was due to any negligence or failure on the part of the Crown. Prosecuting counsel informed the judge that inquiries had revealed no fault on the part of anyone for whom the Crown bore responsibility. This was not disputed by the applicant's counsel, who, moreover, was unable to give any indication as to how Mrs G.'s evidence could be affected by her earlier presence in court. The trial judge accordingly took the view that no injustice would be done by Mrs G.'s examination. Finding that the relevant legal conditions were satisfied (see paragraph 17 below), he therefore exercised his discretion and permitted her to give evidence. Subsequently, counsel for the applicant had the opportunity to cross-examine Mrs G. on the matter of her attendance in court.

In her evidence, Mrs G. stated that the applicant had been at her home the evening before the robbery and had spoken of robbing the post office. The following morning he had left the house and returned later with a bag,

in a state of nervousness. Other evidence against the applicant included the fact that a shotgun and various items stolen from the post office were found on the applicant's premises. In addition, a different witness identified Mr Boner as being one of the robbers and Mrs G.'s statement was supported by her 9-year-old daughter.

9. The jury found the applicant guilty on all the charges. Taking account of his numerous previous convictions, the judge sentenced him to eight years' imprisonment.

10. On 17 April 1990 the applicant, through his solicitor, lodged an intimation of intention to appeal against conviction.

11. Mr Boner instructed new solicitors, who asked a different counsel to advise on the prospects of an appeal and to draft a note of appeal.

In his opinion dated 10 June 1990 counsel stated his view that the only possible ground of appeal related to the "admissibility of the evidence of Mrs G." and to the question "that the trial judge erred in exercising discretion in allowing her to be present". However, he conceded that he had not been provided with sufficient information to be able properly to base an opinion or to frame grounds of appeal. Notwithstanding this acknowledgement he did draft a note of appeal which contained six grounds, the first two of which concerned the trial judge's decision to admit the witness. This note of appeal was filed by the applicant's solicitors on 13 June 1990.

12. Up to this point all the work had been covered by the legal aid granted for the trial. An application to extend legal aid to the appeal proceedings had been submitted in May 1990. On 25 July 1990 the Scottish Legal Aid Board ("the Board") asked the applicant to provide an opinion from counsel on the prospects of success. The earlier opinion dated 10 June 1990 was accordingly forwarded to the Board, together with a supplementary opinion from the same counsel dated 6 September 1990. In this latter opinion counsel reiterated the view that the appeal rested on the question whether Mrs G.'s evidence was admissible. However, he again stated that he had not been provided with sufficient material on which to assess the merits of the appeal. "I regret meantime I am unable to answer the fundamental question in this case", he concluded.

13. On 27 September 1990 the applicant's solicitors informed the Board by telephone that counsel had finally decided that he could not support the application for legal aid or the appeal; that they were of the same view; and that, consequently, they could no longer act for the applicant. The terms of that telephone call were confirmed in a letter dated 2 November 1990 from the solicitors to the Board.

14. On 14 November 1990 the Scottish Legal Aid Board notified Mr Boner's solicitors that his application for legal aid had been refused as the Board was not satisfied, as it was required to be under the relevant legislation (see paragraph 26 below), that he had substantial grounds for

taking an appeal and that it was reasonable that he should receive legal aid. In a letter of 11 December 1990 to the applicant the Board added that it could not see any merit in the appeal. Despite the advice of his solicitors and counsel, Mr Boner decided to proceed with the appeal.

15. The applicant, who had no legal knowledge and had no assistance with his submissions, presented his own case on 24 January 1991 before the High Court of Justiciary, sitting in Edinburgh and acting as an appellate court. The Crown was represented by counsel. There is no indication in the record that the court required counsel for the Crown to address it.

16. The appeal court considered the first two grounds of appeal relating to Mrs G. and held that these were ill-founded and that the trial judge had approached the matter properly. As the applicant did not address the court on the remaining grounds of appeal, these were not considered by the court. It did however examine other points raised by the applicant, but reached "the clear conclusion that there was no miscarriage of justice in the case". The appeal against conviction was unanimously dismissed.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Presence of witness in court

17. Under Scots law, a witness who has been present in court without the court's permission and without consent from the opposite party may still be allowed to give evidence provided that "it appears to the court that the presence of the witness was not the result of culpable negligence or criminal intent, and that the witness had not been unduly instructed or influenced by what took place during his presence, or that injustice will not be done by his examination" (section 140 of the Criminal Procedure (Scotland) Act 1975 - "the 1975 Act").

B. Appeals in criminal proceedings

18. The following details relate solely to the "solemn procedure", under which trial proceeds upon an indictment before a judge sitting with a jury.

19. A person convicted of a criminal charge in Scotland has an automatic right of appeal granted by statute (section 228 of the 1975 Act). No leave to appeal is required.

20. In an appeal, the appellant may ask the court to review any alleged miscarriage of justice in the proceedings in which he was convicted (section 228(2) of the 1975 Act). What is a miscarriage of justice is not defined by statute, but the term covers such matters as misdirections by the trial judge or wrong decisions on the admissibility of evidence, as well as breaches of natural justice. In any appeal, the nature of the alleged miscarriage of justice

must be specified in the grounds of appeal contained in a written note of appeal, lodged within eight weeks of the date when sentence was 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 note of appeal unless, exceptionally and on cause shown, he obtains the leave of the court to do so (section 233(3) of the 1975 Act).

21. An appeal is heard by a bench of not less than three judges. At the hearing of the appeal the appellant or his counsel, if he is represented, makes submissions to the court in support of the grounds of appeal. Appellants who do not have legal representation are not required to make an oral presentation: they are allowed, however, to read any material that they may have prepared or collected.

The Crown is always represented by counsel at the hearing of criminal appeals. Their duty 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 or not favourable to the prosecution.

22. In disposing of an appeal against conviction the court may dismiss it and affirm the verdict of the trial court; set aside the verdict of the trial court either by quashing the conviction or by substituting an amended verdict of guilty; or set aside the verdict of the trial court and authorise a new prosecution (section 254 of the 1975 Act).

C. Representation of appellants by counsel

23. Counsel in Scotland are vested with the public office of advocate, which imposes a number of duties upon them, among which is the duty not to accept instructions to act in circumstances where, in their professional opinion, a case is manifestly unfounded, even if the client is able to pay for such representation.

The basis of this rule of professional conduct is that counsel cannot properly occupy the time of the court in advancing arguments which he knows to be without foundation.

D. Legal aid for criminal appeals

24. The administration of legal aid in Scotland is the responsibility of the Scottish Legal Aid Board, an independent body whose members are appointed by the Secretary of State for Scotland from among counsel, solicitors and other persons with experience of the courts.

25. Legal aid which has been made available for a trial on indictment extends, in the case of conviction, to include consideration and advice by a

solicitor on the question of appeal. An opinion on the prospect of the appeal can also be obtained from the counsel who acted at the trial.

Under special provisions legal aid is also available to enable the solicitor to prepare and lodge the statutory intimation of intention to appeal and, where appropriate, arrange for the opinion of counsel to be obtained as to the prospects of the appeal, and for the drafting and lodging of a note of appeal setting out the grounds of appeal.

26. To extend legal aid beyond this point a further application by the solicitor to the Legal Aid Board is required. This should include confirmation that the applicant's solicitor is willing to act in the appeal as well as a statement of the arguments in support of the grounds of appeal and a note of the solicitor's reasons for believing that the grounds of appeal are substantial and that legal aid should be made available.

The application will be granted if the Board is satisfied that the applicant is financially eligible, that "he has substantial grounds for making the appeal and it is reasonable in the particular circumstances of the case that legal aid should be made available to him" (Legal Aid (Scotland) Act 1986, section 25(2)).

27. The Board takes its decisions on the basis of the documents before it, which normally include copies of the note of appeal, the trial judge's charge to the jury and the trial judge's report on the case. The views expressed by the applicant's solicitor and counsel will also be taken into account.

28. Although the legislation does not provide for a formal review, the Board will, as a matter of practice, when requested to do so, reconsider an application which has been refused. Such reconsideration involves the application being referred to an external reporter, who was not involved in the Board's earlier decision and who reports to the Board on the merits of the application. Otherwise, Board decisions are subject to ordinary judicial review.

29. If the appellant proceeds with his appeal without legal aid and the court considers that, *prima facie*, he may have substantial grounds for taking the appeal and it is in the interests of justice that he should have legal representation in arguing these grounds, the court must immediately adjourn the hearing and make a recommendation that the Board's decision be reviewed.

30. The practice of the court in this regard was formalised following the judgment of the European Court of Human Rights in *Granger v. the United Kingdom* of 28 March 1990 (Series A no. 174) by a Practice Note to this effect issued on 4 December 1990 by the Lord Justice General to all Appeal Court Chairmen and Clerks:

"In any appeal where legal aid has been refused and the court considers that *prima facie* an appellant may have substantial grounds for taking the appeal and it is in the interests of justice that the appellant should have legal representation in arguing his

grounds, the court shall forthwith adjourn the hearing and make a recommendation that the decision to refuse legal aid should be reviewed."

31. Where such a recommendation is made, legal aid is automatically granted. To this end, the Manual of Procedure of the Scottish Legal Aid Board provides in paragraph 6.12 that:

"In these circumstances the Board will receive a letter from the High Court of Justiciary giving the details of the case where they are recommending a re-consideration of the decision to refuse. If we are asked to re-consider a decision in these circumstances, then the application should be granted automatically. The case need not be seen by a reporter or Board solicitor, but ought to be referred to the Assistant Manager for the appropriate action."

PROCEEDINGS BEFORE THE COMMISSION

32. Mr Boner applied to the Commission on 4 April 1991. He relied on Article 6 para. 3 (c) (art. 6-3-c) of the Convention, complaining that he had been refused legal aid.

33. The Commission declared the application (no. 18711/91) admissible on 9 December 1992. In its report of 4 May 1993 (Article 31) (art. 31), it concluded, by seventeen votes to two, that there had been a violation of Article 6 para. 3 (c) (art. 6-3-c).

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

34. At the hearing on 18 April 1993, the applicant invited the Court

"to find and declare that there has been a violation of the applicant's rights in terms of Article 6 para. 3 (c) (art. 6-3-c), and that in the circumstances just satisfaction should be awarded in terms of Article 50 (art. 50) at such a sum as the Court deems appropriate".

The Government, for their part, requested the Court to hold that there had been no violation of the applicant's rights under Article 6 (art. 6).

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 300-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 3 (c) (art. 6-3-c) OF THE CONVENTION

35. The applicant who had been sentenced to eight years' imprisonment complained that he had been refused legal aid for his appeal against conviction in breach of Article 6 para. 3 (c) (art. 6-3-c) of the Convention, which 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;

... "

This contention was accepted by the Commission but disputed by the Government.

36. Sub-paragraph (c) of Article 6 para. 3 (art. 6-3-c) attaches two conditions to an accused's right to receive legal aid. The first, "lack of sufficient means to pay for legal assistance", is not in dispute in the present case. The only issue before the Court is therefore whether the "interests of justice" required that the applicant be granted such assistance free.

37. In this connection, the Court reiterates that the manner in which paragraph 3 (c) of Article 6 (art. 6-3-c) is to be applied in relation to appellate or cassation courts depends upon the special features of the proceedings involved; account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein (see, *inter alia*, the *Monnell and Morris v. the United Kingdom* judgment of 2 March 1987, Series A no. 115, p. 22, para. 56).

38. The Scottish system of criminal appeals grants all persons a right to appeal. No special leave is required (see paragraph 19 above). The High Court of Justiciary, in its appellate function, has wide powers to dispose of appeals (see paragraph 22 above). The procedure is not limited to specific grounds; any alleged miscarriage of justice may be challenged (see paragraph 20 above). Moreover, the proceedings always involve an oral hearing at which the Crown is represented (see paragraph 21 above).

However, not all appellants who qualify on financial grounds obtain legal assistance. An independent body (the Scottish Legal Aid Board) decides on the basis of a file whether an applicant has substantial grounds for taking an

appeal and whether it is in the interests of justice that he should have legal representation (see paragraphs 24-29 above).

39. According to the applicant and the Commission, the interests of justice required that Mr Boner be granted legal assistance for the hearing of his appeal on 24 January 1991 before the High Court of Justiciary. They referred to the Granger case previously cited, where the Court had found a violation, and concluded that there were substantial similarities between Granger and the present case.

40. The Government sought to distinguish the two cases. In their contention, the appeal court in Granger, after hearing the appellant's submissions, considered that there was a point of substance which required further examination. Counsel for the Crown was required to present a long and elaborate argument, which the appellant could neither understand nor respond to. None of these features is to be found in the present case.

The Government further noted that the applicant was not obliged to address the court at the oral hearing and that counsel for the Crown does not appear to have made submissions before it.

In addition, Mr Boner could not, in any event, have found counsel willing to represent him, in view of the rules of professional ethics which impose a duty on counsel not to act for an appellant where they are satisfied that he had no proper basis for bringing an appeal (see paragraph 23 above).

Furthermore, as a consequence of the Granger judgment, a safeguard had been introduced. The Practice Note by the Lord Justice General, dated 4 December 1990, taken in conjunction with the practice of the Scottish Legal Aid Board (see paragraphs 30 and 31 above), ensures that, in any appeal where legal aid has been refused, such aid is automatically granted where the court has reached the conclusion that, *prima facie*, an appellant may have substantial grounds for taking the appeal and that it is in the interests of justice that he should have legal representation in arguing these grounds. Accordingly, under the new system, as soon as it becomes clear that an unrepresented appellant has a point which appears to be of substance, the appeal court must adjourn the appeal to enable the appellant to obtain representation and legal aid will in fact be granted. The effect is thus that there can be no repetition of the unfairness which was found to have occurred in the Granger case.

41. The Court notes that, as the Government pointed out, there are indeed differences between the two cases. In addition, the introduction of a new practice more favourable to the unrepresented appellant is undoubtedly a positive development.

The legal issue in this case may not have been particularly complex. Nevertheless, to attack in appeal proceedings a judge's exercise of discretion in the course of a trial (see paragraph 8 above) requires a certain legal skill and experience. That Mr Boner was able to understand the grounds for his appeal and that counsel was not prepared to represent him

(see paragraph 40 above) does not alter the fact that without the services of a legal practitioner he was unable competently to address the court on this legal issue and thus to defend himself effectively (see, *mutatis mutandis*, the *Pakelli v. Germany* judgment of 25 April 1983, Series A no. 64, p. 18, para. 38).

Moreover, the appeal court, as stated, had wide powers to dispose of his appeal and its decision was final. Of even greater relevance, however, the applicant had been sentenced to eight years' imprisonment. For Mr Boner therefore the issue at stake was an extremely important one.

42. The Government maintained that a finding of a violation in this case might have as its consequence the ending of the automatic right of appeal, thereby effectively diminishing the rights of the accused.

43. It is not the Court's function to indicate the measures to be taken by national authorities to ensure that their appeals system satisfies the requirements of Article 6 (art. 6). Its task is solely to determine whether the system chosen by them in this connection leads to results which, in the cases which come before it, are consistent with the requirements of Article 6 (art. 6) (see, *inter alia*, the *Quaranta v. Switzerland* judgment of 24 May 1991, Series A no. 205, p. 15, para. 30).

The situation in a case such as the present, involving a heavy penalty, where an appellant is left to present his own defence unassisted before the highest instance of appeal, is not in conformity with the requirements of Article 6 (art. 6).

44. Given the nature of the proceedings, the wide powers of the High Court, the limited capacity of an unrepresented appellant to present a legal argument and, above all, the importance of the issue at stake in view of the severity of the sentence, the Court considers that the interests of justice required that the applicant be granted legal aid for representation at the hearing of his appeal.

In conclusion, there has been a violation of paragraph 3 (c) of Article 6 (art. 6-3-c).

II. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

45. Article 50 (art. 50) of the Convention provides as follows:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Under this provision Mr Boner sought compensation for alleged non-pecuniary damage in an amount to be fixed by the Court. In the applicant's

submission, such compensation should serve as "a solatium for the injury to his feelings and state of mind" resulting from the refusal of legal aid.

46. The Court agrees with the Government that the non-pecuniary damage thus caused is sufficiently compensated by a finding that there had been a breach of Article 6 (art. 6).

47. Mr Boner also claimed reimbursement of the costs and expenses entailed by the proceedings before the Convention institutions, which he quantified at £10,955.22.

The Government objected to the method used to calculate the solicitors' estimated account of expenses and stated that they would accept a total of £7,500.28 (value-added tax included). The applicant's representative explained at the hearing that she had been instructed not to insist on this aspect of the claim.

48. The Court grants the last sum proposed, less 16,275.79 French francs already paid by way of legal aid.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of paragraph 3 (c) of Article 6 (art. 6-3-c) of the Convention;
2. Holds as regards the claim for non-pecuniary damage that the present judgment constitutes, in itself, sufficient just satisfaction for the purposes of Article 50 (art. 50) of the Convention;
3. Holds that the respondent State is to pay to the applicant, within three months, £7,500.28 (seven thousand five hundred pounds sterling and twenty-eight pence) less FRF 16,275.79 (sixteen thousand two hundred and seventy-five French francs and seventy-nine centimes) to be converted into pounds sterling in accordance with the exchange rate applicable on the date of delivery of the present judgment, in respect of legal costs and expenses;
4. Rejects the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 October 1994.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the concurring opinions of Mr De Meyer and Sir John Freeland are annexed to this judgment.

R. R.
H. P.

CONCURRING OPINION OF JUDGE DE MEYER

The "interests of justice" normally require that a person "charged with a criminal offence" be assisted by a lawyer.

Without such assistance very few people are able "to present" their "case in an adequate manner"¹ and "to make an effective contribution to the proceedings"².

This is so at each stage of them, and even more so in the higher instances.

It has to be observed thereby that legal assistance is needed, not only in so far as it is "useful ... to the examination of the legal questions"³ in a narrow sense, but also since it is proper to ensure that the facts be ascertained, understood and appraised in a legally relevant manner.

The burden of proving that the interests of justice require legal assistance must not be laid upon the accused person. In order legitimately to dispense with such assistance, if the person concerned has not knowingly and willingly waived it, it has to be clearly and convincingly established that they do not require it in the instance concerned.

There were no valid reasons for such an exception in the circumstances of the present case.

¹ Quaranta v. Switzerland judgment of 24 May 1991, Series A no. 205, p. 18, para. 36.

² Granger v. the United Kingdom judgment of 28 March 1990, Series A no. 174, p. 19, para. 47.

³ Pakelli v. Germany judgment of 25 April 1993, Series A no. 64, p. 18, para. 38.

CONCURRING OPINION OF SIR JOHN FREELAND

1. I have voted with the other members of the Court for the finding that there has been a violation of paragraph 3 (c) of Article 6 (art. 6-3-c), but the reasoning which has led me to this conclusion has in certain respects differed from theirs.

2. On the one hand, the material before the Court has to my mind gone far to demonstrate that the possibility of Mr Boner's having in fact suffered any substantive injustice by virtue of his lack of legal representation at the hearing of his appeal is extremely remote. His solicitors and counsel had, in accordance with their rules of professional conduct, declined to continue to act for him because they had come to the view that the grounds of appeal could not be supported; and the Scottish Legal Aid Board had refused his application for legal aid for the appeal because it was not satisfied that there were substantial grounds for making the appeal. He nevertheless exercised the unfettered right of appeal to which every person convicted of a criminal charge in Scotland is entitled. The appellate court judges would have been provided, well in advance of the hearing, with the appellant's written grounds of appeal, to which no answers were submitted by the prosecution, and with the other papers in the case. They would have known in advance that the appellant was to be unrepresented. In their prior consideration of the matter and at the hearing itself they would have taken particular care to determine whether any of the grounds advanced by him, however inexpertly argued, might raise a point of substance. In accordance with long tradition, they would have been at pains to ensure that he, as an appellant in person, was treated with courtesy and consideration and was not placed in a humiliating or distressing position as a result of his lack of legal expertise. Counsel for the Crown, who apparently took no active part in the hearing, would have been under a duty to draw to the court's attention any substantial arguments of which he was aware that might weigh in the appellant's favour. Lastly, if at any stage the court had concluded that Mr Boner might have had substantial grounds for taking the appeal, then, in conformity with the practice introduced in the wake of the Granger case, it would have immediately adjourned the hearing and legal assistance would have been provided.

3. On the other hand, even if, as I believe, no substantive injustice has been established, that does not dispose of the question whether, in the words of sub-paragraph 3 (c) of Article 6 (art. 6-3-c), "the interests of justice" required that Mr Boner should be given free legal assistance for the hearing of his appeal. As we were reminded in argument, justice should not only be done, it should also be seen to be done. The appeal raised a legal issue concerning the exercise of the trial judge's discretion and Mr Boner's conviction had led to the imposition of a sentence of eight years' imprisonment. As regards the view taken by Mr Boner's solicitors and

counsel and by the Legal Aid Board of the prospects of success of an appeal, lawyers may of course disagree; and it was clear from the pleadings of the Government themselves that there have been cases in which legal aid has been refused yet counsel has subsequently appeared for an appellant and won his appeal. More importantly, the Crown was represented at the hearing of the appeal (as it is in all comparable cases) by counsel who was present and able to advance a legal argument if called upon by the court to do so. Admittedly he was not called upon; but that might be simply because the absence of legal assistance left Mr Boner unable to persuade the court that he had an argument which required a response. Given that there was a legal issue to be addressed on Mr Boner's appeal and that, having regard to the severity of his sentence, so much was at stake for him, I am satisfied that his lack of legal representation for the hearing, when counsel for the Crown was present, produced at least the appearance of injustice.

4. I have therefore, on balance, concluded that the "interests of justice" should have been regarded as requiring the grant to him of free legal assistance for the hearing of his appeal and that failure to grant such assistance amounted, in the circumstances, to a violation of Article 6 para. 3 (c) (art. 6-3-c).