CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (CHAMBER)

CASE OF MONNELL AND MORRIS v. THE UNITED KINGDOM

(Application no. 9562/81; 9818/82)

JUDGMENT

STRASBOURG

2 March 1987

In the case of Monnell and Morris[*],

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 the Rules of Court, as a Chamber composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. Thór VILHJÁLMSSON,
Mr. L.-E. PETTITI,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. J. GERSING,
Mr. A. SPIELMANN,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 2 July 1986 and 30 January 1987,

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

PROCEDURE

1. The case was brought before the Court on 11 July 1985 by the European Commission of Human Rights ("the Commission") and five days later by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government"), within the period of three months laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in two applications (nos. 9562/81 and 9818/82) against the United Kingdom lodged with the Commission in 1981 and 1982 by Mr. Brian Arthur Monnell and Mr. Neville Morris, British citizens, under Article 25 (art. 25).

2. 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 purpose of the request and the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Articles 5, 6 and 14 (art. 5, art. 6, art. 14) of the Convention.

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[*] Note by the Registrar: The case is numbered 7/1985/93/140-141. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

3. In response to the inquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, each applicant stated that he wished to participate in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

4. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 2 October 1985, the President of the Court drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. Thór Vilhjálmsson, Mr. D. Evrigenis, Mr. E. García de Enterría, Mr. L.-E. Pettiti and Mr. R. Bernhardt. Subsequently, Mr. R. Macdonald, Mr. A. Spielmann and Mr. J. Gersing, substitute judges, replaced respectively Mr. Evrigenis, who had died on 27 January 1986, Mr. García de Enterría, whose term of office as judge had expired before the opening of the oral proceedings, and Mr. Bernhardt, who was prevented from taking part in the consideration of the case (Rules 2 § 3, 22 § 1 and 24 § 1).

5. Mr. Ryssdal assumed the office of President of the Chamber (Rule 21 § 5). He ascertained, through the Registrar, the views of the Agent of the Government, the Delegate of the Commission and the lawyers for the applicants regarding the need for a written procedure (Rule 37 § 1). Thereafter, in accordance with the Orders and directions of the President of the Chamber, the following documents were lodged at the registry:

- on 6 December 1985, the memorial of the Government;
- on 10 December 1985, the memorial of the applicant Brian Arthur Monnell.

On 12 December 1985 and 31 January 1986 respectively, the applicant Neville Morris and the Delegate of the Commission notified the Registrar that they did not wish to present any comments in writing.

6. By letter received on 6 January 1986, JUSTICE (the British section of the International Commission of Jurists) requested leave under Rule 37 § 2 to submit written comments. On 4 February 1986, the President granted leave. He specified, however, that the comments to be submitted "should be strictly limited to matters directly concerned with the issues before the Court for decision in the case of Monnell and Morris". He further directed that the comments should be filed not later than 4 April 1986. They were received at the registry on 3 April.

7. On 7 February 1986, after consulting, through the Registrar, the Agent of the Government, the Delegate of the Commission and the lawyers for the applicants, the President directed that the oral proceedings should open on 25 June 1986 (Rule 38).

8. The Government lodged certain documents on 20 and 24 June 1986.

9. The hearing was held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately prior to its opening, the Court had held a preparatory meeting. There appeared before the Court:

- for the Government
Mr. M. EATON, Legal Counsellor
at the Foreign and Commonwealth Office, *Agent*,
Mr. M. PILL, Q.C.,
Mr. A. MOSES, Barrister-at-Law, *Counsel*,
Mr. R. VENNE, Criminal Appeal Office, *Adviser*;
- for the Commission
Mr. H. DANELIUS, *Delegate*;
- for the applicants
Mr. A. PENDLEBURY, Solicitor (for Mr. Monnell),
Mr. M. MARLOW, Solicitor (for Mr. Morris), *Counsel*.

The Court heard addresses by Mr. Pill for the Government, by Mr. Danelius for the Commission and by Mr. Pendlebury and Mr. Marlow for the applicants, as well as their replies to its questions.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

1. In relation to the first applicant

10. The first applicant, Brian Arthur Monnell, is a British citizen born in 1945.

On 4 September 1981, after a trial lasting three days, he was convicted by a jury before the Crown Court at Exeter of an offence of burglary and sentenced to three years' imprisonment. In addition, on the same occasion he received two sentences of imprisonment of nine months each, to run consecutively to the three-year sentence but otherwise concurrently (giving a total sentence of three years and nine months), in respect of two charges of burglary to which he had pleaded guilty before the same Court three days earlier. In deciding the appropriate sentences to impose, the judge also took into account four other offences which Mr. Monnell had admitted to but which did not proceed to trial. At his trial, Mr. Monnell was represented by solicitors and counsel, under a legal aid order.

11. The counsel who had represented Mr. Monnell at the trial advised him in a written opinion dated 29 September 1981 that "no prospect whatsoever exists of appealing the conviction successfully". Counsel came to a similar conclusion regarding an appeal against sentence. In counsel's view, "the offences were serious and the property unrecovered. He had a substantial criminal record and had served several prison sentences for

offences of dishonesty. A further prison sentence was inevitable and the length of sentence passed was equally inevitable".

Notwithstanding this advice, Mr. Monnell went ahead and lodged an application seeking leave to appeal against both conviction and sentence. His application was signed by him on 21 October 1981 and received by the Criminal Appeal Office on 26 October 1981. The gravamen of his application was premised on his view that witnesses who should have been called in his defence were not called. In his application, he acknowledged that he had read the Form AA, which is given to every prisoner contemplating an appeal to the Court of Appeal and which states:

> "Advice on appeal
>
> Loss of Time
>
> ...
>
> If you are thinking about an appeal you should get advice. Your solicitors and counsel at the trial are best able to give it. If they advise that there are grounds of appeal and these grounds are settled and signed by counsel the Court of Appeal will know that you had reasons to apply. It is useless to apply without grounds, or to try to invent them if there are none. Reasons are required - not a form of words.
>
> So it is important to get advice. If you cannot get it, and put in an application without it, you should say why ... before setting out your own grounds. You may, if you wish, ask the Court of Appeal to help you to get advice. But if your solicitor or counsel has advised against an appeal the Court will not give you another solicitor for that reason only.
>
> If you apply without real grounds you might lose by it. Your application may go first to a single Judge who might refuse it and direct that part of the time in custody after putting in the notice of application shall not count towards your sentence. If you then abandoned the application that time would be lost, but only that time. If, however, you renewed the application to a Court of three Judges they might direct that you lost more time. The result in either case is a later date of release."

12. Mr. Monnell, dissatisfied with the manner in which his defence had been conducted at his trial, dismissed his solicitors and, on 4 November 1981, instructed his present solicitors.

In the meantime, the Criminal Appeal Office wrote to Mr. Monnell's former solicitors, informing them that he had applied for leave to appeal and asking them whether they had advised him in this connection. The Criminal Appeal Office also invited the solicitors to comment on the allegation made by Mr. Monnell in his application that a certain individual should have been called as a witness at his trial. In response, the solicitors forwarded a copy of counsel's adverse written advice and described their attempts to trace a large number of witnesses whom Mr. Monnell had initially intended to call in his defence. They explained that Mr. Monnell had later decided against calling most of the witnesses they had succeeded in tracing.

The new solicitors sought legal aid in order, inter alia, to investigate the possibility of applying for a retrial because of additional evidence that could be obtained. Mr. Monnell also requested the Criminal Appeal Office to postpone the hearing of his application for leave to appeal pending the outcome of inquiries commenced by his new solicitors. A limited grant of legal aid was made.

13. Mr. Monnell's application for leave to appeal was considered by a single judge, Mr. Justice Brown (see paragraph 23 below). The additional information obtained from Mr. Monnell's former solicitors was also put before Mr. Justice Brown, together with the relevant court papers (for example, witness statements, a social enquiry report and a psychiatric report). The judge allowed the request that the application be heard although it had been lodged out of time but refused leave to appeal and various ancillary applications made (for legal aid, bail, leave to be present and leave to call witnesses). The judge gave the following written reasons, dated 2 December 1981, for his refusal:

> "You were convicted by the jury upon ample evidence after a full and correct summing up by the judge. The many witnesses you now say you wish to call were not required to be called by you at your trial. There is no ground for interference with the verdict of the jury.
>
> The total sentence passed upon you was not excessive or wrong in principle."

14. On 9 December 1981, Mr. Monnell renewed all those elements of his application which had been refused by Mr. Justice Brown. The Form SJ on which this application was made contained the following warning:

> "LOSS OF TIME. A renewal to the Court after refusal by the Judge may well result in a direction for the loss of time should the Court come to the conclusion that there was no justification for the renewal. If the Judge has already directed that you lose time the Court might direct that you lose more time."

15. A request to extend legal aid was refused at the end of January 1982. The solicitors therefore advised Mr. Monnell that they were unable to carry out any further investigations on his behalf, that the results of the investigations they had carried out were inconclusive and that, consequently, they were not in a position to advise him whether he should pursue his application for leave to appeal or not.

16. On 20 May 1982, the full Court of Appeal rejected the application in its entirety, finding the grounds of appeal to be "wholly without foundation". In its judgment, delivered by Lord Justice Watkins, the Court of Appeal stated:

> "[Mr. Monnell] had no conceivable reason to approach this Court for leave to appeal against either conviction or sentence. His learned counsel, in a very careful opinion on conviction, said: 'In my opinion no prospect whatsoever exists of appealing the conviction successfully', and further that in relation to sentence a further prison sentence was inevitable and the length of sentence passed was equally inevitable.

> When a person, in the light of advice of that kind and clearly without any ground whatsoever for challenging a conviction properly passed, wastes the time of the court by pressing on with his applications for leave to appeal as this applicant has done, it is right that the Court should consider whether or not his time in prison should be extended. We have come to the conclusion that it should be."

The Court of Appeal therefore ordered that 28 days spent by him in custody pending the hearing of his application should not count towards his sentence.

2. In relation to the second applicant

17. The second applicant, Neville Morris, is a British citizen born in 1939.

On 4 August 1980, he appeared before the Reading Crown Court charged, with two others, with conspiracy to supply heroin during a period of two years up to February 1980. The trial terminated three weeks later, on 24 August 1980, when the jury returned verdicts of guilty in respect of Mr. Morris and his co-accused. Mr. Morris was sentenced to three and a half years' imprisonment, his two co-accused to five years' and nine months' imprisonment respectively.

18. At his trial, Mr. Morris was represented, under the legal aid scheme, by a solicitor and by counsel. Following his conviction, his counsel advised him against lodging an application for leave to appeal as, in counsel's opinion, the Court of Appeal would be unlikely to interfere with the exercise of the trial judge's discretion to admit certain damaging evidence since the trial judge had applied the law correctly.

19. Mr. Morris nevertheless drafted his own grounds of appeal against both conviction and sentence, which his solicitor then rendered into a "more comprehensible form" and had typed. The solicitor signed on Mr. Morris' behalf the acknowledgement of having read the Form AA on advice on appeal and loss of time (see paragraph 11 above). The application for leave to appeal was received by the Criminal Appeal Office on 22 September 1980. The principal ground advanced by Mr. Morris for arguing that the conviction was unsafe was that damaging statements had been obtained from him under duress whilst he was suffering from withdrawal from drugs. His main contention in relation to his sentence was that it was unfair, having regard to his role in the conspiracy and to the sentences received by his co-defendants.

On 2 April 1981, the Criminal Appeal Office sent Mr. Morris and his solicitor copies of the short transcript of his trial. On 13 April 1981, he submitted further grounds in support of his appeal, including an unsigned, undated letter claimed by him to have been written by one of his co-accused before the trial and purporting to clear him of any involvement in the offence of which he was subsequently convicted.

20. These documents, along with all other relevant papers, were put before a single judge, Mr. Justice Lawson. On 20 May 1981, the single judge refused leave to appeal against conviction and sentence as well as the ancillary applications (for legal aid and leave to be present). In the written decision sent to Mr. Morris, the judge stated: "there are no reasons to justify granting you leave to appeal".

21. Mr. Morris nonetheless renewed his application for leave to appeal. The Form SJ he used for this purpose (signed by him on 12 June and received by the Criminal Appeal Office on 17 June 1981) contained the same warning as given to Mr. Monnell (see paragraph 14 above).

22. On 27 October 1981, the full Court of Appeal, presided over by the Lord Chief Justice (Lord Lane C.J.), refused the application made by Mr. Morris. The Court first found that "there are no possible grounds for giving leave to appeal against conviction". As to the issue of sentence, the Court took the view that the trial judge had had ample opportunity to apportion the degree of moral responsibility between Mr. Morris and his co-accused and hence to grade the sentence imposed on him. The Court concluded: "... he must pay the penalty for renewing this hopeless application. He will lose 56 days." Consequently, 56 days of the period spent in custody by Mr. Morris awaiting the outcome of his application for leave to appeal did not count towards service of his sentence.

II. RELEVANT LAW AND PRACTICE

23. Under section 1(1) of the Criminal Appeal Act 1968, a person convicted of an offence on indictment (as were both applicants) may appeal to the Court of Appeal against his conviction. Where the appeal is not on a question of law alone, leave of the Court of Appeal must first be obtained, unless the trial judge has granted a certificate that the case is fit for appeal (section 1(2)). A person convicted of an offence on indictment may also appeal to the Court of Appeal against a sentence passed (not being a sentence fixed by law), but such appeal is similarly subject to the leave of the Court of Appeal (sections 9 and 11). An application for leave to appeal, notice of which must be on the relevant form prescribed by the Criminal Appeal Rules 1968, will normally be referred in the first place to a single judge (sections 31 and 45(2)).

24. According to Rule 11(1) of the Criminal Appeal Rules 1968, the single judge may sit in such place as he appoints and may sit otherwise than in open court. The principal purpose of the system of referring applications for leave to appeal first to a single judge is to identify those cases where the grounds of appeal are substantial and arguable.

Where a single judge refuses an application for leave to appeal, the notification of the decision to the applicant will give the name of the judge and the reasons for the refusal. If an applicant wishes to pursue his

application further, he must so notify the Registrar of Criminal Appeals on the prescribed form within 14 days of the date on which the notice of the refusal was served on him. In that event, his application will be determined, in open court, by the full Court of Appeal (section 31(3) of the Criminal Appeal Act 1968). Leave to appeal will be granted if any one member of the Court is of the view that it should be granted (R v. Healey 40 Criminal Appeals Reports 40 at 42).

The single judge and the full Court of Appeal deal with an application for leave to appeal, and associated applications, in the light of all the case-papers and the grounds of appeal, but in the majority of cases without hearing oral argument. Nevertheless, an applicant for leave to appeal may always at private expense instruct counsel to appear and make oral submissions before both the single judge and the full Court (Rule 11(2)).

25. There is no absolute right to legal aid for representation during the procedure for consideration of an application for leave to appeal. The vast majority of defendants in criminal trials before Crown Courts are legally aided. This aid extends up to receiving advice from counsel on the question whether there appear to be reasonable grounds of appeal and, if such grounds appear to exist, assistance in the preparation of an application for leave to appeal where such application is required (Legal Aid Act 1974, sections 28(7) and 30(7)). On the other hand, if trial counsel advises against an appeal, the trial legal aid order ceases, both for solicitors and counsel. The Registrar of Criminal Appeals, the single judge and the full Court, however, have discretion to grant legal aid where an applicant for leave to appeal is unrepresented; they may also do so, whether or not counsel settled the grounds of appeal, for the purposes of further advice and assistance or for oral argument before a single judge or the full Court (Legal Aid Act 1974, sections 28(8) and 30(8); Legal Aid in Criminal Proceedings (General) Regulations (1968), Regulation 3(4)). Where legal aid has been refused by a judge, the Registrar cannot grant it unless the circumstances have changed (Legal Aid in Criminal Proceedings (General) Regulations 1968, Regulation 3(9)). In general, all would-be appellants have the opportunity of obtaining legal advice and assistance as to grounds of appeal and, if they cannot pay for it themselves, it will be available under legal aid.

26. The presence of a person in custody before the Court of Appeal when it is considering an application for leave to appeal is always subject to the leave of the Court (section 22(2)(b) of the Criminal Appeal Act 1968). In practice, leave for a person in custody to be present at the hearing of an application for leave to appeal will only be given in exceptional circumstances, and rarely where the application is being considered by a single judge.

27. Grounds of appeal against conviction are limited. The Court of Appeal does not re-hear the case on the facts. It may hear fresh evidence, although the mere fact that a convicted person says he wished that other

evidence had been called at his trial is not enough. He has to demonstrate to the satisfaction of the Court that fresh evidence which he seeks to adduce is credible and relevant to an issue in the case, and that there was a good reason why it was not called at the trial.

In the proceedings for examination of an application for leave to appeal, no witnesses are called; the Court of Appeal, whether it be the single judge or the full Court, will consider, firstly, whether the grounds as drafted are capable of constituting grounds for appeal and, secondly, whether they have any merit. If the grounds constitute legitimate grounds of appeal and are of some merit, then leave will be granted. But if the grounds, as drafted, are not legitimate grounds for appeal or do not merit further argument or consideration, leave will be refused.

Any convicted person who chooses to take legal advice in relation to an appeal will have those basic principles explained to him. He will further be advised that counsel is not permitted to draft grounds which are unarguable.

Under the terms of section 11(3) of the Criminal Appeal Act 1968, in determining an appeal the Court of Appeal shall "so exercise their powers ... that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below".

28. Under English law, in cases in which there is no appeal, a convicted person starts to serve a sentence of imprisonment immediately it is imposed; and, during any appeal proceedings, he (or she) is not regarded as being in detention on remand. The duration of any sentence must, however, be treated as reduced by the time spent prior to trial in custody on remand.

Section 29(1) of the Criminal Appeal Act 1968 further provides that the time during which an appellant is in custody pending the determination of his appeal (including his application for leave to appeal) "shall, subject to any direction which the Court of Appeal may make to the contrary, be reckoned as part of the term of any sentence to which he is for the time being subject". Where leave to appeal is granted (see paragraph 23 above), the Court has no power to make such a direction (section 29(2) of the Act).

However, the Court of Appeal is not precluded from directing that any such time, or part of it, should not count towards an applicant’s sentence when it refuses an application for leave to appeal. Although this did not occur in the present case, the power to make an order of this kind may also be exercised by a single judge (section 31(2)(h) of the Act). Where such a direction is made, the reasons must be given and communicated to the applicant (section 29(2) of the Act).

29. Prior to 1966, the law had been that the time during which an unsuccessful application for leave to appeal was pursued was not in principle reckoned as part of the sentence but the applicant did not lose more than six weeks unless the Court of Appeal ordered otherwise. The Court retained an overriding discretion to order that no time, or more or less time, should be lost in any particular case. In practice, the Court rarely gave

a special direction and the prisoner thus almost invariably lost up to 42 days by operation of the relevant statute.

The present rule was introduced in 1966 - being re-enacted in section 29 of the Criminal Appeal Act 1968 - in implementation of recommendations made in 1965 in a report prepared by an Interdepartmental Committee on the Court of Criminal Appeal (Command Paper Cmnd 2755). The Committee had suggested that the Court should bring its mind to the question of loss of time instead, as had been the case, of operating an almost automatic rule to the disadvantage of the appellant. The Committee, in making its recommendations, recognised the dangers of weakening the barriers against unmeritorious applications for leave to appeal being made, but envisaged that the power retained by the Court to penalise an applicant whose application was totally devoid of merit would act as a deterrent against a possible flood of hopeless applications.

30. Nonetheless, in 1969, the number of applications for leave to appeal had risen to approximately 9,700 and by March 1970 applications were being made at the rate of over 1,000 a month. As a matter of practice, it was almost unknown for a single judge to give directions for loss of time. On 17 March 1970, the Lord Chief Justice (Lord Parker C.J.) issued a Practice Direction drawing attention to the fact that the sheer volume of applications was leading to unacceptable delays which could not be tolerated in respect of applications which had merit (1970 1 All England Law Reports 119). He therefore announced that because facilities for advice on appeals were available to appellants, almost without exception, under the legal aid scheme, the single judge should have no reason to refrain from directing that time should be lost if he thought it right so to exercise his discretion in all the circumstances of the case. The stated aim of the exercise of the Court's power in this manner was "to enable prompt attention to be given to meritorious cases by deterring the unmeritorious applications which stand in their way". Within a fortnight the number of applications fell by 50 per cent to approximately 500 cases per month.

31. On 14 February 1980, the Lord Chief Justice (Lord Widgery C.J.) issued a further Practice Direction reminding those concerned of the power, both of the full Court and of the single judge, to order loss of time ([1980] 1 All England Law Reports 555). This reminder had once more become necessary as "meritorious appeals [were] suffering serious and increasing delays, due to the lodging of huge numbers of hopeless appeals".

32. According to the Government, the great majority of appeals are those where a convicted person is serving a sentence of imprisonment, and loss-of-time orders have in practice specified a maximum loss of 64 days.

During the year 1981, 6,097 applications for leave to appeal were registered. Precise figures regarding the number of cases in which loss of time was ordered, and the amount of time ordered to be lost in such cases, are not available. However, from information held by the Criminal Appeal

Office it appears that loss of time was ordered in respect of 60 to 65 applications (which figure includes orders made by both single judges and the full Court); that the loss of time ordered ranged from 7 to 64 days; and that in approximately 75 per cent of these cases the loss of time ordered was for 28 days (this being the normal order) or less. In 1984, the last year for which statistics were available, 8,262 cases were dealt with in all. Single judges dealt with approximately 6,500. The total number of cases listed in the full Court was 3,800. Those cases consisted of renewals of applications to the Court after refusal by the single judge, cases where leave to appeal had been granted and cases referred directly to the Court. 91.39 per cent of all applicants were in custody.

PROCEEDINGS BEFORE THE COMMISSION

33. The application of Mr. Monnell (no. 9562/81) was lodged with the Commission on 5 August 1981 and that of Mr. Morris (no. 9818/82) on 13 March 1982. Both applicants claimed that the loss-of-time orders made by the Court of Appeal resulted in a deprivation of liberty not permitted by Article 5 (art. 5) of the Convention, that they had been denied a fair trial in breach of Article 6 (art. 6) because they had not been allowed to attend or be represented in the proceedings before the Court, and that, contrary to Article 14 (art. 14), the loss-of-time procedure was discriminatory. Mr. Monnell also alleged impropriety by the police in the conduct of the criminal investigation.

34. The Commission ordered the joinder of the two applications on 17 January 1984 for the purposes of a joint hearing. On 20 January 1984, it declared both applications admissible in relation to the common complaints (regarding the loss-of-time orders) but the remainder of Mr. Monnell's application inadmissible.

In its joint report adopted on 11 March 1985 (Article 31) (art. 31), the Commission expressed the opinion that there had been a breach of Article 5 § 1 (art. 5-1) (ten votes to one) and Article 6 (art. 6) (nine votes to two) in regard to both applicants, but that it was not necessary to examine separately whether there had been a breach of Article 14 in conjunction with Article 5 (art. 14+5) (unanimously) or with Article 6 (art. 14+6) (seven votes to four). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

35. At the hearing on 25 June 1986, the Government maintained in substance the concluding submissions set out in their memorial, whereby they requested the Court

> "(1) to decide and declare that the orders directing that the applicants' periods of detention pending appeal should not count towards the service of their sentence, were in accordance with Article 5 § 1 (art. 5-1) of the Convention;
>
> (2) to decide and declare that Article 6 (art. 6) did not require the presence of the applicant during the course of the proceedings nor the opportunity to make separate representations over and above those contained in his grounds of appeal;
>
> (3) to decide and declare that it is not necessary to examine separately whether there have been breaches of Article 14 (art. 14);
>
> (4) if it is necessary to examine separately whether there have been breaches of Article 14 (art. 14), to decide and declare that there have been no such breaches".

AS TO THE LAW

I. ALLEGED BREACH OF ARTICLE 5 § 1 (art. 5-1)

36. The applicants contended that the periods of detention which the Court of Appeal ordered should not count towards the service of the sentences of imprisonment imposed on them at first instance were not covered by any of the categories of permitted detention set out in Article 5 § 1 (art. 5-1) of the Convention and hence gave rise to a violation of their right to liberty. Article 5 § 1 (art. 5-1) reads:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

This contention has been disputed throughout by the respondent Government but was upheld by the Commission in its report.

37. In the opinion of the Court, the contested periods of detention fall to be examined in the first place under sub-paragraph (a) of Article 5 § 1 (art. 5-1-a). The case has, moreover, been argued by all concerned on that basis.

38. The principal issue for decision is whether the periods of detention in question were undergone "after conviction by a competent court", within the meaning of this sub-paragraph.

39. There can be no doubt as to each applicant having been the subject of a "conviction by a competent court" (see paragraphs 10 and 17 above). The difference of opinion between the Commission and the applicants, on the one hand, and the respondent Government, on the other, relates to whether the subsequent loss of time ordered by the Court of Appeal can be regarded as a detention undergone "after" those convictions.

40. As established in the case-law of the Court, the word "after" in sub-paragraph (a) does not simply mean that the detention must follow the "conviction" in point of time: in addition, the detention must result from, follow and depend upon or occur by virtue of the "conviction" (see, as the most recent authority, the Weeks judgment of today’s date, Series A no. 114, § 42). In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (ibid.).

41. In England and Wales, in cases in which there is no appeal, a convicted prisoner starts his (or her) sentence immediately it is imposed (see paragraph 28 above). The impugned orders were made pursuant to section 29(1) of the Criminal Appeal Act 1968, which empowers the Court of Appeal to direct that all or part of the time during which an appellant is in custody pending the determination of his appeal (including his application for leave to appeal) shall not be reckoned as part of the term of any sentence of imprisonment to which he is for the time being subject (see paragraph 28 above). The full Court of Appeal, being of the opinion that Mr. Monnell and Mr. Morris had without cause persisted with "hopeless" applications for leave to appeal, chose to exercise its discretionary power under section 29(1) so as to order a loss of time of 28 days against Mr. Monnell and of 56 days against Mr. Morris (see paragraphs 16 and 22 above).

42. The applicants argued that loss of time under section 29(1) constitutes a further period of imprisonment imposed after the original sentence by a different court as a punishment, not for an offence prescribed by the criminal law, but for unmeritoriously seeking leave to appeal. There was therefore, they maintained, no close and direct connection between the conviction by the trial court and the loss-of-time order by the Court of Appeal.

The Government described section 29(1) as being a provision allowing the Court of Appeal to direct that a person who pursues an unmeritorious application for leave to appeal should not start to serve his sentence until some time after the imposition of the sentence by the trial judge. Hence, in their submission, the Court of Appeal, when applying section 29(1), is not imposing a fresh sentence for a fresh offence or even increasing the term of the sentence passed by the Crown Court, but is merely giving directions as to the mode of execution of the sentence in the case of those who pursue an appeal which the Court of Appeal regards as frivolous.

43. In the Court's view, a direction for loss of time cannot be qualified simply as a decision laying down the manner of execution of the original detention order by the trial court, since it effectively imposes a period of imprisonment in addition to that which would result from the sentence. The effect of a loss-of-time direction, as the Form AA warns intending applicants for leave to appeal, "is a later date of release" (see paragraphs 11 and 19 above). This was recognised by the Court of Appeal itself in Mr. Monnell's case when it expressed its decision as being that "his time in prison should be extended" (see paragraph 16 above).

44. As the Commission and its Delegate observed, the relevant additional period of deprivation of liberty was imposed by the Court of Appeal on Mr. Monnell and Mr. Morris for reasons unconnected either with the facts of the offence or with the character and criminal record of the offender, that is to say, with the elements on which the conviction and sentence at first instance were based: it was ordered, in line with the deterrent policy enunciated in the Practice Directions of 1970 and 1980 (see paragraphs 30 and 31 above), for having persisted with an unmeritorious application for leave to appeal. Thus, in Mr. Morris' case, the Court of Appeal spoke in its judgment in terms of his having to "pay the penalty" for having renewed a "hopeless" application (see paragraph 22 above).

Under the express terms of section 29(1) of the Criminal Appeal Act 1968, the direction that the Court of Appeal may make is that a specified period in custody is not to be reckoned as part of any sentence of imprisonment being served by the appellant (see paragraph 28 above).

45. It does not, however, follow from the foregoing that the periods of detention not counted towards the service of the applicants' sentences of imprisonment fall outside the ambit of paragraph 1 (a) of Article 5 (art. 5-1-a).

46. Whilst the loss of time ordered by the Court of Appeal is not treated under domestic law as part of the applicants' sentences as such, it does form part of the period of detention which results from the overall sentencing procedure that follows conviction. As a matter of English law, a sentence of imprisonment passed by a Crown Court is to be served subject to any order which the Court of Appeal may, in the event of an unsuccessful application for leave to appeal, make as to loss of time. Section 29(1) of the 1968 Act is couched in rather wide and flexible terms. However, the power of the Court of Appeal to order loss of time, as it is actually exercised, is a component of the machinery existing under English law to ensure that criminal appeals are considered within a reasonable time and, in particular, to reduce the time spent in custody by those with meritorious grounds waiting for their appeal to be heard; this is made patently clear in the 1965 report of the Interdepartmental Committee on the Court of Criminal Appeal and in the two Practice Directions issued by the Lord Chief Justice (see paragraphs 29, 30 and 31 above). In sum, it is a power exercised to discourage abuse of the Court's own procedures. As such, it is an inherent part of the criminal appeal process following conviction of an offender and pursues a legitimate aim under sub-paragraph (a) of Article 5 § 1 (art. 5-1-a).

47. It was pointed out in argument that under the law of many of the Convention countries detention pending a criminal appeal is treated as detention on remand and a convicted person does not start to serve his or her sentence until the conviction has become final. In such systems, the appellate court itself determines the sentence and, in some of them, exercises a discretion in deciding whether or to what extent detention pending appeal shall be deducted from the sentence (see, for example, as far as the Federal Republic of Germany is concerned, the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 12, § 15, and Series B no. 5, pp. 232 and 268). The Delegate of the Commission was of the opinion that such systems, unlike the English system at issue in the present case, would be compatible with Article 5 § 1 (art. 5-1).

The difference between the two approaches to sentencing procedures is, however, one of form and not of substance as far as the effect on the convicted person is concerned. Sub-paragraph (a) of Article 5 § 1 (art. 5-1-a), which is silent as to the permissible forms of legal machinery whereby a person may lawfully be ordered to be detained "after conviction", must be taken to have left the Contracting States a discretion in the matter. Sentencing procedures may legitimately vary from Contracting State to Contracting State, whilst still complying with the requirements of Article 5 § 1 (a) (art. 5-1-a). The Court considers that the technical and formal difference in the way in which sentencing procedures are arranged in the United Kingdom as compared with other Convention countries is not such as to exclude the applicability of sub-paragraph (a) of Article 5 § 1 (art. 5-1-a) in the present case.

48. In the light of all the foregoing factors, the Court finds that there was a sufficient and legitimate connection, for the purposes of the deprivation of liberty permitted under sub-paragraph (a) of Article 5 § 1 (art. 5-1-a), between the conviction of each applicant and the additional period of imprisonment undergone as a result of the loss-of-time order made by the Court of Appeal. The time spent in custody by each applicant under this head is accordingly to be regarded as "detention of a person after conviction by a competent court", within the meaning of sub-paragraph (a) of Article 5 § 1 (art. 5-1-a).

49. The applicants at certain points in their pleadings appeared to be arguing that their applications for leave to appeal were not in fact hopeless or frivolous. This was a matter of appreciation coming within the discretion conferred on the Court of Appeal by the terms of section 29(1) of the Criminal Appeal Act 1968 (see paragraph 28 above). Save in so far as is necessary to review the contested measure of deprivation of liberty for compatibility with the Convention, it is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts.

50. More generally, the Court is satisfied in the circumstances of the present case as to the lawfulness and procedural propriety of the contested periods of loss of liberty. To begin with, it has not been disputed that the relevant rules and procedures under English law (as described at paragraphs 23 to 28 above) were properly observed by the English courts in relation to the making of the loss-of-time orders. Further, contrary to the submissions of the applicants, the Court finds that these orders depriving the applicants of their liberty issued from and were executed by an appropriate authority and were not arbitrary.

The contested deprivation of liberty must therefore be found to have been both "lawful" and effected "in accordance with a procedure prescribed by law", as those expressions in Article 5 § 1 (art. 5-1) have been interpreted in the Court's case-law (see, inter alia, the Winterwerp judgment of 24 October 1979, Series A no. 33, pp. 17-18 and 19-20, §§ 39-40 and 44-46).

51. There has accordingly been no breach of Article 5 § 1 (art. 5-1) in the present case in respect of either applicant.

II. ALLEGED BREACH OF ARTICLE 6 §§ 1 AND 3 (c) (art. 6-1, art. 6-3-c)

52. Mr. Monnell and Mr. Morris further claimed that the procedure followed before the Court of Appeal in their cases did not comply with paragraphs 1 and 3 (c) of Article 6 (art. 6-1, art. 6-3-c), which provide:

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

"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;

..."

53. The guarantees contained in paragraph 3 (c) (art. 6-3-c) are constituent elements, amongst others, of the general notion of a fair trial in criminal proceedings stated in paragraph 1 (see notably the Colozza judgment of 12 February 1985, Series A no. 89, p. 14, § 26). The Court, like the Commission, considers that the nature of the applicants' complaints makes it appropriate to take paragraphs 1 and 3 (c) (art. 6-1, 6-3-c) together.

A. Applicability

54. No one contested that the consideration of the applications for leave to appeal lodged by Mr. Monnell and Mr. Morris constituted part of the "determination" of the "criminal charges" brought against them. Moreover, it is in accordance with the case-law of the Court that Article 6 (art. 6) is applicable in the present case. Thus, in the Delcourt judgment of 17 January 1970, the Court established the principle that the protection afforded by Article 6 (art. 6) does not cease with the decision at first instance (Series A no. 11, pp. 14-15, § 25):

"[A] criminal charge is not really 'determined' as long as the verdict of acquittal or conviction has not become final. Criminal proceedings form an entity and must, in the ordinary way, terminate in an enforceable decision ....

... [T]he Convention does not, it is true, compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (art. 6)."

B. Compliance

55. In accordance with the procedure normally followed before the Court of Appeal (see paragraphs 23, 24 and 26 above), Mr. Monnell and Mr. Morris were neither present in person nor heard in oral argument in the leave-to-appeal proceedings which resulted in their being ordered to lose time in the calculation of their service of sentence. In the opinion of the Commission, they were thereby deprived of a "fair hearing" and of the right to defend themselves in person (see especially paragraph 152 of the report).

56. The manner in which paragraph 1, as well as paragraph 3 (c), of Article 6 (art. 6-1, art. 6-3-c) is to be applied in relation to appellate or cassation courts depends upon the special features of the proceedings involved (see, inter alia, the above-mentioned Delcourt judgment, Series A no. 11, p. 15, § 26; and the Pakelli judgment of 25 April 1983, Series A no. 64, p. 14, § 29). 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 the Sutter judgment of 22 February 1984, Series A no. 74, p. 13, § 28, and the authorities cited there). As the Commission put it in its report (paragraphs 130 and 131), in order to determine whether the requirements of fairness in Article 6 (art. 6) were met in the present case, it is necessary to consider matters such as the nature of the leave-to-appeal procedure and its significance in the context of the criminal proceedings as a whole, the scope of the powers of the Court of Appeal, and the manner in which the two applicants' interests were actually presented and protected before the Court of Appeal.

57. On an application for leave to appeal, the Court of Appeal does not re-hear the case on the facts, and no witnesses are called, even though the grounds of appeal involve questions of fact as opposed to questions of law alone (see paragraphs 23 and 27 above). The issue for decision in such proceedings is whether the applicant has demonstrated the existence of arguable grounds which would justify hearing an appeal. If the grounds pleaded are in law legitimate grounds for appeal and if they merit further argument or consideration, leave will be given; if one or other of these conditions is lacking, leave will be refused (see paragraph 27 above).

58. As the Court held in its Colozza judgment of 12 February 1985, albeit in a different context, as a general principle paragraph 1 of Article 6 (art. 6-1) requires that a person charged with a criminal offence be entitled to take part in the trial hearing (Series A no. 89, p. 14, § 27). It is not in dispute that at first instance before the Crown Court each applicant had received the benefit of a fair trial which, in particular, satisfied this requirement. The limited nature of the subsequent issue of the grant or refusal of leave to appeal did not in itself call for oral argument at a public hearing or the personal appearance of the two men before the Court of Appeal (see, mutatis mutandis, the Axen judgment of 8 December 1983, Series A no. 72, pp. 12-13, § 28, and the above-mentioned Sutter judgment, Series A no. 74, p. 13, § 30).

However, the Court of Appeal not only refused Mr. Monnell and Mr. Morris leave to appeal but it also exercised its competence under section 29(1) of the Criminal Appeal Act 1968 to order a further period of imprisonment against them in the form of loss of time. It must therefore be ascertained whether, at this stage of the determination of the criminal charges against Mr. Monnell and Mr. Morris, there was a fair procedure and an effective defence of their interests.

59. As noted earlier in the present judgment (see paragraph 46 above), the Court of Appeal's power to direct loss of time is intended to serve in practice as a deterrent against clearly unmeritorious applications for leave to appeal, which, if not discouraged, would unacceptably clog the process of dealing with appeals of some merit.

Article 6 § 1 (art. 6-1) itself prescribes the hearing of criminal cases "within a reasonable time". There can accordingly be no doubt that the aim pursued by the exercise of the power conferred by section 29 (1) of the 1968 Act is a legitimate one in the interests of the proper administration of justice for the purposes of Article 6 (art. 6).

60. Whilst recognising the desirability of the aim pursued, the Commission considered that in view of the potentially extensive risk of loss of liberty involved for Mr. Monnell (eight months) and Mr. Morris (fourteen months), Article 6 (art. 6) required that they should have been allowed to be present and enabled to be heard during the contested procedure.

The applicants adopted the opinion of the Commission. They contended in particular that by virtue of Article 6 § 3 (c) (art. 6-3-c) they were each entitled to be present to defend themselves either in person or with legal assistance of their own choosing, which would have enabled them to submit arguments as to why they should not be subjected to an extension of their deprivation of liberty; and that, for that purpose, they should have been given adequate notice of the Court of Appeal's intention.

The Government argued that, in the context of the exercise of the Court of Appeal's power, fairness did not demand the personal attendance of the applicants before the Court or the making of oral representations on their behalf as to why time should not be lost.

61. Although not expressly provided for in the text of section 29(1) of the Criminal Appeal Act 1968, the basis on which loss of time was ordered against Mr. Monnell and Mr. Morris was, in line with the stated policy and practice of the Court of Appeal (see paragraphs 29-31 and 44 above), the unmeritorious character of their applications for leave to appeal (see paragraphs 16 and 22 above). The nature of the issue to be decided for the ordering of loss of time was not such that their physical attendance was essential to assist the Court of Appeal in its determination (see, mutatis mutandis, the Sanchez-Reisse judgment of 21 October 1986, Series A no. 107, p. 19, § 51).

In the opinion of the Court, Article 6 (art. 6) required that Mr. Monnell and Mr. Morris be provided, in some appropriate way, with a fair procedure enabling them adequately and effectively to present their case against the possible exercise to their detriment of the power under section 29(1) of the 1968 Act. The Court will accordingly review the procedure followed to ascertain whether this condition was satisfied.

62. To begin with, the principle of equality of arms, inherent in the notion of fairness under Article 6 § 1 (art. 6-1) (see the above-mentioned

Delcourt judgment, Series A no. 11, p. 15, § 28), was respected in that the prosecution, like the two accused, was not represented before either the single judge or the full Court of Appeal.

The principle of equality of arms is, however, "only one feature of the wider concept of fair trial" in criminal proceedings; in particular, "even in the absence of a prosecuting party, a trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage" (ibid., pp. 15 and 18, §§ 28 and 34).

63. In this connection, it is to be noted that, pursuant to the legal aid scheme (see paragraph 25 above), Mr. Monnell and Mr. Morris had the benefit of free legal advice on appeal. The counsel who had represented them at the trial advised that there were no reasonable prospects of successfully appealing, but both men chose to ignore this advice and pressed ahead with applications for leave to appeal (see paragraphs 11, 18 and 19 above).

64. They were both also aware that, in the absence of arguable grounds of appeal, to lodge and then to renew their applications for leave to appeal might well result in loss-of-time orders. Warnings to this effect were given in the Forms AA and SJ (see paragraphs 11, 14, 19 and 21 above). Nevertheless and despite the fact that the single judge had refused leave, they renewed their applications to the full Court of Appeal on the same grounds as in their original applications.

65. As to the possible manner of presenting their case, the system whereby applications for leave to appeal are lodged and then renewed on official forms meant that Mr. Monnell and Mr. Morris, like all applicants for leave to appeal, were afforded the opportunity to submit written grounds of appeal (see paragraphs 11, 14, 19 and 21 above).

Admittedly, their ancillary applications to be present before the Court of Appeal were unsuccessful, this being a matter within the discretion of the Court (see paragraphs 13, 14, 16, 20, 21, 22 and 26 above). Consequently, neither man was able to formulate oral arguments in person before being penalised by an additional loss of liberty.

However, there is no reason why their written submissions should not have included considerations relevant to exercise of the power to direct loss of time, especially in view of the warnings given to them in the Forms AA and SJ as to the importance of legal advice and the consequences of pursuing an application without arguable grounds. Indeed, arguments going to the issue of the unmeritorious character of the application will necessarily have been incorporated in their submissions in support of the grounds of appeal.

In accordance with the usual procedure, when considering Mr. Monnell’s and Mr. Morris’ applications, both the single judge and the full Court of Appeal had before them all the relevant papers, including the grounds of appeal, a transcript of the trial and, for Mr. Monnell, the social enquiry and

psychiatric reports prepared on him (see paragraphs 13, 16, 20, 22 and 24 above).

66. Be that as it may, Mr. Monnell and Mr. Morris, like any applicant for leave to appeal, had the right to instruct counsel to appear on their behalf and present oral argument at a hearing both before the single judge and the full Court of Appeal (see paragraph 24 in fine above).

67. It can be presumed that neither Mr. Monnell nor Mr. Morris could afford to pay for counsel out of his own pocket, and under English law they were not automatically entitled to legal aid either for the preparation of the written grounds of appeal or for representation through counsel at an oral hearing (see paragraph 25 above). Under paragraph 3 (c) of Article 6 (art. 6-3-c), they were guaranteed the right to be given legal assistance free only so far as the interests of justice so required. The interests of justice cannot, however, be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6 (art. 6). Each applicant, it is to be noted, benefited from free legal assistance both at his trial and in being advised as to whether he had any arguable grounds of appeal (see paragraphs 10, 11 and 18 above). In the Court's view, the issue to be decided in relation to section 29(1) of the Criminal Appeal Act 1968 did not call, as a matter of fairness, for oral submissions on behalf of the applicants in addition to the written submissions and material already before the Court of Appeal.

68. In short, the interests of justice and fairness could, in the circumstances, be met by the applicants being able to present relevant considerations through making written submissions.

In coming to this conclusion, the Court has also borne in mind that, as the power under section 29(1) is exercised in practice, the maximum loss of time risked is in the order of two months and not the whole of the period spent in custody between conviction and determination by the Court of Appeal (see paragraph 32 above). It is true, as the applicants' lawyers stressed before the Court, that this practical restraint is not brought to the attention of prospective applicants for leave to appeal. However, in view of all the other considerations prevailing, this shortcoming cannot be decisive for present purposes.

69. Finally, the Court has no cause to doubt that the Court of Appeal's decision to refuse the applicants leave to appeal and, further, to impose loss of time was based on a full and thorough evaluation of the relevant factors.

70. Having regard to the special features of the context in which the power to order loss of time was exercised and to the circumstances of the case, the Court finds that neither Mr. Monnell nor Mr. Morris was denied a fair procedure as guaranteed by paragraphs 1 and 3 (c) of Article 6 (art. 6-1, art. 6-3-c). There has accordingly been no breach of either of these provisions of the Convention.

III. ALLEGED BREACH OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLES 5 AND 6 (art. 14+5, art. 14+6)

71. The applicants claimed that in the enjoyment of their rights under Articles 5 and 6 (art. 5, art. 6) they had been the victims of discrimination in breach of Article 14 (art. 14), which provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Article 14 taken in conjunction with Article 5 (art. 14+5)

72. By virtue of section 29(1) of the Criminal Appeal Act 1968, as convicted persons in custody, Mr. Monnell and Mr. Morris risked - and in fact suffered - a loss of liberty in addition to the sentences received at first instance once they set in motion the procedure of application for leave to appeal. Convicted persons not in custody, on the other hand, ran no such risk, however unmeritorious any application for leave to appeal that they might have brought. The applicants contended that this constituted discriminatory treatment.

73. The aim pursued by the Court of Appeal's power to order loss of time, as it is exercised, is to expedite the process of hearing applications and so to reduce the period spent in custody by an applicant with a meritorious appeal (see paragraphs 46 and 59 above). The great majority of applications for leave to appeal are lodged by those in custody (see paragraph 32 above). This being so, even assuming that the situation of Mr. Monnell and Mr. Morris was comparable to that of convicted persons at liberty - which the Government disputed -, the difference in treatment complained of had, in the Court's view, an objective and reasonable justification (see, inter alia, the judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 34, § 10, and the Marckx judgment of 13 June 1979, Series A no. 31, pp. 15-16, § 32).

B. Article 14 taken in conjunction with Article 6 (art. 14+6)

74. The applicants also alleged discrimination since a convicted person at liberty is not inhibited by any risk of a sanction such as loss of liberty from pursuing an application for leave to appeal.

75. In so far as the risk of loss of time may operate in practice as an impediment to access to the Court of Appeal by convicted prisoners as compared with convicted persons at liberty, there was, contrary to the submissions of the Government, a difference of treatment for the purposes of Article 14 (art. 14). However, the Court considers, for the same reasons

as those referred to at paragraph 73 above, that this difference of treatment had an objective and reasonable justification.

C. Conclusion

76. There has accordingly been no breach of Article 14 (art. 14) in respect of the applicants' enjoyment of either their right to liberty under Article 5 (art. 5) or their right to a court under Article 6 (art. 6).

FOR THESE REASONS, THE COURT

1. Holds, by five votes to two, that there has been no violation of Article 5 § 1 (art. 5-1);

2. Holds, by six votes to one, that Article 6 (art. 6) was applicable in the present case;

3. Holds, by five votes to two, that there has been no breach of paragraph 1 or paragraph 3 (c) of that Article (art. 6-1, art. 6-3-c);

4. Holds, unanimously, that there has been no breach of Article 14 taken in conjunction with Article 5 (art. 14+5) or Article 6 (art. 14+6).

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 2 March 1987.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the following separate opinions are annexed to the present judgment:

- dissenting opinion of Mr. Pettiti and Mr. Spielmann;

- separate opinion of Mr. Gersing.

R. R.
M.-A. E.

JOINT DISSENTING OPINION OF JUDGES PETTITI AND SPIELMANN

(Translation)

I. Article 5 § 1 (art. 5-1) of the Convention

Unlike the majority, we held that there had been a breach of Article 5 § 1 (art. 5-1) of the Convention.

The Court rightly recognised that the possible forms of legal machinery whereby a person may be ordered to be detained after conviction are not such as to exclude the applicability of Article 5 § 1 (a) (art. 5-1-a).

In our view, however, the majority of the Court was wrong to conclude in the instant cases that there had not been any breach of that provision.

Generally speaking, it is significant in itself that the very great majority of the Council of Europe's member States have no system, such as the one in issue before the Court, whereby the time spent in custody pending determination of an appeal may not be reckoned as part of sentence.

This system, governed by an Act of 1968, provides that where an application for leave to appeal is refused, all or part of the time spent in custody after the application has been lodged may be ordered not to be reckoned as part of the sentence passed. The same applies if the application is renewed before a three-judge court, which can moreover order loss of an even greater length of time.

The consequence is a later date of release for the person concerned.

In purely humanitarian terms, it is legitimate to question the justification for an institution which makes the right of appeal subject to leave and attaches penalties if such leave is refused.

More particularly, and since this is still the system prevailing in the respondent State, the Court had to ascertain whether in the instant cases such an institution was compatible with the provisions of the Convention.

The Government maintained that the Court of Appeal merely gives directions as to the mode of execution of sentence in the case of those who pursue an appeal which the Court of Appeal regards as frivolous.

We cannot accept such an argument.

Even if the principle of a system of loss of time were accepted, it would still be necessary to provide a number of basic safeguards.

We are of the opinion that the impugned legislation can be said to be incompatible with Article 5 (art. 5).

The loss of time ordered may amount to the whole of the period of detention between conviction and refusal of leave to appeal.

Within the limits of that period, the relevant court determines the loss of time without any fixed criteria or objective grounds.

In the two cases before the Court, the applicants risked losing eight and fourteen months respectively.

The loss of time ordered was twenty-eight and fifty-six days respectively.

In practice, the average loss of time is apparently sixty-four days.

What is more serious is that the theoretical risk run by the convicted person is such as to deter even a convicted person who is innocent, or believes himself to be innocent, from lodging an appeal.

The system complained of is indeed used - as the Government conceded - to deter convicted persons in custody from lodging an appeal, so as not to increase the Court of Appeal's workload needlessly.

In our view, it is inconceivable that a system of sentencing to imprisonment should be dependent upon the exigencies of judicial management (shortage of judges and other staff, etc.).

Such a deviation is likely, in the short or medium term, to transform detainees, or even the common citizen before the law, into the instrument of a crime policy which is subject to political changes in the assessment of what "the administration of justice" must or should be.

In those circumstances, we share the view of the overwhelming majority of the Commission (ten votes to one) that there had been a breach of Article 5 § 1 (art. 5-1) of the Convention.

As the Commission stated (in paragraph 122 of its report), we consider that the periods not reckoned as part of the sentences imposed on the applicants cannot be regarded as being part of their detention after conviction. Such an analysis is indeed ruled out by the very terms of the loss-of-time orders.

The majority of the Commission rightly noted: "... bearing in mind the purpose for which the loss-of-time orders were made, which was unconnected with the original sentences imposed on the applicants or with the offences for which they were convicted ...".

In our view, the periods of detention which were ordered not to be counted towards the service of the applicants' sentences cannot be regarded as detention compatible with Article 5 § 1 (art. 5-1) of the Convention.

II. Article 6 (art. 6) of the Convention

The Court has held - wrongly, in our view - that there was no breach of Article 6 (art. 6) of the Convention.

Even if it were admitted that the system complained of was compatible with the requirements of Article 5 (art. 5) of the Convention, it would nonetheless remain the case that the additional period of imprisonment imposed on the two applicants was a consequence of the refusal of leave to appeal.

That being so, we consider that the principle of a "fair trial" required that the applicants should be heard by the relevant courts so that they could present their case in person.

Can it really be accepted that grounds set out in writing by the applicant - in the closed world of a prison - are sufficient to satisfy the requirements of Article 6 (art. 6)?

The seriousness of a further period of imprisonment militates against that argument.

Surely the requirements in this respect, which were reiterated in the judgment in the Öztürk case - where only a fine was at issue -, should also apply when several months' imprisonment is at stake?

In line with the opinion of the majority of the Commission (see paragraph 152 of the report), we consider that "the applicants' absence from the determination of their applications for leave to appeal, which resulted in the making of orders that they lost time in the calculation of their service of sentence, deprived them of a 'fair hearing' in the determination of the criminal charges against them as guaranteed by Article 6 § 1 (art. 6-1) and of the right to defend themselves in person as guaranteed by Article 6 § 3 (c) (art. 6-3-c) of the Convention".

We are of the opinion that where the individual liberty of the subject is at stake, the decisions should be taken in the presence of the person concerned and during fully adversarial proceedings.

SEPARATE OPINION OF JUDGE GERSING

I voted with the majority of the Court for the non-violation of Article 5 § 1 (art. 5-1) and I fully concur with the reasons given in the judgment in this respect.

However, to my regret I am not able to agree with the majority as to the applicability of Article 6 (art. 6).

It is true that no one contested applicability, but that does not dispense the Court from examining this point of law. In paragraph 54 of the judgment, the majority seems implicitly to accept this principle, which is also well established in the Court's case-law (see, inter alia, the Deweer judgment of 27 February 1980, Series A no. 35, pp. 21-24, §§ 41-47).

The majority states that the applicability of Article 6 (art. 6) in the present case is in accordance with the case-law of the Court, and refers by way of example to the Delcourt judgment. In my opinion, that judgment is not conclusive for the present case. The Delcourt judgment concerned proceedings before the Belgian Court of Cassation which had jurisdiction either to confirm or to quash a judgment by the Court of Appeal in Ghent. Thus, the cassation proceedings were capable of proving decisive for the accused and, consequently, the criminal charge could not be considered as "determined" as long as the verdict of acquittal or conviction had not become final.

The legal situation for the applicants in the present case is different. The leave-to-appeal proceedings as such could not result in an alteration of either the finding of guilt or the length of the sentence, nor could the Court of Appeal quash the judgment of the trial court. They can hardly therefore be said to determine the criminal charge against the applicants. The outcome of the proceedings entailed for the applicants, it is true, a period of imprisonment a little longer than they could normally have expected as a result of the sentence, but this cannot be regarded as involving a variation of the sentence; and the additional detention does not in itself necessitate the application of the procedural guarantees of Article 6 (art. 6), as it is legitimated by Article 5 § 1 (a) (art. 5-1-a).

To the best of my knowledge, there is no clear precedent that leave-to-appeal proceedings of this kind - contrary to appeal proceedings proper - fall within the ambit of Article 6 (art. 6). It would in my view be preferable to consider Article 6 (art. 6) not to be applicable in such cases as its provisions seem to be drafted with the intention of covering ordinary criminal proceedings, and also since there is no pressing need for it to be so applicable. It follows from this approach to the issues raised by the case that the watering-down of the "minimum rights" provided by Article 6 § 3 (art. 6-3), which the majority has accepted, is not called for.

For these reasons, I have voted against the applicability of Article 6 (art. 6) in the present case.