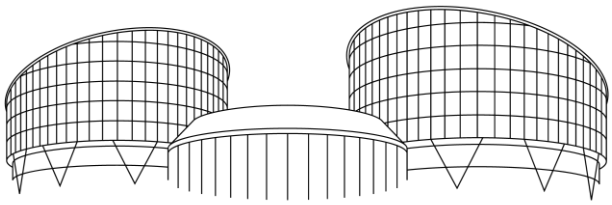

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

# CASE OF BEGGS v. THE UNITED KINGDOM

*(Application no. 25133/06)*

JUDGMENT

STRASBOURG

6 November 2012

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

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

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 16 October 2012,

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 25133/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British and Irish national, Mr William Frederick Ian Beggs ("the applicant"), on 20 June 2006.

2. The applicant was represented by Ms R. Cameron, a lawyer practising in Edinburgh. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger, of the Foreign and Commonwealth Office.

3. On 15 January 2009 the President of the Chamber decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

4. On 14 April 2010 the Irish Government indicated that they did not wish to exercise their right to intervene in the proceedings before the Court (Article 36 § 1 of the Convention).

5. The applicant requested an oral hearing but the Chamber decided not to hold a hearing in the case. It also decided not to admit to the file additional submissions made by the applicant on 10 November 2009 and 5 December 2009 and by the Government on 14 January 2010.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1963 and is currently serving a sentence of life imprisonment in HM Prison Peterhead.

### A. Background facts

7. In the early hours of the morning of Sunday 5 December 1999, Mr Barry Wallace, then aged eighteen years, disappeared following a Christmas function organised by his employers. There was evidence that Mr Wallace had consumed a great deal of alcohol and, after leaving the function, had had an altercation with a friend, G.B., before the two youths made up and Mr Wallace left to go to a nightclub. The last sighting of him was at the entrance to the nightclub at around 1.30 a.m.

8. On 6 December 1999 members of the Central Scotland Police Underwater Search Unit discovered severed parts of a human body while on a training exercise in Loch Lomond. Further body parts were discovered on 7, 8 and 10 December 1999. On 15 December 1999 a human head was discovered at Barassie Beach in Troon. Some weeks later, on 8 January 2000, a human torso was recovered from Loch Lomond. DNA analysis revealed the body parts to be those of Mr Wallace.

9. On 17 December 1999 the police conducted a search of the applicant's home while he was absent and discovered quantities of Mr Wallace's blood, as well as other significant items. On the evening of 17 December 1999, upon hearing of the search of his home via the media, the applicant left Scotland.

10. On 9 January 2001 the applicant was extradited from the Netherlands to the United Kingdom to stand trial. Further details of the extradition process are set out in the Court's decision in *Beggs v. the United Kingdom (No. 2)* (dec.), no. 14599/10, 16 October 2012.

### B. Domestic proceedings

#### *1. Preliminary procedures*

11. Details of the various preliminary matters dealt with in the domestic courts are set out in the Court's decision in *Beggs (No. 2)*, cited above. The following is a brief summary of the relevant matters.

12. On 10 January 2001 the Sheriff granted an order to prevent reporting of the case. On 12 January 2001 the British Broadcasting Corporation ("BBC") lodged a petition to the *nobile officium* of the High Court of Justiciary ("the High Court"), an extraordinary remedy to be granted only in

exceptional circumstances (see paragraph 178 below). In its petition, the BBC sought an order quashing the Sheriff's decision to impose an order preventing the reporting of the case.

13. On 15 January 2001 the High Court received the report from the Sheriff on his order to prevent the reporting of the case. The applicant's agents lodged a petition to the *nobile officium* for an order restricting reporting of the case.

14. On 17 January 2001, the applicant appeared before the Sheriff Court and made no plea or declaration. He was fully committed for trial and remanded in custody for 110 days. The applicant's agents advised the prosecution that they intended to abandon the *nobile officium* application.

15. On 14 March 2001 the Lord Advocate indicted the applicant for trial on a charge of murder in the High Court sitting in Edinburgh, to commence on 17 April 2001.

16. On 3 April 2001 the applicant lodged a minute of postponement of the trial in order to seek preliminary hearings to determine issues concerning pre-trial publicity and the competency of the indictment. The trial was postponed until 14 May 2001.

17. On 10 May 2001 at a preliminary hearing, the applicant sought a further adjournment of the trial. This was granted and a trial date of 25 June 2001 was fixed. A preliminary hearing in respect of the various minutes lodged was fixed for 4 June 2001.

18. On 4 June 2001 the preliminary hearing was continued on the applicant's motion.

19. At the continued preliminary hearing on 29 June 2001, the applicant's legal advisers argued a plea in bar of trial on the grounds of the extensive media coverage and the inclusion in the indictment of matters excluded from the Dutch terms of extradition. This was refused by the High Court in a written opinion by Lord Wheatley. Leave to appeal was granted.

20. The Appeal Court of the High Court of Justiciary ("the Appeal Court") heard the appeal on 7-8 August 2001 and, on 17 August 2001, refused the appeal and issued a written opinion.

21. On 14 September 2001 the applicant pleaded not guilty to the charge. He was represented by senior counsel. His counsel subsequently made a request for an order under section 4(2) of the Contempt of Court Act 1981 restricting the reporting of the trial. The request was refused by Lord Osborne for reasons set out in his written opinion dated 17 September 2001.

### *2. The trial proceedings*

22. Details of the trial are set out in full in the Court's decision in *Beggs (No. 2)*, cited above. The following is a brief summary of the relevant matters.

23. On 18 September 2001, the jury were called and sworn and the applicant's trial commenced before Lord Osborne.

24. On 21 September 2001 Lord Osborne refused the applicant's motion for publishers of certain material to be ordained to appear at the bar of the court to answer allegations of contempt of court, for reasons set out in his second written opinion.

25. On 26 September 2001 Lord Osborne repelled the applicant's objection to the admissibility of certain statements, for reasons set out in his third written opinion.

26. On 3 October 2001 Lord Osborne repelled the applicant's objection to questioning at trial regarding production no. 57 (a search warrant) for reasons set out in his fourth written opinion.

27. On 12 October 2001, the applicant was convicted of murder by majority verdict of the jury. He was sentenced to life imprisonment with a tariff (punishment part) set at twenty years, to run from 28 December 1999.

### *3. The application for leave to appeal*

#### (a) Preparation of trial documents

28. On 17 October 2001, the applicant formally lodged his written intention to lodge an appeal against conviction before the Appeal Court. He was required to lodge a note of appeal within six weeks (see paragraph 172 below). According to the applicant, on 22 October, he requested a copy of the Book of Adjournal, which contained a record of the indictment and the minutes of the trial proceedings.

29. On 29 November 2001 the trial judge's charge to the jury was lodged with the Justiciary Office (court registry). Upon receipt, the Justiciary Office intimated a copy to the applicant's agents.

30. According to the applicant, by 3 December 2001, a copy of the Book of Adjournal had not yet been received and his legal advisers sent a reminder to the court.

31. On 4 December 2001 a note to the Parole Board was produced by Lord Osborne.

#### (b) Extensions of time for lodging note of appeal

32. On 13 December 2001, the applicant's agents sought a first extension under section 110(2) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act – see paragraph 174 below) of the time allowed for lodging the note of appeal. The application stated:

> "The Appellant was sentenced on 12th October 2001 following a trial at Edinburgh High Court which lasted almost 5 weeks. The volume of documentation in connection with preliminary matters which fall within the scope of the appeal is now very great, and in the time available Senior Counsel has not had time to examine the extensive documentation – there were 3 opinions of the trial judge in relation to preliminary matters, and points of law raised during the trial – along with the Charge to the jury to be considered.

An extension of 6 weeks is sought to enable the Note of Appeal to be framed, as it is not in the interests of justice that the appellant's appeal be prejudiced because of pressure of work on Senior Counsel."

33. The application was received by the Justiciary Office on 20 December 2001 and the following day, Lord Johnston granted the applicant a six-week extension of time to lodge his note of appeal. The new time-limit was due to expire on 1 February 2002.

34. On 21 January 2002, the applicant sought authorisation from the Scottish Legal Aid Board ("SLAB") for transcription of the evidence and legal submissions at trial. On 23 January 2002, authorisation was granted and transcripts were ordered from the court.

35. On 29 January 2002, the applicant's agents sought a second extension of the six-week time-limit. The application stated:

"1. The Appellant was sentenced on 12th October 2001 following a trial at Edinburgh High Court which lasted almost 5 weeks. On examination of the extensive documentation here, Senior Counsel has indicated that there is additional information which he requires before the grounds can be framed.

2. Transcripts of the Advocate Depute's speech to the jury, and the evidence of certain of the forensic scientists and two witnesses will be required.

3. Sanction was sought from the Scottish Legal Aid Board to cover the cost of transcription and on 23rd January 2002 this was granted.

4. The Justiciary Office has been asked to put in hand the transcription of the required portions of the trial, using the express service, and although it is hoped that the transcripts will be available within the next 10 days o[r] so, it is not anticipated that there will be sufficient time to enable them to be examined in the detail required and the Grounds framed.

An extension of a further 6 weeks is sought to enable the Note of Appeal to be framed, as it is not in the interests of justice that the appellant's appeal be prejudiced because additional extensive transcripts are required before formulation of the Grounds of Appeal."

36. On 30 January 2002 the applicant was granted a further six-week extension of time to lodge his note of appeal. The new time-limit was due to expire on 13 March 2002.

37. On 7 February 2002, the applicant's agents sought a third extension of the time-limit for lodging the note of appeal. The application stated:

"The Appellant was sentenced on 12th October 2001 following a trial at Edinburgh High Court which lasted almost 5 weeks. An extension of time has been granted to lodge the Note of Appeal Against Conviction. That time limit now expires on 13th March 2002. At consultation with the client on 3rd February 2002, Senior Counsel took the view that an Appeal Against Sentence would be required. This has been prompted by production of the 'Parole Report' by the Judge, and the service on the appellant of the extract conviction.

An extension of time to the 13th March 2002 is sought to enable the Note of Appeal Against Sentence to be incorporated with the Note of Appeal Against Convention."

38. On 11 February 2002, Lady Paton granted the application, according a further five weeks from that date for the lodging of the note of appeal.

39. On 8 March 2002 the applicant's agents sought a fourth extension of the time-limit for lodging the note of appeal. The application stated:

> "1. The Appellant was sentenced on 12th October 2001 following a trial at Edinburgh High Court which lasted almost 5 weeks. Extensive documentation has been produced in the way of transcripts of certain evidence at the trial and Opinions of the trial judge on certain preliminary matters. However it has now become apparent that further transcript[s] of evidence heard at the trial-within-a-trial is required because the Opinion produced contains factual inaccuracies.
>
> 2. The Trial Judge did not produce a decision on the preliminary point taken in relation to 'crime not charged' and in these circumstances a transcript of the submissions made will be required. Sanction will be required from SLAB for these further transcripts.
>
> 3. SLAB has only now granted Sanction to allow an Opinion to be obtained from A Fulford QC who is a Silk at the English bar and an expert on pre-trial publicity. There will be a ground of appeal specifically relating to pre-trial publicity and in particular the influence of the internet.
>
> 4. One of the proposed Grounds of Appeal relates to speciality in the extradition process. Sanction has recently been sought from SLAB to enable the Opinion of an expert (Dr Clive) [to be obtained] ... This will be required before the ground can be framed.
>
> An extension of a further 6 weeks is sought to enable the Note of Appeal to be framed, as it is not in the interests of justice that the appellant's appeal be prejudiced because additional transcripts and further expert advice is required before formulation of the Grounds of Appeal."

40. On 11 March 2002, Lord Philip granted the application and allowed a further six-week extension of time to lodge the note of appeal.

41. On 19 March 2002, a request for sanction for transcription of further evidence was received by the SLAB. The request was granted the following day, 20 March 2002.

42. On 18 April 2002 the applicant's agents sought a fifth extension of the time-limit for lodging the note of appeal. The application stated:

> "1. The Appellant was sentenced on 12th October 2001 following a trial at Edinburgh High Court which lasted almost 5 weeks. Extensive documentation has been produced in the way of transcripts of certain evidence at the trial and opinions of the Trial Judge on certain preliminary matters. A further transcript was required of the evidence heard at a trial within a trial, because the opinion produced in that regard contained factual inaccuracies.
>
> 2. Sanction was sought for transcription and was granted on 21st March 2002. The Justiciary Clerk intimated on 21st March 2002 that the transcribers had been instructed to extend the tapes to typed format. However despite a request for express service, the transcripts were not available until 8th April 2002, and there has been insufficient time to have that portion of the grounds framed and considered by the client.
>
> 3. Sanction has now been obtained from SLAB to enable the expert opinion of Dr Clive to be obtained but this is not yet to hand.

> An extension of a further 6 weeks is sought to enable the Note of Appeal to be framed, as it is not in the interests of justice that the appellant's appeal be prejudiced because detailed consideration of novel and complex matters are required before the Grounds are formulated."

43. On 23 April 2002, Lord Philip granted the application and allowed a further six-week extension of time to lodge the note of appeal.

44. On 20 May 2002 the applicant was transferred from HM Prison Edinburgh to HM Prison Peterhead, some four hours' drive north. The transfer was considered to be beneficial to the applicant because, as the offence of which he was convicted included a charge of sodomy against the victim, he was classified as a sex offender, and HM Prison Peterhead was the prison normally used to house long-term male prisoners who were sex offenders. The applicant subsequently made repeated requests to the prison authorities to be transferred to a prison in central Scotland, in order that he could communicate more readily with his legal advisers. The requests were refused.

45. On 21 May 2002 the applicant's agents sought a sixth extension of the time-limit for lodging the note of appeal. The application stated:

> "1. The Appellant was sentenced on 12th October 2001 following a trial at Edinburgh High Court which lasted almost 5 weeks. Extensions of time have been granted on various occasions since then. The last day for lodging the note of appeal in terms of the most recent extension is 4 June 2002.
>
> 2. Draft grounds have been framed and are being actively revised by senior and junior counsel. However on 20 May 2002 the Appellant was moved from HM Prison Saughton [Edinburgh] to HM Prison Peterhead. The location of the Appellant at HM Prison Peterhead renders the arrangements required for Senior and Junior Counsel and agents to consult with him much more time consuming and difficult to co-ordinate around Court attendances.
>
> 3. An extension of time of a further six weeks is sought to enable the Appellant's instructions on the final form of the grounds of appeal to be taken and to enable the Note of Appeal to be lodged."

46. On 22 May 2002 the applicant was granted a further six-week extension of time to lodge his note of appeal.

47. On 24 May 2002 the SLAB received an application for sanction to cover the costs of a visit to HM Prison Peterhead. After continuing the application for information, which was received on 4 June 2002, authority was granted on 7 June 2002.

48. On 2 July 2002 the applicant's legal advisers lodged a formal note of appeal against conviction and sentence. The note contained eight grounds of appeal against conviction, each ground being subdivided into a number of subparagraphs, and one ground of appeal against the tariff part of his sentence. The grounds referred to prejudicial publicity, extradition and the rule of specialty, the admission of evidence, the conduct of the prosecutor at trial, the lack of reasons from the jury, the trial judge's directions to the jury

and the length of the tariff (the punishment part of the sentence) fixed by the trial judge

**(c) Obtaining the trial judge's report**

49. On 16 August 2002, the applicant's agents contacted the court to inquire after the trial judge's report on the note of appeal (see paragraph 176 below), which was required in order for the court to consider whether to grant leave to appeal. They were advised that the report had not yet been ordered on account of a missing notebook which was in the process of being located. The report was ordered that day and the trial judge was given one month to produce the report.

50. Between 16 August 2002 and 28 November 2002, Lord Osborne was on leave for three weeks, was sitting in the Appeal Court for nine weeks and was presiding over criminal trials for three weeks. On 18 September 2002 and 13 November 2002, the applicant's agents wrote to the Appeal Court regarding the delay in the preparation of the report. Lord Osborne requested three writing days from 19-21 November 2002 in order to progress his report.

51. The trial judge's report on the note of appeal was issued on 28 November 2002 and received by the applicant's agents on 3 December 2002. It was twenty-eight pages long and dealt with the preliminary matters addressed by Lord Wheatley and on appeal, the controversial matters at trial, Lord Osborne's four written opinions and the grounds of appeal.

**(d) The single sift**

52. The application for leave to appeal was considered by a "single sift" judge (see paragraph 177 below). On 20 December 2002, the single sift judge, Lord Bonomy, restricted leave to appeal against conviction and sentence to a limited number of the grounds specified by the applicant in the note of appeal, under section 107(7) of the 1995 Act (see paragraph 177 below). The decision, together with reasons, was set out in a letter to the applicant's agents dated 6 January 2003. The letter advised that an appeal against the decision could be lodged within fourteen days but did not indicate under what legislative provision such an appeal should be made.

**(e) The second sift**

53. By letter dated 17 January 2003 the applicant's agents intimated their intention to have the partial refusal reviewed by the "second sift" under section 107(4) of the 1995 Act (see paragraph 177 below). They sought an additional eight weeks to lodge further submissions directed at the refused grounds of appeal on the basis that, due to the applicant's detention at HM Prison Peterhead, consultation with him was proving difficult. On 7 February 2003 the applicant's agents were advised that the application for

leave to appeal would not be placed before the High Court before 18 March 2003.

54. On 17 March 2003 the applicant's agents wrote to the court requesting a further two-week extension of time to lodge the supplementary submissions and documents.

55. On 20 May 2003 the applicant's agents sent submissions to the court in support of their application to the second sift.

56. On 21 July 2003 the applicant's agents sent further submissions to the court in support of their application to the second sift. On the same day, the court authorities advised that the papers had not yet been passed to the second sift judges.

57. On 20 August 2003, the second sift judges refused the applicant's appeal against the partial refusal of leave to appeal. The reasons for refusal were that:

> "For the reasons given by Lord Bonomy, and notwithstanding the further representations made on behalf of the appellant, we consider the grounds on which leave was refused are unstateable [unarguable]."

58. By letter of 7 October 2003, the applicant sought further reasons for the refusal of the second sift judges to uphold his appeal against the decision of the single sift judge.

59. On 9 October 2003 the SLAB received an application from the applicant for legal aid for a petition to the *nobile officium* jurisdiction of the High Court (see paragraph 178 below) to overturn the decision of the second sift judges. It continued the application for information on 10 and 21 October 2003.

60. On 27 October 2003 the SLAB received a copy of the decision taken at the second sift.

61. In a note dated 1 November 2003 senior counsel for the applicant advised that it was not possible to explain the second sift refusal in the absence of any reasons for the refusal. By letter of 6 November 2003 the applicant's agents sent counsel's note to the court and requested further reasons.

62. On 6 November 2003 the SLAB sought further information in support of the application for legal aid for a petition to the *nobile officium*. On 12 November 2003 further papers were received by the SLAB from the applicant's agents. On 27 November 2003 the SLAB once again continued the application for further information.

63. By letter of 4 December 2003 the clerk noted that in the reasons set out in the decision of 20 August 2003, the second sift judges had stated that they had taken into account the further representations by the applicant and he noted that they had adhered to the reasons given by Lord Bonomy.

64. On 9 December 2003 further papers were received by the SLAB from the applicant's agents in respect of the application for legal aid for the *nobile officium* petition.

65. On 29 December 2003, the SLAB authorised legal aid for a petition to the *nobile officium*.

**(f) The petition to the *nobile officium***

66. On 4 May 2004, the applicant's request for a transfer to a central Scotland prison was granted on a temporary basis. He was transferred from HM Prison Peterhead to HM Prison Edinburgh, for a four-week period in order to facilitate the preparation of his appeal against conviction and sentence, including the *nobile officium* proceedings.

67. On 14 June 2004, the applicant's petition to the *nobile officium* to challenge the decision of the second sift judges was lodged with the court. On 18 June 2004, the High Court granted warrant for the service of the *nobile officium* petition.

68. On 7 July 2004, a preliminary hearing on the petition to the *nobile officium* took place. The court ordered that the prayer of the petition (i.e. what was being sought) be amended within four weeks to provide greater specification of what was being sought and that the applicant lodge a note of argument. The Crown was given four weeks thereafter in which to lodge a note of argument. The petition was continued to a date to be fixed.

69. On 4 August 2004 the applicant's agents lodged a minute of amendment to the petition, along with a full note of argument. A date for the hearing was fixed at the convenience of the applicant's counsel.

70. On 8 December 2004, the petition to the *nobile officium* was argued and granted. In a written decision issued on 18 January 2005 the High Court set aside the decision of the judges on the second sift on the basis that it was not competent for the applicant to appeal to the second sift the decision of a single sift judge to specify only certain grounds of appeal as arguable. That being the case, the decision of the second sift judges was also incompetent. The court further advised that in a case such as the applicant's, an application could be made to the court for leave to argue the refused grounds "on cause shown" under section 107(8) of the 1995 Act (see paragraph 177 below). Such an application would be considered in open court.

**(g) The section 107(8) application to argue further grounds of appeal on cause shown**

71. On 25 January 2005 the applicant's agents requested further transcripts of proceedings at the trial. On 3 February 2005, the clerk authorised the transcripts.

72. On 26 April 2005, the applicant lodged an application under section 107(8) of the 1995 Act for an order to entitle applicant's counsel to found upon those grounds of appeal which Lord Bonomy had failed to specify as arguable in his decision of 20 December 2003. On 27 April 2005 the further transcripts were lodged with the court.

73. On 13 May 2005, 29 June 2005, 12 July 2005 and 5 September 2005, the applicant's legal advisers wrote to the court seeking a hearing date. On 23 September 2005 the applicant's agents were advised that a hearing date of 28 October 2005 had been fixed.

74. The section 107(8) application was heard on 28 October 2005 and the Court made avizandum (reserved its judgment).

75. On 25 November 2005, the Appeal Court granted leave to appeal on all grounds set out in the note of appeal lodged on 2 July 2002. The applicant was ordered to lodge reformulated grounds of appeal within four weeks, i.e. by 23 December 2005.

*4. The substantive appeal proceedings*

76. On 16 January 2006 a reformulated note of appeal was lodged with the Appeal Court, taking into account the judgment of 25 November 2005.

77. On 20 March 2006 authorisation was sought from the SLAB for further transcripts. This was partially granted. On 21 March 2006 the applicant's agents requested further transcript evidence from the trial proceedings. On 29 March 2006 the request for further transcripts was authorised by the clerk.

78. On 4 April 2006 a request by the applicant for interim liberation pending the determination of his trial was refused by the single judge.

79. On 25 April 2006 a hearing of the applicant's appeal against the refusal of interim liberation was continued to 28 April 2006 on the applicant's motion, as his senior counsel was not available. On 28 April, the applicant's appeal against the refusal of interim liberation was refused.

80. On 12 May 2006, the applicant's request for funding to allow transcripts to be prepared on an expedited basis was refused by the SLAB on the ground that this would not have any impact on the speed of the appeal procedure.

81. On 26 May 2006, the applicant's agents sent letters to the Crown, the Foreign and Commonwealth Office and Strathclyde Police requesting disclosure of documents.

82. On 21 June 2006 the applicant's agents requested further transcripts from the trial, namely of eight separate legal submissions made by counsel. On 5 July 2006 the clerk authorised the request for further transcripts.

83. On 10 July 2010 the Crown replied to the request for disclosure of 26 May 2006 and refused disclosure in the terms requested.

84. On 11 July 2006 a procedural hearing in the appeal was heard before three judges. The court decided to allow the applicant's reformulated grounds of appeal to be received and to be treated as the applicant's grounds of appeal. It also directed that any petition for recovery of documents should be lodged with the court within three weeks, with answers lodged thereto, if so advised, within a further three weeks. At that stage a procedural hearing

was to be held before a single judge to consider any further questions of procedure. The court remitted the third ground of appeal (concerning the validity of the search warrant) to the Sheriff inviting him to report to the court on the basis upon which the warrant was granted, to advise what material he had had or still had before him and to indicate what his usual practice would be in such situations. Finally, the court refused the applicant's motion for permission to have any future appeal hearings tape recorded, on the basis that such a step would not be directed to a more expeditious disposal of the appeal.

85. On 31 July 2006, the applicant lodged a first petition for recovery of documents with the court. The annexed specifications of documents and property were wide in their terms, covering in particular pathology reports, all witness statements taken by the police during the investigation, information about search warrants, information about the applicant's travel to the Netherlands and information about K.P., a deceased witness.

86. On 2 August 2006 the applicant's agents lodged a devolution minute in the appeal process (see paragraphs 187-188 below) arguing that the Lord Advocate's failure to disclose all the documents and property described was or would be incompatible with the applicant's rights under Article 6 § 1 of the Convention.

87. On 23 August 2006 the Crown and Strathclyde Police each lodged answers to the applicant's petition for recovery of documents. On the same day the Crown provided the applicant's agents with several documents referred to in the specification of documents annexed to the petition.

88. On 26 September 2006 the applicant's agents sent to the Crown an amended petition for recovery of documents. On the same day a procedural hearing was held before a single judge. The judge allowed the amended petition for recovery of documents to be received and on the applicant's motion continued the procedural hearing to 10 October 2006 in order to allow counsel for the applicant an opportunity to consider and review a decision of the SLAB regarding sanction for unusual work or expenditure.

89. On 4 and 5 October 2006 the Crown wrote to the applicant's agents asking that they provide a copy of correspondence and media samples referred to in the amended petition for recovery of documents.

90. On 10 October 2006 the continued procedural hearing took place before a single judge in the petition for recovery of documents. The applicant's counsel advised the court that the legal aid issue had been resolved and that he was ready to proceed to a full hearing on the petition. The Crown and Strathclyde Police advised the court that they would need time to lodge amended answers, in light of the amendments to the petition received on 26 September 2006. The court allowed the parties fourteen days to lodge answers and continued the hearing to 31 October 2006.

91. On 10 October 2006 a second procedural hearing was held before three judges in the applicant's petition for review of interim liberation. The

applicant's counsel advised the court that he had been unable to consult with the applicant and that a further procedural hearing had been assigned in respect of other matters. The court accordingly continued consideration of the petition for review of interim release until 31 October 2006.

92. On 24 October 2006 the Crown lodged answers to the amended petition for recovery of documents.

93. On 31 October 2006, further procedural hearings took place before three judges in the petition for recovery of documents and the petition for interim release. The court was informed that productive meetings regarding recovery of documents had taken place and continued consideration of that petition to 28 November 2006. On the applicant's motion, the petition for review of interim release was continued to the same date.

94. On 3 and 7 November 2006 the applicant's agents wrote to the Crown requesting disclosure of documents before 9 November 2006. On 23 November 2006 the Crown wrote to the applicant's agents enclosing copies of police statements for civilian witnesses who gave evidence at trial.

95. On 28 November 2006, the continued procedural hearings took place before three judges. The court heard the parties and appointed the petition for recovery of documents to a full three-day hearing before a bench of three judges on a date to be fixed. The parties confirmed that steps would be taken to try and resolve the issues without the need for a hearing. The court also allowed answers for Strathclyde Police to be received.

96. As to the applicant's petition for interim release, Lord Johnston, delivering the opinion of the court, noted:

> "3. We recognise that the length of time, as shown on the chronology up to the present date, is lengthy but we are not prepared, on the evidence before us, to classify this as unreasonable delay in terms of Article 6 of the ... Convention.
>
> 4. A number of factors have contributed to the delay, not least Court procedures, albeit instigated to some extent by the [applicant], and, as a result, the grounds of appeal now before this Court were only reformulated at the beginning of this year. There has also been further delay still ongoing as regards the disputed documents covered by a specification of documents which we understand has undergone considerable alteration. We are not therefore prepared to recognise that Article 6 has been breached at this stage of the process. In any event the issue would be better considered when the whole appeal process is complete."

97. In the exercise of its discretion, taking into account the gravity of the offence, the applicant's history of violence and the risk to the public, the court refused to grant the application for interim release.

98. On 11 December 2006 the applicant's agents wrote to the Crown requesting disclosure of documents not previously requested. On 21 December 2006 the Crown replied.

99. On 7 January 2007, a procedural hearing before three judges took place in relation to the petition for recovery of documents. On the motion of counsel for the applicant, the court allowed the amended petition to be

served upon the Sheriff Clerk at Kilmarnock and the Scottish ministers and allowed these parties to lodge answers within twenty-one days.

100. On 30 January 2007 the applicant's agents wrote to the Crown seeking clarification of matters relating to the precognition of (the taking of a statement from) K.P., the deceased witness. On 7 February 2007 the Crown replied.

101. By letter of 26 February 2007 to the Crown the applicant's agents requested a meeting that week and sought clarification of certain matters in relation to the disclosure of documents. A meeting took place on 1 March 2007.

102. At a hearing on 2 March 2007, in the absence of any opposition from the parties, the court granted the petition in part and ordered the production and recovery of property by the Sheriff Clerk at Kilmarnock and the Scottish ministers detailed in certain calls in the specification of documents. On the applicant's unopposed motion, the petition was otherwise withdrawn.

103. On 12 March 2007 the Sheriff Clerk at Kilmarnock disclosed the property held as ordered by the High Court.

104. On 14 March 2007 the applicant's agents wrote to agents for Strathclyde Police and the Crown requesting a timescale for disclosure of documents.

105. On 18 May 2007 the applicant's agents wrote to agents for Strathclyde Police in relation to intelligence and photographs disclosed. On the same day they wrote to the Crown stating that the petition for recovery of documents had been withdrawn on the undertaking that the documentation still outstanding would be provided.

106. On 23 May 2007, at a procedural hearing before three judges in the appeal against conviction and sentence, the court heard that information had been passed by both the Crown and Strathclyde Police to the applicant's agents. The parties confirmed that further discussions would proceed and that eight days would be required for the substantive appeal hearing. The court appointed the appeal to a date to be fixed and directed that eight days should be reserved for the hearing; and ordered the parties to lodge a note of outline arguments and a note of relevant authorities no later than 21 days before the hearing. A further procedural hearing before three judges was to be fixed on a date about six weeks after the present hearing in order for the court to be addressed on progress in relation to disclosure and any amendments to the grounds of appeal.

107. On 28 May 2007 the applicant's agents wrote to the Crown requesting a meeting date and providing a discussion document regarding disclosure. They also wrote to agents for Strathclyde Police requesting permission to view the principal copies of photographs and providing a discussion document regarding disclosure. On 29 May 2007 they wrote to the agents for Strathclyde Police requesting information regarding the

"tip-off" which led to the search of the applicant's house. On 15 June 2007 they requested from Strathclyde Police delivery of documentation before 18 June 2007 and sight of an original photograph. On 19 June 2007 a disclosure meeting took place between agents and counsel for the applicants, agents and counsel for Strathclyde Police and a representative of the Crown. On 22 June 2007 the applicant's agents wrote to the agents for Strathclyde Police requesting reports of an incident involving the applicant in 1983 and for disclosure of a surveillance log book.

108. On 25 June 2007, the applicant's agents advised the Crown that an application to have a procedural hearing in the case withdrawn from the court roll of 28 June 2007 and for a new date to be assigned in the week beginning 2 July 2007 because of the applicant's counsel's absence on holiday had been granted by the court.

109. On 5 July 2007 a procedural hearing before three judges in the appeal against sentence and conviction took place. The applicant's counsel addressed the court on progress made regarding disclosure and advised that issues of principle might yet have to be considered by the court. The Crown confirmed that disclosure would continue and noted that the subject of disclosure in appeals was to be considered in appeals in several other cases before the court fixed for late August 2007. The court allowed the applicant four weeks within which to lodge any further petition for recovery of documents and four weeks thereafter for answers, and continued the appeal to a further procedural hearing to be held in the week beginning 24 September 2007.

110. On 19 July 2007, the applicant was granted a two-week extension of the time allowed for lodging his new petition for recovery of documents.

111. On 24 August 2007 the applicant's agents lodged a further petition for recovery of documents.

112. On 11 September 2007 a meeting took place between the Crown, and agents and counsel for Strathclyde Police to discuss the further petition for recovery. On 20 September 2007 the Crown lodged answers to the further petition for recovery.

113. On 25 September 2007 a procedural hearing before three judges was held in the appeal. By this stage answers had been lodged by Strathclyde Police and the Police Service of Northern Ireland. On the applicant's motion and of consent the court allowed a further four weeks to adjust the petition and answers. A further procedural hearing was fixed for six weeks' time.

114. On 17 October 2007 the applicant's agents requested an extension of time for the adjustment of the second petition for recovery of documents and answers to 6 November 2007. On 18 October 2007 the court granted the application.

115. On 26 October 2007 a meeting was held between the Crown, counsel for the applicant and Strathclyde Police regarding the applicant's petition for recovery of documents.

116. On 6 November 2007 the applicant's agents lodged an amended petition for recovery of documents.

117. On 17 December 2007 the applicant's agents lodged a second devolution minute arguing that the applicant could not know whether the Crown had discharged its disclosure obligations and indicating that there was reason to suppose that the Lord Advocate had not discharged her obligation, without saying why.

118. On 17 and 18 December 2007 amended answers were lodged by Strathclyde Police and by the Crown in the second petition for the recovery of documents.

119. On 19 December 2007 a procedural hearing took place before three judges. The applicant's counsel advised that there were outstanding issues relating to disclosure in respect of Strathclyde Police. The court assigned a further procedural hearing in January 2008 to afford the parties an opportunity to consider the terms of the court's pending opinion in *McDonald and others v HM Advocate*, a case which dealt with the matter of disclosure. The court continued the devolution minute to that hearing and directed that a hearing on the petition and answers concerning recovery of documents be assigned on a date afterwards fixed. Provisional dates in February and March 2008 were assigned.

120. On 21 December 2007 the Appeal Court issued its opinion in *McDonald and others v HM Advocate*.

121. On 15 January 2008, at a procedural hearing before three judges, the applicant's counsel advised the court that discussions with the Crown had been suspended pending the issue of the *McDonald and others* decision. The applicant's counsel moved for a continuation in order to consider fully the implications of that case and to lodge a third petition for recovery of documents if so advised. The court allowed the applicant a further fourteen days to lodge a fresh or supplementary petition, with a further seven days thereafter for answers from the Crown and Strathclyde Police. A full hearing on the petition and answers was fixed for 11-14 March 2008. A procedural hearing in the substantive appeal before three judges was assigned around four weeks after the date of the present hearing to consider the need for written notes of argument for the March 2008 hearing.

122. On 29 January 2008, the applicant's agents lodged a further petition for recovery of documents and a new associated devolution minute. On 5 February 2008 answers were lodged for the Crown and Strathclyde Police.

123. On 13 February 2008 a procedural hearing was held before three judges. The applicant's counsel indicated that both outstanding petitions would be argued at the hearing fixed for 11-14 March 2008. The court intimated that Strathclyde Police should remain as a party at that hearing

and that it should no later than 4 March 2008 lodge details of an inventory of documents disclosed. The court further directed that the applicant was to lodge a note of argument by 26 February 2008 and the Crown by 4 March 2008; and that the applicant was to lodge an inventory detailing the extent of disclosure already made and the issues in relation to material not disclosed. The consideration of the proposed devolution minute was continued to the hearing of 11-14 March 2008.

124. On 26 February 2008 the applicant's agents lodged outline submissions for the March hearing. On 5 March 2008 the Crown lodged outline submissions for the March hearing. It also intimated to the applicant's agents a Crown schedule of disclosure indicating which documents had been disclosed and when, during the period from January 2001 to March 2008. The schedule showed regular disclosure from 9 January 2001 to 17 September 2001. Disclosure resumed on 23 August 2006 and was continuing.

125. On 11-14 March 2008 a full hearing took place before three judges on the petition for recovery of documents and answers. The applicant's counsel spoke for all four available court days and did not conclude his submissions. The hearing was continued to a further hearing to be fixed. In the absence of any inventory from the applicant detailing the extent of disclosure already made and the issues in relation to material not disclosed, the court requested that prior to the next hearing the defence consider the Crown's schedule of disclosure and confirm in writing which documents, if any, had not been disclosed by the Crown.

126. On 22 May 2008 a procedural hearing took place before three judges. The proceedings were continued to await the outcome of the Privy Council's decision in *McDonald and others*. A two-day hearing set down for 12-13 June 2008 was discharged.

127. On 8 August 2008 the applicant's agents wrote to the Crown indicating that they had not received the Crown schedule of disclosure to which the court had referred in its hearing of 11-14 March 2008 and requested a copy. On 18 September 2008 the Crown replied to the applicant's agents that the relevant schedule together with annexes was provided to them on 5 March 2008. A further copy was provided.

128. The Privy Council handed down its decision in *McDonald and others* on 16 October 2008.

129. On 28 October 2008 the Crown sent further documents to the applicant's agents, including a revised and updated Crown schedule of disclosure together with papers under reference to various calls in the specification of documents annexed to the applicant's petition for recovery of documents.

130. On 22 January 2009 the Crown wrote to the clerk seeking to make progress in the appeal proceedings. The clerk undertook to ask the applicant's agents to clarify whether they still wished to argue the petitions

for recovery in whole or in part. On 24 March 2009 the Crown wrote to the applicant's agents asking them how they intended to proceed with the appeal and advising them that they were anxious that progress be made.

131. On 6 May 2009 a procedural hearing took place before three judges. The Crown advised the court that all statements, previous convictions and outstanding charges in relation to all witnesses at trial had been disclosed and calls in each of the applicant's petitions for recovery had been satisfied. The Crown moved for the appeal to be assigned to a full hearing. The defence moved to withdraw the outstanding petitions for recovery currently before the court and indicated that it was content for a full hearing to be fixed, provided that it did not take place before autumn 2009, to allow time for further inquiries. The court allowed the petitions to be withdrawn and appointed the appeal to a full hearing of eight days' duration to be held no sooner than autumn 2009. It directed the applicant to lodge outline written submissions no later than four weeks before the hearing and the Crown to lodge outline written submissions no later than two weeks before the hearing.

132. The court assigned 29 September 2009 to 9 October 2009 as the dates for the substantive hearing in the applicant's appeal against conviction and sentence.

133. On 21 September 2009, following the disclosure process which had taken place, the applicant lodged a ground of appeal regarding non-disclosure, in relation to a police statement by I.C., a witness in the case.

134. The appeal against conviction was heard between 29 September 2009 and 9 October 2009.

135. On 9 March 2010 the Appeal Court handed down its judgment refusing all the grounds of appeal against conviction. The judgment was 128 pages long, and was detailed and comprehensive. For full details of the court's judgment, see the summary in *Beggs (No. 2)*, cited above.

136. As to the delay in the proceedings, the court noted the following:

> "2. Given the time which has flowed since the appellant's conviction, it is appropriate to say something of the steps which have occurred in this regrettably protracted appeal process.
>
> 3. In brief, on 2 July 2002 the appellant lodged a note of appeal. Following the obtaining from the trial judge of the requisite report, the matter was in due course considered by a single judge who, on 20 December 2002, granted leave to appeal but only as respects certain grounds, which the single judge sought to identify by the exclusion of certain paragraphs of the rather lengthy and discursive note of appeal. The appellant then required the application for leave to be considered, as respects the excluded paragraphs, by a triumvirate 'second sift' bench. That bench refused to grant leave for any of the excluded grounds. The appellant thereafter brought a petition to the *nobile officium* of the High Court of Justiciary challenging that second sift decision. The decision in that petition – issued on 8 December 2004 – identified that where an applicant for leave to appeal is dissatisfied with a decision of a single judge allowing some, but refusing other, grounds of appeal to be argued the correct

procedure to be followed is an application under Section 107(8) of the Criminal Procedure (Scotland) Act 1995 and that the further application to the 'second sift' followed in the present case, albeit no doubt common practice at the time – was incompetent ...

4. Following that decision, the appellant duly lodged an application in terms of Section 107(8) of the 1995 Act, which was heard on 28 October 2005 and in consequence of which the court, on 25 November 2005, granted leave to argue certain additional grounds ... The court then invited the submission of reformulated grounds of appeal framed in light of the initial sift decision and its decision of 25 November 2005 and such reformulated grounds of appeal were duly lodged with the court on 16 January 2006. With the exception of an additional ground of appeal tendered only at the opening of the hearing before us, to which we shall subsequently refer – those reformulated terms are the grounds of appeal which form the basis of this appeal. The formal interlocutor allowing those reformulated grounds of appeal to be the grounds of appeal was pronounced on 11 July 2006.

5. Notwithstanding that the grounds of appeal had thus eventually been reformulated and settled and allowed to be argued in July 2006, those acting for the appellant then embarked upon a lengthy process of seeking various orders for disclosure of documents and information from the Crown. It would not be profitable to recount the details of this exercise. It suffices to say that the insistence of those acting for the appellant in that exercise has, so far as it is possible to tell, had little significant result but it has substantially delayed the hearing of this appeal. Only on 6 May 2009 did counsel for the appellant withdraw his applications for orders for disclosure and for recovery of documents, thus enabling a hearing of the appeal to be fixed. At a cost no doubt to the progress of the cases of other appellants, the court was able to arrange for the appeal to be heard over eight days in ...October 2009."

137. On 27 May 2010 permission to appeal to the Supreme Court was refused by the Appeal Court. Further details of the decision are set out in *Beggs (No. 2)*, cited above.

138. On 29 July 2010 the applicant lodged a devolution minute in which he contended that there had been a breach of his right under Article 6 of the Convention to a hearing of the criminal charges against him within a reasonable time. Particular criticism was made in the minute of disclosure of information by the prosecution.

139. The applicant's appeal against sentence was due to be heard on 4 August 2010. On that day, the applicant requested, and was granted, an adjournment of the hearing to allow him to request leave to appeal against conviction from the Supreme Court.

140. On or around 21 October 2010, the applicant lodged an application for permission to appeal and an extension of time with the Supreme Court. In his application, he explained that the delay was caused by the need to await further information from the police, which was received on 29 September 2010.

141. On 16 December 2010 the Supreme Court refused the applicant's application for leave to appeal against conviction.

142. On 22 February 2011 a hearing took place before the Appeal Court in the applicant's outstanding appeal against sentence. His counsel intimated

that he did not intend to pursue the grounds stated in his note of appeal against sentence (that there had been a miscarriage of justice in selecting a punishment part of twenty years). The appeal against sentence was not, however, formally abandoned; nor was it then refused for non-insistence. Given the existence of the devolution minute, it was continued for fuller argument. Provision was made for written submissions to be lodged by each party, which was duly done, and a hearing was fixed for 1 April 2011.

143. On 1 April 2011, pressure of business at the court prevented a hearing taking place. The court therefore fixed 7 April for hearing the matter.

144. On 7 April 2011 a hearing took place in the case. The applicant's counsel insisted that his application was not an appeal against sentence under the 1995 Act, albeit the remedy sought from the court was a reduction in the punishment part which had been specified; it was an application to the court under the Human Rights Act 1998, independent of the 1995 Act.

145. On 12 May 2011 the Appeal Court issued its opinion. The court examined the provisions of the Human Rights Act and considered it plain that the possibility of bringing proceedings under section 7(1)(a) of the Act (see paragraph 191 below) was limited to bringing proceedings in the civil courts. There was therefore no possibility, under section 7(1)(a), of bringing proceedings in any criminal court. The Court acknowledged that under the provisions in section 7(1)(b) of the Act, a person claiming that a public authority had acted unlawfully could rely on Convention rights in any legal proceedings, which could include criminal proceedings. However, it continued:

> "14. ... But they import that the legal proceedings in question are still in dependence and that reliance is placed on the Convention right or rights in those proceedings during their dependency."

146. The court explained that where a person who had been convicted in criminal proceedings complained that his right to determination of the criminal charge or charges against him within a reasonable time had been infringed, he could, in these proceedings, seek a remedy. It referred to the case of *Mills* v *HM Advocate*, where Lord Steyn had said that in criminal proceedings the remedies available could include an order for discontinuance of a prosecution, quashing of the conviction, reduction of the sentence, monetary compensation or a declaration (see paragraphs 196-197 below). It noted that the complaint that there had been a breach of that appellant's Article 6 rights had been made in the form of a further ground of appeal, in the context of an appeal against sentence. Other relevant domestic case-law considered by the court provided evidence of the same approach.

147. The court noted that the applicant had also lodged a devolution minute, under the Scotland Act (see paragraphs 187-189 below), addressing delay, but considered that there was ample authority that a devolution issue did not have an existence separate from the process in which it was taken.

Indeed, it observed, the contrary was not suggested by counsel for the applicant.

148. The court therefore concluded:

> "20. We are accordingly satisfied that, if an appellant in criminal proceedings seeks to maintain that his right to a determination within a reasonable time of the charge or charges against him has, in breach of Article 6(1) of the Convention, been infringed and that a remedy should be afforded to him by the criminal court, he should do so by focusing that contention in a ground of appeal. Ordinarily that will be in a ground of appeal against sentence – if reduction in sentence is the remedy sought. If the delay complained of arises in, or mainly in, the appellate proceedings themselves, it will not be practicable to submit such a ground at the outset of these proceedings. But it will or should be evident to any person concerned about such delay to identify and formulate it in good time before the proceedings are otherwise concluded. Leave can then be sought to expand any existing ground of appeal against sentence to include the complaint or, if there is otherwise no appeal against sentence, leave can be sought to lodge such an appeal out of time. There is no difficulty about the court affording a remedy of reduction of sentence within its existing powers. The court is in use when dealing with appeals against sentence to take into account relevant circumstances which have occurred since sentence was passed. In appropriate circumstances the court can award just satisfaction for any infringement of Article 6(1) by exercising its power to reduce the sentence originally passed.
>
> 21. In these circumstances [counsel for the applicant's] argument founded on a supposed application under the Human Rights Act 1998 unrelated to the appellate provisions of the 1995 Act is misconceived. Although encouraged to do so, he resisted the suggestion that his arguments on the merits of delay might be presented in the form of an amended ground of appeal against sentence or by seeking leave of the court under section 110(4) of the 1995 Act to found his argument on an aspect not contained in any note of appeal. In these circumstances we have no alternative but to refuse his application as incompetent. His existing ground of appeal against sentence not being insisted on, it also must be refused."

149. The court considered, however, that it would not be in the interest of justice to leave the case without making some observations on the merits of the complaint of undue delay. It indicated that, notwithstanding evidence of extensive communications between the parties and hearings before the court throughout, the period until final disposal of his appeal against conviction was such as to give grounds for real concern.

150. The court noted that no complaint was made regarding the period up until conviction and sentence. It observed in any event that part of that period elapsed because the applicant had fled to the Netherlands and resisted measures to extradite him to Scotland. Once he was returned to Scotland in January 2001, proceedings had moved reasonably expeditiously having regard to the complexity of the issues, including the issues raised by the applicant in defence. The length of the trial had been, in the court's view, commensurate with the nature of the issues raised.

151. The court noted that the applicant's first complaint was in respect of delay arising in the proceedings which ultimately resulted in leave being granted, on 25 November 2005, to appeal against conviction and sentence

without qualification. He did not rely on the earlier part of that period, until 2 July 2002, when he finally lodged grounds of appeal. The court continued:

> "24. ... That time was largely the result of applications made by the applicant for extensions of time, which given the complexity of the issues may well have been justified. The complexities may also explain, at least in part, the time taken by the trial judge to produce his report. Matters thereafter proceeded reasonably expeditiously to a decision (on 21 December 2002) by the single judge on the application for leave to appeal. It was thereafter that time passed, which, in retrospect, might have been better occupied. The single judge had refused leave to appeal in respect of certain of the stated grounds. The applicant was dissatisfied with that decision and wished leave on all the grounds stated. But he set about seeking to secure this by what turned out to be the wrong legislative route. He can hardly be criticised for doing so, since the route which he took was that generally regarded at that time by the legal profession as appropriate. The judges who considered his application to the High Court under section 107(4) of the 1995 Act fell into the same error. However, the basic explanation for the error was the problematic character of the relevant legislation. It was only after that had been addressed and elucidated on 8 December 2004 that matters could proceed on the right basis. This two-year excursion was unfortunate but it was attributable to the state of the legislation for which neither of the relevant public authorities, the Crown and the court, is responsible."

152. The court then turned to the applicant's second complaint, in respect of the period which had elapsed between the presentation of the applicant's first petition for recovery of documents (on 31 July 2006) and the date (28 October 2008) when the Crown had disclosed the final documents sought. In this respect, it noted:

> "25. ... Over that period the applicant lodged three separate petitions (each subsequently adjusted or amended) for recovery of materials from the Crown and others. The substantive hearing on his appeal could not take place until these petitions were disposed of or withdrawn. In the event all these petitions were withdrawn, the only executive orders made under any of them being those against the sheriff clerk at Kilmarnock and the Scottish ministers on 2 March 2007. These orders were promptly complied with. It is no doubt true that the bringing of these various petitions may to some extent have been instrumental in the disclosure of information; but what is more material is whether this exercise was in the event justified ... [T]he appeal court which heard the applicant's substantive appeal concluded that, in so far as it was possible to tell, the recovery process had had little significant result. Effectively, it caused only delay in disposal of the appeal. This delay can thus be substantially attributed to the applicant and his advisers. [Counsel for the applicant] said that the Crown was at fault in not producing certain documentation until the decision of the Supreme Court was issued in the case of *McDonald and Others*. But, while the principles of disclosure have been clear since *McLeod* v *HM Advocate* 1998 SCCR 77, the practical application of them was, as appears from Lord Hope's judgment in *McDonald and Others* ..., an evolving process ... Without attempting to demonstrate their materiality to the issues in the appeal, [counsel for the applicant] made a general assertion that the Crown had failed to disclose witness statements. But it seems plain that by at least November 2006 (a few weeks after the lodging of the first petition for recovery of documents) the Crown had, with one exception, disclosed the police statements of all the civilian witnesses who gave evidence at the trial. The exception was a police statement given in December 1999 by [I.C.]. This was, it seems, disclosed only in July 2009. It formed the basis of an additional ground of appeal. This ground was

discussed ... in the opinion of the court which heard the substantive appeal. That court concluded ...:

'We therefore have grave difficulties in seeing how, realistically, disclosure of the police note of the interview could have possibly affected the outcome of the trial or given a real possibility of a different outcome. We are accordingly satisfied that the absence from the defence file of the police note of the interview with [I.C.] (an absence also shared, we understand, by the trial Advocate depute) did not result in material prejudice to the appellant or in the trial being unfair.'

While the non-disclosure earlier of [I.C.'s] statement may have been an oversight by the Crown, there is no reason to conclude that that oversight caused or materially contributed to the time spent on the recovery exercise. We are accordingly not persuaded that there was any material failure of disclosure by the Crown which resulted in significant delay in the appellate process."

153. The court observed that counsel for the applicant did not suggest that the Crown or the court had otherwise significantly contributed to the delay in that process, which, it noted, given the complexities involved would inevitably have taken a substantial time to complete. It concluded:

"26. ... In these circumstances we are not persuaded that the applicant's Article 6 right to determination of the charges against him within a reasonable time has been infringed. Much of the time was spent in pursuing grounds of appeal which were unmeritorious. We would add that, in contrast with other cases, there is no suggestion that the applicant had suffered any anxiety or other adverse effect by reason of any delay."

154. Finally, the court explained, for the sake of completeness, that:

"[t]he hearing of this application was scheduled for Friday 1 April 2011 but, because of pressure of other business, was unable to proceed on that day. The court was anxious, given the passage of time which had already occurred, that the hearing should not be postponed longer than was essential. It fixed on the following Thursday, 7 April, for hearing the matter. There was originally some uncertainty as to whether both preferred counsel would be available on that day, but that was in due course resolved by accommodating the other commitments of the applicant's counsel. Both counsel were fully heard on the afternoon of 7 April, the court sitting late to complete the hearing."

155. On 21 March 2012 the Supreme Court refused leave to appeal. The following reasons were provided:

"Permission to appeal refused because the Supreme Court does not have jurisdiction to hear an appeal against a decision of the High Court of Justiciary refusing to give the appellant a remedy under the Human Rights Act 1998 and because it does not have an original jurisdiction to deal with devolution issues which have not been the subject of decision by the High Court of Justiciary."

### *3. Ancillary proceedings*

#### (a) The judicial review proceedings regarding the applicant's correspondence

156. On a number of occasions, starting in about February 2003, letters from the applicant's legal advisers were opened by prison officers at

Peterhead. Although the applicant received official apologies and assurances that it would not happen again, the incidents continued.

157. In September 2003 the applicant lodged a petition for judicial review in respect of the opening of his privileged correspondence by prison staff, arguing a violation of Article 8 of the Convention.

158. On 5 September 2003, in the context of the judicial review proceedings, the Scottish ministers gave an undertaking not to open, or have the applicant open in the presence of prison staff, the applicant's privileged correspondence or correspondence from the Complaints Commissioner sent to HM Prison Peterhead. The judge refused the applicant's motions for interim interdict (injunction) and interim declarator, noting the terms of the undertaking. The applicant appealed.

159. While the applicant was detained in HM Prison Edinburgh, his letters were once again opened, the undertaking of the Scottish ministers applying only to mail sent to HM Prison Peterhead. On 19 May 2004, the Scottish ministers extended their undertaking to cover HM Prison Edinburgh.

160. On 26 November 2004 a prison officer at Peterhead opened a letter from the Complaints Commissioner to the applicant in the latter's presence. It transpired that the staff responsible for sorting and delivering mail did not understand that the undertaking applied to correspondence with the Complaints Commissioner.

161. The applicant sought a contempt of court order against the Scottish ministers for the breach of the undertaking. On 15 March 2005, judgment was handed down in the appeal and the court found the Scottish ministers in contempt of court.

#### (b) The judicial review proceedings regarding the prison transfer

162. Following the applicant's transfer to HM Prison Edinburgh in May 2004 (see paragraph 66 above), he sought judicial review before the Court of Session of the decision to return him to HM Prison Peterhead.

163. A hearing on a motion for an interim order in the judicial review proceedings regarding the applicant's prison transfer took place on 2-3 June 2004. The applicant complained that interference with his correspondence and the distance between HM Prison Peterhead and his chosen counsel meant that preparation of his substantive criminal appeal against conviction and sentence and of his application to the *nobile officium* was being hampered.

164. The applicant was returned to HM Prison Peterhead on 4 June 2004.

165. On 18 June 2004, Lord Drummond Young refused the applicant's motion for an interim order against his prison transfer. He noted that the applicant had had 33 visits from his legal representatives since the move to Peterhead and concluded:

> "I do not think that the difficulties involved in travelling to Peterhead can reasonably be considered a material obstacle to the petitioner's preparations for his appeal and relative application to the *nobile officium*."

166. Between the applicant's return to Peterhead and 28 January 2005, the applicant made some 540 telephone calls to his legal advisers and received some 111 privileged letters.

167. On 9 March 2005, following a full hearing on the judicial review petition in respect of the prison transfer, Lord Carloway dismissed the petition. He issued his opinion on 24 March 2005, holding that:

> "the petitioner's fundamental complaint is that his location at Peterhead, pending the resolution of the petition to the *nobile officium* and his criminal appeal, mean that his right to effective access to his legal advisers is being denied. However, he has already been brought down to Edinburgh for a month to secure ready access to these advisers. He has also been brought to Edinburgh on at least two occasions since then. The petition to the *nobile officium* has been disposed of. Many months have now passed, during which there must have been ample time in which to discuss his appeal by way of telephone calls, written correspondence and consultation. A date for an appeal has not yet been fixed, so there will be even further opportunity for such discussion."

168. The applicant appealed the decision.

169. On 10 March 2006, the applicant's appeal in the judicial review proceedings against his prison transfer was dismissed.

170. While in Peterhead, the applicant made 2,916 private calls (other than to family and friends) in 2004, 2,916 private calls in 2005, 2,626 private calls in 2006, 2,838 private calls in 2007, 3,145 private calls in 2008 and, between January and April 2009, 928 private calls. During his time in Edinburgh, the applicant made approximately 118 calls. Between 2002 and April 2009, he received approximately 100 visits from solicitors and counsel regarding his various legal proceedings. Between 2003 and April 2009, he received approximately 1,121 privileged letters and packets.

## B. Relevant law and practice

### *1. The Criminal Procedure (Scotland) Act 1995*

#### (a) Right of appeal

171. Section 106 of the 1995 Act grants any convicted person the right to appeal against conviction or sentence (where such sentence is not fixed by law), provided that the leave of the court under section 107 of the Act has been obtained.

#### (b) The note of appeal and the written report

172. Section 110(1) of the 1995 Act, as in force at the material time, allowed six weeks for the lodging of a written note of appeal. The note was required to identify the proceedings; contain a full statement of all the

grounds of appeal; and be in as near as may be the form prescribed by the relevant rules. The note of appeal is generally lodged on the basis of the issues at trial and after consideration of the trial judge's charge to the jury.

173. Section 110(4) provided that it was not competent for the applicant to found any aspect of his appeal on a ground not contained in the note of appeal.

174. Section 110(2) provided that the six-week time limit for lodging the note of appeal could be extended at any time before it expired.

175. Section 110(1) of the 1995 Act provides that when a convicted person lodges a note of appeal with the clerk, the clerk must send a copy to the judge who presided at trial.

176. Under section 113 of the 1995 Act:

> "(1) As soon as is reasonably practicable after receiving the copy note of appeal sent to him under section 110(1) of this Act, the judge who presided at the trial shall furnish the Clerk of Justiciary with a written report giving the judge's opinion on the case generally and on the grounds contained in the note of appeal.
>
> (2) The Clerk of Justiciary shall send a copy of the judge's report–
>
> (a) to the convicted person or his solicitor;
>
> (b) to the Crown Agent; ...
>
> (3) Where the judge's report is not furnished as mentioned in subsection (1) above, the High Court may call for the report to be furnished within such period as it may specify or, if it thinks fit, hear and determine the appeal without the report.
>
> ..."

**(c) The sift**

177. Section 107 of the 1995 Act provides, insofar as relevant:

> "(1) The decision whether to grant leave to appeal for the purposes of section 106 (1) of this Act shall be made by a judge of the High Court who shall–
>
> (a) if he considers that the documents mentioned in subsection (2) below disclose arguable grounds of appeal, grant leave to appeal and make such comments in writing has he considers appropriate; and
>
> (b) in any other case–
>
> (i) refuse leave to appeal and give reasons in writing for the refusal ...
>
> (2) The documents referred to in subsection (1) above are–
>
> (a) the note of appeal ...
>
> ...
>
> (c) where the judge who presided at the trial furnishes a report under section 113 of this Act, that report; and
>
> (d) where, by virtue of section 94 (1) of this Act, a transcript of the charge to the jury of the judge who presided at the trial is delivered to the Clerk of Justiciary, that transcript.

...

(4) Where leave to appeal is refused under subsection (1) above the appellant may, within 14 days ..., apply to the High Court for leave to appeal.

(4A) The High Court may, on cause shown, extend the period of 14 days mentioned in subsection (4) above, or that period as extended under this subsection, whether or not the period to be extended has expired ...

(5) In deciding an application under subsection (4) above the High Court shall–

(a) if, after considering the documents mentioned in subsection (2) above

and the reasons for the refusal, the court is of the opinion that there are arguable grounds of appeal, grant leave to appeal and make such comments in writing as the court considers appropriate; and

(b) in any other case–

(i) refuse leave to appeal and give reasons in writing for the refusal ...

(6) Consideration whether to grant leave to appeal under subsection (1) or (5) above shall take place in chambers without the parties being present.

(7) Comments in writing made under subsection (1)(a) or (5)(a) above may, without prejudice to the generality of that provision, specify the arguable grounds of appeal (whether or not they are contained in the note of appeal) on the basis of which leave to appeal is granted.

(8) Where the arguable grounds of appeal are specified by virtue of subsection (7) above it shall not, except by leave of the High Court on cause shown, be competent for the appellant to found any aspect of his appeal on any ground of appeal contained in the note of appeal but not so specified.

(9) Any application by the appellant for the leave of the High Court under subsection (8) above Act–

(a) shall be made not less than seven days before the date fixed for the hearing of the appeal; and

(b) shall, not less than seven days before that date, be intimated by the appellant to the Crown Agent.

..."

### *2. The* nobile officium

178. In *Perrie, Petitioner* (1991 S.C.C.R. 475), Lord Justice General Hope (as he then was) described the jurisdiction of the court under the *nobile officium* as follows:

"The purpose of the *nobile officium* is to prevent injustice or oppression where the circumstances are extraordinary or unforeseen and where no other remedy or procedure is provided by the law."

### *3. The duty of disclosure under Scots law*

179. In the case of *McLeod v HM Advocate (No. 2)* (1998 JC 67), Lord Justice General Rodger (as he then was) held:

"Our system of criminal procedure ... proceeds on the basis that the Crown have a duty at any time to disclose to the defence information in their possession which would tend to exculpate the accused ... Equally ... the Crown will respond to specific requests from the defence for information or for the production of statements or other items where the defence can explain why they would be material to the defence ...

In a system which operates in this way there should for the most part be no need for an accused person to invoke the petition procedure to recover documents whose possible exculpatory effect can be appreciated by the Crown, whether spontaneously or when the defence ask for them. In such a system also it can be expected that the defence will have access to the documents which are material to the preparation and presentation of their case ...

Like others in the past I am conscious of the difficulty of formulating the test which the court should apply when asked to order the production of documents in a criminal case where the charges are set out relatively succinctly and the only formal documents indicating a line of defence will be any transcript of the accused's judicial examination and any special defence or notice of incrimination. I consider, however, that an accused person who asks the court to take the significant step of granting a diligence for the recovery of documents, whether from the Crown or from a third party, does require to explain the basis upon which he asks the court to order the haver to produce the documents. The court does not grant such orders unless it is satisfied that they will serve a proper purpose and that it is in the interests of justice to grant them. This in turn means that the court must be satisfied that an order for the production of the particular documents would be likely to be of material assistance to the proper preparation or presentation of the accused's defence. The accused will need to show how the documents relate to the charge or charges and the proposed defence to them. Such a requirement imposes no great burden on an accused person or his advisers: the averments in the petition may be relatively brief and the court will take account of any relevant information supplied at the hearing."

180. In *Sinclair v HM Advocate* ([2005] UKPC D2), the Privy Council considered the position of disclosure in Scots law and the relevant Convention authorities. Lord Hope of Craighead set out the following principles:

"First, it is a fundamental aspect of the accused's right to a fair trial that there should be an adversarial procedure in which there is equality of arms between the prosecution and the defence. The phrase 'equality of arms' brings to mind the rules of a mediaeval tournament – the idea that neither side may seek an unfair advantage by concealing weapons behind its back. But in this context the rules operate in one direction only. The prosecution has no Convention right which it can assert against the accused. Nor can it avoid the accused's Convention right by insisting that the duty does not arise unless the accused invokes it first. Secondly, the prosecution is under a duty to disclose to the defence all material evidence in its possession for or against the accused. For this purpose any evidence which would tend to undermine the prosecution's case or to assist the case for the defence is to be taken as material. Thirdly, the defence does not have an absolute right to the disclosure of all relevant evidence. There may be competing interests which it is in the public interest to protect. But decisions as to whether the withholding of relevant information is in the public interest cannot be left exclusively to the Crown. There must be sufficient judicial safeguards in place to ensure that information is not withheld on the grounds of public interest unless this is strictly necessary."

181. Lord Rodger of Earlsferry added:

> "The Crown's article 6(1) duty to disclose evidence in favour of the defence does not ... depend on any request being made by the defence. That duty subsists unless, unusually, it is waived by the defence."

182. In that case the Privy Council quashed the convictions, holding that the failure of the prosecution to disclose police statements of witnesses rendered the trial unfair.

183. In the case of *McDonald and others v HM Advocate* ([2008] UKPC 46), the Privy Council again considered the duty of disclosure in Scottish criminal proceedings. In that case, the defence had requested statements and details of previous convictions of witnesses from the prosecution, contending that no formal specification of documents was required in light of the prosecution's general duty of disclosure. The prosecution declined to provide the documents requested and considered that for recovery of documents in such wide terms, a petition for the recovery of documents should be lodged with, and considered by, the court. The defence lodged petitions for recovery of documents and challenged before the court, by reference to Article 6 of the Convention, the position of the prosecution regarding disclosure.

184. The Privy Council considered developments in the duty of disclosure in Scotland and the requirements of the Convention. It dismissed the appeals and found the system of disclosure in Scotland, as it operated at the time, to be compatible with Article 6.

185. An October 2008 version of the prosecutors' Disclosure Manual, revised in light of the decision in *McDonald and others* and available on the website of the Crown Office, provides guidance as to the extent and operation of the obligation of disclosure under Scots law. In particular, the manual sets out the following disclosure principles:

> "**The Crown's Principles of Disclosure**
>
> 1. The Crown is obliged to disclose all material evidence for or against the accused. This relates to statements, but it also relates to all information of which the Crown is aware.
>
> 2. 'Material' means evidence which is likely to be of real importance to any undermining of the Crown case, or to any casting reasonable doubt on it, and of positive assistance to the accused.
>
> 3. This legal duty persists in perpetuity. This means that the duty exists during the appeal process, and even where there is no live appeal, for example, where such material comes to the attention of the Crown after conviction, or after an appeal has been refused.
>
> 4. Compliance with the duty requires the Crown to disclose all statements of all witnesses on the Crown and defence lists ...
>
> 5. Compliance with the duty requires the Crown, without having to be requested to do so, to disclose all previous convictions and outstanding charges for all witnesses on

> the Crown lists ..., subject to the materiality test and the public interest in protecting the Convention Rights of the witnesses.
>
> 6. Failure to disclose material evidence risks a miscarriage of justice. Disclosure carried out properly and timeously ensures that justice is done and prevents unnecessary trials and delay."

186. Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 codifies and clarifies the duty of disclosure in criminal proceedings in Scotland. It entered into force on 6 June 2011.

### *4. Devolution issues*

187. Section 57(2) of the Scotland Act 1998 provides that the Scottish Executive (of which the Lord Advocate is a member) has no power to act in a manner incompatible with the Convention.

188. A devolution issue is an issue raised under Schedule 6 to the Scotland Act concerning whether a legislative provision or an administrative act passed or taken under the Scotland Act 1998 is within the powers of the Scottish Parliament or the Scottish Executive.

189. In *Russell* v *Thomson* ([2010] HCJAC 138), the Appeal Court observed:

> "15. A Devolution Minute in an appeal process, which complains of the actions of the lower court, does not have a life of its own. It requires to be linked to the grounds of appeal raised. In this case, these grounds are expressed in the appellant's Note of Appeal and are simply that the appellant's conduct, as spoken to by the witnesses, did not amount to a breach of the peace. The Note defines the scope of the appeal. If the appellant had wished to pursue any of the many matters contained in his Devolution Minute, he should have included them in his Note of Appeal. If he had failed to do that, he should have applied to the court to allow that Note to be amended to include them ..."

### *5. The Human Rights Act 1998*

190. Section 6(1) of the Human Rights Act 1998 ("the 1998 Act") provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 6(3) clarifies that "public authority" includes a court or tribunal and any person certain of whose functions are functions of a public nature.

191. Section 7(1) provides that:

> "A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may–
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

192. Section 8 of the Act sets out available remedies and provides:

"(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining–

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

193. However, section 9(3) limits the possibility of claiming damages where the act or failure of which an individual complains is a judicial act or failure:

"(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention."

194. Section 9(5) defines "judicial act" as a judicial act of a court, including an act done on the instructions, or on behalf, of a judge.

*6. Remedies for delay in legal proceedings in Scotland*

195. As a consequence of section 57(2) of the Scotland Act 1998 (see paragraph 187 above), in carrying on prosecutions or directing them to be carried on the Lord Advocate, may not act incompatibly with Article 6 § 1 of the Convention. Thus an accused person in Scotland who complains about undue delay in criminal proceedings under Article 6 § 1 may raise a devolution issue against the Lord Advocate under section 57(2) of the Scotland Act 1998 or, alternatively, he may make a complaint against the court as a public authority under the Human Rights Act 1998 (see *R. v. HM Advocate* [2002] PC D3, per Lord Steyn at paragraph 1). He may also raise civil proceedings in the High Court alleging a violation of section 6 of the Human Rights Act 1998 in the event that he is dissatisfied with the remedy granted by the High Court.

196. In *Mills v HM Advocate* [2002] UKPC D1, the court was required to examine whether, following an unreasonable delay in the hearing of an appeal, the reduction in sentence awarded by the High Court provided adequate redress. The Privy Council considered that in light of the express acknowledgement of a violation of the Convention and the extent of the reduction in sentence, there had been adequate redress and the applicant was no longer a victim of any violation.

197. Lord Steyn noted the available remedies for delay in criminal proceedings (at paragraphs 15-16):

> "The separate question of the remedies available in respect of a breach of the guarantee of a hearing within a reasonable time must now be considered. The court is entitled to be informed of all factors logically relevant to the appropriateness of the remedy. In a post conviction case, for example, the fact that the accused's guilt was established at trial and that an unmeritorious appeal was dismissed, is undoubtedly a relevant factor in considering what remedy, if any, to grant.
>
> The remedies available could include an order for discontinuance of a prosecution, quashing of the conviction, reduction of the sentence, monetary compensation or a declaration. A finding of a violation of a guarantee may itself sometimes be a sufficient vindication of the right: *Eckle v Germany (Just Satisfaction)* (1983) 13 EHRR 556, 560, para 24 ..."

198. Similarly in *R v. HM Advocate* [2002] UKPC D3, the applicant complained of a breach of the reasonable time requirement. Lord Steyn, setting out domestic law, noted (at paragraph 1):

> "The result of this scheme is that an accused person in Scotland who complains about undue delay in criminal proceedings under article 6.1, may raise a devolution issue against the Lord Advocate under section 57(2) or, alternatively, he may make a complaint against the court as a public authority under the Human Rights Act 1998."

199. On the question of remedies, he explained (at paragraph 11):

> "The width of the reasonable time guarantee is relevant to the separate question of the remedies available for a breach. There is no automatic remedy. In this case too the role of the Strasbourg Court is a residuary one. In the Strasbourg Court the only remedies available are therefore declaratory judgments and award of damages. But domestic courts have available a range of remedies for breach of the reasonable time guarantee. In a post conviction case the remedies may be a declaration, an order for compensation, reduction of sentence, or a quashing of the conviction: see *Mills v H M Advocate (No 2),* 2002 SLT 939, 944, para 16. In a preconviction case the remedies may include a declaration, an order for a speedy trial, compensation to be assessed after the conclusion of the criminal proceedings, or a stay of the proceedings. Where there has been a breach of the reasonable time guarantee, but a fair trial is still possible, the granting of a stay would be an exceptional remedy."

200. The majority of the Privy Council held that in light of the acceptance by the prosecution that there had been unreasonable delay in the case, it would be incompatible with the appellant's right to a determination of a criminal charge against him within a reasonable time for the Lord Advocate to continue to prosecute him on two of the charges of the

indictment and, as section 57(2) of the Scotland Act 1998 provided that the Lord Advocate had no power to do an act which was incompatible with the Convention right, the plea in bar of trial should be sustained and the relevant charges dismissed from the indictment.

201. In *Gillespie v. HM Advocate* 2003 SLT 210 the appellate court found a breach of Article 6 on length and granted, by way of remedy, a reduction of six months in the punishment part previously imposed by the High Court.

202. In *Spiers v. Ruddy* [2008] UKPC D2, the Privy Council once again considered the range of remedies available for breach of the reasonable time requirement. Lord Bingham concluded (at paragraph 16):

> "...The European Court does not prescribe what remedy will be effective in any given case, regarding this as, in the first instance, a matter for the national court. The Board, given its restricted role in deciding devolution issues, should be similarly reticent. It is for the Scottish courts, if and when they find a breach of the reasonable time provision, to award such redress as they consider appropriate in the light of the Strasbourg jurisprudence."

# THE LAW

## I. SCOPE OF THE COMPLAINTS

203. The applicant complained that the length of the appeal proceedings was incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

204. He also complained that the domestic courts had failed to expedite the proceedings or to provide interim relief, in breach of the requirement to provide an effective remedy set out in Article 13, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

205. Being master of the characterisation to be given in law to the facts of the case (see *Phillips v. the United Kingdom*, no. 41087/98, § 38, ECHR 2001-VII; and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 54, 17 September 2009), the Court considers that in the light of its case-law (see *Price and Lowe v. the United Kingdom*, nos. 43185/98 and 43186/98, § 23, 29 July 2003; *Crowther v. the United Kingdom*, no. 53741/00, § 29, 1 February 2005; *Bullen and Soneji v. the United Kingdom*, no. 3383/06, §§ 65-66, 8 January 2009; *Richard Anderson v. the United Kingdom*, no. 19859/04, § 28, 9 February 2010; and *McFarlane v. Ireland* [GC],

no. 31333/06, §§ 126 and 152, 10 September 2010) the applicant's complaints concerning the failure of the domestic courts to take steps to expedite the proceedings are most appropriately examined from the standpoint of Article 6 § 1 of the Convention.

206. As to the applicant's complaint under Article 13 regarding the failure of the domestic courts to provide interim relief, the Court observes that the applicant failed, in his application form, to clarify the exact nature of this complaint. It observes that he referred in this context to the Appeal Court, in its judgment of 28 November 2006, having "declared that the issue is best considered only once the Appeal has been determined" and having refused to grant interim relief (see paragraphs 96-97 above).

207. The Court notes that these comments and conclusions of the Appeal Court in its judgment of 28 November 2006 were in the context of the applicant's application for interim release pending his appeal, on the basis that release was justified by the delay which had occurred. Having regard to the nature of the applicant's complaint as outlined in his application form, the Court's consideration will be limited to an examination of whether Article 13 required interim release in the applicant's case.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

### A. Admissibility

#### *1. The parties' submissions*

##### (a) The Government

208. The Government contended that the applicant had failed to exhaust domestic remedies in that he had been dilatory at various stages of the procedure; had caused delay by the misinterpretation of the relevant legislation and the raising of petitions for recovery of documents which were later withdrawn; and had failed to use domestic procedures open to him to accelerate the determination of the proceedings or to seek remedies for any alleged unreasonable delay to date.

209. The Government set out a number of steps which they argued the applicant could have taken in order to obtain acknowledgement of any alleged violation and appropriate redress. First, he could have sought an early hearing for his substantive appeal. Second, he could have requested the High Court to make a finding that his Article 6 § 1 right to trial within a reasonable time had been violated. This finding could have formed the basis for a remedy at the end of the appeal process, which could have included a reduction of sentence in the event that the substantive appeal was unsuccessful (referring to *Gillespie v. HM Advocate* – see paragraph 201 above). Third, the applicant could have appealed under section 7 of the

Human Rights Act (see paragraph 191 above) against any act or failure on the part of the High Court which in his opinion contributed to the alleged violation of his Article 6 § 1 rights. Finally, the applicant could have sought judicial review to identify any alleged violation and seek damages under section 7 of the Human Rights Act 1998.

**(b) The applicant**

210. The applicant argued that he was not responsible for the delays encountered in the proceedings and that there was no available remedy to expedite the proceedings or to obtain relief at the time of his application to this Court, as the domestic court did not recognise that the delay in his case was unreasonable or in contravention of Article 6 § 1.

*2. The Court's assessment*

211. It is convenient to distinguish between two categories of remedies proposed by the Government: (1) remedies to expedite the proceedings; and (2) remedies to allow the applicant to obtain a declaration that the delay in his case was unreasonable and any appropriate redress at the conclusion of the proceedings.

212. As regards the former category, the Court finds that the Government's submissions in this respect essentially identify periods in the proceedings where, in their view, the delay was caused by the applicant's conduct and, in particular, his failure to take steps to ensure the expedition of the appeal proceedings. As such, it finds that these submissions in reality go to the merits of the application and in particular to the applicant's conduct and contribution, if any, to the length of the proceedings (see *Richard Anderson*, cited above, § 19).

213. As regards the second category, the Court observes that the applicant lodged his case with this Court while the appeal proceedings were still pending. Subsequent to the receipt of the written observations in the case, the applicant lodged a devolution minute in the Appeal Court contending that there had been a breach of the reasonable time requirement contained in Article 6 (see paragraph 138 above). He subsequently informed the Appeal Court that he did not intend to pursue the grounds stated in his note of appeal against sentence (see paragraph 142 above). At a hearing in April 2011, he insisted that he was not seeking to appeal against sentence under the 1995 Act, but was instead seeking to make an application under the Human Rights Act (see paragraph 144 above). The Appeal Court refused the application as incompetent (see paragraphs 145-148 above). His attempt to secure leave to appeal to the Supreme Court was refused on similar grounds (see paragraph 155 above).

214. It is clear from the judgment of the Appeal Court issued on 12 May 2011 that the applicant could have sought remedies for an alleged breach of the reasonable time requirement in the context of an appeal against sentence

(see paragraphs 146 and 148 above). For reasons which he did not explain, the applicant chose not to pursue an appeal against sentence under the 1995 Act. It is, however, to be noted that an appeal against sentence permits the Appeal Court to review the sentence and while it may allow a reduction in sentence, it is also open to that court to increase the sentence where it considers that the sentence imposed was too lenient. However, the Court observes that an application under the Human Rights Act for a reduction in sentence based on an alleged violation of Article 6 did not appear to offer any scope for an increase in the applicant's sentence by the court. The Court further observes that the applicant did not seek to commence judicial review proceedings under the Human Rights Act to seek a declaration and, where appropriate, compensation for the alleged delay in the appeal proceedings. He has failed to explain why he has not done so.

215. However, the Court reiterates that the applicant lodged his case with this Court while the criminal proceedings remained pending. In these circumstances, the Court is not prepared to take into consideration remedies which would not have become available to the applicant until the conclusion of the proceedings when determining whether the applicant exhausted available remedies. In any event the Court observes that in the context of the applicant's appeals against conviction and sentence the Appeal Court considered the extent of the delay in the proceedings and did not accept the applicant's arguments in this regard.

216. It follows that the Government's objection as to non-exhaustion of domestic remedies must be dismissed. The Court further notes that the applicant's complaint under Article 6 of the Convention is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that they are not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

### *1. The parties' submissions*

#### (a) The applicant

217. The applicant complained that he had not had a final determination of the criminal proceedings against him within a reasonable time because of, *inter alia*, the lack of any formal disclosure system in Scotland which led to delays in accessing relevant information; his removal to a prison in Peterhead and the resulting difficulties in communicating with his legal advisers, exacerbated by the opening of his prison correspondence by the prison authorities; the delay in obtaining authorisation from the SLAB for certain expenditure and its refusal to authorise expedited transcripts; and the poor administration of his case by the Appeal Court. He emphasised that it was the duty of the respondent State to organise its judicial system in such

as way as to meet the requirements of Article 6 § 1. He argued that the courts should take a firm approach in cases of unreasonable delay even if that meant quashing a conviction and noted that in *Mellors v. the United Kingdom*, no. 57836/00, 17 July 2003, the Court had found a violation of Article 6 § 1 where the time taken to conclude an appeal against conviction was some three years and two months in which fifteen months were not satisfactorily explained or excused.

218. The applicant further pointed to the additional information sought by the SLAB before authorisation of expenditure as contributing to delay in his case. He concluded that while it was not alleged that the conduct of the SLAB in his case caused particularly great periods of delay, it doubtless had "some impact".

219. As to the cause of delay in the lodging of the note of appeal, the applicant emphasised that the notice of intention to appeal had been lodged timeously. In respect of the various extensions of time sought by the applicant to lodge his note of appeal, the applicant submitted that the reasons that the extensions were required should be considered, which included the need to obtain further transcripts and sanction from the SLAB, as part of the overall delay. In particular, he argued that the requirement to see the Book of Adjournal was not unusual, as it contained the official record of the terms of the conviction as set against the sentence passed, and in a complex appeal such as the applicant's, it was not uncommon to have regard to the Book of Adjournal when drafting grounds of appeal. He also pointed to the need for transcripts in his appeal, which were necessary for greater certainty of what was actually said in court, both in terms of factual testimony and legal submissions.

220. The applicant was critical of the delay between the lodging of the note of appeal and the issuing of the trial judge's report. He further contended that the delay between the notification of the decision of the single sift judge and the granting of leave to appeal on all grounds set out in the applicant's note of appeal was the result of a chronic misunderstanding and misapplication of the law and practice on appeals.

221. Regarding the cause of delay since full leave to appeal against conviction was eventually granted, the applicant contended that the lack of a functional system of disclosure lay at the heart of much of the delay in this respect. Citing *Roche v. the United Kingdom* [GC], no. 32555/96, § 167, ECHR 2005-X, the applicant argued *mutatis mutandis* that it was incumbent on States to put in place an effective and accessible procedure for disclosure. Although the applicant had subsequently withdrawn his petitions for recovery of documents, this was on the understanding that the Crown was prepared to disclose the documents sought. He argued that the material sought to be disclosed was highly relevant to his conviction and grounds of appeal and that any delay resulting from his attempts to obtain the material was attributable to the Crown.

222. The applicant further argued that his move to HM Prison Peterhead protracted proceedings in that it made it more difficult for him to consult with his lawyers and to communicate with them in appropriately confidential conditions. His privileged correspondence had been opened on occasions and thus eroded the applicant's trust in this method of communication.

**(b) The Government**

223. The Government pointed out that between 10 January 2001, when the applicant arrived back in the United Kingdom, and 12 October 2001, when he was convicted following trial, the High Court heard not only the applicant's trial but also his application to restrict reporting, his legal challenges, at first instance and on appeal, against the competency of the indictment and in relation to pre-trial publicity, and four substantive motions made at his instance during trial.

224. In respect of the nine months taken by the applicant to lodge his note of appeal, the Government emphasised that the applicant had regularly sought extensions of time due to pressure of work on his counsel, the volume of documentation in the case, and the need for additional transcripts and expert opinions. Accordingly, they submitted, the delay was wholly attributable to the conduct of the applicant and his solicitors. In particular, the Scottish Court Service was unable to find any record of a request for the Book of Adjournal, it was not usual practice for such a request to be made, and the Book of Adjournal itself contained no more detail than would already have been available to the applicant's own solicitors who attended trial. It was clear from the various requests for extension that the applicant's agents were in possession of the materials normally available to those seeking to appeal, including the trial judge's charge to the jury (see paragraph 29 above).

225. The delay in obtaining the trial judge's report on the note of appeal was, the Government argued, due to the considerable care and effort of the trial judge in the preparation of the report.

226. As to the period of almost three years to challenge the decision of the single sift judge, this was in the Government's contention entirely due to the applicant's misinterpretation of the statute and to the extensions of time sought by him.

227. Finally, the period between November 2005, when leave to appeal on all grounds was granted, and the conclusion of the appeal was due to the applicant's actions in seeking further transcripts and disclosure of additional materials by the authorities. The Government pointed out that the State permitted a procedure for recovery of documents and the applicant chose to insist on using it, but argued that the State was not responsible for his decision to pursue and then abandon this process. The Government noted that the applicant had offered no explanation for the necessity to obtain

further or additional materials to support his appeal. The Government relied on the Crown schedule of disclosure in the applicant's case which they contended showed regular and full disclosure in the applicant's case (see paragraph 124 above).

228. Throughout the whole period, the State was responding to ever more specific and far-reaching requests by the applicant's lawyers for further details about the trial process and for authority to incur additional expenditure on transcripts, travel and further opinions of counsel and experts. Legal aid applications were determined promptly and court documents were provided within a reasonable time. The Government submitted a report detailing every request for legal aid made by the applicant to the SLAB in the context of his appeal against conviction and sentence and his petition to the *nobile officium*. The report identified instances where the SLAB asked the applicant's agents for further information and reasons were provided in each instance. The length of the proceedings was due to the sheer amount of documentation, the fact that applicant's counsel was busy on other cases, the fact that the applicant himself took an unusually close interest in the appeal and the applicant's desire to have external input into the framing of his appeal grounds.

229. The Government contested the suggestion that delay was caused by the applicant's detention at HM Prison Peterhead, referring to the judgments in the applicant's judicial review proceedings (see paragraphs 165 and 167 above) and the number of visits received and telephone calls made by the applicant during his detention in HM Prison Peterhead (see paragraph 170 above). As to the interference with the applicant's correspondence, the Government argued that the instances where it had been accepted in domestic proceedings that the applicant's privileged correspondence had been interfered with did not prevent or dissuade the applicant from communicating regularly with his legal advisers and other relevant authorities, as the applicant's use of the mail demonstrated (see paragraph 170 above).

230. The Government disputed that the Appeal Court or its registry were to blame for any delay. During the appeal proceedings, the Appeal Court was required to have regard to the applicant's desire to use remedies and procedures available to him. His awareness and perception of his legal rights, together with his willingness to have recourse to further legal proceedings to vindicate them, played a part in prolonging the proceedings.

231. The Government accepted that the appeal was of great importance to the applicant. However, they argued that the appeal proceedings were complex and matters were complicated by the applicant's involvement in a variety of other legal proceedings as the applicant was essentially running three strands of court proceedings at once: the substantive appeal against conviction and sentence; petitions for recovery of documents; and devolution minutes. The applicant had chosen to pursue every avenue

available to him to investigate the case and delay the final outcome. In the circumstances the Government argued that the State had acted reasonably and with due expedition. Referring to the various proceedings before the courts between 2001 and 2009 and the regular procedural hearings conducted by the High Court and the Appeal Court, the Government concluded that there had been no single excessive period of delay, nor had there been an unreasonable delay overall. The applicant's conduct, on the other hand, had contributed to the length of the proceedings. In particular, he had shown no desire to bring the matters to a full hearing and had been astute to explain and justify why further time should be afforded to him for submission of documents, preparing of hearing or seeking new information.

*2. The Court's assessment*

232. The Court notes at the outset that the applicant's complaint concerned the proceedings on appeal only.

233. The parties made no submissions as to the exact period to be taken into consideration. The Court considers that the relevant period started on 17 October 2001, when the applicant intimated to the court his intention to lodge an appeal. As to the end of that period, the Court notes that the Supreme Court refused the applicant permission to appeal his conviction on 17 December 2010. The applicant's appeal against sentence was, at that time, outstanding. However, on 7 April 2011 his counsel made it clear to the Appeal Court that the appeal against sentence under the 1995 Act and the associated devolution minute would not be pursued. The Court does not consider that the application purportedly made pursuant to section 7 of the Human Rights Act can be considered part of the criminal appeal proceedings for the purposes of Article 6, in light of the insistence of applicant's counsel that the proceedings were wholly independent of the possibility envisaged under the 1995 Act to appeal against sentence (see paragraphs 142 and 144 above). The Court is accordingly satisfied that the proceedings ended, for the purposes of Article 6, on the day of the hearing on 7 April 2011. The relevant proceedings therefore lasted for ten years, three months and twenty-one days.

234. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, what was at stake for the applicant and the conduct of the applicant of the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II; *Sürmeli v. Germany* [GC], no. 75529/01, § 128, ECHR 2006-VII; and *McFarlane*, cited above, § 140).

**(a) Complexity of the case**

235. As regards the complexity of the case, the Court notes that prior to trial, preliminary matters relating to the competency of the indictment and pre-trial publicity were examined, both at first instance and on appeal (see paragraphs 19-20 above). The trial proceedings lasted almost five weeks and four separate written opinions were handed down by the trial judge (see paragraphs 21-26 above and the Court's decision in *Beggs (No. 2)*, cited above). The applicant's subsequent note of appeal relied on eight grounds of appeal against conviction and one ground of appeal against sentence, covering diverse and complex matters including prejudicial pre-trial publicity, extradition and the rule of specialty, the admission of evidence and the trial judge's directions to the jury, and each ground of appeal contained several subparagraphs (see paragraph 48 above). Shortly before the appeal was heard the applicant lodged a further ground of appeal regarding disclosure (see paragraph 133 above). From 2006 onwards, the applicant sought disclosure of a large volume of documents, both informally and through the use of court procedures, from a variety of bodies including the Crown, the Sheriff Court, the Foreign and Commonwealth Office and the police (see, *inter alia*, paragraphs 81, 85, 94, 98-101, 104, 107, 111-112, 115 and 122 above). This documentation was in addition to the extensive case file already in existence. He also pursued ancillary civil proceedings in respect of his detention at HM Prison Peterhead and the opening of his prison correspondence, as well as raising devolution minutes in the context of his appeal proceedings (see paragraphs 86 and 117 above). The multitude of court proceedings added to the complexity of proceedings which were in substance complicated and vast. The appeal hearing itself took eight days and the detailed judgment handed down was 128 pages long (see paragraphs 134-135 above and the Court's decision in *Beggs (No. 2)*, cited above).

236. The Court accordingly concludes that the proceedings were particularly complex.

**(b) What was at stake for the applicant**

237. The importance of what was at stake for the applicant, namely a conviction for a serious criminal offence and sentence of life imprisonment with a substantial tariff, is not in doubt.

**(c) Conduct of the parties**

238. The complexity of the case, while an important factor in assessing the reasonableness of the length of the appeal proceedings, cannot of itself justify appeal proceedings which lasted for over ten years. Of particular relevance in the present case is therefore the conduct of the parties.

239. The Court notes that it has previously found in the context of civil proceedings that where the parties to the proceedings are required to take

the initiative with regard to the progress of the case this does not dispense the State from complying with its obligation to deal with cases in a reasonable time (see *Price and Lowe*, cited above, § 23; and *Crowther*, cited above, § 29). As the Court has indicated, the manner in which a State provides for mechanisms to comply with this requirement – whether by way of increasing the numbers of judges, or by automatic time-limits and directions, or by some other method – is for the State to decide. However, if a State lets proceedings continue beyond the "reasonable time" prescribed by Article 6 of the Convention without doing anything to advance them, it will be responsible for the resultant delay (see *Price and Lowe*, cited above, § 23). The same principles apply in criminal proceedings, where the courts have a responsibility to take steps of their own motion if necessary in order to advance the proceedings (see *Bullen and Soneji*, cited above, §§ 65-66; and *McFarlane*, cited above, § 152).

240. The Court further considers that in giving due weight to the various aspects of a fair trial guaranteed by Article 6, difficult decisions have to be made by the domestic courts in cases where these aspects appear to be in conflict. In particular, the right to a trial within a reasonable time must be balanced against the need to afford to the defence sufficient time to prepare its case and must not unduly restrict the right of the defence to equality of arms. Thus in assessing whether the length of proceedings was reasonable, particularly in a case where an applicant relies upon the court's responsibility to take steps to advance the proceedings, this Court must have regard to the reasons for the delay and the extent to which delay resulted from an effort to secure other key rights guaranteed by Article 6.

241. In order to assess the extent of any delay caused by the conduct of the applicant or the conduct of the authorities in the appeal proceedings, the Court considers it expedient to examine each stage of the appeal proceedings in turn.

*(i) The lodging of the note of appeal: 17 October 2001 to 2 July 2002*

242. The Court notes at the outset that the applicant did not seek to complain about alleged delay in this part of the proceedings in the context of his incompetent application under the Human Rights Act (see paragraph 151 above). However, he contended before this Court that this period of delay was attributable to the acts of the authorities. The Court emphasises in this regard that following the conviction of the applicant on 12 October 2001, he was required to lodge a note of appeal with the Appeal Court in order to commence the appeal proceedings (see paragraph 171 above). Despite lodging his written intention to lodge an appeal, he failed to produce his note of appeal within the requisite six-week period. Instead, he requested six extensions of time for lodging the note, amounting to a total of around thirty-five weeks' extension, relying on the complexity of the trial and the mass of documentation as well as the need to obtain expert evidence

and additional transcripts and the other commitments of his own counsel. In the event, the note of appeal was finally lodged on 2 July 2002, some nine months after the conclusion of the trial. The Court emphasises that the applicant was responsible for taking the procedural steps necessary to commence his appeal, including lodging his note of appeal.

243. The Court notes that each request for an extension of time was reasoned and four of the six applications made reference to potential prejudice to the applicant if the request for an extension were not granted. In their second request for an extension (see paragraph 35 above) based on the need for further transcripts, the applicant's agents did not explain which transcripts were required and why they were needed. The Court notes that by the time the request was made, the SLAB had already processed, in two days, a request for sanction for further transcripts (see paragraph 34 above). As regards the third request for an extension in February 2002 (see paragraph 37 above), based on the "production of the 'Parole Report'" by the judge, the Court notes that the applicant did not specify when he or his solicitors first saw the note to the Parole Board, but it is clear that the note was available by 4 December 2001 (see paragraph 31 above) and it is therefore unclear why it would have prompted the need for an extension some two months later. The Court further observes that while the fourth request for an extension referred to factual inaccuracies in the trial judge's opinion, the applicant has not clarified to which of Lord Osborne's rulings he was referring, nor did he explain what the inaccuracies were. It appears that when the note of appeal was finally lodged with the court, it made no reference to any factual inaccuracies. The extension of time request also referred to the need for further transcripts. However, the Court notes that this request for an extension was made some five months after the conclusion of the trial. The applicant has failed to explain why further transcripts were required at this late stage and had not been sought earlier. Similar considerations apply to the reference in the extension of time request to the need for SLAB sanction for expert evidence to be obtained on the issue of pre-trial publicity. The Court notes that the question of pre-trial publicity was argued as a plea in bar of trial in October 2001 and the late decision that an expert opinion was required in order to formulate a relevant ground of appeal has not been explained by the applicant. The fifth extension was requested in April 2002 (see paragraph 42 above) in order to obtain authority to transcribe yet further evidence. Again, it is not clear why transcripts were still being sought at this late stage and it is clear that the request for sanction was treated promptly by the SLAB, being received on 19 March 2002 and granted the following day (see paragraph 41 above). Similarly, as regards the sixth request for an extension on 21 May 2002 (see paragraph 45 above) on the basis of the applicant's transfer to HM Prison Peterhead and the difficulty of arranging a meeting, the Court notes that an application for SLAB sanction for the costs of a visit to

Peterhead was only made on 24 May 2002 and was granted three days after receipt of additional information requested (see paragraph 47 above).

244. In his submissions to the Court the applicant claimed that part of the delay was attributable to the respondent State. He referred to delays in obtaining authorisations by the SLAB and transcripts and a copy of the Book of Adjournal from the High Court. The Court notes that the facts outlined by the applicant demonstrate that the SLAB dealt with his requests promptly (see for example paragraphs 34, 41, 47, 59-60, 62, 64-65, 77 and 80 above). He further did not dispute the information provided by the Government as to the SLAB's treatment of his requests (see paragraph 228 above). That information discloses no significant periods of delay in sanctioning requests for additional expenditure. In particular, there can be no criticism of the SLAB's request for further information in order to assess whether there was a need for the additional expenditure to be incurred and paid for through public funds. Requests for further information were made timeously and once the requested information was received, the SLAB dealt promptly with legal aid applications. Accordingly the Court finds that no unreasonable delay on the part of the SLAB during this stage of proceedings has been established on the facts. There is also no evidence of unreasonable delay in obtaining transcripts and the applicant has not pointed to any occasion on which the clerk failed to promptly approve a request for further transcripts. The Court further observes that none of the applicant's requests for extension made reference to any delay in obtaining a copy of the Book of Adjournal. In any event the Court does not consider that any delay in obtaining a copy of the official record of the appeal proceedings should have had a significant effect on the preparation of the applicant's note of appeal, given the technical nature of the information it contained.

245. The applicant further argued that his transfer to HM Prison Peterhead was a cause of delay in the preparation of his note of appeal. However, the Court considers that there is no evidence that the transfer caused any delay at this stage. The applicant was able to and frequently did communicate with his legal team (see paragraph 170 above). In any event, the drafting of the note of appeal was principally a legal exercise and the applicant was represented by experienced senior counsel, as his requests for extensions of time to lodge the note of appeal confirm (see, for example, paragraphs 32 and 37 above). Accordingly, while the applicant could reasonably be expected to play a role in the formulation of the grounds of appeal, the Court is not persuaded that the constant and regular input of the applicant was necessary throughout the period in which the grounds of appeal were being researched and drafted.

246. In conclusion, the Court does not consider that the delay in lodging the note of appeal can be attributed to the authorities. In seeking six extensions of time and making late requests for transcription, the delay

encountered at this stage of the proceedings was wholly attributable to the conduct of the applicant and his legal team.

*(ii) The trial judge's report: 2 July 2002 to 28 November 2002*

247. The Court notes that although the note of appeal was lodged on 2 July 2002, the trial judge's report was not ordered until 16 August 2002, apparently on account of a missing notebook. However, the Court observes in this regard that, had extensions of time not been sought and granted, the note of appeal would have been lodged in late December 2001, two and a half months after the conclusion of the trial. Instead, the applicant finally lodged the note of appeal almost seven months later, at the beginning of the summer holiday period. The Court considers that the delay in locating the notebook and ordering the trial judge's report was therefore not unreasonable in the circumstances.

248. Once the report was ordered, it took a further fifteen weeks for it to be completed and provided to the parties. However, the Court observes that the trial lasted almost five weeks. Prior to the trial proceedings the applicant challenged the competency of the indictment and the fairness of the trial following extensive media coverage, both at first instance and on appeal. Moreover, four written opinions were handed down by the trial judge during the trial proceedings. Further, the note of appeal contained eight grounds of appeal against conviction and one ground of appeal against sentence covering diverse and complex legal issues, and was further divided into a number of subparagraphs. By the time the trial judge received the request for a report, the trial had finished some ten months earlier. It is clear that some time was necessary for him to reacquaint himself with the case. The report which he prepared was twenty-eight pages long and provided a clear picture for the Appeal Court, with particular reference to the factual background, the preliminary matters dealt with by Lord Wheatley and on appeal, the matters of controversy that arose during the trial itself and the trial judge's comments on the grounds of appeal (see paragraph 51 above).

249. The applicant pointed to the other commitments of the trial judge which in his contention delayed the production of the report. The Court notes that while Contracting States are obliged to organise their justice systems in such a way as to avoid unreasonable delay, in the present case the applicant delayed lodging his note of appeal for some thirty-five weeks and in the circumstances it was not surprising nor was it unreasonable at this stage in the proceedings that when the note was eventually lodged, the trial judge was otherwise engaged for some time. In any case, it is evident that as time passed, the urgency of finalising the report became apparent to the authorities and the trial judge, and steps were taken to progress matters more speedily, including the allocation of three writing days in mid-November 2002 (see paragraph 50 above).

250. In all the circumstances, the Court finds that there was no unjustified delay in producing the trial judge's report.

*(iii) The leave proceedings: 29 November 2002 to 25 November 2005*

251. The Court notes that once the note of appeal had been lodged, the decision of the single sift judge was made swiftly, around one month later, and shortly thereafter notified to the applicant. Following that decision, a period of almost three years was spent first pursuing incompetent avenues to obtain leave and, subsequently, seeking leave via the correct route.

(α) The incorrect procedure via the second sift and the *nobile officium*

252. The Court notes, first, that a period of almost two years – between the decision of the single sift judge to grant leave on a restricted number of grounds of appeal, notified on 6 January 2003, and the decision of the High Court in respect of the *nobile officium* petition on 8 December 2004 – was wasted in court proceedings which were, in the event, unnecessary and incompetent. The Court must therefore examine the extent to which the authorities were to blame for this period of delay.

253. The Court observes that the letter of 6 January 2003 advising the applicant of the decision of the single sift judge, informed him that he had 14 days in which to lodge an appeal, but did not refer to the legislative provision under which such an appeal could be made. An examination of section 107 of the 1995 Act reveals that while a 14-day appeal period is mentioned in respect of an appeal to the second sift judges, no such time period is mentioned in section 107(8) dealing with refusal of leave on some grounds. The Government have not provided any evidence to support their contention that the error was of the applicant's own making and have not disputed the applicant's allegation that this procedure was standard at the time and was followed in thousands of appeals following the entry into force of the 1995 Act and until the High Court decision in his case. The Court further observes that the applicant was granted leave to apply to the *nobile officium*, an extraordinary remedy which can only be used where no other remedy is available, which appears to support his contention that he had followed the procedure required by the court at that time. The Court accordingly concludes that the applicant cannot be criticised for the erroneous appeal to the second sift judges and the subsequent *nobile officium* application.

254. However, the Court emphasises that it is a fundamental role of the domestic courts to interpret and apply national law. It is not unusual for the courts' examination of statutory provisions to result in the development of the law either in substance or as regards procedural requirements. While it is regrettable in the applicant's case that the erroneous application to the second sift and the resulting unnecessary petition to the *nobile officium* resulted in a delay of twenty-three months, the State cannot be held

responsible for the incorrect procedure followed. Notwithstanding this conclusion, it remains to be established whether the authorities complied with their obligation to conduct the proceedings within a reasonable time.

255. In this regard, the Court notes that from 17 January 2003 to 21 July 2003, the applicant and his advisers were continuing to develop their arguments in support of their application for leave to appeal against the decision of the single sift judge, and sought a total of ten weeks' extension of time for that purpose (see paragraphs 53-56 above). The decision of the High Court on the second sift on 20 August 2003 followed merely one month after receipt of the further submissions of the applicant (see paragraphs 56-57 above) yet the applicant subsequently waited until 14 June 2004, some ten months later, to lodge his application to the *nobile officium* (see paragraph 67 above), and this despite the fact that as early as October 2003 he had applied to the SLAB for legal aid and that legal aid was granted, following receipt of further information requested, on 29 December 2003 (see paragraphs 59-65 above). The applicant has argued that his detention at HM Prison Peterhead caused delay during this period but the Court disagrees. The grounds of appeal had already been elaborated over a nine-month period for the drafting of the note of appeal. Further written submissions had already been made to the second sift judges. The Court sees no reason to doubt that the substance of the grounds of appeal had been well rehearsed between the applicant and his lawyers long before the preparation of the *nobile officium* application. The actual drafting of the application was principally a task for the applicant's lawyers and while consultation was undoubtedly necessary from time to time, such contact as was required was not impeded by the applicant's detention at Peterhead. In any event, the Court notes that the applicant was transferred back to HM Prison Edinburgh for one month to facilitate the preparation of the application (see paragraph 66 above).

256. The Court further observes that once the petition had been lodged, a preliminary hearing took place less than one month later and short deadlines were fixed for the lodging of notes of argument (see paragraph 68 above). The applicant's full note of argument was lodged on 4 August 2004 and a date for the hearing was fixed at the convenience of the applicant's counsel (see paragraph 69 above). In the event the petition was argued and granted on 8 December 2004 (see paragraph 70 above), four months after the full note of argument had been lodged. In the circumstances the Court does not consider that the authorities contributed to any unreasonable delay at this stage in the proceedings or failed to ensure the timeous progress of the applicant's case.

(β) The correct procedure via section 107(8) of the 1995 Act

257. Following the High Court's judgment of 8 December 2004 that the correct route of appeal was under section 107(8), judgment in the

applicant's section 107(8) application was not handed down until 25 November 2005, almost a year later.

258. However, the Court notes at the outset that despite the judgment of 8 December 2004, the applicant failed to lodge his section 107(8) application until 26 April 2005, four and a half months later, engaging in the interim in a process of obtaining yet further transcripts (see paragraphs 70-72 above). The authorities cannot be faulted for this delay as it was the responsibility of the applicant to lodge an application under section 107(8) if he wished to obtain leave to appeal on all grounds.

259. Nonetheless, once the application had been lodged, it was the duty of the court to progress it with expedition, having regard to the overall length of time which had already passed in the appeal proceedings and in particular the time spent in the unnecessary application to the second sift and the *nobile officium*. However, from the evidence available to the Court, it would appear that the domestic courts failed to take any additional steps to deal with the section 107(8) application speedily and the applicant's agents were required to make persistent inquiries with the court as to progress over a period of some five months (see paragraph 73 above). The Government have indicated that this period of inactivity was due to the unavailability of the applicant's counsel and the need to find judges who had not previously sat in any of the applicant's previous hearings, an explanation which the applicant did not dispute. The Court considers that, while there may have been some delay due to the applicant's counsel's commitments, and while in such complex and multifaceted proceedings scheduling hearings becomes more difficult due to the need to ensure an independent and impartial bench, the Government have not demonstrated that the authorities took all steps possible to minimise delay. In this regard the Court refers to the four letters sent by the applicant's advisers in May, June, July and September 2005. Further, the Court notes that no explanation has been given by the Government for the one-month delay in handing down the judgment and have not sought to argue that the matters to be decided were particularly complex such as to justify the delay (see paragraphs 74-75 above).

260. In the circumstances, the Court finds that there was unreasonable delay by the judicial authorities as a result of their apparent inactivity during the seven-month period taken for the examination of the applicant's section 107(8) application.

*(iv) The substantive appeal against conviction: 25 November 2005 to 9 March 2010*

261. Once leave to appeal on all grounds had been granted, it took four years, three months and two weeks for judgment to be handed down in the appeal against conviction.

262. The Court notes that when granting leave to appeal on all grounds following the section 107(8) application on 25 November 2005, the Appeal Court ordered the applicant to lodge reformulated grounds of appeal within four weeks. However, the applicant failed to lodge his reformulated grounds until 16 January 2006, some seven weeks later. Once the grounds were lodged, it is not clear what steps, if any, were then taken by the Appeal Court to progress the substantive appeal in the ensuing period. It would appear that the first procedural hearing in the substantive appeal took place on 11 July 2006, almost six months later, when the reformulated note of appeal was admitted and a deadline was set for answers to be lodged (see paragraph 84 above). No explanation has been provided by the Government for this period of inactivity on the part of the Appeal Court. Procedural hearings in the appeal were subsequently held on a regular basis until May 2008 (see paragraphs 88, 90, 93, 95, 99, 102, 106, 109, 113, 119-121, 123 and 125-126 above) but little progress was made and there is no evidence that any steps were taken by the court to urge the parties to proceed to a full hearing on the appeal.

263. The Court further observes that in December 2007, a procedural hearing was adjourned to allow the parties to consider the terms of a judgment concerning the issue of disclosure in another Appeal Court case (see paragraph 119 above). Some progress was subsequently made in the applicant's case, including the holding of a full hearing on the petition for recovery of documents (see paragraph 125 above). However, in May 2008, the proceedings were again continued to await the judgment of the Privy Council in the same case (see paragraph 126 above). The judgment was handed down on 16 October 2008, five months later. The Court recalls in this regard that although Article 6 requires proceedings to be conducted expeditiously, it also lays down the more general principle of the proper administration of justice. The continuation of hearings in order to await the judgment of senior courts in a case on disclosure was, in all the circumstances of the case and in particular in light of the applicant's numerous challenges to the disclosure made by the Crown, compatible with the fair balance that has to be struck between the various aspects of the right to a fair trial (see *Pafitis and Others v. Greece*, 26 February 1998, § 97, *Reports of Judgments and Decisions* 1998-I). However, following the handing down of the judgment of the Privy Council in *McDonald and others* on 16 October 2008, it appears that no action was taken to bring the applicant's case back before the court until 22 January 2009, when the prosecution wrote to the clerk seeking to make progress (see paragraph 130 above). For reasons which have not been explained, a procedural hearing was not held until 6 May 2009, at which time it was agreed to fix a date for the appeal hearing, at the applicant's request not before autumn 2009 (see paragraph 131 above).

264. Following the lodging of his reformulated note of appeal in January 2006, the applicant for his part pursued further transcripts and recovery of documents (see, for example, paragraphs 77, 81-82, 85, 94, 101, 104, 107 and 127 above). His decision to request disclosure of additional documents for the first time in May 2009 (see paragraph 81 above) has not been explained by the applicant; the Court observes that no issue had been taken as to allegedly inadequate disclosure during the applicant's trial itself. The Court recalls that applicants are entitled to make use of all relevant domestic procedural steps but emphasises that they should do so with diligence and must bear the consequences when such procedural applications result in delay (see *Jordan v. the United Kingdom (no. 2)*, no. 49771/99, § 44 10 December 2002; *Boczoń v. Poland*, no. 66079/01, § 51, 30 January 2007; and *McFarlane*, cited above, § 148). In the applicant's case three petitions for recovery of documents were lodged (see paragraphs 85, 111 and 122 above) together with associated devolution minutes (see paragraphs 86, 117 and 122 above). Various amendments to the petitions were made (see paragraphs 87 and 116 above). One petition for recovery was lodged some three weeks later than the deadline permitted (see paragraph 111 above). Despite being ordered to do so prior to the hearing on 11-14 March 2008, the applicant failed to lodge an inventory detailing the extent of disclosure already made and the issues in relation to material not disclosed (see paragraphs 123 and 125 above). In the event, none of the petitions resulted in an order for recovery being made against the Crown and although some further material was disclosed to the applicant between July 2006 and May 2009, the Appeal Court in its judgment of 9 March 2010 indicated that the disclosure exercise which the applicant and his advisers had embarked upon had had little significant result but had substantially delayed the hearing of the appeal (see paragraph 136 above). This was a point reiterated in its later judgment of 12 March 2011, where the Appeal Court accepted that the petitions for recovery might have been, to some extent, instrumental in obtaining disclosure of information, but emphasised that what was material was whether the exercise was justified (see paragraph 152 above). Only once the petitions for recovery of documents had been withdrawn, in May 2009, could the court move to fix a hearing.

265. The Court notes that the applicant blamed the allegedly inadequate system of disclosure for the delay. However, the Court does not consider that there is any evidence before it that the system of disclosure was inadequate. It appears that a great deal of disclosure took place, and it is noteworthy that the only ground of appeal linked to non-disclosure related to a statement by I.C., which the Court found in its decision in *Beggs (No. 2)* did not constitute material evidence in the case. The Appeal Court held regular procedural hearings in the applicant's case in order to assess progress on disclosure, and in affording such extensive opportunities to the

applicant to avail himself of the procedural possibilities for further disclosure safeguarded the applicant's right to adequate time and facilities in the preparation of his case as well as his right to have access to all material evidence for or against him.

266. However, the Court cannot ignore the fact that this state of affairs continued over a period of almost three years, delaying the hearing of the substantive appeal, and that there were nonetheless periods of inactivity on the part of the judicial authorities. It may be that there was very little that the Appeal Court could do in the face of the applicant's persistent attempts to obtain yet further disclosure and his refusal to move to a substantive hearing, and that any efforts by the court to expedite matters would have been frustrated by the applicant's conduct. However, the fact remains that Article 6 § 1 required the domestic court to adopt an active role in steering the appeal to a speedy conclusion, and in particular in the present case, to press for the resolution of the matters concerning disclosure and the fixing of a date for the appeal hearing, particularly in the period following the handing down of the Privy Council decision in *McDonald and Others* in October 2008 (see paragraph 128 above). There is no evidence before the Court that the domestic courts that the court took matters in hand in this way (see *Richard Anderson*, cited above, § 28).

267. There was accordingly also unjustified delay on the part of the authorities at this stage in the appeal proceedings.

*(v) Subsequent proceedings for leave to appeal against conviction*

268. Following the publication of the Appeal Court's judgment on 9 March 2010, the applicant applied for permission to appeal to the Supreme Court in respect of the human rights issues arising. Leave was refused by the Appeal Court promptly, on 27 May 2010 (see paragraph 137 above). The applicant subsequently applied to the Supreme Court for leave to appeal and an extension of time. He lodged his application on or around 21 October 2010 (see paragraph 140 above). This was refused shortly afterwards, on 16 December 2010 (see paragraph 141 above).

269. The Court is accordingly satisfied that there was no undue delay during this period in the proceedings.

*(vi) The appeal against sentence*

270. After handing down its judgment in the appeal against conviction and refusing leave to appeal, the Appeal Court fixed the hearing in the applicant's appeal against sentence to take place on 4 August 2010, just over two months later but the applicant requested that the hearing be adjourned to allow him to request leave to appeal his conviction to the Supreme Court (see paragraph 139 above). Following the refusal of leave by the Supreme Court on 16 December 2010, a procedural hearing in the applicant's appeal against sentence was fixed for 22 February 2011, just

under two months later (see paragraph 142 above). At that hearing, the applicant's counsel advised the court that the application would proceed in a different form to that originally intimated. Time was allowed for the lodging of written submissions and a hearing date was fixed for 1 April 2011, around six weeks later. Because of pressure of business, the hearing did not take place on that day, but it is clear that steps were taken by the court, in recognition of the time which had elapsed in the case, to ensure a swift hearing. In particular, other engagements of counsel were accommodated to permit a hearing to take place the following week, and the court sat late to complete the hearing (see paragraph 154 above).

271. The Court does not consider that an undue delay took place during this phase of the proceedings. Indeed, on the contrary, recognising the delay which had occurred, special efforts were made by both the court and counsel to ensure a speedy determination of the outstanding issues in the case.

#### (d) Conclusion

272. While it is regrettable that the applicant's appeal proceedings took over ten years to be concluded, it is clear that a substantial proportion of the delay is attributable to the applicant's own conduct. Further delays were incurred through no fault of either party as a result of clarifications of the law as regards the correct procedure for appealing a decision of the single sift judge. It is clear from the judgments of the domestic courts, particularly in the later stages of the proceedings, that they were alive to the issue of delay and that they were prepared to take steps to expedite the proceedings.

273. However, given the periods of inactivity identified above and the failure of the judicial authorities during these periods to take steps to progress matters of their own motion, the Court concludes that there has been a violation of Article 6 § 1 in the present case.

## III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

### A. Admissibility

#### *1. The parties' submissions*

#### (a) The applicant

274. The applicant complained that his application for interim liberty was not an effective remedy, noting that the respondent State had been obliged to seek his extradition from the Netherlands and that the application for interim release was made at the appeal stage, when he had already been convicted and sentenced to life imprisonment with a tariff of twenty years. He pointed out that the court did not recognise the delay in his case as being

unreasonable or in violation of Article 6 § 1 of the Convention and contended that only by abandoning all attempts to secure a fair trial could he have achieved an early conclusion to the case.

**(b) The Government**

275. The Government pointed out that the applicant's application for interim liberty was difficult to justify given the gravity of the crime, the applicant's previous record of violence and the need to protect the public. They contended that an application for interim liberation could constitute an effective remedy, in combination with other measures, and the fact that it was refused by the court in the present case did not render it ineffective.

*2. The Court's assessment*

276. The Court reiterates that, given the lack of clarity concerning the exact nature of the applicant's complaint under this head, its consideration will be limited to an examination of whether Article 13 required interim release in the applicant's case (see paragraphs 206-207 above). The Court recalls that in cases concerning length of detention prior to conviction, Article 5 § 3 imposes stringent requirements on States, particularly with the passage of time, as regards interim liberation. However, the Court doubts whether the availability of interim release in post-conviction cases, where detention is justified under Article 5 § 1 (a), is required under Article 13 in order to establish that there exist effective remedies for a complaint regarding length of proceedings.

277. In any case, the Court notes that the applicant was able to and did make an application for interim release. The fact that due to the gravity of the crime, his history of violence and the risk to the public, the court declined to grant interim release in the applicant's case (see paragraph 97 above) does not render the procedure ineffective. There was no suggestion that it was not within the power of the court to grant interim release in circumstances where this was justified.

278. In the circumstances, the Court finds the applicant's complaint under Article 13 to be manifestly ill-founded and therefore rejects it pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

## IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

279. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

280. The applicant claimed 16,400 pounds sterling (GBP) in respect of non-pecuniary damage.

281. The Government argued that the claim was excessive and inconsistent with the Court's jurisprudence. They further called on the Court to take into account the periods where delay was attributable to the applicant.

282. The Court considers that the applicant suffered some frustration resulting from delays attributable to the authorities, which cannot sufficiently be compensated by the finding of a violation (see, for example, *Mitchell and Holloway v. the United Kingdom*, cited above, § 69). Taking into account the contributory delay imputable to the applicant and ruling on an equitable basis, the Court awards him EUR 2,000 in respect of non-pecuniary damage.

### B. Costs and expenses

283. The applicant also claimed GBP 10,332.76 for the costs and expenses incurred before the Court.

284. The Government contested the claim. They noted in particular that it included over sixty hours' work by counsel, in addition to the expenses of the applicant's solicitors. They submitted that a total of no more than GBP 5,000 was appropriate.

285. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,000 for the proceedings before the Court.

### C. Default interest

286. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 6 § 1 admissible and by a majority the remainder of the application inadmissible;

2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage and EUR 4,000 (four thousand euros) in respect of costs and expenses, inclusive of any tax that may be chargeable, to be converted into pounds sterling at the rate applicable on the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Fatoş Aracı | Lech Garlicki |
| Deputy Registrar | President |