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

THIRD SECTION

CASE OF AVERILL v. THE UNITED KINGDOM

(Application no. 36408/97)

JUDGMENT

STRASBOURG

6 June 2000

FINAL

06/09/2000

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of Averill v. the United Kingdom,

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

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mrs H.S. GREVE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 6 July 1999 and 16 May 2000,

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

PROCEDURE

1. The case originated in an application (no. 36408/97) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish citizen, Mr Liam Averill ("the applicant"), on 24 March 1997.

2. The applicant was represented by Mr W.A. McNally, a solicitor practising in Magherafelt, Northern Ireland. The Government of the United Kingdom ("the Government") were represented by their Agent, Mr C. Whomersley, of the Foreign and Commonwealth Office, London.

3. The applicant alleged, *inter alia*, that he had been denied a fair hearing on account of the facts that the trial judge drew an adverse inference from his silence when questioned by the police and that he had been refused access to his solicitor during the first twenty-four hours of his interrogation in custody.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).

6. By a decision of 6 July 1999, the Chamber declared the application admissible[1].

7. The applicant and the Government each filed observations on the merits. The Chamber having decided, after consulting the parties, that no

1. *Note by the Registry*. The Court's decision is obtainable from the Registry.

hearing on the merits was required (Rule 59 § 2 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

9. On 24 April 1994, at about 6.15 p.m., four men wearing balaclava masks, some of whom were armed with firearms, entered the bungalow of the Murphy family and, seizing the keys to their white Vauxhall Cavalier car, drove off in it. Ten minutes later, at 6.25 p.m., the white Vauxhall Cavalier stopped in front of two cars parked side by side on Main Street, Garvagh, and began shooting at the occupants. The drivers of both vehicles were killed, and a third person, in the passenger seat of one vehicle, was wounded.

10. At about 6.55 p.m. the police found a white Vauxhall Cavalier which had been set on fire. They discovered in the car two black and a dark blue balaclava masks, a pair of black gloves and four cartridge cases.

11. At 7.20 p.m., at an army checkpoint on Halfgayne Road, some eight miles from the spot where the abandoned vehicle was found, a red Toyota car was stopped. The car contained three men: Martin and Patrick Kelly and the applicant. About 7.45 p.m. a number of police officers arrived under the command of Sergeant Ford. On being questioned by Sergeant Ford, the applicant stated that he had been helping the Kelly brothers with sheep since around 1 p.m., that he had washed at the Kellys' and had something for tea there. He stated that he was going for a drink in town. The applicant was arrested under section 14(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1989 and taken to Gough Barracks, Armagh. Access to a solicitor was deferred pursuant to section 45 of the Northern Ireland (Emergency Provisions) Act 1991 (“the 1991 Act”) for a period of twenty-four hours. Thereafter, and up until he was charged, the applicant was seen daily by a solicitor.

12. Shortly after arrival at Gough Barracks, head hair combings were taken from the applicant and sent for forensic examination along with the clothes he was wearing at the time of his arrest.

13. The applicant was interviewed by police officers who cautioned him before each interview in terms of Article 3 of the Criminal Evidence (Northern Ireland) Order 1988 (“the 1988 Order”). The applicant was told that:

> "You do not have to say anything unless you wish to do so but I must warn you that if you fail to mention any fact which you rely on in your defence in court, your failure to take this opportunity to mention it may be treated in court as supporting any relevant evidence against you. If you wish to say anything, what you say may be given in evidence."

14. The applicant was asked if he understood the caution and made no reply. He made no reply to questions about his movements on 24 April 1994 and about fibres from the balaclavas and gloves found on his hair and clothing. He maintained silence throughout the interview and throughout thirty-six further interviews, which took place between 25 and 30 April 1994. The applicant was denied access to legal advice during police interviews.

15. On 28 April 1994, during interview no. 20, a police constable cautioned the applicant pursuant to Article 6 of the 1988 Order, requesting him to account for his presence at Halfgayne Road about the time the murder of the two men in Garvagh was committed. The applicant was warned that if he failed or refused to do so, a court, judge or jury might draw such inference from his failure or refusal as appeared proper. The applicant made no response and refused to sign the written request. During the same interview, the applicant was cautioned, pursuant to Article 5 of the 1988 Order, in respect of adverse inferences which might be drawn from any failure to account for a number of fibres found on his person by means of a hair combing which linked him to the commission of an offence. During interview no. 36 on 30 April 1994, a caution was administered under Article 5 in respect of fibres found on the applicant's clothes which were forensically linked to material found in a Vauxhall Cavalier allegedly used by the culprits. The applicant made no reply and refused to sign the written request.

16. On 1 May 1994 the applicant was charged, *inter alia*, with the murder of M.A.S., and J.A.W.Mc., the attempted murder of P.J.S. and with possession of two loaded AKM assault rifles with intent. The applicant pleaded not guilty and was tried before Lord Chief Justice Hutton sitting without a jury.

17. The prosecution case linking the applicant to the hijacking of the car and the shooting incident was based on forensic evidence. The link was between a balaclava and the gloves found in the car and the applicant. According to the prosecution, the fibres found in the hair combings taken from the applicant and found on his clothing matched exactly the fibres of the two black balaclavas and the fibres of the pair of gloves found in the car.

18. The forensic expert witness called by the prosecution testified that:

> "Considering the presence of fibres to match two separate fibre sources from the car on [the applicant] and his clothing would strongly support the proposition that there had been direct and intimate contact with the black masks and gloves from the car."

19. At his trial the applicant gave evidence to the effect that at the relevant time he had been working with sheep at the Kellys' farm on the afternoon of 24 April and had then stayed at the farm for a meal until about 7 p.m. He further stated that on the previous day, 23 April, when he was at work, he had worn black gloves and a rolled up balaclava as protective clothing.

20. The applicant called several witnesses to support his alibi, including the Kelly brothers.

21. On 20 December 1995 the applicant was convicted of two counts of murder, one count of attempted murder, one count of possession of two rifles and a handgun together with a quantity of ammunition with intent, contrary to Article 17 of the Firearms (Northern Ireland) Order 1981, one count of assaulting and falsely imprisoning Michael Murphy, and one count of hijacking a Vauxhall Cavalier motor car, contrary to section 2(1)(a) of the Criminal Jurisdiction Act 1975.

22. In his judgment the judge found the applicant guilty, having regard to circumstantial evidence of a forensic nature linking the applicant with the Vauxhall car allegedly used by the gunmen and the applicant's presence in the vicinity of the shooting (some fourteen miles from its location). The forensic evidence consisted of the following:

(a) twelve fibres were found in the head hair of the applicant matching exactly the fibres from one of the balaclava masks and fourteen fibres were found in the head hair of the applicant matching exactly the fibres from the pair of black gloves;

(b) one fibre matching exactly the fibres from one of the black balaclava masks was found on the jacket of the applicant and twelve fibres matching exactly the fibres from the pair of black gloves were found on the jacket of the applicant;

(c) four fibres matching the fibres from the pair of black gloves were found on the outside of the jeans of the applicant and large numbers of fibres matching exactly the fibres of the pair of black gloves were found in both side pockets of the jeans of the applicant;

(d) one fibre exactly matching the fibres of one of the black balaclava masks was found in each of the side pockets of the jeans of the applicant.

23. The judge accepted the evidence of the prosecution forensic expert witness that the presence of fibres to match the two separate fibre sources from the car, namely the black balaclava masks and the pair of black gloves on the head hair and on and in the clothing of the applicant strongly supported the proposition that there had been direct and intimate contact between him and one or both of those black balaclava masks and the pair of black gloves.

24. Moreover, the judge relied on the “very strong adverse inference” which he drew against the applicant under Articles 3 and 5 of the 1988 Order. The judge stated:

"Yet the [applicant] made no reply to the questions repeatedly put to him throughout the interviews and gave no information whatsoever about his movements on 24 April and no account of wearing a balaclava and gloves at his work on 23 April, but gave detailed evidence in respect of these matters for the first time at his trial. I therefore draw a very strong adverse inference against him under Article 3 of the 1988 Order. ... it would have been a simple and easy thing for him to have told these matters to the interviewing police officers.

Mr Harvey [counsel for the applicant] submitted that the court should not draw an adverse inference under Article 3 by reason of the fact that when the [applicant] was stopped at the vehicle check-point on the evening of 24 April he told Sergeant Ford about 7.45 p.m., when asked how he came to be in the company of the other two men, that he had been giving them a hand with sheep all afternoon since around 1 p.m., and that he later told Sergeant Ford about 8.20 p.m., that he had been at the Kellys' all afternoon working with sheep since about 1 p.m., that he had a fry at the Kellys', and that he had got washed in that house. Mr Harvey submitted that the purpose of Article 3 was to stop an accused at his trial putting forward an ambush defence. As the [applicant] had told the police who stopped him at the vehicle check-point that he had been at the Kellys' working with sheep all afternoon, the purpose of Article 3 had been achieved, and that it would therefore be wrong to draw an adverse inference against the [applicant] under the Article because he refused in interviews to repeat to the police his defence or to answer questions about it. I reject that submission. ... Notwithstanding that the [applicant] told Sergeant Ford in brief terms that he had been working at the Kellys' farm since 1 p.m., common sense clearly indicates that if the defence which he advanced in the witness box was true, he would have told the police of it after he was cautioned in Gough Barracks under Article 3 and was questioned at length about his movements on 24 April and was asked if he had an explanation for the fibres found on his hair and clothing. In addition I draw a very strong adverse inference against the [applicant] under Article 5 of the 1988 Order. The [applicant] failed to account for these fibres after each caution was read ... although he gave an explanation at the trial that he had been wearing gloves and a balaclava at his work on 23 April, which explanation was clearly designed and intended to show that the fibres found on his hair and on his clothing came from gloves and a balaclava which he was wearing ... on 23 April. This was an explanation which he could easily have given to the constable who served the Article 5 caution on him, and by reason of this failure to do so I draw a very strong adverse inference against him that the evidence which he gave at the trial about wearing a balaclava and gloves at work on 23 April was false. Mr Harvey submitted that I should not draw that inference because the cautions lacked clarity and detail ... and ... did not give the [applicant] sufficient information to enable him to understand that he was being requested to account for the presence of fibres from a pair of gloves and from a balaclava ... on his hair and clothing. ... I do not accept that submission. It follows from the very strong inferences which I have drawn against the [applicant] under Article 3 and Article 5 that I reject the evidence of the witnesses who sought to give the [applicant] an alibi by stating in the witness box that he was in the Kellys' farm at Halfgayne Road during the period when the gunmen were going to the Murphys' bungalow, imprisoning Mr Murphy and hijacking his car, murdering M.A.S. and J.A.W.Mc. ... For the same reason I reject the evidence of Sean McIldowney that the accused wore a balaclava and gloves at work on 23 April."

25. The judge continued with reference to Article 5 of the 1988 Order:

"Having regard to the matters clearly put and explained to the [applicant] ... I think it is clear that the accused knew perfectly well that the Article 5 cautions referred to the fibres from the balaclava masks and pair of gloves found in the gunmen's cars, but

> he failed to give the explanation which he later put forward at trial and this failure gives rise to the very strong adverse inference which I draw against him."

26. The judge did not draw any inference under Article 6 of the 1988 Order.

27. The judge also held:

> "It follows from the very strong adverse inferences which I have drawn against the [applicant] under Article 3 and Article 5 that I reject the evidence of the witnesses who sought to give the [applicant] an alibi by stating in the witness box that he was in the Kellys' farm ... during the period when the gunmen were ... murdering ... and escaping from the place where the car was set on fire. The [applicant] had ample time to get to the Kellys' farm before 7 p.m. from the place where the car had been set on fire. ...
>
> In addition, and apart from the very strong adverse inferences which I draw under Articles 3 and 5, having seen them in the witness box I regarded the [applicant] and Patrick Kelly as dishonest and unreliable witnesses whose evidence I did not believe."

28. The applicant appealed on the grounds, *inter alia*, that the trial judge had erred in drawing an adverse inference under Article 3 when the accused was questioned about his movements on 24 April 1994 since he had already given an account of his movements to Sergeant Ford when he was stopped on that evening; that the inference drawn from his failure to give an explanation of the forensic findings concerning the fibres found on him by mentioning to the police that he had been wearing a balaclava and gloves on the day before the killing should not have been one of significant weight; that the police did not give him sufficient information to enable him to understand the nature of the forensic evidence for which he was requested to account; and, finally, that it was not open to the trial judge to reject the applicant's explanation that he had kept silent because it was simply his policy not to speak to the police.

29. In its judgment of 3 January 1997 the Court of Appeal (Lord Justice MacDermott) of Northern Ireland agreed with the trial judge in the following terms:

> "... [T]he drawing of an inference under Article 3 is not automatic. ... Before an inference may be drawn against an accused, the tribunal of fact must be of the view that it is proper to do so. This will allow for consideration of the adequacy of a single statement of a relevant defence and whether any explanation for a failure to repeat it is acceptable. Moreover, the court which invokes Article 3 can weigh the strength of the inference to be drawn against the accused."

Lord Justice MacDermott continued:

> "As we have already held, the mere recital on a single occasion of the gist of a defence on which an accused subsequently relies on trial will not usually prevent the invocation of Article 3. Whether such a statement will prompt the court not to draw an inference against the accused will depend on an evaluation by the tribunal of fact of all the relevant circumstances including the accused's explanation for his failure to repeat the statement of his defence on interview. ... Where ... allegations are put to a suspect in interview which, if unchallenged, are clearly indicative of his guilt and where he

fails, until trial, to put forward his answers to these or an explanation of them consistent with his innocence, this will justify the drawing of a strong inference against him. In this case the significance of the forensic evidence could scarcely be more obvious and important. It called for the production of the appellant's explanation at the earliest moment. The failure to produce that explanation on a point of such obvious and immediate importance justified the drawing of a strong adverse inference against the appellant. When that failure went unexplained (save by reference to a policy which was neither justified nor elaborated upon by the [applicant]) the drawing of a strong adverse inference against him was virtually inevitable. Mr Harvey [counsel for the applicant] submitted that the manner in which the forensic evidence was described by the [police] must have confused the appellant as to the nature of the forensic evidence which existed against him. Like the learned trial judge we do not accept this proposition. Mr Harvey submitted that it was not open to the learned trial judge to conclude that such a policy [by the applicant not to speak to the police] did not exist. We reject this argument. ... A person may have and apply such a policy but he must realise that the tribunal of fact may then draw an adverse inference from his silence. This [applicant] was seen daily by his solicitor after an initial 24-hour deferral and if he chose to remain silent it was his free choice. This does not avoid the possibility of Articles 3 or 5 being used to his disadvantage, however. To accept that a suspect may successfully rely on a 'policy' of silence to avoid the adverse effect of the Articles would 'drive a coach and four through the statute'."

30. In conclusion, Lord Justice MacDermott stated:

"We are entirely satisfied that the learned trial judge approached his task in a careful and critical manner, he adverted to all the evidence and he was satisfied of the guilt of the [applicant] having not only heard the evidence but observed the witnesses. In our judgment these convictions were in no way unsafe or unsatisfactory."

31. The Court of Appeal dismissed the applicant's appeal.

32. The applicant escaped from prison shortly before Christmas 1997. He remains unlawfully at large.

II. RELEVANT DOMESTIC LAW

A. Provisions governing inferences which may be drawn from an accused's silence

33. The relevant parts of Article 3 of the Criminal Evidence (Northern Ireland) Order 1988 provide:

"*Circumstances in which inferences may be drawn from the accused's failure to mention particular facts when questioned, charged, etc.*

(1) Where, in any proceedings against a person for an offence, evidence is given that the accused -

(a) at any time before he was charged with the offence, on being questioned by a constable trying to discover whether or by whom the offence has been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, paragraph (2) applies.

(2) Where this paragraph applies:

...

(c) the court ... in determining whether the accused is guilty of the offence charged,

may -

(i) draw such inferences from the failure as appear proper;

(ii) on the basis of such inferences treat the failure as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention."

34. The relevant parts of Article 5 of the Criminal Evidence (Northern Ireland) Order 1988 provide:

"(1) Where -

(a) a person is arrested by a constable, and there is -

(i) on his person; or

(ii) in or on his clothing or footwear; or

(iii) otherwise in his possession; or

(iv) in any place in which he is at the time of his arrest,

any object, substance or mark, or there is any mark on any such object; and

(b) the constable reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable; and

(c) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, paragraph (2) applies.

(2) Where this paragraph applies -

(a) the court, in determining whether to commit the accused for trial or whether there is a case to answer; and

(b) the court or jury, in determining whether the accused is guilty of the offence charged,

may -

(i) draw such inferences from the failure or refusal as appear proper;

(ii) on the basis of such inferences, treat the failure or refusal as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure or refusal is material.

...

(4) Paragraphs 1 and 2 do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in paragraph (1)(c) what the effect of this Article would be if he failed or refused to comply with the request."

B. Provisions governing access to a solicitor

35. The relevant parts of section 45 of the Northern Ireland (Emergency Provisions) Act 1991 provide:

"(1) A person who is detained under the terrorism provisions and is being held in police custody shall be entitled, if he so requests, to consult a solicitor privately.

(2) A person shall be informed of the right conferred on him by subsection (1) above as soon as practicable after he has become a person to whom that subsection applies.

...

(4) If a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable except to the extent that any delay is permitted by this section.

(5) Any delay in complying with a request under subsection (1) above is only permitted if -

(a) it is authorised by an officer of at least the rank of superintendent; and

(b) it does not extend beyond the relevant time.

(6) In subsection (5) above "the relevant time" means

(a) where the request is the first request made by the detained person under subsection (1) above, the end of the period referred to in section 44(6) above; or

(b) where the request follows an earlier request made by the detained person under that subsection in pursuance of which he has consulted a solicitor, the end of the period of forty-eight hours beginning with the time when that consultation began.

...

(8) An officer may only authorise a delay in complying with a request under subsection (1) above where he has reasonable grounds for believing that the exercise of the right conferred by that subsection at the time when the detained person desires to exercise it:

(a) will lead to interference with or harm to evidence connected with a scheduled offence or interference with or physical injury to any person; or

(b) will lead to the alerting of any person suspected of having committed such an offence but not yet arrested for it; or

(c) will hinder the recovery of any property obtained as a result of such an offence; or

(d) will lead to interference with the gathering of information about the commission, preparation or instigation of acts or terrorism; or

(e) by alerting any person, will make it more difficult -

(i) to prevent an act of terrorism; or

(ii) to secure the apprehension, prosecution or conviction of any person in connection with the commission, preparation or instigation of an act of terrorism."

36. There is no right at common law to have a solicitor present during a police interview. Such a right has been conferred by paragraph 6.8 of Code C, made pursuant to section 65 of the Police and Criminal Evidence Act 1989 ("PACE"), on those who are not arrested or detained under section 14(1) of the Prevention of Terrorism (Temporary Provisions) Act 1989. However, by section 66(12) of PACE it was expressly provided that the Code affording that right does not apply to those arrested and detained for terrorist offences. In particular, having regard to the legislative context, the House of Lords has recently declined to hold that such persons have any common-law right to have a solicitor present during interview (*R. v. Chief Constable of the RUC, ex parte Begley* [1997] 1 Weekly Law Reports 1475).

37. Following the judgment of the European Court of Human Rights in the case of John Murray v. the United Kingdom (judgment of 8 February 1996, *Reports of Judgments and Decisions* 1996-I), the Home Office issued Circular 53/98 to inform chief officers of the judgment's implications and the consequent new arrangements for use by police officers and prosecutors of evidence obtained from a suspect during the course of an interview in

which legal advice was sought but delayed by the police. Paragraph 6 of the circular states:

> "I attach a copy of the guidance which has been issued by the Attorney General to advise Prosecutors reviewing a case, or presenting a case in court, in which the suspect's access to legal advice was delayed in accordance with Annex B of Code C, that they will not be able to attach any weight to the accused's failure to reply to questions in an interview conducted at the Police Station when access to legal advice has been delayed but that inferences may be drawn under sections 34, 36 and 37 of the 1994 [Criminal Justice and Public Order] Act if the suspect remained silent when re-interviewed after legal advice was obtained."

The circular continues:

> "4. ... The Prosecution should not seek to rely on inferences from silence before access to legal advice has been granted. In the event the court, or of its own volition, indicates an intention to draw any such inferences, its attention should be drawn to the judgment of the European Court of Human Rights in John Murray v. the United Kingdom.
>
> 5. The question of drawing inferences from silence is most likely to arise under section 34 of the 1994 Act and Article 3 of the 1988 Order (which relate to failure to mention when questioned or charged facts subsequently relied upon by an accused in his own defence). The position to be adopted by Prosecutors is set out above. ... If access to a solicitor has been denied at the Police Station, the court should not be invited to draw the inferences which might otherwise be drawn in such circumstances (irrespective of the line of defence put forward by the accused) since it is a situation where, but for the denial of access to a solicitor, the accused would ordinarily have access to legal advice."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

38. The applicant complained that he was denied a fair trial in breach of Article 6 § 1 of the Convention, the relevant parts of which provide:

> "In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... "

39. The Government submitted that the facts of the applicant's case clearly established that there was no violation of the rights invoked by the applicant. With reference in particular to the Court's John Murray judgment cited above, the Government argued that there was convincing and unchallenged forensic evidence linking the applicant to the balaclavas and gloves found in the car used by the gunmen. That evidence clearly called for an explanation from the applicant when questioned. However, he provided neither Sergeant Ford, who questioned him at the army checkpoint on

24 April 1994, nor the police officers who questioned him under caution between 24 April and 1 May 1994, with any details of the matters on which he later relied at his trial. Nor did he provide any explanation at all prior to his trial as to how the fibres might have come to be in his hair and on his clothes. The applicant did not mention that he had been wearing a balaclava and gloves at work the day before the shootings when invited to account for the presence of the fibres under Article 5 of the Criminal Evidence (Northern Ireland) Order 1988 ("the 1988 Order").

40. In the Government's conclusion, the very strong inferences drawn by the trial judge under Articles 3 and 5 of the 1988 Order were, on the facts, both justified and a matter of common sense.

41. The applicant stated that his silence was central to his conviction and undermined his own testimony as well as that of the witnesses whom he called in his defence. The applicant referred in this latter connection to the fact that the trial judge rejected the evidence of the defence witnesses who confirmed his alibi since the judge had drawn a very strong inference from his silence. For the same reason, the trial judge rejected the testimony of the defence witness who confirmed that he had been wearing a balaclava and black gloves at his place of work the day before the shooting incident.

42. The applicant further maintained that he provided the essential elements of his alibi defence when questioned by Sergeant Ford at the checkpoint on 24 April 1994 and answered all other questions asked of him with as much detail as requested.

43. Furthermore, the applicant invited the Court to have regard to the fact that there are many reasons why some persons in Northern Ireland prefer to remain silent in the face of police questioning, including the absence of safeguards against unfairness and a lack of trust in the police force. In the applicant's submission, it is wholly inappropriate to equate an accused's silence with guilt or to assume that silence is probative of guilt. He asserted that in his case such an equation led to the rejection of his own evidence, his witnesses' evidence and, finally, the drawing of very strong inferences against him under Articles 3 and 5 of the 1988 Order.

44. The Court recalls that in its John Murray judgment cited above, it proceeded on the basis that the question whether the right to silence is an absolute right must be answered in the negative (pp. 49-50, § 47). It noted in that case that whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation (ibid.).

45. The Court stressed in the same judgment that since the right to silence, like the privilege against self-incrimination, lay at the heart of the notion of a fair procedure under Article 6, particular caution was required

before a domestic court could invoke an accused's silence against him. Thus, it observed that it would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. Nevertheless, the Court found that it is obvious that the right cannot and should not prevent the accused's silence, in situations which clearly call for an explanation from him, from being taken into account when assessing the persuasiveness of the evidence adduced by the prosecution (ibid.).

46. The Court observes that the applicant, contrary to the stance adopted by John Murray at his trial, testified at his trial and offered an alibi to account for his whereabouts at the time of the double murder in Garvagh. He also put forward an explanation for the traces of fibre found on his clothing and person, which, according to the prosecution, provided a clear and definite link between the applicant and the apparel found in the gunmen's car. The trial judge drew "very strong" adverse inferences under Articles 3 and 5 of the 1988 Order from the applicant's failure to mention these matters when questioned by the police under caution. Furthermore, the trial judge rejected the applicant's submission that his silence at the pre-trial stage was motivated by considerations of policy.

47. Whether the drawing of adverse inferences vitiated the fairness of the applicant's trial must be assessed from the standpoint of the above-mentioned principles enunciated in the John Murray judgment (see paragraphs 44 and 45 above) with particular attention being accorded to the role played by the inferences in the proceedings against the applicant and especially in his conviction.

48. The Court observes that the applicant's failure to answer questions put to him in custody did not expose him to the threat of penal sanction. The fact that he was warned in accordance with the terms of the cautions administered to him that his silence might lead to the drawing of adverse inferences at his trial discloses a level of indirect compulsion. That of itself is not decisive (see the John Murray judgment cited above, p. 50, § 50). At the same time, however, it is to be noted that the applicant's interrogation began and continued for a period of twenty-four hours without his solicitor being present (see paragraph 11 above). This must be considered a relevant factor to be weighed in the balance when assessing the fairness of the trial judge's decision to draw an adverse inference under Article 3 of the 1988 Order. Equally so, is the fact that the applicant was able to consult with his solicitor on a daily basis after the end of the first 24-hour period and up to the moment of being charged.

49. The Court notes in this connection that the scheme contained in Articles 3 and 5 of the 1988 Order is intended to permit the drawing of proper inferences from the failure of suspects to mention to the police any fact later relied on in their defence, to prevent the hampering of police investigations by accused who take advantage of their right to silence by

waiting until trial to spring exculpatory explanations, in circumstances in which the accused has no reasonable excuse for withholding an explanation. Notwithstanding these justifications, the Court considers that the extent to which adverse inferences can be drawn from an accused's failure to respond to police questioning must be necessarily limited. While it may no doubt be expected in most cases that innocent persons would be willing to cooperate with the police in explaining that they were not involved in any suspected crime, there may be reasons why in a specific case an innocent person would not be prepared to do so. In particular, an innocent person may not wish to make any statement before he has had the opportunity to consult a lawyer. For the Court, considerable caution is required when attaching weight to the fact that a person, arrested, as in this case, in connection with a serious criminal offence and having been denied access to a lawyer during the first twenty-four hours of his interrogation, does not provide detailed responses when confronted with incriminating evidence against him. Nor is the need for caution removed simply because an accused is eventually allowed to see his solicitor but continues to refuse to answer questions. It cannot be excluded that the accused's continued silence is based on, for example, *bona fide* advice received from his lawyer. Due regard must be given to such considerations by the fact-finding tribunal when confronted with the possible application of Articles 3 and 5 of the 1988 Order.

50. As to this last point, the Court notes that the trial judge was not obliged to draw adverse inferences from the applicant's silence. He did so in the exercise of a discretion conferred on him by Articles 3 and 5 and provided detailed reasons for his decision. The Court of Appeal scrupulously reviewed the reasons which led the trial judge to draw adverse inferences and endorsed his decision. It clearly emerges from the judgment given by the trial judge that the applicant was not convicted solely or mainly on account of his silence. The trial judge had due regard to the weight of the evidence adduced by the prosecution in support of its case, in particular the considerable body of forensic evidence which strongly supported a finding that there had been direct and intimate contact between the applicant and the balaclava masks and gloves found in the abandoned car used by the gunmen (see paragraph 23 above). It must also be observed that the applicant's oral testimony did not in any way advance his alibi defence having regard to the fact that the trial judge found him to be a dishonest and unreliable witness (see paragraph 27 above). It is true that the applicant called witnesses on his behalf to confirm his account that he had been at the Kellys' farm at the relevant time and that the fibres found on his clothes and person could be explained with reference to the clothes he had been wearing at work on the day before the murder took place (see paragraphs 19 and 20 above). However, it would appear that the prosecution undermined the credibility of his witnesses' testimony since the trial judge, who observed their demeanour in the witness-box, dismissed their evidence as lies. The Court does not

agree with the applicant's submission that his witnesses' testimony was discounted merely because the trial judge drew adverse inferences from his silence. The applicant's own testimony to the court lacked credibility and it could not be reprieved by the testimony of his defence witnesses.

51. In the Court's opinion, the decision to draw adverse inferences must be seen as only one of the elements upon which the trial judge found that the charges against the applicant had been proved beyond reasonable doubt. Furthermore, in drawing adverse inferences, it cannot be said that the trial judge exceeded the limits of fairness since he could properly conclude that, when taxed in custody by questions as to his whereabouts at the material time or the presence of fibres on his hair and clothing, the applicant could have been expected to provide the police with explanations. It is to be noted that the applicant had been stopped by the police not far from the scene of the crime and had volunteered an explanation of his movements. However, he held his silence after being taken into custody. For the Court, the presence of incriminating fibres in the applicant's hair and clothing called for an explanation from him. His failure to provide an explanation when questioned by the police at Gough Barracks could, as a matter of common sense, allow the drawing of an adverse inference that he had no explanation and was guilty, all the more so since he did have daily access to his lawyer following the first twenty-four hours of his interrogation when he was again questioned about these matters under caution. Moreover, the applicant did not contend at his trial that he remained silent on the strength of legal advice. His only explanation was that he did not cooperate with the Royal Ulster Constabulary for reasons of policy. This justification was considered and discounted by the trial judge and by the Court of Appeal. Quite apart from the consideration that the defence of policy sits ill with the fact that the applicant volunteered information to Sergeant Ford when stopped at the checkpoint soon after the Garvagh killings (see paragraph 11 above), it must also be noted that the applicant was fully apprised of the implications of remaining silent and was therefore aware of the risks which a policy-based defence could entail for him at his trial.

52. For these reasons the Court concludes that there has been no violation of Article 6 § 1 of the Convention in respect of the adverse inferences drawn at the applicant's trial from his silence during police questioning.

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

53. The applicant maintained that the drawing of adverse inferences from his silence in custody violated his right to be presumed innocent, contrary to Article 6 § 2 of the Convention, which states:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

54. The Court considers that the issue raised by the applicant under Article 6 § 2 is a restatement of his argument under Article 6 § 1. Having found that the latter Article has not been breached, the Court considers that for the same reasons there has been no violation of Article 6 § 2.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 6 § 3 (c)

55. The applicant stated that the complete denial of any access to a solicitor for the first twenty-four hours of interrogation and the absence of a solicitor during any interview with the police was incompatible with the provisions of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c). Article 6 § 3 (c) stipulates:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

56. In support of this submission, the applicant highlighted the fact that a person arrested under the prevention of terrorism legislation in England had the right to have a solicitor present during questioning and, moreover, the interview was recorded. The applicant further stressed that, in the light of the Court's John Murray judgment and the Attorney-General's Guidance (see paragraph 37 above), his conviction could not be sustained since to do so would countenance maintaining a conviction in breach of the minimum right to a fair hearing guaranteed under Article 6 of the Convention.

57. The Government drew attention to the fact that neither the applicant nor his lawyers pleaded before the domestic courts that deferral of access to a solicitor for a period of twenty-four hours had resulted in unfairness. They noted that the judgments at first instance and on appeal contained one sentence on this point. Further, the applicant was only denied access to a lawyer for the first twenty-four hours of his detention. By the time the applicant had been cautioned under Article 5 of the 1988 Order, he had already had access to his solicitor, but he chose to remain silent as a matter of policy. There is no suggestion that the applicant would have provided answers if his solicitor had been present. In the Government's contention, it was quite clear that the applicant would not have done so. Furthermore, the Attorney-General's Guidance relied on by the applicant did not assist his case since, firstly, he was only requested to account for the incriminating fibres after he had access to legal advice and, secondly, he maintained his refusal to answer police questions after he saw his solicitor. On that account

they submitted that there was no breach of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c).

58. The Court observes that the applicant was interrogated under caution on the first day of his detention. He was asked about his movements at the time of the Garvagh killings and about fibres taken from his hair and clothes. He was not allowed access to a solicitor during that time.

59. The Court recalls that in its John Murray judgment it noted that the scheme contained in the 1988 Order was such that it was of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation. It observed that, under the Order, an accused is confronted at the beginning of police interrogation with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. Under such conditions the concept of fairness enshrined in Article 6 requires that the accused have the benefit of the assistance of a lawyer already at the initial stages of police interrogation (see the judgment cited above, p. 55, § 66).

60. Even though the applicant was denied access to a lawyer for a shorter period than was applied to John Murray, a refusal to allow an accused under caution to consult a lawyer during the first twenty-four hours of police questioning must still be considered incompatible with the rights guaranteed to him by Article 6. The situation in which the accused finds himself during that 24-hour period is one where the rights of the defence may well be irretrievably prejudiced on account of the above-mentioned dilemma which the Order presents for the accused. The fact that the applicant maintained his silence after he had seen his solicitor cannot justify the denial. Nor does the Court's conclusion as to the drawing of adverse inferences from the applicant's silence (see paragraphs 50 and 51 above) serve to legitimate the authorities' refusal to provide him with access to a solicitor during the first twenty-four hours of his interrogation. It suffices to note that the trial judge did in fact invoke the applicant's silence during the first twenty-four hours of his detention against him. As a matter of fairness, access to a lawyer should have been guaranteed to the applicant before his interrogation began.

61. The Court finds therefore that the denial to the applicant of access to his solicitor during the first twenty-four hours of detention failed to comply with the requirements of Article 6 § 3 (c) of the Convention. For that reason, there has been a breach of that provision taken in conjunction with Article 6 § 1 of the Convention.

62. Having regard to that conclusion, the Court finds it unnecessary to consider the applicant's complaint concerning the refusal to allow his solicitor to be present during interview.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. 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

64. The applicant claimed compensation for his loss of liberty and imprisonment and the suffering and distress inherent in the violations complained of, including his wrongful conviction in breach of Article 6 of the Convention. The applicant did not quantify the alleged damage.

65. The Government observed that the applicant remains unlawfully at large and that it would be wrong in these circumstances for the Court to make an award of damages. In the alternative, the Government contended that if the Court were minded to find a violation of Article 6 of the Convention that in itself would constitute just satisfaction.

66. The Court cannot speculate on whether the outcome of the applicant's trial would have been different had he obtained access to a solicitor at the beginning of his interrogation. It agrees with the Government that a finding of a violation of the Convention, in itself, constitutes sufficient just satisfaction for the purposes of Article 41 of the Convention.

B. Costs and expenses

67. The applicant claimed under this head the sum of 8,812.50 pounds sterling (GBP) inclusive of value-added tax (VAT) in respect of the fees charged by his counsel for work on his case during the Convention proceedings. He further claimed the sum of GBP 3,525, also inclusive of VAT, in respect of the fees charged by his solicitor.

68. The Government requested the Court to reject the claim since, other than supplying two invoices, the applicant had failed to provide any details capable of substantiating the claim. The Government further submitted that the applicant's counsel had already been involved in earlier applications raising similar issues. Since the pleadings submitted in the instant case were in a large measure drawn from those submitted in the earlier cases, the Court should reflect this fact in its award. The Government opined that a global sum of GBP 3,000 would be an appropriate amount in the circumstances.

69. The Court, deciding on an equitable basis and having regard to the fact that the finding of a violation only relates to the applicant's complaint concerning access to a solicitor, awards the sum of GBP 5,000.

C. Default interest

70. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been no violation of Article 6 § 1 of the Convention arising out of the drawing of adverse inferences from the applicant's silence;

2. *Holds* by six votes to one that there has been no violation of Article 6 § 2 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c) as regards the applicant's lack of access to a lawyer during the first twenty-four hours of his police detention;

4. *Holds* by six votes to one that, as regards non-pecuniary damage, the finding of a violation of Article 6 § 1 taken in conjunction with paragraph 3 (c) constitutes in itself sufficient just satisfaction for the purposes of Article 41 of the Convention;

5. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, for costs and expenses, GBP 5,000 (five thousand pounds sterling);
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* by six votes to one the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 6 June 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly concurring and partly dissenting opinion of Mr Loucaides is annexed to this judgment.

J.-P.C.
S.D.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE LOUCAIDES

I agree with the finding of the majority that there has been a breach of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c). However, I disagree with the conclusion that there has been no violation of Article 6 §§ 1 and 2 of the Convention arising out of the drawing of adverse inferences from the applicant's silence.

I had the opportunity both in the case of Saunders v. the United Kingdom (judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI) and in the case of John Murray v. the United Kingdom (judgment of 8 February 1996, *Reports* 1996-I) to express the view that the drawing of adverse inferences against an accused person, because of his silence during police interrogation, is incompatible with the right to remain silent and not to be compelled to incriminate oneself. As I have already explained, this right is safeguarded by Article 6 § 2 of the Convention as a corollary of the presumption of innocence. This is a safeguard against abuses of power by law enforcement agencies. It is for this reason that I believe that this protection should be applicable during pre-trial police detention. I continue to be of the same view and I strongly support the proposition that under no circumstances should a person in police custody be compelled in any way to incriminate himself.

Contrary to the opinion of the majority, I believe that the right to remain silent, if it is to be meaningful, must be absolute. Should the right be made subject to any qualification or depend on the circumstances of a case, the door would be open to possible abuses.

As I already pointed out in the Saunders case, it is true that the above approach, although it protects the innocent, may at the same time provide shelter to the guilty. However, the aim of bringing the guilty to punishment, praiseworthy as it is, should not be aided by the sacrifice of those great principles, established by mankind's years of endeavour in order to secure effective protection of individuals against oppression and abuse of power.

While accepting that “the right to silence, like the privilege against self-incrimination, lay at the heart of the notion of a fair procedure under Article 6” (see paragraph 45 of this judgment), the majority, nevertheless, find that the right “should not prevent the accused's silence, in situations which clearly call for an explanation from him, from being taken into account when assessing the persuasiveness of the evidence adduced by the prosecution” (ibid.). However, this approach overlooks the basic philosophy or the *raison d'être* of the right to silence which is the protection of individuals, especially the weak and vulnerable, from oppressive methods. I have stressed this in the John Murray case where I stated the following in this connection: “... an accused person, when faced with the law-enforcing agencies before trial, alone and without the legal guidance of a counsel,

lacks the necessary safeguards for an effective presentation of his version in an inherently coercive setting in which the prosecutorial forces have the upper hand. Although he may not be guilty he may not be in a position to establish effectively his innocence."

In the light of the above, I hold that there has been a violation of Article 6 §§ 1 and 2 of the Convention. For these reasons, I would be prepared to make an award for non-pecuniary damage to the applicant, taking into account this violation as well as the above-mentioned violation found by the majority and with which I agree.