CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 40451/98
by Robert KERR
against the United Kingdom

The European Court of Human Rights (Third Section) sitting on 7 December 1999 as a Chamber composed of

Mr J.-P. Costa, *President*,
Sir Nicolas Bratza,
Mr L. Loucaides,
Mr W. Fuhrmann,
Mr K. Jungwiert,
Mr K. Traja,
Mr M. Ugrekhelidze, *judges*,

and Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 8 January 1998 by Robert Kerr against the United Kingdom and registered on 25 March 1998 under file no. 40451/98;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Irish national, born in 1956 and living in Belfast, Northern Ireland.

He is represented before the Court by Ms Angela Ritchie of Madden and Finucane, a firm of solicitors based in Belfast.

A. Particular circumstances of the case

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

The applicant was arrested at his home in Belfast at 9.43 a.m. on 7 November 1996. He was informed that he was being arrested under section 14(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1989 ("the 1989 Act") because there were reasonable grounds for suspecting that he had been concerned in the commission, preparation or instigation of acts of terrorism.

On the applicant's arrest the police seized from his house three computers, a hand-written note and a short camcorder tape of Wallace Park, Lisburn. The applicant was taken to Castlereagh police station where he was questioned until 12.15 p.m. on 14 November 1996 when he was charged. The applicant was subjected to a total of thirty-nine interviews during his detention. He was cautioned under Article 5 of the Criminal Evidence (Northern Ireland) Order 1988. He was asked, *inter alia,* about his involvement in an explosion at a barracks in Lisburn on 7 October 1996, his movements on the date of the explosion, his membership of the Provisional IRA, the items seized by the police, the purpose to which the computer equipment was put, his association with other suspects, the information stored in the computer (which included electoral lists), the use of the said information to enable members of the security forces to be identified as targets for terrorist attacks and the reason for possession of such information.

The applicant remained silent throughout the interviews other than to say that he would be maintaining silence on the basis of legal advice and once to say he did not recognise the hand-written note recovered from his home.

The applicant was cautioned and on 14 November 1996 charged with possession of "any record or document likely to be useful to terrorists" and conspiring to "collect or record any information which is of such a nature to be useful to terrorists in planning or carrying out an act of violence". The charges did not specify the "record or document" or the "information" but the police maintained these matters would have been clear from the interviews and the written caution. The applicant was brought before Belfast Magistrates' Court on 14 November 1996 and remanded in custody. He was subsequently remanded on various occasions after that date following appearances in court.

When on remand the applicant was again interviewed on 12 February 1997 without a solicitor being present. He was asked about further information retrieved from computer disks seized at the time of his arrest. He was questioned, *inter alia*, about his knowledge of what was on the computer disks, why he had information about the British Army and its breakdown into specialised units, the suggestion that he had the information for targeting by the Provisional IRA, why he had information on the disks amounting to an in-depth insight into the Royal Ulster Constabulary's "E" department, and the belief that this information was for use in

training terrorist units. Computer print-outs were produced to him but he declined to look at them. Neither the applicant nor his solicitor received advance disclosure of the evidence or information that was to form the basis of the questioning.

On several occasions the applicant's solicitors sought more specific details about the evidence that had been obtained. The Director of Public Prosecutions stated in a letter to the applicant's solicitors dated 6 February 1997 the police standpoint:

> "They remain of the view that to specify details of the evidence in this case would be prejudicial to their enquiries, which are wide ranging and continue. At present therefore the prima facie case which is held to apply to [the applicant] is the nature of material found to have been stored on a computer.
>
> I appreciate that this lack of detailed information remains a matter of concern to you and [the applicant]."

In view of the refusal to inform the applicant in detail of the nature and causes of the charges against him, judicial review proceedings were commenced. The prosecution position was that maximum secrecy had to be maintained to ensure the effectiveness of the police investigation. On 8 July 1997 the Lord Chief Justice of Northern Ireland, Lord Carswell, sitting in the High Court, held that the prosecution was not under a duty to provide any further details at that stage of the investigation. The Lord Chief Justice stated in his judgment:

> "On being arrested a suspect is entitled to be told the grounds of his arrest, and it is not in dispute that the arresting officer discharged this duty in the present case. …
>
> It would also be open to the applicant to bring an application in the High Court for bail. On the hearing of such application the court generally requires counsel appearing for the Crown to furnish it with some details of the evidence, sufficient to satisfy the court that there is a prima facie case against the accused. The applicant has not chosen to bring an application for bail and accordingly has not received such information.
>
> What he claims ... is that there is a further duty imposed upon the Crown, to give him further details of the charges against him at some stage or stages after he has been charged and before the committal proceedings are held. We cannot accept that the right of an accused to a fair trial requires the imposition of such an obligation upon the Crown. The accused will be entitled to full details of the evidence against him at the time of the committal proceedings, and to a proper opportunity to prepare himself for those proceedings. After committal he will be entitled to have adequate time and facilities to prepare his defence for trial. We do not consider that it is a necessary constituent of the applicant's right to a fair trial that he should receive the details which he seeks, nor do we consider it unfair to him that he has not received them at this stage."

The applicant was released from custody on 30 August 1997 when the charges were withdrawn.

B. Relevant Convention and domestic law and practice

In its Brogan and Others v. the United Kingdom judgment (29 November 1988, Series A no. 145-B), the Court held that there had been a violation of Article 5 § 3 of the Convention in the case of all four applicants who had been detained under section 12 of the Prevention of Terrorism Act 1984, which was the predecessor provision of section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989. The applicants had been held for periods ranging between six days and sixteen-and-a-half hours and four days and six hours without being brought before a judicial authority. The Court found that even the shortest of the periods of detention, namely four days and six hours, fell outside the strict constraints as to time permitted by the first part of Article 5 § 3. In the Court's view, the undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism was not on its own sufficient to ensure compliance with the specific requirements of Article 5 § 3.

Following that judgment, the United Kingdom informed the Secretary General of the Council of Europe on 23 December 1988 that the Government had availed themselves of the right of derogation conferred by Article 15 § 1 to the extent that the exercise of powers under section 12 of the 1984 Act might be inconsistent with the obligations imposed by Article 5 § 3 of the Convention. Part of that declaration reads as follows:

> "... Following [the Brogan and Others judgment], the Secretary of State for the Home Department informed Parliament on 6 December 1988 that, against the background of the terrorist campaign, and the over-riding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced. He informed Parliament that the Government were examining the matter with a view to responding to the judgment. On 22 December 1988, the Secretary of State further informed Parliament that it remained the Government's wish, if it could be achieved, to find a judicial process under which extended detention might be reviewed and where appropriate authorised by a judge or other judicial officer. But a further period of reflection and consultation was necessary before the Government could bring forward a firm and final view. Since the judgment of 29 November 1988 as well as previously, the Government have found it necessary to continue to exercise, in relation to terrorism connected with the affairs of Northern Ireland, the powers described above enabling further detention without charge, for periods of up to 5 days, on the authority of the Secretary of State, to the extent strictly required by the exigencies of the situation to enable necessary enquiries and investigations properly to be completed in order to decide whether criminal proceedings should be instituted. To the extent that the exercise of these powers may be inconsistent with the obligations imposed by the Convention the Government have availed themselves of the right of derogation conferred by Article 15 § 1 of the Convention and will continue to do so until further notice..."

In a further notice dated 12 December 1989 the United Kingdom informed the Secretary General that a satisfactory procedure for the review of detention of terrorist suspects involving the judiciary had not been identified and that the derogation would therefore remain in place for as long as circumstances require.

The Prevention of Terrorism (Temporary Provisions) Act 1989 has been renewed annually ever since.

Section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989 provides as follows:

> "14. (1) Subject to subsection (2) below, a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be–
>
> (a) a person guilty of an offence under section 2, 8, 9, 10 or 11 above;
>
> (b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this section applies; or
>
> (c) a person subject to an exclusion order.
>
> (2) The acts of terrorism to which this section applies are–
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> (a) acts of terrorism connected with the affairs of Northern Ireland; and
>
> (b) acts of terrorism of any other description except acts connected solely with the affairs of the United Kingdom or any part of the United Kingdom other than Northern Ireland.
>
> (3) The power of arrest conferred by subsection (1)(c) above is exercisable only–
>
> (a) in Great Britain if the exclusion order was made under section 5 above; and
>
> (b) in Northern Ireland if it was made under section 6 above.
>
> (4) Subject to subsection (5) below, a person arrested under this section shall not be detained in right of the arrest for more than forty-eight hours after his arrest.
>
> (5) The Secretary of State may, in any particular case, extend the period of forty-eight hours mentioned in subsection (4) above by a period or periods specified by him, but any such further period or periods shall not exceed five days in all and if an application for such an extension is made the person detained shall as soon as practicable be given written notice of that fact and of the time when the application was made.
>
> (6) The exercise of the detention powers conferred by this section shall be subject to supervision in accordance with Schedule 3 to this Act.
>
> (7) The provisions of this section are without prejudice to any power of arrest exercisable apart from this section."

COMPLAINTS

The applicant alleges:

1. A breach of Article 5 § 2 of the Convention in that he was not informed promptly (or at all) of the reasons for his arrest and the charges against him.

2. Breaches of Article 5 § 3 of the Convention, firstly, in that he was not brought promptly before a judge or other officer authorised by law to exercise judicial power and, secondly, in that he did not receive a trial within a reasonable time or release pending trial.

As to his complaint under Article 5 § 3 concerning the lawfulness of his detention, the applicant submits that the respondent State should not be able to rely on the derogation which it has lodged under Article 15 of the Convention because:

(a) at the material time there was no war or public emergency threatening the life of the nation; and

(b) the measures taken derogating from its obligations under Article 5 § 3 were not strictly required by the exigencies of the situation.

3. A breach of Article 5 § 4 in that he was not entitled to take proceedings by which the lawfulness of his detention could be decided, since as a matter of domestic law his detention was lawful.

4. A breach of Article 5 § 5 in that he had no enforceable right to compensation since his detention was lawful under domestic law.

5. Breaches of Article 6 §§ 1 and 3 (a) in that he was not informed promptly and in detail of the nature and cause of the accusations against him.

6. Breaches of Article 6 §§ 1 and 3 (b) and 3 (c) in that he did not have adequate time and facilities for the preparation of his defence, was denied access to a solicitor during interviews and denied adequate disclosure of the case made against him.

7. Breaches of Article 3 in that the conditions of his detention amounted to inhuman or degrading treatment, of Article 5 § 1 which permits no more deprivation of liberty than absolutely necessary and Article 6 §§ 1, 2 and 3 (b) and (c) in that the treatment was designed to coerce and was inconsistent with the presumption of innocence.

8. A breach of Article 13 as he has no effective remedy in respect of the breaches complained of.

THE LAW

1. The applicant complained that his rights under Article 5 of the Convention were violated in various respects. Article 5 provides in relevant part:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> ...
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
> ...
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

A. Article 5 § 2

The Court recalls that paragraph 2 of Article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed "promptly" (in French: "*dans le plus court délai*"), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (see the Fox, Campbell and Hartley v. the United Kingdom judgment of 30 August 1990, Series A no.182, p. 19, § 40).

The Court notes that at the time of his arrest the applicant was notified of the provision under which he was being detained. However a bare indication of the legal basis for an arrest cannot, taken on its own, be sufficient for the purposes of Article 5 § 2 (see the above-mentioned Fox, Campbell and Hartley judgment, p. 19, § 41) Following arrest the applicant was interrogated about his suspected involvement in a recent bomb explosion at a military barracks, his membership of a proscribed organisation and about the use made of the items seized by the police from his house, in particular computer equipment and the information stored on the computer.

For the Court, there is no reason to suppose that these periods of questioning were not such as to enable the applicant to understand why he was arrested and why he was suspected of being concerned in the commission, preparation or instigation of acts of terrorism and to have more than a reasonable idea of the charges which he was facing. It is to be observed that, although requested by the Registry to do so, the applicant has not provided details of when the interviews took place. However the applicant states that he was subjected to thirty-nine interviews in all between 9.43 a.m. on 7 November 1996 and 12.15 p.m. on 14 November 1996. It can reasonably be inferred from the intense frequency of the interviews that the applicant was apprised of these matters within a few hours of his arrest and thus within the constraints of time imposed by the notion of promptness within the meaning of Article 5 § 2 of the Convention.

The Court would also observe that the charges which were read out to the applicant on 14 November 1996 pertained to his possession of records or documents or information for terrorist purposes and were consistent with the line of questioning pursued by the police since the beginning of his detention and with the nature of the materials seized at the applicant's house at the time of his arrest. In this respect, the Court notes that the fact that the applicant was only notified about the charges against him on 14 November 1996 does not in itself raise an issue under Article 5 § 2 from the standpoint of the requirement of promptness. It is to be recalled that that requirement only comes into play if there is "any charge" against the

applicant. As was noted in the Court's Murray v. the United Kingdom judgment of 28 October 1994 (Series A no. 300-A, p. 27, § 55), facts which raise a suspicion capable of grounding an arrest need not be of the same level as those necessary to justify bringing a charge against the arrestee, which comes at the next stage of the process of criminal investigation. In the instant case, the applicant remained silent throughout the period of detention and the police were unable to make any headway in pursuing their suspicions against him. It was only towards the end of the period of detention that they decided to charge him. The applicant has not contended before the Court that the purpose of the arrest and detention was not genuinely to bring him before a competent judicial authority, and for that reason it does not have to examine whether the period of detention was deliberately delayed as part of an intelligence-gathering exercise.

In the light of the above considerations, the Court finds that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected under Article 35 § 4 thereof.

The Court notes that the applicant also submits that he was denied, in breach of Article 5 § 2 of the Convention, details of the evidence on which the prosecution intended to rely in respect of the charges against him. He maintains that the refusal to provide him with such information prejudiced his position by preventing him from adequately preparing his defence and for this reason he had been compelled to take judicial review proceedings. In the Court's opinion this complaint falls to be determined in the context of his complaints under Article 5 § 3, Article 5 § 4 and Article 6 of the Convention and it will accordingly consider it below.

B. Article 5 § 3

1. As to the length of the applicant's detention before being brought before a judicial authority

The applicant maintains that he was arrested on 7 November 1996 and detained until 14 November 1996 when he was charged and brought before a court. In the applicant's submission, this period of detention was in clear breach of Article 5 § 3 of the Convention. Furthermore, although the respondent Government's derogation under Article 15 of the Convention was in force at the relevant time, it could not be said to be valid since at the time of his arrest the conditions governing the validity of the derogation were no longer satisfied. Article 15 of the Convention states:

> "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision.
>
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the

Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

The Court considers that at this stage it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of this complaint to the respondent Government.

2. As to the applicant's complaint that he was not brought to trial within a reasonable time or released pending trial

The Court notes that the applicant did not make a bail application although he was brought before Belfast Magistrates' Court on several occasions during the period of his remand. The applicant confined himself to challenging the refusal of the authorities to supply him with full details of the prosecution's case against him, with a view to the preparation of his defence to the charges. Accordingly the issue submitted to the domestic court was different to the one which he now raises in his application. In these circumstances the applicant cannot be considered to have exhausted domestic remedies as required by Article 35 § 1 of the Convention in respect of his Article 5 § 3 complaint. The complaint is therefore inadmissible under Article 35 § 4 of the Convention.

The Court would further observe that a period of detention of nine months cannot be considered unreasonable in length in the context of a person charged with serious terrorist offences, especially having regard to the fact that the need for the applicant's continued detention was the subject of periodic review over that period.

C. Article 5 § 4

The applicant contends that he was not entitled to take proceedings by which the lawfulness of his detention could be decided.

The Court recalls that, according to its established case-law, the notion of lawfulness under paragraph 4 has the same meaning as in paragraph 1, and whether an "arrest" or "detention" is lawful has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. By virtue of paragraph 4 of Article 5, arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty (see the above-mentioned Brogan and Others case, p. 34, § 65).

In its Brogan and Others judgment the Court, with reference to relevant case-law of the Northern Ireland courts, concluded that the remedy of *habeas corpus* allowed arrested or detained persons to have a review which fulfilled these requirements (pp. 34-35, §§ 63-65). The availability of that remedy has not been affected by the existence of the above-mentioned derogation (see the Brannigan and McBride v. the United Kingdom judgment of 26 May 1993, Series A no. 258-B, p. 65, § 63). The applicant has not argued that the remedy of *habeas corpus* would not have afforded him an opportunity to mount an appropriate challenge to the reasons relied on to justify his detention in the context of an adversarial procedure (see, *mutatis mutandis*, the Lamy v. Belgium judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29).

Since the applicant was entitled to take proceedings to test the lawfulness of his detention in this manner, his complaint to the contrary is manifestly ill-founded, within the meaning of Article 35 § 3 of the Convention, and on that account it is inadmissible under Article 35 § 4 of the Convention.

The Court reiterates in this connection its previous remarks when addressing the applicant's complaint that he had not been brought to trial within a reasonable time that the issue which the applicant argued before the domestic court regarding the production of the evidence against him was of an entirely different nature to the point on which he now relies.

D. Article 5 § 5

The applicant maintains that since his detention was lawful under domestic law in the light of the Article 15 derogation introduced by the respondent Government, he had no enforceable right to compensation.

The Court considers that at this stage it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of this complaint to the respondent Government.

E. Article 6 §§ 1 and 3 (b) and (c)

The applicant further complained that his rights under various provisions of Article 6 of the Convention had been breached.

The Court would observe that the applicant cannot claim to have been unlawfully deprived of his right to a fair trial. The charges against him were dropped and his case did not proceed to trial.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected under Article 35 § 4 thereof.

F. Article 3 in conjunction with Article 5 § 1

The applicant states that throughout his seven-day detention he was held incommunicado in an atmosphere of coercion, questioned in the course of thirty-nine interviews, denied exercise, deprived of sensory relief, and refused writing and reading materials. He invokes Article 3 of the Convention in conjunction with Article 5 § 1 thereof. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Court recalls that, according to its settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects (see, among many other

authorities, the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, § 162).

The Court does not dispute the applicant's contention that his detention was austere. However, it considers that his complaints do not disclose that he was in any way ill-treated either physically or mentally such as to disclose an appearance of a violation of Article 3 of the Convention either alone or in conjunction with Article 5 § 1 thereof.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected under Article 35 § 4 thereof.

G. Article 13

The applicant asserts that he had no effective remedy in respect of the complaints which he raised in his application to the Court and, for that reason, there had been a breach of Article 13 of the Convention. Article 13 provides:

> "Everyone whose rights and freedoms as set forth in this 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."

The Court has found that the applicant did not avail himself of the remedy of *habeas corpus* to challenge the lawfulness of his detention and that that remedy would have satisfied the requirements of Article 5 § 4 of the Convention. It recalls in this connection that Article 13, as a more general guarantee, does not apply in cases where the more specific guarantees of Article 5 § 4 apply, Article 5 § 4 being *lex specialis* in relation to Article 13 and absorbing its requirements (see the above-mentioned Brannigan and McBride judgment, p. 57, § 76).

Having regard to its conclusion on the applicant's complaint under Article 5 § 4, the Court finds that this complaint discloses no appearance of a violation of Article 13 of the Convention. It follows that this part of the application is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected under Article 35 § 4 thereof.

For these reasons, the Court, unanimously,

DECIDES TO ADJOURN the examination of the applicant's complaints that he was not brought promptly before a judicial authority following his arrest and had no enforceable right under domestic law to compensation in this respect.

DECLARES INADMISSIBLE the remainder of the application.

S. Dollé
Registrar

J.-P. Costa
President