



EUROPEAN COMMISSION OF HUMAN RIGHTS

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY OF

Application No. 14739/89
by Hugh CALLAGHAN and Others
against the United Kingdom

The applicant's identity
may be disclosed.
L'identité du requérant
peut être divulguée.

The European Commission of Human Rights sitting in private on
9 May 1989, the following members being present:

MM. S. TRECHSEL, Acting President
F. ERMACORA
G. SPERDUTI
E. BUSUTTI
G. JÖRUNDSSON
A. WEITZEL
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the
Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 13 October 1988
by Hugh CALLAGHAN and Others against the United Kingdom and registered
on 7 March 1989 under File No. 14739/89;

Having regard to the report provided for in Rule 40 of the
Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are Mr. Hugh CALLAGHAN, born in 1930, Mr. Robert Gerard HUNTER, born in 1945, Mr. Patrick Joseph HILL, born in 1944, Mr. John WALKER, born in 1935, Mr. William POWER, born in 1945, and Mr. Richard McILKENNY, born in 1933. They are Irish citizens currently serving terms of life imprisonment in H.M. Prison Gartree. They are represented before the Commission by Mrs. G. Peirce, a solicitor practising in London. The facts as submitted by the applicants may be summarised as follows.

The six applicants were convicted on 15 August 1975 of 21 counts of murder arising out of the bombing of two public houses in 1975. They appealed against conviction but their appeal was dismissed on 30 March 1976.

New evidence subsequently came to light concerning

1) allegations that the applicants had been beaten and intimidated by the police into making the admissions of guilt relied on in evidence by the prosecution and

2) the scientific evidence which had suggested that two, possibly three of the applicants had been in contact with explosives.

This new evidence was brought to the attention of the Home Secretary, who in January 1987 referred the case for further consideration to the Court of Appeal pursuant to section 17(1)a of the Criminal Appeal Act 1968 which provides that:

"Where a person has been convicted on indictment, or been tried on indictment and found not guilty by reason of insanity, or been found by a jury to be under disability, the Secretary of State may, if he thinks fit, at any time either:

(a) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the Court by that person; ..."

The powers of the Court of Appeal in appeal proceedings are fully applicable to reference proceedings (*Stafford v. D.P.P.* [1973] 3 WLR 719). The scope of the Court of Appeal's powers on appeal is set out in section 2 of the 1968 Act. Section 2 provides:

"(1) Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think:

(a) that the conviction should be set aside on the ground that under all circumstances of the case it is unsafe or unsatisfactory;

(b) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or

(c) that there was a material irregularity in the course of the trial,

and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.

(2) In the case of an appeal against conviction the Court shall, if they allow the appeal, quash the conviction.

(3) An order of the Court of Appeal quashing a conviction shall, except when under section 7 below the appellant is ordered to be retried, operate as a direction to the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal."

During proceedings at which the applicants were represented by counsel, the Court of Appeal heard the new evidence put forward by the applicants. In a written judgment given on 28 January 1988, the Court of Appeal stated as regards the question of a re-trial before a jury:

"First <the applicants> submit that if their contentions are accepted we should not allow the appeal outright but should order a re-trial so that the whole matter can be re-assessed by another jury in the light of the fresh evidence.

This in our judgment is an unreal suggestion. It would as a matter of practical politics be highly unsatisfactory if not unjust, 13 years or more after the events, to hold a re-trial. Suffice it to say that this is the sort of case in which there is no half-way house. If there is any doubt in our minds as to whether the conviction is safe or satisfactory the appeals must be allowed and the convictions quashed."

The Court of Appeal went on to review in detail the new evidence. It concluded however that it had no doubt that the convictions were both safe and satisfactory and dismissed the applicants' appeals.

On 14 April 1988, the House of Lords declined to give leave to appeal to the applicants.

COMPLAINTS

The applicants complain that they have been denied a fair and public hearing contrary to Article 6 para. 1 of the Convention since the new evidence was considered only by the Court of Appeal, which declined to exercise its power to order a re-trial before a jury which is the proper forum for the assessment of evidence in its entirety.

The applicants further submit that in deciding the relevance of the new evidence, the Court of Appeal started from the basis that the applicants were guilty and thus applied a different burden of proof than that required in criminal trials.

The applicants also complain that they have no remedy against this decision contrary to Article 13 of the Convention.

THE LAW

1. The applicants complain that they did not receive a fair trial since the Court of Appeal refused to direct a new trial at which the new evidence could be assessed by a jury.

Article 6 para. 1 first sentence of the Convention provides:

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

The Commission must first examine whether Article 6 para. 1 of the Convention applies to the reference proceedings before the Court of Appeal.

In the Delcourt case (Eur. Court H.R., Delcourt judgment of 17 January 1970, Series A No. 11, pp. 14-15 para. 25) the Court stated as follows:

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

In that case the Court held that Article 6 applied to proceedings in cassation following a conviction at first instance. In the case of Monnell and Morris (Eur. Court H.R., Monnell and Morris judgment of 2 March 1987, Series A No. 115, p. 7 para. 54) the Court held that Article 6 applied to proceedings before the English Court of Appeal for leave to appeal from a conviction. In those cases the cassation proceedings and appeal proceedings were normal steps in criminal proceedings.

The Commission notes that in this case the criminal proceedings had long been completed and that the reference procedure was not a normal step. Nonetheless the proceedings on the Secretary of State's reference had all the features of an appeal against conviction, and could have resulted in the applicants being found not guilty or, as in fact happened, the convictions being upheld. They must therefore in the Commission's view be regarded as having the effect of determining, or re-determining, the charges against the applicants. The proceedings therefore fell within the scope of Article 6 para. 1 of the Convention.

The manner in which the guarantees of Article 6 of the Convention are to be applied in relation to such proceedings must however depend upon their special character (Eur. Court H.R., Delcourt judgment loc. cit., pp. 15 para. 26 and Eur. Court H.R., Pakelli judgment of 25 April 1983, Series A No. 64, p. 14 para. 29). Account must be taken in particular of the nature of the role of the appellate or cassation court involved, the scope of its powers and the manner in which the individual's interests are presented and protected before the Court (see e.g. Eur. Court H.R., Monnell and Morris judgment of 2 March 1987, loc. cit., p. 7 para. 56).

In the present case, the Court of Appeal, after hearing the new evidence, dismissed the applicants' appeals on the basis that the convictions were safe and satisfactory. The Commission notes that the applicants were represented by counsel, who was able to examine the witnesses and address the Court on the applicants' behalf. The applicants complain however that the Court of Appeal failed to direct a re-trial before a jury, which would then be in a position to rehear all the evidence together.

The Commission notes that trial by jury is widely considered in the United Kingdom as an important element in ensuring fairness in the system of criminal justice. Article 6 of the Convention does not however specify trial by jury as one of the elements of a fair hearing in the determination of a criminal charge (see e.g. No. 8299/78, Dec. 10.10.80, D.R. 22 p. 51, para. 73). The Commission's case-law establishes also that no right to a retrial is as such included among the rights and freedoms guaranteed by the Convention (see e.g. Nos. 1237/61, Dec. 5.3.62, Yearbook 5 pp. 36, 100 and 7761/77, Dec. 8.5.78, D.R. 14 pp. 171, 173).

Having regard to the exceptional character of the reference proceedings which in effect re-opened the original proceedings which ended in 1975, the Commission finds no indication that the assessment of the new evidence by the Court of Appeal itself and its failure to direct a fresh trial before a jury to hear this evidence deprived the applicants of a fair hearing as required by Article 6 para. 1 of the Convention. The Commission notes in this regard the Court of Appeal's opinion that it would be impracticable to order a new trial thirteen years after the events in question and that, if there was least doubt that the verdicts were safe or satisfactory, the Court would quash the convictions.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The applicants also complain that in assessing the new evidence the Court of Appeal reversed the burden of proof and acted on the assumption that the applicants were guilty by adopting the approach that the verdict should stand unless proved to be unsatisfactory.

Article 6 para. 2 of the Convention provides:

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

While the Commission has found in the present case that the reference proceedings fall within the scope of Article 6 of the Convention, the Commission recalls the special nature of these proceedings. The applicants had been convicted after a trial in 1975, and their appeal against this conviction was dismissed on 30 March 1976. The Commission recalls that in the Delcourt case (Eur. Court. H.R. loc. cit., para. 26) while stating that Article 6 para. 1 was applicable to supervisory proceedings the Court held that "the way in which it applies must, however, clearly depend on the special features of such proceedings". The Court of Appeal in its reference proceedings was concerned with the question whether the verdict of the jury should be set aside on the ground that in light of new evidence

not available at the trial the verdict of the jury was unsafe or unsatisfactory. In such circumstances the Commission finds that Article 6 para. 2 had no application to the reference proceedings.

It follows that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

3. The applicants further complain that they have no effective remedy in respect of their complaints contrary to Article 13 of the Convention, which 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."

Article 13 of the Convention guarantees a right to a remedy before a national authority when an individual has an arguable claim of a violation of the Convention. When the alleged violation concerns the decision of a court the right to a remedy would appear to require a remedy before a higher court. However, in light of the established case-law concerning Article 6 of the Convention as stated above and Article 2 of Protocol No. 7 which expressly accords the right of review by a higher tribunal in criminal matters, Article 13 cannot be interpreted as according such a right (see e.g. No. 11508/85, Dec. 17.7.86, to be published in D.R.). Consequently, this provision cannot be relied on as affording a right of appeal from an inferior court to a superior court.

The Commission notes that the applicants' complaint of a violation arises from the decision of the Court of Appeal. The Commission finds that their complaint of being unable to challenge this decision discloses no appearance of a violation of the Convention. It follows that this complaint must be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission

Acting President of the Commission

(H.C. KRÜGER)

(S. TRECHSEL)