AS TO THE ADMISSIBILITY OF

Application No. 15123/89
by Mark Selwyn BRAITHWAITE
against the United Kingdom

The European Commission of Human Rights sitting in private on 18 April 1991, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
H. DANELIUS
Sir Basil HALL
MM. F. MARTINEZ RUIZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ
B. MARXER

Mr. J. RAYMOND, Deputy 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 12 June 1989 by Mark Selwyn BRAITHWAITE against the United Kingdom and registered on 15 June 1989 under file No. 15123/89;

Having regard to

- the report provided for in Rule 47 of the Rules of Procedure of the Commission;

- the Government's observations of 20 March 1990 and the applicant's observations of 31 July 1990;

- the submissions made at an oral hearing on 18 April 1991;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1967 and resident in London. He is currently serving a prison sentence in Wormwood Scrubs. He is represented by Danny Simpson, a solicitor practising in London. The facts as submitted by the parties may be summarised as follows.

On the night of 6 October 1985, serious civil disorder arose on the Broadwater Farm Estate in Tottenham, North London, involving hundreds of members of the public and police officers. At about 22.00 hrs a number of police officers who had been assisting a fire-fighting team were chased towards police lines by a large crowd. One officer, P.C. Blakelock, fell and was surrounded by a number of young men, attacking him with sticks, knives and machetes. He suffered 40 wounds of various degrees of severity and died of his injuries.

The police later arrested 6 persons in connection with the killing of P.C. Blakelock. Five were arrested between 9 and 12 October 1985. The applicant was arrested on 4 February 1986. At 16.03 hrs, just after his arrival at Enfield Police Station, the applicant was read a notice which set out his rights. He asked to consult a solicitor and for his mother to be informed of his detention. He was told that neither of these requests would be acted upon whilst a senior officer considered whether the rights should be delayed under the Police and Criminal Evidence Act 1984. At 14.30 hrs it was decided that access to a solicitor was to be delayed on the grounds that others to be arrested may be alerted and forensic evidence may be lost or destroyed although his solicitor and mother could both be informed of his detention. The applicant was so informed. At 16.57 hrs, the applicant's solicitor was informed of his arrest and of the decision to delay access. At 17.OO hrs the applicant's sister was told of his arrest.

The applicant was interviewed on 7 occasions from 4 to 6 February in the absence of his solicitor. During those interviews, the applicant was recorded as making incriminating statements as to his involvement in the events of 6 October 1985. He admitted being present during the riot on 6 October 1985 and taking a bottle of cherryade which had been thrown out of a shop, which had been looted. He also admitted throwing stones at the police and seeing two police officers fall and be attacked by a crowd. He further told the police that he had hit twice one of the policemen with a bar, on his leg and his side. The applicant however denied hitting the policeman who had died and said that he had hit the other policeman who had been attacked nearby.

The applicant was tried with 5 others for the murder of P.C. Blakelock from 14 January to 19 March 1987 and for being concerned in a riot. During the course of the trial, the judge (Mr. Justice Hodgson) directed the acquittal of the 3 juvenile defendants on the charge of murder as a result of their treatment in police custody and lack of evidence. The evidence identifying the applicant as one of those who attacked P.C. Blakelock consisted solely of the statements recorded by the police during the interviews.

At the trial the applicant gave evidence that he had spent the whole evening at a friend's house and that the statements he had made to the police were made up from information he had obtained from the media and from other persons. He claimed that the police had sworn at him, bullied and pressurised him. The friend, and a friend of hers, gave evidence in support of the alibi. It was also contended on his behalf that even if the statements made by him to the police were true they amounted to an admission of an attack on another policeman, and not on Constable Blakelock.

During cross-examination by the applicant's counsel, the Detective Chief Superintendent in charge of the case stated that he refused the applicant access to a solicitor since he considered the solicitor might wittingly or unwittingly alert other persons still wanted for the murder or lead to the destruction of evidence.

On 19 March 1987, the applicant was found guilty of the charge of murder and a charge of riot. He was sentenced to life imprisonment with a sentence of 8 years for riot.

The applicant applied for leave to appeal against conviction on the grounds inter alia that the trial judge had not given fair or adequate treatment in his summing-up to the applicant's defence which was that the admissions made by the applicant amounted to no more than having taken part in an attack on one of the other policemen on the scene. Leave was refused by the single judge of the Court of Appeal. He renewed his application before the full Court of Appeal, which heard the applicant on 13 December 1988. The Court of Appeal found no

substance in the applicant's criticisms of the trial judge's direction to the jury which it considered gave a fair and balanced account of the evidence.

His application for leave to appeal was accordingly refused.

The Court concluded in its judgment:

> "The question for us to decide is essentially: was there an unfair imbalance in the way the judge dealt with Braithwaite? As to that the answer is an emphatic no. It was a balanced and fair account. He put matters as clearly as could be. Braithwaite's defence was an exceedingly difficult one to run, namely, 'I was not there but if, which is denied, I was there, I did not do what is alleged against me'. It is not surprising the jury came to the conclusion they did. His application too is refused."

RELEVANT DOMESTIC LAW AND PRACTICE

Access to a solicitor in police custody

The detention and treatment of a person whilst in police custody is subject to the provisions of the Police and Criminal Evidence Act 1984 ("PACE") as supplemented by Code C of the Codes of Practice issued by the Secretary of State under Section 66 of PACE. These provisions came into force on 1 January 1986.

Section 58 of PACE confers a right on a person who has been arrested and is held in custody in a police station to consult a solicitor privately at any time if he so requests. It provides as follows:

"(1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.
(2) Subject to sub-section (3) below, a request under sub-section (1) above and the time at which it was made shall be recorded in the custody record.

(3) Such a request need not be recorded in the custody record of a person who makes it at a time while he is at a court after being charged with an offence.

(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 delay is permitted by this section.

(5) In any case he must be permitted to consult a solicitor within 36 hours from the relevant time, as defined in Section 41(2) above.

(6) Delay in compliance with a request is only permitted -

(a) in the case of a person who is in police detention for serious arrestable offence; and

(b) if an officer of at least the rank of superintendent authorises it.

(7) An officer may give an authorisation under the sub-section above orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.

(8) An officer may only authorise delay where he has reasonable grounds for believing that the exercise of the right conferred by sub-section (1) above at the time when the

person detained desires to exercise it -

(a) will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or

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

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

(9) If delay is authorised -

(a) the detained person shall be told the reason for it; and

(b) the reason shall be noted on his custody record.

(10) The duties imposed by sub-section (9) above shall be performed as soon as is practicable.

(11) There may be no further delay in permitting the exercise of the right conferred by sub-section (1) above once the reason for authorising delay ceases to subsist. ..."

Section 58 is supplemented by Code C of the Codes of Practice issued under Section 66 of PACE.

Under Section 66 of PACE, the Secretary of State is under a duty to issue Codes of Practice in connection with the detention, treatment, questioning and identification of persons by police officers. The procedure in connection with the issuing of a Code is laid down in Section 67. In particular a draft Code has to be laid before both Houses of Parliament and the Code cannot be brought into force until each House has approved an Order to that effect.

Section 67(8) of PACE provides that a police officer is liable to disciplinary proceedings for a failure to comply with any provision of a Code (unless this is precluded under Section 104 of PACE). A Code is admissible in evidence by virtue of sub-section (11).

Pursuant to Section 66(b) the Secretary of State issued the Code of Practice for the detention, treatment and questioning of persons by police officers, Code C, which applies to persons who entered police detention after midnight on 31 December 1985.

Where a person is brought to a police station under arrest, Section 3.1 of the Code requires the custody officer to inform him of his right to have someone informed of his arrest, the right to consult a solicitor and the right to consult the various Codes of Practice issued under Section 66 of PACE. Under Section 3.2 of the Code the person must be given a written notice setting out these three rights, the right to a copy of the custody record in accordance with Section 2.4 of Code C and the caution in the terms prescribed by Section 10 of the Code.

Admission and exclusion of confession evidence

Provision about the admissibility of confession evidence and the exclusion of unfair evidence is made in Part VIII of PACE. These provisions came into force on 1 January 1986. For these purposes, a confession includes, "any statement wholly or partly adverse to the person who made it, whether made to person in authority or not and whether made in words or otherwise" (Section 82(1)(a) of PACE).

By virtue of Section 76 of PACE, a confession by an accused person may be given in evidence against him. Where given, it is admissible without it having to be corroborated. The section, however, contains safeguards relating to the circumstances in which the confesson came to be made and which may mean that the confession must be excluded. Under sub-section (2) the trial court is required not to allow the confession to be given in evidence if it is represented to the court that it was or may have been obtained by oppression or in consequence of something said or done which was likely to render the confession unreliable unless the prosecution can prove to the court, beyond a reasonable doubt, that the confession was not so obtained. The court may, of its own motion, require the prosecution to prove that a confession on which the prosecution proposes to rely was not obtained by oppression or in circumstances likely to render it unreliable (sub-section (3)). In R v. Fulling [1987] 2 WLR 913, which was decided by the Court of Appeal in February 1987 during the applicant's trial, it was held that "oppression" was to be given its ordinary dictionary meaning and the court cited the Shorter Oxford English Dictionary definition, "exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc; the imposition of unreasonable or unjust burdens." By virtue of sub-section (8) of Section 76, oppression includes torture, inhuman or degrading treatment, and the use of threat of violence (whether or not amounting to torture).

Section 78 provides as follows:

"(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

In R v. Mason [1988] 1 WLR 139, the Court of Appeal held that Section 78 applied to all evidence which might be introduced in the trial by the prosecution and that, accordingly, a trial judge had a discretion whether to exclude a confession in the interests of the fairness of the trial. The Court also held that the Section did no more than re-state the power which judges had at common law before the Section was passed to exclude evidence.

In R. v. Samuel [1988] 2 WLR 920 5 (decided on 17 December 1987), the Court of Appeal, which included Hodgson J, dealt with the admissibility of confession evidence given after, the Court held, the accused had been wrongly denied access to a solicitor. The Court held that denial of the right conferred by Section 58 of PACE can lead to the exclusion of evidence obtained at unlawful interviews conducted after the denial either by the exercise of the power in the trial judge conferred by Section 78(1) or, where the prosecutor fails to satisfy the court that the denial did not amount to oppression, under Section 76. In the circumstances of this case, the Court of Appeal found that the reasons given for denial of access to a solicitor, namely that the solicitor might inadvertently or otherwise hinder further enquiries, were insufficient given that there was no specific reason to suspect the solicitor or to anticipate that he would be hoodwinked by the accused person. The Court applied Section 78 and the conviction, which was based on confession evidence allegedly obtained after the denial of access to a solicitor, was quashed.

COMPLAINTS

1. The applicant complains that he did not receive a fair trial within the meaning of Article 6 para. 1 of the Convention for the following reasons:

a. He was convicted solely upon an ambiguous, challenged, series of statements made in the absence of his legal representative.

b. The trial judge failed to draw the jury's attention to the several points stressed by the defence upon which the applicant's account differed from the agreed evidence of the attack on P.C. Blakelock.

c. The Court of Appeal was not entitled to find that the trial judge's direction was balanced and fair or that the applicant's account in interview amounted to a confession to the murder of P.C. Blakelock.

2. The applicant also complains under Article 5 of the Convention that no court is competent to determine issues of guilt based on the evidence available in this case.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 June 1989 and registered on 15 June 1989.

On 2 October 1989, the Commission decided to communicate the application to the Government pursuant to the Commission's Rules of Procedure and to invite them to submit written observations on the admissibility and merits.

The Government's observations were submitted on 20 March 1990 after one extension in the time-limit. The applicant's observations were submitted on 31 July 1990 after two extensions in the time-limit.

On 6 April 1990, the Commission decided to grant legal aid to the applicant.

On 4 September 1990, the applicant's solicitor requested that the Commission obtain a copy of part of the transcript of the applicant's trial.

On 19 September 1990, the President of the Commission requested the respondent Government to provide a copy of the relevant part of the transcript. The respondent Government submitted this information on 10 October 1990.

0n 10 December 1990, the Commission decided to hold an oral hearing on the admissiblity and merits of the case. At the hearing, which was held on 18 April 1991, the parties were represented as follows:

For the Government:

Mrs. A. F. Glover — Agent, Foreign and Commonwealth Office
Mr. A. Moss, QC — Counsel
Mr. H. Carter — Adviser, Home Office

For the applicant:

Mr. D. Simpson — Solicitor, Messrs. John Howell & Co.
Mr. S. Kamlish — Counsel
Ms. S. Maguire — Counsel

THE LAW

1. The applicant alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention on the ground that:

a. He was convicted solely upon an ambiguous, challenged, series of statements made in the absence of his legal representative.

b. The trial judge failed to draw the jury's attention to the several points stressed by the defence upon which the applicant's account differed from the agreed evidence of the attack on P.C. Blakelock.

c. The Court of Appeal was not entitled to find that the trial judge's direction was balanced and fair or that the applicant's account in interview amounted to a confession to the murder of P.C. Blakelock.

The applicant also complains under Article 5 (Art. 5) of the Convention that no court can determine issues of guilt based on the evidence available in this case.

2. The Commission considers that Article 5 (Art. 5) has no relevance to the applicant's complaints and has examined the case solely under Article 6 para. 1 (Art. 6-1) of the Convention which provides as follows:

"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 applicant contends that he did not receive a fair hearing in the determination of the criminal charges against him in that the statements made by him to the police on 4, 5 and 6 February 1986 should not have been admitted in evidence.

The Government submit that the applicant has failed to comply with the requirement as to the exhaustion of domestic remedies in this respect, or, in the alternative, that the application is manifestly ill-founded. They point out that the applicant's representatives did not challenge the admissibility in evidence of the applicant's statements to the police, either at the outset of the trial or in its course. Furthermore the applicant did not seek leave to appeal in respect of the admission of that evidence at the trial.

The applicant concedes that that was so but contends that both Courts should have made a decision on the point ex officio and without it having been drawn to their attention.

However, the Commission is not required to decide whether this allegation discloses any appearance of a violation of this provision as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.

In the present case the applicant's lawyers failed to challenge the admissiblity of the confession evidence at the outset of the trial (by requesting a 'voire dire'), after the evidence had been submitted, in his grounds of appeal or in argument before the Court of Appeal. The effect of this is that the domestic courts were deprived of the opportunity of considering the issues raised by the use of the contested evidence. The applicant has therefore, not exhausted the remedies available to him under United Kingdom law. Moreover, an examination of the case does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from exhausting

the domestic remedies at his disposal. As to the submission that the court should have excluded the evidence of its own motion, the Commission recalls that, even where domestic courts are under a duty to consider matters of their own motion, applicants are not relieved of the requirements of Article 26 (Art. 26) of the Convention (cf. No. 11244/84, Dec. 2.3.87, to be published in D.R. 55). In any event, although Section 76 (2) of PACE provides that a trial court is required not to allow a confession to be given in evidence if it is represented to the court that it was or may have been obtained by oppression or in consequence of something said or done which was likely to render the confession unreliable, the applicant's lawyers do not appear to have made any representation to the trial court that oppression was involved in the course of the interviews. Section 76(3) specifically allows a court not to allow a confession to be given in evidence except in so far as the prosecution proves beyond reasonable doubt that it was not obtained by oppression. It has not, however, been substantiated that there was any material before the Court which would lead a court to apply that provision. No argument was made in the applicant's grounds of appeal to the Court of Appeal that oppression was involved such that the Central Criminal Court should have excluded the evidence of its own motion.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies in this respect and this part of the application must therefore be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

3. As to the remainder of the application, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its established case-law (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45).

The Commission has examined these complaints as submitted by the applicant and finds no indication of unfairness within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

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

For these reasons, the Commission by a majority

DECLARES THIS APPLICATION INADMISSIBLE.

Deputy Secretary to the Commission — President of the Commission

(J. RAYMOND) — (C.A. NØRGAARD)