CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 3811/04
by Barry DONNAN
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 8 November 2005 as a Chamber composed of:

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr J. BORREGO BORREGO,
Mr J. ŠIKUTA, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 1 December 2003,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Barry Donnan, is a British national who was born on 29 May 1971 and lives in Kilwinning, Scotland

A. The circumstances of the case

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

In 1993 the applicant was discharged from the army with post traumatic stress disorder ("PTSD"). Thereafter, he was involved in a legal dispute with the Ministry of Defence. On 28 March 2002 and 4 April 2002 he took part in protests concerning PTSD in Edinburgh. The first protest passed without incident. However, during the second protest he was arrested.

He alleged that he was not informed of the reason for his arrest at the time. The authorities, however, alleged that he was informed that he was being arrested for breach of the peace. According to a subsequent police complaint report there was an independent witness who confirmed the police's account.

In any case, he was taken to St Leonard's Police Office, where his particulars were taken, he was fingerprinted, photographed and DNA samples were taken. After approximately forty minutes he was released from custody and a case alleging 'Breach of the Peace' was submitted to the Procurator Fiscal. The Procurator Fiscal subsequently decided to discontinue the case.

In December 2002 the applicant was visited at his home by two officers from Strathclyde Police on an unrelated matter. During the visit the applicant had sight of a document he describes as his "criminal record". On examining this document, he claims that he observed that the case relating to the incident in April in Edinburgh was recorded even though no court proceedings had ever taken place.

B. Relevant domestic law

Sections 6 and 8 of the Human Rights Act 1998 ("the 1998 Act") provide (in so far as relevant):

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right...
>
> (3) In this section "public authority" includes-
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament...
>
> 8. (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including-

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

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

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

(4) In determining-

(a) whether to award damages, or

(b) the amount of an award,

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

(6) In this section-

"court" includes a tribunal;

"damages" means damages for an unlawful act of a public authority; and

"unlawful" means unlawful under section 6(1).”

The English courts have relied on section 8 of the 1998 Act to make awards of damages (see *R v Enfield London Borough Council ex p Bernard* [2003] HRLR 4).

COMPLAINTS

The applicant complained under Article 10 that he was arrested while taking part in a peaceful protest. He alleged that no reasons were given for his arrest at the time and that the arrest was politically motivated.

He also complained under Article 7 that he had been given a “criminal record” without ever having been taken before a court.

THE LAW

A. Article 35 § 1 of the Convention

The Court recalls the general principles as set out in *H.L. v. the United Kingdom*, (dec.), no. 45508/99, ECHR 2004-):

“The Court recalls that Article 35 § 1 of the Convention requires those seeking to bring their case against a State to use first those remedies provided by the national legal system, including available and effective appeals, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The complaints

> intended to be made subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law and, further, any procedural means that might prevent a breach of the Convention should have been used (*Cardot v. France* judgment of 19 March 1991, Series A no. 200, § 34)."

The Court observes that the applicant could have relied on section 6 of the 1998 Act to bring an application for judicial review against the public authority responsible for his arrest and allegedly responsible for giving him the "criminal record" to which he referred. If he had been successful, he could have obtained a declaration that the arrest was unlawful, an order quashing any such criminal record and even damages, if that was necessary in order to afford him just satisfaction (see section 8 of the 1998 Act and *R v Enfield ex p. Barnet*). The applicant did not explain why he did not bring any such application.

In such circumstances, the Court does not consider that the applicant has demonstrated that he has exhausted all effective domestic remedies available to him as required by Article 35 § 1. Accordingly, his complaint must be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to declare the application inadmissible.

Françoise ELENS-PASSOS
Deputy Registrar

Josep CASADEVALL
President