AS TO THE ADMISSIBILITY OF

Application No. 17579/90
by John KELLY
against the United Kingdom

The European Commission of Human Rights sitting in private on 13 January 1993, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Sir Basil HALL
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI

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 4 December 1990 by John Kelly against the United Kingdom and registered on 19 December 1990 under file No. 17579/90;

Having regard to

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

- the written observations submitted by the respondent Government on 1 May 1992 and the observations in reply submitted by the applicant on 25 July 1992;

- the oral submissions made by the parties at a hearing on 13 January 1993;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Irish citizen born in 1937 and resident in Belfast. He is represented by Trevor Smyth and Company, Solicitors practising in Belfast.

The facts as submitted by the parties may be summarised as follows.

On 18 January 1985, the applicant's son P., who was 17 years old, and four other youths went riding in a stolen car, a Ford Granada, in Belfast. The car was handed over to the youths in West Belfast. For reasons not explained it was driven into South and East Belfast, areas where it was more likely to be intercepted. They stopped in the vicinity of a house belonging to a member of the Security Forces and one of the youths in the car attempted to steal the car outside. The description of the stolen car and the fact that it had been seen in the vicinity of the house of a member of the Security Forces was transmitted over the radio to units in the area. Two detachments of soldiers of the Ulster Defence Regiment in Land Rovers had been patrolling in South and East Belfast and stopping vehicles at checkpoints. Shortly after midnight they were ordered to set up a joint vehicle checkpoint in Stockman's Lane, a road leading towards West Belfast.

P. was driving the stolen car when, at about midnight, it entered Stockman's Lane. It was noticed by one of the units, which too had just entered Stockman's Lane at another point, and the occupants of the stolen car were observed to duck down below the window. The unit reported the presence of the car by radio and continued to follow it down Stockman's Lane at a cautious distance.

The commander of the other detachment decided to set up a snap vehicle checkpoint on the roundabout at the west end of Stockman's Lane from which there are exits to the M1 motorway and to Kennedy Way, leading to West Belfast.

At the roundabout, the UDR detachment positioned their Land Rover in the middle of the roadway and began to set up the checkpoint. A Cortina arrived and stopped near the Land Rover. Members of the unit immediately went to check the identity of the occupants who they asked to get out of the car. Another member of the unit went to get a caltrop from the back of the Land Rover.

At this point, the stolen car driven by P. appeared on the roundabout. It stopped abruptly and then began to reverse away from the checkpoint at considerable speed. It collided with the UDR Land Rover approaching from behind. P. then drove the car forwards where it collided with the Cortina waiting at the checkpoint. During these manoeuvres soldiers had run towards the car waving and shouting at it to stop. One soldier had to dive out of the path of the car to avoid being struck while another attempted to break the window at the driver's seat with his rifle butt.

As the car hit the Cortina in the rear, the force of the impact shunted it into the Land Rover in front and in this collision one soldier was knocked over and another pinned between the two vehicles, both sustaining minor injuries. As P. proceeded to attempt to drive round the checkpoint, he hit the Cortina once more and scraped along the side of the Land Rover. The car then passed the checkpoint by mounting onto the central reservation and returning to the roadway, heading at speed for the exit roads further round the roundabout. P. appeared to be trying to turn into Kennedy Way, failing and then making for M1 exit. Before reaching it the car came off the road, knocking down two concrete posts and being held by chain link wire. The soldiers opened fire as the car passed the checkpoint, firing about 14-15 rounds. P. died as a result of gunshot wounds and two others were struck by bullets, one of whom was trying to run away from the car.

The applicant brought an action against the Ministry of Defence for assault, battery and negligence in that the death of his son was the result, inter alia, of excessive and unjustifiable force. The

claim was heard in the High Court from 28 November to 2 December 1988.

After hearing evidence from several of the youths in the car, and from the soldiers involved in the shooting, the High Court judge found on 13 January 1989 that the soldiers had formed the genuine belief that the occupants of the car were terrorists making a determined attempt to escape from the checkpoint and that use of force to prevent that escape was justified in the prevention of crime, i.e. further terrorist activities.

The judge held, inter alia:

> "I had an opportunity to assess these witnesses over a fairly extended period as they gave their evidence, which was fully tested in cross-examination. I am satisfied that each did form a genuine belief that the occupants of the Ford Granada were terrorists who were making a determined attempt to escape from the checkpoint. I further consider that the belief entertained by each soldier, considered individually, was reasonable in the circumstances of the case. Each knew that the car was stolen, and each saw the driver resort to unusually determined and violent measures to get his vehicle through the checkpoint. The checkpoint was at a natural access point to West Belfast for vehicles coming from South Belfast. I think that the conclusion reached by the soldiers that the manner of driving of the car was not indicative of a drunken driver or joyriders was reasonable. The several factors operated in their minds to bring them to the conclusion that it contained determined terrorists, bent on making good their escape. In my opinion that conclusion was on the facts of this case a reasonable one for each to reach...
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> ... the intention of the soldiers in shooting at the car covered both these objectives <of the prevention of crime and the effecting of a lawful arrest>. Although some of them expressed it in terms only of arresting the occupants of the car, I think that consideration of the soldiers' evidence as a whole shows that they intended to stop the car, with the object of apprehending the occupants and preventing them from escaping and carrying out further terrorist missions. The one act of stopping the car might readily have achieved both objectives, on the facts which the soldiers believed to be correct, and can be regarded as directed towards both....
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> The method of stopping the car to which the soldiers had resort was to shoot at it with their rifles. The modern military rifle is a high-powered and accurate weapon, and each of the soldiers was aiming at the car in order to hit the driver and so bring the vehicle to halt. If he hit his target, there was a high probability that the shots would kill him or inflict severe injury.
>
> There was also a considerable risk that the passengers, particularly those seated behind the driver, would sustain serious or possibly fatal injuries from the bullets fired or fragments scattered on impact with the car. The action of the soldiers has to be considered on the footing that it was designed to kill or seriously to injure the driver, with knowledge of the risk of death or injury to the passengers. It could only be regarded as a reasonable action if the risks to the public involved in allowing a car containing terrorists to escape outbalance in the scales of reason the danger of inflicting death or serious injury to its occupants. In weighing these considerations one has to take account of the fact that the only weapons

available to the soldiers were their rifles, and they either used them to effect or took no action to stop the car. There had not been time to get the caltrop out and lay it across the road, which might have formed a sufficient means of stopping it. It was not suggested, nor would I have been attracted to the suggestion if it had been advanced, that it was possible to immobilise the car effectively by shooting at the tyres or the engine block. The use of a firearm must in my view be an expedient of last resort, but when it is brought into service that can only usefully be done by shooting at the driver.

It is reasonable to take such a course only if the justification is shown to be sufficient...

In the present case the mischief which the soldiers intended to prevent by firing at the driver of the car was the escape of a number of terrorists, as I have found they reasonably thought the occupants of the car to be. Ex hypothesi the driver at least out of those occupants was regarded by the soldiers as a person who was so intent on escaping capture that he was prepared to break through a checkpoint by knocking vehicles out of his path, reckless of injury to any persons who might be in the way. A person so determined to escape capture, and probably his associates, would be likely to be active and committed terrorists, who would very probably continue to commit terrorist crimes if allowed to go free. The checkpoint was the only place at which it was likely to be possible to stop them, and if they escaped it they would retain their liberty to engage in attacks upon the community of the nature perpetrated by terrorist organisations. The harm to which the occupants of the car were exposed when the soldiers aimed at the driver was predictable and grave and the risk of its occurrence was high. But in my opinion the kind of harm to be averted (as the soldiers reasonably thought) by preventing their escape was even graver - the freedom conferred on active and dangerous terrorists to resume their activities of dealing in death and destruction and, in Lord Diplock's words,

> `encouraging the continuance of the armed insurrection and all the misery and destruction of life and property that terrorist activity in Northern Ireland has entailed.'<Attorney General for Northern Ireland's Reference 1976 N.I. 169>

In my judgment the justification for opening fire upon the car has been shown to be sufficient, and I accordingly hold that the defendant has discharged the burden of proving that the act of the soldiers in firing at it was the use of such force as was reasonable in the circumstances in the prevention of crime. .."

The applicant appealed to the Court of Appeal alleging, inter alia , that the judge had erred in holding that the act of the soldiers in firing was the use of reasonable force or for the purpose of the prevention of crime.

The Court of Appeal in Northern Ireland dismissed the applicant's appeal on 10 October 1989, finding that the judge had correctly applied the law as to the justified use of force.

Leave to appeal to the House of Lords was refused on 11 June 1990.

Relevant Domestic Law and Practice

Section 3 (1) of the Criminal Law Act 1967 provides:

" 3 -(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

COMPLAINTS

The applicant complains that the death of his son constituted a deprivation of life in contravention of Article 2 of the Convention. He submits that the use of force was not justified under Article 2 para. 2 (a) (b) or (c). In particular he complains that the courts failed to afford protection to the right to life in that they held that the use of force could be justified without the existence or suspected existence of an actual or specific crime and that prevention of crime could include an unspecific crime to be committed at a remote future time.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 4 December 1990 and registered on 19 December 1990.

On 12 December 1991, the Commission decided to communicate the application to the respondent Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 1 May 1992 after one extension in the time-limit and the applicant's observations in reply were submitted on 25 July 1992 also after one extension in the time-limit.

On 22 May 1992, the Commission decided to grant legal aid to the applicant.

On 10 September 1992, the Commission decided to hold an oral hearing on the admissibility and merits of the case.

At the hearing, which was held on 13 January 1993, the parties were represented as follows:

For the Government:

Mrs. Audrey GLOVER	Agent Foreign and Commonwealth Office
Mr. Brian KERR, Q.C.	Counsel
Mr. Nicholas BRATZA, Q.C.	Counsel
Mr. David SEYMOUR	Adviser, Home Office
Mrs. Christine COLLINS	Adviser, Northern Ireland Office
Mr. James HARRISON	Adviser, Ministry of Defence
Mr. Iain CHRISTIE	Adviser, Foreign and Commonwealth Office

For the applicants:

Mr. Phillip MOONEY, Q.C.	Counsel
Mr. Hugh Martin RODGERS, B.L.	Counsel
Mr. Harold DAVIDSON	Solicitor

The applicant was also present.

THE LAW

The applicant complains that his son was deprived of his life in violation of Article 2 (Art. 2) of the Convention.

Exhaustion of domestic remedies

The Government submit that the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention since he did not raise before the Court of Appeal the specific argument that the words "prevention of crime" should refer to an act being committed or about to be committed rather than a crime to be committed at a remoter future date or time.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach (cf. No. 9248/81, Dec. 10.10.83, D.R.34 p.78).

It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court. H.R., Deweer judgment of 27 February 1980, Series A no. 35, p. 15, para. 26, and No. 9013/80, Dec. 11.12.82, D.R. 30 p. 96, at p. 102).

In the present case the Commission notes that the applicant's grounds of appeal had included the argument in general terms that the conduct in issue was not "in the prevention of crime". Further the issue had already been considered in a previous case before the House of Lords, referred to and relied upon by the High Court judge and there is no indication that raising it before the Court of Appeal would have had any prospect of success. The Commission accordingly finds that the application cannot be declared inadmissible for non-exhaustion of domestic remedies.

Article 2 (Art. 2) of the Convention

Article 2 (Art. 2) of the Convention provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection."

The applicant submits that the killing of his son by soldiers as he attempted to drive round a vehicle checkpoint in a stolen car was in violation of the above provision since it could not be regarded as "absolutely necessary" for one of the purposes specified in the second

paragraph.

The Government have submitted that the use of force pursued the objective of effecting a lawful arrest and was not disproportionate to that aim, given the finding of the High Court judge that the soldiers reasonably believed that the occupants of the car were terrorists, determined to break through the checkpoint violently, and that the only action open to them to stop the car was to open fire.

As a preliminary remark, the Commission would emphasise that the situations where deprivation of life may be justified are exhaustive and must be narrowly interpreted. The use of force which has resulted in a deprivation of life must have been shown to have been "absolutely necessary" for one of the purposes set out in the second paragraph. The Commission has held that the test of necessity includes an assessment as to whether the interference was proportionate to the legitimate aim pursued and that the qualification of the word "necessary" by the adverb "absolutely" indicates that a stricter and more compelling test of necessity must be applied than in context of other provisions of the Convention. More specifically, the Commission considered that :

> " ...Article 2 para. 2 (Art. 2-2) permits the use of force for the purposes enumerated in sub-paragraphs (a), (b) and (c) subject to the requirement that the force used is strictly proportionate to the achievement of the permitted purpose. In assessing whether the use of force is strictly proportionate, regard must be had to the nature of the aim pursued, the dangers to life and limb inherent in the situation and the degree of the risk that the force employed might result in loss of life. The Commission's examination must have due regard to all the relevant circumstances surrounding the deprivation of life" (No. 10444/82, Dec. 10.7.84, D.R. 39 p.162, at p. 169-171).

As regards the objective of the shooting in this case, the Commission notes that the High Court judge found in his judgment of 13 January 1989 that the intention of the soldiers in shooting at the car covered both the objectives of the prevention of crime and the effecting of a lawful arrest. Their evidence indicated that they intended to stop the car with the object of apprehending the occupants and preventing them from escaping and carrying out further terrorist missions. The Commission recalls that the High Court judge reviewed the evidence of the soldiers involved and deemed reasonable their view that the manner of driving the car was not indicative of a drunken driver or joyriders. Their conclusion that the car contained desperate terrorists, bent on making good their escape, was also held to be reasonable. The judge concluded that the action taken was lawful, in that the force used was such as was reasonable in the circumstances in the prevention of crime and hence justified under Section 3 of the Criminal Law Act 1967.

The Commission notes that the judge reached his decision in this case after hearing the evidence of the surviving occupants of the car and the soldiers involved, tested under cross-examination by the applicant's counsel. His examination of the factual and legal issues, upheld on appeal, gives no indication of arbitrariness or other ground which would justify the Commission reaching different conclusions. Having regard to the foregoing, the Commission is satisfied that the shooting in this case was for the purpose of apprehending the occupants of the stolen car, who were reasonably believed to be terrorists, in order to prevent them carrying out terrorist activities. Accordingly, the action of the soldiers in this case was taken for the purpose of effecting a lawful arrest within the meaning of Article 2 para. 2 (b) (Art. 2-2-b) of the Convention. It is unnecessary in view of this finding to examine the judge's application and interpretation of the concept "prevention of crime", being a justification for the use of force under domestic law which does not appear in Article 2 (Art. 2).

The Commission has therefore examined whether the force used in pursuit of the above aim was "absolutely necessary", in particular whether it was strictly proportionate, having regard to the situation confronting the soldiers, the degree of force employed in response and the risk that the use of force could result in the deprivation of life.

In this regard, the applicant has submitted that the use of force was disproportionate and excessive, given the possibility that a car which goes through a checkpoint could be driven by joyriders or by drunken, inadvertent or frightened motorists. The Commission recalls, however, that the High Court judge expressly addressed this issue and found that the soldiers reasonably believed the occupants to be terrorists. This finding is supported by the suspicion already existing with regard to the car, which was known to have been stolen and had been seen in questionable circumstances in the vicinity of the house and car of a member of the security forces. It was reinforced by the determined and even desperate efforts made by the driver of the car to escape the checkpoint, which was not found to be indicative of joyriders or drunken motorists.

The Government have submitted, and the applicant has not disputed, that the only course of action open to the soldiers was either to open fire or to allow the car to escape. Neither before the domestic courts, nor before the Commission, was it contended that it would have been possible to immobilise the car by shooting at the tyres or the engine block. The Commission notes that the High Court judge commented that there was a high probability that shots fired at the driver would kill him or inflict serious injury. The situation facing the soldiers, however, had developed with little or no warning and involved conduct by the driver putting them and others at considerable risk of injury. Their conduct must also be assessed against the background of the events in Northern Ireland, which is facing a situation in which terrorist killings have become a feature of life. In this context the Commission recalls the judge's comments that, although the risk of harm to the occupants of the car was high, the kind of harm to be averted (as the soldiers reasonably thought) by preventing their escape was even greater, namely the freedom of terrorists to resume their dealing in death and destruction.

The Commission concludes therefore, having regard to all the surrounding circumstances, that the use of force in the present case was justified in terms of Article 2 para. 2 (Art. 2-2) of the Convention.

It follows that the application must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. Krüger) — (C.A. Nørgaard)