CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

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

The European Court of Human Rights, sitting on 10 July 2001 as a Chamber composed of

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Sir Nicolas BRATZA,
Mr V. BUTKEVYCH,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mrs S. BOTOUCHAROVA, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 8 January 1998 and registered on 25 March 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the partial decision of 7 December 1999,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Robert Kerr, is an Irish national, born in 1956 and living in Belfast. He is represented before the Court by Ms Angela Ritchie, a lawyer practising in Belfast. The respondent Government are represented by their Agent, Mr C. Whomersley, Foreign and Commonwealth Office, London.

A. The circumstances of the case

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

The applicant was arrested at his home in Belfast at 9.42 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. At the time of his arrest the applicant had been released on licence

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.

At 5.21 p.m. on 8 November 1996 the applicant was informed in the presence of his solicitor that an application was being made to the Secretary of State for an extension order under section 14(1) of the 1989 Act. A three-day extension was granted to allow finger prints to be checked and forensic

tests to be carried out. The applicant did not make any representations to the Secretary of State regarding the extension request. The applicant asserts that this was because he was never informed of the reasons for the request. The applicant was informed in the presence of his solicitor that the request had been granted.

At 5.50 p.m. on 11 November 1996 the applicant was told that a further application for a two-day extension of his detention was being made. This application was granted. According to the applicant he was never informed of the reasons for the application and a written copy of the application has never been made available to him.

During the period of his detention the applicant had twenty-four meetings with his solicitor and was medically examined on three occasions. He declined further medical examinations.

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 for lack of evidence.

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–

(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."

The notification made by the United Kingdom Government under Article 15 § 3 of the Convention was withdrawn on 19 February 2001, with effect from 26 February 2001.

C. The political and security situation in Northern Ireland

The political and security situation covering the years 1974-1987 is described in the Court's Brannigan and McBride v. the United Kingdom judgment of 26 May 1993 (Series A 258-B, pp. 38-39, §§ 12-15).

In their submissions on the admissibility of the instant application the Government referred to the official statistics on deaths and injuries resulting from the security situation as well as the reviews which have been undertaken of the operation of the 1989 Act.

The statistics indicate that between 1969 and 1999 (3 June) a total number of 3,295 persons (military and civilian) have died due to the security situation. The number of deaths (military and civilian) due to the security situation between 1989 and 1999 (3 June) is as follows:

1989: 62; 1990: 76; 1991: 94; 1992: 85; 1993: 84; 1994: 62; 1995: 9; 1996: 15; 1997: 22; 1998: 55; 1999: 6.

The official statistics indicate that between 1968 and 1999 (3 June) a total of 42,766 persons (military and civilian) have been injured as a result of the security situation. The number of persons injured (military and civilian) over the period 1998 to 1999 (3 June) is as follows:

1989: 959; 1990: 906; 1991: 162; 1992: 1066; 1993: 824; 1994: 825; 1995: 937; 1996: 1419; 1997: 1237; 1998: 1564; 1999: 550.

The reviews undertaken by the authorities of the Prevention of Terrorism (Temporary Provisions) Act 1974 and of the amending Act passed in 1976 are summarised at paragraphs 13 to 15 of the Brannigan and McBride judgment.

Reviews of the operation of 1989 Act were undertaken by JJ Rowe QC for each of the years 1993 to 1998.

In his 1996 Report, which was completed on 4 February 1997, the Reviewer noted that there had been a marked increase in the level of terrorist activity in the wake of the IRA's decision to end the cease-fire which it called in August 1994.

In his 1997 Report, which was completed on 16 February 1998, the reviewer noted that the threat of terrorism continued to be real and observed that, while in principle, there should be judicial participation in the extension of detention, "this was not yet possible ... because the judges in [Northern Ireland] cannot yet be asked to do this work."

In his 1998 Report, which was completed on 11 February 1999, the reviewer observed that, despite the cease fire declared by the major paramilitary groups in 1994 "there are dissident elements who are intent upon causing injury and damage, and they have the capacity to do so. All in all there is a real threat that some terrorist activity will continue in Northern Ireland ... .My conclusion is this, criminals with a terrorist or paramilitary disposition have the means to carry out attacks with explosives and firearms at any time; furthermore, some of them have maintained an organisation which has structure and influence."

As to the continuing use of the power of extended detention, the reviewer reiterated his view expressed in earlier reports, that he favoured judicial involvement in the decision-making process. He noted that the appropriate place to examine this issue thoroughly was in the Consultation Paper which the Government of the day had presented to Parliament in December 1998.

The Consultation Paper proposed judicial participation in applications for extension. In their submissions in the instant case, the Government indicated that they envisage the introduction of legislation to include provisions for a form of judicial involvement in extensions of detention.

D. Remedies in respect of arrest and detention under the prevention of terrorism legislation

An analysis of court remedies relevant to arrest and detention under the prevention of terrorism legislation including section 14 of the 1989 Act is contained in the above-mentioned Brannigan and McBride judgment (pp. 1645, §§ 16-29).

COMPLAINTS

The applicant complains under Article 5 § 3 of the Convention that he was not brought promptly before a judge or other officer authorised by law to exercise judicial power and that the respondent State should not be able to rely on the derogation to this right 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 in derogation from its obligations under Article 5 § 3 were not strictly required by the exigencies of the situation.

The applicant further complains of a breach of Article 5 § 5 of the Convention in that he had no enforceable right to compensation since his detention was lawful under domestic law.

THE LAW

The applicant asserts that he was detained for a period of seven days without being brought before a judge, in breach of the "promptness" requirement contained in Article 5 § 3 of the Convention. He submits that the Government cannot rely on the terms of their derogation of 23 December 1998 in order to justify this breach since the derogation could no longer be considered compatible with the terms of Article 15 at the material time. The provisions relied on by the applicant provide to the extent relevant:

Article 5 §§ 3 and 5

> "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.
>
> 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."

Article 15

"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 Government submit that the applicant's complaints are time-barred under Article 35 § 1 of the Convention. The period of detention impugned by the applicant in the Convention proceedings ended on 14 November 1996 whereas his application to the Commission was lodged on 8 January 1998. He has therefore failed to comply with the six-months time-limit. In the Government's view, the applicant cannot save his application with reference to the decision of the Lord Chief Justice Carswell handed down on 8 July 1997. The proceedings before Lord Chief Justice Carswell had no bearing on the complaints currently before the European Court.

The applicant opposes this view and maintains that at the core of his High Court application was an attempt to find out the reasons, basis and justification for his continued detention. Accordingly, Lord Chief Justice Carswell's decision was inextricably linked to the instant complaints and must on that account be considered the final decision within the meaning of Article 35 § 1 of the Convention.

The Court observes that the applicant applied for judicial review of the authorities' refusal to inform him of the details of the nature and causes of the charges which were laid against him on 14 November 1996. His application was made in the perspective of his defence to those charges at his trial. At no stage did the applicant challenge in substance the administrative decision to prolong his detention. Indeed, it clearly emerges from the High Court's judgment that the applicant did not dispute in those proceedings the lawfulness of the grounds for his arrest on 7 November 1996. It is also to be noted that he never issued an application for habeas corpus in connection with his arrest or the continuing lawfulness of his detention.

The Court does not doubt that any attempt to contest the lawfulness of the procedure for extending his detention would have had no prospects of success, given that the absence of any judicial involvement in that procedure was authorised by section 15(5) of the 1989 Act and that the Court in its

Brannigan and McBride v. the United Kingdom judgment of 26 May 1993 (Series A no. 258) ruled that those applicants' complaint under Article 5 § 3 had been met by the derogation whose validity is at issue in the instant case (p. 57, § 74).

The Court recalls, however, that according to Article 35 § 1 of the Convention, and in the absence of a "final decision" within the meaning of that provision, an applicant is required to submit his complaint within six months of the act complained of. The applicant submitted his application to the Court on 8 January 1998, almost fourteen months after the impugned act.

It follows that the applicant's complaints are introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

In view of this conclusion the Court is not required to consider the admissibility of the applicant's complaint concerning the validity of the derogation.

For these reasons, the Court unanimously

Declares inadmissible the remainder of the application.

Vincent BERGER
Registrar

Georg RESS
President