AS TO THE ADMISSIBILITY OF

Application No. 18632/91
by Liam McCOTTER
against the United Kingdom

The European Commission of Human Rights sitting in private on 9 December 1992, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER

Mr. de SALVIA, 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 26 July 1991 by Liam McCotter against the United Kingdom and registered on 5 August 1991 under file No. 18632/91;

Having regard to

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

- the observations submitted by the respondent Government on 14 July 1992 and the observations in reply submitted by the applicant on 29 September 1992;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Irish citizen, born in 1963. At present he is detained at HM Prison Leicester. He is represented in the proceedings before the Commission by Ms McLeod of Messrs. Tom McGoldrick, solicitors practising in London.

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

The applicant was arrested on 19 February 1987 and subsequently charged with conspiracy to cause explosions contrary to Section 3(1)(a) of the Explosive Substances Act 1883 and Section 7 of the Criminal Jurisdiction Act 1975. This was alleged to be part of a terrorist campaign conducted in England by the Provisionae applicant was arrested on 19 February 1987 and subsequently charged with conspiracy to cause explosions contrary to Section 3(1)(a) of the Explosive Substances Act

1883 and Section 7 of the Criminal Jurisdiction Act 1975. This was alleged to be part of a terrorist campaign conducted in England by the Provisional IRA. He was held in custody until trial. On 17 June 1988 he was convicted of the offence and on 20 June 1988 sentenced to 17 years' imprisonment.

The applicant was sent to HM Prison Brixton on arrest and to HM Prison Frankland on sentence. He was transferred on 8 December 1988 to HM Prison Full Sutton and on 22 October 1990 to HM Prison Leicester where he is being held at present. All the above prisons are in England.

For the duration of his time in custody, the applicant has been classified by the Secretary of State as a Category A prisoner (Exceptional Risk), that is as one whose escape would be highly dangerous to the public or the police or the security of the state.

The applicant's brother P. was convicted in Belfast in April 1987 of unlawful imprisonment and possession of firearms with intent to endanger life and sentenced to 20 years' imprisonment. His brother S. was convicted in Belfast in May 1989 of possession of explosives with intent to endanger life and sentenced to 12 years' imprisonment.

On or about 1 June 1987 the applicant applied to the Governor of HM Prison Brixton for a temporary transfer to HM Prison Maze in Northern Ireland to visit his brother P. who was and still is detained there. On 3 June 1987 the Governor rejected his application. The applicant then petitioned the Secretary of State for the Home Department. His petitions are dated 3 June 1987, 26 August 1988, 17 November 1988 and 13 November 1990.

By petition of 17 November 1988 he also sought a temporary transfer to HM Prison Crumlin Road in Northern Ireland so that he could visit his brother S. who was detained there. By petition of 13 November 1990 he sought a temporary transfer to HM Prison Maze for the additional purpose of visiting S. who is now also detained there.

The applicant receives visits regularly from 7 other of his siblings and 3 of their spouses, who are on the list of approved visitors. Since June 1991, he has received 49 visits from them on 34 separate days.

By written decisions dated 23 July 1987, 29 September 1988, 17 March 1989 and 1 February 1991 the Secretary of State rejected each of the above petitions.

The decisions provide as follows:

> "The Secretary of State has fully considered your Petition. Inter-prison visits may indeed be made between England and Northern Ireland but no unsentenced prisoner and, for security reasons, no prisoner in category A may be transferred for this purpose. The Secretary of State is therefore unable to grant your request" (23.7.87 and 29.9.88).
>
> "The Secretary of State has fully considered your Petition with regard to your request for an inter-prison visit in Northern Ireland. He has nothing further to add on this matter to his earlier reply of 29 September 1988". (17.3.89)
>
> "The Secretary of State has carefully considered your request for a temporary transfer to Northern Ireland. He has decided that the transfer would pose an unacceptable risk to security and your request is therefore refused."

(1.2.91)

The applicant has made further applications for temporary transfer by petitions dated 23 and 29 April 1992 and 16 July 1992.

Relevant Domestic Law and Practice

a) Visit entitlement

The Prison Rules 1964 (S.I. 1964/388), made by statutory instrument under the Prison Act 1952, Sections 47 and 52, contain, inter alia, the following provisions:

> 33(1) "The Secretary of State may ... impose restrictions ... generally ... upon the communications to be permitted between a prisoner and other persons."
>
> 34(1) "An unconvicted prisoner may ... receive as many visits as he wishes within such limits and subject to such conditions as the Secretary of State may direct, either generally or in a particular case.
>
> (2) A convicted prisoner shall be entitled -
> (b) to receive a visit once in four weeks ..."

Accumulated Visits:

> "Subject to the provisions of Orders 5A 12-18 ... convicted inmates may be allowed to accumulate visits up to a maximum of 12 and apply ... to be temporarily transferred to any local prison to take their visits. Category A inmates ... must petition for temporary transfer ... An inmate must have accumulated at least 3 visits before he can be transferred to take accumulated visits."

b) Temporary transfer

The Criminal Justice Act 1961 and Standing Order 5A provide that a prisoner may apply for temporary transfer to another prison to receive visits. These may be from a close relative or relatives who may also be in custody. "Close relative" is defined so as to include "brother". The material provision is Section 27(1) of the Criminal Justice Act 1961 which provides that:

> "The responsible minister may, on the application of a person serving a sentence of imprisonment or detention in any part of the United Kingdom, make an order for his temporary transfer to another part of the United Kingdom... and for his removal to an appropriate institution there."

There are no statutory criteria governing the exercise of the Secretary of State's discretion.

c) Categorisation of prisoners

Category A prisoners are defined as those whose escape would be highly dangerous to the public, or to the police, or to the security of the state, no matter how unlikely that escape might be. Category A prisoners are further classified as presenting either a standard, high, or an exceptional escape risk. Prisoners assessed as Category A (exceptional risk) are located in Special Security Units within prisons. In deciding on a prisoner's categorisation, account is taken of the nature and circumstances of the offence; details of any previous convictions, where appropriate, the prisoner's mental state; and reports from police, prison and other sources. The need to continue

to hold a confirmed Category A inmate in the highest security category is reviewed at least once every 12 months on the basis of up to date reports.

Category A prisoners are subject to certain restrictions. Their movements within the prison are escorted and are closely monitored and recorded. Their visitors have to be approved and their photographs verified by the police under special arrangements known as the Approved Visitors Scheme. They are subject to frequent cell changes. They are not permitted to work in the prison kitchen. In addition, prisoners in Special Security Units do not have access to prison workshops.

COMPLAINTS

The applicant complains that the refusal by the Home Secretary of a temporary transfer to Northern Ireland to facilitate visits from his family, in particular, his two brothers, constitutes a violation of his rights under Article 8 of the Convention. He submits that his relationship with his brothers is very close as his parents died when he was very young. He further submits that the refusal on the ground of his security classification is arbitrary and unreasonable since a number of other Category A prisoners have been granted temporary transfers both from Northern Ireland to England and from England to Northern Ireland and permanent transfers from England to Northern Ireland have taken place where there were similar security considerations.

The applicant also complains that he has no effective remedy in respect of his complaints since in judicial review proceedings the courts will not look into alleged security reasons. He invokes Article 13 of the Convention in this respect.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 26 July 1992 and registered on 5 August 1991.

On 2 April 1992, the Commission (First Chamber) 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 14 July 1992 and the applicant's observations in reply were submitted on 29 September 1992.

THE LAW

1. The Government submit that the applicant has failed to exhaust domestic remedies since he has not instituted proceedings for judicial review of the refusal to transfer. The applicant has replied that such proceedings would be doomed to failure in light of domestic case-law "In the matter of an application for judicial review by Paul Peter Baker" of the High Court in Northern Ireland and the Divisional Court in McAvoy ([1984] 3A11E.R.417).

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 a remedy, do not in reality offer any chance of redressing the alleged breach (cf. Application No. 9248/81, Dec. 10.10.83, D.R. 34, p. 78).

It is furthermore established that the burden of proving the existence of the 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, Application No. 9013/80, Dec. 11.12.82., D.R. 30, p. 96, p. 102).

The Commission notes from the cases cited by the applicant that it appears that domestic courts will not examine the Secretary of State's reasons for refusing an application if that refusal is based on considerations of national security.

In these circumstances, the Commission finds that there is no indication that the applicant would have had any possibility of successfully challenging the refusal of the Secretary of State by way of judicial review. The Commission is accordingly unable to accept that the application should be declared inadmissible for non-exhaustion of domestic remedies.

2. The applicant complains that the refusal to transfer him temporarily to a prison in Northern Ireland to facilitate visits with his family, in particular, his two brothers, is a violation of Article 8 (Art. 8) of the Convention.

Article 8 (Art. 8) of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government have submitted that the relationship between the applicant and his brothers does not constitute family life within the meaning of Article 8 (Art. 8) of the Convention. They refer to case-law where emphasis was placed on the element of financial or other dependency. The Commission however considers that in the context of prisoners or other persons who are detained the concept of "family life" must be given a wider scope. Prisoner generally have limited means of contact with the outside community and of maintaining relationships with family members. "Family life" for prisoners is inevitably restricted to visits, correspondence and possibly other forms of communication such as telephone calls. Emotional dependency between, for example, parents and adult children, or siblings is even enhanced in these circumstances. The Commission recalls in this context that the European Prison Rules emphasise the need to encourage these links:

> "65. Every effort shall be made to ensure that the regimes of the institutions are designed and managed so as:
>
> (c) to sustain and strengthen those links with relatives and the outside community that will promote the best interests of prisoners and their families."

The Commission has also stated that it is of the opinion that Article 8 (Art. 8) requires the State to assist prisoners as far as possible to create and sustain ties with people outside prison in order to facilitate prisoners' social rehabilitation (eg. No. 9054/90, Dec. 8.10.82, D.R. 30 p. 113 and No. 15817/89, Dec. 1.10.90, to be published in D.R.).

In light of these factors, the Commission finds that the applicant's complaints must be held as falling within the scope of Article 8 para. 1 (Art. 8-1) of the Convention.

The applicant has submitted that the refusal of temporary transfer constitutes an interference with his right to respect for his family life. The Commission considers however that the applicant is arguing in effect not that the State should refrain from acting but rather that it should take steps to implement a particular policy. Although the essential object of Article 8 (Art. 8) is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life (see eg. Eur. Court H.R., Marckx judgment of 13 June 1979, Series A no. 31 p. 31 para. 31). In this context, the notion of "respect" is not clear-cut and its requirements will vary considerably from case to case according to the practices followed ach 1992, Series A no. 232-C para. 44)

With regard to the present case, the Commission recalls that the first applicant who is from Northern Ireland is detained in a prison in England and that he is requested a transfer to facilitate visits with his brothers and other members of his family. The Commission notes that the first applicant, as are his brothers, is serving a long term of imprisonment and that the considerable distance involved imposes difficulties in utilising visit entitlements which cannot be said to be negligible.

The Commission notes however that the applicant is lawfully detained, as are his brothers, for serious offences committed against the background of a terrorist campaign. The applicant is in addition detained as a Category A (Exceptional Risk) prisoner. Any transfer would, in the Government's submission, be highly dangerous, increasing greatly the risk of escape and his detention in Nortern Ireland would also facilitate his contact with others of his beliefs and increase the potential for covert subversive activity in the prison there.

The Commission has also had regard to its constant case-law according to which a prisoner has no right as such under the Convention to choose the place of his confinement and that a separation of a detained person from his family and the hardship resulting from it are the inevitable consequences of detention (see e.g. No. 5229/71, Dec. 5.10.72, Collection 42 p. 14, No. 5712/72, Dec. 15.7.74, Collection 46 p. 112 and No. 9054/90, Dec. 8.10.82, D.R. 30 p. 113). The Commission considers that only in exceptional circumstances will the detention of a prisoner a long way from his home or family infringe the requirements of Article 8 (Art. 8) of the Convention (see e.g. No. 5712/72, Dec. 18.7.74, Coll. 46, p. 112 and No. 7819/77, Dec. 6.5.78, published in part, D.R. 14, p. 186).

The Commission finds that no exceptional circumstances arise in this case. It notes that the applicant is detained in England since he was arrested and tried there in respect of offences committed as part of an alleged terrorist campaign in England. As a prisoner, the applicant is subject to the normal regime as regards correspondence and visits. While his family reside, or are detained, in Northern Ireland, it appears that seven of the applicant's siblings and three of their spouses are on the list of approved visitors and visit him regularly - in the last year they made 49 visits over 34 separate days.

Having regard to the above circumstances, the Commission finds that the failure on the part of the United Kingdom Government to provide temporary transfer arrangements to Northern Ireland discloses no lack of respect for the applicant's family life within the meaning of Article 8 (Art. 8) of the Convention.

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

3. The applicant also complains under Article 13 (Art. 13) of the Convention that he has no effective remedy in respect of his complaints.

Article 13 (Art. 13), however, does not require a remedy under domestic law in respect of any alleged violation of the Convention. It only applies if the individual can be said to have an "arguable claim" of a violation of the Convention (Eur. Court H.R., Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 23, para. 52).

The Commission recalls that it has found the applicant's complaints under Article 8 (Art. 8) of the Convention manifestly ill-founded. In these circumstances, the Commission also find that the applicant cannot be said to have an "arguable claim" of a violation of the Convention.

It follows that this part of the application must also be rejected as 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.

Deputy Secretary to the Commission

(M. de SALVIA)

President of the Commission

(C.A. NØRGAARD)