AS TO THE ADMISSIBILITY OF

Application No. 23956/94
by Michael MCKENNY
against the United Kingdom

The European Commission of Human Rights sitting in private on 28 November 1994, the following members being present:

Present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS

Mr. M. 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 11 April 1994 by Michael MCKENNY against the United Kingdom and registered on 25 April 1994 under file No. 23956/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Irish citizen, born in 1927, and currently serving a prison sentence in Frankland Prison, Durham in England. The applicant is represented by Ms. Maire Higgins of the Irish Prisoners' Support Group in London. The applicant has had a previous application before the Commission, no. 20485/92, declared inadmissible on 1 September 1993.

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

a. Particular circumstances of the case

The applicant was arrested in Ireland on 6 May 1986. He was tried in the United Kingdom in connection with conspiracy to cause explosions. He was sentenced to 16 years' imprisonment. The applicant was classified at that time as a Category A prisoner.

The applicant requested that he serve his sentence of imprisonment in a prison in Northern Ireland in order to be near to his family, who, except for one nephew, reside in Ireland and where he had previously been resident. His transfer would particularly have eased the difficulty of visiting for his sister-in-law, C.M., who is his main visitor. His brother J.M. was unable to visit the United Kingdom because of ill-health. The applicant has also begun to suffer from ill-health due to a serious liver complaint.

According to the facts submitted in the applicant's previous application to the Commission, the applicant's request for transfer was refused by the Home Office on 10 September 1990 and 12 February 1992. The refusals were based on the fact that the first applicant has no relatives in Northern Ireland, and on the possibility that if transferred he would stand to benefit from the more generous remission rate that applies in Northern Ireland.

In or about February/March 1993, the applicant was down-graded from Category A to Category B.

b. Relevant domestic law and practice

Following an interdepartmental review, a report was issued on 23 November 1992 concerning the issue of transfers of prisoners to Northern Ireland prisons. Its recommendations, which were accepted and submitted to Parliament, stated that a system of extended temporary transfers would be instituted.

Since late 1993, a number of prisoners who previously lived in Northern Ireland, including those of Category A classification, have been transferred on a temporary basis from prison in mainland United Kingdom to prison in Northern Ireland.

COMPLAINTS

1. The applicant complains of the refusal to transfer him to a prison in Northern Ireland. All his family reside in Ireland, save one nephew, and the cost of travelling to mainland United Kingdom is prohibitive. The applicant's sister-in law, for example, has to travel over 1000 miles, find accommodation and transport to the prison which, if remote and inaccessible, requires the use of taxis. Single visits are impracticable and so visitors tend to stay over several days taking "accumulated" visits which are stressful to prisoner and visitor. Visitors are also discouraged by the experiences suffered by many relatives of prisoners when arriving in the United Kingdom where they may be stopped, strip-searched and detained. The applicant's sister-in-law has been detained while travelling to visit the applicant. His nephew who has the same name as the applicant is afraid to visit on the basis of the possible harassment which might result. The health of the applicant's sister-in-law has recently begun to deteriorate and she has been obliged to reduce her visits from twice a year to once per year, with the risk that in the future she will be unable to visit at all and the applicant will receive no visits from family whatsoever.

The applicant submits that there is no reasonable justification for the refusal of transfer: there is plenty of accommodation in Northern Irish prisons; he is a sixty-seven year old man in failing health who is not classified as a security risk and if he was transferred he would not benefit from the different rules of remission

by more than 1-2 months.

The applicant invokes Article 8 of the Convention in respect of the above.

2. The applicant also complains of discriminatory treatment on the ground of his status as an Irish Republican prisoner. He submits that there have often been transfers of Category A prisoners who are not Republicans and the use of Category A is constant in the case of Republicans. The constant amendment of the applicable transfer criteria discloses a policy of blanket refusal of transfers for Republicans.

THE LAW

1. The applicant complains of the refusal to transfer him from mainland United Kingdom to a prison in Northern Ireland to facilitate visits from his family which, with only one exception, reside in Ireland. He invokes Article 8 (Art. 8) of the Convention which 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 Commission recalls that it considered a previous complaint by the applicant in No. 20485/92 which related to the refusal of transfer. Pursuant to Article 27 para. 1 (b) (Art. 27-1-b) of the Convention, the Commission must reject any petition which is substantially the same as a matter which has already been examined unless it contains relevant new information.

The Commission notes that the applicant has identified an error of fact in the Commission's decision in his previous application. The decision states that the applicant was detained as a Category A prisoner whereas it appears from the material now before the Commission that from about February/March 1993 he had been classified as Category B. Since the Commission's decision contains in its reasoning a reference to the applicant's classification as indicating that security considerations applied in his case, the Commission accepts that relevant new information within the meaning of Article 27 para. 1 (b) (Art. 27-1-b) has arisen. The Commission may therefore proceed to an examination of the applicant's complaints.

The applicant submits, inter alia, that there is no justification for refusing to transfer him to Northern Ireland. He submits that there is adequate room to accommodate prisoners on transfer, that he would not benefit from any substantial gain in remission and that he poses no security risk whatsoever. He contends that the previous policy of refusing to transfer Republican prisoners was punitive in purpose. The recent policy introduced of transferring prisoners on a temporary basis demonstrates, it is submitted, the lack of any real security considerations.

The Commission's case-law indicates however that a prisoner has no right as such under the Convention to choose the place of his confinement and the separation of a detained person from his family and the hardship resulting from it are the inevitable consequences of detention (see eg. No. 5712/72, Dec. 18.7.74, Collection 46 p. 112). 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 eg. 7819/77, Dec. 6.5.78, published in part, D.R. 14 p. 186).

The Commission finds that no sufficiently exceptional circumstances arise in this case. It notes that the transfer would render it easier and more convenient for the applicant's visitors who travel from Ireland. This consideration is however insufficient to impose what in effect would be a positive obligation on the respondent Government to effect a transfer from mainland United Kingdom to Northern Ireland. It has had regard in this context to the wide margin of appreciation which must be accorded to the domestic authority, where, as in this case, sensitive issues arise related to the special situation which obtains in Northern Ireland.

It follows that the applicant's complaints disclose no lack of respect for his right to family life under Article 8 (Art. 8) of the Convention and must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains of discriminatory treatment as a Republican prisoner.

Article 14 (Art. 14) of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Commission recalls that it dismissed a previous complaint under this provision in the applicant's earlier application (No. 20485/92). However since the reasoning in the decision referred incorrectly to the applicant's security classification in finding that he could not be considered as being in an analogous position to other prisoners, it considers that a relevant new fact has been raised and that the complaint to this extent cannot be rejected under Article 27 para. 1 (b) (Art. 27-1-b) as substantially the same.

The applicant complains that as a Republican prisoner he has been punished as regards the policy of transfers. It is alleged that, save for rare and special cases, there was a blanket refusal on transfers of Republican prisoners whereas non-Republican prisoners would generally be granted transfers to and from Northern Ireland.

The Commission notes that the applicant has been consistently refused a transfer despite the apparent lack of any real security risk posed by him, whereas it appears that non-Republican prisoners, even those of security risk, have been transferred to Northern Ireland. The Commission recalls however that the applicant was refused transfer on the grounds that he had no links with Northern Ireland itself and as a result of the possible benefit he might thereby obtain from different remission rules. It is not apparent that the first of these factors was present in the other cases to which the applicant refers. Further even though the applicant alleges that there was a blanket refusal policy, it appears that he concedes that transfers of a small number of Republican prisoners were made in previous years and that recently a significant number of Republican prisoners have been transferred on a temporary basis.

In light of the above, the Commission is not satisfied that the applicant has substantiated his complaint that he has been refused transfer on the ground of his status as a Republican prisoner in circumstances where any other prisoner would have been transferred.

However, even assuming that the applicant has been subject to a difference of treatment on the basis of his status as a Republican

prisoner, the Commission recalls that whether a difference in treatment constitutes discrimination in the sense of Article 14 (Art. 14) of the Convention depends on whether or not there exists an objective and reasonable justification. This requires that the difference pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In this assessment of whether and to what extent differences in otherwise similar situations justify a different treatment, Contracting States enjoy a margin of appreciation which will vary according to the circumstances, subject-matter and background (see eg. Eur. Court H.R., Lithgow and others judgment of 8 July 1986, Series A no. 102, pp. 66-67, para. 177).

Having regard to the above, the Commission recalls that the applicant, a Republican prisoner, was convicted of offences in relation to conspiracy to cause explosions in the United Kingdom. The disposition of such prisoners within the prison administration system raises special and sensitive considerations, given the history of conflict in Northern Ireland in respect of which the political situation is subject to continuing and complex pressures. To the extent therefore that there has been any difference of treatment, the Commission finds that it falls within the wide margin of appreciation enjoyed by the domestic authorities.

It follows that this complaint 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 — President to the Commission

(M. de SALVIA) — (C.A. NØRGAARD)