AS TO THE ADMISSIBILITY OF

Application No. 20485/92
by Michael, James and Carmel McKENNY
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 1 September 1993, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
G.B. REFFI
N. BRATZA

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 3 July 1992 by Michael, James and Carmel McKenny against the United Kingdom and registered on 12 August 1992 under file No. 20485/92;

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 first applicant is an Irish citizen, born in 1927, and currently serving a prison sentence in Full Sutton Prison, England.

The second applicant is the brother of the first applicant. He is an Irish citizen, born in 1931, and resides in Dublin, Ireland.

The third applicant is the sister-in-law of the first applicant. She is an Irish citizen, born in 1936, and resides in Dublin, Ireland.

The applicants are represented by Peter Madden, a solicitor practising in Belfast.

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

The first applicant was arrested on 6 May 1986. He was charged with conspiracy to cause explosions. He was sentenced to 17 years'imprisonment. The first applicant has been classified as a Category A prisoner.

The first applicant has requested that he serve his sentence of

imprisonment in a prison in Northern Ireland in order to be near to his family and friends, who all, with the exception of one nephew, reside in Ireland. His request for transfer has been refused by the British 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. He is detained as a category A prisoner.

The second applicant is retired. The third applicant is a housewife. An estimated cost of a visit to an English prison is between £250 and £300. As no financial assistance is available from the Irish Government for prison visits to England, all travel, accommodation and subsistence expenses must be paid for personally. This poses a heavy financial strain on the second and third applicants.

The third applicant visits the first applicant approximately twice a year, although she suffers from travel sickness, high blood pressure, and a high cholesterol level. She has been advised to avoid stress.

It is alleged that the general position for all visitors travelling to England from Ireland to visit prisoners is dominated by the fear of arrest, detention, strip-searching, general harassment and hostility demonstrated by the security forces at airports and ports. The family members of some prisoners over the years have been detained under the Prevention of Terrorism Act without reasonable suspicion and held for varying periods of time, being released without charge and sometimes missing travel connections for prison visits. Such fears are very real as, for example, the third applicant has been already detained and questioned on a few occasions when travelling to England. Other visitors have been excluded from visiting England at all under the Prevention of Terrorism Act. Exclusion from England is an executive decision which is not open to judicial review.

The first applicant submits that the conditions of detention for Irish Republican prisoners in England are considerably worse than those for their counterparts in Northern Ireland. Unlike the position in Northern Ireland, the applicant and other Irish Republican prisoners are completely segregated from each other unless one or two prisoners are in the same establishment due to the fact that there are no other prisons available. Irish Republican prisoners are generally held in solitary confinement, in isolation, and dispersed throughout as many available prison establishments as are in existence throughout England. There is a policy of regular transfer from prison to prison, resulting in the prisoners being unable to settle into familiar surroundings, which has an adverse effect on health for prisoners serving lengthy prison sentences. During his imprisonment so far the first applicant has been transferred several times to different prisons in England.

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:

> "31.(1) Special attention shall be paid to the maintenance of such relations between a prisoner and his family as are desirable in the best interests of both.
>
> (2) A prisoner shall be encouraged and assisted to establish and maintain such relations with persons and agencies outside prison as may, in the opinion of the governor, best promote the interests of his family and his own social rehabilitation...

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 ..."

From April 1992, the normal visit entitlement was increased to two visits in every period of four weeks.

Accumulated Visits (Standing Order):

"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" and "sister". 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."

c) Permanent transfer

Section 26 of the Criminal Justice Act 1961 provides inter alia:

"(1) 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 transfer to another part of the United Kingdom, there to serve the remainder of his sentence, and for his removal to an appropriate institution [there]...

(4) Subject to the following provisions of this section, a person transferred under this section to any part of the United Kingdom there to serve his sentence or the remainder of his sentence shall be treated for purposes of detention, release, supervision, recall and otherwise as if that sentence (and any other sentence to which he may be subject) had been an equivalent sentence passed by a court in the place to which he is transferred."

In a written decision relating to a request by a prisoner for permanent transfer from the United Kingdom to Northern Ireland the Secretary of State indicated the criteria he would apply in exercising his discretion to transfer prisoners. That decision reads, in part, as follows:

"Revised criteria governing the transfer of prisoners to another jurisdiction in the United Kingdom were announced in reply to a Parliamentary question on 23 June 1989.

These provide that an inmate's request to be transferred will, normally, be granted provided that all the following conditions are met:

(i) the inmate would have at least six months left to serve in the receiving jurisdiction before his or her date of release;

(ii) the inmate was ordinarily resident in the receiving jurisdiction prior to the current sentence or his or her close family currently reside there and there are reasonable grounds for believing that it is the inmate's firm intention to take up residence there on release; and

(iii) both departments concerned are reasonably satisfied that the inmate will not, if transferred, disrupt or attempt to disrupt any prison establishment or otherwise pose an unacceptable risk to security.

It was also stated, however, that even if these criteria were met, transfer may be refused if it is considered that the inmate's crimes were so serious as to render him or her undeserving of any degree of public sympathy or to make it inappropriate that the inmate should benefit from a substantial reduction in the time left to serve if that would be a consequence of transfer.

Similarly, transfers may be refused if there are reasonable grounds for believing that the inmate's primary intention in making the application is to secure a reduction in the time left to serve. On the other hand, an application that does not meet these conditions may, nevertheless, be granted where there are strong compassionate or other compelling grounds for transfer".

d) Differences in release policies and procedures

The law and practice relating to the proportion of a sentence which must be served before release differs between the three United Kingdom jurisdictions. Prisoners serving determinate sentences in England and Wales are entitled to one-third remission of their sentence. Prisoners in Northern Ireland are generally entitled to remission of one half of their sentence. There are also differences in the administration of life sentences so that those serving sentences for comparable offences are generally released earlier in Northern Ireland than they would be if they were sentenced in England and Wales.

e) 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 applicants complain that the refusal of a transfer is in violation of their right to respect for their private and family life as guaranteed by Article 8 of the Convention. They submit that alternative prison accommodation is available in Northern Ireland and that there is no valid reason for refusing the transfer. The denial of a transfer is deliberately and unnecessarily punitive.

The applicants also complain that they are discriminated against on the grounds of political or other opinion, national origin and association with a national minority, contrary to Article 14 of the Convention. In particular, they submit that Irish Republican prisoners are discriminated against as a class in that they are treated less favourably than other prisoners in relation to questions of transfer.

The applicants further submit that they have no effective remedy as required by Article 13 of the Convention.

THE LAW

1. The applicants complain that the refusal to transfer the first applicant permanently to a prison in Northern Ireland to facilitate visits from his family is a violation of Article 8 (Art. 8) of the Convention.

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

"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 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 has considered whether the relationship between the applicants constitutes family life within the meaning of Article 8 (Art. 8) of the Convention. It notes that the second applicant is the brother, and that the third applicant is the sister-in-law of the first applicant. It recalls that it has held that in the context of prisoners or other persons who are detained the concept of "family life" must be given a wider scope than in other situations: "Prisoners 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.'"

(No. 19085/91, Dec. 9.12.92, to be published in D.R.).

The Commission has also stated 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 (e.g. No. 9054/80, 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 applicants' complaints must be held as falling within the scope of Article 8 para. 1 (Art. 8-1) of the Convention.

The applicants have submitted that the refusal of a transfer constitutes an interference with their right to respect for their family life. The Commission considers, however, that the applicants are 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 be positive obligations inherent in an effective "respect" for family life (see e.g. Eur. Court H.R., Marckx judgment of 13 June 1979, Series A no. 31, p. 14 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 and the situations obtaining in Contracting States. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual (see e.g. Eur. Court H. R., Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 33 para. 67, and the B. v. France judgment of 25 March 1992, to be published in Series A no. 232-C, para. 44).

The Commission recalls that in the present case the first applicant is detained in a prison in England and that he has requested a transfer to facilitate visits from his family, including the second and third applicants. The Commission notes that the first applicant 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 first applicant is lawfully detained for serious offences committed against the background of a terrorist campaign. The applicant is detained as a Category A prisoner. Any transfer would be arguably highly dangerous, increasing greatly the risk of escape.

The Commission also refers 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, and No. 5712/72, Dec. 18.7.74, Collection 46 p. 112). 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 loc. cit., 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 first applicant is detained in England since he was tried there in respect of offences committed as part of

an alleged terrorist campaign. As a prisoner, the applicant is subject to the normal regime applicable to his category as regards correspondence and visits. The second and third applicants are entitled to visit the first applicant. The second applicant visits him twice a year.

Having regard to the above circumstances, the Commission finds that the decision of the United Kingdom Government to refuse permanent transfer arrangements to Northern Ireland discloses no lack of respect for the applicants' 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.

2. The applicants also complain that they are discriminated against, contrary to Article 14 in conjunction with Article 8 (Art. 14+8) of the Convention, since Irish Republican prisoners in the United Kingdom are treated less favourably than other prisoners as regards transfer.

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

> "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 notes that the applicants do not contend that there is a blanket prohibition on transfer of Irish Republican prisoners to Northern Ireland. In the present case, the Commission notes that the first applicant was refused transfer. Insofar as this refusal can be said to be motivated by the first applicant's status as an Irish Republican prisoner, the Commission considers that different considerations concerning security apply to different prisoners. It recalls that the first applicant is a Category A (high security or exceptional risk) prisoner convicted in relation to terrorist offences. In these circumstances, his position cannot be considered as analogous to that of other prisoners for the purposes of Article 14 (Art. 14) of the Convention.

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

3. The applicants also complain under Article 13 (Art. 13) of the Convention that they have no effective remedy in respect of their 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 rejected the applicants' complaints under Articles 8 and 14 (Art. 8, 14) of the Convention, no lack of respect for family life and no unlawful discrimination having been disclosed. In these circumstances, the Commission also finds that the applicants cannot be said to have an "arguable claim" of a violation of the Convention necessitating an Article 13 (Art. 13) remedy.

It follows that this part of the application must also 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 First Chamber	President of the First Chamber
(M.F. BUQUICCHIO)	(A. WEITZEL)