AS TO THE ADMISSIBILITY OF

Application No. 22384/93
by Kevin MURRAY
against the United Kingdom

The European Commission of Human Rights sitting in private on 10 October 1994, the following members being present:

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

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 27 April 1993 by K.S.M. against the United Kingdom and registered on 15 July 1993 under file No. 22384/93;

Having regard to:

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

- the observations submitted by the respondent Government on 2 March 1994

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1970 and presently detained in the Maze Prison, Northern Ireland. He is represented by Messrs. John Fahy & Company, a firm of solicitors practising in Strabane, County Tyrone.

The facts as submitted by the parties, and which may be deduced from documents lodged with the application, may be summarised as follows.

On 13 March 1989, at 07.30, W.A., a part-time soldier in the Ulster Defence Regiment (UDR), was injured after being shot four times by two gunmen wearing balaclava helmets over their faces.

Shortly after that same day, the police went to the applicant's house and asked him to account for his movements since the previous evening. The applicant stated that he had spent the previous night at a friend's house and that he had returned to his own house at 09.00 hours that day. When questioned about certain items of clothing, in particular a pair of jeans which had mud on them, the applicant explained that he had worn them when out hunting.

At 11.28 hours, the applicant was arrested under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 in connection with the shooting of W.A..

The applicant was taken to Castlereagh Police Office, where on arrival he requested to see a solicitor. At 13.30 hours, a Detective Superintendent authorised a delay in access to a solicitor for 48 hours, pursuant to section 15 of the Northern Ireland (Emergency Provisions) Act 1987.

The applicant was cautioned, pursuant to Article 3 of the Criminal Evidence (Northern Ireland) Order 1988, that a failure to mention any fact that he later relied on in his defence in court might be treated as supporting the case against him. He was also cautioned, pursuant to Article 5 of the Order, in respect of adverse inferences which might be drawn from any failure to account for items of clothing in his possession on which were marks or substances attributable to participation in the commission of an offence, and also in respect of fibres found in his hair from a balaclava helmet allegedly used by one of the gunmen. The applicant remained silent.

The applicant saw his solicitor on 15 March 1989 at 11.26 hours. He was advised to remain silent.

On 18 March 1989, the applicant was charged with attempted murder and possession of a firearm with intent to endanger life. He was subsequently charged with the wounding of W.A. and possession of a firearm for no lawful object.

On 23 March 1989, the applicant's application to be released on bail was refused by the judge on the grounds of the serious nature of the charges and the serious risk of the applicant not turning up for trial.

Between 13 and 22 March 1989, 38 items were delivered by the police for examination by the Northern Ireland Forensic Science Laboratory ("NIFSL"). On 5 April and 14 June 1989, further exhibits were delivered to the NIFSL.

The forensic report on cartridge residue was issued on 18 May 1989, the report on tyre mark comparisons on 31 October 1989, and the report on fibre elements on 29 November 1989.

On 8 August 1989, the police file was received at the office of the Director of Public Prosecutions.

The decision to prosecute was taken late November/early December and the file was forwarded to the case preparation section for committal proceedings to be arranged.

The direction to prosecute was signed but held back pending the Attorney General's decision whether to consent to prosecution against the applicant's co-accused, L., for the offence of allowing property to be used for terrorism (ie. the Vauxhall car of L.' s father which L. had borrowed on 13 March 1990 and which the police alleged to have been the car used by the two gunmen).

The Attorney General gave consent for L.'s prosecution on 11 January 1990. On 24 January 1990, the direction to prosecute the applicant and L. was sent to the Chief Constable.

The committal for trial was fixed for 21 February 1990 but was adjourned when L., who was on bail, absconded. The committal papers had to be edited for the applicant to be charged alone.

On 28 March 1990, the applicant was committed for trial. The bill of indictment was received at the Crown Court office on 2 May 1990. He was arraigned on 13 June 1990 and because of the serious nature of the charges his case was scheduled for hearing before a High court judge.

The applicant's case was listed for hearing initially on 20 November 1990 but subject twice to short postponements when the trial before overran.

The applicant was tried before a judge sitting without a jury from 26 to 28 November 1990.

At his trial, the applicant on the advice of his legal advisers did not give evidence.

The prosecution case was founded on circumstantial evidence of a forensic nature linking the applicant with the Vauxhall car allegedly used by the gunmen (a thumb print of the applicant on the interior rear view mirror), and including residue of discharge from a firearm on a pair of jeans owned by the applicant and fibres in his hair consistent with those from a balaclava helmet allegedly used by one of the gunmen. The applicant's father gave evidence that he and his son had been shooting at rabbits several days before the shooting of the UDR soldier. P. gave evidence that the night before the shooting the applicant had sat and talked with him in the Vauxhall car which L. had borrowed from his father. Another witness, I., stated that he had seen the applicant driving the Vauxhall car that evening in the company of L. It was also asserted in the applicant's defence that the fibres in his hair could have come from similar material in his anorak rather than the balaclava.

On 18 January 1991, the applicant was found guilty of the offences of attempted murder of W.A. and possession of a firearm with intent to endanger life. He was sentenced to a total of eighteen years' imprisonment.

The trial judge in convicting the applicant relied upon Article 4 of the Criminal Evidence (Northern Ireland) Order 1988, pursuant to which at the end of the prosecution case he had called upon the applicant to give evidence in his own defence in default of which adverse inferences could be drawn. He also drew inferences under Article 3 of the Order from the applicant's silence during questioning by the police, but declined to draw inferences under Article 5.

The trial judge stated in regard to Article 3 of the Order and the applicant's failure to respond to questions by the police:

> "By this silence, can it be said that he failed to mention facts relied upon in his defence at the trial? I do not forget that before he was cautioned under Article 3 at Castlereagh he gave a general account of his movements to Detective Constable Bell and explained the condition of his

jeans on the ground that he had been out "hunting" two days before. What he omitted to do in reply to the caution under Article 3 was to repeat these matters of his defence and to fail to answer questions relative to their detail. He omitted to mention at all and this to me is significant that he had driven the Vauxhall car on the Saturday night before the crime and that he had met up with <B., P. and L.> in the early hours of the 13th. I consider that the <applicant> "could reasonably have been expected" to have mentioned these matters at Castlereagh. The "hunting" story could have been investigated by the police. Its forensic significance would have been considered by the firearms expert. The potentially damning evidence of the fingerprint, if left unexplained, found on the car mirror was brought home to the accused at Castlereagh in clear language as was the evidence linking the car to the scene of the crime. The incriminating nature of fingerprint evidence must be well-known to any member of the public. I would have expected a suspect when faced with this, if he had an innocent alternative to give, to have given it.

I do not, however, in all the circumstances draw the strongest adverse inference that one may be entitled to draw in other cases under Article 3. My reason is that he did disclose in general terms some of the facts relied on in his defence. But I do find that his failure to mention the particular matters that he did, many of which were of the greatest importance in his defence, reduces the credibility of his defence and increases the weight of the prosecution case..."

In relation to the applicant's silence in court and the application of Article 4 of the Order, the trial judge commented:

"In the instant case it seems to be that what the prosecution has proved in evidence calls for evidence from the accused in the witness box. No reasons have been advanced for his refusal to give evidence. Nor are any reasons apparent to the court for withholding his account on oath. Indeed it seems to me remarkable he has not given evidence. It is not the function of the court to conjure up reasons for his silence. He has been told by the court in plain language what the consequences of his failure may be and he has no doubt been advised by his experienced counsel to the same effect. It is only commonsense, in the circumstances, to infer as proper inference that he is not prepared to assert his innocence on oath because that is not the case. The inference which I draw from his failure to give evidence under Article 4 is stronger and much more to his detriment than that drawn by me under Article 3."

The applicant appealed against his conviction, alleging inter alia that the judge had erred in applying Article 4 of the 1988 Order in his case. The appeal was dismissed by the Court of Appeal in Northern Ireland on 25 October 1991. Lord Chief Justice Hutton, giving the judgment of the court, rejected the argument by the applicant's counsel that the approach of the trial judge had the effect of reversing the burden of proof. It found that the trial judge had correctly drawn an inference from the applicant's failure to give evidence:

"The right of the court under Article 4 to draw such inferences as appear proper arises once the Crown has established a prima facie case and does not require that the Crown case constituted by the evidence should be `on the brink' of proving guilt or should create a situation which at common law would be regarded as a `confession and avoidance' situation. But whether or not the court will

draw inferences will depend upon the circumstances of the particular case and, if inferences are drawn, the strength of those inferences will also depend upon the particular circumstances of the case.

There may be cases where, despite the refusal of the accused to give evidence when called upon by the court to do so pursuant to Article 4, the court may think it inappropriate to draw any inferences against him. Moreover, before convicting the court, having regard to the evidence adduced by the Crown and to the inferences (if any) which it draws under Article 4, must always be satisfied that the Crown has discharged the burden of proving that the accused is guilty beyond a reasonable doubt. Article 4 does not alter the fundamental principle that the burden rests on the Crown to prove guilt beyond a reasonable doubt.

The refusal of the accused to give evidence on his own behalf does not in itself indicate guilt. Under Article 4 it would be improper for the court to draw the bare inference that because the accused refused to give evidence in his own defence he was therefore guilty. But where commonsense permits it, it is proper in an appropriate case for the court to draw the inference from the refusal of the accused to give evidence that there is no reasonable possibility of an innocent explanation to rebut the prima facie case established by the evidence adduced by the Crown, and for the drawing of this inference to lead on to the conclusion, after all the evidence in the case has been considered, that the accused is guilty...

We consider that in this case the trial judge was entitled to draw the inference from the refusal of the appellant to give evidence in his own defence that there was no reasonable possibility of an innocent explanation which he could put forward to rebut the inference which could be drawn from the evidence adduced by the Crown, and that accordingly the inference which the Crown submitted should be drawn from that evidence, namely that the appellant was one of the gunmen who used the Vauxhall car and who shot and wounded <W.A.>... was correct and that therefore the appellant was guilty...".

While the Court of Appeal found that the trial judge had erred in drawing an inference under Article 3 of the Order from the failure to offer an explanation for the fingerprint (ie. the fingerprint had not been identified as that of the applicant until after his interviews with the police), it found that this error did not invalidate his general findings. It concluded that the convictions were not rendered thereby unsafe or unsatisfactory.

The applicant was granted leave to appeal to the House of Lords.

In its judgment of 29 October 1992, the House of Lords rejected the applicant's appeal, agreeing with the judgment of the Court of Appeal.

Lord Slynn in the leading judgment stated:

"The accused cannot be compelled to give evidence but he must risk the consequences if he does not do so. Those consequences are not simply, as the appellant contends, that specific inferences may be drawn from specific facts. They include in a proper case the drawing of an inference that the accused is guilty of the events with which he is charged.

This does not mean that the court can conclude simply because the accused does not give evidence that he is guilty. In the first place the prosecutor must establish a prima facie case - a case for him to answer. In the second place in determining whether the accused is guilty the judge or jury can draw only `such inferences from the refusal as appear proper'. As Lord Diplock said in Haw Tua Tau v. Public Prosecutor at p. 153B:

> `What inferences are proper to be drawn from an accused's refusal to give evidence depend upon the circumstances of the particular case, and is a question to be decided by applying ordinary commonsense.'

There must thus be some basis derived from the circumstances which justify the inference.

If there is no prima facie case shown by the prosecution there is no case to answer. Equally if parts of the prosecution had so little evidential value that they called for no answer, a failure to deal with those specific matters cannot justify an inference of guilt.

On the other hand if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of commonsense allow the drawing of an inference that there is no explanation and that the accused is guilty...

In the present case if the only evidence relied on was that relating to the fibres in the hair, on the clothing and in the car, it might well not be enough to justify an inference that the accused was guilty beyond a reasonable doubt. The cartridge residue on the jeans, the thumb print on the mirror and the mud on the trousers, the evidence that he was not at home during the night clearly taken in combination call for an explanation if there was one. The judge was moreover entitled to have regard to the cumulative effect of all the circumstantial evidence in deciding whether a failure to give evidence justified an inference of guilt.

In my opinion the evidence adduced by the prosecution established a clear prima facie case and the trial judge was entitled in all the circumstances of the case, and as a matter of commonsense, to infer that there was no innocent explanation to the prima facie case and that the accused was guilty... Contrary to the <applicant's> contention, he quite plainly did not proceed on the basis that simply because the accused did not give evidence he was therefore guilty...".

Relevant domestic law and practice

Provisions governing inferences which may be drawn from an accused's silence

Article 3 of the Criminal Evidence (Northern Ireland) Order 1988 (hereafter referred to as the Order) provides as relevant:

"Circumstances in which inferences may be drawn from accused's failure to mention particular facts when questioned, charged, etc.

3. (1) Where, in any proceedings against a person for an offence, evidence is given that the accused

(a) at any time before he was charged with the offence, on being questioned by a constable trying to discover whether or by whom the offence has been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, paragraph (2) applies.

(2) Where this paragraph applies:

(a) the court, in determining whether to commit the accused for trial or whether there is a case to answer,

(b) a judge, in deciding whether to grant an application made by the accused under Article 5 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (application for dismissal of charge where a case of fraud has been transferred from a magistrates' court to the Crown Court under Article 3 of that Order), and

(c) the court or jury, in determining whether the accused is guilty of the offence charged,

may

(i) draw such inferences from the failure as appear proper;

(ii) on the basis of such inferences treat the failure as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention."

Article 4 of the Order provides as relevant:

"Accused to be called upon to give evidence at trial

4. (1) At the trial of any person (other than a child) for an offence paragraphs (2) to (7) apply unless

(a) the accused's guilt is not in issue, or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to be called upon to give evidence;

but paragraph (2) does not apply if, before any evidence is called for the defence, the accused or counsel or a solicitor representing him informs the court that the accused will give evidence.

(2) Before any evidence is called for the defence, the court

(a) shall tell the accused that he will be called upon by the court to give evidence in his own defence, and

(b) shall tell him in ordinary language what the effect of this Article will be if

(i) when so called upon, he refuses to be sworn;

(ii) having been sworn, without good cause he refuses to answer any question;

and thereupon the court shall call upon the accused to give evidence.

(3) If the accused

(a) after being called upon by the court to give evidence in pursuance of this Article, or after he or counsel or a solicitor representing him has informed the court that he will give evidence, refuses to be sworn, or

(b) having been sworn, without good cause refuses to answer any question, paragraph (4) applies.

(4) The court or jury, in determining whether the accused is guilty of the offence charged, may

(a) draw such inferences from the refusal as appear proper;

(b) on the basis of such inferences, treat the refusal as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the refusal is material."

Provisions governing access to a solicitor

Section 15 of the Northern Ireland (Emergency Provisions) Act 1987 provides as relevant:

"15. Right of access to legal advice

(1) A person who is detained under the terrorism provisions and is being held in police custody shall be entitled, if he so requests, to consult a solicitor privately...

(4) If a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable except to the extent that any delay is permitted by this section...

(8) An officer may only authorise a delay in complying with a request under subsection (1) where he has reasonable grounds for believing that the exercise of the right conferred by that subsection at the time when the detained person desires to

exercise it -

...

(d) will lead to interference with the gathering of information about the commission, preparation or instigation of acts of terrorism; or

(e) by alerting any person, will make it more difficult -

i. to prevent an act of terrorism, or

ii. to secure the apprehension, prosecution or conviction of any person in connection with the commission, preparation or instigation of an act of terrorism."

The delay must be authorised by a police officer of at least the rank of superintendent (sub-section (5)(a)), and the detained person must be told the reason for the delay (subsection (7)). The maximum delay is 48 hours.

COMPLAINTS

The applicant complains of the period of detention up to the date of the original judgment, invoking Article 5 para. 3 of the Convention.

The applicant contends that the application of Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 violated his right to a fair trial, as guaranteed by Article 6 para. 1 of the Convention, and that it effectively removed the presumption of innocence, contrary to Article 6 para. 2 of the Convention.

The applicant submits that the application of Article 3 of the 1988 Order also abrogated his right to remain silent and violated Article 6 para. 3(b) of the Convention.

Further, the applicant contends that the refusal to allow him access to a solicitor was in breach of Article 5 para. 3 of the Convention.

Finally, he invokes Articles 13 and 14 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 27 April 1993 and registered on 15 July 1993.

On 11 October 1993, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the case.

The Government's observations were submitted on 2 March 1994, after two extensions in the time-limit fixed for this purpose. The applicant was invited to submit written observations in reply by 28 April 1994. None were produced.

THE LAW

1. The applicant has complained of the length of his detention on remand. He invokes Article 5 para. 3 (Art. 5-3) of the Convention, which provides:

"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."

The period to be considered under the above provision runs from the applicant's arrest on 13 March 1989 to the date on which the first instance court determined the charges against him, ie. in this case on 18 January 1991 - an overall period of 22 months and five days.

The Commission notes that the applicant was refused release on bail on the ground of the serious risk that he would abscond. The Commission recalls that the applicant's co-accused did in fact abscond when released before trial and it finds that the authorities had reasonable grounds to fear the applicant, facing more serious charges than his co-accused, might do the same.

The case-law of the Convention organs indicates that where relevant and sufficient grounds exist for detention pending trial, it must be ascertained that the competent domestic authorities displayed "special diligence" in the conduct of the proceedings (eg. Eur. Court H.R., Tomasi judgment of 27 August 1992, Series A no. 241, p. 35, para. 84).

As regards the conduct of the proceedings, the Commission recalls that the case rested primarily on the forensic evidence which was dispatched to a laboratory for analysis and report. While the bulk of the material had been sent to the laboratory by 22 March 1989, additional exhibits were delivered on 5 April and 14 June 1989, and the reports of the NIFSL were issued on 18 May, 31 October and 29 November 1989.

The Commission does not find that the time spent on producing the forensic reports, which necessarily required careful and thorough preparation, was of such length as to disclose a lack of expedition. The time which elapsed between committal and trial also, in the Commission's view, does not disclose undue delay.

There was also a lapse of time between the committal of the applicant for trial on 28 March 1990 and the beginning of his trial on 26 November 1990. However, part of this time was required for the filing of the bill of indictment and the arraignment of the applicant before the court. In any event, the Commission cannot find that the delay which may have occurred at that stage was sufficiently important to warrant a finding of a violation of Article 5 para. 3 (Art. 5-3) of the Convention.

Consequently, the Commission finds that the applicant's detention on remand did not exceed a "reasonable time" within the meaning of Article 5 para. 3 (Art. 5-3) of the Convention.

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

2. The applicant also complains that he was deprived of the right to silence and the presumption of innocence in the criminal proceedings brought against him as a result of the operation of the provisions of the Criminal Evidence (Northern Ireland) Order 1988, which permitted a judge, sitting without a jury, to draw inferences from his failure to answer police questions and from his failure to give evidence in his own defence during the trial. He further complains that he was deprived of access to his solicitor in the first 48 hours of his detention. The applicant invokes Article 6 paras. 1, 2 and 3 (b), Article 13 and Article 14 (Art. 6-1, 6-2, 6-3-b, 13, 14) of the Convention. These provide as relevant:

Article 6 para. 1 (Art. 6-1) of the Convention:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...".

Article 6 para. 2 (Art. 6-2) of the Convention:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Article 6 para. 3 (b) (Art. 6-3-b) of the Convention:

"Everyone charged with a criminal offence has the following minimum rights:

...

b. to have adequate time and facilities for the preparation of his defence;".

Article 13 (Art. 13) of the Convention:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 14 (Art. 14) of the Convention:

"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 Government submit, inter alia, that the provisions of the 1988 Order did not operate to deprive the applicant either of a fair hearing, contrary to Article 6 para. 1 (Art. 6-1) of the Convention, or of the presumption of innocence contrary Article 6 para. 2 (Art. 6-2) . They refer to the safeguards provided in the Order: no inference may be drawn unless the suspect/accused has been warned in advance of the possible effect; before any inference is drawn, the prosecution must have established a prima facie case against the accused; the judge has a discretion whether to draw an inference and is limited to drawing only such inferences as may be proper. The Order merely allows the trier of fact to draw such inferences as common sense dictates. In the present case, there was a formidable case against the applicant which called for evidence from the applicant if there was an innocent explanation for his conduct. The burden of proof remained throughout on the prosecution.

As regards the denial of access by the applicant to his solicitor for 48 hours, the Government contend that this delay did not disadvantage the applicant in the conduct of his defence and therefore discloses no violation of Article 6 (Art. 6) of the Convention.

The Commission has taken cognizance of the submissions of the parties. It notes similar issues regarding the right to silence and presumption of innocence are at present under examination by the European Court of Human Rights in the case of John Murray v. the United Kingdom. It considers that, in the circumstances, it is not appropriate at the present time to decide on the admissibility of this part of the application.

For these reasons, the Commission by a majority

DECLARES INADMISSIBLE the applicant's complaint concerning the length of his detention on remand;

ADJOURNS the examination of the remainder of the application.

Secretary to the Commission	President of the Commission
(H.C. KRÜGER)	(C.A. NØRGAARD)