CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 37555/97
by Gerald O'HARA
against the United Kingdom

The European Court of Human Rights (Third Section), sitting on 14 March 2000 as a Chamber composed of

Mr J.-P Costa, *President*,
Sir Nicolas Bratza,
Mr L. Loucaides,
Mr P. Kūris,
Mrs F. Tulkens,
Mr K. Jungwiert,
Mrs H.S. Greve, *judges*,

and Mrs S. Dollé, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 20 May 1997 and registered on 29 August 1997,

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 observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is an Irish citizen born in 1953. He is represented before the Court by Mr Denis E. Mullan, a solicitor practising in Belfast.

A. The circumstances of the case

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

Kurt Konig was a German citizen working for the caterers of canteens in police stations in Londonderry. He was murdered on 21 November 1985. The Provisional IRA claimed responsibility for his death.

The applicant was, and still is, a prominent member of Sinn Fein. He alleges that he has been arrested on 30 occasions and that he has successfully claimed compensation for wrongful arrest and detention on each occasion.

The Government submit that Special Branch received intelligence that the applicant and three other persons were involved in the murder. The intelligence derived from Special Branch informants who had proved reliable in the past. Detective Superintendent R. of the Royal Ulster Constabulary ("RUC") was briefed by Special Branch concerning this intelligence that the applicant was a member of the Provisional IRA and had been implicated in the murder.

Detective Superintendent R. briefed Inspector B. who in turn briefed Detective Constable S.

On 28 December 1985, at about 6.00-6.15 a.m., Detective Constable S. visited the applicant's house and conducted a search. At the conclusion of their search at 8.05 a.m., S. arrested the applicant. He told the applicant that he was arresting him under section 12(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1984 ("the 1984 Act") which empowered a police constable to arrest, without a warrant, a person whom he had reasonable grounds for suspecting of being concerned in the commission, preparation or instigation of acts of terrorism.

The applicant was taken to Castlereagh detention centre where he was questioned about his possible membership of the IRA, his suspected involvement in Konig's murder and also his possible involvement in the murder of two soldiers on 1 April 1982. He was interviewed on 34 occasions. He made no response to any questions. According to the Government, the first interview occurred on 28 December 1985 at 11.50 a.m., at the start of which he was told that the police were inquiring into his involvement with the Provisional IRA and related matters. Police notes provided by the Government record that during the next interview, from 2.05 to 4 p.m., the interrogating officers told the applicant that they were making inquiries in relation to his membership of the IRA and the murder of Kurt Konig.

On 29 December 1985, the Secretary of State for Northern Ireland extended the applicant's period of detention beyond the initial forty-eight hour period, by five days. The applicant was released without charge on 3 January 1986 at 9 p.m., after six days and thirteen hours in custody.

By a writ issued on 20 August 1986 against the Chief Constable of the RUC, the applicant instituted a civil action for damages before the High Court in Northern Ireland in respect of, *inter alia*, false imprisonment and unlawful arrest on the basis that the arresting officer failed to inform him of the grounds for his arrest, that the reasonable grounds of the arresting officer's suspicion were not based on his own knowledge of the facts and that the Chief Constable had failed to prove that the police officer who directed the applicant's arrest had reasonable grounds for suspecting him to be concerned in the commission of these offences. The evidence before the domestic courts of Detective Constable S was to the effect that he attended a briefing on 28 December 1985 in which he was told that he was to carry out a search to find evidence and arrest persons, including the applicant, suspected of involvement in the murder of Kurt Konig. He had been told that the applicant was involved in the murder by his superior officer, Inspector B, and stated that these were the reasonable grounds for suspecting the applicant. He did not state that Inspector B had told him the grounds for his own suspicion, nor was he asked by counsel for either party. It was common ground that the murder was a terrorist offence. The superior officer was not called as a witness in the proceedings.

On 14 September 1990, the High Court dismissed the applicant's claims. The judge found that the detective had suspected that the applicant was involved in the murder and that this suspicion was reasonably based on information given to him by a superior officer. He noted that the applicant had not sought in cross-examination to probe the details which had been disclosed to the arresting officer during the briefing. The judge concluded that:

> "I would not wish to lay down the proposition that reasonable suspicion could in all circumstances be based on the opinion of another officer expressed without any supporting allegations of fact. But it does seem to me that a briefing officially given by a superior officer would give reasonable grounds for suspicion of the matters stated therein. The fact that I have only such scanty evidence of the matters disclosed to <the arresting officer> means that I am only just satisfied of the legality of the arrest, but I am fortified in my view by the lack of detailed challenge in cross-examination as to the nature of the information given to him."

On 24 October 1990, the applicant gave notice of appeal to the Court of Appeal in Northern Ireland. He did not however pursue the ground of appeal that the arresting officer had failed to inform him of the true grounds of his arrest, due to the intervening decision of the Court of Appeal on a similar point in the case of *Oscar v. Chief Constable of the RUC* ([1992] 9 NIJB 27) where leave to appeal to the House of Lords had been refused.

On 6 May 1994, the Court of Appeal dismissed the appeal upholding the decision of the High Court that reasonable suspicion could be derived from information from a superior officer and that the arrest was lawful. In addition, the court held, as in the *Oscar* case, that the words used by the arresting officer - "I arrest you under s. 12(1)b of the <1984 Act> as I have reasonable grounds for suspecting you have been concerned in the commission, preparation or instigation of acts of terrorism" were sufficient, without it being necessary for the officer to tell him of the nature of the acts.

An appeal to the House of Lords against the decision of the Court of Appeal was dismissed on 12 December 1996. In his judgment, with which the others judges agreed, Lord Hope of Craighead held that it was not necessary for an arresting officer to possess all the information which has led to a decision to arrest, but that the constable must have equipped himself with sufficient information that he has reasonable cause to suspect before exercising the power to arrest. The information acted upon by the arresting officer need not be based on

his own observations, as he is entitled to form a suspicion based on what he has been told; his reasonable suspicion may be based on information which has been given to him anonymously, or it may be based on information which turns out later to be wrong. While the evidence about the matters disclosed at the briefing was indeed scanty, he found that the trial judge was entitled to weigh up the evidence in the light of surrounding circumstances and having regard to the source of that information, draw inferences as to what a reasonable man, in the position of the independent observer would make of it.

B. Relevant domestic law and practice

Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 provides as relevant:

> "(1) Subject to sub-section (2) below, a Constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be:
> (b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of the Act applies; …
>
> (4) A person arrested under this section shall not be detained in right of the arrest for more than forty-eight hours after his arrest; but the Secretary of State may, in any particular case, extend the period of forty eight hours by a period or periods specified by him."

COMPLAINTS

The applicant complains of a violation of Article 5 § 1 of the Convention in that his arrest and detention were not in accordance with that provision since he was not arrested on a reasonable suspicion of commission of an offence, nor was the purpose of his arrest to bring him before the competent legal authority.

The applicant also complains of a violation of Article 5 § 2 of the Convention in that he was not informed promptly of the reasons for his arrest or of any charge against him.

Further, the applicant complains that he was not brought promptly or at all, before a judge or other officer authorised by law to exercise judicial power in accordance with Article 5 § 3 of the Convention. In particular, the applicant claims that his period of detention of six days and thirteen hours without being brought before a judge or judicial officer cannot be considered compatible with the requirement of promptness in Article 5 § 3 of the Convention.

Finally, the applicant complains of a violation of Article 5 § 5 of the Convention in that he does not have an enforceable right to compensation, and Article 13 in that he has no effective remedy in respect of his claim under Article 5.

THE LAW

1. The applicant complains that he was not brought promptly or at all before a judge after his arrest, invoking Article 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."

Concerning exhaustion of domestic remedies and the six month time-limit

The Government submit that the applicant has not exhausted domestic remedies as required by Article 35 § 1 of the Convention because he did not pursue on appeal his complaints about the length of his detention after his arrest. Alternatively, they submit that his application is out of time as he was released from detention on 3 January 1986 and his application introduced only on 20 May 1997, therefore outside the six month time-limit imposed by Article 35 § 1 of the Convention.

The applicant claims that his domestic proceedings at first instance and on appeal involved allegations that his detention was unlawful and that these claims were therefore only resolved on 12 December 1996. His application was introduced less than six months after that date and therefore within the requisite time-limit.

The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The application of the rule of exhaustion of domestic remedies must however make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case (see the Akdivar and Others judgment cited above, p. 1211, § 69, and the Aksoy judgment cited above, p. 2276, §§ 53 and 54).

In the present case, the applicant brought civil proceedings alleging that his arrest and detention had been unlawful. It is true that in the proceedings on appeal there is no indication that he relied on the length of the detention in itself as disclosing unlawfulness. It is nonetheless the case that the applicant was challenging the lawfulness of the arrest which permitted the exercise of the power to extend the period of his detention and, if he had been successful, he would have been able to claim damages for that period of detention as being unlawful. Since he would have arguably received redress for his detention at the conclusion of the appeal proceedings, the Court finds that they can be regarded as part of the process of exhaustion of domestic remedies pursuant to Article 35 § 1 of the Convention. Accordingly, the relevant date for the calculation of the six month time-limit imposed by Article 35 § 1 must be taken as the dismissal of his appeal by the House of Lords on 12 December 1996. His application was introduced on 11 May 1997, less than six months later.

This part of the application cannot therefore be rejected for lack of compliance with the requirements of Article 35 § 1 of the Convention.

Concerning the substance of the complaints

The Government concede that the requirements of Article 5 § 3 have not been complied with in this case. They note that the applicant's arrest and detention took place before the Court's judgment in the case of Brogan and Others v. the United Kingdom (judgment of 29 November 1988, Series A no. 145) and that on 23 December 1988, they lodged their derogation under Article 15 of the Convention concerning the exercise of powers under section 12 of the 1984 Act which were inconsistent with Article 5 § 3 of the Convention.

The applicant disputes that the United Kingdom Government's derogation has any relevance to his arrest and detention which took place at an earlier date. He submits that his detention for six days without being brought before a judge discloses a clear breach of the requirement of Article 5 § 3 that an arrested person be brought promptly before an appropriate judicial officer.

In view of the submissions of the parties, the Court considers that this part of the application raises serious issues under Article 5 § 3 of the Convention which require determination on the merits. It follows that this complaint cannot be dismissed as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant complains that his arrest did not comply with the requirements of Article 5 § 1 (c) of the Convention which provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: …
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; … ."

The Government submit that the applicant's arrest was in conformity with Article 5 § 1 (c) of the Convention, as Detective Constable S reasonably suspected the applicant of being involved in the murder of Kurt Konig. The basis of his reasonable suspicion was a briefing which he had attended given by a superior officer. It was common ground in the domestic courts that S. subjectively had the necessary suspicion, as was the fact that Kurt Konig had been murdered in a terrorist offence.

The Government further point out that the information passed on at the briefing derived from high grade intelligence from reliable informants passed on to officers of Special Branch to the effect that the applicant and three others were involved in the murder and that the applicant was a member of the IRA. There were no reasons for doubting the veracity of this information.

The applicant submits that, as he never had been a member of the IRA or been involved in the murder, the police could not have received reliable information to that effect. He points out that it was never suggested to him during his interviews with the police that they had information from any source implicating him in this way or regarding the nature of his alleged involvement. The Government have not provided any documentation or details to support their bare assertion that any such information was received.

The applicant alleges that his arrest and detention by the police was probably to harass him and put pressure on him as he was prominent member of Sinn Fein. He alleges that he has been arrested on at least 30 separate occasions and detained for various periods of time and on each occasion has successfully claimed compensation for wrongful arrest and detention. In these circumstances, where there is a real possibility that the police were motivated by malice, particular care should be taken in assessing the sufficiency of the information provided regarding the grounds of suspicion.

In view of the submissions of the parties, the Court considers that this part of the application raises serious issues under Article 5 § 1 (c) of the Convention which require determination on the merits. It follows that this complaint cannot be dismissed as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

3. The applicant complains that he was not given reasons for arrest contrary to Article 5 § 2 of the Convention, which provides:

> "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

The Government submit that the applicant failed to pursue his appeal concerning the inadequate reasons given on his arrest. In any event, the applicant was made aware of the reasons for his arrest during his interviews with the police after his arrest and that this occurred "promptly", as that criterion has been interpreted by the Court in previous cases.

The applicant noted that his appeal concerning the inadequate reasons given on his arrest became pointless once the Court of Appeal had ruled on the issue in another case. He accepted that in the case of Fox, Campbell and Hartley v. the United Kingdom (cited above, § 42) a delay of up to 6 hours 20 minutes before the reasons for the arrest were disclosed during interrogation was not found to fall outside the notion of promptness. However, he submits that, where the arresting officer was aware of the reasons, as in this case, the requirement of promptness imposed an obligation on him to inform the applicant at the time of the arrest.

The Court finds it unnecessary to consider whether the applicant exhausted domestic remedies in respect of this complaint for the reasons given below.

The elementary safeguard contained in paragraph 2 of Article 5, namely, that any person arrested should know why they are being deprived of their liberty, requires that any person arrested must be told, in simple non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. While this information must be conveyed promptly, it need not be related in its entirety by the arresting officer at the moment of arrest. Whether the content and promptness of the information were sufficient is

to be assessed in each case according to its special features (see Fox, Campbell and Hartley judgment, cited above, § 40).

The bare indication to the applicant on his arrest at 8.05 a.m. on 28 December 1985 of the legal basis of that arrest under section 12(1)b of the 1984 Act, taken on its own, is insufficient. However, the applicant was interviewed from 2.05 to 4.00 p.m. on the same day, during which time he was informed that he was suspected of involvement in the murder of Kurt Konig and of membership of the IRA. The reasons why he was suspected of terrorist offences was therefore brought to his attention. In the context of the present case, this interval cannot be regarded as falling outside the constraints of time imposed by the notion of promptness in Article 5 § 2 of the Convention (see Fox, Campbell and Hartley judgment, cited above, § 42).

It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

4. The applicant invokes Article 5 § 5 of the Convention which provides:

> "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."

The Government submit that the applicant did have an enforceable right to compensation in the courts in respect of unlawful arrest and detention. He did not receive compensation, however, as the courts were satisfied that he had been lawfully arrested and detained.

The applicant submits that the requirements for a lawful arrest in domestic law fell short of the requirements imposed by Article 5 of the Convention and, therefore, pursuant to domestic law, he did not have an enforceable right to compensation for the matters of which he complained.

The Court observes that this complaint is closely connected to the other allegations made by the applicant concerning the lawfulness of his arrest and detention above. It accordingly raises serious issues under the Convention which require determination on the merits. It follows that this complaint cannot be dismissed as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

5. The applicant has also invoked Article 13 of the Convention, which requires an effective remedy to be provided in respect of arguable breaches of the Convention. The Court considers that generally Article 5 must be regarded as the *lex specialis* concerning complaints of unlawful arrest and detention. It finds no separate issue arising under Article 13 in the present case and does not propose to examine it further.

For these reasons, the Court, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaints concerning the length of his detention without being brought before a judge, the existence of a reasonable suspicion justifying his arrest and the existence of an enforceable right to compensation in respect of these matters;

DECLARES INADMISSIBLE the remainder of the application.

Commented [Note1]: Summarise the complaints without necessarily citing the invoked Convention Articles.

S. Dollé
Registrar

J.-P. Costa
President