



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

COURT (PLENARY)

**CASE OF BRANNIGAN AND McBRIDE v. THE UNITED  
KINGDOM**

*(Application no. 14553/89; 14554/89)*

JUDGMENT

STRASBOURG

25 May 1993

**In the case of Brannigan and McBride v. the United Kingdom\*,**

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 51 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,  
Mr R. BERNHARDT,  
Mr Thór VILHJÁLMSSON,  
Mr F. GÖLCÜKLÜ,  
Mr F. MATSCHER,  
Mr L.-E. PETTITI,  
Mr B. WALSH,  
Mr R. MACDONALD,  
Mr C. RUSSO,  
Mr A. SPIELMANN,  
Mr J. DE MEYER,  
Mr N. VALTICOS,  
Mr S.K. MARTENS,  
Mrs E. PALM,  
Mr I. FOIGHEL,  
Mr R. PEKKANEN,  
Mr A.N. LOIZOU,  
Mr J.M. MORENILLA,  
Mr F. BIGI,  
Sir John FREELAND,  
Mr A.B. BAKA,  
Mr M.A. LOPES ROCHA,  
Mr L. WILDHABER,  
Mr G. MIFSUD BONNICI,  
Mr J. MAKARCZYK,  
Mr D. GOTCHEV,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 November 1992 and 22 April 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

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\* The case is numbered 5/1992/350/423-424. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

## PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 21 February 1992, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in two applications against the United Kingdom of Great Britain and Northern Ireland (nos. 14553-14554/89) both lodged with the Commission under Article 25 (art. 25) on 19 January 1989 by Irish citizens, Mr Peter Brannigan and Mr Patrick McBride. Mr McBride subsequently died in 1992 (see paragraph 11 below).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the United Kingdom of its obligations under Article 5 paras. 3 and 5 and Article 13 (art. 5-3, art. 5-5, art. 13), in the light of the United Kingdom's derogation under Article 15 (art. 15).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mr Brannigan and Mrs McBride - Mr McBride's mother and personal representative (see paragraph 11 below) - stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30). For reasons of convenience Mr McBride will continue to be referred to in this judgment as the applicant.

The Irish Government, having been informed by the Registrar of its right to intervene in the proceedings (Article 48, sub-paragraph (b), of the Convention and Rule 33 para. 3 (b)) (art. 48-b), did not indicate any intention of so doing.

3. The Chamber to be constituted included, *ex officio*, Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 February 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Bernhardt, Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr B. Walsh, Mr S.K. Martens, Mr R. Pekkanen and Mr L. Wildhaber (Article 43 in fine of the Convention\* and Rule 23) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government of the United Kingdom ("the Government"), the Delegate of the Commission and the representatives of the applicants on the organisation of the proceedings (Rules 37 para. 1 and 38). In accordance with the

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\* Note by the Registrar: as amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

President's orders and directions, the Registrar received, on 17 July 1992, the memorial of the Government. The applicants' memorial was filed out-of-time on 31 August 1992. However, on 28 October 1992, the Chamber decided that it should be regarded as part of the case file (Rule 37 para. 1 in fine). The Secretary to the Commission had previously informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 27 March, the President had granted, under Rule 37 para. 2, leave to the Northern Ireland Standing Advisory Commission on Human Rights to submit written comments on specific aspects of the case. Leave was also granted on 27 May, subject to certain conditions, to Amnesty International and three organisations which had made a joint request, namely Liberty, Interights and the Committee on the Administration of Justice. The respective comments were received on 22 June, 7 and 19 August 1992.

6. On 28 October 1992 the Chamber decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court.

7. As directed by the President, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 November 1992.

There appeared before the Court:

- for the Government

Mrs A. GLOVER, Legal Counsellor,  
Foreign and Commonwealth Office,

*Agent,*

Mr N. BRATZA, Q.C.,

Mr R. WEATHERUP,

*Counsel;*

- for the Commission

Mr H. DANELIUS,

*Delegate;*

- for the applicants

Mr R. WEIR, Q.C.,

Mr S. TREACY, Barrister-at-law,

*Counsel,*

Mr P. MADDEN, Solicitor.

The Court heard addresses by Mr Bratza for the Government, by Mr Danelius for the Commission and by Mr Weir for the applicants, as well as replies to questions put by two of its members individually.

8. Prior to the hearing the Government were granted permission by the President to file comments on certain aspects of the observations made by the amici curiae. The applicants' written comments on these submissions were received on 18 December 1992. The Government's observations on the applicants' Article 50 (art. 50) claims were submitted on 17 January 1993.

9. Mr B. Repik, who had attended the hearing and taken part in the deliberations of 26 November 1992, was unable to sit in the present case after 31 December 1992, his term of office having come to an end owing to the dissolution of the Czech and Slovak Federal Republic (Articles 38 and 65 para. 3 of the Convention) (art. 38, art. 65-3).

## AS TO THE FACTS

### I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

#### **A. Peter Brannigan**

10. The first applicant, Mr Peter Brannigan, was born in 1964. He is a labourer and lives in Downpatrick, Northern Ireland.

He was arrested at his home by police officers on 9 January 1989 at 6.30 a.m. pursuant to section 12 (1) (b) of the Prevention of Terrorism (Temporary Provisions) Act 1984 ("the 1984 Act"). He was then removed to the Interrogation Centre at Gough Barracks, Armagh, where he was served with a copy of the "Notice to Persons in Police Custody" which informs the prisoner of his legal rights (see paragraph 24 below). A two-day extension of his detention was granted by the Secretary of State on 10 January 1989 at 7.30 p.m., and a further three-day extension was granted on 12 January 1989 at 9.32 p.m. He was released at 9 p.m. on 15 January 1989. He was therefore detained for a total period of six days, fourteen hours and thirty minutes.

During his detention he was interrogated on forty-three occasions and denied access to books, newspapers and writing materials as well radio and television. He was not allowed to associate with other prisoners.

Although access to a solicitor was at first delayed for forty- eight hours because it was believed by the police that such a visit would interfere with the investigation, the first applicant was subsequently visited by his solicitor on 11 January 1989. He was seen by a medical practitioner on seventeen occasions during police custody.

#### **B. Patrick McBride**

11. The second applicant, Mr Patrick McBride, was born in 1951.

He was arrested at his home by police officers on 5 January 1989 at 5.05 a.m. pursuant to section 12 (1) (b) of the 1984 Act. He was then removed to Castlereagh Interrogation Centre where he was served with a copy of the "Notice to Persons in Police Custody". A three-day extension of his period of detention was granted by the Secretary of State at 5.10 p.m. on 6 January 1989. He was released at 11.30 a.m. on Monday 9 January 1989. He was therefore detained for a total period of four days, six hours and twenty-five minutes.

During his detention he was interrogated on twenty-two occasions and was subject to the same regime as Mr Brannigan (see paragraph 10 above).

He received two visits from his solicitor on 5 and 7 January 1989 and was seen by a medical practitioner on eight occasions during police custody.

Mr McBride was shot dead on 4 February 1992 by a policeman who had run amok and attacked Sinn Fein Headquarters in Belfast.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Introduction

12. The emergency situation in Northern Ireland in the early 1970s and the attendant level of terrorist activity form the background to the introduction of the Prevention of Terrorism (Temporary Provisions) Act 1974 ("the 1974 Act"). Between 1972 and 1992, over three thousand deaths were attributable to terrorism in Northern Ireland. In the mid 1980s, the number of deaths was significantly lower than in the early 1970s but organised terrorism has continued to grow.

Since the commencement of the terrorist campaign there have been 35,104 people injured in Northern Ireland as a result of terrorist acts. Many of these injuries involved loss of limbs and permanent physical disability. In the same period there have been a total of 41,859 terrorist shooting or bombing incidents. Other parts of the United Kingdom have also been subjected to a considerable scale of terrorist violence.

13. The 1974 Act came into force on 29 November 1974. The Act proscribed the Irish Republican Army ("IRA") and made it an offence to display support in public of that organisation in Great Britain. The IRA was already a proscribed organisation in Northern Ireland. The Act also conferred special powers of arrest and detention on the police so that they could deal more effectively with the threat of terrorism (see paragraphs 16-17 below).

This Act was subject to renewal every six months by Parliament so that, *inter alia*, the need for the continued use of the special powers could be monitored. The Act was thus renewed until March 1976, when it was re-enacted with certain amendments.

Under section 17 of the 1976 Act, the special powers were subject to parliamentary renewal every twelve months. The 1976 Act was in turn renewed annually until 1984, when it was re-enacted with certain amendments. The 1984 Act, which came into force in March 1984, proscribed the Irish National Liberation Army as well as the IRA. It was renewed every year until replaced by the 1989 Act which came into force on 27 March 1989. Section 14 of the 1989 Act contains provisions similar to those contained in section 12 of the 1984 Act.

14. The 1976 Act was reviewed by Lord Shackleton in a report published in July 1978 and subsequently by Lord Jellicoe in a report published in

January 1983. Annual reports on the 1984 Act have been presented to Parliament by Sir Cyril Philips (for 1984 and 1985) and Viscount Colville (from 1986-1991). A wider-scale review of the operation of the 1984 Act was also carried out by Viscount Colville in 1987.

15. These reviews were commissioned by the Government and presented to Parliament to assist consideration of the continued need for the legislation. The authors of these reports concluded in particular that in view of the problems inherent in the prevention and investigation of terrorism, the continued use of the special powers of arrest and detention was indispensable. The suggestion that decisions extending detention should be taken by the courts was rejected, notably because the information grounding those decisions was highly sensitive and could not be disclosed to the persons in detention or their legal advisers. For various reasons, the decisions were considered to fall properly within the sphere of the executive.

In his 1987 report reviewing the provisions of section 12, Viscount Colville considered that good reasons existed for extending detention in certain cases beyond forty-eight hours and up to seven days. He noted in this regard that the police in Northern Ireland were frequently confronted by a situation where they had good intelligence to connect persons with a terrorist incident but the persons concerned, if detained, made no statements, and witnesses were afraid to come forward, certainly in court: in these circumstances, it was concluded, the reliance on forensic evidence by the prosecution was increasing, and detective work had assumed a higher degree of importance. He also set out the reasons which individually or, as often, in combination constituted good grounds for extending the various periods within which otherwise persons suspected of involvement in terrorism would have to be charged or taken to court. These included checking of fingerprints; forensic tests; checking the detainee's replies against intelligence; new lines of inquiry; information obtained from one or more than one other detainee in the same case; finding and consulting other witnesses (Command Paper 264, paragraphs 5.1.5-5.1.7, December 1987).

### **B. Power to arrest without warrant under the 1984 and other Acts**

16. The relevant provisions of section 12 of the 1984 Act, substantially the same as those of the 1974 and 1976 Acts, are as follows:

"12. (1) [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 this Act applies;

...

(3) The acts of terrorism to which this Part of this Act applies are

(a) acts of terrorism connected with the affairs of Northern Ireland;

...

(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.

(5) Any such further period or periods shall not exceed five days in all.

(6) The following provisions (requirement to bring accused person before the court after his arrest) shall not apply to a person detained in right of the arrest

...

(d) Article 131 of the Magistrates' Courts (Northern Ireland) Order 1981;

...

(8) The provisions of this section are without prejudice to any power of arrest exercisable apart from this section."

17. According to the definition given in section 14 (1) of the 1984 Act, "terrorism means the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear". An identical definition of terrorism in the Northern Ireland (Emergency Provisions) Act 1978 was held to be "in wide terms" by the House of Lords, which rejected an interpretation of the word "terrorist" that would have been "in narrower terms than popular usage of the word 'terrorist' might connote to a police officer or a layman" (*McKee v. Chief Constable for Northern Ireland* [1985] 1 All England Law Reports 1 at 3-4, per Lord Roskill).

### **C. Detention under the ordinary criminal law**

18. Article 131 of the Magistrates' Courts (Northern Ireland) Order 1981, declared inapplicable in cases of suspected terrorism by section 12(6)(d) of the 1984 Act (see paragraph 16 above), provided that where a person arrested without warrant was not released from custody within twenty-four hours, he had to be brought before a Magistrates' Court as soon as practicable thereafter but not later than forty-eight hours after his arrest.

19. Article 131 was repealed by the Police and Criminal Evidence (Northern Ireland) Order 1989 (Statutory Instrument 1989/1341 (Northern

Ireland) 12). Under the provisions of the 1989 Order (which corresponds directly with the Police and Criminal Evidence Act 1984 in force in England and Wales) a person arrested on suspicion of his involvement in an offence may initially not be kept in police detention for more than twenty-four hours without being charged (Article 42(1)). On the authority of a police officer of the rank of Superintendent or above, the detention may be extended for a period not exceeding thirty-six hours from the time of arrest, or arrival at a police station after arrest, when the officer concerned:

"... has reasonable grounds for believing that -

(a) the detention of that person without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him;

(b) an offence for which he is under arrest is a serious arrestable offence;

(c) the investigation is being conducted diligently and expeditiously." (Article 43(1))

By Article 44(1) of the Order a Magistrates' Court is empowered, on a complaint in writing by a constable, to extend the period of police detention if satisfied that there are reasonable grounds for believing that the further detention of that person is justified. Detention is only justified for these purposes if the conditions set out in (a)-(c) above are satisfied (Article 44(4)). The person to whom the complaint relates must be furnished with a copy of the complaint and brought before the court for the hearing (Article 44(2)) and is entitled to be legally represented at the hearing (Article 44(3)). The period of further detention authorised by the warrant may not exceed thirty-six hours (Article 44(12)). By Article 45 a Magistrates' Court may, on a complaint in writing by a constable, extend the period of detention for such period as the court thinks fit, having regard to the evidence before it (Article 45(1), (2)). This additional extension may not exceed thirty-six hours and may not end later than ninety-six hours after the time of arrest or arrival at the police station after arrest (Article 45(3)).

#### **D. Exercise of the power to make an arrest under section 12(1)(b) of the 1984 Act**

20. In order to make a lawful arrest under section 12(1)(b) of the 1984 Act, the arresting officer must have a reasonable suspicion that the person being arrested is or has been concerned in the commission, preparation or instigation of acts of terrorism. In addition, an arrest without warrant is subject to the applicable common law rules laid down by the House of Lords in the case of *Christie v. Leachinsky* [1947] Appeal Cases 573 at 587 and 600. The person being arrested must in ordinary circumstances be informed of the true ground of his arrest at the time he is taken into custody

or, if special circumstances exist which excuse this, as soon thereafter as it is reasonably practicable to inform him. This does not require technical or precise language to be used provided the person being arrested knows in substance why.

In the case of *Ex parte Lynch* [1980] Northern Ireland Reports 126 at 131, in which the arrested person sought a writ of habeas corpus, the High Court of Northern Ireland discussed section 12(1)(b). The arresting officer had told the applicant that he was arresting him under section 12 of the 1976 Act as he suspected him of being involved in terrorist activities. Accordingly, the High Court found that the lawfulness of the arrest could not be impugned in this respect.

21. The arresting officer's suspicion must be reasonable in the circumstances and to decide this the court must be told something about the sources and grounds of the suspicion (per Higgins J. in *Van Hout v. Chief Constable of the RUC and the Northern Ireland Office*, decision of Northern Ireland High Court, 28 June 1984).

#### **E. Purpose of arrest and detention under section 12 of the 1984 Act**

22. Under ordinary law, there is no power to arrest and detain a person merely to make enquiries about him. The questioning of a suspect on the ground of a reasonable suspicion that he has committed an arrestable offence is a legitimate cause for arrest and detention without warrant where the purpose of such questioning is to dispel or confirm such a reasonable suspicion, provided he is brought before a court as soon as practicable (*R. v. Houghton* [1979] 68 Criminal Appeal Reports 197 at 205, and *Holgate-Mohammed v. Duke* [1984] 1 All England Law Reports 1054 at 1059).

On the other hand, Lord Lowry LCJ held in the case of *Ex parte Lynch* (loc. cit. at 131) that under the 1984 Act no specific crime need be suspected to ground a proper arrest under section 12(1)(b). He added (*ibid.*):

"... [I]t is further to be noted that an arrest under section 12(1) leads ... to a permitted period of detention without preferring a charge. No charge may follow at all; thus an arrest is not necessarily ... the first step in a criminal proceeding against a suspected person on a charge which was intended to be judicially investigated."

#### **F. Extension of period of detention**

23. In Northern Ireland, applications for extended detention beyond the initial forty-eight-hour period are processed at senior police level in Belfast and then forwarded to the Secretary of State for Northern Ireland for approval by him or, if he is not available, a junior minister.

There are no criteria in the 1984 Act (or its predecessors) governing decisions to extend the initial period of detention, though strict criteria that

have been developed in practice are listed in the reports and reviews referred to above (see paragraphs 14 and 15 above).

According to statistics submitted by the Government a total number of 1,549 persons were arrested under the Prevention of Terrorism (Temporary Provisions) Act in 1990 of whom approximately 333 were eventually charged. Of these, 1,140 were detained for two days or less, 17% of whom were charged. However, of the 365 persons detained for more than two days and less than five days 39% were charged. In addition, of the 45 persons detained for more than five days some 67% were charged, many with serious offences including murder, attempted murder and causing explosions. In each of these cases the evidence which formed the basis of the charges only became available or was revealed in the latest stages of the detention of the person concerned.

### **G. Rights during detention**

24. A person detained under section 12 of the 1984 Act (now section 14 of the 1989 Act) has the rights, if he so requests, to have a friend, relative or other person informed of the fact and place of his detention and to consult a solicitor privately; he must be informed of these rights as soon as practicable. Any such requests must be complied with as soon as practicable. This may, however, be delayed for up to forty-eight hours in certain specified circumstances (sections 44 and 45 of the Northern Ireland (Emergency Provisions) Act 1991 - formerly sections 14 and 15 of the 1987 Act).

A decision to deny access to a solicitor within the first forty-eight hours is subject to judicial review. Cases decided by the High Court in Northern Ireland establish that under section 45 of the Northern Ireland (Emergency Provisions) Act 1991 the power to delay access can only be used if the officer concerned has reasonable grounds for believing that the exercise of the right would have one or more of the specific consequences set out in subsection 8 of section 45. There is a burden on the officer concerned to show to the satisfaction of the court that he had reasonable grounds for his belief. In the absence of evidence to establish such reasonable grounds the court will order the immediate grant of access to a solicitor (decisions of the Northern Ireland High Court in applications for judicial review by Patrick Duffy (20 September 1991), Dermot and Deirdre McKenna (10 February 1992), Francis Maher and Others (25 March 1992)).

Since 1979, the practice has been that a detainee is not interviewed until he has been examined by a forensic medical officer. Thereafter, arrangements are made for the detainee to have access to a medical officer including his own doctor. There is provision for consultation with a forensic medical officer at a pre-arranged time each day.

The above rights are briefly set out in a "Notice to Persons in Police Custody" which is served on persons arrested under section 12 when they are detained.

#### **H. Judicial involvement in terrorist investigations**

25. Under paragraph 2 of Schedule 7 to the Prevention of Terrorism (Temporary Provisions) Act 1989 a justice of the peace may grant a warrant authorising a constable involved in a terrorist investigation to search premises and seize and retain anything found there if he has reasonable grounds for believing inter alia that it is likely to be of substantial value to the investigation. Paragraphs 5(1) and (4) of Schedule 7 confer a similar power on a circuit judge and on a county court judge in Northern Ireland.

However, paragraph 8(2) provides that the Secretary of State may give to any constable in Northern Ireland the authority which may be given by a search warrant under paragraphs 2 and 5 if inter alia it appears to him that the disclosure of information that would be necessary for an application under those provisions "would be likely to prejudice the capability of members of the Royal Ulster Constabulary in relation to the investigation of offences ... or otherwise prejudice the safety of, or of persons in, Northern Ireland".

#### **I. REMEDIES**

26. The principal remedies available to persons detained under the 1984 Act are an application for a writ of habeas corpus and a civil action claiming damages for false imprisonment.

##### *1. Habeas Corpus*

27. Under the 1984 Act, a person may be arrested and detained in right of arrest for a total period of seven days (section 12(4) and (5) - see paragraph 16 above). Paragraph 5(2) of Schedule 3 to the 1984 Act provides that a person detained pursuant to an arrest under section 12 of the Act "shall be deemed to be in legal custody when he is so detained". However, the remedy of habeas corpus is not precluded by paragraph 5(2) cited above. If the initial arrest is unlawful, so also is the detention grounded upon that arrest (per Higgins J. in the Van Hout case, loc. cit. at 18).

28. Habeas Corpus is a procedure whereby a detained person may make an urgent application for release from custody on the basis that his detention is unlawful.

The court hearing the application does not sit as a court of appeal to consider the merits of the detention: it is confined to a review of the lawfulness of the detention. The scope of this review is not uniform and

depends on the context of the particular case and, where appropriate, the terms of the relevant statute under which the power of detention is exercised. The review will encompass compliance with the technical requirements of such a statute and may extend, inter alia, to an inquiry into the reasonableness of the suspicion grounding the arrest (*Ex parte Lynch*, loc. cit., and *Van Hout*, loc. cit.). A detention that is technically legal may also be reviewed on the basis of an alleged misuse of power in that the authorities may have acted in bad faith, capriciously or for an unlawful purpose (*R. v. Governor of Brixton Prison*, ex parte Sarno [1916] 2 King's Bench Reports 742, and *R. v. Brixton Prison (Governor)*, ex parte Soblen [1962] 3 All England Law Reports 641).

The burden of proof is on the respondent authorities which must justify the legality of the decision to detain, provided that the person applying for a writ of habeas corpus has first established a prima facie case (*Khawaja v. Secretary of State* [1983] 1 All England Law Reports 765).

## 2. *False imprisonment*

29. A person claiming that he has been unlawfully arrested and detained may in addition bring an action seeking damages for false imprisonment. Where the lawfulness of the arrest depends upon reasonable cause for suspicion, it is for the defendant authority to prove the existence of such reasonable cause (*Dallison v. Caffrey* [1965] 1 Queen's Bench Reports 348 and *Van Hout*, loc. cit. at 15). In false imprisonment proceedings, the reasonableness of an arrest may be examined on the basis of the well-established principles of judicial review of the exercise of executive discretion (see *Holgate-Mohammed v. Duke*, loc. cit.).

## III. THE UNITED KINGDOM DEROGATION

30. Issues akin to those arising in the present case were examined by the Court in its *Brogan and Others* judgment of 29 November 1988 (Series A no. 145-B) where it held that there had been a violation of Article 5 para. 3 (art. 5-3) of the Convention in respect of each of the applicants, all of whom had been detained under section 12 of the 1984 Act. The Court held that even the shortest of the four periods of detention concerned, namely four days and six hours, fell outside the constraints as to time permitted by the first part of Article 5 para. 3 (art. 5-3). In addition, the Court held that there had been a violation of Article 5 para. 5 (art. 5-5) in the case of each applicant (Series A no. 145-B, pp. 30-35, paras. 55-62 and 66-67).

Following that judgment, the Secretary of State for the Home Department made a statement in the House of Commons on 22 December 1988 in which he explained the difficulties of judicial control over decisions to arrest and detain suspected terrorists. He stated inter alia as follows:

"We must pay proper regard to the tremendous pressures that are already faced by the judiciary, especially in Northern Ireland, where most cases have to be considered. We are also concerned that information about terrorist intentions, which often forms part of the case for an extension of detention, does not find its way back to the terrorists as a consequence of judicial procedures, which at least in the United Kingdom legal tradition generally require someone accused and his legal advisers to know the information alleged against him.

...

In the meantime, the position cannot be left as it stands. I have already made clear to the House that we shall ensure that the police continue to have the powers they need to counter terrorism, and they continue to need to be able to detain suspects for up to seven days in some cases. To ensure that there can be no doubt about the ability of the police to deal effectively with such cases, the Government are today taking steps to give notice of derogation under Article 15 (art. 15) of the European Convention of Human Rights, and Article 4 of the International Covenant on Civil and Political Rights. There is a public emergency within the meaning of these provisions in respect of terrorism connected with the affairs of Northern Ireland in the United Kingdom ..."

31. On 23 December 1988 the United Kingdom informed the Secretary General of the Council of Europe that the Government had availed itself of the right of derogation conferred by Article 15 para. 1 (art. 15-1) to the extent that the exercise of powers under section 12 of the 1984 Act might be inconsistent with the obligations imposed by Article 5 para. 3 (art. 5-3) of the Convention. Part of that declaration reads as follows:

"... Following [the Brogan and Others judgment], the Secretary of State for the Home Department informed Parliament on 6 December 1988 that, against the background of the terrorist campaign, and the over-riding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced. He informed Parliament that the Government were examining the matter with a view to responding to the judgment. On 22 December 1988, the Secretary of State further informed Parliament that it remained the Government's wish, if it could be achieved, to find a judicial process under which extended detention might be reviewed and where appropriate authorised by a judge or other judicial officer. But a further period of reflection and consultation was necessary before the Government could bring forward a firm and final view. Since the judgment of 29 November 1988 as well as previously, the Government have found it necessary to continue to exercise, in relation to terrorism connected with the affairs of Northern Ireland, the powers described above enabling further detention without charge, for periods of up to 5 days, on the authority of the Secretary of State, to the extent strictly required by the exigencies of the situation to enable necessary enquiries and investigations properly to be completed in order to decide whether criminal proceedings should be instituted. To the extent that the exercise of these powers may be inconsistent with the obligations imposed by the Convention the Government have availed themselves of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice ..."

32. The Government have reviewed whether the powers of extended detention could be conferred on the normal courts but have concluded that it would not be appropriate to involve courts in such decisions for the reasons

given in a Written Answer in Parliament by the Secretary of State, Mr David Waddington, on 14 November 1989:

"Decisions to authorise the detention of terrorist suspects for periods beyond 48 hours may be, and often are, taken on the basis of information, the nature and source of which could not be revealed to a suspect or his legal adviser without serious risk to individuals assisting the police or the prospect of further valuable intelligence being lost. Any new procedure which avoided those dangers by allowing a court to make a decision on information not presented to the detainee or his legal adviser would represent a radical departure from the principles which govern judicial proceedings in this country and could seriously affect public trust and confidence in the independence of the judiciary. The Government would be most reluctant to introduce any new procedure which could have this effect". (Official Report, 14 November 1989, col. 210)

In a further notice dated 12 December 1989 the United Kingdom informed the Secretary General that a satisfactory procedure for the review of detention of terrorist suspects involving the judiciary had not been identified and that the derogation would therefore remain in place for as long as circumstances require.

## PROCEEDINGS BEFORE THE COMMISSION

33. The applicants applied to the Commission on 19 January 1989 (applications nos. 14553/89 and 14554/89). They complained that they were not brought promptly before a judge, in breach of Article 5 para. 3 (art. 5-3). They also alleged that they did not have an enforceable right to compensation in breach of Article 5 para. 5 (art. 5-5) and that there was no effective remedy in respect of their complaints contrary to Article 13 (art. 13).

They subsequently withdrew other complaints that they had made under Articles 3, 5 paras. 1 and 4, 8, 9 and 10 (art. 3, art. 5-1, art. 5-4, art. 8, art. 9, art. 10) of the Convention.

34. On 5 October 1990 the Commission ordered the joinder of the applications and on 28 February 1991 declared the case admissible. In its report of 3 December 1991 (Article 31) (art. 31) the Commission expressed the opinion:

(a) by eight votes to five, that there had been no violation of Article 5 paras. 3 and 5 (art. 5-3, art. 5-5) of the Convention in view of the United Kingdom's derogation of 23 December 1988 under Article 15 (art. 15) of the Convention;

(b) unanimously, that no separate issue arose under Article 13 (art. 13) .

The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment\*.

## FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

35. The Government requested the Court to find that there has been no violation of Article 5 paras. 3 and 5 (art. 5-3, art. 5-5) in view of the United Kingdom's derogation of 23 December 1988 under Article 15 (art. 15) of the Convention and that there has been no violation of Article 13 (art. 13) or alternatively that no separate issue arises under this provision.

## AS TO THE LAW

### I. ALLEGED VIOLATIONS OF ARTICLE 5 (art. 5)

36. The applicants, Mr Brannigan and Mr McBride, were detained under section 12 (1) (b) of the 1984 Act in early January 1989 very shortly after the Government's derogation of 23 December 1988 under Article 15 (art. 15) of the Convention, which itself was made soon after the Court's judgment of 29 November 1988 in the case of Brogan and Others (judgment of 29 November 1988, Series A no. 145-B). Their detention lasted for periods of six days, fourteen hours and thirty minutes, and four days, six hours and twenty-five minutes respectively (see paragraphs 10-11 above). They complained of violations of Article 5 paras. 3 and 5 (art. 5-3, art. 5-5) of the Convention. The relevant parts of Article 5 (art. 5) are as follows:

"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 ...;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...

...

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\* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 258-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article (art. 5) shall have an enforceable right to compensation."

37. The Government, noting that both of the applicants were detained for longer periods than the shortest period found by the Court to be in breach of Article 5 para. 3 (art. 5-3) in the case of Brogan and Others, conceded that the requirement of promptness had not been respected in the present cases (see paragraph 30 above). They further accepted that, in the absence of an enforceable right to compensation in respect of the breach of Article 5 para. 3 (art. 5-3), Article 5 para. 5 (art. 5-5) had not been complied with.

Having regard to its judgment in the case of Brogan and Others, the Court finds that Article 5 paras. 3 and 5 (art. 5-3, art. 5-5) have not been respected (*loc. cit.*, pp. 30-35, paras. 55-62 and 66-67).

38. However, the Government further submitted that the failure to observe these requirements of Article 5 (art. 5) had been met by their derogation of 23 December 1988 under Article 15 (art. 15) of the Convention.

The Court must therefore examine the validity of the Government's derogation in the light of this provision. It recalls at the outset that the question whether any derogation from the United Kingdom's obligations under the Convention might be permissible under Article 15 (art. 15) by reason of the terrorist campaign in Northern Ireland was specifically left open by the Court in the Brogan and Others case (*loc. cit.*, pp. 27-28, para. 48).

Validity of the United Kingdom's derogation under Article 15 (art. 15)

39. The applicants maintained that the derogation under Article 15 (art. 15) was invalid. This was disputed by both the Government and the Commission.

40. Article 15 (art. 15) provides:

"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2 (art. 2), except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 (art. 3, art. 4-1, art. 7) shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

### *1. The Court's approach to the matter*

41. The applicants argued that it would be inconsistent with Article 15 para. 2 (art. 15-2) if, in derogating from safeguards recognised as essential for the protection of non-derogable rights such as Articles 2 and 3 (art. 2, art. 3), the national authorities were to be afforded a wide margin of appreciation. This was especially so where the emergency was of a quasi-permanent nature such as that existing in Northern Ireland. To do so would also be inconsistent with the Brogan and Others judgment where the Court had regarded judicial control as one of the fundamental principles of a democratic society and had already - they claimed - extended to the Government a margin of appreciation by taking into account in paragraph 58 (p. 32) the context of terrorism in Northern Ireland (*loc. cit.*).

42. In their written submissions, Amnesty International maintained that strict scrutiny was required by the Court when examining derogation from fundamental procedural guarantees which were essential for the protection of detainees at all times, but particularly in times of emergency. Liberty, Interights and the Committee on the Administration of Justice ("Liberty and Others") submitted for their part that, if States are to be allowed a margin of appreciation at all, it should be narrower the more permanent the emergency becomes.

43. The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, pp. 78-79, para. 207).

Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision (*ibid.*). At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.

### *2. Existence of a public emergency threatening the life of the nation*

44. Although the applicants did not dispute that there existed a public emergency "threatening the life of the nation", they submitted that the

burden rested on the Government to satisfy the Court that such an emergency really existed.

45. It was, however, suggested by Liberty and Others in their written submissions that at the relevant time there was no longer any evidence of an exceptional situation of crisis. They maintained that reconsideration of the position could only properly have led to a further derogation if there was a demonstrable deterioration in the situation since August 1984 when the Government withdrew their previous derogation. For the Standing Advisory Commission on Human Rights, on the other hand, there was a public emergency in Northern Ireland at the relevant time of a sufficient magnitude to entitle the Government to derogate.

46. Both the Government and the Commission, referring to the existence of public disturbance in Northern Ireland, maintained that there was such an emergency.

47. Recalling its case-law in *Lawless v. Ireland* (judgment of 1 July 1961, Series A no. 3, p. 56, para. 28) and *Ireland v. the United Kingdom* (loc. cit., Series A no. 25, p. 78, para. 205) and making its own assessment, in the light of all the material before it as to the extent and impact of terrorist violence in Northern Ireland and elsewhere in the United Kingdom (see paragraph 12 above), the Court considers there can be no doubt that such a public emergency existed at the relevant time.

It does not judge it necessary to compare the situation which obtained in 1984 with that which prevailed in December 1988 since a decision to withdraw a derogation is, in principle, a matter within the discretion of the State and since it is clear that the Government believed that the legislation in question was in fact compatible with the Convention (see paragraphs 49-51 below).

3. *Were the measures strictly required by the exigencies of the situation?*

**(a) General considerations**

48. The Court recalls that judicial control of interferences by the executive with the individual's right to liberty provided for by Article 5 (art. 5) is implied by one of the fundamental principles of a democratic society, namely the rule of law (see the above-mentioned *Brogan and Others* judgment, Series A no. 145-B, p. 32, para. 58). It further observes that the notice of derogation invoked in the present case was lodged by the respondent Government soon after the judgment in the above-mentioned *Brogan and Others* case where the Court had found the Government to be in breach of their obligations under Article 5 para. 3 (art. 5-3) by not bringing the applicants "promptly" before a court.

The Court must scrutinise the derogation against this background and taking into account that the power of arrest and detention in question has

been in force since 1974. However, it must be observed that the central issue in the present case is not the existence of the power to detain suspected terrorists for up to seven days - indeed a complaint under Article 5 para. 1 (art. 5-1) was withdrawn by the applicants (see paragraph 33 above) - but rather the exercise of this power without judicial intervention.

**(b) Was the derogation a genuine response to an emergency situation?**

49. For the applicants, the purported derogation was not a necessary response to any new or altered state of affairs but was the Government's reaction to the decision in *Brogan and Others* and was lodged merely to circumvent the consequences of this judgment.

50. The Government and the Commission maintained that, while it was true that this judgment triggered off the derogation, the exigencies of the situation have at all times since 1974 required the powers of extended detention conferred by the Prevention of Terrorism legislation. It was the view of successive Governments that these powers were consistent with Article 5 para. 3 (art. 5-3) and that no derogation was necessary. However, both the measures and the derogation were direct responses to the emergency with which the United Kingdom was and continues to be confronted.

51. The Court first observes that the power of arrest and extended detention has been considered necessary by the Government since 1974 in dealing with the threat of terrorism. Following the *Brogan and Others* judgment the Government were then faced with the option of either introducing judicial control of the decision to detain under section 12 of the 1984 Act or lodging a derogation from their Convention obligations in this respect. The adoption of the view by the Government that judicial control compatible with Article 5 para. 3 (art. 5-3) was not feasible because of the special difficulties associated with the investigation and prosecution of terrorist crime rendered derogation inevitable. Accordingly, the power of extended detention without such judicial control and the derogation of 23 December 1988 being clearly linked to the persistence of the emergency situation, there is no indication that the derogation was other than a genuine response.

**(c) Was the derogation premature?**

52. The applicants maintained that derogation was an interim measure which Article 15 (art. 15) did not provide for since it appeared from the notice of derogation communicated to the Secretary General of the Council of Europe on 23 December 1988 that the Government had not reached a "firm or final view" on the need to derogate from Article 5 para. 3 (art. 5-3) and required a further period of reflection and consultation. Following this period the Secretary of State for the Home Department confirmed the derogation in a statement to Parliament on 14 November 1989 (see

paragraph 32 above). Prior to this concluded view Article 15 (art. 15) did not permit derogation. Furthermore, even at this date the Government had not properly examined whether the obligation in Article 5 para. 3 (art. 5-3) could be satisfied by an "officer authorised by law to exercise judicial power".

53. The Government contended that the validity of the derogation was not affected by their examination of the possibility of judicial control of extended detention since, as the Commission had pointed out, it was consistent with the requirements of Article 15 para. 3 (art. 15-3) to keep derogation measures under constant review.

54. The Court does not accept the applicants' argument that the derogation was premature.

While it is true that Article 15 (art. 15) does not envisage an interim suspension of Convention guarantees pending consideration of the necessity to derogate, it is clear from the notice of derogation that "against the background of the terrorist campaign, and the over-riding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced". However it remained the Government's wish "to find a judicial process under which extended detention might be reviewed and where appropriate authorised by a judge or other judicial officer" (see paragraph 31 above).

The validity of the derogation cannot be called into question for the sole reason that the Government had decided to examine whether in the future a way could be found of ensuring greater conformity with Convention obligations. Indeed, such a process of continued reflection is not only in keeping with Article 15 para. 3 (art. 15-3) which requires permanent review of the need for emergency measures but is also implicit in the very notion of proportionality.

**(d) Was the absence of judicial control of extended detention justified?**

55. The applicants further considered that there was no basis for the Government's assertion that control of extended detention by a judge or other officer authorised by law to exercise judicial power was not possible or that a period of seven days' detention was necessary. They did not accept that the material required to satisfy a court of the justification for extended detention could be more sensitive than that needed in proceedings for habeas corpus. They and the Standing Advisory Commission on Human Rights also pointed out that the courts in Northern Ireland were frequently called on to deal with submissions based on confidential information - for example, in bail applications - and that there were sufficient procedural and evidential safeguards to protect confidentiality. Procedures also existed where judges were required to act on the basis of material which would not be disclosed either to the legal adviser or to his client. This was the case, for example, with claims by the executive to public interest immunity or

application by the police to extend detention under the Police and Criminal Evidence (Northern Ireland) Order 1989 (see paragraph 19 above).

56. On this point the Government responded that none of the above procedures involved both the non-disclosure of material to the detainee or his legal adviser and an executive act of the court. The only exception appeared in Schedule 7 to the Prevention of Terrorism (Temporary Provisions) Act 1989 where *inter alia* the court may make an order in relation to the production of, and search for, special material relevant to terrorist investigations. However, paragraph 8 of Schedule 7 provides that, where the disclosure of information to the court would be too sensitive or would prejudice the investigation, the power to make the order is conferred on the Secretary of State and not the court (see paragraph 25 above).

It was also emphasised that the Government had reluctantly concluded that, within the framework of the common-law system, it was not feasible to introduce a system which would be compatible with Article 5 para. 3 (art. 5-3) but would not weaken the effectiveness of the response to the terrorist threat. Decisions to prolong detention were taken on the basis of information the nature and source of which could not be revealed to a suspect or his legal adviser without risk to individuals assisting the police or the prospect of further valuable intelligence being lost. Moreover, involving the judiciary in the process of granting or approving extensions of detention created a real risk of undermining their independence as they would inevitably be seen as part of the investigation and prosecution process.

In addition, the Government did not accept that the comparison with habeas corpus was a valid one since judicial involvement in the grant or approval of extension would require the disclosure of a considerable amount of additional sensitive information which it would not be necessary to produce in habeas corpus proceedings. In particular, a court would have to be provided with details of the nature and extent of police inquiries following the arrest, including details of witnesses interviewed and information obtained from other sources as well as information about the future course of the police investigation.

Finally, Lords Shackleton and Jellicoe and Viscount Colville in their reports had concluded that arrest and extended detention were indispensable powers in combating terrorism. These reports also found that the training of terrorists in remaining silent under police questioning hampered and protracted the investigation of terrorist offences. In consequence, the police were required to undertake extensive checks and inquiries and to rely to a greater degree than usual on painstaking detective work and forensic examination (see paragraph 15 above).

57. The Commission was of the opinion that the Government had not overstepped their margin of appreciation in this regard.

58. The Court notes the opinions expressed in the various reports reviewing the operation of the Prevention of Terrorism legislation that the

difficulties of investigating and prosecuting terrorist crime give rise to the need for an extended period of detention which would not be subject to judicial control (see paragraph 15 above). Moreover, these special difficulties were recognised in its above-mentioned *Brogan and Others* judgment (see Series A no. 145-B, p. 33, para. 61).

It further observes that it remains the view of the respondent Government that it is essential to prevent the disclosure to the detainee and his legal adviser of information on the basis of which decisions on the extension of detention are made and that, in the adversarial system of the common law, the independence of the judiciary would be compromised if judges or other judicial officers were to be involved in the granting or approval of extensions.

The Court also notes that the introduction of a "judge or other officer authorised by law to exercise judicial power" into the process of extension of periods of detention would not of itself necessarily bring about a situation of compliance with Article 5 para. 3 (art. 5-3). That provision - like Article 5 para. 4 (art. 5-4) - must be understood to require the necessity of following a procedure that has a judicial character although that procedure need not necessarily be identical in each of the cases where the intervention of a judge is required (see, among other authorities, the following judgments: as regards Article 5 para. 3 (art. 5-3) *Schiesser v. Switzerland* of 4 December 1979, Series A no. 34, p. 13, para. 30 and *Huber v. Switzerland* of 23 October 1990, Series A no. 188, p. 18, paras. 42-43; as regards Article 5 para. 4 (art. 5-4), *De Wilde, Ooms and Versyp v. Belgium* of 18 June 1971, Series A no. 12, p. 41, para. 78, *Sanchez-Reisse v. Switzerland* of 21 October 1986, Series A no. 107, p. 19, para. 51, and *Lamy v. Belgium* of 30 March 1989, Series A no. 151, pp. 15-16, para. 28).

59. It is not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other (see the above-mentioned *Ireland v. the United Kingdom* judgment, Series A no. 25, p. 82, para. 214, and the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 23, para. 49). In the context of Northern Ireland, where the judiciary is small and vulnerable to terrorist attacks, public confidence in the independence of the judiciary is understandably a matter to which the Government attach great importance.

60. In the light of these considerations it cannot be said that the Government have exceeded their margin of appreciation in deciding, in the prevailing circumstances, against judicial control.

**(e) Safeguards against abuse**

61. The applicants, Amnesty International and Liberty and Others maintained that the safeguards against abuse of the detention power were negligible and that during the period of detention the detainee was completely cut off from the outside world and not permitted access to newspapers, radios or his family. Amnesty International, in particular, stressed that international standards such as the 1988 United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly Resolution 43/173 of 9 December 1988) ruled out incommunicado detention by requiring access to lawyers and members of the family. Amnesty submitted that being brought promptly before a judicial authority was especially important since in Northern Ireland habeas corpus has been shown to be ineffective in practice. In their view Article 5 para. 4 (art. 5-4) should be considered non-derogable in times of public emergency.

In addition, it was contended that a decision to extend detention cannot in practical terms be challenged by habeas corpus or judicial review since it is taken completely in secret and, in nearly all cases, is granted. This is evident from the fact that, despite the thousands of extended detention orders, a challenge to such a decision has never been attempted.

62. Although submissions have been made by the applicants and the organisations concerning the absence of effective safeguards, the Court is satisfied that such safeguards do in fact exist and provide an important measure of protection against arbitrary behaviour and incommunicado detention.

63. In the first place, the remedy of habeas corpus is available to test the lawfulness of the original arrest and detention. There is no dispute that this remedy was open to the applicants had they or their legal advisers chosen to avail themselves of it and that it provides an important measure of protection against arbitrary detention (see the above-mentioned Brogan and Others judgment, Series A no. 145-B, pp. 34-35, paras. 63-65). The Court recalls, in this context, that the applicants withdrew their complaint of a breach of Article 5 para. 4 (art. 5-4) of the Convention (see paragraph 33 above).

64. In the second place, detainees have an absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest. Both of the applicants were, in fact, free to consult a solicitor after this period (see paragraphs 10 and 11 above).

Moreover, within this period the exercise of this right can only be delayed where there exists reasonable grounds for doing so. It is clear from judgments of the High Court in Northern Ireland that the decision to delay access to a solicitor is susceptible to judicial review and that in such proceedings the burden of establishing reasonable grounds for doing so rests on the authorities. In these cases judicial review has been shown to be a

speedy and effective manner of ensuring that access to a solicitor is not arbitrarily withheld (see paragraph 24 above).

It is also not disputed that detainees are entitled to inform a relative or friend about their detention and to have access to a doctor.

65. In addition to the above basic safeguards the operation of the legislation in question has been kept under regular independent review and, until 1989, it was subject to regular renewal.

**(f) Conclusion**

66. Having regard to the nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the existence of basic safeguards against abuse, the Court takes the view that the Government have not exceeded their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.

*4. Other obligations under international law*

67. The Court recalls that under Article 15 para. 1 (art. 15-1) measures taken by the State derogating from Convention obligations must not be "inconsistent with its other obligations under international law" (see paragraph 40 above).

68. In this respect, before the Court the applicants contended for the first time that it was an essential requirement for a valid derogation under Article 4 of the 1966 United Nations International Covenant on Civil and Political Rights ("the Covenant"), to which the United Kingdom is a Party, that a public emergency must have been "officially proclaimed". Since such proclamation had never taken place the derogation was inconsistent with the United Kingdom's other obligations under international law. In their view this requirement involved a formal proclamation and not a mere statement in Parliament.

69. For the Government, it was open to question whether an official proclamation was necessary for the purposes of Article 4 of the Covenant, since the emergency existed prior to the ratification of the Covenant by the United Kingdom and has continued to the present day. In any event, the existence of the emergency and the fact of derogation were publicly and formally announced by the Secretary of State for the Home Department to the House of Commons on 22 December 1988. Moreover there had been no suggestion by the United Nations Human Rights Committee that the derogation did not satisfy the formal requirements of Article 4.

70. The Delegate of the Commission considered the Government's argument to be tenable.

71. The relevant part of Article 4 of the Covenant states:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed ..."

72. The Court observes that it is not its role to seek to define authoritatively the meaning of the terms "officially proclaimed" in Article 4 of the Covenant. Nevertheless it must examine whether there is any plausible basis for the applicant's argument in this respect.

73. In his statement of 22 December 1988 to the House of Commons the Secretary of State for the Home Department explained in detail the reasons underlying the Government's decision to derogate and announced that steps were being taken to give notice of derogation under both Article 15 (art. 15) of the European Convention and Article 4 of the Covenant. He added that there was "a public emergency within the meaning of these provisions in respect of terrorism connected with the affairs of Northern Ireland in the United Kingdom ..." (see paragraph 30 above).

In the Court's view the above statement, which was formal in character and made public the Government's intentions as regards derogation, was well in keeping with the notion of an official proclamation. It therefore considers that there is no basis for the applicants' arguments in this regard.

### *5. Summary*

74. In the light of the above examination, the Court concludes that the derogation lodged by the United Kingdom satisfies the requirements of Article 15 (art. 15) and that therefore the applicants cannot validly complain of a violation of Article 5 para. 3 (art. 5-3). It follows that there was no obligation under Article 5 para. 5 (art. 5-5) to provide the applicants with an enforceable right to compensation.

## II. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

75. In the proceedings before the Commission the applicants complained that they had no effective domestic remedy at their disposal in respect of their Article 5 (art. 5) claims. They requested the Court to uphold this claim but made no submissions in support of it.

Article 13 (art. 13) provides as follows:

"Everyone whose rights and freedoms as set forth in [the] 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."

76. The Court recalls that it was open to the applicants to challenge the lawfulness of their detention by way of proceedings for habeas corpus and that the Court in its *Brogan and Others* judgment of 29 November 1988 found that this remedy satisfied Article 5 para. 4 (art. 5-4) of the Convention (Series A no. 145-B, pp. 34-35, paras. 63-65). Since the requirements of Article 13 (art. 13) are less strict than those of Article 5 para. 4 (art. 5-4),

which must be regarded as the *lex specialis* in respect of complaints under Article 5 (art. 5), there has been no breach of this provision (see the *de Jong, Baljet and van den Brink v. the Netherlands* judgment of 22 May 1984, Series A no. 77, p. 27, para. 60).

## FOR THESE REASONS, THE COURT

1. Holds by twenty-two votes to four that the United Kingdom's derogation satisfies the requirements of Article 15 (art. 15) and that therefore the applicants cannot validly complain of a violation of Article 5 para. 3 (art. 5-3);
2. Holds by twenty-two votes to four that there has been no violation of Article 5 para. 5 (art. 5-5);
3. Holds by twenty-two votes to four that there has been no violation of Article 13 (art. 13).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 May 1993.

Rolv RYSSDAL  
President

Marc-André EISSEN  
Registrar

A statement by Mr Thór Vilhjálmsson and, in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- concurring opinion of Mr Matscher, joined by Mr Morenilla;
- dissenting opinion of Mr Pettiti;
- dissenting opinion of Mr Walsh;
- concurring opinion of Mr Russo;
- dissenting opinion of Mr De Meyer;

- concurring opinion of Mr Martens;
- dissenting opinion of Mr Makarczyk.

R.R.  
M.A.E.

DECLARATION BY JUDGE THÓR VILHJÁLMSSON

In my opinion the second sub-paragraph of paragraph 37 of the judgment should be deleted.

**CONCURRING OPINION OF JUDGE MATSCHER, JOINED  
BY JUDGE MORENILLA**

*(Translation)*

In the final analysis I subscribe to the conclusion reached by the majority of the Court, namely that the applicants cannot validly complain of a violation of Article 5 para. 3 (art. 5-3) and that there had been no violation of Articles 5 para. 5 and 13 (art. 5-5, art. 13) of the Convention.

Nevertheless - and particularly from the point of view of method - I should like to stress the following:

Correctly - and for reasons with which I entirely agree - the Court found that the derogation - in substance from the first sentence of Article 5 para. 3 (art. 5-3) - notified by the United Kingdom by virtue of Article 15 (art. 15) satisfied the requirements of that provision. Accordingly, during the period of validity of that derogation, Article 5 para. 3 (art. 5-3) is quite simply inapplicable in the United Kingdom. It follows that any discussion of whether it has been complied with is redundant (see paragraph 37 of the judgment). I would add that the inapplicability of Article 5 para. 3 (art. 5-3) necessarily entails that of Article 5 para. 5 (art. 5-5), as well as that of Article 13 (art. 13) in respect of the first-mentioned provision.

In my view, a derogation pursuant to Article 15 (art. 15) may be classified as a temporary "reservation" (within the meaning of Article 64 (art. 64) as regards its "substantive" effects. The difference between the two devices - reservation and derogation - lies in the fact that, in respect of the former, the Court's power of review is confined to the formal aspects of the validity - within the meaning of Article 64 (art. 64) - of the declaration relating thereto (see the *Belilos v. Switzerland* judgment of 29 April 1988, Series A no. 132, pp. 24 et seq., paras. 50 et seq.), whereas for the latter the Court must also satisfy itself that the substantive conditions for its validity have been met (not only when the derogation is notified, but also subsequently whenever the Government relies on such a derogation). However, as I have just said, the "substantive" effects of a reservation and a declaration of derogation, provided that they are validly made, are exactly the same, in other words quite simply the inapplicability of a specific provision of the Convention.

A different line of reasoning applies with regard to the applicability of Article 14 (art. 14) in conjunction with a provision of the Convention which is the subject of a derogation or a reservation; whereas Article 14 (art. 14) cannot be invoked in relation to a provision which is the subject of a reservation, it remains applicable in respect of a substantive provision of the Convention, notwithstanding the fact that the latter is subject to a derogation. It is, however, unnecessary to go into this question more thoroughly. It is moreover an aspect which I discussed at the Fifth

International Colloquy on the Convention (Frankfurt-on-Main 1980, p. 136 of the relevant publication); reference may also be made to my separate opinion on the subject in the Ireland v. United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 140 et seq.

## DISSENTING OPINION OF JUDGE PETTITI

*(Translation)*

I parted company with the majority which voted for the non-violation of Article 5 paras. 3 and 5 and Article 13 (art. 5-3, art. 5-5, art. 13) in so far as it took the view that the derogation invoked by the Government of the United Kingdom fulfilled the requirements of Article 15 (art. 15) of the Convention. I consider that those requirements were not satisfied and that there was, on the merits, a violation of Articles 5 and 13 (art. 5, art. 13).

The European Court has jurisdiction to carry out a review of the derogations from the guarantees recognised as essential for the protection of the rights set out in the Convention, certain of which are not even susceptible to derogation (Articles 2, 3 and 7) (art. 2, art. 3, art. 7). It was therefore competent to examine whether the derogation from the guarantees of Article 5 (art. 5), following a judgment of the European Court finding on similar facts a violation of that Article (art. 5) (Case of Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A no. 145-B) was indeed in conformity with Article 15 (art. 15) (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25).

Even if it is accepted that States have a margin of appreciation in determining whether they are threatened by a "public emergency" within the meaning of the *Lawless v. Ireland* judgment (judgment of 1 July 1961, Series A no. 3) and, if they are, in deciding whether to resort to the solution of a derogation, the situation relied on must be examined by the European Court.

The fact of terrorism and its gravity in Northern Ireland is incontestable. It led to the acceptance of an extension of police custody by the 1974 Act and by the 1976 and 1984 Acts.

Following the Brogan and Others judgment of 29 November 1988, the United Kingdom availed itself on 23 December 1988 of its right of derogation under the Convention.

It does not appear from the evidence that the terrorist phenomenon became more serious in Northern Ireland between the period of the arrest of Mr Brogan and the other three applicants and 29 November 1988 and 23 December 1988, which led Mr Brannigan and Mr McBride to maintain that the request for a derogation was a means of circumventing the consequences of the Brogan and Others judgment.

In any event, the derogation cannot constitute a *carte blanche* accorded to the State for an unlimited duration, without its having to adopt the measures necessary to satisfy its obligations under the Convention.

The Government contended that it was only when the European Court ruled in the Brogan and Others case that it became apparent that the powers

conferred on the police by the 1974 Act were incompatible with Article 5 para. 3 (art. 5-3) (excessive duration of police custody).

The Government accepted the Commission's reasoning according to which the derogation remains:

"... consistent with the nature and spirit of Article 15 (art. 15), and in particular paragraph 3 (art. 15-3). Implicit in Article 15 (art. 15) is the requirement that derogation measures should be kept under constant review and, if necessary, modified if they are to meet the strict exigencies of an emergency situation which can recede or otherwise develop. As the Court held in the case of Ireland v. the United Kingdom, the interpretation of Article 15 (art. 15) must leave a place for progressive adaptations (Series A no. 25, p. 83, para. 220)". (Commission's report, paragraph 56)

However, the need for the above-mentioned powers - for the derogation - remains constantly open to scrutiny.

The State was under a duty to implement mechanisms complying with the Brogan and Others judgment and making it possible to conform thereto without resorting to derogation.

The Commission in the Ireland v. the United Kingdom case added, correctly,

"There must be a link between the facts of the emergency on the one hand and the measures chosen to deal with it on the other. Moreover, the obligations under the Convention do not entirely disappear. They can only be suspended or modified 'to the extent that is strictly required' as provided in Article 15 (art. 15). (This limitation, in the circumstances, may require safeguards against the possible abuse, or excessive use, of emergency measures.) In the present case, it must be shown that the emergency affected the normal functioning of the community and the administration of law" (Series B no. 23-I, p. 119).

The Government argued on the one hand that the introduction of a judicial element into the procedure for authorising the extension of detention could not render it compatible with Article 5 para. 3 (art. 5-3); on the other hand, that such a reform, even if the State had accepted its principle, would have required a long period of reflection and the elaboration of new legislation.

On the first point, the Government stated that it had ordered

"a full re-examination of the question whether it would be feasible to introduce a judicial element into the procedure for authorising extensions, which would be compatible with the provisions of Article 5 para. 3 (art. 5-3) but which would not weaken the effectiveness of the response to the serious terrorist threat. For the reasons given in the Written Answer of the Home Secretary of 14 November 1989 (see paragraph 2.58 of the Government's observations) the Government reluctantly concluded that no satisfactory alternative procedures could be identified. In particular the view was taken that to involve the judiciary in the process of granting or approving extensions of detention in terrorist cases would create a very real risk of undermining their independence. In the continuing fight against organised terrorism, the judiciary perform a central and vital role. It is on the judiciary that the responsibility rests for upholding the rule of law and for ensuring that those charged with acts of terrorism receive a fair trial. The judiciary - and particularly the judiciary in Northern Ireland - have for very many years been required to perform this role in acutely difficult

circumstances. The Northern Ireland judiciary is small in size (there are at present ten High Court judges, thirteen County Court judges and seventeen Resident Magistrates in the whole Province) and on them falls the heavy burden of trying suspected terrorists and doing so without the benefit of a jury. In addition to terrorist attacks (including murders) made on members of the judiciary and on court buildings since 1973, there have been concerted attacks made on the authority of the judiciary by terrorist organisations dedicated to the destruction of the rule of law.

If the judiciary is to continue to play its central role under the common law system in upholding the rule of law, it is crucial that it should not only be rigorously independent of the Executive, including the police, and the prosecuting authority, but that it should be seen to be independent. If the judiciary were to be involved in the process of granting or approving extended detentions on terrorist cases, it could not avoid being perceived as part of the investigation and prosecution process. This perception would only be enhanced if, as would almost invariably be the case, the judicial officer was required to act on the basis of material which could not be disclosed to the person detained or his legal advisers. As the Home Secretary's Written Answer made clear, it is the Government's judgment that this is a risk, which in the circumstances of the present terrorist threat simply cannot be taken.

It is recognised that some might disagree with this judgment and would consider that the risk of damaging public trust in the judicial system was a risk worth running. While this is doubtless a legitimate point of view" (paragraph 2.34 of the Government's memorial),

It is somewhat surprising considering the British tradition which legitimately places the judge at the summit of the system of guarantees in all the spheres of freedoms.

It is difficult to believe that the independence of a judge would be undermined because he took part in proceedings making it possible to grant or approve an extension of detention.

This system operates in England and in Wales, despite the fact that terrorist acts are perpetrated there. The argument that the appeal to a judge would mean that "the application would have to be made *ex parte*: the judge would be determining the issue in the absence of the detained person or his representatives on the basis of material which could not be disclosed to either" is not persuasive.

The member States of the Council of Europe which went through serious periods of terrorism (for example Italy) confronted such terrorism while retaining judicial involvement in extended police custody. It would be possible to find in comparative law and in criminal procedure examples of judicial mechanisms protecting the use by the police of "informers" who have to remain anonymous. In camera hearings can be envisaged. The British system too has recourse to the principle of immunity which makes it possible for the public prosecutor not to disclose certain prosecution evidence. It is thus possible to avoid the disadvantages of the ordinary procedural rules applicable at this stage (see the *Edwards v. the United Kingdom* judgment of 16 December 1992, Series A no. 247-B). Is there not,

on the part of the police, a desire to conceal from the courts some of their practices?

The two dissenting members of the Commission, Mr Frowein and Mr Loucaides, who was joined by Mrs Thune and Mr Rozakis, noted that the Government had neither provided any evidence nor put forward any convincing arguments as to the reasons for which they had not chosen to proceed otherwise than by using the derogation, namely by the introduction of judicial review of the extension of detention from four to seven days.

The means of protecting information concerning State security exist even in proceedings subject to judicial review, if necessary by a mechanism imposing a temporary restriction on communication. It is difficult to see the difference of approach which would in these circumstances render powerless or less independent the judge responsible for reviewing extension, or responsible for reviewing the Minister's decision, in relation to a judge called upon to rule on a habeas corpus application.

If, on the other hand, other means might be adopted, as has been suggested by some legal writers, they could surely have been adopted between 29 November 1988 and 23 December 1988; this would mean that even if the Court were to take as its basis for the decision the date on which the derogation came into force or the date on which Mr Brannigan's application was lodged, i.e. 19 January 1989 rather than the date of the judgment in 1993, it could have found a violation, because such a reform could have been adopted, in view of the urgency, within a relatively short period.

The *quid pro quo* for a derogation based on a public emergency threatening a State must be the implementation by the State of means enabling it to overcome the obstacles, in particular when a decision of the European Court has found a violation of Article 5 (art. 5), and therefore to re-examine in an appropriately short time the reality of the emergency and the persistence of the threat.

The argument based on recourse to habeas corpus does not appear convincing. The experience of the years 1974 to 1993 establishes that habeas corpus in respect of the extension of detention is not an effective remedy for the purposes of the Court's case-law. Even if Article 13 (art. 13) does not require the incorporation of the Convention into domestic law, it does require an effective remedy to ensure that that instrument is complied with.

From that point of view the conditions of the incommunicado detention were contrary to Article 5 (art. 5).

At paragraph 20 of its comments of 21 August 1992 Amnesty observed as follows:

"Experience has shown that incommunicado detention of any period can put detainees at risk. This is not only Amnesty International's experience as noted above, but also that of the United Nations. The Special Rapporteur on torture of the United

Nations Commission on Human Rights, Mr Peter Kooijmans, Professor of International Law at the University of Leiden, has drawn attention to the connection between incommunicado detention and torture in every annual report he has submitted to the Commission. Since 1988 he has routinely called on States to declare such detention illegal. Amnesty International would be deeply concerned if States were to be allowed to impose periods of incommunicado detention, or deny access to judicial redress and/or medical attention, especially during states of emergency. In the context of its ruling in this case, Amnesty International urges the Court to declare that certain minimum guarantees are inherent in the non-derogable rights and as such can never be the subject of derogation. It also urges that any restriction to judicial redress should be carefully scrutinised. A wide margin of appreciation is inappropriate in such cases."

In my view, the standards and rules of international law prohibit extended "incommunicado detention" (Principle 37 of the Body of Principles cited by Amnesty); this is particularly the case where "the person detained is not brought before a judicial or other authority provided by law promptly after his arrest".

In the Brannigan and McBride case, in my opinion, the Government's action fell outside the margin of appreciation which the Court is able to recognise. The fundamental principle which must prevail and which is consistent with British and European tradition is that detention cannot be extended from four days to seven days without the involvement of a judge, who is the guarantor of individual freedoms and fundamental rights.

## DISSENTING OPINION OF JUDGE WALSH

1. Under the terms of the derogation the Government of the United Kingdom claims to be no longer answerable to the Convention organs for failure to comply with Article 5 para. 3 (art. 5-3) of the Convention in respect of the arrest of persons anywhere in the United Kingdom under the provisions of the Prevention of Terrorism Act 1984 in relation to the affairs of Northern Ireland.

2. The terms of Article 15 para. 1 (art. 15-1) of the Convention have been invoked as a justification for this step, namely that there is a "time of war or other public emergency threatening the life of the nation". In the present case "the nation" is presumed to be the entire United Kingdom. While there is ample evidence of political violence in Northern Ireland which could be described as threatening the life of that region of the United Kingdom there is no evidence that the life of the rest of the United Kingdom, viz. the island of Great Britain, is threatened by "the war or public emergency in Northern Ireland", which is separated by sea from Great Britain and of which it does not form a part.

3. Furthermore there is no evidence that the operation of the courts in either Northern Ireland or Great Britain has been restricted or affected by "the war or public emergency" in Northern Ireland. It is the United Kingdom Government which wishes to restrict the operation of the courts by being unwilling to allow arrested persons to be brought before a judge as prescribed by Article 5 para. 3 (art. 5-3) of the Convention. The exigency of the situation relied on is the unwillingness of the Government to allow a judge to become aware of the grounds of the police's "reasonable suspicion" that the arrested person has "committed an offence ..." (see Article 5 para. 1 (c)) (art. 5-1-c), but who has not been charged with any offence and who has been arrested because the arresting officer "... has reasonable grounds" for suspecting that the person has been "concerned ..." in acts of "terrorism" that is to say "the use of violence for political ends" or "any use of violence for the purpose of putting the public or any section of the public in fear" provided the matters suspected are concerned with the affairs of Northern Ireland, or any other such acts of "terrorism", except acts concerned solely with the affairs of any part of the United Kingdom other than Northern Ireland. The legislation in force does not create any offence of "terrorism" and no such offence is known to the law in any part of the United Kingdom. Judicial interpretation of section 12 (1)(b) of the Act of 1984 has been to the effect that no specific crime need be suspected to ground a lawful arrest under that section.

4. Until some specific crime or crimes can reasonably be suspected it is clear that no charge can be brought. Therefore, Article 5 para. 2 (art. 5-2) of the Convention cannot be observed so far as a charge is concerned. But there still remains the obligation under Article 5 para. 2 (art. 5-2) to inform

every arrested person of the reasons for his arrest. That has not been a subject of the derogation. It remains to be seen whether the Convention requirement can be satisfied in a case where no specific crime is suspected.

5. A reason put forward by the Government for being unwilling to bring an arrested person before a judge "promptly" after arrest (or not at all until it is decided to charge him) is the possible embarrassment to the judges in knowing what was in the mind of the arresting officer. The reality is the question of the concealment of secret sources of information. The concealment of sources and the names of informants, is a matter that arises in many areas in the prosecution of offences. Rarely, if ever, does a court in the United Kingdom press for such sources and a police claim of privilege against disclosure is invariably upheld. It is quite wrong to suggest that the adversary procedure of the common law requires such disclosure, particularly on first appearance in court.

6. One of the suggested remedies for arrested persons in the present case is the ancient writ of habeas corpus. This remedy can only be obtained if there is a proven breach of the national law. A breach of the Convention cannot ground such relief unless it is also a breach of the national law. It is unfortunate that the Court has been allowed to believe otherwise, as is evidenced by the portion of the judgment relating to Article 13 (art. 13). Yet in the present case the Government suggests that in habeas corpus proceedings the genuineness of the "reasonable belief" may be tested (though I doubt if the secret sources would be required to be disclosed in any court) although that remedy, which fits into Article 5 para. 4 (art. 5-4) of the Convention, has not been sought to be excluded by the terms of the derogation. A habeas corpus writ can, in theory, be sought within an hour or so after an arrest; in other words well within the period encompassed in the expression "promptly" in Article 5 para. 3 (art. 5-3). That procedure, if it is possible to avail of it, could thus impart the disadvantage to the police secrecy which the respondent Government claims it is entitled to avoid; yet the Government has not sought to explain this inconsistency.

7. It appears to me to be an inescapable inference that the Government does not wish any such arrested person to be brought before a judge at any time unless and until they are in a position to and desire to prefer a charge. The real target might appear to be Article 5 para. 1 (c) (art. 5-1-c). The admitted purpose of the arrest is to interrogate the arrested person in the hope or expectation that he will incriminate himself. Article 5 (art. 5) makes it quite clear that no arrest can be justified under the Convention if the sole justification for it is the desire to interrogate the arrested person. If an arresting officer has a "reasonable belief" that is coupled to the knowledge or intention that the grounds will never be revealed to a judge, and that the arrested person must be released if no revealable evidence is forthcoming, such arrest ought not to be regarded as an arrest in good faith for the purposes of Article 5 para. 1 (c) (art. 5-1-c) of the Convention.

8. The grounds relied upon by the Government to qualify as "exigencies of the situation" are really procedural devices which could equally be put forward in cases of suspected thefts, robberies, or drug dealings where the police are in possession of information from secret informants whose existence they don't wish to disclose or indicate. For example, the former Attorney General of England and Northern Ireland, Sir Michael Havers, (later Lord Chancellor) informed the Court in the Malone case (Series B no. 67, p. 230) that where the only evidence to connect a person with a crime was a police telephone "tap" he would be allowed to go free rather than disclose the existence of the telephone interception by the police.

9. Article 5 para. 3 (art. 5-3) of the Convention is an essential safeguard against arbitrary executive arrest or detention, failure to observe which could easily give rise to complaints under Article 3 (art. 3) of the Convention which cannot be the subject of derogation. Prolonged and sustained interrogation over periods of days, particularly without a judicial intervention, could well fall into the category of inhuman or degrading treatment in particular cases. In the present case, the applicant Brannigan, during hundred and fifty-eight hours of detention, was interrogated forty-three times which means he was interrogated on average every two and a half hours over that period, assuming he was allowed the regulation period of eight hours free from interrogation every twenty-four hours. The applicant McBride on the same basis was interrogated on average every three hours over his period of detention of ninety-six hours. The object of these interrogations was to gain "sufficient admissions" to sustain a charge, or charges.

10. The Government's plea that it is motivated by a wish to preserve public confidence in the independence of the judiciary is, in effect, to say that such confidence is to be maintained or achieved by not permitting them to have a role in the protection of the personal liberty of the arrested persons. One would think that such a role was one which the public would expect the judges to have. It is also to be noted that neither Parliament nor the Government appears to have made any serious effort to rearrange the judicial procedure or jurisdiction, in spite of being advised to do so by the persons appointed to review the system, to cater for the requirement of Article 5 para. 3 (art. 5-3) in cases of the type now under review. It is the function of national authorities so to arrange their affairs as not to clash with the requirements of the Convention. The Convention is not to be remoulded to assume the shape of national procedures.

11. In my opinion the Government has not convincingly shown, in a situation where the courts operate normally, why an arrested person cannot be treated in accordance with Article 5 para. 3 (art. 5-3). The fact that out of 1,549 persons arrested in 1990 only 30 were subsequently charged, indicates a paucity of proof rather than any deficiency in the operation of the judicial function. It is commonplace in the courts of the United

Kingdom that persons facing criminal charges are brought before a judge who is almost invariably asked by the prosecution, in non-summary cases, for an adjournment or a remand to permit of further inquiries by the police. In Northern Ireland, in proceedings under the Prevention of Terrorism Acts, court remands in custody have been known to last for up to two years. In such cases no evidence of any secret sources of information or evidence has ever been revealed. A judge remanding such cases is performing a judicial function and is not performing an executive act. In those cases a specific charge or charges were laid. What is sought in the present case is to remove from scrutiny by the Convention organs cases where no charge is preferred. It should not be beyond the ability of Parliament to legislate for a situation where the arrested person could be brought before a judge with liberty to grant an adjournment for up to a period of five or seven days before the expiration of which the arrested person must be released or charged where the arresting officer is prepared to swear that he has reasonable grounds for suspecting that the arrested person has been involved in or engaged in "acts of terrorism" within the meaning of the relevant legislation. He would not be required, in such event, to reveal the sources of his belief. It is quite erroneous to believe that the adversary system creates an obligation to reveal them.

12. The Court, in paragraphs 62 to 67 inclusive of its judgment, overlooks the information before it to the effect that the so-called safeguards are, in practice, illusory as their availability within the first forty-eight hours of detention is solely dependent upon police willingness. In the result the arrested person is secretly detained for that period and is held incommunicado and without legal assistance, or if he receives it, he may expect to have it overheard by the police, a clear breach of the spirit of the Court's decision in *S. v. Switzerland* (judgment of 28 November 1991, Series A no. 220). Even the great historic remedy of habeas corpus, theoretically available almost instantly, can be put out of the reach of the arrested person by reason of non-access to the world outside the detention centre.

13. In my opinion there has been a breach of Article 5 para. 3 (art. 5-3) of the Convention in respect of the detention of each of the applicants.

14. Article 13 (art. 13) of the Convention requires that an effective remedy shall be available before a national authority for everyone whose rights and freedoms as set forth in the Convention are violated. The application of Article 13 (art. 13) does not depend upon a violation being proved. No such authority is or was available in the United Kingdom and the Convention has not been incorporated in the national law. It is not correct to suggest that the remedy of habeas corpus satisfies the requirements of Article 13 (art. 13). That remedy depends upon showing a breach of the national laws. It is not available for a claim that the detention is illegal by reason only of a breach of the Convention.

15. In my opinion there has also been a breach of Article 13 (art. 13).

## CONCURRING OPINION OF JUDGE RUSSO

*(Translation)*

I share the view of the majority of my colleagues that the derogation notified by the United Kingdom satisfies the requirements of Article 15 (art. 15) and that the applicants cannot therefore validly complain of a violation of Article 5 para. 3 (art. 5-3).

As is noted at paragraph 51 of the judgment the derogation of 23 December 1988 is clearly linked to the persistence of the emergency situation. This, in my opinion, means that its validity must be strictly limited to the time necessary for the Government to find a means of ensuring greater conformity with Convention obligations (see paragraph 54, third sub-paragraph, of the judgment).

The finding of a non-violation thus refers to the case in issue and to the situation which existed when the applicants were arrested. If the derogation were to be extended and to become almost permanent, I would consider it to be incompatible with the guarantees which the Convention affords in respect of liberty of the person and which are of fundamental importance in a democratic society. It is therefore "in principle" only that "the decision to withdraw a derogation is ... a matter within the discretion of the State (see paragraph 47, second sub-paragraph, of the judgment); they do not enjoy complete freedom in this area.

## DISSENTING OPINION OF JUDGE DE MEYER

Certainly the situation in relation to terrorism connected with the affairs of Northern Ireland has for a long time been very serious and it still remains so at the present time. One can thus understand that for this reason the Government of the United Kingdom have, since 1957, repeatedly felt it appropriate to avail themselves of their right of derogation under Article 15 (art. 15) of the Convention.

In 1984 they had come to the conclusion that this was no longer necessary.

We have been told that one of their reasons for doing so was their belief that detaining for up to seven days a person suspected of terrorism without bringing that person before a judge or other judicial officer was not inconsistent with their obligations under the Convention\*.

In our *Brogan and Others v. the United Kingdom* judgment of 29 November 1988 we held that this assumption was wrong, and we strongly emphasised the importance of the fundamental human right to liberty and the need for judicial control of interferences therewith\*\*.

The Government of the United Kingdom have tried to escape the consequences of that judgment by lodging once again a notice of derogation under Article 15 (art. 15) in order to continue the practice concerned\*\*\*.

In my view, this is not permissible: they failed to convince me that such a far-reaching departure from the rule of respect for individual liberty could, either after or before the end of 1988, be "strictly required by the exigencies of the situation".

Even in circumstances as difficult as those which have existed in respect of Northern Ireland for many years it is not acceptable that a person suspected of terrorism can be detained for up to seven days without any form of judicial control.

This was, in fact, what we had already decided in the *Brogan and Others* case\*\*\*\* and there was no valid reason for deciding otherwise in the present one.

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\* Paragraph 50 of the present judgment.

\*\* Series A no. 145, p. 32, para. 58.

\*\*\* Paragraphs 30 and 31 of the present judgment.

\*\*\*\* At p. 33, para. 61.

## CONCURRING OPINION OF JUDGE MARTENS

1. The position I have taken in the case of *Brogan and Others* (Series A no. 145-B) - a position which I still maintain - explains why I have voted for finding that the derogation lodged by the United Kingdom satisfies the requirements of Article 15 (art. 15) of the Convention: in this respect I would compare what I have said in paragraph 12 of my dissenting opinion in the case of *Brogan and Others* with paragraphs 60-67 of the present judgment.

I would add, however, that I have voted in this way only after considerable hesitations. I was impressed by Amnesty International's argument that under a derogation regular judicial review of extended detention is an essential guarantee to protect the detainee from unacceptable treatment - a risk which is all the greater where there is the possibility of incommunicado detention - even if the procedure to be followed does not meet fully the requirements implied in Article 5 para. 3 (art. 5-3). I trust that the United Kingdom Government, in the course of the process of continued reflection referred to in paragraph 54 of the Court's judgment, will once more consider the advice submitted by their own Standing Advisory Commission on Human Rights stressing the possibility of introducing some form of judicial review of extended detention.

2. I disagree with the Court's decision in paragraph 43 of the present judgment according to which a wide margin of appreciation should be left to the national authorities of the derogating State with respect both to the question whether there is a "time of war or other public emergency threatening the life of the nation" and whether the derogation is "to the extent strictly required by the exigencies of the situation".

3. For my part, I found Amnesty International's arguments against so deciding persuasive, especially where Amnesty emphasised developments in international standards and practice in answer to world-wide human rights abuses under cover of derogation and underlined the importance of the present ruling in other parts of the world. Consequently, I regret that the Court's only refutation of those arguments is its reference to a precedent which is fifteen years old.

Since 1978 "present day conditions" have considerably changed. Apart from the developments to which the arguments of Amnesty refer, the situation within the Council of Europe has changed dramatically. It is therefore by no means self-evident that standards which may have been acceptable in 1978 are still so. The 1978 view of the Court as to the margin of appreciation under Article 15 (art. 15) was, presumably, influenced by the view that the majority of the then member States of the Council of Europe might be assumed to be societies which (as I put it in my aforementioned dissenting opinion) had been democracies for a long time and, as such, were fully aware both of the importance of the individual right

to liberty and of the inherent danger of giving too wide a power of detention to the executive. Since the accession of eastern and central European States that assumption has lost its pertinence.

4. However that may be, the old formula was also criticised as unsatisfactory per se both by Amnesty International and Liberty, Interights and the Committee on the Administration of Justice, the latter referring to the 1990 Queensland Guidelines of the ILA (International Law Association). I agree with these criticisms. The Court's formula is already unfortunate in that it uses the same yardstick with regards to two questions which are of a different nature and should be answered separately.

The first question is whether there is an objective ground for derogating which meets the requirements laid down in the opening words of Article 15 (art. 15). Inevitably, in this context, a certain margin of appreciation should be left to the national authorities. There is, however, no justification for leaving them a wide margin of appreciation because the Court, being the "last-resort" protector of the fundamental rights and freedoms guaranteed under the Convention, is called upon to strictly scrutinise every derogation by a High Contracting Party from its obligations.

The second question is whether the derogation is to "the extent strictly required by the exigencies of the situation". The wording underlined clearly calls for a closer scrutiny than the words "necessary in a democratic society" which appear in the second paragraph of Articles 8-11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2). Consequently, with respect to this second question there is, if at all, certainly no room for a wide margin of appreciation.

## DISSENTING OPINION OF JUDGE MAKARCZYK

I regret that I am unable to share the position of the majority of the Court in the present case. This is for three main reasons: the general consequences of the judgment; the question of a time-limit for the derogation and the reasons for the derogation as put forward by the respondent Government.

1. The principle that a judgment of the Court deals with a specific case and solves a particular problem does not, in my opinion, apply to cases concerning the validity of a derogation made by a State under Article 15 (art. 15) of the Convention. A derogation made by any State affects not only the position of that State, but also the integrity of the Convention system of protection as a whole. It is relevant for other member States - old and new - and even for States aspiring to become Parties which are in the process of adapting their legal systems to the standards of the Convention. For the new Contracting Parties, the fact of being admitted, often after long periods of preparation and negotiation, means not only the acceptance of Convention obligations, but also recognition by the community of European States of their equal standing as regards the democratic system and the rule of law. In other words, what is considered by the old democracies as a natural state of affairs, is seen as a privilege by the newcomers which is not to be disposed of lightly. A derogation made by a new Contracting Party from Eastern and Central Europe would call into question this new legitimacy and is, in my opinion, quite improbable. Any decision of the Court concerning Article 15 (art. 15) should encourage and confirm this philosophy. In any event it should not reinforce the views of those in the new member States for whom European standards clash with interests which they have inherited from the past. I am not convinced that the reasoning adopted by the majority fulfils these requirements. This is especially so as the derogation concerns a provision of the Convention which, for some, should not be the subject of any derogation at all.

2. I fully recognise the difficulties, and even the impossibility, for the Court in setting a precise time-limit for the derogation as a precondition of its validity under Article 15 (art. 15). However, I believe that the judgment should very clearly and unequivocally indicate that the Court accepts the derogation only as a strictly temporary measure. After all, it recognises the non-observance of Article 5 para. 3 (art. 5-3) of the Convention (paragraph 37 of the judgment), a basic provision of which the applicants cannot avail themselves of because of the derogation. The Court also considers the time factor as essential when speaking of its supervisory role in respect of the margin of appreciation (paragraph 43 of the judgment). It is true that the Court emphasises the obligation of the derogating State to review the situation on a regular basis (paragraph 54 of the judgment). But this obligation clearly results from the third paragraph of Article 15 (art. 15-3) and the emphasis does not contribute to reassure the international

community that the Court is doing all that is legally possible for the full applicability of the Convention to be restored as soon as practicable. On the contrary, the present wording of the judgment tends rather to perpetuate the status quo and opens, for the derogating State, an unlimited possibility of applying extended administrative detention for an uncertain period of time, to the detriment of the integrity of the Convention system and, I firmly believe, of the derogating State itself.

3. This leads me to the third reason for my dissent which I consider to be of vital importance.

The main point that, in my opinion, the United Kingdom Government should attempt to prove before the Court is that extended administrative detention does in fact contribute to eliminate the reasons for which the extraordinary measures needed to be introduced - in other words the prevention and combating of terrorism. But, as far as I can see, no such attempt has been made either in the Government's memorial and the attached documents, or in the pleading before the Court. Instead, the Government's main arguments have centred on the alleged detrimental effects on the judiciary of control by a judge of extended detention without the normal judicial procedure.

I will not enlarge on this last argument, which has been skilfully called into question by dissenters both in the Commission and in the Court. I can only add that any form of judicial control could be beneficial for all concerned. If the Government had been able to provide valid arguments that extended detention without any form of judicial control does in fact contribute both to the punishment and prevention of the crime of terrorism, I would be ready to accept the legality of the derogation, notwithstanding the first two reasons of my dissent.