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

COURT (PLENARY)

CASE OF BROGAN AND OTHERS v. THE UNITED KINGDOM

(Application no. 11209/84; 11234/84; 11266/84; 11386/85)

JUDGMENT

STRASBOURG

29 November 1988

In the case of Brogan and Others·,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr J. A. CARRILLO SALCEDO,
Mr N. VALTICOS,
Mr S. K. MARTENS,
Mrs E. PALM,

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

Having deliberated in private on 27 May and 28 October 1988,

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

PROCEDURE

1. The case was brought before the Court on 15 July 1987 by the European Commission of Human Rights ("the Commission") and on 3 August 1987 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") within the period of three months laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the

· Note by the registry: The case is numbered 10/1987/133/184-187. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in four applications (nos. 11209/84, 11234/84, 11266/84 and 11386/85) against the United Kingdom lodged with the Commission under Article 25 (art. 25) on 18 October 1984, 22 October 1984, 22 November 1984 and 8 February 1985 respectively by Mr Terence Brogan, Mr Dermot Coyle, Mr William McFadden and Mr Michael Tracey, who are British citizens.

2. 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 and of the Government's application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 (art. 5) and, as far as the request was concerned, Article 13 (art. 13) of the Convention.

3. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, each applicant stated that he wished to participate in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

4. The Chamber to be constituted included, as ex officio members, Sir Vincent Evans, 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 August 1987, the Vice-President of the Court, acting by delegation of the President of the Court, drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr B. Walsh, Mr A. Spielmann, Mr A. Donner, Mr J. De Meyer and Mr J.A. Carrillo Salcedo (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr J. Pinheiro Farinha, substitute judge, replaced Mr Donner, who was prevented from taking part in the Chamber's consideration of the case (Rules 22 para. 1 and 24 para. 1).

5. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5). He ascertained, through the Registrar, the views of the Agent of the Government, the Delegate of the Commission and the lawyer for the applicants regarding the need for a written procedure (Rule 37 para. 1). Thereafter, in accordance with the Orders and directions of the President of the Chamber, the memorial of the Government was lodged at the registry on 14 December 1987 and the memorial of the applicants on 18 January 1988.

The Secretary to the Commission informed the Registrar on 14 March 1988 that the Delegate would submit his observations at the hearing.

Further documents were lodged at the registry on 24 February and 18 March 1988 by the Agent of the Government and the applicants' representatives respectively.

6. By letter received on 23 November 1987, the Standing Advisory Commission on Human Rights, Belfast, sought leave to submit written comments (Rule 37 para. 2). On 2 December 1987, the President granted

leave subject to certain conditions. The comments were filed at the registry on 19 January 1988.

7. After consulting, through the Registrar, those who would be appearing before the Court, the President directed on 15 March 1988 that the oral proceedings should open on 25 May 1988 (Rule 38).

8. On 23 March 1988, the Chamber relinquished jurisdiction in favour of the plenary Court (Rule 50).

9. The hearing took place in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately prior to its opening, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government
  Mr M. WOOD, Legal Counsellor,
  Foreign and Commonwealth Office, *Agent*,
  Sir Nicholas LYELL, Q.C., Solicitor-General,
  Mr A. CAMPBELL, Q.C.,
  Mr N. BRATZA, Q.C., *Counsel*;
- for the Commission
  Mr H. DANELIUS, *Delegate*;
- for the applicants
  Mr R. Charles HILL, Q.C.,
  Mr S. TREACY, Barrister-at-Law, *Counsel*,
  Mr J. Christopher NAPIER, Solicitor.

10. The Court heard addresses by Sir Nicholas Lyell for the Government, by Mr Danelius for the Commission and by Mr Hill for the applicants. The Government filed their replies to the Court's questions and to the questions put by one of the judges on 25 May and 24 June 1988 respectively.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Terence Patrick Brogan

11. The first applicant, Mr Terence Patrick Brogan, was born in 1961. He is a farmer and lives in County Tyrone, Northern Ireland.

12. He was arrested at his home at 6.15 a.m. on 17 September 1984 by police officers under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 ("the 1984 Act"). He was then taken to Gough

Barracks, Armagh, where he was detained until his release at 5.20 p.m. on 22 September 1984, that is a period of detention of five days and eleven hours.

13. Within a few hours of his arrest, he was questioned about his suspected involvement in an attack on a police mobile patrol which occurred on 11 August 1984 in County Tyrone and resulted in the death of a police sergeant and serious injuries to another police officer. He was also interrogated concerning his suspected membership of the Provisional Irish Republican Army ("IRA"), a proscribed organisation for the purposes of the 1984 Act. He maintained total silence and refused to answer any questions put to him. In addition, he turned away from his questioners and stared at the floor, ceiling or wall and periodically stood to attention. He was visited by his solicitor on 19 and 21 September 1984.

B. Dermot Coyle

14. The second applicant, Mr Dermot Coyle, was born in 1953. He is at present unemployed and lives in County Tyrone, Northern Ireland.

15. He was arrested at his home by police officers at 6.35 a.m. on 1 October 1984 under section 12 of the 1984 Act. He was then taken to Gough Barracks, Armagh, where he was detained until his release at 11.05 p.m. on 7 October 1984, that is a period of detention of six days and sixteen and a half hours.

16. Within a few hours of his arrest, he was questioned about the planting of a land-mine intended to kill members of the security forces on 23 February 1984 and a blast incendiary bomb attack on 13 July 1984, both of which occurred in County Tyrone. He was also interrogated about his suspected provision of firearms and about his suspected membership of the Provisional IRA. He maintained complete silence apart from one occasion when he asked for his cigarettes. In one interview, he spat several times on the floor and across the table in the interview room. He was visited by his solicitor on 3 and 4 October 1984.

C. William McFadden

17. The third applicant, Mr William McFadden, was born in 1959. He is at present unemployed and lives in Londonderry, Northern Ireland.

18. He was arrested at his home at 7.00 a.m. on 1 October 1984 by a police officer under section 12 of the 1984 Act. He was then taken to Castlereagh Police Holding Centre, Belfast, where he was detained until his release at 1.00 p.m. on 5 October 1984, that is a period of four days and six hours.

19. Within a few hours of his arrest, he was questioned about the murder of a soldier in a bomb attack in Londonderry on 15 October 1983

and the murder of another soldier during a petrol bomb and gunfire attack in Londonderry on 23 April 1984. He was also interrogated about his suspected membership of the Provisional IRA. Apart from one interview when he answered questions of a general nature, he refused to answer any questions put to him. In addition, he periodically stood up or sat on the floor of the interview room. He was visited by his solicitor on 3 October 1984.

D. Michael Tracey

20. The fourth applicant, Mr Michael Tracey, was born in 1962. He is an apprentice joiner and lives in Londonderry, Northern Ireland.

21. He was arrested at his home at 7.04 a.m. on 1 October 1984 by police officers under section 12 of the 1984 Act. He was then taken to Castlereagh Royal Ulster Constabulary ("RUC") Station, Belfast, where he was detained until his release at 6.00 p.m. on 5 October 1984, that is a detention period of four days and eleven hours.

22. Within a few hours of his arrest, he was questioned about the armed robbery of post offices in Londonderry on 3 March 1984 and 29 May 1984 and a conspiracy to murder members of the security forces. He was also interrogated concerning his suspected membership of the Irish National Liberation Army ("INLA"), a proscribed terrorist organisation. He remained silent in response to all questions except certain questions of a general nature and sought to disrupt the interviews by rapping on heating pipes in the interview room, singing, whistling and banging his chair against the walls and on the floor. He was visited by his solicitor on 3 October 1984.

E. Facts common to all four applicants

23. All of the applicants were informed by the arresting officer that they were being arrested under section 12 of the 1984 Act and that there were reasonable grounds for suspecting them to have been involved in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland. They were cautioned that they need not say anything, but that anything they did say might be used in evidence.

24. On the day following his arrest, each applicant was informed by police officers that the Secretary of State for Northern Ireland had agreed to extend his detention by a further five days under section 12(4) of the 1984 Act. None of the applicants was brought before a judge or other officer authorised by law to exercise judicial power, nor were any of them charged after their release.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Introduction

25. 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 1983, over two thousand deaths were attributable to terrorism in Northern Ireland as compared with about one hundred in Great Britain. In the mid 1980s, the number of deaths was significantly lower than in the early 1970s but organised terrorism continued to thrive.

26. The 1974 Act came into force on 29 November 1974. The Act proscribed the IRA and made it an offence to display support in public for 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 30-33 below).

27. The 1974 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 INLA as well as the IRA. It has been renewed every year but will expire in March 1989, when the Government intend to introduce permanent legislation.

28. 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 (for 1986 and 1987), who also completed in 1987 a wider-scale review of the operation of the 1984 Act.

29. 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 reviews 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 fell properly within the sphere of the executive.

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

30. 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."

31. 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).

32. Article 131 of the Magistrates' Courts (Northern Ireland) Order 1981, declared inapplicable by section 12(6)(d) of the 1984 Act (see paragraph 30 above), provides that where a person arrested without warrant is not within twenty-four hours released from custody, he must be brought before a Magistrates' Court as soon as practicable thereafter but not later than forty-eight hours after his arrest.

33. The Northern Ireland (Emergency Provisions) Act 1978 also conferred special powers of arrest without warrant. Section 11 provided that a constable could arrest without warrant any person whom he suspected of being a terrorist. Such a person could be detained for up to seventy-two hours without being brought before a court.

The 1978 Act has been amended by the Northern Ireland (Emergency Provisions) Act 1987, which came into force on 15 June 1987. The powers of arrest under the 1978 Act have been replaced by a power to enter and search premises for the purpose of arresting a suspected terrorist under section 12 of the 1984 Act.

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

34. 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. The High Court held that the officer had communicated the true ground of arrest and had done what was reasonable in the circumstances to convey to the applicant the nature of his suspicion, namely that the applicant was involved

in terrorist activities. Accordingly, the High Court found that the lawfulness of the arrest could not be impugned in this respect.

35. 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).

D. Purpose of arrest and detention under section 12 of the 1984 Act

36. 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."

E. Extension of period of detention

37. 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 appended to the Government's memorial.

According to statistics quoted by the Standing Advisory Commission on Human Rights in its written submissions (see paragraph 6 above), just over 2% of police requests for extended detention in Northern Ireland between the entry into force of the 1984 Act in March 1984 and June 1987 were refused by the Secretary of State.

F. Remedies

38. 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

39. 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 30 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).

40. 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 firstly established a prima facie case (Khawaja v. Secretary of State [1983] 1 All England Law Reports 765).

2. False imprisonment

41. 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.).

PROCEEDINGS BEFORE THE COMMISSION

42. The applicants applied to the Commission on 18 October 1984, 22 October 1984, 22 November 1984 and 8 February 1985 respectively (applications nos. 11209/84, 11234/84, 11266/84 and 11386/85). They claimed that their arrest and detention were not justified under Article 5 para. 1 (art. 5-1) of the Convention and that there had also been breaches of paragraphs 2, 3, 4 and 5 of that Article (art. 5-2, art. 5-3, art. 5-4, art. 5-5). They also alleged that, contrary to Article 13 (art. 13), they had no effective remedy in respect of their other complaints.

The complaint under Article 5 para. 2 (art. 5-2) was subsequently withdrawn.

43. On 10 July 1986, the Commission ordered the joinder of the applications in pursuance of Rule 29 of its Rules of Procedure and, on the following day, it declared the applications admissible.

In its report of 14 May 1987 (drawn up in accordance with Article 31) (art. 31), the Commission concluded that there had been a breach of paragraphs 3 and 5 of Article 5 (art. 5-3, art. 5-5) in respect of Mr Brogan and Mr Coyle (by ten votes to two for paragraph 3 (art. 5-3), and nine votes to three for paragraph 5 (art. 5-5)), but not in respect of Mr McFadden and Mr Tracey (by eight votes to four for both paragraphs (art. 5-3, art. 5-5)). It also concluded that there had been no breach of paragraphs 1 and 4 of Article 5 (art. 5-1, art. 5-4) (unanimously for paragraph 1 (art. 5-1), and by ten votes to two for paragraph 4 (art. 5-4)) and finally that no separate issue arose under Article 13 (art. 13) (unanimously).

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

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

44. At the public hearing on 25 May 1988, the Government maintained in substance the concluding submissions set out in their memorial, whereby they requested the Court to decide

"(1) that the facts disclose no breach of paragraphs 1, 3, 4 or 5 of Article 5 (art. 5-1, art. 5-3, art. 5-4, art. 5-5) of the Convention;

(2) that the facts disclose no breach of Article 13 (art. 13) of the Convention, alternatively that no separate issue arises under Article 13 (art. 13) of the Convention".

In addition, the Government requested the Court not to entertain the complaint raised under Article 5 para. 2 (art. 5-2).

AS TO THE LAW

I. SCOPE OF THE CASE BEFORE THE COURT

45. In their original petitions to the Commission, the applicants alleged breach of paragraph 2 of Article 5 (art. 5-2), which provides:

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

However, they subsequently withdrew the claim, and the Commission noted in its admissibility decision that the applicants were no longer complaining under paragraph 2 (art. 5-2).

In a letter filed in the registry on 17 May 1988, the applicants sought the leave of the Court to reinstate the complaint. In their oral pleadings both the respondent Government and the Commission objected to the applicants' request.

46. The scope of the Court's jurisdiction is determined by the Commission's decision declaring the originating application admissible (see, inter alia, the Weeks judgment of 2 March 1987, Series A no. 114, p. 21, para. 37). The Court considers that regard must be had in the instant case to the express withdrawal of the claim under paragraph 2 (art. 5-2). As a result, the Commission discontinued its examination of the admissibility of this complaint. To permit the applicants to resuscitate this complaint before the Court would be to circumvent the machinery established for the examination of petitions under the Convention.

47. Consequently, the allegation that there has been a breach of Article 5 para. 2 (art. 5-2) cannot be entertained.

II. GENERAL APPROACH

48. The Government have adverted extensively to the existence of particularly difficult circumstances in Northern Ireland, notably the threat posed by organised terrorism.

The Court, having taken notice of the growth of terrorism in modern society, has already recognised the need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights (see the Klass and Others judgment of 6 September 1978, Series A no. 28, pp. 23 and 27-28, paras. 48-49 and 59).

The Government informed the Secretary General of the Council of Europe on 22 August 1984 that they were withdrawing a notice of derogation under Article 15 (art. 15) which had relied on an emergency situation in Northern Ireland (see Yearbook of the Convention, vol. 14, p. 32 [1971], vol. 16, pp. 26-28 [1973], vol. 18, p. 18 [1975], and vol. 21, p. 22 [1978], for communications giving notice of derogation, and Information Bulletin on Legal Activities within the Council of Europe and in Member States, vol. 21, p. 2 [July, 1985], for the withdrawal). The Government indicated accordingly that in their opinion "the provisions of the Convention are being fully executed". In any event, as they pointed out, the derogation did not apply to the area of law in issue in the present case.

Consequently, there is no call in the present proceedings to consider whether any derogation from the United Kingdom's obligations under the Convention might be permissible under Article 15 (art. 15) by reason of a terrorist campaign in Northern Ireland. Examination of the case must proceed on the basis that the Articles of the Convention in respect of which complaints have been made are fully applicable. This does not, however, preclude proper account being taken of the background circumstances of the case. In the context of Article 5 (art. 5), it is for the Court to determine the significance to be attached to those circumstances and to ascertain whether, in the instant case, the balance struck complied with the applicable provisions of that Article in the light of their particular wording and its overall object and purpose.

III. ALLEGED BREACH OF ARTICLE 5 PARA. 1 (art. 5-1)

49. The applicants alleged breach of Article 5 para. 1 (art. 5-1) of the Convention, which, in so far as relevant, provides:

> "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 ...;
>
> ..."

There was no dispute that the applicants' arrest and detention were "lawful" under Northern Ireland law and, in particular, "in accordance with a procedure prescribed by law". The applicants argued that the deprivation of liberty they suffered by virtue of section 12 of the 1984 Act failed to comply with Article 5 para. 1 (c) (art. 5-1-c), on the ground that they were not arrested on suspicion of an "offence", nor was the purpose of their arrest to bring them before the competent legal authority.

50. Under the first head of argument, the applicants maintained that their arrest and detention were grounded on suspicion, not of having committed a specific offence, but rather of involvement in unspecified acts of terrorism, something which did not constitute a breach of the criminal law in Northern Ireland and could not be regarded as an "offence" under Article 5 para. 1 (c) (art. 5-1-c).

The Government have not disputed that the 1984 Act did not require an arrest to be based on suspicion of a specific offence but argued that the definition of terrorism in the Act was compatible with the concept of an offence and satisfied the requirements of paragraph 1 (c) (art. 5-1-c) in this respect, as the Court's case-law confirmed. In this connection, the Government pointed out that the applicants were not in fact suspected of involvement in terrorism in general, but of membership of a proscribed organisation and involvement in specific acts of terrorism, each of which constituted an offence under the law of Northern Ireland and each of which was expressly put to the applicants during the course of their interviews following their arrests.

51. Section 14 of the 1984 Act defines terrorism as "the use of violence for political ends", which includes "the use of violence for the purpose of putting the public or any section of the public in fear" (see paragraph 31 above). The same definition of acts of terrorism - as contained in the Detention of Terrorists (Northern Ireland) Order 1972 and the Northern Ireland (Emergency Provisions) Act 1973 - has already been found by the Court to be "well in keeping with the idea of an offence" (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 74-75, para. 196).

In addition, all of the applicants were questioned within a few hours of their arrest about their suspected involvement in specific offences and their suspected membership of proscribed organisations (see paragraphs 13, 16, 19 and 22 above).

Accordingly, the arrest and subsequent detention of the applicants were based on a reasonable suspicion of commission of an offence within the meaning of Article 5 para. 1 (c) (art. 5-1-c).

52. Article 5 para. 1 (c) (art. 5-1-c) also requires that the purpose of the arrest or detention should be to bring the person concerned before the competent legal authority.

The Government and the Commission have argued that such an intention was present and that if sufficient and usable evidence had been obtained during the police investigation that followed the applicants' arrest, they would undoubtedly have been charged and brought to trial.

The applicants contested these arguments and referred to the fact that they were neither charged nor brought before a court during their detention. No charge had necessarily to follow an arrest under section 12 of the 1984 Act and the requirement under the ordinary law to bring the person before a court had been made inapplicable to detention under this Act (see paragraphs 30 and 32 above). In the applicants' contention, this was therefore a power of administrative detention exercised for the purpose of gathering information, as the use in practice of the special powers corroborated.

53. The Court is not required to examine the impugned legislation in abstracto, but must confine itself to the circumstances of the case before it.

The fact that the applicants were neither charged nor brought before a court does not necessarily mean that the purpose of their detention was not in accordance with Article 5 para. 1 (c) (art. 5-1-c). As the Government and the Commission have stated, the existence of such a purpose must be considered independently of its achievement and sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody.

Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others. There is no reason to believe that the police investigation in this case was not in good faith or that the detention of the applicants was not intended to further that investigation by way of confirming or dispelling the concrete suspicions which, as the Court has found, grounded their arrest (see paragraph 51 above). Had it been possible, the police would, it can be assumed, have laid charges and the applicants would have been brought before the competent legal authority.

Their arrest and detention must therefore be taken to have been effected for the purpose specified in paragraph 1 (c) (art. 5-1-c).

54. In conclusion, there has been no violation of Article 5 para. 1 (art. 5-1).

IV. ALLEGED BREACH OF ARTICLE 5 PARA. 3 (art. 5-3)

55. Under the 1984 Act, a person arrested under section 12 on reasonable suspicion of involvement in acts of terrorism may be detained by police for an initial period of forty-eight hours, and, on the authorisation of the Secretary of State for Northern Ireland, for a further period or periods of up to five days (see paragraphs 30-37 above).

The applicants claimed, as a consequence of their arrest and detention under this legislation, to have been the victims of a violation of Article 5 para. 3 (art. 5-3), which provides:

> "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 and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The applicants noted that a person arrested under the ordinary law of Northern Ireland must be brought before a Magistrates' Court within forty-eight hours (see paragraph 32 above); and that under the ordinary law in England and Wales (Police and Criminal Evidence Act 1984) the maximum period of detention permitted without charge is four days, judicial approval being required at the thirty-six hour stage. In their submission, there was no plausible reason why a seven-day detention period was necessary, marking as it did such a radical departure from ordinary law and even from the three-day period permitted under the special powers of detention embodied in the Northern Ireland (Emergency Provisions) Act 1978 (see paragraph 33 above). Nor was there any justification for not entrusting such decisions to the judiciary of Northern Ireland.

56. The Government have argued that in view of the nature and extent of the terrorist threat and the resulting problems in obtaining evidence sufficient to bring charges, the maximum statutory period of detention of seven days was an indispensable part of the effort to combat that threat, as successive parliamentary debates and reviews of the legislation had confirmed (see paragraphs 26-29 above). In particular, they drew attention to the difficulty faced by the security forces in obtaining evidence which is both admissible and usable in consequence of training in anti-interrogation techniques adopted by those involved in terrorism. Time was also needed to undertake necessary scientific examinations, to correlate information from other detainees and to liaise with other security forces. The Government claimed that the need for a power of extension of the period of detention was borne out by statistics. For instance, in 1987 extensions were granted in Northern Ireland in respect of 365 persons. Some 83 were detained in excess of five days and of this number 39 were charged with serious terrorist offences during the extended period.

As regards the suggestion that extensions of detention beyond the initial forty-eight-hour period should be controlled or even authorised by a judge, the Government pointed out the difficulty, in view of the acute sensitivity of some of the information on which the suspicion was based, of producing it in court. Not only would the court have to sit in camera but neither the detained person nor his legal advisers could be present or told any of the details. This would require a fundamental and undesirable change in the law and procedure of the United Kingdom under which an individual who is

deprived of his liberty is entitled to be represented by his legal advisers at any proceedings before a court relating to his detention. If entrusted with the power to grant extensions of detention, the judges would be seen to be exercising an executive rather than a judicial function. It would add nothing to the safeguards against abuse which the present arrangements are designed to achieve and could lead to unanswerable criticism of the judiciary. In all the circumstances, the Secretary of State was better placed to take such decisions and to ensure a consistent approach. Moreover, the merits of each request to extend detention were personally scrutinised by the Secretary of State or, if he was unavailable, by another Minister (see paragraph 37 above).

57. The Commission, in its report, cited its established case-law to the effect that a period of four days in cases concerning ordinary criminal offences and of five days in exceptional cases could be considered compatible with the requirement of promptness in Article 5 para. 3 (art. 5-3) (see respectively the admissibility decisions in application no. 2894/66, X v. the Netherlands, Yearbook of the Convention, vol. 9, p. 568 (1966), and in application no. 4960/71, X v. Belgium, Collection of Decisions, vol. 42, pp. 54-55 (1973)). In the Commission's opinion, given the context in which the applicants were arrested and the special problems associated with the investigation of terrorist offences, a somewhat longer period of detention than in normal cases was justified. The Commission concluded that the periods of four days and six hours (Mr McFadden) and four days and eleven hours (Mr Tracey) did satisfy the requirement of promptness, whereas the periods of five days and eleven hours (Mr Brogan) and six days and sixteen and a half hours (Mr Coyle) did not.

58. The fact that a detained person is not charged or brought before a court does not in itself amount to a violation of the first part of Article 5 para. 3 (art. 5-3). No violation of Article 5 para. 3 (art. 5-3) can arise if the arrested person is released "promptly" before any judicial control of his detention would have been feasible (see the de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52). If the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer.

The assessment of "promptness" has to be made in the light of the object and purpose of Article 5 (art. 5) (see paragraph 48 above). The Court has regard to the importance of this Article (art. 5) in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty (see the Bozano judgment of 18 December 1986, Series A no. 111, p. 23, para. 54). Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 para. 3 (art. 5-3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, "one of the

fundamental principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention" (see, mutatis mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, pp. 25-26, para. 55) and "from which the whole Convention draws its inspiration" (see, mutatis mutandis, the Engel and Others judgment of 8 June 1976, Series A no. 22, p. 28, para. 69).

59. The obligation expressed in English by the word "promptly" and in French by the word "aussitôt" is clearly distinguishable from the less strict requirement in the second part of paragraph 3 (art. 5-3) ("reasonable time"/"délai raisonnable") and even from that in paragraph 4 of Article 5 (art. 5-4) ("speedily"/"à bref délai"). The term "promptly" also occurs in the English text of paragraph 2 (art. 5-2), where the French text uses the words "dans le plus court délai". As indicated in the Ireland v. the United Kingdom judgment (18 January 1978, Series A no. 25, p. 76, para. 199), "promptly" in paragraph 3 (art. 5-3) may be understood as having a broader significance than "aussitôt", which literally means immediately. Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty (see, inter alia, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 30, para. 48, and Article 33 para. 4 of the Vienna Convention of 23 May 1969 on the Law of Treaties).

The use in the French text of the word "aussitôt", with its constraining connotation of immediacy, confirms that the degree of flexibility attaching to the notion of "promptness" is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3 (art. 5-3). Whereas promptness is to be assessed in each case according to its special features (see the above-mentioned de Jong, Baljet and van den Brink judgment, Series A no. 77, p. 25, para. 52), the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 para. 3 (art. 5-3), that is to the point of effectively negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.

60. The instant case is exclusively concerned with the arrest and detention, by virtue of powers granted under special legislation, of persons suspected of involvement in terrorism in Northern Ireland. The requirements under the ordinary law in Northern Ireland as to bringing an accused before a court were expressly made inapplicable to such arrest and detention by section 12(6) of the 1984 Act (see paragraphs 30 and 32 above). There is no call to determine in the present judgment whether in an ordinary criminal case any given period, such as four days, in police or administrative custody would as a general rule be capable of being compatible with the first part of Article 5 para. 3 (art. 5-3).

None of the applicants was in fact brought before a judge or judicial officer during his time in custody. The issue to be decided is therefore whether, having regard to the special features relied on by the Government, each applicant's release can be considered as "prompt" for the purposes of Article 5 para. 3 (art. 5-3).

61. The investigation of terrorist offences undoubtedly presents the authorities with special problems, partial reference to which has already been made under Article 5 para. 1 (art. 5-1) (see paragraph 53 above). The Court takes full judicial notice of the factors adverted to by the Government in this connection. It is also true that in Northern Ireland the referral of police requests for extended detention to the Secretary of State and the individual scrutiny of each police request by a Minister do provide a form of executive control (see paragraph 37 above). In addition, the need for the continuation of the special powers has been constantly monitored by Parliament and their operation regularly reviewed by independent personalities (see paragraphs 26-29 above). The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 para. 3 (art. 5-3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.

The difficulties, alluded to by the Government, of judicial control over decisions to arrest and detain suspected terrorists may affect the manner of implementation of Article 5 para. 3 (art. 5-3), for example in calling for appropriate procedural precautions in view of the nature of the suspected offences. However, they cannot justify, under Article 5 para. 3 (art. 5-3), dispensing altogether with "prompt" judicial control.

62. As indicated above (paragraph 59), the scope for flexibility in interpreting and applying the notion of "promptness" is very limited. In the Court's view, even the shortest of the four periods of detention, namely the four days and six hours spent in police custody by Mr McFadden (see paragraph 18 above), falls outside the strict constraints as to time permitted by the first part of Article 5 para. 3 (art. 5-3). To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word "promptly". An interpretation to this effect would import into Article 5 para. 3 (art. 5-3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court thus has to conclude that none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own

sufficient to ensure compliance with the specific requirements of Article 5 para. 3 (art. 5-3).

There has thus been a breach of Article 5 para. 3 (art. 5-3) in respect of all four applicants.

V. ALLEGED BREACH OF ARTICLE 5 PARA. 4 (art. 5-4)

63. The applicants argued that as Article 5 (art. 5) had not been incorporated into United Kingdom law, an effective review of the lawfulness of their detention, as required by paragraph 4 of Article 5 (art. 5-4), was precluded. Article 5 para. 4 (art. 5-4) provides as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

64. The remedy of habeas corpus was available to the applicants in the present case, though they chose not to avail themselves of it. Such proceedings would have led to a review of the lawfulness of their arrest and detention under the terms of the 1984 Act and the applicable principles developed by case-law (see paragraphs 39-40 above).

The Commission found that the requirements of Article 5 para. 4 (art. 5-4) were satisfied since the review available in Northern Ireland would have encompassed the procedural and substantive basis, under the Convention, for their detention. The Government have adopted the same reasoning.

65. According to the Court's established case-law, the notion of "lawfulness" under paragraph 4 (art. 5-4) has the same meaning as in paragraph 1 (art. 5-1) (see notably the Ashingdane judgment of 28 May 1985, Series A no. 93, p. 23, para. 52); and whether an "arrest" or "detention" can be regarded as "lawful" has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 para. 1 (art. 5-1) (see notably the above-mentioned Weeks judgment, Series A no. 114, p. 28, para. 57). By virtue of paragraph 4 of Article 5 (art. 5-4), arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that, in the instant case, the applicants should have had available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements set out in section 12 of the 1984 Act but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.

As is shown by the relevant case-law, in particular the Van Hout and Lynch judgments (see paragraph 40 above), these conditions are met in the

practice of the Northern Ireland courts in relation to the remedy of habeas corpus.

Accordingly, there has been no violation of Article 5 para. 4 (art. 5-4).

VI. ALLEGED BREACH OF ARTICLE 5 PARA. 5 (art. 5-5)

66. The applicants further alleged breach of Article 5 para. 5 (art. 5-5) which reads:

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

A claim for compensation for unlawful deprivation of liberty may be made in the United Kingdom in respect of a breach of domestic law (see paragraph 41 above on false imprisonment). As Article 5 (art. 5) is not considered part of the domestic law of the United Kingdom, no claim for compensation lies for a breach of any provision of Article 5 (art. 5) which does not at the same time constitute a breach of United Kingdom law.

The Government argued, inter alia, that the aim of paragraph 5 (art. 5-5) is to ensure that the victim of an "unlawful" arrest or detention should have an enforceable right to compensation. In this regard, they have also contended that "lawful" for the purposes of the various paragraphs of Article 5 (art. 5) is to be construed as essentially referring back to domestic law and in addition as excluding any element of arbitrariness. They concluded that even in the event of a violation being found of any of the first four paragraphs, there has been no violation of paragraph 5 because the applicants' deprivation of liberty was lawful under Northern Ireland law and was not arbitrary.

67. The Court, like the Commission, considers that such a restrictive interpretation is incompatible with the terms of paragraph 5 (art. 5-5) which refers to arrest or detention "in contravention of the provisions of this Article".

In the instant case, the applicants were arrested and detained lawfully under domestic law but in breach of paragraph 3 of Article 5 (art. 5-3). This violation could not give rise, either before or after the findings made by the European Court in the present judgment, to an enforceable claim for compensation by the victims before the domestic courts; this was not disputed by the Government.

Accordingly, there has also been a breach of paragraph 5 (art. 5-5) in this case in respect of all four applicants. This finding is without prejudice to the Court's competence under Article 50 (art. 50) in the matter of awarding compensation by way of just satisfaction (see the Neumeister judgment of 7 May 1974, Series A no. 17, p. 13, para. 30).

VII. ALLEGED BREACH OF ARTICLE 13 (art. 13)

68. The applicants claimed before the Commission that they had no effective remedy in Northern Ireland in respect of their complaints under Article 5 (art. 5) and that consequently there was also a breach of Article 13 (art. 13) which 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."

In the light of the finding that there has been no violation of Article 5 para. 4 (art. 5-4) in this case, the Court does not deem it necessary to inquire whether the less strict requirements of Article 13 (art. 13) were complied with, especially as the applicants did not pursue this complaint before the Court (see, inter alia, the Bouamar judgment of 29 February 1988, Series A no. 129, p. 25, para. 65).

VIII. APPLICATION OF ARTICLE 50 (art. 50)

69. By virtue of Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

70. The applicants, three of whom have received legal aid before the Commission and the Court, did not submit any claim for reimbursement of costs and expenses, and this is not a matter which the Court has to examine of its own motion (see, as the most recent authority, the above-mentioned Bouamar judgment, ibid., p. 26, para. 68).

71. On the other hand, the applicants contended that "because the breaches were conscious and flagrant, exemplary damages or an enhanced award of damages ... would be appropriate". They suggested that compensation should be calculated on the basis of approximately £2000 (two thousand pounds) per hour for each hour of wrongful detention.

The Government requested the Court to reserve the matter.

In the circumstances of the case, the Court considers that the question of the application of Article 50 (art. 50) is not yet ready for decision in relation to the claim for compensation for prejudice suffered. It is therefore necessary to reserve the matter and to fix the further procedure, taking due account of the possibility of an agreement between the respondent State and the applicants (Rule 53 paras. 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. Holds by sixteen votes to three that there has been no violation of Article 5 para. 1 (art. 5-1);

2. Holds by twelve votes to seven that there has been a violation of Article 5 para. 3 (art. 5-3) in respect of all four applicants;

3. Holds unanimously that there has been no violation of Article 5 para. 4 (art. 5-4);

4. Holds by thirteen votes to six that there has been a violation of Article 5 para. 5 (art. 5-5) in respect of all four applicants;

5. Holds unanimously that it is not necessary also to consider the case under Article 13 (art. 13);

6. Holds unanimously that there is no call to examine the application of Article 50 (art. 50) in relation to reimbursement of any costs or expenses incurred;

7. Holds unanimously that the question of the application of Article 50 (art. 50) as raised in respect of compensation for prejudice sustained is not ready for decision;

accordingly,

(a) reserves the said question in that respect;

(b) invites the Government to submit, within the forthcoming three months, their written comments thereon and, in particular, to notify the Court of any agreement reached between them and the applicants;

(c) reserves the further procedure and delegates to the President of the Court power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg on 29 November 1988.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the following separate opinions are annexed to the present judgment:

- joint dissenting opinion of Mr Thór Vilhjálmsson, Mrs Bindschedler-Robert, Mr Gölcüklü, Mr Matscher and Mr Valticos;

- partly dissenting opinion of Mr Pinheiro Farinha;

- dissenting opinion of Mr Walsh and Mr Carrillo Salcedo in respect of Article 5 para. 1 (c) (art. 5-1-c);

- partly dissenting opinion of Sir Vincent Evans;

- concurring opinion of Mr De Meyer;

- dissenting opinion of Mr Martens.

R.R.
M.-A.E.

JOINT DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON, BINDSCHEDLER-ROBERT, GÖLCÜKLÜ, MATSCHER AND VALTICOS

(Translation)

1. The application of Article 5 para. 3 (art. 5-3) is complex in the instant case, because it raises a question of legal construction - which has in fact already been decided in earlier cases - and brings different rights and interests into conflict. We cannot share the view of the majority of the Court as to the way in which the issue should be resolved.

As regards the question of legal construction, firstly, it is clear that in several previous cases the Court and the Commission have both taken the view that the requirement that "everyone arrested or detained ... shall be brought promptly [in French: aussitôt] before a judge ..." does not, given the English term used and the general context, mean that this must be done immediately and instantaneously, but that it must be done as soon as possible having regard to place, time and the circumstances of each case. Some - limited - discretion is here left to governments, subject to review by the Convention institutions.

The question is how much latitude is allowable. Obviously the acceptable period of time will not be the same in every case, and it would be artificial to lay down a numerical limit valid for all situations. The Court has on more than one occasion held that it is impossible to translate the concept of reasonable time into a fixed number of days, weeks, etc. (see the Stögmüller judgment of 10 November 1969, Series A no. 9). Thus, in each case, there arises a question of assessment, which will depend on the particular circumstances.

In earlier cases, the Commission took the view that in the case of ordinary criminal offences a period of four days' detention was consistent with the requirement of Article 5 para. 3 (art. 5-3), and a period of five days was found to be acceptable in an exceptional case in which the detainee had had to be hospitalised. On the other hand, both the Court and the Commission held that various cases - concerning mostly Sweden and the Netherlands - in which the periods spent in custody prior to appearance before a judge or other judicial officer ranged from seven to fifteen days were incompatible with the provision in question.

The background to the instant case is a situation which no one would deny is exceptional. Terrorism in Northern Ireland has assumed alarming proportions and has claimed more than 2,000 victims who have died following actions of this kind. The nature and organisation of terrorism, the fear it inspires and the secrecy surrounding it make it difficult, having regard also to the applicable criminal procedure (which does not provide for

the swift intervention of an investigating judge), to bring detainees promptly before a court. At the same time there can be no question of accepting prolonged detention, which violates the rights of the persons detained and is in any case expressly prohibited in Article 5 para. 3 (art. 5-3), a provision fundamental to the protection of personal liberty.

It is therefore necessary to weigh carefully, on the one hand, the rights of detainees and, on the other, those of the population as a whole, which is seriously threatened by terrorist activity.

In the instant case, the four applicants were detained without being brought before a judicial authority for periods varying from four days and six hours to six days and sixteen and a half hours.

In our view, no distinction can be made between these individual cases as they all fall within the same category and the various periods do not differ very substantially.

In view of the exceptional situation in Northern Ireland, which was referred to above, it seems to us that in the final analysis, if a period of four days has been accepted in the case of normal situations, it would be reasonable to regard the foregoing periods of time, which are all less than a week, as being acceptable. Such a view fits in with the case-law and is justified by the wholly exceptional conditions obtaining in Northern Ireland.

While considering, therefore, that there was no breach of Article 5 para. 3 (art. 5-3) in the instant case, we are anxious to stress that this view can be maintained only in so far as such exceptional conditions prevail in the country, and that the authorities should monitor the situation closely in order to return to the practices of ordinary law as soon as more normal conditions are restored, and even that, until then, an effort should be made to reduce as much as possible the length of time for which a person is detained before being brought before a judge.

2. Nor can we follow the majority of the Court in finding a breach of Article 5 para. 5 (art. 5-5). On the one hand, since we take the view that there has been no violation of Article 5 para. 3 (art. 5-3), no question of reparation arises. On the other hand, the determination of the exact scope of Article 5 para. 5 (art. 5-5) and of the conditions under which a detention considered to be wrongful can ground an entitlement to compensation raises difficult issues and it does not appear appropriate to us to discuss them on the present occasion.

PARTLY DISSENTING OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

1. In my opinion, there was also a violation of Article 5 para. 1 (art. 5-1) for the following reasons.

2. "... [T]he Court has stressed the vital role of the international jurisdiction and the necessity of interpreting restrictions on personal freedom strictly having regard to the exceptional importance of the right guaranteed, which is crucial for the freedom and dignity of the human being" (Louis-Edmond Pettiti, preface to the book by Vincent Berger, Jurisprudence de la Cour européenne des Droits de l'Homme).

3. A "person whom it is reasonably considered necessary to prevent ... committing an offence" may be arrested or detained only "for the purpose of bringing him before the competent legal authority" (see the Lawless judgment of 1 July 1961, Series A no. 3, pp. 51-52, para. 14). The applicants, however, were detained for the purposes of the investigation so that evidence could be gathered, and not "for the purpose of bringing [them] before the competent legal authority".

4. Detainees are required to be brought before the competent legal authority in order that the lawfulness of their detention may be monitored; an assessment has to be made of whether the suspicions of the police are reasonable.

I do not consider it compatible with the Convention that a police officer should arrest a person whom he reasonably suspects of being or having been involved in the commission, preparation or instigation of terrorist acts and that the police should not be required to answer to a judicial authority in order that it may be verified that there is a reasonable suspicion.

DISSENTING OPINION OF JUDGES WALSH AND CARRILLO SALCEDO IN RESPECT OF ARTICLE 5 PARA. 1 (c) (art. 5-1-c)

We believe that Article 5 (art. 5) of the European Convention on Human Rights does not afford to the State any margin of appreciation. If the concept of a margin of appreciation were to be read into Article 5 (art. 5), it would change the whole nature of this all-important provision which would then become subject to executive policy.

An arrest made under section 12 of the Prevention of Terrorism Act 1984 as modified or amended by the various orders mentioned in the case and the detention thereby permitted do not require the preferring of any charge against the arrested person at any time. Thus such an arrest and detention

> "is not necessarily ... the first step in a criminal proceeding against a suspected person on a charge which was intended to be judicially investigated" (see the judgment of Lord Lowry, Lord Chief Justice, in the case of ex parte Lynch, referred to at paragraph 36 of the judgment of the Court).

All that is required is a reasonable suspicion on the part of the arresting authority that the person arrested is or has been concerned in

> "acts of terrorism connected with the affairs of Northern Ireland" (see paragraph 30 of the judgment of the Court).

Although in fact there is no such offence as "terrorism" (definition of which appears in paragraph 31 of the judgment of the Court), the law does not require the detained person to be informed of any specific criminal offence of which he may be suspected, nor does the law require that his interrogation should be in respect of offences of which he may be suspected. In fact his interrogation might be confined solely to matters of which other persons are suspected. The longer a person is detained in custody, the more likely he is to confess to something. In our opinion, Article 5 (art. 5) does not permit the arrest and detention of persons for interrogation in the hope that something will turn up in the course of the interrogation which would justify the bringing of a charge.

In our view the arrests in the present cases were for the purpose of interrogation at a time when there was no evidential basis for the bringing of any charge against them. No such evidence ever emerged and eventually they had to be released. That the legislation in question is used for such a purpose is amply borne out by the fact that since 1974 15,173 persons have been arrested and detained in the United Kingdom pursuant to the legislation yet less than 25% of those persons, namely 3,342, have been charged with any criminal offence arising out of the interrogation including offences totally unconnected with the original arrest and detention. Still fewer of them have been convicted of any offence of a terrorist type.

The Convention embodies the presumption of innocence and thus enshrines a most fundamental human right, namely the protection of the individual against arbitrary interference by the State with his right to liberty. The circumstances of the arrest and detention in the present cases were not compatible with this right and accordingly we are of the opinion that Article 5 para. 1 (art. 5-1) has been violated.

The undoubted fact that the arrest of the applicants was inspired by the legitimate aim of protecting the community as a whole from terrorism is in our opinion not sufficient to ensure compliance with the requirements of Article 5 para. 1 (c) (art. 5-1-c). Compliance requires that the purpose of the arrest must be to bring the person arrested before the competent legal authority on reasonable suspicion of having committed a specified offence or offences. The Convention does not permit an arrest for the purposes of interrogation in the hope of getting enough information to ground a charge.

PARTLY DISSENTING OPINION OF JUDGE SIR VINCENT EVANS

1. I agree with the judgment of the Court that there was no violation of Article 5 para. 1 (art. 5-1) or of Article 5 para. 4 (art. 5-4) in this case and also that it is not necessary to consider the case under Article 13 (art. 13). I am unable to agree, however, with the majority of my colleagues that there have been violations of Article 5 para. 3 and of Article 5 para. 5 (art. 5-3, art. 5-5).

2. The application of Article 5 para. 3 (art. 5-3) in the present case turns on the meaning which should be given to the word "promptly" in the context of the requirement that "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". Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 permits a person suspected on reasonable grounds of involvement in acts of terrorism to be detained for a period of up to seven days, subject to the authorisation of the Secretary of State after forty-eight hours, before he is released or brought before a court. The question is whether the detention of the applicants for periods ranging from four days and six hours to six days and sixteen and a half hours under the provisions of that section without being brought before a court was compatible with Article 5 para. 3 (art. 5-3).

3. The Court has already recognised in several cases that the word "promptly" in the context of Article 5 para. 3 (art. 5-3) cannot mean "immediately". Thus in the case of de Jong, Baljet and van den Brink the Court said: "The issue of promptness must be assessed in each case according to its special features" (judgment of 22 May 1984, Series A no. 77, p. 25, para. 52). In that case it found that "in the particular circumstances, even taking into account the exigencies of military life and military justice", intervals of six, seven and eleven days could not be regarded as consistent with the required "promptness" (ibid.). But the clear implication of this finding was that, in the Court's opinion, it was consistent with the use of the word "promptly" (and "aussitôt" in the French text) and with the object and purpose of paragraph 3 (art. 5-3) to allow some - though certainly not unlimited - flexibility having regard to the circumstances in which the individuals concerned were detained.

The Commission for its part has for more than twenty years taken the view that in normal cases a period of up to four days before the detained person is brought before a judge is compatible with the requirement of promptitude and that a somewhat longer period is justifiable in some circumstances. The Court has not hitherto cast doubt on the Commission's view in these respects. If anything, the Court's judgments in the de Jong,

Baljet and van den Brink and other cases have tended by implication to confirm it.

Furthermore, the Court has consistently recognised that States must, in assessing the compatibility of their laws and practices with the requirements of the Convention, be permitted a "margin of appreciation" and that inherent in the whole Convention is the search for a fair balance between the demands of the general interest of the community and the protection of the individual's fundamental rights. In the Klass case, the Court agreed with the Commission that "some compromise between the requirements of defending democratic society and individual rights is inherent in the system of the Convention" (judgment of 6 September 1978, Series A no. 28, p. 28, para. 59).

In my opinion, the jurisprudence thus far developed constitutes a reasonable interpretation of Article 5 para. 3 (art. 5-3), and in particular of the word "promptly".

4. The need to assess the issue of promptness according to the special features of the case and to strike a fair balance between the different rights and interests involved are considerations which are surely relevant in the special circumstances of the situation in Northern Ireland where more than thirty thousand persons have been killed, maimed or injured as a direct result of terrorist activity in the last twenty years. The balance to be sought in applying the Convention in this situation is between, on the one hand, the interests of the community and of ordinary decent men, women and children who are so often the victims of terrorism and, on the other hand, the rights of persons suspected on reasonable grounds of belonging to or supporting a proscribed terrorist organisation or of otherwise being concerned in the commission, preparation or instigation of acts of terrorism.

The special factors held by the Government to justify the exceptional powers of detention in cases under section 12 of the 1984 Act are summarised in paragraph 56 of the Court's judgment. They include the difficulty faced by the security forces in these cases in obtaining evidence which is admissible and usable particularly in consequence of the training received by terrorists in anti-interrogation techniques, the highly sensitive nature of information on which suspicion is based in many such cases making impossible its production in court in the presence of the detained person or his legal adviser, and the extra time needed for examining and correlating evidence and for liaison with other security forces. The need for the exceptional powers under section 12 to which such factors give rise is supported by the statistics quoted in the same paragraph of the judgment - that in 1987, for instance, of some 83 persons detained in excess of five days, 39 were charged with serious terrorist offences during the extended period.

Viscount Colville in chapter 12 of his 1987 Report on the operation of the 1984 Act accepted that there was no technical reason why the decison to

grant an extension of a person's detention beyond 48 hours should not be made by a High Court Judge instead of by the Secretary of State, but he concluded that such a change would be wrong. He pointed out that the decisions in question would have to be made by a judge sitting in camera without any effective representation of the detained person and that in his opinion the change would add nothing to the safeguards for civil liberties but could lead to unanswerable criticisms of the judiciary. These considerations were of course equally pertinent in 1984 when the applicants were detained (see, for instance, Lord Jellicoe's Report of 1983 on the operation of the Prevention of Terrorism (Temporary Provisions) Act 1976, para. 70). I find them to be convincing and to support the view that the relevant provisions of section 12 of the 1984 Act do enable a fair balance to be struck between the interests of the community and the rights of persons detained thereunder.

The Court in paragraph 61 of its judgment takes notice of and does not dispute the factors adverted to by the Government and it acknowledges the special problems which the investigation of terrorist offences poses for the authorities of the State. It also accepts that the difficulties of judicial control over decisions to arrest and detain suspected terrorists may call for "appropriate procedural precautions". The majority of the Court have nevertheless felt constrained to interpret the word "promptly" as in effect making incompatible with Article 5 para. 3 (art. 5-3) any period of detention under section 12 of the 1984 Act exceeding the four days previously considered, at least by the Commission, to be acceptable in normal cases. In my opinion, given that the notion of promptness in the context of Article 5 para. 3 (art. 5-3) must be applied with some degree of flexibility, this is an unduly restrictive interpretation which does not take sufficiently into account the special factors underlying the provisions of section 12. My conclusion is that the provisions in question are justified by the need to strike a fair balance in the circumstances and that they are consonant with what must also be the aim under the Convention of protecting human rights against the continuing inhumanity of terrorism in Northern Ireland.

5. For these reasons, I do not find that the power under section 12 of the 1984 Act to detain a person for up to seven days without bringing him before a court is in itself incompatible with Article 5 para. 3 (art. 5-3). As regards the exercise of that power in the four instances before the Court, there is no reason to doubt that each of the applicants was justifiably detained in accordance with section 12 and consequently in my opinion there was no violation of Article 5 para. 3 (art. 5-3) in any of these cases.

6. It follows that in my view there was no violation of Article 5 para. 5 (art. 5-5) either.

CONCURRING OPINON OF JUDGE DE MEYER

Whilst wholly concurring in the result of the judgment, I would observe, as to the dictum in paragraph 48, that the present case does not really raise the issue of "the defence of the institutions of democracy", but rather concerns a problem of civil coexistence within a society deeply torn by national and religious antagonisms.

DISSENTING OPINION OF JUDGE MARTENS

I. Preliminary remarks

1. I find that I am unable to concur in the opinion of the majority that the United Kingdom is in violation of its obligations under Article 5 para. 3 (art. 5-3) of the Convention in this case.

I rather regret this because, being called to the Court but recently, I am reluctant to disagree with so many of my more experienced brethren.

2. I regret this all the more because, generally speaking, it is my conviction that it enhances the Court's authority if the right to express a dissenting opinion is used rather reticently. Moreover, in this particular case I share to a great extent the opinions of the majority. I to think: (1) that this case cannot be judged without taking into account that it is concerned with terrorism (paragraph 48 of the Court's judgment); (2) that it is permissible to take this factor into account although Article 15 (art. 15) of the Convention does not apply (ibid.); and (3) that "judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 para. 3 (art. 5-3)" (paragraph 58 of the Court's judgment).

That I have nevertheless reached a different conclusion is, I think, due to a difference of opinion with regard, firstly, to the weight to be attached to terrorism, or rather to the liberty to be left to Governments to cope with that and similar scourges of our times, especially where the individual's right to liberty is concerned, and, secondly, to the weight to be attached to the wording of the Convention.

3. As the Court rightly recalls in paragraph 48 of its judgment, terrorism is a feature of modern life, which has attained its present extent and intensity only since the Convention was drafted. Terrorism - and particularly terrorism on the scale obtaining in Northern Ireland - is the very negation of the principles the Convention stands for and should therefore be combated as vigorously as possible. It seems obvious that to suppress terrorism the executive needs extraordinary powers, just as it seems obvious that Governments should to a large extent be free to choose the ways and means which they think most efficacious for combating terrorism. Of course, in combating terrorism the States Parties to the Convention have to respect the rights and freedoms secured therein to everyone. I subscribe to that and I am aware of the danger of measures being taken which, as the Court has put it, may undermine or even destroy democracy on the ground of defending it (see the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 23, para. 49). But I think that this danger must not be exaggerated - especially with regard to States which have a long and firm traditon of democracy - and should not lead to the wings of national

authorities being excessively clipped, for that would unduly benefit those who do not hesitate to trample on the rights and freedoms of others.

4. It goes without saying that a person against whom there is a reasonable suspicion of being involved in acts of terrorism should be free from torture or inhuman or degrading treatment. But it seems to me legitimate to ask whether he may not be detained, before being brought before a judge, for a somewhat longer period than is acceptable under ordinary criminal law. In this connection, I consider that the Court by saying, in the second section of paragraph 58 of its judgment, that Article 5 (art. 5) "enshrines a fundamental human right" somewhat overestimates the importance of this provision in the Convention system. Undoubtedly, the right to liberty and security of person is an important right, but it does not belong to that small nucleus of rights from which no derogation is permitted. This means that there is room for weighing the general interest in an effective combating of terrorism against the individual interests of those who are arrested on a reasonable suspicion of involvement in acts of terrorism. The search for such a fair balance between the general interest of the community and the interests of the indiviudual is, as the Court has already pointed out repeatedly and points out again in its present judgment (paragraph 48), inherent in the whole of the Convention.

5. The Court finds it decisive, however, that the wording of Article 5 para. 3 (art. 5-3) - especially "the plain meaning of the word ‘promptly’" - leaves no (or at least hardly any) room for such a weighing of interests (see paragraphs 59 to 62 of its judgment). I will explain in paragraphs 6 to 13 below why I do not share this view. Here I should like to indicate breifly two reasons for thinking that it is undesirable to attach a degree of importance to the wording of this Convention that excludes application of a principle which seems fundamental in this context and, under the Court’s established case-law, is inherent in the Convention as a whole.

The first reason is that the way the Convention is worded still bears obvious traces of its origin : its wording is not seldom better suited to a manifesto than to an international treaty designed to provide, for a considerable time and for a great number of different legal orders, answers to fundamental but often delicate questions of law.

The second reason for not attaching too much weight to the wording of the Convention is that, in my belief, the Court should remain free to adapt the interpretation of the Convention to changing social conditions and moral opinions. That calls for methods of interpretation that do not stop, prematurely, at the wording of a provision.

II. Is the seven-day period under section 12 of the 1984 Act compatible with the requirement of promptness?

6. I now turn to what in my opinion is the decisive question, i.e. whether the seven-day period under section 12 of the 1984 Act is compatible with Article 5 para. 3 (art. 5-3), and especially with the requirement of "promptness" in that provision.

7. However, as this is the first time that I am called upon to express an opinion on questions of construction of the Convention, I will permit myself a short digression, which may serve both as an explanation of my way of putting the above question and as a starting point for further reasoning.

As we are dealing with a question of interpretation of Article 5 (art. 5) of the Convention, it may be worthwhile to start by ascertaining exactly what are the engagements undertaken by the High Contracting Parties in the Convention under this Article (art. 5).

To me it seems clear that these engagements are twofold:

(1) to ensure that their national law is in accordance with the provisions of this Article; and

(2) to apply that law, and to have that law applied[1], in accordance with these provisions.

I think that the same applies to the Convention as a whole. At first sight, it may appear from the wording of many of its provisions that they contain rules of uniform law, but, on reflection, it becomes clear that, although perhaps they may exceptionally serve that function, generally speaking their function is that of directives[2]. Directives for national law-making authorities (mainly legislators) to model their laws, for national executive authorities to model their conduct and for the Court to assess whether those laws and that conduct are in conformity with the standards of the Convention.

I realise, of course, that the Court has repeatedly stressed that, in proceedings originating in an individual application, its task - as a rule[3] - is not to review in abstracto whether the law of the State Party concerned is in conformity with the Convention, but only to assess whether the application of that law to the applicant has violated a right set forth in the Convention. The ground given for this doctrine - which is reiterated in the present

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[1] See the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 91, para. 239.

[2] See the judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 35, para. 10 in fine; the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, para. 48; the Sunday Times judgment of 26 April 1979, Series A no. 30, pp. 37-38, para. 61.

[3] There are exceptions to this rule: see the Klass and Others judgment of 6 September 1978, Series A no. 28, pp. 17-18, para. 33. See also the X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, in general and, especially, the heading on p. 13; the Lithgow and Others judgment of 8 July 1986, Series A no. 102, in general and, especially, p. 52, para. 124; the Leander judgment of 26 March 1987, Series A no. 116, p. 30, para. 79.

judgment (paragraph 53) - is the difference in wording between Articles 24 and 25 (art. 24, art. 25), but to me it would seem that the more fundamental basis for it is judicial restraint.

I think however that, in cases where the treatment the applicant is complaining about is in every respect in conformity with one or more specific and precise provisions of national law, both logic and truthfulness demand that the first step in assessing whether the application of that law constitutes a violation of the Convention should be to review whether that law is in conformity with the Convention. If the latter question is to be answered in the affirmative, the answer to the former will almost always be in the negative. But if the internal law as such is found to be incompatible with the Convention, it is still possible that its application in concreto does not violate the Convention.

The present case illustrates the point. If section 12 of the 1984 Act is compatible with Article 5 (art. 5) of the Convention, it follows that the arrests in concreto did not violate this provision; but if the 1984 Act is not in conformity with the Convention, it is still possible to hold that (one or more of) the arrests in concreto did not violate Article 5 (art. 5).

8. Having explained why the question set out in paragraph 6 above is decisive, I will now turn to the answer to that question which, of course, depends on the meaning of the word "promptly". What then does that word mean in the context of Article 5 para. 3 (art. 5-3)?

I think that one may give two types of answer to this question, according to whether one is inclined, as the Court is, to stop at the wording of this provision, or whether one is willing to look also at other means of interpretation.

9. But let us start with the wording. On a first reading, the wording of paragraph 3 (art. 5-3), especially that of the French version[4], seems to suggest that a person arrested shall be brought before a judge immediately after the arrest. Already at this stage it becomes clear, however, that you simply cannot stop at a literal interpretation, for that would give a rule which obviously would be unworkable. Some room for exceptions must be presumed. The rule should accordingly be that a person arrested shall be brought before a judge immediately unless the particular circumstances of the case make this impossible: if at the time of the arrest the judge is not available or if there are other reasons which make it impossible to bring the person immediately before the judge, some postponement may be permitted,

[4] The French version has "aussitôt", which however suggests "aussitôt que possible" - as soon as possible. Thus the word "promptly" in paragraph 3 (art. 5-3) would perhaps be a shade broader than the same word in paragraph 2 (art. 5-2), where the French version reads: "dans le plus court délai".

provided this is no longer than is absolutely necessary in the particular circumstances of the case[5].

10. On further consideration, however, it seems most unlikely that the construction set forth in the preceding paragraph is what the draftsmen of Article 5 para. 3 (art. 5-3) intended. It follows from what I have said in paragraph 7 above that they were drafting a yardstick for testing their national laws or, to be more precise, for testing national provisions which lay down the period during which a person may be detained without being brought before a judge.

According to Fawcett, in most of the States Parties to the Convention, this period "seldom exceeds" two days[6]. Fawcett does not give any authority for this statement, but let us assume for argument's sake that it is correct. Assuming further, as seems reasonable, that the authors of the Convention, when drafting this paragraph, tried to lay down a provision with which their aforesaid national provisions (as they were then) would comply, one cannot but conclude that it is simply impossible that "promptly" has the rather strict meaning referred to in paragraph 5 above, because under that construction of paragraph 3 almost every national law would have been incompatible with the Convention right from the outset! Again it becomes clear that one simply cannot stop at a literal interpretation of this text.

In my view, these considerations justify the conclusion that it was the intention of the Parties to the Conventon that the word "promptly" in the context of Article 5 para. 3 (art. 5-3) has "a special meaning"[7] and must be understood as: a (rather) short period, but nevertheless a period which may last some days, to be fixed in the national laws of the High Contracting States.

Under this construction, "promptly" implies that the national legislature has a certain margin of appreciation and is free to fix the period it thinks most suitable to the specific conditions of the country in question, although subject to the ultimate control of the Convention organs[8].

The extent of this margin of appreciation depends on the exactitude of Fawcett's aforementioned assertion: if there is a definite European standard of two days, three days would seem within, but four days would seem outside, that margin. I venture to think however that, at least with regard to the first decades of the Convention, that assertion was not correct. Firstly, if

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[5] An example of the kind of circumstances that are relevant under this construction is to be found in the Commission's decision of 19 July 1972 (application no. 4960/71) (Collection of Decisions, vol. 42, p. 49): the person arrested had to be hospitalised immediately after his arrest and could only be brought before a judge after his recovery.

[6] See J.E.S. Fawcett, The Application of the European Convention on Human Rights, p. 93.

[7] See Article 31 para. 4 of the Vienna Convention on the Law of Treaties.

[8] See for other examples of an (implied) margin of appreciation outside the field of Articles 8-11, 14 and 15 (art. 8, art. 9, art. 10, art. 11, art. 14, art. 15): the Kjeldsen, Busk Madsen and Pedersen judgment of 7 December 1976, Series A no. 23, p. 26, para. 53; and the Colozza judgment of 12 February 1985, Series A no. 89, pp. 15-16, para. 30.

it were correct, the Commission would hardly have found - as it did in its decision of 6 October 1966, application no. 2894/66, Yearbook, vol. 9, p. 564 - a period of four days "consistent with the general tendency of other member States of the Council of Europe". Secondly, Hulsman, in his report for the Congress on European Criminal Law, held at Brussels in November 1968, said: "The maximum length of provisional detention which precedes judicial control had been laid down in the law of most countries and ranges from twenty-four hours till seven days"![9] These data confirm the Commission's aforementioned decision of October 1966. Since it has not been maintained, let alone established, that meanwhile a new and more severe European standard has been developed, I cannot subscribe to the criticism of this decision implied in paragraph 60 of the Court's judgment (quite apart from the question whether, from the point of view of legal certainty, such sudden criticism of a decision which has for years been the leading case on the subject is judicious).

11. The two possible constructions of Article 5 para. 3 (art. 5-3) discussed in paragraphs 9 and 10 above seem mutually exclusive, in the sense that if one is correct the other cannot be. I think, however, that it follows from what has been said in paragraph 7 that the situation is not as simple as that.

The construction set out in paragraph 10 (promptly means a period which may last some days, to be fixed in the national laws) squares with this provision's function as a directive: in principle this is therefore the correct construction. But the construction set out in paragraph 9 may be of some use when, after it has been established that the national law is in conformity with the Convention, the question whether or not the application of that law in concreto constituted a violation must be addressed. Then it may become decisive whether the particular circumstances of the case justify the person being brought before a judge only after the maximum period laid down in that law has expired.

I think that this point is illustrated by the Commission's decisions and accounts for the marked difference between its decision of 1972, referred to in note 5, and its decision of October 1966, referred to in paragraph 10 above: in the former the Commission was concerned only with the specific application before it, whereas in the latter its first concern was whether Dutch law was in conformity with Article 5 para. 3 (art. 5-3).

Since I am primarily concerned here with the latter type of question, it is interesting to note that the Commission, in its 1966 decision, has clearly adopted the construction set out in paragraph 10 above:

[9] See European Criminal Law, Brussels, 1970, p. 491; see also L.E. Teitelbaum, Revue des Droits de l'Homme, Vol. V (1972), pp. 433 et seq.

"Whereas ... the Commission considers that the Contracting Parties are given a certain margin of appreciation when interpreting and applying the requirement as to promptitude laid down in Article 5 para. 3 (art. 5-3)."

As far as I have been able to ascertain, the Court has never explicitly expressed its view as to this construction. It may, however, be interesting to note that in its de Jong, Baljet and van den Brink judgment of 22 May 1984 (Series A no. 77, p. 25, para. 52), the Court took account not only of the particular circumstances of each individual case - as would have been appropriate if the Court were of the opinion set out in paragraph 9 above - but also referred to "the exigencies of military life and justice". This seems to imply that the Court also then shared the opinion expressed in paragraph 10 above.

It follows from the present judgment that the Court now rejects that construction, but in view of the above considerations I feel that the Court, by merely stressing that as a matter of linguistics "the degree of flexibility attaching to the notion of 'promptness' is limited", has not sufficiently motivated that rejection.

12. Having reached the conclusion that, under Article 5 para. 3 (art. 5-3), the States Parties to the Convention enjoy a certain margin of appreciation, I now turn to the question whether or not the United Kingdom legislature exceeded that margin when enacting section 12 of the 1984 Act.

If this provision were an ordinary criminal law provision, there would have been no case at all: after the Court's de Jong, Baljet and van den Brink judgment (Series A no. 77, p. 25, para. 53) it should be considered as settled that an ordinary criminal law provision allowing for a period of detention of seven days without bringing the person before a judge violates paragraph 3 of Article 5 (art. 5-3).

But we are not dealing with the ordinary criminal law of the United Kingdom on detention but - as I have stressed already in paragraph 3 above - with a special provision of a special law directed against terrorism. It is the United Kingdom Government's position that, when answering the question whether or not they have exceeded their margin of appreciation under Article 5 (art. 5), this special feature of that law not only should be taken into account but also should carry much weight.

As already indicated in paragraphs 2 to 4 above, I think that the first of these contentions is correct: in my opinion it is quite compatible with the Convention system for a State to invoke the requirements of combating terrorism in order to justify fixing at a longer duration than would be acceptable under ordinary circumstances the period during which a person arrested on a reasonable suspicion of involvement in acts of terrorism my be detained without being brought before a judge.

This brings me, of course, to the crucial question whether, taking into account the assertion of the United Kingdom Government that the special powers under section 12 of the 1984 Act are necessary for the purposes of

combating terrorism, a period of seven days, which in the context of ordinary criminal law has already been condemned as incompatible with the requirement of promptness, may be accepted.

It is my conviction that, in this regard, the principle which the Court has developed with respect to the requirements of morality[10] should apply. Striking a fair balance between the interests of the community that suffers from terrorism and those of the individual is particularly difficult and national authorities, who from long and painful experience have acquired a far better insight into the requirements of effectively combating terrorism and of protecting their citizens than an international judge can ever hope to acquire from print, are in principle in a better position to do so than that judge!

It is in this context that three factors seem to me to be of importance:

(i) The first factor is the particular extent, vehemence and persistence of the terrorism that has raged since 1969 in Northern Ireland, a community of 1.5 million people. In his address to the Court, the Solicitor General said that since 1969 2,646 persons have died as a direct result of terrorist activity and 30,658 have been maimed and injured. There were, he said, 43,649 bombing and shooting incidents. These data have not been disputed.

(ii) The second factor is that we are undoubtedly dealing with a society which has been a democracy for a long time and as such is fully aware both of the importance of the individual right to liberty and of the inherent dangers of giving too wide a power of detention to the executive[11].

(iii) The third factor is that the United Kingdom legislature, apparently being aware of those dangers, has each time granted the extraordinary powers only for a limited period, i.e. one year on each occasion, and only after due inquiry into the continued need for the legislation by investigators who - as the Government have asserted and the applicants have not seriously denied - were independent and professionally qualified for such investigation[12]. Time and again both these investigators and the British Parliament concluded that the section under discussion could not be dispensed with.

In my opinion, these three factors also make it highly desirable for an international judge to adopt an attitude of reserve.

Against this background I think that the Court can find that the United Kingdom, when enacting and maintaining section 12 of the 1984 Act, overstepped the margin of appreciation it is entitled to under Article 5 para. 3 (art. 5-3) only if it considers that the arguments for maintaining the seven-day period are wholly unconvincing and cannot be reasonably defended. In my opinion that condition has not been satisfied.

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[10] See the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, para. 48.

[11] See, mutatis mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, p. 27, para. 59.

[12] See the Court's judgment, paragraphs 27-29.

Of course, as the written comments of the Standing Advisory Commission on Human Rights show, it is possible to question whether the maximum period of detention under the anti-terrorism legislation should be seven days or five (as that Commission suggests), and to maintain that judicial control is quite feasible. Having read the arguments on both sides, I am even prepared to say that, especially on the last point, the arguments advanced for allowing judicial control are perhaps slightly stronger than those against it[13]. But, in my opinion, these remain questions on which reasonable people may hold different views. This means that the Court should respect the United Kingdom Government's choice and cannot but hold that they did not overstep their margin of appreciation.

These are, however, not the only factors to be taken into account.

The United Kingdom Government have pointed out that the seven-day period is a maximum[14], the Secretary of State's office seeing to it that in every individual case the period of detention is as short as possible. This assertion has not been contested seriously and the present case indicates that, in any event, it is at least plausible.

The Government have further asserted that, as a rule, within forty-eight hours after arrest the family of the arrested person is notified[15] and that the person has access to legal advice after forty-eight hours and thereafter at forty-eight-hourly intervals[16]. These assertions have not been contested either. Neither has it been denied that the person arrested, by seeking a writ of habeas corpus, may have the question whether his arrest is lawful, i.e.

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[13] I cannot refrain from pointing out that, in my opinion, the Court has, in paragraph 61 of its judgment, made light of the Government's arguments. These arguments were (1) that in order to protect informants - a protection which is all the more indispensable because an effective investigation depends on the preparedness to inform -, essential data on which the suspicion is based should be kept secret as long as possible; (2) that to make these data available only to the judge is quite incompatible with fundamental conceptions in England of the role of a judge; (3) that, after weighing the disadvantages of the seven-day period for those arrested on a reasonable suspicion of involvement in terrorism against the injurious effects on general esteem for the judiciary which might flow from the introduction of a system whereby justice was administered on the basis of data withheld from one of the parties, they have thought the former the lesser evil. I feel that it is too easy to reject these arguments by merely suggesting that "appropriate procedural precautions in view of the nature of the suspected offences" would have been possible, and implying that such "procedural precautions" would have been compatible with the guarantees implicit in the words "judge or other officer authorised by law to exercise judicial power" in Article 5 para. 3 (art. 5-3)!

[14] Memorial of the Government, paragraphs 1.9 and 1.12.

[15] Memorial of the Government, paragraph 1.19.

[16] Memorial of the Government, paragraphs 1.19 and 2.41. See also paragraph 2.47, where it is stressed that the present applicants were seen by their solicitor (see also paragraphs 11-22 of the Court's judgment).

whether the conditions of section 12 of the 1984 Act have been met, scrutinised in court[17].

These are, I think, important safeguards against potential abuse of the power to detain under section 12 of the 1984 Act[18].

Taking all these factors into account and keeping in mind that - as follows from paragraph 10 above - for ordinary criminal cases a four-day period must still be deemed acceptable, I find that the 1984 Act cannot be said to be incompatible with Article 5 para. 3 (art. 5-3) of the Convention.

13. The conclusion I have reached in the preceding paragraph relieves me from going into the question whether the application of the 1984 Act in concreto constituted a violation of Article 5 para. 3 (art. 5-3): the detention the applicants are complaining about lasted less than seven days and therefore cannot be regarded as a violation, if my conclusion that seven days is not incompatible with the Convention is correct.

[17] See the Court's judgment, paragraphs 39 and 40. The mere fact that this remedy does not appear to be used often does not seem material; what is material is that it is available to those detained under section 12 of the 1984 Act and that, from the replies by the Government to the questions put by the Court, it appears that out of thirteen applications three resulted in release by the court, while in four other cases release by the police occurred before the hearing.

[18] In paragraph 4 of their replies to the questions put by the Court, the Government have listed further safeguards; I do not think it necessary to go into these, since I deem those discussed in the text the most important in the present context.