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

GRAND CHAMBER

CASE OF McKAY v. THE UNITED KINGDOM

(Application no. 543/03)

JUDGMENT

STRASBOURG

3 October 2006

In the case of McKay v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Christos Rozakis, *President*,
Jean-Paul Costa,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Nina Vajić,
Matti Pellonpää,
Rait Maruste,
Kristaq Traja,
Snejana Botoucharova,
Javier Borrego Borrego,
Ljiljana Mijović,
Egbert Myjer,
Sverre Erik Jebens,
Ján Šikuta,
Ineta Ziemele, *judges*,
and Vincent Berger, *Acting Registrar*,

Having deliberated in private on 14 June and 13 September 2006,

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

PROCEDURE

1. The case originated in an application (no. 543/03) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Mark McKay ("the applicant"), on 9 December 2002.

2. The applicant was represented by Mr P. McDermott, a lawyer practising in Belfast. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger, of the Foreign and Commonwealth Office.

3. Relying on Article 5 § 3 of the Convention, the applicant complained that after his arrest the magistrate had had no power to order his release on bail.

4. The application was allocated to the Fourth Section. It was declared admissible by a Chamber of that Section, composed of Josep Casadevall, Nicolas Bratza, Matti Pellonpää, Rait Maruste, Kristaq Traja, Ljiljana

Mijović, Ján Šikuta, judges, and Michael O'Boyle, Section Registrar. On 17 January 2006 the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72 of the Rules of Court).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

6. The applicant and the Government each filed a memorial on the merits.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 June 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	J. GRAINGER,	*Agent*,
Mr	D. PERRY,	
Mr	P. MAGUIRE,	*Counsel*,
Mr	I. WIMPRESS,	
Ms	C. MERSEY,	*Advisers*;

(b) *for the applicant*

Mr	J. LARKIN, QC	
Mr	B. TORRENS,	*Counsel*,
Mr	P. MCDERMOTT,	*Solicitor.*

The Court heard addresses by Mr Perry and Mr Larkin and their answers to questions put by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1983 and lives in Bangor, County Down, Northern Ireland.

9. On Saturday 6 January 2001 at 10 p.m., the applicant was arrested on suspicion of having carried out a robbery of a petrol station in Bangor. On Sunday 7 January 2001 he admitted being responsible for the robbery. He was charged at 12.37 p.m.

10. On Monday 8 January 2001 at 10 a.m., the applicant made his first appearance in the magistrates' court, where he instructed his solicitors to make an application for release on bail. The police officer gave evidence to

the court stating that the robbery was not connected with terrorism and that, subject to the proper conditions, he would have no objection to bail. The sitting resident magistrate refused the application, indicating that the offence was a scheduled offence and that he therefore did not have the power to order release (section 67(2) of the Terrorism Act 2000 and section 3(2) of the Northern Ireland (Emergency Provisions) Act 1996).

11. On 8 January 2001 the applicant applied to the High Court for bail. On 9 January 2001 the High Court heard and granted his application.

12. On 12 April 2001 the applicant pleaded guilty in the Crown Court to an offence of robbery and was sentenced to two years' detention in a young offenders' institution, followed by a year of probation.

13. Meanwhile, on 9 January 2001, the applicant made an application for judicial review, seeking a declaration of incompatibility of the legislation cited above with Articles 5 and 14 of the Convention.

14. On 3 May 2002 the High Court rejected the applicant's application. Mr Justice Kerr held:

> "There is nothing in the text of Article 5 nor in the jurisprudence of ECtHR which requires that the court before which an arrested person must be brought should be the same court that has power to grant him bail. He must be brought promptly before a court or an officer authorised to exercise judicial power. He must also have the opportunity to apply for bail. It is not necessarily the case, however, that these two separate and distinct rights require to be vindicated at the same time or in the same forum. Provided that the arrested person is brought promptly before a court that has power to review the lawfulness of his detention and that he has the opportunity to apply without undue delay for release pending his trial, the requirements of Article 5 § 3 are met.
>
> The applicant was brought before the magistrates' court promptly – within 36 hours of his arrest. His appearance before the magistrate was automatic and did not depend on any initiative from the applicant. Moreover, the resident magistrate was empowered to review the lawfulness of the applicant's detention ... Here the magistrate can review the legal basis on which the arrested person is detained. He must be satisfied that the arrest and continued detention are lawful. If he is not so satisfied, he must order the release of the person detained. The applicant in the present case was therefore entitled to a prompt automatic examination by a competent judicial officer of the legal basis of his arrest and continued detention. He was moreover entitled to – and did obtain – a prompt examination by a judge of his right to release on bail. ..."

15. The judge also rejected the arguments under Article 14 that accused members of the security forces were treated more favourably concerning bail than other accused persons and refused leave to appeal.

16. On 16 May 2002 the Divisional Court refused leave to appeal to the House of Lords, but certified as points of law of general public importance whether the legislation was compatible with the Convention and whether Article 5 required that the court before whom an accused person was brought pursuant to Article 5 § 3 should have the power to admit him to bail.

17. On 4 December 2002 leave to appeal was refused by the House of Lords.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Power to release on bail concerning scheduled offences

18. Section 67(2) of the Terrorism Act 2000 (which came into force on 19 February 2001) is substantially the same as section 3(2) of the Northern Ireland (Emergency Provisions) Act 1996 (in force at the time of the applicant's appearance), and provides:

> "Subject to subsections (6) and (7), a person to whom this section applies shall not be admitted to bail except –
>
> (a) by a judge of the High Court or the Court of Appeal, or
>
> (b) by the judge of the court of trial on adjourning the trial of a person charged with a scheduled offence."

19. The sole jurisdiction of the High Court, Court of Appeal and trial judge to grant bail in the case of scheduled offences dates from 1973 and is based on the original provisions of the Northern Ireland (Emergency Provisions) Act 1973. The rationale derives from the Diplock Report ("Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland" (1972 Cmnd. 5185)), which concluded that resident magistrates who heard bail applications were particularly susceptible to threats and intimidation (at the relevant time one had been shot and the homes of two others bombed). The 2000 Act provides for the position to be annually reviewed by Parliament. Annual reports on the working of the legislation are laid before Parliament for this purpose.

20. In the 2002 report of the Independent Reviewer, Lord Carlile of Berriew QC recommended the return of bail applications to the magistrates' court, noting that the requirement for all applications in scheduled offences to go before the High Court led in practice to some defendants spending additional days in custody and that a significant proportion of cases were ultimately not proceeded with, or defendants were acquitted or given non-custodial sentences. He recommended that the power be given to a small number of specially trained magistrates. However, in his 2004 report, he noted a continuing danger from sophisticated terrorist crime and numerous serious criminal offences with a strong terrorist link, with syndicated crime having a paramilitary connection increasing and significant levels of intimidation remaining. In considering whether or not to give resident magistrates the power to deal with bail applications, he did not repeat his earlier recommendation, observing that the security assessment was that

there would be a significant threat of intimidation and violence towards them and those close to them. He did, however, agree that bail hearings should be available at the weekends and this change was brought into force immediately.

21. Robbery, in so far as it involves any explosive, firearm, imitation firearm or weapon of offence, is specified in paragraph 10 (b) of schedule 9 to the Terrorism Act 2000 as a scheduled offence.

B. Procedure for High Court bail applications

22. This was set out in the Rules of the Supreme Court (Northern Ireland) Order 79, supplemented by Practice Direction 1976 no. 1. This provided for the High Court to sit every day except Saturdays and Sundays for the purpose, *inter alia*, of hearing bail applications. The Practice Direction instituted a deadline for papers to be lodged by 11 a.m. on the day before bail applications were heard. From October 2000, the deadline was moved to noon and the office adopted the practice of accepting faxed applications. A bail judge would also consider admitting a late application in a genuinely exceptional case.

23. As from 31 January 2004, the High Court also sat on Saturdays to hear bail applications.

THE LAW

ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

24. The applicant complained that the magistrate before whom he had appeared after his arrest had had no power to release him on bail. He relied on Article 5 § 3 of the Convention, which provides:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The relevant parts of Article 5 § 1 of the Convention provide:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence ...”

A. The parties’ submissions

1. The applicant

25. The applicant submitted that there was no justification in practice or under Strasbourg case-law for separating the power to review the lawfulness of detention from the power to grant bail. The latter was a much more practical facet of judicial supervision, there being a great many cases where on first appearance before a magistrate detention was formally lawful but where there were no reasons against bail. The regime of scheduled offences covered many cases, such as his, where there was not even a remote suspicion of connection with terrorism and accordingly the Government justification of the regime had no basis in fact or policy. Reliance on the possible intimidation of magistrates in terrorist cases could not logically justify the removal of their bail jurisdiction, where they remained able to determine the lawfulness of detention and to discharge an accused from custody.

26. The applicant argued that the judge before whom an accused appeared had to exercise a plenitude of judicial power, and had to have jurisdiction to pronounce not merely on the bare legality of detention but also on whether the detention was objectively justified on the merits. The Court’s case-law indicated that the review had to be sufficiently wide to encompass the various circumstances militating for and against detention. Even if the enquiry into formal lawfulness logically preceded an enquiry into the propriety of bail, it was perverse to interpret the case-law as allowing the removal of the jurisdiction to consider bail. The unconditional obligation that a detained person appear before such an officer fell upon the State and such appearance had to occur promptly and automatically.

27. The applicant submitted therefore that in his case it was a breach of Article 5 § 3 that the magistrate had had no power to consider bail and that he had been required, of his own motion, to make an application for bail. Such a requirement could impact particularly upon the most vulnerable of detained persons, such as the mentally weak or ill, those subjected to ill-treatment in custody or those unable to speak the language of the court.

2. The Government

28. The Government submitted that the purpose of Article 5 § 3 was to provide a safeguard against arbitrary detention by providing an independent scrutiny of the reasons for an accused’s detention and to ensure release if

continued detention was not justified. The judicial officer concerned had to be independent and have the power to order release. However, nothing in the text of Article 5 or in the Court's jurisprudence required that the court before which an arrested person was to be brought had to be the same court that had the power to grant bail. The detained person had to be brought promptly before a court or officer authorised to exercise judicial power; he also had to have the opportunity to apply for bail. Only the first was required to be automatic; the second, the question of bail, only came into play when the arrest and detention were lawful and did not necessarily form part of the prompt automatic review of the merits.

29. The Government submitted that Article 5 § 3 had therefore been complied with in the applicant's case. The magistrate was able to review the legal basis on which the applicant was detained, and had to be satisfied that the arrest and detention were lawful and therefore not arbitrary; if he had not been so satisfied, he would have been obliged to order the applicant's release. Thus the applicant obtained a prompt examination by a judge of the legal basis of his arrest and continued detention. He was also entitled to, and did obtain, a prompt examination by a judge of the High Court of his right to release on bail. Referring to the margin of appreciation, they concluded that the legislation represented a fair balance between individual rights and the requirements of defending society against a continuing danger from terrorist crime and a high level of intimidation and was entirely consistent with the aims and objectives of the Convention in promoting the rule of law.

B. The Court's assessment

1. General principles

30. Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of an individual (see, for example, its link with Articles 2 and 3 in disappearance cases such as *Kurt v. Turkey*, 25 May 1998, § 123, *Reports of Judgments and Decisions* 1998-III) and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see, for example, *Lukanov v. Bulgaria*, 20 March 1997, § 41, *Reports* 1997-II; *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 461, ECHR 2004-VII). Three strands in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly (see *Ciulla v. Italy*, 22 February 1989, § 41, Series A no. 148) and which do not allow for the broad range of justifications under other provisions (Articles 8-11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule

of law (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33); and the importance of the promptness or speediness of the requisite judicial controls (under Article 5 §§ 3 and 4).

31. Article 5 § 3 as part of this framework of guarantees is structurally concerned with two separate matters: the early stages following an arrest when an individual is taken into the power of the authorities, and the period pending eventual trial before a criminal court during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked (see *T.W. v. Malta* [GC], no. 25644/94, § 49, 29 April 1999).

(a) The arrest period

32. Taking the initial stage under the first limb, the Court's case-law establishes that there must be protection of an individual arrested or detained on suspicion of having committed a criminal offence through judicial control. Such control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures. The judicial control must satisfy the following requirements.

(i) Promptness

33. The judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision (see *Brogan and Others v. the United Kingdom*, 29 November 1988, § 62, Series A no. 145-B, where periods of more than four days in detention without appearance before a judge were held to be in violation of Article 5 § 3, even in the special context of terrorist investigations).

(ii) Automatic nature of the review

34. The review must be automatic and cannot depend on the application of the detained person; in this respect it must be distinguished from Article 5 § 4 which gives a detained person the right to apply for release. The automatic nature of the review is necessary to fulfil the purpose of the paragraph, as a person subjected to ill-treatment might be incapable of lodging an application asking for a judge to review their detention; the same might also be true of other vulnerable categories of arrested person, such as

the mentally frail or those ignorant of the language of the judicial officer (see *Aquilina v. Malta* [GC], no. 25642/94, § 49, ECHR 1999-III).

(iii) The characteristics and powers of the judicial officer

35. The judicial officer must offer the requisite guarantees of independence from the executive and the parties and he or she must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 146, *Reports* 1998-VIII). As regards the scope of that review, the formulation which has been at the basis of the Court's long-established case-law dates back to the early case of *Schiesser v. Switzerland* (4 December 1979, § 31, Series A no. 34):

> "... [U]nder Article 5 § 3, there is both a procedural and a substantive requirement. The procedural requirement places the 'officer' under the obligation of hearing himself the individual brought before him (see, *mutatis mutandis*, the above-mentioned *Winterwerp* judgment, p. 24, § 60); the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons (above-mentioned *Ireland v. the United Kingdom* judgment, p. 76, § 199)."

More recently, this has been expressed by saying "(i)n other words, Article 5 § 3 requires the judicial officer to consider the merits of the detention" (see *T.W. v. Malta*, cited above, § 41, and *Aquilina*, cited above, § 47).

36. However, an examination of these cases gives no ground for concluding that the review must, as a matter of automatic obligation, cover the release of the applicant pending trial, with or without conditions, for reasons aside from the lawfulness of the detention or the existence of reasonable suspicion that the applicant has committed a criminal offence. The *Schiesser* case, cited above, made no reference to bail and although it attributes the general statement of principle above, which on its face appears capable of encompassing bail-type considerations, to *Ireland v. the United Kingdom* (18 January 1978, § 199, Series A no. 25), no basis for such statement appears in that judgment. Nor indeed was release on bail in issue in *Schiesser*, which was principally concerned with the question whether the District Attorney offered the guarantees of independence inherent in the notion of an officer authorised by law to exercise judicial power (§§ 33-35). There is nothing therefore to suggest that, when referring to "the circumstances militating for or against detention", the Court was doing more than indicating that the judicial officer had to have the power to review the lawfulness of the arrest and detention under domestic law and its compliance with the requirements of Article 5 § 1 (c).

37. As regards the Maltese cases (see *T.W. v. Malta* and *Aquilina*, both cited above), the phrase "merits of the detention" must be read in their

context. In both, the applicants appeared promptly before the judicial officer but, as found by the Court, neither the magistrate before whom the applicants first appeared nor any other judicial officer had the power to conduct a review, of his or her own motion, of whether there had been compliance with the requirements of Article 5 § 1 (c). According to the Government of Malta, release might have been ordered if the detained person faced charges which, according to Maltese law, did not even allow for detention. However the Court held that, even if this were the case, the scope of such powers of review was clearly insufficient to satisfy the requirements of paragraph 3 of Article 5, since, as the Government conceded, the judicial officer had no power to order release if there was no reasonable suspicion that the detained person had committed an offence. Further, the fact, relied on by the Government, that the applicants could request bail equally did not satisfy paragraph 3, since it depended on a previous application being made by the detained person, whereas the judicial control of the lawfulness and proper basis of the detention under the first limb of paragraph 3 had to be automatic.

38. This reading of the Grand Chamber's judgments is supported by the subsequent case of *Sabeur Ben Ali v. Malta* (no. 35892/97, 29 June 2000) where the Court, examining the compatibility with Article 5 § 3 of a similar arrest and detention of an applicant, quoted the relevant passage from *Aquilina* (cited above, § 47) and found that this requirement had not been complied with since "the applicant could not obtain an automatic ruling by a domestic judicial authority on whether there existed a reasonable suspicion against him".

39. Nor, on examination, does the case of *S.B.C. v. the United Kingdom* (no. 39360/98, 19 June 2001) provide persuasive authority for finding that the first obligatory appearance before a judge must encompass the power to grant release on bail. This case concerned the Criminal Justice and Public Order Act 1994, which provided that persons charged with a serious offence such as murder, manslaughter or rape and who had previously been convicted of a similar offence were excluded from the grant of bail under any circumstances. This removal of judicial control throughout the period of pre-trial detention was found to violate Article 5 § 3 of the Convention. This denial of any access to bail clearly offended against the independent right which is conferred in the second limb of paragraph 3. In so far as it may be suggested that the power to grant bail was a power which the magistrates had to be able to exercise on the first court appearance of the detained person after arrest, the Grand Chamber is unable to agree with this interpretation.

40. The initial automatic review of arrest and detention accordingly must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person has committed an offence, in other words, that detention falls within the permitted exception set out in

Article 5 § 1 (c). When the detention does not, or is unlawful, the judicial officer must then have the power to release.

(b) The pre-trial or remand period

41. The presumption is in favour of release. As established in *Neumeister v. Austria* (27 June 1968, p. 37, § 4, Series A no. 8), the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable.

42. Continued detention therefore can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, §§ 110 et seq., ECHR 2000-XI).

43. The responsibility falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned demand of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see, for example, *Weinsztal v. Poland*, no. 43748/98, § 50, 30 May 2006).

44. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but with the lapse of time this no longer suffices and the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings (see, among other authorities, *Letellier v. France*, 26 June 1991, § 35, Series A no. 207, and *Yağcı and Sargın v. Turkey*, 8 June 1995, § 50, Series A no. 319-A).

45. In sum, domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty. For at least an initial period, the existence of reasonable suspicion may justify

detention but there comes a time when this is no longer enough. As the question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features, there is no fixed time frame applicable to each case.

46. The Court's case-law has not yet had occasion to consider the very early stage of pre-trial detention in this context, presumably as, in the great majority of cases, the existence of suspicion provides a sufficient ground for detention and any unavailability of bail has not been seriously challengeable. It is not in doubt, however, that there must exist the opportunity for judicial consideration of release pending trial as even at this stage there will be cases where the nature of the offence or the personal circumstances of the suspected offender are such as to render detention unreasonable, or unsupported by relevant or sufficient grounds. There is no express requirement of "promptness" as in the first sentence of paragraph 3 of Article 5. However, such consideration, whether on application by the applicant or by the judge of his or her own motion, must take place with due expedition, in order to keep any unjustified deprivation of liberty to an acceptable minimum.

47. In order to ensure that the right guaranteed is practical and effective, not theoretical and illusory, it is not only good practice, but highly desirable in order to minimise delay, that the judicial officer who conducts the first automatic review of lawfulness and the existence of a ground for detention also has the competence to consider release on bail. It is not, however, a requirement of the Convention and there is no reason in principle why the issues cannot be dealt with by two judicial officers, within the requisite time frame. In any event, as a matter of interpretation, it cannot be required that the examination of bail take place with any more speed than is demanded of the first automatic review, which the Court has identified as being a maximum of four days (see *Brogan and Others*, cited above).

2. Application in the present case

48. The Court notes that the applicant was arrested on 6 January 2001 at 10 p.m. on suspicion of having carried out a robbery of a petrol station. He was charged at 12.37 p.m. the next day. On 8 January 2001 at 10 a.m., the applicant made his first appearance in the magistrates' court which remanded him in custody. It is not in dispute that the magistrate had the competence to examine the lawfulness of the arrest and detention and whether there were reasonable grounds for suspicion and moreover that he had the power to order release if those requirements were not complied with. That alone provided satisfactory guarantees against abuse of power by the authorities and ensured compliance with the first limb of Article 5 § 3 as being prompt, automatic and taking place before a duly empowered judicial officer.

49. The question of release pending trial was a distinct and separate matter which logically only became relevant after the establishment of the existence of a lawful basis and a Convention ground for detention. It was, in the applicant's case, dealt with some twenty-four hours later, on 9 January 2001, by the High Court which ordered his release. No element of possible abuse or arbitrariness arises from the fact that it was another tribunal or judge that did so nor from the fact that the examination was dependent on his application. The applicant's lawyer lodged such an application without any hindrance or difficulty; it is not apparent, nor falls to be decided in this case, that the system in operation would prevent the weak or vulnerable from making use of this possibility.

50. While it is true that the police had no objection to bail and that if the magistrate had had the power to release on bail, the applicant would have been released one day earlier, the Court nonetheless considers that the procedure in this case was conducted with due expedition, leading to his release some three days after his arrest.

51. There has, accordingly, been no violation of Article 5 § 3 of the Convention.

FOR THESE REASONS, THE COURT

Holds by sixteen votes to one that there has been no violation of Article 5 § 3 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 3 October 2006.

Vincent Berger
Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint separate opinion of Judges Rozakis, Tulkens, Botoucharova, Myjer and Ziemele;

(b) separate opinion of Judge Borrego Borrego;

(c) dissenting opinion of Judge Jebens.

C.L.R.
V.B.

JOINT SEPARATE OPINION OF JUDGES ROZAKIS, TULKENS, BOTOUCHAROVA, MYJER AND ZIEMELE

Although we agree with the outcome of the case, we disagree with the reasoning of the majority in reaching that conclusion.

1. The Court has consistently held that the fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3 (see *Pantea v. Romania*, no. 33343/96, § 231, ECHR 2003-VI). The judicial officer must offer the requisite guarantees of independence from the executive and the parties and must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention (see, for example, *Assenov and Others v. Bulgaria*, 28 October 1998, § 146, *Reports of Judgments and Decisions* 1998-VIII: "... the officer must have the power to make a binding order for the detainee's release"; *Nikolova v. Bulgaria* [GC], no. 31195/96, § 49, ECHR 1999-II; *H.B. v. Switzerland*, no. 26899/95, § 55, 5 April 2001; *Shishkov v. Bulgaria*, no. 38822/97, § 53, ECHR 2003-I; and *Rahbar-Pagard v. Bulgaria*, nos. 45466/99 and 29903/02, § 49, 6 April 2006).

As regards the scope of that review, there is a long-established line of case-law to the effect that:

> "... under Article 5 § 3, there is both a procedural and a substantive requirement. The procedural requirement places the 'officer' under the obligation of hearing himself the individual brought before him (see, *mutatis mutandis*, *Winterwerp* [*v. the Netherlands*, 24 October 1979], p. 24, § 60, [Series A no. 33]); the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons (... *Ireland v. the United Kingdom*, [18 January 1978], p. 76, § 199, [Series A no. 25])." (see *Schiesser v. Switzerland*, 4 December 1979, § 31, Series A no. 34)

More recently, this has been expressed by saying that "[i]n other words, Article 5 § 3 requires the judicial officer to consider whether detention is justified" (see *Pantea*, cited above, § 231 *in fine*), that is, "to consider the merits of the detention" (see *T.W. v. Malta* [GC], no. 25644/94, § 41, 29 April 1999, and *Aquilina v. Malta* [GC], no. 25642/99, § 47, ECHR 1999-III).

These statements are clearly wide enough to encompass considerations not only of lawfulness and the existence of reasonable suspicion as required by Article 5 § 1 (c) but also whether or not continued detention is justified or necessary in the circumstances of the individual case.

2. This reading is supported by *S.B.C. v. the United Kingdom* (no. 39360/98, 19 June 2001), which provides persuasive authority for finding that the first obligatory appearance before a judicial officer must encompass bail. The case concerned the Criminal Justice and Public Order

Act 1994, which provided that persons charged with a serious offence such as murder, manslaughter or rape who had previously been convicted of a similar offence should not be granted bail under any circumstances. This removal of judicial control from the moment of arrest was found to violate Article 5 § 3 of the Convention.

Further, the Court's case-law which deals with the length of pre-trial detention generally underlines the presumption in favour of release. As first held in *Neumeister v. Austria* (27 June 1968, p. 37, § 4, Series A no. 8), the second sentence of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable (see *Jablonski v. Poland*, no. 33492/96, § 83, 21 December 2000). Continued detention can therefore be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweigh the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, §§ 110 et seq., ECHR 2000-XI).

3. It is true that the Court has not had previous occasion to consider the very early stage of pre-trial detention in the context of a bail request, presumably as, in the vast majority of cases, the existence of suspicion and possible risk to the ongoing investigation has provided a ground for detention and any unavailability of bail has not been seriously challengeable. Nonetheless, it cannot be in doubt that there must be an opportunity for judicial consideration of release pending trial at even this stage as there will be cases where the nature of the offence, the state of the investigation or the personal circumstances of the suspected offender are such as to render (further) detention unreasonable or unsupported by relevant or sufficient grounds.

The interpretation of the Convention, and more particularly of Article 5 § 3, to include the obligation on a judge to release a detained person either of his or her own motion or at the detained person's request serves better the fundamental purpose of protecting individual liberty. Interpreting the third paragraph in a restrictive manner which would deny the judge acting under that paragraph the power to release a person whenever the circumstances allowed would frustrate one of its main safeguards, namely that of reducing to a minimum undue restrictions on liberty through the promptness and speediness of judicial control.

4. Accordingly, in order to ensure that the right guaranteed is practical and effective, not theoretical and illusory (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37, which first laid down this guiding principle of interpretation of the Convention), the judicial officer who conducts the first

automatic review of lawfulness and the existence of a ground for detention must have *full jurisdiction*, that is, must also have the competence to consider release, with or without conditions.

While the question of release pending trial is therefore a distinct and separate matter which logically only becomes relevant after the establishment of the existence of a lawful basis and a Convention ground for detention, it must also fall within the scope of the first automatic appearance before a judicial officer. So, in our view, the judge before whom the arrested individual appears must in principle not only have the power to order an accused's release when the detention is not lawful or when there is no – or no longer any – reasonable suspicion, but also when he considers that further deprivation of liberty is, for other reasons, no longer justified or necessary.

5. In our opinion the reasoning of the majority in concluding that no automatic bail review is required on the first appearance before a judicial officer is not in conformity with the very purpose of Article 5 § 3 of the Convention: to protect, through prompt judicial control, an individual who has been arrested or detained on suspicion of having committed a criminal offence and to have him immediately released once it is established that there is no – or no longer any – reasonable suspicion justifying the arrest or further deprivation of his liberty, or that there are no – or no longer any – grounds justifying or necessitating the further deprivation of his liberty, or that these grounds can also be addressed by less far-reaching measures than deprivation of liberty, such as release on bail. Or, to put it in other words, the majority place insufficient emphasis on the principle laid down in Article 5 § 1 read in conjunction with Article 5 § 3: at the pre-trial stage an arrested person has the right to prompt and full judicial control and the right to be set free immediately unless there are (still) sufficient grounds to keep him in custody.

6. In the present case, the applicant – who is a young offender – was arrested on 6 January 2001 at 10 p.m. on suspicion of having carried out a robbery of a petrol station. It should be noted that the offence he committed was without any link to terrorist activity. He was charged at 12.37 p.m. the next day. On 8 January 2001 at 10 a.m., the applicant made his first appearance in the magistrates' court, which remanded him in custody. It is not in dispute that the magistrate had the competence to examine the lawfulness of the arrest and detention and whether there were reasonable grounds for suspicion and, moreover, that he had the power to order release if those requirements were not complied with. However, he did not have the power to order release *on bail*, even though there was no police or other objection to such a course, with the result that the applicant was, without any justification, retained in custody. In that respect, therefore, the applicant's appearance before the magistrate did not comply with the requirements of Article 5 § 3 of the Convention.

However, it is nonetheless the case that, following his application to the High Court, which was heard on 9 January 2001, the applicant was released. As this occurred less than 36 hours after his arrest, within the maximum period of four days laid down in *Brogan and Others v. the United Kingdom* (29 November 1988, Series A no. 145-B), the applicant cannot complain that there was a failure to provide him with the requisite judicial control of his arrest and detention. In the circumstances, the requirements of *promptness* and *speediness*, which are, in our view, of paramount importance, have been satisfied. This is why, accordingly, we came to the conclusion that, in this case, there has been no violation of Article 5 § 3 of the Convention.

SEPARATE OPINION OF JUDGE BORREGO BORREGO

(Translation)

I voted in favour of finding that there had been no violation. However, in my opinion this application should have been declared inadmissible as being manifestly ill-founded (Article 35 § 3 of the Convention).

Was it open to the Grand Chamber to declare the application inadmissible? Without a shadow of a doubt. In the judgment in *Azinas v. Cyprus* ([GC], no. 56679/00, § 32, ECHR 2004-III), for instance, the Grand Chamber held that "the Court [could] reconsider a decision to declare an application admissible ...". More recently, in *Blečić v. Croatia* ([GC], no. 59532/00, § 65, ECHR 2006-III) the Grand Chamber reaffirmed the possibility of "reconsider[ing] a decision to declare an application admissible ... at any stage of the proceedings" in accordance with Article 35 § 4 of the Convention.

The composition of the Grand Chamber which examined the present case was determined by Rule 24 § 2 of the Rules of Court. Accordingly, the members of the Chamber that had relinquished jurisdiction after declaring the application admissible were also members of the Grand Chamber. However, where a case is referred to the Grand Chamber under the procedure laid down in Article 43 of the Convention, the Grand Chamber, as provided in Rule 24 § 2 (d), does not, save for the exceptions listed in the Rule, include any of the judges who sat in the original Chamber that delivered the judgment or ruled on the admissibility of the application.

It would therefore seem easier to reconsider the admissibility of an application where it is referred to the Grand Chamber under Article 43 of the Convention than where it is referred under Article 30, since in the latter case the Grand Chamber also includes the members of the Chamber that relinquished jurisdiction after the admissibility stage. However, this difference in the composition of the Grand Chamber according to the origin of its intervention (which I might perhaps describe as illogical) does not preclude the Court from declaring an application inadmissible "at any stage of the proceedings".

Was this application manifestly inadmissible? In my opinion, it was.

As is pointed out in paragraph 47 of the judgment, in *Brogan and Others v. the United Kingdom* (29 November 1988, Series A no. 145-B) the Court identified a maximum period of four days for detention without appearance before a judge. In the present case, less than three days elapsed between the applicant's detention (on a Saturday evening) and his release by order of a judge. In general, where the period in question is so short, as in this instance, the application is declared inadmissible by a Committee.

However, in the present case the Grand Chamber decided to examine whether the magistrate before whom the applicant first appeared had the power to order his release.

I should like to make two points here. Firstly, the Court "is not required to examine the impugned legislation *in abstracto*, but must confine itself to the circumstances of the case before it" (see *Brogan and Others*, cited above, § 53). In my view, the judgment in the present case is precisely an example of a review *in abstracto* of domestic law.

Secondly, in a judgment the only reasoning that has the force of *res judicata* is the *ratio decidendi*. In the present case it is clear that the *ratio decidendi* for the finding that there had been no violation was the short period between the applicant's arrest and his release on bail. Even if the rest of the judgment is important, not least because it is a Grand Chamber judgment, anything that does not constitute the *ratio decidendi* is merely an expression of an opinion and becomes superfluous. Similarly, while I agree about the importance of procedure, I consider that repeatedly magnifying the procedural aspect at all times and for all purposes creates the risk of turning procedure into a new golden calf to be venerated. That, in my view, would be taking things too far.

I do not think that it would be easy to explain to the general public, to the European citizen, that the Grand Chamber of the European Court of Human Rights has devoted all its attention and time to the examination of a complaint submitted by an applicant who was found guilty of robbery and was released on bail three days after being arrested. Hence my separate opinion.

DISSENTING OPINION OF JUDGE JEBENS

I respectfully disagree with the majority as to the scope of the review provided for in the first limb of Article 5 § 3, and also with the minority when it comes to the consequences of the fact that the sitting magistrate did not have the power to order release on bail. I will explain this in the following paragraphs, first by outlining the requirements in Article 5 § 3, then by highlighting some factual elements, and finally by discussing whether there has been a violation.

Article 5 § 3 describes the initial review of detention in criminal cases in its first limb, by stating that the "judge or other officer" before whom the arrested person is to be "brought promptly" must be "authorised by law to exercise judicial power". The wording implies that the judicial officer must have the power to order release, but does not in itself define the scope of the review. However, the Court has sought to clarify this in its case-law. It has stated that the judicial officer must review "the circumstances militating for or against detention" (see *Schiesser v. Switzerland*, 4 December 1979, § 31, Series A no. 34); "consider the merits of the detention" (see *T.W. v. Malta* [GC], no. 25644/94, § 41, 29 April 1999, and *Aquilina v. Malta* [GC], no. 25642/94, § 47, ECHR 1999-III); and, in a recent judgment, "consider whether detention is justified" (see *Pantea v. Romania*, no. 33343/96, § 231, ECHR 2003-VI). In my opinion, this strongly indicates that the judicial officer cannot limit the scope of the review to the lawfulness of the detention and the question of reasonable suspicion. Moreover, such a limited scope would not be sufficient in a great number of cases, where the question in issue is not primarily whether there exists a reasonable suspicion, but whether detention is justified because of the danger of absconding or collusion, or the need to preserve evidence, prevent crime or maintain public order. Circumstances which are related to the person in question, such as very young or old age, illness or frailness, must also be considered. A review which is limited to the lawfulness of the detention and the question of reasonable suspicion could therefore, in my opinion, easily lead to unjustified detentions.

It follows from this that the initial review must be broad and automatic. However, release on bail cannot be ordered by the judicial officer unless it is an actual and realistic alternative in the circumstances of the case. Therefore, release on bail must be subject to a submission by the person detained or the defence lawyer. Accordingly, it cannot normally be included in the automatic review.

In the present case, however, the applicant had instructed his solicitors to apply for release on bail, and a request to that effect was actually put before the magistrate. Furthermore, the police officer who appeared in the magistrates' court had no objection to bail, provided that proper conditions

were set. The applicant's release on bail was nevertheless refused because the resident magistrate was not empowered to grant it, on account of the special rules applicable for scheduled offences in Northern Ireland.

The fact that release on bail was not considered by the judicial officer before whom the applicant was brought implies that the applicant was deprived of his right to a full review, which is secured in the first limb of Article 5 § 3. It remains to be discussed, however, whether the fact that the applicant was released one day later, by a decision of the High Court, remedied this deficiency.

The minority have taken the view that the applicant cannot complain that there was a failure to provide him with the requisite judicial control of his arrest and detention because he was released within the maximum period of four days laid down in *Brogan and Others v. the United Kingdom* (29 November 1988, § 62, Series A no. 145-B). In my opinion, this is not relevant, for the following reasons.

The first limb of Article 5 § 3 contains two rights for persons who are detained on reasonable suspicion of having committed a criminal offence. The first requires that the person be "brought promptly before a judge or other officer", while the second requires that the judicial officer be "authorised by law to exercise judicial power". These rights are linked to each other, notably because they refer to the same judicial officer. Still, they are separate rights in that they refer respectively to the requirements of promptness and automaticity and the thoroughness of the initial judicial control. Deficiencies as to one of the rights can therefore not be remedied by securing the other right.

Turning to the present case, it is undisputed that the applicant was brought before the magistrates' court within the time-limit permitted by the first limb of Article 5 § 3. He was, however, denied release on bail by the sitting resident magistrate, notably not because of the merits of the case, but because the resident magistrate did not have that power. In order to be released on bail the applicant had to appeal to the High Court. He was, in other words, obliged to invoke the right to continuous judicial supervision, which is secured in Article 5 § 4 and applies to all deprivations of liberty, in order to obtain a decision as to his release on bail.

Neither the fact that the High Court granted the applicant release on bail, following his appeal, nor the fact that the decision was given one day after the applicant had appeared in the magistrates' court can therefore in my opinion remedy the deficiency of the initial judicial review. I accordingly consider that there has been a violation of Article 5 § 3 of the Convention.