



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

COURT (GRAND CHAMBER)

CASE OF JOHN MURRAY v. THE UNITED KINGDOM

(Application no. 18731/91)

JUDGMENT

STRASBOURG

8 February 1996

In the case of John Murray v. the United Kingdom ¹,

The European Court of Human Rights, sitting, pursuant to Rule 51 of Rules of Court A ², as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr R. BERNHARDT,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mr B. WALSH,

Mr N. VALTICOS,

Mr S.K. MARTENS,

Mrs E. PALM,

Mr I. FOIGHEL,

Mr R. PEKKANEN,

Mr A.N. LOIZOU,

Mr F. BIGI,

Sir John FREELAND,

Mr M.A. LOPES ROCHA,

Mr L. WILDHABER,

Mr J. MAKARCZYK,

Mr D. GOTCHEV,

Mr K. JUNGWIERT,

Mr U. LOHMUS,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 28 September 1995 and 25 January 1996,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 September 1994 and by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") on 11 October 1994, within the three-month period laid

¹ The case is numbered 41/1994/488/570. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

² Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 18731/91) against the United Kingdom lodged with the Commission under Article 25 (art. 25) by Mr John Murray, a British citizen, on 16 August 1991.

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 the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 2 and Article 14 (art. 6-1, art. 6-2, art. 14) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 September 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr R. Macdonald, Mr N. Valticos, Mr S.K. Martens, Mrs E. Palm, Mr M.A. Lopes Rocha and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Mr Macdonald, who was unable to take part in the case, was subsequently replaced by Mr U. Lohmus (Rule 22 para. 1).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence on 4 November 1994, the Registrar received the Government's memorial on 24 February 1995 and the applicant's memorial on 27 February. The Secretary to the Commission subsequently indicated that the Delegate would submit his observations at the hearing.

5. On 26 January 1995, the President had granted, under Rule 37 para. 2, leave to Amnesty International and Justice to submit written comments in the case. Leave was also granted, on the same date, to the Committee on the Administration of Justice, Liberty and British-Irish Rights Watch to file a joint written submission and on 28 April to the Northern Ireland Standing Advisory Commission on Human Rights. Their respective comments were received on 1, 3 and 10 April and 11 May.

6. On 17 May 1995, the Government filed written comments on the submission of Amnesty International, Justice and Liberty and Others.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 June 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J.J. RANKIN, Legal Counsellor, Foreign and
Commonwealth Office, *Agent,*

The Rt Hon. Sir Nicholas LYELL QC, Attorney-General for
England and Wales and Attorney-General for
Northern Ireland,

Mr P. COGHLIN QC, Mr J. Eadie, *Counsel,*
Mr C. WHOMERSLEY, Legal Secretariat to the
Law Officers,

Mr O. PAULIN, Crown Solicitors Office, Mr R. Heaton,
Home Office,

Mr A. WHYSALL, Northern Ireland Office, *Advisers;*

(b) for the Commission

Mr H. DANELIUS, *Delegate;*

(c) for the applicant

Mr S. TREACY, Barrister-at-Law, *Counsel,*

Mr K. WINTERS, of Madden & Finucane, *Solicitor,*

Mr A. CAMPBELL, *Adviser*

The Court heard addresses by Mr Danelius, Mr Treacy and Sir Nicholas Lyell.

8. On 23 June 1995, the Chamber decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of a Grand Chamber. By virtue of Rule 51 para. 2 (a) and (b) the President and the Vice-President of the Court (Mr Ryssdal and Mr Bernhardt) as well as the other members of the original Chamber are members of the Grand Chamber. On 13 July 1995 the names of the additional judges were drawn by lot by the President in the presence of the Registrar, namely Mr F. Matscher, Mr B. Walsh, Mr I. Foighel, Mr R. Pekkanen, Mr A.N. Loizou, Mr F. Bigi, Mr L. Wildhaber, Mr J. Makarczyk and Mr D. Gotchev.

9. With the agreement of the President, the applicant submitted a detailed bill of costs on 28 June 1995. The Government forwarded their comments on this document on 21 July 1995.

10. A further document entitled "Comments from the [United Nations] Human Rights Committee" was submitted by Liberty and Others on 1 August 1995 and by the applicant on 13 August. This was communicated to the Government and the Commission for their information on 9 August and was admitted to the case file by the Grand Chamber on 28 September 1995.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. The applicant's arrest and detention

11. The applicant was arrested by police officers at 5.40 p.m. on 7 January 1990 under section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989. Pursuant to Article 3 of the Criminal Evidence (Northern Ireland) Order 1988 ("the Order") (see paragraph 27 below), he was cautioned by the police in the following terms:

"You do not have to say anything unless you wish to do so but I must warn you that if you fail to mention any fact which you rely on in your defence in court, your failure to take this opportunity to mention it may be treated in court as supporting any relevant evidence against you. If you do wish to say anything, what you say may be given in evidence."

In response to the police caution the applicant stated that he had nothing to say.

12. On arrival at Castlereagh Police Office at about 7 p.m., he refused to give his personal details to the officer in charge of the custody record. At 7.05 p.m. he was informed of his right to have a friend or relative notified of his detention and indicated that he did not require anyone to be so notified. At 7.06 p.m. he indicated that he wished to consult with a solicitor. At 7.30 p.m. his access to a solicitor was delayed on the authority of a detective superintendent pursuant to section 15 (1) of the Northern Ireland (Emergency Provisions) Act 1987 ("the 1987 Act"). The delay was authorised for a period of 48 hours from the time of detention (i.e. from 5.40 p.m. on 7 January) on the basis that the detective superintendent had reasonable grounds to believe that the exercise of the right of access would, *inter alia*, interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent an act of terrorism (see paragraph 33 below).

13. At 9.27 p.m. on 7 January a police constable cautioned the applicant pursuant to Article 6 of the Order, *inter alia*, requesting him to account for his presence at the house where he was arrested. He was warned that if he failed or refused to do so, a court, judge or jury might draw such inference from his failure or refusal as appears proper. He was also served with a written copy of Article 6 of the Order (see paragraph 27 below).

In reply to this caution the applicant stated: "Nothing to say."

14. At 10.40 p.m. he was reminded of his right to have a friend or relative notified of his detention and stated that he did not want anyone notified. He was also informed that his right of access to a solicitor had

been delayed. He then requested consultation with a different firm of solicitors. A police inspector reviewed the reasons for the delay and concluded that the reasons remained valid.

15. The applicant was interviewed by police detectives at Castlereagh Police Office on twelve occasions during 8 and 9 January. In total he was interviewed for 21 hours and 39 minutes. At the commencement of these interviews he was either cautioned pursuant to Article 3 of the Order or reminded of the terms of the caution.

16. During the first ten interviews on 8 and 9 January 1990 the applicant made no reply to any questions put to him. He was able to see his solicitor for the first time at 6.33 p.m. on 9 January. At 7.10 p.m. he was interviewed again and reminded of the Article 3 caution. He replied: "I have been advised by my solicitor not to answer any of your questions." A final interview, during which the applicant said nothing, took place between 9.40 p.m. and 11.45 p.m. on 9 January.

His solicitor was not permitted to be present at any of these interviews.

B. The trial proceedings

17. In May 1991 the applicant was tried by a single judge, the Lord Chief Justice of Northern Ireland, sitting without a jury, for the offences of conspiracy to murder, the unlawful imprisonment, with seven other people, of a certain Mr L. and of belonging to a proscribed organisation, the Provisional Irish Republican Army (IRA).

18. According to the Crown, Mr L. had been a member of the IRA who had been providing information about their activities to the Royal Ulster Constabulary. On discovering that Mr L. was an informer, the IRA tricked him into visiting a house in Belfast on 5 January 1990. He was falsely imprisoned in one of the rear bedrooms of the house and interrogated by the IRA until the arrival of the police and the army at the house on 7 January 1990. It was also alleged by the Crown that there was a conspiracy to murder Mr L. as punishment for being a police informer.

19. In the course of the trial, evidence was given that when the police entered the house on 7 January, the applicant was seen by a police constable coming down a flight of stairs wearing a raincoat over his clothes and was arrested in the hall of the house. Mr L. testified that he was forced under threat of being killed to make a taped confession to his captors that he was an informer. He further said that on the evening of 7 January he had heard scurrying and had been told to take off his blindfold, that he had done so and had opened the spare bedroom door. He had then seen the applicant standing at the stairs. The applicant had told him that the police were at the door and to go downstairs and watch television. While he was talking to him the applicant was pulling tape out of a cassette. On a search of the house by the police items of clothing of Mr L. were subsequently found in

the spare bedroom, whilst a tangled tape was discovered in the upstairs bathroom. The salvaged portions of the tape revealed a confession by Mr L. that he had agreed to work for the police and had been paid for so doing. At no time, either on his arrest or during the trial proceedings, did the applicant give any explanation for his presence in the house.

20. At the close of the prosecution case the trial judge, acting in accordance with Article 4 of the Order, called upon each of the eight accused to give evidence in their own defence. The trial judge informed them *inter alia*:

"I am also required by law to tell you that if you refuse to come into the witness box to be sworn or if, after having been sworn, you refuse, without good reason, to answer any question, then the court in deciding whether you are guilty or not guilty may take into account against you to the extent that it considers proper your refusal to give evidence or to answer any questions."

21. Acting on the advice of his solicitor and counsel, the applicant chose not to give any evidence. No witnesses were called on his behalf. Counsel, with support from the evidence of a co-accused, D.M., submitted, *inter alia*, that the applicant's presence in the house just before the police arrived was recent and innocent.

22. On 8 May 1991 the applicant was found guilty of the offence of aiding and abetting the unlawful imprisonment of Mr L. and sentenced to eight years' imprisonment. He was acquitted on the remaining charges.

23. The trial judge rejected D.M.'s evidence (see paragraph 21 above) as untruthful. He considered that

"the surrounding facts, including the finding of the tangled tape in the bathroom with the broken cassette case, and the fact that, on entering the house some appreciable time after they arrived outside it and some appreciable time after they first knocked on the door, the police found Murray coming down the stairs at the time when all the other occupants of the house were in the living room, strongly confirm L's evidence that after the police knocked on the door Murray was upstairs pulling the tape out of the cassette".

24. In rejecting a submission by the applicant that Articles 4 and 6 of the Order did not operate to permit the court to draw an adverse inference against him, where, at the end of the Crown case, there was a reasonably plausible explanation for the accused's conduct consistent with his innocence, the trial judge stated as follows:

"There can be debate as to the extent to which, before the making of the Criminal Evidence (Northern Ireland) Order 1988, a tribunal of fact in this jurisdiction was entitled to draw an adverse inference against an accused because he failed to give evidence on his own behalf, or to account for his presence at a particular place or to mention particular facts when questioned by the police. But I consider that the purpose of Article 4 and of Articles 3 and 6 of the 1988 Order was to make it clear that, whatever was the effect of the previous legal rules, a judge trying a criminal case without a jury, or a jury in a criminal case, was entitled to apply common sense in drawing inferences against the accused in the circumstances specified in Article 4, and in Articles 3 and 6 ...

... I think it is clear that the purpose of Article 4 is to permit the tribunal of fact to draw such inferences against the accused from his failure to give evidence in his own defence as common sense requires.

The inference which it is proper to draw against an accused will vary from case to case depending on the particular circumstances of the case and, of course, the failure of the accused to give evidence on his own behalf does not in itself indicate guilt. Nor does the failure to mention particular facts when questioned or the failure to account for presence in a particular place in itself indicate guilt. But I consider that the intendment of ... Article 4 and Article 6 is to enable the tribunal of fact to exercise ordinary common sense in drawing inferences against an accused ...

Therefore when I come to consider the case against the accused ... I propose to draw such inferences against [him] under Article 4 and under Article 6 as ordinary common sense dictates."

25. In concluding that the applicant was guilty of the offence of aiding and abetting false imprisonment, the trial judge drew adverse inferences against the applicant under both Articles 4 and 6 of the Order. The judge stated that in the particular circumstances of the case he did not propose to draw inferences against the applicant under Article 3 of the Order. He stated furthermore:

"I accept the submissions of counsel for the accused that as demonstrated by his replies in cross-examination, L. is a man who is fully prepared to lie on oath to advance his own interests and is a man of no moral worth whatever. I, therefore, accept the further submissions of counsel for the accused that, unless his evidence were confirmed by other evidence, a court should not act on his evidence, particularly against accused persons in a criminal trial ...

I now turn to consider the fifth count charging the false imprisonment of L. against the accused [the applicant]. For the reasons which I have already stated, I am satisfied that, as L. described in his evidence, [the applicant] was at the top of the stairs pulling the tape out of the cassette after the police arrived outside the house.

I am also satisfied, for the reasons which I have already stated, that [the applicant] was in the house for longer than the short period described by his co-accused, [D.M.]. I am further satisfied that it is an irresistible inference that while he was in the house [the applicant] was in contact with the men holding L. captive and that he knew that L. was being held a captive. I also draw very strong inferences against [the applicant] under Article 6 of the 1988 Order by reason of his failure to give an account of his presence in the house when cautioned by the police on the evening of 7 January 1990 under Article 6, and I also draw very strong inferences against [the applicant] under Article 4 of the 1988 Order by reason of his refusal to give evidence in his own defence when called upon by the Court to do so.

Therefore I find [the applicant] guilty of aiding and abetting the false imprisonment of L. because, knowing he was being held captive in the house, he was present in the house concurring in L. being falsely imprisoned. As Vaughan J. stated in *R. v. Young* ... [the applicant] was 'near enough to give [his] aid and to give [his] countenance and assistance'."

C. The appeal proceedings

26. The applicant appealed against conviction and sentence to the Court of Appeal in Northern Ireland. In a judgment of 7 July 1992, the court dismissed the applicant's appeal holding, *inter alia*:

"... to suggest, with respect, that [the applicant] went into the house just as the police were arriving outside, immediately went upstairs, attempted to destroy a tape and then walked downstairs, and that this was the sum of his time and activity in the house defies common sense

...

We are satisfied that it can reasonably be inferred that [the applicant] knew before he came to the house that [L.] was being held captive there. With this knowledge he assisted in the false imprisonment by directing the captive from the bedroom where he had been held and by giving him the directions and admonition [L.] said. Accordingly [the applicant] aided and abetted the crime. We do not accept that [L.] would have been free to leave the house, if the police and army had been taken in by the pretence of the television watching and had departed without making any arrests. We have no doubt that [L.] remained under restraint in the living room when the police were there and if they had left, he would have remained a prisoner to await the fate that his captors would determine.

We consider that there was a formidable case against [the applicant]. He was the only one of the accused whom [L.] observed and identified as playing a positive part in the activities touching his captivity. [L.]'s evidence therefore called for an answer. No answer was forthcoming of any kind to the police or throughout the length of his trial. It was inevitable that the judge would draw 'very strong inferences' against him.

The Crown case deeply implicated [the applicant] in the false imprisonment of [L.]."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal Evidence (Northern Ireland) Order 1988

27. The 1988 Order includes the following provisions:

Article 2 (4) and (7)

"(4) A person shall not be committed for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in Article 3 (2), 4 (4), 5 (2) or 6 (2).

...

(7) Nothing in this Order prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion."

Article 3

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

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

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

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, paragraph (2) applies.

(2) Where this paragraph applies

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

(b)

...

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

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

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

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

..."

Article 4

"Accused to be called upon to give evidence at trial

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

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

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to be called upon to give evidence; but paragraph (2) does not apply if, before any evidence is called for the defence, the accused or counsel or a solicitor representing him informs the court that the accused will give evidence.

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

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

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

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

(ii) having been sworn, without good cause he refuses to answer any question; and thereupon the court shall call upon the accused to give evidence.

(3) If the accused

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

or

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

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

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

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

(5) This Article does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn.

..."

Article 6

"Inferences from failure or refusal to account for presence at a particular place

(1) Where

(a) a person arrested by a constable was found by him at a place or about the time the offence for which he was arrested is alleged to have been committed, and

(b) the constable reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence, and

(c) the constable informs the person that he so believes, and requests him to account for that presence, and

(d) the person fails or refuses to do so, then if, in any proceedings against the person for the offence, evidence of those matters is given, paragraph (2) applies.

(2) Where this paragraph applies

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

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

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

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

(3) Paragraphs (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in paragraph (1) (c) what the effect of this Article would be if he failed or refused to do so.

(4) This Article does not preclude the drawing of any inference from the failure or refusal of a person to account for his presence at a place which could properly be drawn apart from this Article.

..."

28. In the case of *R. v. Kevin Sean Murray* (sub nom. *Murray v. Director of Public Prosecutions*), the House of Lords considered the effect of Article 4 of the Order ([1993] 97 Criminal Appeal Reports 151). In the leading judgment of the House of Lords, Lord Slynn stated that:

"- at common law there was a divergence of view as to whether, and if so, when and in what manner a judge might comment on the failure of the accused to give evidence;

- the Order intended to change the law and practice and to lay down new rules as to the comments which could be made and the inferences which could be drawn when the accused failed to give evidence at his trial;

- under the Order the accused could not be compelled to give evidence but had to risk the consequences if he did not do so; and

- the inferences which might be drawn from the accused's failure to give evidence in his own defence included in a proper case the drawing of an inference that the accused was guilty of the offences with which he was charged."

29. He added:

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

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

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

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

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

30. Lord Mustill in *R. v. Kevin Sean Murray* (cited above) stated that the expression "a prima facie case"

"was intended to denote a case which is strong enough to go to a jury - i.e. a case consisting of direct evidence which, if believed and combined with legitimate inferences based upon it, could lead a properly directed jury to be satisfied beyond reasonable doubt ... that each of the essential elements of the offence is proved".

31. Even if a prima facie case is established, the trial judge has a discretion whether or not to draw inferences on the facts of the particular case. In the present case, the Court of Appeal indicated that if a judge accepted that an accused did not understand the warning given in the caution required by Article 6 or if he had doubts about it "we are confident that he would not activate Article 6 against him".

32. In *R. v. Director of Serious Fraud Office, ex parte Smith* [1992] 3 Weekly Law Reports 66, Lord Mustill stated that it was necessary to analyse which aspect of the right to silence is involved in any particular situation, because

"... In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute."

Amongst the group of immunities which were covered by the expression "right to silence" Lord Mustill identified the following:

(1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.

(2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

(3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.

(4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

(5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

(6) A specific immunity ..., possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial."

B. Provisions governing access to a solicitor

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

"15. Right of access to legal advice

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

(2) A person shall be informed of the right conferred on him by subsection (1) as soon as practicable after he has become a person to whom the subsection applies.

(3) A request made by a person under subsection (1), and the time at which it is made, shall be recorded in writing unless it is made by him while at a court and being charged with an offence.

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

...

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

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

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

i. to prevent an act of terrorism, or

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

34. The delay must be authorised by a police officer of at least the rank of superintendent (section 15, subsection (5) (a)) and the detained person must be told the reason for the delay (subsection (9) (a)). The maximum delay is 48 hours.

35. The courts in Northern Ireland have taken the view that the provisions of the 1988 Order should not be read subject to section 15 of the 1987 Act above. In the case of *R. v. Dermot Quinn* (judgment of the Belfast Crown Court of 23 December 1991), the trial judge rejected a submission to the effect that an adverse inference under Article 3 of the 1988 Order should not be drawn where the accused had asked for access to his solicitor but been interviewed by the police before his solicitor arrived to advise him. He noted that the 1988 Order had come into force after section 15 of the 1987 Act and considered that Parliament had not intended that an inference dictated by common sense which was permitted by Article 3 of the 1988 Order should not be drawn because of the right to access to legal advice given by section 15.

In its judgment of 17 September 1993, the Court of Appeal in Northern Ireland upheld the trial judge's ruling, finding no unfairness in the circumstances of the case in drawing an adverse inference in respect of the accused's failure to respond to questions by the police before the receipt of legal advice from his solicitor. The court commented that a breach of section 15 might in certain circumstances allow the trial judge in his discretion to refuse to draw an adverse inference under Article 3 of the 1988 Order.

PROCEEDINGS BEFORE THE COMMISSION

36. The applicant lodged his application (no. 18731/91) with the Commission on 16 August 1991. He complained, under Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention, that he was deprived of the right to silence in the criminal proceedings against him. He further complained, under Article 6 para. 3 (c) (art. 6-3-c), of his lack of access to a solicitor during his detention and the fact that the practice concerning access to solicitors differs between Northern Ireland and England and Wales in violation of Article 14 (art. 14) of the Convention.

37. The Commission declared the application admissible on 18 January 1994. In its report of 27 June 1994 (Article 31) (art. 31), the Commission expressed the opinion that there had been no violation of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) (fifteen votes to two), that there had been a violation of Article 6 para. 1 in conjunction with Article 6 para. 3 (c) (art. 6-1+art. 6-3-c) (thirteen votes to four) and that it was not necessary to examine whether there had been a violation of Article 14 in conjunction with Article 6 (art. 14+art.6) (fourteen votes to three).

The full text of the Commission's opinion and of the five separate opinions contained in the report is reproduced as an annex to this judgment³.

FINAL SUBMISSIONS TO THE COURT

38. The Government invited the Court to find that the applicant's complaints of a breach of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) and of Article 6 paras. 1 and 3 (c) read in conjunction with Article 14 (art. 6-1, art. 6-3-c+art. 14) disclose no breach of the Convention.

39. The applicant submitted that the provisions of the 1988 Order which permit inferences to be drawn from the failure of the accused to answer police questions or to give evidence and its use in determining the guilt of the applicant, violated Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention. Secondly, that the drawing of adverse inferences and the restrictions which the Order imposed on the conduct of the defence also violated those provisions (art. 6-1, art. 6-2). Thirdly, he invited the Court to hold that the denial of access to a solicitor while in police custody amounted to a violation of Article 6 para. 3 (c) (art. 6-3-c) of the Convention.

³ For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions - 1996), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 (art. 6) OF THE CONVENTION

40. The applicant alleged that there had been a violation of the right to silence and the right not to incriminate oneself contrary to Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention. He further complained that he was denied access to his solicitor in violation of Article 6 para. 1 in conjunction with paragraph 3 (c) (art. 6-1+art. 6-3-c) of the Convention. The relevant provisions (art. 6-1, art. 6-3-c) provide as follows:

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

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

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

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

The Court will examine each of these allegations in turn.

A. Article 6 paras. 1 and 2 (art. 6-1, art. 6-2): right to silence

41. In the submission of the applicant, the drawing of incriminating inferences against him under the Criminal Evidence (Northern Ireland) Order 1988 ("the Order") violated Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention. It amounted to an infringement of the right to silence, the right not to incriminate oneself and the principle that the prosecution bear the burden of proving the case without assistance from the accused.

He contended that a first, and most obvious element of the right to silence is the right to remain silent in the face of police questioning and not to have to testify against oneself at trial. In his submission, these have always been essential and fundamental elements of the British criminal justice system. Moreover the Commission in *Saunders v. the United Kingdom* (report of the Commission of 10 May 1994, paras. 71-73) and the Court in *Funke v. France* (judgment of 25 February 1993, Series A no. 256-A, p. 22, para. 44) have accepted that they are an inherent part of the right to

a fair hearing under Article 6 (art. 6). In his view these are absolute rights which an accused is entitled to enjoy without restriction.

A second, equally essential element of the right to silence was that the exercise of the right by an accused would not be used as evidence against him in his trial. However, the trial judge drew very strong inferences, under Articles 4 and 6 of the Order, from his decision to remain silent under police questioning and during the trial. Indeed, it was clear from the trial judge's remarks and from the judgment of the Court of Appeal in his case that the inferences were an integral part of his decision to find him guilty.

Accordingly, he was severely and doubly penalised for choosing to remain silent: once for his silence under police interrogation and once for his failure to testify during the trial. To use against him silence under police questioning and his refusal to testify during trial amounted to subverting the presumption of innocence and the onus of proof resulting from that presumption: it is for the prosecution to prove the accused's guilt without any assistance from the latter being required.

42. Amnesty International submitted that permitting adverse inferences to be drawn from the silence of the accused was an effective means of compulsion which shifted the burden of proof from the prosecution to the accused and was inconsistent with the right not to be compelled to testify against oneself or to confess guilt because the accused is left with no reasonable choice between silence - which will be taken as testimony against oneself - and testifying. It pointed out that Article 14 (3) (g) of the United Nations International Covenant on Civil and Political Rights explicitly provides that an accused shall "not be compelled to testify against himself or to confess guilt". Reference was also made to Rule 42 (A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia which expressly provides that a suspect has the right to remain silent and to the Draft Statute for an International Criminal Court, submitted to the United Nations General Assembly by the International Law Commission, which in Draft Article 26 (6) (a) (i) qualifies the right to silence with the words "without such silence being a consideration in the determination of guilt or innocence".

Liberty and Others made similar submissions. Justice stressed that such encroachments on the right to silence increased the risk of miscarriages of justice.

The Northern Ireland Standing Advisory Commission on Human Rights, for its part, considered that the right to silence was not an absolute right, but rather a safeguard which might, in certain circumstances, be removed provided other appropriate safeguards for accused persons were introduced to compensate for the potential risk of unjust convictions.

43. The Government contended that what is at issue is not whether the Order as such is compatible with the right to silence but rather whether, on the facts of the case, the drawing of inferences under Articles 4 and 6 of the

Order rendered the criminal proceedings against the applicant unfair contrary to Article 6 (art. 6) of the Convention.

They maintained, however, that the first question should be answered in the negative. They emphasised that the Order did not detract from the right to remain silent in the face of police questioning and explicitly confirmed the right not to have to testify at trial. They further noted that the Order in no way changed either the burden or the standard of proof: it remained for the prosecution to prove an accused's guilt beyond reasonable doubt. What the Order did was to confer a discretionary power to draw inferences from the silence of an accused in carefully defined circumstances. They maintained that this did not, of itself, violate the right to silence.

In this respect, they emphasised the safeguards governing the drawing of inferences under the Order which had been highlighted in national judicial decisions (see paragraphs 24 and 29 above). In particular, it had been consistently stressed by the courts that the Order merely allows the trier of fact to draw such inferences as common sense dictates. The question in each case is whether the evidence adduced by the prosecution is sufficiently strong to call for an answer.

With regard to the international standards to which reference had been made by Amnesty International, it was contended that they did not demonstrate any internationally-accepted prohibition on the drawing of common-sense inferences from the silence of an accused whether at trial or pre-trial. In particular, the Draft Statute for an International Criminal Court is far from final and cannot be said to have been adopted by the international community.

As to the question whether, on the facts of the case, the drawing of inferences under Articles 4 and 6 of the Order rendered the criminal proceedings against the applicant unfair, the Government comprehensively analysed the trial court's assessment of the evidence against the applicant. On the basis of this analysis they submitted that on the evidence adduced against the applicant by the Crown, the Court of Appeal was right to conclude that a formidable case had been made out against him which deeply implicated him in the false imprisonment of Mr L. and that this case "called for an answer". The drawing of inferences therefore had been quite natural and in accordance with common sense.

44. The Court must, confining its attention to the facts of the case, consider whether the drawing of inferences against the applicant under Articles 4 and 6 of the Order rendered the criminal proceedings against him - and especially his conviction - unfair within the meaning of Article 6 (art. 6) of the Convention. It is recalled in this context that no inference was drawn under Article 3 of the Order. It is not the Court's role to examine whether, in general, the drawing of inferences under the scheme contained in the Order is compatible with the notion of a fair hearing under Article 6 (art. 6) (see, amongst many examples, the *Brogan and Others v. the United*

Kingdom judgment of 29 November 1988, Series A no. 145-B, p. 29, para. 53).

45. Although not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6) (see the Funke judgment cited above, *loc. cit.*). By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6 (art. 6).

46. The Court does not consider that it is called upon to give an abstract analysis of the scope of these immunities and, in particular, of what constitutes in this context "improper compulsion". What is at stake in the present case is whether these immunities are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be so used, is always to be regarded as "improper compulsion".

47. On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.

Wherever the line between these two extremes is to be drawn, it follows from this understanding of "the right to silence" that the question whether the right is absolute must be answered in the negative.

It cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him. In particular, as the Government have pointed out, established international standards in this area, while providing for the right to silence and the privilege against self-incrimination, are silent on this point.

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 (art. 6) is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.

48. As regards the degree of compulsion involved in the present case, it is recalled that the applicant was in fact able to remain silent. Notwithstanding the repeated warnings as to the possibility that inferences

might be drawn from his silence, he did not make any statements to the police and did not give evidence during his trial. Moreover under Article 4 (5) of the Order he remained a non-compellable witness (see paragraph 27 above). Thus his insistence in maintaining silence throughout the proceedings did not amount to a criminal offence or contempt of court. Furthermore, as has been stressed in national court decisions, silence, in itself, cannot be regarded as an indication of guilt (see paragraphs 24 and 29 above).

49. The facts of the present case accordingly fall to be distinguished from those in *Funke* (see paragraph 41 above) where criminal proceedings were brought against the applicant by the customs authorities in an attempt to compel him to provide evidence of offences he had allegedly committed. Such a degree of compulsion in that case was found by the Court to be incompatible with Article 6 (art. 6) since, in effect, it destroyed the very essence of the privilege against self-incrimination.

50. Admittedly a system which warns the accused - who is possibly without legal assistance (as in the applicant's case) - that adverse inferences may be drawn from a refusal to provide an explanation to the police for his presence at the scene of a crime or to testify during his trial, when taken in conjunction with the weight of the case against him, involves a certain level of indirect compulsion. However, since the applicant could not be compelled to speak or to testify, as indicated above, this factor on its own cannot be decisive. The Court must rather concentrate its attention on the role played by the inferences in the proceedings against the applicant and especially in his conviction.

51. In this context, it is recalled that these were proceedings without a jury, the trier of fact being an experienced judge. Furthermore, the drawing of inferences under the Order is subject to an important series of safeguards designed to respect the rights of the defence and to limit the extent to which reliance can be placed on inferences.

In the first place, before inferences can be drawn under Article 4 and 6 of the Order appropriate warnings must have been given to the accused as to the legal effects of maintaining silence. Moreover, as indicated by the judgment of the House of Lords in *R. v. Kevin Sean Murray* the prosecutor must first establish a *prima facie* case against the accused, i.e. a case consisting of direct evidence which, if believed and combined with legitimate inferences based upon it, could lead a properly directed jury to be satisfied beyond reasonable doubt that each of the essential elements of the offence is proved (see paragraph 30 above).

The question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused "calls" for an explanation which the accused ought to be in a position to give that a failure

to give any explanation "may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty". Conversely if the case presented by the prosecution had so little evidential value that it called for no answer, a failure to provide one could not justify an inference of guilt (*ibid.*). In sum, it is only common-sense inferences which the judge considers proper, in the light of the evidence against the accused, that can be drawn under the Order.

In addition, the trial judge has a discretion whether, on the facts of the particular case, an inference should be drawn. As indicated by the Court of Appeal in the present case, if a judge accepted that an accused did not understand the warning given or if he had doubts about it, "we are confident that he would not activate Article 6 against him" (see paragraph 31 above). Furthermore in Northern Ireland, where trial judges sit without a jury, the judge must explain the reasons for the decision to draw inferences and the weight attached to them. The exercise of discretion in this regard is subject to review by the appellate courts.

52. In the present case, the evidence presented against the applicant by the prosecution was considered by the Court of Appeal to constitute a "formidable" case against him (see paragraph 26 above). It is recalled that when the police entered the house some appreciable time after they knocked on the door, they found the applicant coming down the flight of stairs in the house where Mr L. had been held captive by the IRA. Evidence had been given by Mr L. - evidence which in the opinion of the trial judge had been corroborated - that he had been forced to make a taped confession and that after the arrival of the police at the house and the removal of his blindfold he saw the applicant at the top of the stairs. He had been told by him to go downstairs and watch television. The applicant was pulling a tape out of a cassette. The tangled tape and cassette recorder were later found on the premises. Evidence by the applicant's co-accused that he had recently arrived at the house was discounted as not being credible (see paragraphs 25 and 26 above).

53. The trial judge drew strong inferences against the applicant under Article 6 of the Order by reason of his failure to give an account of his presence in the house when arrested and interrogated by the police. He also drew strong inferences under Article 4 of the Order by reason of the applicant's refusal to give evidence in his own defence when asked by the court to do so (see paragraph 25 above).

54. In the Court's view, having regard to the weight of the evidence against the applicant, as outlined above, the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances. As pointed out by the Delegate of the Commission, the courts in a considerable number of countries where evidence is freely assessed may have regard to

all relevant circumstances, including the manner in which the accused has behaved or has conducted his defence, when evaluating the evidence in the case. It considers that, what distinguishes the drawing of inferences under the Order is that, in addition to the existence of the specific safeguards mentioned above, it constitutes, as described by the Commission, "a formalised system which aims at allowing common-sense implications to play an open role in the assessment of evidence".

Nor can it be said, against this background, that the drawing of reasonable inferences from the applicant's behaviour had the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence.

55. The applicant submitted that it was unfair to draw inferences under Article 6 of the Order from his silence at a time when he had not had the benefit of legal advice. In his view the question of access to a solicitor was inextricably entwined with that of the drawing of adverse inferences from pre-trial silence under police questioning. In this context he emphasised that under the Order once an accused has remained silent a trap is set from which he cannot escape: if an accused chooses to give evidence or to call witnesses he is, by reason of his prior silence, exposed to the risk of an Article 3 inference sufficient to bring about a conviction; on the other hand, if he maintains his silence inferences may be drawn against him under other provisions of the Order.

56. The Court recalls that it must confine its attention to the facts of the present case (see paragraph 44 above). The reality of this case is that the applicant maintained silence right from the first questioning by the police to the end of his trial. It is not for the Court therefore to speculate on the question whether inferences would have been drawn under the Order had the applicant, at any moment after his first interrogation, chosen to speak to the police or to give evidence at his trial or call witnesses. Nor should it speculate on the question whether it was the possibility of such inferences being drawn that explains why the applicant was advised by his solicitor to remain silent.

Immediately after arrest the applicant was warned in accordance with the provisions of the Order but chose to remain silent. The Court, like the Commission, observes that there is no indication that the applicant failed to understand the significance of the warning given to him by the police prior to seeing his solicitor. Under these circumstances the fact that during the first 48 hours of his detention the applicant had been refused access to a lawyer does not detract from the above conclusion that the drawing of inferences was not unfair or unreasonable (see paragraph 54 above).

Nevertheless, the issue of denial of access to a solicitor, has implications for the rights of the defence which call for a separate examination (see paragraphs 59-69 below).

57. Against the above background, and taking into account the role played by inferences under the Order during the trial and their impact on the rights of the defence, the Court does not consider that the criminal proceedings were unfair or that there had been an infringement of the presumption of innocence.

58. Accordingly, there has been no violation of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention.

B. Access to lawyer

59. The applicant submitted that he was denied access to a lawyer at a critical stage of the criminal proceedings against him. He pointed out that in Northern Ireland the initial phase of detention is of crucial importance in the context of the criminal proceedings as a whole because of the possibility of inferences being drawn under Articles 3, 4 and 6 of the Order.

He was in fact denied access to any legal advice for 48 hours. During that time Article 3 and Article 6 cautions had been administered without his having had the benefit of prior legal advice. He was interviewed on twelve occasions without a solicitor being present to represent his interests. When he was finally granted access to his solicitor he was advised to remain silent partly because he had maintained silence already during the interview and partly because the solicitor would not be permitted to remain during questioning. The silence which had already occurred prior to seeing his solicitor would have triggered the operation of both Articles 3 and 6 at any subsequent trial, even had he chosen to give an account to the police. Having regard to the very strong inferences which the trial judge drew under Articles 4 and 6 of the Order, the decision to deny him access to a solicitor unfairly prejudiced the rights of the defence and rendered the proceedings against him unfair contrary to Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) of the Convention.

60. In the submission of the Government, actual as opposed to notional or theoretical prejudice must be shown by an applicant in order to conclude that there had been a breach of Article 6 para. 1 (art. 6-1). The following matters were highlighted in this respect.

In the first place, the applicant did not seek to challenge by way of judicial review the exercise of the statutory power to delay access to a lawyer for up to 48 hours. The power is designed, *inter alia*, to limit the risk of interference with the vital information-gathering process and the risk that a person involved in an act of terrorism or still at large may be alerted. The denial of access was therefore a *bona fide* exercise of necessary and carefully designed statutory powers on reasonable grounds.

Secondly, as accepted by the Commission, the inferences drawn under Articles 4 and 6 of the Order were not the only evidence against the applicant. Furthermore the delay of access to a lawyer was for a limited

period of 48 hours. Thereafter he had access to lawyers of his own choosing. He was represented both at his trial and on appeal by experienced solicitors and counsel and was in receipt of legal aid.

The Government did not accept that the applicant was irretrievably prejudiced in his defence because of the denial of access. They submitted that if, having consulted his solicitor, he had accounted for his presence at the scene of the crime and put forward an innocent explanation, it would have been extremely unlikely that Article 3 or Article 6 inferences would have been drawn. Moreover there was nothing to suggest, in his attitude or actions, that he would have acted differently had he seen a solicitor from the beginning. He had consistently refused to answer any questions put to him, both before and after he had consulted with his solicitor. In order to make out a case of actual prejudice it must be alleged by the applicant that if he had been able to consult his solicitor earlier he would have acted differently.

In sum, a limited delay of access to a lawyer did not cause any actual prejudice to the applicant's defence.

61. Amnesty International and Liberty and Others stressed that access to a lawyer when in police custody is an integral part of well-established international standards concerning protection against the dangers of incommunicado detention. It was also a vital element in enabling access to the procedural guarantees of the courts in respect of illegal detention. They both stressed, *inter alia*, that in the context of Northern Ireland where adverse inferences could be drawn from the applicant's failure to answer questions by the police it was particularly important to be assisted by a solicitor at an early stage.

The Northern Ireland Standing Advisory Commission on Human Rights considered that it was very much in the public interest that those detained for questioning should have immediate access to legal advice.

62. The Court observes that it has not been disputed by the Government that Article 6 (art. 6) applies even at the stage of the preliminary investigation into an offence by the police. In this respect it recalls its finding in the *Imbrioscia v. Switzerland* judgment of 24 November 1993 that Article 6 (art. 6) - especially paragraph 3 (art. 6-3) - may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (art. 6-3) (Series A no. 275, p. 13, para. 36). As it pointed out in that judgment, the manner in which Article 6 para. 3 (c) (art. 6-3-c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case (*loc. cit.*, p. 14, para. 38).

63. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 (art. 6) will normally require that the accused be

allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.

64. In the present case, the applicant's right of access to a lawyer during the first 48 hours of police detention was restricted under section 15 of the Northern Ireland (Emergency Provisions) Act 1987 on the basis that the police had reasonable grounds to believe that the exercise of the right of access would, *inter alia*, interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent such an act.

65. It is observed that the applicant did not seek to challenge the exercise of this power by instituting proceedings for judicial review although, before the Court, he now contests its lawfulness. The Court, however, has no reason to doubt that it amounted to a lawful exercise of the power to restrict access. Nevertheless, although it is an important element to be taken into account, even a lawfully exercised power of restriction is capable of depriving an accused, in certain circumstances, of a fair procedure.

66. The Court is of the opinion that the scheme contained in the Order is such that it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation. It observes in this context that, under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him.

Under such conditions the concept of fairness enshrined in Article 6 (art. 6) requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is - whatever the justification for such denial - incompatible with the rights of the accused under Article 6 (art. 6).

67. The Government have argued that in order to complain under Article 6 (art. 6) of denial of access to a lawyer it must be clear that, had the applicant been able to consult with his solicitor earlier, he would have acted differently from the way he did. It is contended that the applicant has not shown this to be the case.

68. It is true, as pointed out by the Government, that when the applicant was able to consult with his solicitor he was advised to continue to remain

silent and that during the trial the applicant chose not to give evidence or call witnesses on his behalf. However, it is not for the Court to speculate on what the applicant's reaction, or his lawyer's advice, would have been had access not been denied during this initial period. As matters stand, the applicant was undoubtedly directly affected by the denial of access and the ensuing interference with the rights of the defence. The Court's conclusion as to the drawing of inferences does not alter that (see paragraphs 43-57 above).

69. In his written submissions to the Court, the applicant appeared to make the further complaint under this head that his solicitor was unable to be present during police interviews. However, whether or not this issue formed part of the complaints admitted by the Commission, in any event its examination of the case was limited to that of the question of his access to a lawyer. Moreover, the case as argued before the Court was, in the main, confined to this issue. In these circumstances, and having regard to the Court's finding that he ought to have had access to a lawyer, it is not necessary to examine this point.

70. There has therefore been a breach of Article 6 para. 1 in conjunction with paragraph 3 (c) (art. 6-1+art. 6-3-c) of the Convention as regards the applicant's denial of access to a lawyer during the first 48 hours of his police detention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 6 (art. 14+art.6)

71. The applicant further complained that the practice in Northern Ireland regarding access of solicitors to terrorist suspects was discriminatory, contrary to Article 14 of the Convention taken in conjunction with Article 6 (art. 14+art.6), having regard to the fact that solicitors were not permitted to be present at any stage during the interviewing of suspects by the police unlike their counterparts in England and Wales.

72. However, in the light of its conclusion that the denial of access to a solicitor in the present case gave rise to a breach of Article 6 para. 1 in conjunction with paragraph 3 (c) (art. 6-1+art. 6-3-c) of the Convention (see paragraph 70 above), the Court does not consider that it is necessary to examine this issue.

III. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

73. Article 50 (art. 50) of the Convention provides as follows:

"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."

A. Pecuniary and non-pecuniary damage

74. The applicant claimed compensation in such amount as the Court might consider equitable for the damage suffered by him by reason of his conviction and sentence in violation, inter alia, of Article 6 (art. 6) of the Convention.

75. The Government, on the other hand, submitted that even in the event of a finding of a violation no award should be made under this head.

76. The Court agrees. It recalls that its finding of a violation of Article 6 (art. 6) is limited to the applicant's complaint concerning access to a solicitor. In its opinion, the finding of a violation is, in itself, sufficient just satisfaction for the purposes of Article 50 (art. 50) of the Convention.

B. Costs and expenses

77. The applicant claimed £57,263.51 by way of costs and expenses.

78. The Government considered that the applicant's bill of costs was in various respects excessive. They submitted that, in the event of the Court finding in favour of the applicant, only £36,241.09 should be awarded. However only a proportion of the costs and expenses should be allowed if the Court were to find that only part of the applicant's complaints gave rise to a breach of the Convention.

79. Bearing in mind that the finding of a violation only relates to the applicant's complaint concerning access to a lawyer, the Court awards £15,000 less 37,968.60 French francs granted by the Council of Europe by way of legal aid.

C. Default interest

80. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. Holds by fourteen votes to five that there has been no violation of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention arising out

of the drawing of adverse inferences on account of the applicant's silence;

2. Holds by twelve votes to seven that there has been a violation of Article 6 para. 1 in conjunction with paragraph 3 (c) (art. 6-1+art. 6-3-c) of the Convention as regards the applicant's lack of access to a lawyer during the first 48 hours of his police detention;
3. Holds unanimously that it is not necessary to examine the applicant's complaint of a violation of Article 14 in conjunction with Article 6 (art. 14+art. 6);
4. Holds unanimously that, as regards pecuniary and non-pecuniary damage, the finding of a violation of Article 6 para. 1 in conjunction with paragraph 3 (c) (art. 6-1+art. 6-3-c) constitutes, in itself, sufficient just satisfaction for the purposes of Article 50 (art. 50) of the Convention;
5. Holds unanimously
 - (a) that the respondent State is to pay, within three months, for costs and expenses £15,000 (fifteen thousand), less 37,968.60 (thirty-seven thousand nine hundred and sixty-eight) French francs and sixty centimes to be converted into pounds sterling at the rate of exchange applicable on the date of delivery of the present judgment;
 - (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;
6. Dismisses unanimously the remainder of the claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 February 1996.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

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

- (a) joint partly dissenting opinion of Mr Ryssdal, Mr Matscher, Mrs Palm, Mr Foighel, Sir John Freeland, Mr Wildhaber and Mr Jungwiert;
- (b) partly dissenting opinion of Mr Pettiti, joined by Mr Valticos;
- (c) partly dissenting opinion of Mr Walsh, joined by Mr Makarczyk and Mr Lohmus.

R. R.
H. P.

JOHN MURRAY v. THE UNITED KINGDOM JUDGMENT
JOINT PARTLY DISSENTING OPINION OF JUDGES RYSSDAL, MATSCHER,
PALM, FOIGHEL, SIR JOHN FREELAND, WILDHABER AND JUNGWIERT
JOINT PARTLY DISSENTING OPINION OF JUDGES
RYSSDAL, MATSCHER, PALM, FOIGHEL, SIR JOHN
FREELAND, WILDHABER AND JUNGWIERT

1. We are unable to agree with the conclusion of the majority that there has been a violation of Article 6 para. 1 in conjunction with paragraph 3 (c) (art. 6-1+art. 6-3-c) of the Convention as regards the applicant's lack of access to a solicitor during the first 48 hours of his police detention.

2. We have no difficulty with paragraphs 41 to 58 of the judgment, in which the Court, after a careful analysis, rejects the contention that the criminal proceedings were unfair or that there had been an infringement of the presumption of innocence and accordingly concludes that there has been no violation of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention. In the course of that analysis the Court points out (paragraph 44) that it "must, confining its attention to the facts of the case, consider whether the drawing of inferences against the applicant ... rendered the criminal proceedings against him - and especially his conviction - unfair within the meaning of Article 6 (art. 6)" and goes on to say that "[i]t is not the Court's role to examine whether, in general, the drawing of inferences under the scheme contained in the Order is compatible with the notion of a fair hearing under Article 6 (art. 6) ..." (emphasis added). In our view this approach, stressing as it does the actual facts of the case, is entirely correct.

3. When, however, the judgment comes to deal with the question of access to a lawyer, a rather different approach is adopted. After some general observations about the application of Article 6 (art. 6) at the stage of preliminary investigation by the police, the Court acknowledges that the right of an accused to benefit from the assistance of a lawyer "already at the initial stages of police interrogation ..., may be subject to restrictions for good cause". It adds that the "question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing" (paragraph 63).

4. The Court then, after giving some consideration to the exercise of the power of restriction under section 15 of the 1987 Act which took place in this case, expresses in paragraph 66 of the judgment the opinion that the scheme contained in the 1988 Order is such that "it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation". The paragraph concludes by saying that to "deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is - whatever the justification for such denial - incompatible with the rights of the accused under Article 6 (art. 6)".

5. We consider the focus here to be misdirected. It has not been suggested that in the circumstances existing at the relevant time in Northern

Ireland it was unreasonable that a power should be available to a senior police officer under section 15 of the 1987 Act to delay access to a lawyer for a period not exceeding 48 hours when he had reasonable grounds for believing that earlier access would lead to interference with the gathering of information about acts of terrorism or by alerting any person would make more difficult the prevention of such an act or the apprehension, prosecution or conviction of any person in connection therewith. As regards the exercise of the power, the Court pointed out in *Brannigan and McBride v. the United Kingdom* (judgment of 26 May 1993, Series A no. 258-B, p. 43, para. 24, and p. 55, para. 64) that within the period of 48 hours access to a solicitor can only be delayed where there exist reasonable grounds for doing so. "It is clear", the Court added, "from judgments of the High Court in Northern Ireland that the decision to delay access to a solicitor is susceptible to judicial review and that in such proceedings the burden of establishing reasonable grounds for doing so rests on the authorities. In these cases judicial review has been shown to be a speedy and effective manner of ensuring that access to a solicitor is not arbitrarily withheld ...".

6. In the present case, as paragraph 65 of the judgment observes, although the applicant now contests before the Court the lawfulness of the exercise of the power to delay his access to a lawyer, he did not seek to challenge such exercise by instituting proceedings for judicial review. The Court rightly concludes that it has itself no reason to doubt that the exercise of the power was lawful.

7. In these circumstances, the question to be dealt with by the Court, consistently with the approach followed in the earlier part of the judgment, should in our view be whether, on the facts of the case, the drawing of an inference from conduct on the part of the applicant prior to his access to a solicitor rendered the criminal proceedings against him - and especially his conviction - unfair within the meaning of Article 6 (art. 6) of the Convention. As to this, it should be noted that the trial judge had a discretion as to the drawing of inferences under the 1988 Order and in fact drew no inference against the applicant under its Article 3. The refusal of the applicant to give evidence in his own defence when called upon at the trial to do so, which formed the basis for the adverse inference drawn by the trial judge under Article 4 of the 1988 Order, of course took place at a time when legal advice had become available to him. The issue therefore resolves itself into whether the drawing of an inference against the applicant under Article 6 of the 1988 Order by reason of his failure to give an account of his presence in the house at 124 Carrigart Avenue when cautioned by the police on the evening of 7 January 1990 - that is, before he obtained access to a lawyer - rendered his trial and conviction unfair.

8. In this context the following should be recalled.

(a) The caution given to the applicant on the evening of 7 January 1990 warned him quite clearly of the possibility of an adverse inference being

drawn from a failure or refusal on his part to account for his presence at 124 Carrigart Avenue. There is no ground for believing that he failed to understand the caution.

(b) He nevertheless remained silent, both before and after he obtained access to legal advice. At no stage has he argued that he would or could have provided an innocent explanation.

(c) The applicant's silence in the period before he received legal advice did not necessarily entail prejudice to his defence. Articles 3 and 6 of the 1988 Order had become applicable as a result of that silence, but whether adverse inferences would be drawn at the trial was a matter for the judge (who, as has been noted, drew no such inference under Article 3). If the judge were to be satisfied - as he might be, if for example the applicant had offered an innocent explanation as soon as he had consulted his solicitor - that in any particular set of circumstances it would not be proper to draw an adverse inference, he would not do so. Clearly, in the present case, he concluded in the exercise of his discretion that an Article 6 (art. 6) inference could properly be drawn. No cogent reason has been established for him to have concluded otherwise.

(d) The adverse inferences drawn against the applicant by reason of his conduct either before or after obtaining access to a solicitor were far from being the sole or even main basis for his conviction. As paragraph 26 of the judgment recalls, the Court of Appeal in Northern Ireland considered, for all the reasons which it gave, that there was "a formidable case" against him.

9. Taking account of these factors, we conclude that the applicant has failed to establish that, in the circumstances of his case, the drawing of an inference against him by reason of conduct on his part before he obtained access to legal advice caused any unfairness in his trial and conviction. We therefore do not agree that the delay of access involved a violation of Article 6 (art. 6). We consider that the majority of the Court, in making the linkage at paragraph 66 between "the scheme contained in the Order" and the right of access to a lawyer, strays unjustifiably far from the specific circumstances of the instant case.

10. To say this is not, of course, to dispute in any way the desirability in principle of early access by an accused to legal advice or that Article 6 (art. 6) may, as the Court found in *Imbrioscia v. Switzerland* (see paragraph 62 of the judgment), be relevant before a case is sent for trial so as to safeguard the right to a fair hearing.

PARTLY DISSENTING OPINION OF JUDGE PETTITI,
JOINED BY JUDGE VALTICOS

(Translation)

I consider that there has been a breach of Article 6 paras. 1 and 2 (art. 6 1, art. 6-2) of the Convention.

With the majority I voted in favour of holding that there had been a breach of Article 6 para. 1 taken together with paragraph 3 (c) (art. 6-1+art. 6-3-c), because the applicant was denied access to a solicitor and the benefit of the effective assistance of a lawyer, at least at the end of the period of police custody.

Nevertheless, on this point I note, in relation to paragraph 66 of the judgment, that the British system, instead of laying down in law the arrangements for access to a solicitor during police custody, leaves the responsibility to the police authorities.

As regards the common-law procedural background, I agree with the comments of Judge Walsh:

"In a criminal prosecution the burden of proof of guilt beyond reasonable doubt always rests on the prosecution. Therefore a prima facie case means one in which the evidential material presented by the prosecution, if believed and not rebutted, is sufficient in law to establish the guilt of the accused. In adjudicating on this point the trial judge need not at that stage disclose, or arrive at, his own view as to the truth but he must be satisfied that it is, if believed, objectively sufficient in law to warrant a verdict of guilty if not rebutted.

...

To rely upon it afterwards appears to me to negative the whole intent of Article 6 para. 2 (art. 6-2). To permit such a procedure is to permit a penalty to be imposed by a criminal court on an accused because he relies upon a procedural right guaranteed by the Convention. I draw attention to the decision of the Supreme Court of the United States in *Griffin v. State of California* (1965) 380 US, 609 ..."

I refer, like Judge Walsh, to the decision of the Northern Ireland Court of Appeal and to the *Miranda* decision (United States Supreme Court).

The right to silence is a major principle.

Any constraint which has the effect of punishing the exercise of this right, by drawing adverse inferences against the accused, amounts to an infringement of the principle.

The reasoning would be similar in the procedure of continental legal systems. The fact that the trial or appeal court can base its judgment on its innermost conviction is no obstacle to respecting the right to silence, since in its reasoning the court could not derive, from the fact that the accused had remained silent, any information amounting to incriminating evidence. A

person charged is free to incur a risk of his own choosing, just as he is free to confess or not to confess, and this is a form of respect for human dignity.

The principle also corresponds to the doctrine on unlawfully or unfairly obtained evidence. Similar findings have been made in comparative law (see *Procédures pénales en Europe*, ed. M. Delmas-Marty, Thémis, PUF).

The level of certainty to be reached by the judge under the "innermost conviction" system or the "beyond reasonable doubt" system, which is essential in order to arrive at a fair judgment, must not be achieved by a form of coercion to speak that would lead to a confession. Only in this way are the presumption of innocence and the status of the accused fully respected, both of which are central to the democratic conception of a criminal trial.

**PARTLY DISSENTING OPINION OF JUDGE WALSH,
JOINED BY JUDGES MAKARCZYK AND LOHMUS**

1. In my opinion there have been violations of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention.

The applicant was by Article 6 para. 2 (art. 6-2) guaranteed a presumption of innocence in the criminal trial of which he complains. Prior to the introduction of the Criminal Evidence (Northern Ireland) Order 1988 a judge trying a case without a jury could not lawfully draw an inference of guilt from the fact that an accused person did not proclaim his innocence. Equally in a trial with a jury it would have been contrary to law to instruct the jurymen that they could do so (see the judgment of the Northern Ireland Court of Appeal in the case of *R. v. Kevin Sean Murray*). In the same judgment the Northern Ireland Court of Appeal held that the object and effect of the 1988 Order was to reverse that position.

In the judgment of the House of Lords in the *R. v. Kevin Sean Murray* case which upheld the decision of the Northern Ireland Court it was pointed out that the time for drawing such inferences as the Order purported to permit was after the judge was satisfied that the prosecution had established a *prima facie* case of the guilt of the accused and that if it had not, the accused must be acquitted.

In a criminal prosecution the burden of proof of guilt beyond reasonable doubt always rests on the prosecution. Therefore a *prima facie* case means one in which the evidential material presented by the prosecution, if believed and not rebutted, is sufficient in law to establish the guilt of the accused. In adjudicating on this point the trial judge need not at that stage disclose, or arrive at, his own view as to the truth but he must be satisfied that it is, if believed, objectively sufficient in law to warrant a verdict of guilty if not rebutted.

The verdict itself cannot be determined until after all the evidence has been received by the court.

2. It is obvious from the House of Lords decision in *R. v. Kevin Sean Murray* that inferences which are not to be drawn until a *prima facie* case has been established cannot form part of the decision as to whether or not a *prima facie* case has been established notwithstanding Article 3 of the Order. Therefore where the accused has maintained silence that fact cannot be relied upon to establish a *prima facie* case.

3. To rely upon it afterwards appears to me to negative the whole intent of Article 6 para. 2 (art. 6-2). To permit such a procedure is to permit a penalty to be imposed by a criminal court on an accused because he relies upon a procedural right guaranteed by the Convention. I draw attention to the decision of the Supreme Court of the United States in *Griffin v. State of California* (1965) 380 US, 609, which dealt with a similar point in relation to the Fifth Amendment of the Constitution by striking down a Californian

law which permitted a court to make adverse comment on the accused's decision not to testify.

In *Miranda v. Arizona* (1966) 384 US, 436, the US Supreme Court affirmed that the constitutional protection against self-incrimination contained in the Fifth Amendment guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own free will" whether during custodial interrogation or in court. This Court in its judgment in *Funke v. France* (Series A no. 256-A) said that "the special features of customs law ... cannot justify ... an infringement of the right of anyone 'charged with a criminal offence', within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself" (p. 22, para. 44).

4. I am in agreement with the majority that the refusal to permit the applicant to have his lawyer present when he had so requested was also a breach of Article 6 (art. 6). To round off the account of the circumstances of the applicants pre-trial experiences it is to be noted that the facts of the case reveal a clear breach of Article 5 para. 3 (art. 5-3) of the Convention.

5. For the above reasons I have concluded that there has also been a breach of Article 6 para. 2 (art. 6-2).