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COURT OF HUMAN RIGHTS STRASBOURG

Ireland v The United Kingdom

Report of Hearing, 19-22 April 1977

Part 1: Summary of Pleadings

1. The second part of the oral hearings in the inter-State case took place at the Court of Human Rights in Strasbourg from 19 to 22 April 1977. The Irish Delegation was led by the Attorney General and included Mr. M. Hayes and Mr. P. Hennessy from this Department. Following the hearings before the Court from 7 - 9 February an order was made by the President of the Court indicating that the Court, having heard further submissions from both Governments and from the Commission would inter alia

(a) pronounce on the non-contested allegations under Art. 3 but considered it would not require further evidence;

(b) take cognisance of those contested cases referred to in our Memorial in deciding on the existence of a practice in breach of Art. 3;

(c) not rule on the correctness of the procedure followed by the Commission in hearing the "London evidence" but would assess the relevance and probative value of the evidence so obtained.

2. It was agreed at informal discussions prior to the opening of the hearing that the Irish Government would speak first taking all the contested articles together, followed by the UK and finally by the Commission. It was also agreed that Art. 1 would be dealt with on the basis of written submissions. The Attorney General referred the Court, in respect of Art. 3,

to the list of findings sought as set out in our Memorial (p. 30/31). The main points in his submission were however a request to the Court to hand down a finding in respect of Palace Barracks of Torture and not merely inhuman treatment as found by the Commission, and to further find that the practices complained of were not confined to Autumn 1971, but continued until the closing down of the interrogation centre at Palace Barracks in June 1972. The Court was also asked to find that there occurred at different places in Northern Ireland between 1971 and 1974 a substantial number of other acts in breach of Art. 3 in addition to those specific cases of breach found by the Commission. The Attorney General submitted that the Court should place greater evidential value on the documentary evidence submitted by the Irish Government then had been done by the Commission. Having referred to the sheer volume of evidence available to the Court he went on "behind the entire list of approximately 230 cases which the applicant Government referred to the Commission lie thousands of other complaints which have been lodged against the police and army in Northern Ireland". (April 19 a.m., p. 26) He also drew the Court's attention to the large sums paid in damages to victims of assaults at the hands of the security forces. The Attorney then referred to the consequential orders which were sought from the Court.

(a) prohibiting the reintroduction of the "five techniques", and

(b) requiring the UK to institute criminal or disciplinary proceedings "against those who have committed wrongful acts in breach of Art. 3".

He indicated that in the light of the undertakings given by the UK at the February hearings an order in respect of (a) would not now be required. It was submitted in respect of (b) that the Court had full jurisdiction to make the order sought and the Attorney went on"By virtue of Article 54 of the Convention, the judgement of the Court is transmitted to the Committee of Ministers, which shall supervise its execution. It would then

be a matter for the respondent Government to satisfy the Committee of Ministers as to the manner in which it gave effect to any order under these proceedings" (April 19 a.m., p. 31)

3. The Court was requested by the Attorney to reverse the findings of the Commission in respect of Arts. 5 and 6. His submission was in the main taken up with detailed refutations of various points made by the UK in its Counter Memorial. The burden of his case was that the measures taken by the Northern Ireland, and subsequently the UK, Government to deal with the emergency in Northern Ireland far exceeded what was strictly required by the exigencies of the situation and were therefore not covered by Art. 15 derogations. (see April 19 a.m., p. 31 - p.m., p. 10)

4. The Attorney completed his submissions to the Court with a long and detailed statement on Article 14 and requested the Court to find, unlike the Commission, that there had been discrimination as between Republicans and Loyalists in the implementation of internment. He stated that Loyalist violence was a factor in the N.I. situation long before the present emergency began, that those engaged in violence were known to the police and that the failure to institute court proceedings against them supported the view that normal legal proceedings were equally ineffective against terrorists from both communities - the failure to intern Loyalists (none until Feb. 1973 and relatively few thereafter) therefore reflected, in the words of the Commission's Report, "a hesitation or reluctance" on the part of the security forces to move against Loyalist terrorists. The Attorney referred to the refusal of the UK Government to make available witnesses who could testify to the policy behind the internment operation and to the restrictive conditions imposed by the UK Government in making available other of its witnesses. It was submitted to the Court that the Commission had failed to give sufficient weight in coming to its conclusions to its own findings of fact and had misdirected itself by engaging in subjective speculation as to the possible motives of those engaged in the implementation of internment in a manner that went beyond the submissions of the UK Government itself.

The Attorney concluded that the strength of the Loyalist para-militaries was best indicated by their success in the UWC strike in bringing down the power-sharing Executive and thus succeeding, where the IRA had always failed, in subverting the constitution of Northern Ireland: "The Court should it is submitted give full weight to the role which the Loyalist terrorists played in subverting the constitution of Northern Ireland. This fact underlines, as perhaps no other single fact does, the consequences resulting from the unilateral application of the extrajudicial measures and clearly demonstrates that no reasonable justification existed for the distinction made by the authorities in Northern Ireland, both prior to February 1973 and after that date, in the application of their measures". (April 19 p.m., p. 43).

5. The British submissions on Arts 3 and 5 were made by Mr. Hutton Q.C., on Arts 6 and 14 by Mr. Lester Q.C. and a brief concluding statement by the UK Attorney General, Mr. S. Silkin. Speaking on Art 3 Mr. Hutton denied that the evidence available in respect of the individual cases constituted evidence of an administrative practice. He referred approvingly to the finding of the Commission in the Donnelly case to the effect that, if there are adequate domestic remedies, there is only an administrative practice which constitutes a violation of the Convention if there is tolerance at a high level of the States. It was the contention of the UK that there were both adequate remedies and a total intolerance at high level. While it was their submission that the Court could not reach a decision on practice without a detailed examination of each of the individual cases filed by the Irish Government with the Commission they were confident that if the Court did consider it proper to come to a decision on the basis of documentary evidence alone, they would find that the existence of a practice had not been established.

6. The main submission of the UK Government in regard to Art 5 was that that the Commission had in its report described fairly and accurately the circumstances in which the powers of detention and internment were put into operation and continued, and had come to the correct conclusion that the measures were

strictly required by the exigencies of the situation. In arguing that internment was strictly required Mr. Hutton based himself in part on the Lawless case while commenting that the level of violence which prompted the Republic to bring into operation its powers of detention in 1957 was on a very small and limited scale compared to the situation in Northern Ireland in 1971. In respect of Art 6 Mr. Lester for the UK contended that the Irish submissions under this head were misconceived but if, contrary to this submission, the Court did decide that issues did arise for decision he asked the Court to hold that the measures taken were strictly required by the security situation and were therefore permissible under the terms of Art. 15.

7. Mr. Lester made a spirited defence of the NI and British Governments' handling of internment and strongly denied any breach of Art. 14. He embraced the findings of the Commission on this Article and gave himself the task of demolishing what he termed, the "main lines of attack" by the Irish Government on the Commission's findings. He said the UK Government had based its case on the fact that in August 1971 it was from the IRA alone that there was proceeding an organised campaign for the destruction of life and property, and that the sporadic actsof violence committed by the Loyalists in 1971 were beneath comparison with what was being done by the IRA. In a hard-hitting critique of our written and oral submissions he described them as seriously "untrue", "wholly misleading", "inaccurate and tendentious". He admitted that the policy of internment did in fact fail (20 April p.m., p. 54) but this was, he said, irrelevant to this case and went on to invite the Court "to disregard the political attack" made by the applicant Government. His intervention was noteworthy also for its firm rebuff of the Attorney's submission on the UWC strike and he went on to put on record as follows his assessment of the fall of the Executive:

"In my submission there can be no more striking illustration of the misconceived basis of the applicant Government's political attack on the Commission's report. No doubt Loyalist para-military organisations played a significant role in contributing to the collapse of the power-sharing Executive in May 1974. But the notion that the activities of the Loyalist terrorists were the sole or even the predominant cause of that collapse is a complete distortion of history.

Mr. President, the power-sharing Executive was brought down primarily by a strike organised by a Loyalist body called the Ulster Workers' Council, which certainly had links with para-military organisations. The strike was supported by a very large number of ordinary people who had no links with any terrorist organisation. No doubt one reason for this widespread support was the intimidation of ordinary working people by Loyalist extremists. But it is beyond dispute that in the general election which was held throughout the United Kingdom in February 1974 candidates who were opposed to the power-sharing Executive won more than 50% of the popular vote in Northern Ireland, and that hostility to that Executive was an emotion strongly felt by many ordinary people to whom political violence was anathema.

The collapse of the Executive was a major set-back for the policy of successive United Kingdom Governments. And to suggest, even with the benefit of hindsight, that the collapse was caused by a failure to extend the policy of internment on the Loyalist side is frankly absurd. In our submission, the applicant Government's attempt to make use of this collapse to discredit the Commission's opinion demonstrates the irrelevance and danger of a political attack of this nature."

(20 April, p.m. p. 56/57).

8. Mr. Silkin's intervention was preceded by much speculation as to whether he would adopt a hard or soft line, fueled primarily, it appeared, by leaks to the press corps by members of the British delegation. His prior announcement of his intention to speak at the conclusion of the British submission and his absence from the Court until the moment he rose to speak contributed to a sense of theatre and heightened expectations that he had something of particular note to say. In the event, his speech was, at least for the press, an anti-climax. There was no attack on the Government for bringing the case. Instead there were conciliatory references to the "common dangers common problems, common interests" created for both governments by terrorists, but principally by the IRA, which constituted a

threat to our "common heritage of political traditions, ideals, freedom and the rule of law". He submitted that the Court was not required to make any findings in respect of the non-contested findings of the Commission under Art. 3. He further stated that it was outside the jurisdiction of the Court to hand down the orders sought for prosecution of those involved in ill-treatment. (21 April a.m. pp 36-42).

9. The Commission delegates defended their findings at some length (21 April a.m. p. 42 - p.m. p. 72). They referred to our request to the Court that it take a broader approach in determining breaches of Art. 3 and agreed that its own method of investigation and the insistence on a high standard of proof led to rather narrow conclusions. Nevertheless it commended its approach to the Court on the basis that it was thereby enabled to make findings of breach in relation to specific places and times which had solid evidential and legal foundations. It therefore asked the Court to make no general findings in respect of the alleged breaches in the period 1971-74. On Art. 14 it was submitted that the crucial question was whether the authorities were refraining from detaining Loyalist terrorists for improper reasons. The delegate proceeded to give a detailed account of Loyalist terrorism from the mid-sixties onwards. They said that it was plain that it was from the Loyalist side that the bombing and shooting started in 1969 and that it was only in 1970 that IRA violence emerged as the most serious threat to the authorities. The Commission however found, and remained of the opinion, that IRA activity increased to such a pitch from 1970 until the introduction of direct rule in March 1972 that the differential treatment of the two sidesin respect of internment by the authorities was justified. Following the introduction of direct rule the Commission found that violence from the Loyalist side increased noticeably and Loyalistswere responsible for a large number of sectarian assassinations. During this period the Commission felt there had been considerable reluctance at lower levels in the security forces to recommend the detention or internment of Loyalists. It nevertheless found that the Government in this period was determined in its efforts to pursue an even-headed policy towards both sides and that in terms of overall

security policy a balance was maintained. It consequently again found that there had been no breach of the Convention. In his final submission the principal Commission delegate indicated certain doubts as to whether the question of consequential orders properly arose for decision by the Court.

10. The Attorney General exercising his right to reply on the morning of 22 April made a hard hitting and at times, angry intervention. He alluded to the references by Mr. Hutton to the pressures under which the security forces were working in NI and the inevitability of overreaction by certain individuals. The allegations brought before the Court by the Irish Government were not, the Attorney said, incidents of casual ill-treatment committed under provocation - rather they were, in our opinion, serious acts of violence against the person amounting to torture within the meaning of Art. 3. In respect of the Commission's enquiries into the allegations under Arts. 3 and 14 the Attorney strongly critized the failure of the UK Government to cooperate in the establishment of the facts either by refusing to make certain (ministerial) witnesses available or by imposing restrictions on the extent to which other witnesses could assist the investigation. It was submitted that it had been clearly established that the failure to intern Loyalists arose from a fear by the authorities of the consequences if they did so and a combination of fear and, in some instance, latent sympathy with their cause among the security forces. The UWC strike was the culmination of this disastrous policy and was an inevitable result of the "failure to apply the extrajudicial measures in the way they were applied against the other groups of terrorists, and is one that cannot be objectively justified" (22 April a.m., p. 47) The Attorney concluded with these general remarks:

> "Mr. President, may I conclude - and as this is the last time on which the applicant Government will have an opportunity to address the Court - I would like to conclude with some very brief observations of a general character.
>
> The Court has rightly been concerned with legal arguments, legal submissions and the analysis of hundreds of pages of documentary material, but I know that all the Members of the Court are keenly aware, just as we, the advocates who

are appearing before you, are aware, of the grim reality of the violence and human suffering which the written documents record. Part of that grim reality is the IRA. The IRA, Mr. President, is a body of ruthless men whose evil conduct besmirches the honourable traditions of the Irish nationalism, who comprise but a tiny minority of the Irish people they claim to represent and whose actions have been repudiated time and time again by the electorate in both parts of Ireland.

Another part of that reality is represented by the Loyalist extremists whose actions defile the high principles of the religious tradition they pretend to uphold and whose deeds are an affront to all right-thinking people of the political tradition they claim to defend.

My Government and the respondent Government have been cooperating in many ways and on many levesl for the purpose of extirpating the evil of terrorism from our midst, but there is, Mr. President, no inconsistency between this common concern of our two Governments who are here represented and the institution and maintenance of these proceedings before the supervisory organs of the Convention of which both our Governments are signatories.

It was believed and is believed that serious breaches of human rights had occurred in Northern Ireland; that practices had occurred which it was proper to bring to the notice of this tribunal and of the Commission so that they could be condemned. To fail to institute and maintain these proceedings because of the need to take common action against terrorist organisations would have been both illogical and a breach of our responsibilities as signatories of the Convention.

The belief that serious breaches of the Convention occurred has been justified by the Commission's opinion. By asking the Court to confirm that opinion and to make further findings of breach, the applicant Government are not motivated by any malice or any spirit of vindictiveness. The Irish Government believe that the European Convention of Human Rights, and the judicial machinery for the protection of human rights which is established, constitute one of the most significant developments in the history of postwar Europe. Through these present proceedings, they believe that human rights for the people of Northern Ireland will be strengthened and more adequately secured, a factor which in itself will help to defeat the men of violence. But this case we know will have a wider significance. This Court, by its decisions, will be setting standards for the protection of human rights which will be of relevance for all the people of Europe and, indeed, for a wider community outside the European continent. As a result of the evils of these past seven years in Northern Ireland some lasting good can come, and it is in this hope, Mr. President and Members of the Court, that the many and complex issues are brought before this Court for its consideration and adjudication."

(22 April, a.m. p. 47-49)

11. The hearing concluded with some final remarks from Mr. Silkin and Mr. Opsahl of the Commission. The only point of note made by the former was, in reference to the request for consequential orders, that the case which was now coming to an end should not have "trailers" after it which would "keep alive" the bitterness inevitably created both by the events and by the investigation of them, hwoever proper that investigation may be". The judges indicated that they did not wish to put questions to any of the parties and the hearing then concluded.

Part 2: Future Developments

12. It emerged in informal discussions after the hearing that the Court would be in a position to deliver its judgment not earlier than October but almost certainly before the end of the year. The practice of the Court is to read out its judgment at a specially convened public hearing. The Court, unlike the Commission, does not enter into discussions with the parties while preparing its judgment and, in theory, no indication of what it contains is given to the parties prior to its public pronouncement.

13. The Convention provides that "the judgment of the Court shall be final" (Art. 52) and that "reasons shall be given for the judgment of the Court" (Art 51). There is also provision for minority opinions. Under the terms of Art. 54 the judgment of the Court is transmitted to the Committee of Ministers "which shall supervise its execution". This was the aspect of the Convention referred to by the Attorney when requesting the Court to include in its judgment an order directing the UK Government to institute criminal and/or disciplinary proceedings against members of the security forces involved in ill-treatment. It should be noted however that opinion amongst members of our legal team was that it was unlikely that the Court would make the orders requested. The consensus of opinion on the outcome of the case as a whole seemed to be that the Court would be disinclined to depart radically from the Commission's findings, but if changes were to be made they would most probably be in respect of the findings under Art. 14.

14. While the Committee of Ministers has a reasonably well defined corpus of precedents and procedures for dealing with inter-State cases referred to it under Art. 32 (i.e. cases which have not been heard by the Court) this is not the position in respect of inter-State cases on which the Court has delivered judgment; the present case being of course the first such case. Nevertheless there should be no difficulty - particularly if the Court declines to make consequential orders - in ensuring, if both the applicant and respondent Governments so wish, that the judgment of the Court is merely noted by the Committee without any further comment from

the representatives of either party. If however the judgment of the Court does contain instructions or directions to the respondent Government it will presumably be necessary to consider in greater detail, in the light of both domestic and international considerations, how the matter should be handled within the Committee.

P. Hennessy
5 May, 1977