



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

THIRD SECTION

**CASE OF O'HARA v. THE UNITED KINGDOM**

*(Application no. 37555/97)*

JUDGMENT

STRASBOURG

16 October 2001

**FINAL**

*16/01/2002*



**In the case of O'Hara v. the United Kingdom,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,

Mr L. LOUCAIDES,

Mr P. KÜRIS,

Mrs F. TULKENS,

Mr K. JUNGWIERT,

Sir Nicolas BRATZA

Mrs H.S. GREVE, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 12 June and 25 September 2001,

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

**PROCEDURE**

1. The case originated in an application (no. 37555/97) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Mr Gerard Patrick O'Hara ("the applicant"), on 20 May 1997.

2. The applicant, who had been granted legal aid, was represented by his counsel. The United Kingdom Government ("the Government") were represented by their Agent.

3. The applicant alleged principally that he had not been arrested on a reasonable suspicion that he had committed an offence, that he had not been brought promptly before a judge or other judicial officer and that he did not have an enforceable right to compensation in respect of these matters. He relied on Article 5 §§ 1, 3 and 5 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11). The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 14 March 2000, the Chamber declared the application partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 12 June 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr H. LLEWELLYN, Foreign and Commonwealth Office,	<i>Agent,</i>
Mr S. FREELAND,	<i>Counsel,</i>
Mr O. PAULIN,	
Mr S. BRAVINER,	
Mrs M. MADDEN,	<i>Advisers;</i>

(b) *for the applicant*

Mr B. MACDONALD,	<i>Counsel,</i>
Mr D. MULLAN, of the Londonderry Bar,	<i>Solicitor.</i>

The Court heard addresses by Mr MacDonald and Mr Freeland.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was, and still is, a prominent member of Sinn Fein. He has been arrested by the police on a number of occasions and has issued proceedings relating to his allegations, *inter alia*, of arbitrary arrest, assault and ill-treatment arising out of six incidents. In proceedings lodged for incidents in 1988 and on 19 March 1993, he received an award of damages (amount unspecified). In or about January 1994 he was awarded damages of 2,500 pounds sterling (GBP) for an incident in Guildhall Square on 16 March 1993 when the judge found that he had been wrongfully arrested by police officers who had purported to arrest the applicant for obstruction in failing to give his name when in fact they were fully aware of his identity. This case concerns his arrest in 1985 in relation to the murder of Mr Kurt Konig.

9. Kurt Konig was a German citizen working for the caterers of canteens in police stations in Londonderry. He was murdered on 21 November 1985. The Provisional IRA claimed responsibility for his death.

10. The Government submitted that Special Branch received intelligence that the applicant and three other persons were involved in the murder. The intelligence derived from four informants who had proved reliable in the past and had provided information leading to seizures of explosives or

firearms and to prosecutions. None of the informants had a criminal record. The information given by these four informants was consistent, in that all gave the same names as being involved, and independent, in that none was aware of the existence of the others and each gave the information at separate meetings with police officers.

11. Detective Superintendent R. of the Royal Ulster Constabulary (“the RUC”) was briefed by Special Branch concerning this intelligence that the applicant was a member of the Provisional IRA and had been implicated in the murder.

12. Detective Superintendent R. briefed Inspector B. who in turn briefed Detective Constable S.

13. On 28 December 1985, at about 6 or 6.15 a.m., Detective Constable S. visited the applicant’s house and conducted a search. At the conclusion of the search, at 8.05 a.m., S. arrested the applicant. He told the applicant that he was arresting him under section 12(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1984 (“the 1984 Act”) which empowered a police constable to arrest, without a warrant, a person whom he had reasonable grounds for suspecting of being concerned in the commission, preparation or instigation of acts of terrorism.

14. The applicant was taken to Castlereagh Detention Centre where he was questioned about his possible membership of the IRA, his suspected involvement in Kurt Konig’s murder and also his possible involvement in the murder of two soldiers on 1 April 1982. He was interviewed on thirty-four occasions. He did not respond to any questions. According to the Government, the first interview occurred on 28 December 1985 at 11.50 a.m., at the start of which he was told that the police were enquiring into his involvement with the Provisional IRA and related matters. Police notes provided by the Government record that during the next interview, from 2.05 to 4 p.m., the interrogating officers told the applicant that they were making enquiries in relation to his membership of the IRA and the murder of Kurt Konig.

15. On 29 December 1985 the Secretary of State for Northern Ireland extended the applicant’s period of detention beyond the initial 48-hour period, by five days. The applicant was released without charge on 3 January 1986 at 9 p.m., after six days and thirteen hours in custody.

16. By a writ issued on 20 August 1986 against the Chief Constable of the RUC, the applicant instituted a civil action for damages before the High Court in Northern Ireland in respect of, *inter alia*, assault, seizure of documents, false imprisonment and unlawful arrest.

17. Before the High Court, the submissions of the applicant’s counsel concentrated, as the trial judge found, on the issues of assault and confiscation of documents. He did however raise the argument, in the context of the lawfulness of the arrest, that Detective Constable S. did not have sufficient grounds for suspicion that the applicant had committed an

offence to justify the arrest. The evidence before the court from Detective Constable S. was to the effect that he attended a briefing at 5.30 a.m. on 28 December 1985 in which he was told that he was to carry out a search to find evidence and arrest persons, including the applicant, suspected of involvement in the murder of Kurt Konig. He had been told by his superior officer, Inspector B., at that briefing that the applicant was involved in the murder and stated that these were the reasonable grounds for suspecting the applicant. He did not state that Inspector B. had told him the grounds for his own suspicion, nor was he asked about that matter by counsel for either party. It was common ground that the murder was a terrorist offence. The superior officer was not called as a witness in the proceedings.

18. On 14 November 1990 Judge McCollum found that there had been an unlawful taking of the applicant's notes by a police officer and awarded Mr O'Hara GBP 100 in damages. He rejected the applicant's claims of assault and ill-treatment, finding that he had not satisfied him on the balance of probabilities that his version of events was right and that of the police officers wrong.

As regards the allegations of wrongful arrest, the judge noted:

“... while [the applicant's counsel] submitted that the officer who arrested the [applicant] was required, in order to render the arrest lawful, in addition to holding the suspicion grounding the arrest of the [applicant], [to] have reasonable grounds for that suspicion, based on his own knowledge of facts giving rise to that suspicion. He accepted that both Mr Justice Carswell and the Lord Chief Justice had previously rejected the same submission in similar cases.

While he reserved his position on this issue he made no new submissions and produced no new arguments to me which would cause me to depart from the reasoning in their decisions, and in the circumstances I am satisfied in this case on the evidence of Detective Constable [S.] that as a result of the information he had been given he had reasonable grounds for suspecting that the [applicant] had been concerned in the commission, preparation or instigation of acts of terrorism.

Cross-examination of the detective constable did not probe the details which had been disclosed to Detective Constable [S.] in the course of the briefing during which he was supplied with this information.

I find on the evidence that the detective constable had a suspicion that the [applicant] was involved in the murder of Kurt Konig and that this suspicion was reasonably based on information given to him by a superior officers at the briefing that morning.

Either party could have elicited details of the briefing, not as truth of the matters disclosed, but as relevant on the issue of the reasonableness of the suspicion held by the arresting officer. Proof of the lawfulness of the arrest lies on the defendant.

I would not wish to lay down the proposition that reasonable suspicion could in all circumstances be based on the opinion of another officer expressed without any supporting allegations of fact. But it does seem to me that a briefing officially given

by a superior officer would give reasonable grounds for suspicion of the matters stated therein. The fact that I have such scanty evidence of the matters disclosed to Detective Constable [S.] means that I am only just satisfied of the legality of the arrest, but I am fortified in my view by the lack of detailed challenge in cross-examination as to the nature of the information given to him.

The main issue between the parties is as to whether the [applicant] was assaulted and mistreated during the period of his detention ...”

19. On 24 October 1990, the applicant gave notice of appeal to the Court of Appeal in Northern Ireland concerning the claim of unlawful arrest and false imprisonment.

20. On 6 May 1994 the Court of Appeal dismissed the appeal, upholding the decision of the High Court that reasonable suspicion could be derived from information provided by a superior officer and that the arrest was lawful.

“Notwithstanding his concern that more detail of the briefing had not been given, the learned trial judge was able to conclude:

‘(1) that the arresting officer ... did have a suspicion that the [applicant] was involved in a terrorist murder and it was implicit that that suspicion was genuinely held by him;

and (2) that the official briefing which he had attended given by [his superior officer] gave him reasonable grounds for that suspicion.’

These were factual findings and clearly contained in our view all the essential proofs that the respondent was required to adduce to constitute lawful arrest under section 12(1)(b) of the Act.

[Applicant’s counsel] submitted that this was not the case. The source of the suspicion and the reasonable grounds for it must be before the court, namely evidence from the briefing officer, Inspector [B.], as to the grounds on which he suspected the [applicant] of being involved in the commission, preparation and instigation of acts of terrorism. It would be unjust, he contended, if section 12 could give Inspector [B.] protection from liability for false imprisonment if the Inspector himself had not reasonable grounds for the suspicion. The first part of this submission flies in the face of the authorities as we have said. The second part, so far as this case is concerned, seems to be hypothetical in that the regularity or the bona fides of the ‘official briefing’ were not questioned. No factual foundation for such a case was made out ...

We consider that the decision of the learned trial judge was correct. The information given at the briefing to the arresting officer was admissible and although, in his words, ‘scanty’ it was sufficient to constitute the required state of mind of an arresting officer under section 12(1)(b) of the Act.”

21. An appeal to the House of Lords against the decision of the Court of Appeal was dismissed on 12 December 1996. In his judgment, with which the other judges agreed, Lord Hope of Craighead held that it was not necessary for an arresting officer to possess all the information which had led to the decision to arrest, but that the arresting officer must have

equipped himself with sufficient information so that he had reasonable cause to suspect before exercising the power of arrest. The information acted upon by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told; his reasonable suspicion may be based on information which has been given to him anonymously, or it may be based on information which turns out later to be wrong. While the evidence about the matters disclosed at the briefing was indeed scanty, he found that the trial judge was entitled to weigh up the evidence in the light of the surrounding circumstances and, having regard to the source of that information, and to draw inferences as to what a reasonable man, in the position of the independent observer, would make of it.

22. Lord Steyn stated, *inter alia*, concerning the general principles:

“Certain general propositions about the powers of constables under a section such as section 12(1) can now be summarised. (1) In order to have a reasonable suspicion the constable need not have evidence amounting to a *prima facie* case. Ex hypothesi one is considering a preliminary stage of the investigation and information from an informer or a tip-off from a member of the public may be enough: *Hussien v. Chong Fook Kam* [1970] A.C. 942, 949. (2) Hearsay information may therefore afford a constable reasonable grounds to arrest. Such information may come from other officers ... (3) The information which causes the constable to be suspicious of the individual must be in existence to the knowledge of the police officer at the time he makes the arrest. (4) The executive ‘discretion’ to arrest or not ... vests in the constable, who is engaged on the decision to arrest or not, and not in his superior officers.

Given the independent responsibility and accountability of a constable under a provision such as section 12(1) of the Act of 1984 it seems to follow that the mere fact that an arresting officer has been instructed by a superior officer to effect the arrest is not capable of amounting to reasonable grounds for the necessary suspicion within the meaning of section 12(1). It is accepted, and rightly accepted, that a mere request to arrest without any further information by an equal ranking officer, or a junior officer, is incapable of amounting to reasonable grounds for the necessary suspicion. How can the badge of superior officers and the fact that he gave an order make a difference? ... In practice it follows that a constable must be given some basis for a request to arrest someone under a provision such as section 12(1), e.g. a report from an informer.”

## II. RELEVANT DOMESTIC LAW AND PRACTICE

23. Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 provided at the relevant time:

“(1) Subject to sub-section (2) ..., a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be:

...

(b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of this Act applies;

...

(4) A person arrested under this section shall not be detained in right of the arrest for more than forty-eight hours after his arrest; but the Secretary of State may, in any particular case, extend the period of forty-eight hours by a period or periods specified by him.”

24. This provision sets a test of an honest suspicion upon reasonable grounds, involving an objective element. Domestic case-law indicates that an arrest will be unlawful where, although there was an honest suspicion on the part of the arresting officer, that suspicion was not objectively reasonable (see, for example, *Foulkes v. Chief Constable of the Merseyside Police* [1998] 3 All England Law Reports 705).

25. Although section 12 concerns the suspicion held by the arresting officer, where a briefing officer has told an arresting officer that there is reliable information when there is not, the Chief Constable may become vicariously liable for a wrongful arrest, on behalf of the briefing officer, not the arresting officer (see *Clarke v. Chief Constable of North Wales Police*, 5 April 2000).

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

26. The applicant complained about his arrest on 28 December 1985, relying on Article 5 § 1 of the Convention, the relevant parts of which provide:

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

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...”

### **A. Submissions of the parties**

27. The applicant submitted that, as he had never been a member of the IRA or been involved in the murder, the police could not have received reliable information to that effect. He pointed out that it was never suggested to him during his interviews with the police that they had information from any source implicating him in this way or regarding the nature of his alleged involvement. The Government had not provided any documentation or details to support their bare assertion that any such information was received.

28. The applicant alleged that his arrest and detention by the police was to harass him and put pressure on him as he was a prominent member of Sinn Fein. He stated that he had been arrested on at least thirty occasions and detained for various periods of time and had successfully claimed compensation for wrongful arrest and detention. In these circumstances, where there was a real possibility that the police were motivated by malice, particular care should be taken in assessing the sufficiency of the information provided regarding the grounds of suspicion.

29. The applicant argued that domestic law, by restricting the courts' examination to the arresting officer's mind instead of the objective facts, provided virtually no protection against arbitrary arrest. It permitted the use of an arresting officer as a tool in a "planned arrest" scenario. As a result of the approach by the domestic courts, if the information given by a briefing officer to the arresting officer was sufficient to generate an honest suspicion, it was also probably sufficient to create one that was reasonable. It was impossible in practical terms for an applicant to prove misfeasance by the superior officer for misleading the arresting officer. Nor in any event was it for the applicant to prove a lack of reasonable grounds for arrest in the domestic proceedings, but rather for the defendant police authorities to establish the lawfulness of the arrest by calling the appropriate witnesses and producing the relevant documentary records.

30. In the applicant's view, the lack of protection against arbitrariness was shown in this case by the evidence that the police had been actuated by malice, having arrested the applicant on previous occasions, and at no stage during the interviews did they suggest that they had any information from any source implying that the applicant was a member of the IRA or implicating him in the murder of Mr König; nor had they given any indication of the nature of his alleged role in that murder. There had been insufficient material disclosed in this case for the Court properly to be satisfied of the reasonableness of the alleged suspicion, the mere reference to the alleged existence of information from anonymous informers being untested or substantiated in any way. It would be possible, he argued, for the Government to provide notes, summaries or other documents edited and

anonymised to protect the informer as had been done in, for example, the Bloody Sunday Inquiry.

31. The Government submitted that the applicant's arrest was in conformity with Article 5 § 1 (c) of the Convention, as Detective Constable S. reasonably suspected the applicant of being involved in the murder of Kurt Konig. The basis of his reasonable suspicion was a briefing which he had attended given by a superior officer. It was common ground in the domestic courts that S. subjectively had the necessary suspicion, as was the fact that Kurt Konig had been murdered in a terrorist offence. As domestic law had been changed to reflect the test of reasonable as opposed to honest suspicion, a finding by the domestic courts that an arrest was lawful indicated that the requirements of Article 5 § 1 (c) had been complied with, unless the domestic courts had wrongly applied the domestic law. In that context, they drew the Court's attention to the fact that the domestic courts had the benefit of hearing the oral testimony of witnesses, tested under cross-examination. The arresting officer had therefore been heard but, as the focus of the applicant's claim was on the alleged assault, the applicant did not in fact seek any further elucidation of the background to the arrest, such as seeking to cross-examine the other officers involved in the arrest. In particular, no allegation of bad faith was made against the arresting or briefing officers. Nor in fact did the applicant cross-examine the arresting officer as to what occurred at the briefing.

32. The Government stated that the information passed on at the briefing derived from high-grade intelligence provided by reliable informants passed on to officers of the Special Branch to the effect that the applicant and three others were involved in the murder and that the applicant was a member of the IRA. There were no reasons for doubting the veracity of this information, which was sufficient for the purposes of Article 5 § 1 (c) as it gave details of the nature of the information provided and some details about its reliability. It was of overriding importance that further details which might prejudice an intelligence source, placing him at risk or jeopardising the free flow of information to the police, should not be disclosed.

33. The Government further pointed out that, under domestic law, only the facts and matters known to the arresting officer were taken into account under section 12(1)(b) of the 1984 Act. However, if the information was shown not to be true and had been maliciously provided, the arrested person would be entitled to compensation in an action for false imprisonment against an officer who acted maliciously. This ensured the function of preventing arbitrary arrest either by the arresting officer or his superior.

## **B. The Court's assessment**

34. The Court emphasises that the “reasonableness” of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention laid down in Article 5 § 1 (c) of the Convention. This requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence, though what may be regarded as reasonable will depend on all the circumstances of the case (see *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, Series A no. 182, p. 16, § 32).

35. In that context, terrorist crime poses particular problems, as the police may be called upon, in the interests of public safety, to arrest a suspected terrorist on the basis of information which is reliable but which cannot be disclosed to the suspect or produced in court without jeopardising the informant. However, though Contracting States cannot be required to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing confidential sources of information, the Court has held that the exigencies of dealing with terrorist crime cannot justify stretching the notion of “reasonableness” to the point where the safeguard secured by Article 5 § 1 (c) is impaired. Even in those circumstances, the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence (see *Fox, Campbell and Hartley*, cited above, pp. 16-18, §§ 32-34).

36. It may also be observed that the standard imposed by Article 5 § 1 (c) does not presuppose that the police have sufficient evidence to bring charges at the time of arrest. The object of questioning during detention under sub-paragraph (c) of Article 5 § 1 is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge which comes at the next stage of the process of criminal investigation (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, p. 29, § 53, and *Murray v. the United Kingdom*, judgment of 28 October 1994, Series A no. 300-A, p. 27, § 55).

37. In the present case the Court recalls that the applicant was arrested by Detective Constable S. on suspicion of having committed a terrorist offence, namely the murder of Mr König. After six days and thirteen hours in detention, during which time he was questioned by police officers without making any reply, the applicant was released. The lawfulness of the arrest was challenged by the applicant in domestic proceedings, where the courts rejected his complaints.

38. The Court notes, first of all, that the standard of suspicion set by domestic law for arrest is that of honest suspicion on reasonable grounds (section 12(1)(b) of the 1984 Act – see paragraphs 23-24 above). The present application is therefore to be distinguished from those in *Fox, Campbell and Hartley* and *Murray* (both cited above) in which the Court examined complaints about arrest effected under provisions requiring only an honest suspicion. In the applicant's case, his claims that his arrest was not justified by a suspicion, held on reasonable grounds, that he had committed an offence, was examined by three levels of domestic courts. In those proceedings, evidence was given by the arresting officer, Detective Constable S., concerning the circumstances of the arrest and the applicant was given the opportunity to cross-examine. This must be regarded *per se* as providing a significant safeguard against arbitrary arrest.

39. As regards the basis for the applicant's arrest, the arresting officer, Detective Constable S., gave evidence that he had been given information by a superior officer, at a briefing prior to the arrest, that the applicant was suspected of involvement in the murder of Kurt Konig. No further questions were asked by the applicant's counsel as to what information passed at the briefing. Nor were any steps taken to have other officers involved in the arrest and detention, such as the briefing officer, called to give evidence. Furthermore, the applicant did not make any requests for discovery in relation to the existing documentary evidence concerning the arrest. The applicant argued before the Court that it was for the defendant police authorities to call the necessary witnesses to establish the lawfulness of the arrest. The Government pointed out that they had no reason to call any other officers as no issue had been raised concerning their role in the events. The Court observes that indeed very little ("scanty" in the words of the High Court judge) evidence was produced concerning the background to the applicant's arrest, largely because at the trial level the applicant was in fact concentrating on his claims of assault and ill-treatment. The defendants in that action, not unreasonably, would have geared their response to the allegations which he was making. To the extent therefore that the applicant complains before this Court that no information was elicited during the domestic proceedings concerning the briefing, the Court considers that this was the consequence of the way in which the applicant pursued his claims.

40. In the proceedings before the Court, the Government have explained that the information which led the police to arrest the applicant was obtained independently from four separate informers, who had proved previously reliable and whose information concerning the murder was consistent. It was this information which was the basis of the decision to arrest the applicant and in respect of which instructions were given by the briefing officer to the arresting officer, Detective Constable S. The applicant disputed that this information was in fact received or that it could be regarded as reliable, since he was not involved in the incident. He argued

that he was arrested as part of an arbitrary police policy which targeted him as a prominent member of Sinn Fein. The Court recalls, however, that no challenge was made in the domestic proceedings by the applicant to the good faith of any of the officers involved in the arrest or detention. It was never suggested, for example, that the arrest had been motivated by malice or was an arbitrary abuse of power, as the applicant had succeeded in proving concerning an incident on 16 March 1993 (see paragraph 8 above). It had not been disputed by the applicant that a briefing had occurred, attended by police officers, at which information was passed on concerning the identity of persons involved in the murder of Kurt Konig and steps taken to plan a number of arrests.

41. The Court recalls that in *Fox, Campbell and Hartley* (cited above, pp. 8-9, §§ 8-14), two of the applicants had been arrested when their car had been stopped and searched. There had allegedly been information known to the police prior to this incident that they were suspected of being members of the IRA and involved in intelligence gathering. The third applicant had been arrested on suspicion of involvement in a kidnapping, without any indication given as to the basis for the suspicion beyond reference to sensitive material available to the police connecting him with the incident. This was found by the Court in respect of all three applicants not to meet the minimum standard set by Article 5 § 1 for judging the reasonableness of an arrest of an individual. On the other hand, in *Murray* (cited above, p. 28, §§ 61-62) the standard was satisfied when the arrest of the applicant, on suspicion of involvement in the collection of funds for the purchase of arms, was based on information provided to the arresting officer that the applicant's brothers had been convicted of similar offences in the United States, which implied collaboration with "trustworthy" persons in Northern Ireland and the applicant was known to have visited the United States and maintained contacts with her brothers, elements which were not necessarily incriminating of the applicant. There may thus be a fine line between those cases where the suspicion grounding the arrest is not sufficiently founded on objective facts and those which are. Whether the requisite standard is satisfied and whether the guarantee against arbitrary arrest laid down by Article 5 § 1 (c) is thereby satisfied depends on the particular circumstances of each case.

42. The suspicion in the present case was based on information passed on at a police briefing by informers who identified the applicant as one of a number of persons suspected of involvement in a specific terrorist event, the murder of Mr Konig. There is no basis in the material provided for the Court to reject the Government's submissions on this point. The arrest was therefore a pre-planned operation, more akin to the arrest in *Murray*, and was based on slightly more specific detail than in *Fox, Campbell and Hartley*. In these circumstances, and having regard to additional distinguishing elements referred to above (see paragraphs 38-40), the Court

considers that the domestic courts' approach – that the judge was entitled on the sparse materials before him to infer the existence of reasonable grounds of suspicion – was not incompatible with the standard imposed by Article 5 § 1 (c) of the Convention.

43. The applicant argued, with some force, that police officers should not be able to hide behind references to anonymous informants by way of justifying abuse of their power of arrest. The Court reiterates, however, that in the domestic proceedings the applicant did not attempt to raise any complaints concerning bad faith or oppression. His claim was based on the narrow legal argument concerning the state of mind of the arresting officer relevant under section 12(1)(b) of the 1984 Act. Nor is the Court persuaded that there was any immunity conferred on other police officers, as a result of the finding by the domestic courts, that the arresting officer had the required suspicion. If the briefing officer or any other superior officer had deliberately passed on misleading or inaccurate information to the arresting officer, the police authorities would have been liable for wrongful arrest or false imprisonment in respect of that misconduct (see paragraph 25 above).

44. The Court does not find, therefore, that the approach of the domestic courts to the standard of suspicion in this case removed the accountability of the police for arbitrary arrest, or conferred on the police any impunity with regard to arrests conducted on the basis of confidential information. In the circumstances, the suspicion against the applicant reached the required level as it was based on specific information that he was involved in the murder of Kurt König and the purpose of the deprivation of liberty was to confirm or dispel that suspicion. The applicant can accordingly be said to have been arrested and detained on “reasonable suspicion” of a criminal offence, within the meaning of sub-paragraph (c) of Article 5 § 1.

Accordingly, there has been no violation of that provision.

## II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

45. The applicant complained that he had not been brought promptly or at all before a judge after his arrest, relying on Article 5 § 3 of the Convention, which provides:

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

46. The Court notes that the Government have not disputed that the applicant was held for six days and thirteen hours before his eventual release and that this was not in compliance with the requirement to bring an arrested person promptly before an appropriate judicial officer. Having regard to its case-law (in particular *Brogan and Others*, cited above, pp. 33-34, § 62, where detention periods exceeding four days for terrorist suspects

were found not to be compatible with the requirement of prompt judicial control), the Court finds that there has in this respect been a violation of Article 5 § 3 of the Convention.

### III. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

47. The applicant also relied on Article 5 § 5 of the Convention, which provides:

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

48. The Government submitted that the applicant did have an enforceable right to compensation in the courts in respect of unlawful arrest and detention. He did not receive compensation, however, as the courts were satisfied that he had been lawfully arrested and detained.

49. The applicant submitted that the requirements for a lawful arrest in domestic law fell short of the requirements imposed by Article 5 of the Convention and, therefore, pursuant to domestic law, he did not have an enforceable right to compensation for the matters of which he complained.

50. As the Court has found no violation of Article 5 § 1 (concerning the existence of reasonable grounds of suspicion to justify the applicant's arrest), no issue arises under Article 5 § 5 in relation to this complaint of the applicant.

51. On the other hand, the Court has found above that there has been a breach of Article 5 § 3 of the Convention concerning the length of time during which the applicant was detained before being either released or brought before an appropriate judicial officer. It is not disputed that, as this detention was in accordance with domestic law, no enforceable right to compensation existed. In this regard, therefore, there has been a breach of Article 5 § 5 of the Convention.

### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

#### **A. Damage**

53. The applicant claimed that he had suffered non-pecuniary damage in relation to the six days and thirteen hours which he spent in detention, referring to the allegations which he had made in the domestic proceedings

that he had been assaulted. He also referred to the conditions of detention in Castlereagh as being inhuman and degrading. He claimed that exemplary damages were appropriate where those responsible for arrest had been shown to have acted in a high-handed or oppressive manner. He claimed 20,000 to 40,000 pounds sterling (GBP), having regard to the applicable domestic scales.

54. The Government disputed that any award should be made for non-pecuniary damage, pointing out that the applicant's claims concerning assault and ill-treatment had been rejected. In so far as any violation of the Convention were found, such finding would in itself constitute sufficient just satisfaction.

55. The Court recalls that it has rejected the applicant's claim that his arrest failed to comply with Article 5 § 1 of the Convention. There have been no findings as regards the ill-treatment or other oppressive treatment alleged by the applicant. It has however found a breach of Article 5 § 3 in that the applicant was detained for more than the acceptable period before being either released or brought before a court, and a breach of Article 5 § 5 in that he enjoyed no enforceable right to compensation in that respect. Nevertheless, the Court finds, in the circumstances of this case, that these findings of a violation constitute sufficient just satisfaction.

## **B. Costs and expenses**

56. The applicant claimed a total of GBP 29,868.25. This included sums of GBP 15,462 for costs incurred in the domestic legal proceedings in the High Court, Court of Appeal and House of Lords and, in respect of the Convention proceedings, GBP 5,000 for senior counsel, GBP 5,406 for junior counsel and GBP 3,955 for a solicitor.

57. The Government disputed that any costs incurred in the domestic proceedings should be recoverable. They considered that the fees claimed for two counsel were excessive and that a sum of GBP 8,000, plus any value-added tax (VAT) that may be chargeable would be reasonable. They accepted that the amount of GBP 3,955, inclusive of VAT, was reasonable in respect of the solicitor's fees.

58. The Court recalls that the domestic proceedings in respect of which the applicant makes a claim related to his complaints about the unlawfulness of his arrest. However, this part of the application has not resulted in any finding of a violation. The Court is accordingly unable to make any award in this respect. In so far as the applicant's complaints under the Convention were therefore only partly successful, the Court, making an equitable assessment, awards the sum of GBP 11,000, plus any VAT that may be chargeable, for costs and expenses.

### C. Default interest

59. 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 7.5% per annum.

### FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been no violation of Article 5 § 1 of the Convention;
2. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 5 § 5 of the Convention in relation to the applicant's complaint under Article 5 § 1;
4. *Holds* unanimously that there has been a violation of Article 5 § 5 of the Convention in relation to the applicant's complaint under Article 5 § 3;
5. *Holds* unanimously that these findings of a violation constitute in themselves sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
6. *Holds* unanimously
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, for costs and expenses, GBP 11,000 (eleven thousand pounds sterling), plus any value-added tax that may be chargeable;
  - (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;
7. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 16 October 2001 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ  
Registrar

J.-P. COSTA  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Loucaides is annexed to this judgment.

J.-P.C.  
S.D.

## PARTLY DISSENTING OPINION OF JUDGE LOUCAIDES

While I share the view of the majority as regards the violation of Article 5 §§ 3 and 5, I do not agree that there has been no violation of paragraph 1 of the same Article.

My disagreement with the majority does not concern the legal principles expressed in the judgment, but only their application to the facts of this particular case. I, myself, would emphasise the principle mentioned in paragraph 34 of the judgment, according to which

“... the ‘reasonableness’ of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention laid down in Article 5 § 1 (c) of the Convention. This requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence, though what may be regarded as reasonable will depend on all the circumstances of the case (see *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, Series A no. 182, p. 16, § 32)”.

In the case just cited the Court also dealt with the situation of terrorist crime, which was described as falling “into a special category” in respect of which “the ‘reasonableness’ of the suspicion justifying such arrests [of suspected terrorists] cannot always be judged according to the same standards as are applied in dealing with conventional crime” (*ibid.*).

But even for such cases the Court pointed out that “the exigencies of dealing with terrorist crimes cannot justify stretching the notion of reasonableness to the point where the essence of the safeguard secured by Article 5 § 1 (c) is impaired” (*ibid.*) and that the “Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) has been secured. Consequently the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence” (*ibid.*, p. 18, § 34).

Therefore, the question in this case boils down to whether the respondent Government furnished “at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence”. The burden is on the Government to provide evidence of such facts or information, which must of course have existed at the time of the arrest.

It is common ground that the evidence produced before the domestic courts by the prosecution in order to justify the existence of reasonable suspicion against the applicant was simply that the arresting constable was told by a superior officer that the applicant was suspected of having been involved in the murder under investigation. No more information was given. The arresting constable did not state that his superior officer had told him the grounds for his own suspicion, nor was he asked by counsel for either party.

Can we regard this concrete information placed before the domestic courts as providing an objectively sufficient basis for a “reasonable suspicion”? In my view, the answer must, without any hesitation, be in the negative. If we accept the contrary, we will be legalising a general formula for justifying any arbitrary arrest: any arrest could always be justified by the mere statement of the arresting constable that his superior ordered him to arrest a person because the latter was suspected, no grounds at all being given for such suspicion. In the absence of any information as to why the suspicion was reasonable, how can a court decide whether the arrest was arbitrary or not?

In this case the trial judge himself described the evidence produced before him in support of the existence of reasonable suspicion as “scanty”. The same description was repeated in the judgment of the House of Lords. Nevertheless, we read the following finding in one of the judgments of the House of Lords, shared by the majority of the judges:

“The trial judge described the evidence as scanty. But he inferred that the briefing afforded reasonable grounds for the necessary suspicion. In other words the judge inferred that some further details must have been given in the briefing. The legal burden was on the respondent to prove the existence of reasonable grounds for suspicion. Nevertheless I am persuaded that the judge was entitled on the sparse materials before him to infer the existence of reasonable grounds for suspicion.”

I find that there is a good deal of speculation in the conclusion that the trial judge did in fact infer “that some further details must have been given in the briefing” and “that the judge was entitled on the sparse materials before him to infer the existence of reasonable grounds for suspicion”. Personally, I fail to comprehend why further details relating to the reasonableness of the suspicion must necessarily have been given in a briefing of a constable by his superior officer which resulted in an *order* to arrest the applicant. Moreover I cannot understand why the trial judge was *entitled* on the sparse material before him to infer the existence of *reasonable grounds for suspicion*. He did not have before him any information at all regarding the grounds of suspicion. He only had a statement that the arresting constable had been told by his superior that the applicant was suspected of involvement in the murder of Kurt Konig and that the constable had consequently been ordered to arrest the applicant.

The majority in the judgment of our Court relied on the fact that the arresting officer was not cross-examined by the applicant’s counsel as to what information was given at the briefing. The majority went on to state that “nor were any steps taken to have other officers involved in the arrest and detention, such as the briefing officer, called to give evidence” and concluded with the following finding: “To the extent therefore that the applicant complains before this Court that no information was elicited during the domestic proceedings concerning the briefing, the Court

considers that this was the consequence of the way in which the applicant pursued his claims.”

However, the legal burden of establishing a reasonable suspicion to the satisfaction of the judicial authorities responsible for preventing possible abuses rests with the arresting law enforcers, and this was expressly admitted by the House of Lords in the relevant domestic proceedings. Therefore, the trial court had a duty to determine whether the material produced before it was in actual fact sufficient to satisfy the requirement of the “existence of some facts or information capable of satisfying the court that the arrested person was reasonably suspected of having committed the alleged offence”. What really matters is the actual material, produced before the court, and not the tactics used by the parties in respect of the presentation of that material. In other words, at the end of the day, the judge has to decide whether the relevant requirement is satisfied exclusively on the basis of the evidence before him. Whether more or less evidence could have been produced as a result of greater or lesser effectiveness in the questioning by the parties would not have affected the task of the court. In fact, this is true in respect of any determination of factual issues by courts: they have to make findings on the basis of the evidence before them without any speculation as to the existence or non-existence of other evidence which might or might not have come to light through the conduct of the proceedings by the parties.

I referred to the evidence as to the “reasonable suspicion” produced before the domestic courts in this case at the material time. In my view, this is the evidence which really matters for the question in issue. Evidence produced for the first time *ex post facto* before this Court is, in my opinion, irrelevant and should be disregarded for the simple reason that so long as that evidence was available at the time of the arrest, it should have been adduced before the competent domestic courts in order to be assessed and decided upon by them with reference to the question in issue. The European Court of Human Rights cannot act as a first-instance or even as a fourth-instance court and evaluate evidence which was never adduced before the domestic courts in cases such as the present one.

In the proceedings before the European Court, the Government explained that the information which led the police to arrest the applicant was obtained independently from four separate informers, who had proved previously reliable and whose information concerning the murder was consistent. According to the Government it was this information which was the basis of the decision to arrest the applicant and in respect of which instructions were given by the briefing officer to the arresting officer, Detective Constable S. The applicant disputed that this information had in fact been received or that it could be regarded as reliable, since he had not been involved in the incident. The majority seem to have accepted this information and dismissed the position of the applicant, mainly on the

ground that “no challenge was made in the domestic proceedings by the applicant to the good faith of any of the officers involved in the arrest or detention”. In this connection the majority added the general statement that “there [was] no basis in the material provided for the Court to reject the Government’s submissions on this point” (see paragraphs 40 and 42 of the judgment).

For my part, for the reasons I have given above, I consider the additional information given by the Government to the Court fifteen years after the event to be inadmissible. In any event, it is doubtful whether the information strengthens to an adequate degree the Government’s position, given that it does not cover the grounds of suspicion or the nature of the applicant’s alleged involvement in the crime in question, let alone the fact that this information was not produced before the trial court at the material time.

In the majority’s judgment, a comparison is made between this case and those in *Fox, Campbell and Hartley* and *Murray v. the United Kingdom*. The majority found that the arrest in the present case was more akin to the arrest in *Murray* than to that in *Fox, Campbell and Hartley*. I would reiterate the statement in the judgment of the majority that the question whether the guarantee against arbitrary arrest laid down by Article 5 § 1 (c) is satisfied depends on the particular circumstances of each case. I would add that no two cases can be identical. Still, if a comparison on the basis of similarities is to be embarked upon in respect of the above cases, I believe that this case is nearer to *Fox, Campbell and Hartley* than to *Murray*, the reason being that both in this case and in the first-mentioned case no grounds at all in support of the reasonableness of the suspicion were submitted to the domestic courts, while in *Murray* certain facts in support of the suspicion were in fact adduced in the competent national courts.

My conclusion is that in the present case no facts or information at all were submitted to suggest that the suspicion against the applicant was reasonable. Therefore, the judicial supervision of whether the guarantee against arbitrary arrest laid down by Article 5 § 1 (c) was satisfied, was rendered ineffective. I believe that the liberty of an individual is a very important value in a democratic society and can only be interfered with when there are objective and well-founded reasons. It is not enough to establish a *reasonable* suspicion justifying an arrest on the basis of a mere statement by the arresting constable to the effect that “my boss suspects a person and therefore he ordered me to arrest him”. In fact that is what happened in this case, and that is why I find that there has been a violation of Article 5 § 1 of the Convention.

Consequently, I would have awarded the applicant a higher amount for costs and expenses.