



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

FOURTH SECTION

**CASE OF HEANEY AND McGUINNESS v. IRELAND**

*(Application no. 34720/97)*

JUDGMENT

STRASBOURG

21 December 2000

**FINAL**

*21/03/2001*



**In the case of Heaney and McGuinness v. Ireland,**

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

Mr G. RESS, *President*,

Mr A. PASTOR RIDRUEJO,

Mr L. CAFLISCH,

Mr I. CABRAL BARRETO,

Mr V. BUTKEVYCH,

Mrs N. VAJIĆ,

Mr M. PELLONPÄÄ, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 16 March, 11 July and 12 December 2000,

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

**PROCEDURE**

1. The case originated in an application (no. 34720/97) against the Republic of 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 two Irish nationals, Mr Anthony Heaney and Mr William McGuinness (“the applicants”), on 17 January 1997.

2. The applicants, who had been granted legal aid, were represented by Mr D. Robinson, a lawyer practising in Dublin. The Irish Government (“the Government”) were represented successively by their Agents, Ms E. Kilcullen, Mr R. Siev and Mr A. Connolly, all of the Department of Foreign Affairs.

3. The applicants alleged that section 52 of the Offences against the State Act 1939 constituted a violation of the rights guaranteed by Articles 6, 8 and 10 of the Convention.

4. On 1 July 1998 the Commission decided to communicate to the Government the applicants' complaints under Articles 6 and 10 of the Convention. 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).

5. The application was allocated to the Fourth 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. Mr J. Hedigan, the judge elected in respect of Ireland, withdrew from sitting in the case (Rule 28). The Government

accordingly appointed Ms N. Vajić, the judge elected in respect of Croatia, to sit in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

6. By a decision of 21 September 1999, the Court declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry.].

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Court decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*) and the parties replied in writing to each other's observations on the merits.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

8. At approximately 4.10 a.m. on 23 October 1990 a large explosion occurred at a British Army/Royal Ulster Constabulary checkpoint in County Derry. Five British soldiers and one civilian were killed and a number of other British army personnel were seriously injured.

9. Approximately an hour and a half later, Irish police officers on surveillance duty noted a light in a house approximately four miles from the scene of the explosion. At approximately 6.05 a.m. on 24 October 1990 a warrant was obtained to search the house. At or around 7 a.m. that morning the police entered the house and found an assortment of gloves (rubber and knitted), balaclavas, caps and other clothing. The seven men in the house, including the owner and the applicants, were arrested and detained by the police under section 30 of the Offences against the State Act 1939 (“the 1939 Act”). As later noted by the High Court (see paragraph 15 below), it was suspected that the bombing had been carried out by the Irish Republican Army (an unlawful paramilitary organisation known as the IRA) and the applicants were, in turn, suspected by the police of membership of that organisation and of involvement in the bombing.

10. Both applicants were cautioned by police officers in the usual terms, namely that they were not required to say anything unless they wished to do so and they were also informed that anything they did say would be taken down in writing and might be given in evidence against them.

Mr Heaney was then questioned about the bombing and about his presence in the house where he was arrested. He refused to answer the questions put to him. Police officers then read section 52 of the 1939 Act to him and he was requested pursuant to that section to give a full account of his movements and actions between 6 p.m. on 23 October and 6.55 a.m. on 24 October 1990. He refused to answer any questions.

Mr McGuinness was also questioned about the explosion and about his presence in the house where he was arrested. He refused to answer those questions. He was then requested to account for his movements between 1 a.m. and 7.15 a.m. on 24 October 1990. He refused to answer. Police officers then read section 52 of the 1939 Act to him and he was handed a copy of the section and asked to read it. He continued not to answer questions put to him.

11. On 25 October 1990 both applicants were brought to the Special Criminal Court in Dublin and charged with the offence of membership of an unlawful organisation (contrary to section 21 of the 1939 Act) and of failing to account for their movements (contrary to section 52 of the 1939 Act).

12. On 19 April 1991 the applicants' trial in the Special Criminal Court took place. On 26 June 1991 the applicants were acquitted of the charge of membership of an unlawful organisation but each was convicted of failing to provide an account of their movements during a specified period contrary to section 52 of the 1939 Act. The court rejected their arguments that section 52 must be read as including a right to refuse to provide such information on reasonable grounds and about the confusion caused by police officers giving the usual caution about the right to remain silent and then making a request for information under section 52 of the 1939 Act. Both applicants were sentenced to six months' imprisonment. Their sentences commenced on 26 June 1991. They were released on 10 November 1991.

13. The applicants then appealed against their conviction and sentence under section 52 to the Court of Criminal Appeal. As regards their conviction, they submitted that the Special Criminal Court had erred in finding that the applicants were not confused as a result of the caution about their right to remain silent and the conflicting request for information under section 52 by the same officers. They argued that section 52 should have been read as including the possibility of a refusal to give information based on reasonable excuse. As to their sentence, they argued that the confusion caused by the caution and request for information should have been a mitigating factor; that there was no evidence that they warranted the maximum sentence; and that the court failed to take into account the time the applicants had spent in custody prior to their trial.

14. On 3 May 1992 the applicants took proceedings in the High Court challenging the constitutionality of section 52 of the 1939 Act. The proceedings pending before the Court of Criminal Appeal were consequently adjourned.

15. By a judgment dated 24 June 1994, the High Court rejected their application. It based the applicants' right not to answer questions as regards their movements on Article 38 of the Constitution rather than on Article 40, noting that their case related to suspects in custody and not to accused persons on trial. However, it was considered that section 52 constituted a

proportionate interference with the applicants' right to silence, the objective being to assist police investigations into serious crimes of a subversive nature involving the security of the State. In addition, the restrictions were not considered arbitrary or irrational.

The High Court also considered that the restriction did not excessively impair the right to silence given the objective pursued by section 52 and the other legal protections applicable to persons in custody under section 30 of the 1939 Act, which protections were afforded to minimise the risk of an accused wrongfully confessing to a crime and to safeguard against the possible abuse of the powers provided by section 52 of the 1939 Act. Those protections were listed by the High Court: the requirement that a police officer must have a *bona fide* suspicion prior to arrest; the obligation to inform the suspect of the offences under the 1939 Act and/or of the scheduled offences of which he is suspected; the right to legal assistance when reasonably requested; the right to medical assistance; the right of access to a court; the right to remain silent and to be told of that right; the obligations to provide appropriate cautions to detainees and to abstain from cross-examining a person in detention under section 30 of the 1939 Act and from unfair and oppressive questioning of such detainees; and the conditions attaching to any extension of the length of detention under section 30 of the 1939 Act.

16. By a judgment dated 23 July 1996 the Supreme Court rejected the applicants' appeal, finding that section 52 of the 1939 Act was not inconsistent with the Constitution. It was noted that section 52 of the 1939 Act was silent on the use which could be made of statements provided pursuant to requests made under section 52. While the Court of Criminal Appeal had suggested in a previous case (*The People (Director of Public Prosecutions) v. McGowan* [1979] Irish Reports 45) that information lawfully obtained under section 52 might be later used in evidence, the Supreme Court expressly reserved its position as to whether that view was correct or not.

The Supreme Court considered that the right to silence was a corollary to freedom of expression guaranteed by Article 40 of the Constitution and that the relevant assessment was to consider the proportionality of the restriction on the right to silence in view of the public order exception to Article 40 of the Constitution. It noted that the 1939 Act was aimed at actions and conduct calculated to undermine public order and the authority of the State and that the proclamation made pursuant to section 35 of the 1939 Act remained in force.

As to whether section 52 restricted the right to silence more than was necessary in light of the disorder against which the State was attempting to protect the public, the court noted that an innocent person had nothing to fear from giving an account of his or her movements even though such a person may wish, nevertheless, to take a stand on grounds of principle and

to assert his or her constitutional rights. However, it considered that the entitlement of citizens to take such a stand must yield to the right of the State to protect itself. The entitlement of those with something relevant to disclose concerning the commission of a crime to remain silent must be regarded as of an even lesser order. The Supreme Court concluded that the restriction in section 52 was proportionate to the State's entitlement to protect itself.

17. The applicants' appeal to the Court of Criminal Appeal in relation to their conviction under section 52 of the 1939 Act has been adjourned generally pending the outcome of the present application.

## II. RELEVANT DOMESTIC LAW

### A. Pertinent Constitutional provisions

18. Article 38 § 1 of the Irish Constitution provides that no person shall be tried on any criminal charge save in due course of law. By Article 40, the State guarantees liberty for the exercise, subject to public order and morality, of the right of citizens to express freely their convictions and opinions.

### B. The Offences against the State Act 1939

19. The Offences against the State Act 1939 is described in its long (explanatory) title as an Act to make provision for actions and conduct calculated to undermine public order and the authority of the State and, for that purpose, to provide for the punishment of persons guilty of offences against the State, and to establish Special Criminal Courts.

20. Section 21 of the 1939 Act makes it an offence to be a member of an unlawful organisation as defined in the Act.

21. Section 30 deals with the arrest and detention of suspected persons and provides that a member of the police can arrest and detain a person whom he suspects of having committed an offence under the 1939 Act or an offence scheduled under Part V of the 1939 Act (the scheduled offences are mainly offences under the firearms and explosive substances' legislation). This power of arrest is a permanent power so that it is not dependent on a section 35 proclamation (see the following paragraph).

22. Section 35 of the 1939 Act provides that Part V of that Act (which establishes the Special Criminal Courts and contains section 52) is to come into force by means of a proclamation by the government made when the government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order, and when the government therefore makes and publishes a

proclamation to that effect. The proclamation was made in 1972 and is still in force. Accordingly, section 52 of the 1939 Act has been in force since 1972 to date.

23. By section 36 of the 1939 Act the government may declare that a particular class or kind of offence is a scheduled offence for the purpose of the 1939 Act and such offences are to be tried by the Special Criminal Courts established under section 38 of the 1939 Act.

24. Section 52 of the 1939 Act reads as follows:

“1. Whenever a person is detained in custody under the provisions in that behalf contained in Part IV of this Act, any member of the [police] may demand of such person, at any time while he is so detained, a full account of such person's movements and actions during any specified period and all information in his possession in relation to the commission or intended commission by another person of any offence under any section or sub-section of this Act or any scheduled offence.

2. If any person, of whom any such account or information as is mentioned in the foregoing sub-section of this section is demanded under that sub-section by a member of the [police], fails or refuses to give to such member such account or any such information or gives to such member any account or information which is false or misleading, he shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months.”

25. Under the terms of the Good Friday Peace Agreement of 10 April 1998, the government committed to initiating a wide ranging review of, *inter alia*, the 1939 Act with a view to reform and dispensing with those elements of the 1939 Act which would no longer be required. The Minister for Justice, Equality and Law Reform has, with government approval, established a committee to examine all aspects of the Offences against the State Acts and to report to the Minister with recommendations for reform. The committee has already commenced its work.

### **C. Relevant case-law**

26. In the *McGowan* case cited above, the accused had been arrested under section 30 of the 1939 Act and had made certain statements to the police. The defence argued that because of the basis of his arrest (section 30), the existence of section 52 of the 1939 Act and even though no section 52 requests had actually been made, the accused was bound under penalty to give an account of his movements. Accordingly, the statements which had been made by him were involuntary and not therefore admissible. The court did not find this argument persuasive since no section 52 requests had in fact been made. It went on to point out that, even if section 52 had been relied on by the police, the defence submission was not well-founded because of previous Irish case-law which had held that statements obtained in accordance with Irish law, even a law which made it a criminal offence to refuse to answer, were not inadmissible in any legal proceedings.

27. The Garda Siochana (police) Handbook contains relevant legislation and commentaries and is published by the Incorporated Law Society of Ireland in association with the Garda Siochana. The commentary on section 52 of the 1939 Act in the sixth edition (1991) provides as follows:

“The fact that the accused is bound under threat of penalty to answer questions lawfully put under section 52 does not render the resultant answers or statements inadmissible in evidence.”

The judicial authority for that proposition was noted in the handbook as being found in the *McGowan* case cited above and the earlier Irish case-law approved in the *McGowan* case.

28. In the case of *National Irish Bank Ltd (In the matter of National Irish Bank Ltd and the Companies Act 1990, [1999] 1 Irish Law Reports Monthly 343)* the Supreme Court found that a confession of a bank official obtained by inspectors as a result of the exercise by them of their powers under

section 10 of the Companies Act 1990 would not, in general, be admissible at a subsequent criminal trial of that official unless, in any particular case, the trial judge was satisfied that the confession was voluntary. The Supreme Court considered that compelling a person to confess and then convicting that person on the basis of the compelled confession would be contrary to Article 38 of the Constitution. That court also found that any other evidence obtained as a result of information provided under section 52 of the 1939 Act would be admitted in evidence in a subsequent trial if the trial judge considered, in all the circumstances, that it would be just and fair to admit it.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 2 OF THE CONVENTION

29. The applicants complained that section 52 of the 1939 Act violated their rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention and inverted the presumption of innocence guaranteed by Article 6 § 2. The relevant parts of Article 6 read as follows:

“1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... 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.”

## A. The parties' submissions

### 1. The Government's submissions

30. The Government submitted, in the first place, that the applicants' complaints fell outside the scope of Article 6 §§ 1 and 2 of the Convention. They had had, for reasons outlined by the Government, a fair trial in respect of their conviction under section 52 of the 1939 Act. Since Article 6 provides protection of a procedural nature for the determination of a criminal charge, the applicants could not rely on Article 6 effectively to challenge the offence under section 52 itself. In addition, both were acquitted on the charge of membership of an illegal organisation so that they could not, in that respect, complain of a violation of the procedural guarantees of Article 6 of the Convention.

31. Secondly, the Government pointed to substantial safeguards which exist in order to minimise the risk that an individual may wrongfully confess to a crime, which safeguards were noted by the High Court in the present applicants' constitutional action (see paragraph 15 above).

32. Thirdly, the Government maintained that section 52 of the 1939 Act was a reasonable and appropriate measure given that that section did not provide for, or allow, the use in subsequent criminal proceedings against an accused of information obtained compulsorily from that person.

While the domestic courts in the applicants' case left the question open, if there were cases where information obtained pursuant to section 52 had been later introduced in evidence against the accused, the Government could not find any such case. They pointed out that the statement of the Court of Criminal Appeal in the *McGowan* case cited above on which the applicant relied was *obiter dictum* since no section 52 requests had been made of that accused. In any event, the matter was clarified for the future by the Supreme Court in its judgment of January 1999 in the *National Irish Bank Ltd* case cited above. That court found that compelling a person to confess and then convicting him on the basis of the compelled confession would be contrary to Article 38 of the Constitution. It also found that any other evidence obtained as a result of information provided under section 52 of the 1939 Act would be admitted in evidence in a subsequent trial only if the trial judge considered, in all the circumstances of the case, that it would be just and fair to admit it.

33. Fourthly, the Government also considered that section 52 of the 1939 Act was a proportionate response given the security situation pertaining in the Irish State related to Northern Ireland and the consequent concerns to ensure the effective administration of justice and to preserve public peace and order.

The Government maintained that, as it is legitimate to impose sanctions in civil matters (such as, for example, taxation matters) when a citizen does not divulge information, the power to obtain information under threat of sanction is all the more necessary in criminal matters where the information sought could be essential for the investigation of serious and subversive crime. They noted that the applicants were suspected by the police of membership of the IRA and of having been involved in the bombing of 23 October 1990 and that their questioning under section 52 of the 1939 Act took place in the context of police investigations into that bombing, an explosion which caused the death and serious injury of many persons.

The Government emphasised that section 52 of the 1939 Act remained applicable only as long as a proclamation under section 35 of the 1939 Act was in force. As such, section 52 was a part of Irish law only as long as it was considered warranted by a subsisting terrorist and security threat. The Government summarised the duration and level of violence to the date of their observations, detailed recent bombings and other atrocities, referred to a public statement in December 1999 of the Continuity IRA (who are committed to continuing an armed campaign) and outlined recent weapons, explosives and vehicle bomb seizures. Consequently, they considered that the maintenance of the section 35 proclamation continued to be necessary. This necessity had been constantly reviewed, most recently in March 1998, when it was decided to maintain the proclamation in force, the Government noting, in this context, that the single worst atrocity of the entire period of the proclamation occurred in August 1998 when twenty-nine persons lost their lives in a bombing in Omagh. The Government also referred to their commitment as regards the Offences against the State Acts in the Good Friday Peace Agreement of 10 April 1998.

Moreover, the use of section 52 of the 1939 Act was strictly limited to arrests and detention under section 30 of that Act and the circumstances in which section 30 came into play were, in turn, strictly limited. The domestic courts were, in addition, vigilant in ensuring that the arrest powers under section 30 were not abused or used for improper purposes (*The People (D.P.P.) v. Quilligan and O'Reilly* [1986] Irish Reports 495 and *The State (Trimbole) v. the Governor of Mountjoy Prison* [1985] Irish Reports 550).

34. Finally, the Government distinguished the *Saunders v. the United Kingdom* judgment (17 December 1996, *Reports of Judgments and Decisions* 1996-VI) on the basis that the Court condemned the use at trial of evidence obtained from the accused under compulsion but not the means by which that evidence was initially obtained. They also distinguished the *Funke v. France* judgment (25 February 1993, Series A no. 256-A), pointing out that Mr Funke was subjected to a continuing sanction as long as he refused to provide the requested information. The *John Murray v. the United Kingdom* judgment (8 February 1996, *Reports* 1996-I) was also distinguished, the Government emphasising that Mr Murray's case related to

the subsequent drawing of negative inferences from his silence during questioning whereas the present applicants were acquitted on the charges of membership of an unlawful organisation. The Government considered the *Serves v. France* case (judgment of 20 October 1997, *Reports* 1997-VI) to be similar to the present case but, nevertheless, also distinguishable in that Mr Serves's objection was premature because he refused to take the oath as a witness rather than being compelled to respond to questions.

## 2. *The applicants' submissions*

35. The applicants emphasised the precise nature of their complaints. Information was demanded of them while they were in police custody. On the one hand, they were warned that a failure to answer could itself entail a criminal conviction (section 52 of the 1939 Act) and, on the other, the police officers advised them of their right to remain silent (the standard caution).

They did not deny that the State was entitled to have certain information-gathering powers, but submitted that the State was not entitled to force a person to provide it and to use that information thereafter against that person. They relied on their rights to silence and against self-incrimination noting, as was accepted by the High Court in their case, that the fairness of a trial can be compromised because of what happened prior to it.

36. As to the domestic law applicable to the use against the accused of prior involuntary statements and the Government's reliance on the *National Irish Bank Ltd* case, the applicants pointed out that the legal position at the relevant time was that any information they provided could have been admissible in subsequent criminal proceedings against them and they referred, in this respect, to the judgments of the High and Supreme Courts in their constitutional proceedings.

In addition, they disputed the Government's interpretation of the judgment of the Supreme Court in the *National Irish Bank Ltd* case, pointing out that even after that judgment it is still not clear if involuntary confessions could be used in a subsequent trial or as a basis for gathering further evidence to be used in a subsequent trial. In the first place, the Supreme Court confirmed that Article 38 of the Irish Constitution required that any confession admitted against an accused person in a criminal trial should be a voluntary confession but that court did not, and did not have to, resolve the question of whether a test of proportionality could be applied to dilute the protection offered by Article 38 of the Constitution when, for example, national security matters are alleged to be at issue. The applicants considered this important as the domestic courts in their cases balanced the security concerns underlying the 1939 Act against their constitutional rights, an approach continued by the Government in their submissions to this Court. Secondly, the Supreme Court rejected the contention that no use at all could be made of any such confessions so that it would be for the trial

judge to decide in all the circumstances of the case whether it would be fair to admit evidence obtained as a result of or in consequence of a compelled confession. This uncertainty is, according to the applicants, itself unacceptable under the Convention.

In any event, even if the *National Irish Bank Ltd* case did clarify the position as the Government alleged, it did not do so until January 1999, many years after the applicants were questioned and convicted under section 52 of the 1939 Act.

37. The applicants further considered the Government's reliance on matters of public security and proportionality to have been misplaced, noting that the Court in the Saunders case cited above pointed out that the public interest could not be relied on to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during later trial proceedings. In any event, the public policy and security concerns could have been addressed otherwise. Accordingly, if the purpose of the section 52 request was to prosecute the person to whom the request was made, certain negative inferences could have been drawn from that accused's silence (as in the John Murray case cited above) or if the objective of the section 52 request was to investigate a crime committed by others, the request could have been coupled with a clear immunity from prosecution in favour of the addressee of the request in respect of and based upon answers so provided.

38. As to the previous case-law of this Court referred to by the Government, the applicants pointed out that, *inter alia*, their punishment for not providing information placed them in an even worse position than Mr Funke (see the Funke judgment cited above): the demands were made of them in police custody; the request was for oral admissions and not for physical evidence which existed independently of the applicants as in Mr Funke's case; and they served substantial prison terms for refusing to provide the information requested. They were in a worse situation than Mr Murray (see the John Murray judgment cited above) since he was only sanctioned by the drawing of adverse inferences at his trial.

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

### *1. Applicability of Article 6 §§ 1 and 2 of the Convention*

39. The Government argued that Article 6 could not apply to the applicants' complaints because of their later acquittal on the charge of membership of an unlawful organisation ("the substantive proceedings") and because they had had a fair hearing in relation to the other charge under section 52 of the 1939 Act. The applicants considered that they are entitled to rely on Article 6 § 1 given that they were convicted of an offence and

sentenced to imprisonment for having relied on their rights guaranteed by that Article.

40. The Court recalls its established case-law to the effect that, although not specifically mentioned in Article 6 of the Convention, the rights relied on by the applicants, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right in question is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention (see the Saunders judgment cited above, p. 2064, § 68).

The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. The Court would note, in this context, that the present case does not concern a request, through the use of compulsory powers, of material which had an existence independent of the will of the applicants, such as documents or blood samples (*ibid.*, pp. 2064-65, § 69).

41. The Court observes that the applicants complained under Article 6 of the Convention about having been punished, through the application of section 52 of the 1939 Act, for relying on their rights to silence, against self-incrimination and to be presumed innocent during police questioning in the course of a serious criminal investigation. It recalls that the autonomous meaning of the expression “charge” in Article 6 § 1 of the Convention means that a person can be considered to have been “charged” for the purposes of that Article when that individual's situation has been “substantially affected” (see the Serves judgment cited above, p. 2172, § 42).

42. While the present applicants had not yet been formally charged on 24 October 1990 when the section 52 requests were made, the Court considers that they were, at that stage, “substantially affected” and therefore “charged”, in the above-noted sense, with membership of the IRA and with some involvement in the bombing in October 1990.

The High Court noted that it was suspected that the bombing had been carried out by the IRA and that the applicants had been arrested on suspicion of membership of the IRA and of involvement in that bombing. The Government confirmed this in their observations. They were arrested within approximately twenty-four hours of the bombing in a house close to the site of the explosion while that house was being searched by the police on the basis of a warrant. They were expressly arrested and detained under

section 30 of the 1939 Act. Having been cautioned, they were questioned, *inter alia*, about the bombing. The subsequent section 52 requests related to the applicants' movements around the time of that bombing.

43. However, it is true that, while the applicants may have been so charged within the meaning of Article 6 when the section 52 requests were made, they were acquitted in the substantive proceedings relating to the charge of membership of the IRA. The Court recalls that an accused's acquittal, in general, precludes that person from claiming to be a victim of a violation of the procedural guarantees of Article 6 (see, for example, *Byrn v. Denmark*, application no. 13156/87, Commission decision of 1 July 1992, Decisions and Reports 73, p. 5).

44. Nevertheless, the Court notes that this latter principle has been refined in certain circumstances.

Article 6 § 2 has already been applied, and violations of that provision found, in the *Minelli and Sekanina* cases (*Minelli v. Switzerland*, judgment of 25 March 1983, Series A no. 62, and *Sekanina v. Austria*, judgment of 25 August 1993 Series A no. 266-A), even though the relevant national courts concerned had, in the former case, closed the proceedings because the limitation period had expired and had, in the latter case, acquitted the applicant. It has also found Article 6 § 2 to be applicable in respect of the public comments of police officers suggestive of an accused's guilt of charges even though the proceedings on those charges were subsequently discontinued (see the *Alletet de Ribemont v. France* judgment of 10 February 1995, Series A no. 308, pp. 15-17, §§ 32-37). Moreover, while Mr Funke was convicted for not supplying information to the customs authorities, the criminal proceedings initially considered by those authorities as regards his financial dealings with other countries were never actually initiated against him (see the *Funke* judgment cited above).

45. In the *Alletet de Ribemont* case, the Court explained this refinement, pointing out that the Convention, including Article 6 § 2, must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory (see the *Alletet de Ribemont* judgment cited above, p. 16, § 35). Applying this approach to the present case, the Court observes that, if the applicants were unable to rely on Article 6, their acquittal in the substantive proceedings would exclude any consideration under Article 6 of their complaints that they had been, nevertheless, already punished prior to that acquittal for having defended what they considered to be their rights guaranteed by Article 6 of the Convention.

46. In such circumstances, the Court finds that the applicants can rely on Article 6 §§ 1 and 2 in respect of their conviction and imprisonment under section 52 of the 1939 Act.

## *2. Compliance with Article 6 §§ 1 and 2 of the Convention*

47. The Court accepts that the right to silence and the right not to incriminate oneself guaranteed by Article 6 § 1 are not absolute rights (see the John Murray judgment cited above, pp. 49-50, § 47).

48. However, it is also recalled that Mr Funke's criminal conviction for refusing to provide information requested by the customs authorities was considered to amount to a violation of Article 6 § 1. In that case, the Court noted that the customs authorities had secured Mr Funke's conviction in order to obtain certain documents which they believed existed, although they were not certain of the fact. The Court found that the customs authorities, being unable or unwilling to procure them by some other means, attempted to compel Mr Funke himself to provide the evidence of offences he had allegedly committed. The special features of customs law were found insufficient by the Court to justify such an infringement of the right of anyone charged with a criminal offence, within the autonomous meaning of that expression in Article 6, to remain silent and not to contribute to incriminating himself (see the Funke judgment cited above, p. 22, § 44).

In the John Murray judgment, the Court described the Funke case, pointing out that the “degree of compulsion” which had been applied through the initiation of criminal proceedings against Mr Funke was found to have been incompatible with Article 6 because “in effect, it destroyed the very essence of the privilege against self-incrimination” (see the John Murray judgment cited above, p. 50, § 49).

49. The Government distinguished the Funke case from the present application on the basis of the sanctions imposed. The Court does not find this argument persuasive. The nature of the sanction inflicted on Mr Funke (accumulating fines) may have been different from that imposed in the present case (a single prison sentence). However, both cases concerned the threat and imposition of a criminal sanction on the applicants in question because they failed to supply information to authorities investigating the alleged commission of criminal offences by them.

50. However, the Government pointed out that section 52 of the 1939 Act should be considered against the background of the numerous protections available to persons in the applicants' position.

51. The Court notes that the High Court considered that such protections minimised the risk of accused persons wrongfully confessing to a crime and of an abuse of the powers conferred by section 52 of the 1939 Act. Important as they are, the Court is, however, of the view that such protections could only be relevant to the present complaints if they could effectively and sufficiently reduce the degree of compulsion imposed by section 52 of the 1939 Act to the extent that the essence of the rights at issue would not be impaired by that domestic provision. However, it is considered that the protections listed by the High Court, and subsequently raised by the Government before this Court, could not have had this effect. The

application of section 52 of the 1939 Act in an entirely lawful manner and in circumstances which conformed with all of the safeguards referred to above could not change the choice presented by section 52 of the 1939 Act: either the information requested was provided by the applicants or they faced potentially six months' imprisonment.

52. The Government also maintained that section 52 of the 1939 Act was a reasonable measure given that a statement made pursuant to that section was not later admissible in evidence against its author and because any evidence obtained as a result of such a statement could only be admitted if the trial judge considered it fair and equitable to do so. The applicants essentially considered that any relevant indications in the domestic case-law prior to the *National Irish Bank Ltd* judgment cited above indicated that such section 52 statements could be later admitted in evidence against their author and that the latter case did not authoritatively clarify this question. In any event, the applicants pointed to the conflicting cautions given to them on 24 October 1990.

53. The Court considers that the legal position as regards the admission into evidence of section 52 statements was particularly uncertain in October 1990 when the applicants were questioned.

It notes that the text of section 52 of the 1939 Act is silent on this point. The Government did not refer to any domestic case-law prior to October 1990 which would have authoritatively excluded the later admission into evidence against the applicants of any statements made by them pursuant to those requests. Nor did the Government exclude the possibility that, prior to October 1990, statements made pursuant to section 52 had in fact been admitted in evidence against accused persons. The Government's position was rather that, in any event, the situation had been clarified for the future by the January 1999 judgment in the *National Irish Bank Ltd* case. This uncertainty about the domestic legal position in October 1990 is underlined by the comments of the Supreme Court in the present applicants' constitutional proceedings on the judgment of the Court of Criminal Appeal in the earlier *McGowan* case (see paragraphs 16 and 26-27 above).

In any event, the applicants were provided with conflicting information in this respect by the questioning police officers on 24 October 1990. At the beginning of their interviews they were informed that they had the right to remain silent. Nevertheless, when the section 52 requests were made during those interviews, they were then effectively informed that, if they did not account for their movements at particular times, they risked six months' imprisonment. The only reference during the interviews to the possible use of statements made by the applicants in any later proceedings was to inform them that anything they did say would be written down and might be used against them.

54. Given this uncertainty, the position in October 1990 as regards the later admission into evidence of section 52 statements could not have, in the

Court's view, contributed to restoring the essence of the present applicant's rights to silence and against self-incrimination guaranteed by Article 6 of the Convention.

The Court is not, therefore, called upon in the present case to consider the impact on the rights to silence or against self-incrimination of the direct or indirect use made in later proceedings against an accused of statements made pursuant to section 52 of the 1939 Act.

55. Accordingly, the Court finds that the “degree of compulsion” imposed on the applicants by the application of section 52 of the 1939 Act with a view to compelling them to provide information relating to charges against them under that Act in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent.

56. The Government contended that section 52 of the 1939 Act is, nevertheless, a proportionate response to the subsisting terrorist and security threat given the need to ensure the proper administration of justice and the maintenance of public order and peace.

57. The Court has taken judicial notice of the security and public order concerns detailed by the Government.

However, the Court recalls that in the Saunders case (judgment cited above, pp. 2066-67, § 74) it found that the argument of the United Kingdom government that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could not justify such a marked departure in that case from one of the basic principles of a fair procedure. It considered that the general requirements of fairness contained in Article 6, including the right not to incriminate oneself, “apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex”. It concluded that the public interest could not be relied on to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.

Moreover, the Court also recalls that the Brogan case (Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B) concerned the arrest and detention, by virtue of powers granted under special legislation, of persons suspected of involvement in terrorism in Northern Ireland. The United Kingdom government had relied on the special security context of Northern Ireland to justify the length of the impugned detention periods under Article 5 § 3. The Court found that even the shortest periods of detention at issue in that case would have entailed consequences impairing the very essence of the relevant right protected by Article 5 § 3. It concluded that the fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism was not, on its own, sufficient to ensure compliance with the specific requirements of Article 5 § 3 of the Convention.

58. The Court, accordingly, finds that the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention.

59. It concludes, therefore, that there has been a violation of the applicants' right to silence and their right not to incriminate themselves guaranteed by Article 6 § 1 of the Convention.

Moreover, given the close link, in this context, between those rights guaranteed by Article 6 § 1 of the Convention and the presumption of innocence guaranteed by Article 6 § 2 (see paragraph 40 above), the Court also concludes that there has been a violation of the latter provision.

## II. ALLEGED VIOLATION OF ARTICLES 8 AND 10 OF THE CONVENTION

60. The applicants also complained that section 52 of the 1939 Act constituted a violation of their rights guaranteed by Article 8 (referring to the private life aspect of that provision) and by Article 10 of the Convention.

61. The relevant parts of Article 8 read as follows:

“1. Everyone has the right to respect for his private ... life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety ..., for the prevention of disorder or crime, ... or for the protection of the rights and freedoms of others.”

The relevant parts of Article 10 read as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, ... for the protection of the ... rights of others ...”

62. The Government submitted that there had been no violation of either Article, pointing out that any interference with the applicants' rights under those Articles was in accordance with the law and proportionate to legitimate aims pursued, taking account of the margin of appreciation afforded to the State in such cases. The section 52 requests made of the applicants could have served either in the investigation of crimes of which the applicants were suspected or of crimes committed by others. Moreover, the background to the present case was the commission of an atrocity by subversives and, given the secrecy surrounding the activities of subversives,

the Government considered it difficult to see how the relevant information could have been otherwise obtained.

The applicants referred to the correlative right not to speak or furnish information guaranteed by Article 10 and to their entitlement to maintain the privacy of their own personal lives and maintained that their conviction and sentencing under section 52 of the 1939 Act constituted a disproportionate interference with their rights protected by Articles 8 and 10 of the Convention.

63. The Court considers that the essential issue raised by the applicants was the compulsion imposed by section 52 of the 1939 Act to respond to the questions of police officers investigating the commission of a serious criminal offence, a matter considered above by the Court under Article 6 of the Convention. It does not consider therefore that the applicants' complaints under Articles 8 and 10 of the Convention give rise to any separate issue.

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

64. 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

65. The applicants did not claim that they had suffered any pecuniary damage.

66. They claimed compensation, however, for non-pecuniary damage. They pointed out that, as a direct result of section 52 of the 1939 Act, they were each convicted of a criminal offence and each served a substantial term of imprisonment (from 26 June to 10 November 1991). They therefore claimed 50,000 Irish pounds (IEP) for all “injuries” sustained and a further unspecified sum in compensation for the damage to their reputations and for the distress and anxiety suffered.

67. The Government argued that, in the absence of any substantiation of the alleged injuries, anxiety, distress or damage to their reputations, the Court should reject those claims. Alternatively, should the Court consider that the applicants had suffered some non-pecuniary damage as a result of their convictions and imprisonment, the Government maintained that a finding of a violation would be sufficient just satisfaction. Should, nevertheless, the Court award some damages as regards the injuries sustained as a result of their convictions and imprisonment, the Government

submitted that this could be regarded as sufficient to cover any alleged damage to their reputation. The Government requested the Court to take into account, in considering the applicants' claims, that they were asked to account for their movements during an investigation into a bombing which resulted in the death and serious injury of several persons.

68. The Court observes that, as a direct consequence of the violation found in this case, each applicant was convicted of a criminal offence and spent from 26 June to 10 November 1991 in prison. It notes that neither applicant has attempted in any way to detail or substantiate the alleged impairment of reputations to which they referred, although it accepts that, as a result of his criminal conviction and imprisonment, each applicant experienced certain inconvenience, anxiety and distress.

The Court concludes that each applicant suffered non-pecuniary damage for which a finding of a violation does not afford just satisfaction. Making its assessment on an equitable basis, it awards each applicant IEP 4,000 in compensation for non-pecuniary damage.

## **B. Costs and expenses**

69. The applicants initially claimed legal costs and expenses for both the domestic and Convention proceedings. The High and Supreme Courts had recommended that the legal costs and expenses before those courts be discharged by the "Attorney-General's Scheme", but by letter dated 15 January 1999 the Attorney-General indicated that the proceedings were not of a type that fell within the relevant scheme. The applicants' counsel gave the opinion in August 1999 that the Attorney-General's refusal to cover those costs from the relevant scheme of legal aid was invalid. The Attorney-General then indicated, by a letter dated 24 February 2000, that the relevant scheme would in fact discharge the costs of the applicants' domestic proceedings, without prejudice to the Attorney-General's position that the scheme was not liable to do so. Accordingly, the applicants discontinued their claim before this Court for the costs of the domestic proceedings.

Their remaining claim relates to the costs of the Convention proceedings only and is made up of solicitors' costs in the sum of IEP 5,000, counsel's fees in the sum of IEP 2,250 and expenses of IEP 500 amounting to a total sum claimed (inclusive of value-added tax (VAT)) of IEP 9,377.50.

The Government accepted that, subject to certain items in the applicants' bill of costs being properly vouched (including counsel's fees), those fees were reasonable apart from two matters. They considered that a sum of IEP 250 would be more appropriate as regards outlay and they rejected the applicants' claim for costs regarding the preparation of a bill of the costs of the domestic proceedings, since the applicants withdrew their claim before this Court for the costs of those proceedings.

70. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II).

The Court notes that the applicants did not pursue before this Court their claim for the costs of the domestic proceedings before the High and Supreme Courts, given the undertaking from the Attorney-General to discharge those legal costs and expenses out of the Attorney-General's Scheme.

As to the counsel's fees to which the Government refer, the Court considers the work completed by counsel for the Convention proceedings to be evident from the detailed bill of costs submitted by the applicants' solicitor and it notes that the Government did not in principle contest the amount claimed in respect of counsel. It also considers the outlay claimed to be reasonable as to quantum. As to the applicants' claim regarding time spent preparing a bill of the costs of the domestic proceedings for the purposes of their just satisfaction proposals to this Court, the Court notes that they were not informed that the costs of those proceedings would be discharged from the Attorney-General's scheme until they had prepared and submitted their just satisfaction proposals. Accordingly, the Court finds that the costs incurred and claimed in preparing the relevant bill of costs were necessarily and reasonably incurred.

71. Having regard to the foregoing, the Court awards to the applicants, in respect of their legal costs and expenses, the sums claimed by them namely, IEP 9,377.50 (which figure is inclusive of any VAT that may be chargeable) less the amount of legal aid paid by the Council of Europe to the applicants in the sum of 5,000 French francs.

### **C. Default interest**

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

## **FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Holds* that there has been a violation of Article 6 §§ 1 and 2 of the Convention;
2. *Holds* that no separate issue arises under Articles 8 or 10 of the Convention;

3. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention:

(i) IEP 4,000 (four thousand Irish pounds) to each applicant in respect of non-pecuniary damage;

(ii) a total of IEP 9,377.50 (nine thousand three hundred and seventy-seven Irish pounds fifty pence) to the applicants for costs and expenses of the Strasbourg proceedings (inclusive of any value-added tax that may be chargeable) less FRF 5,000 (five thousand French francs) paid by the Council of Europe in legal aid;

(b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 21 December 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER  
Registrar

Georg RESS  
President