



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

SECOND SECTION

**CASE OF DEVENNEY v. THE UNITED KINGDOM**

(Application no. 24265/94)

JUDGMENT

STRASBOURG

19 March 2002

**FINAL**

*19/06/2002*

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.



**In the case of Devenney v. the United Kingdom,**

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

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

Mr A.B. BAKA,

Mr GAUKUR JÖRUNDSSON,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs W. THOMASSEN,

Mr M. P. PELLONPÄÄ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 26 February 2002,

Delivers the following judgment, which was adopted on that date:

**PROCEDURE**

1. The case originated in an application (no. 24265/94) against the United Kingdom 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 citizen, Mr Liam Devenney (“the applicant”), on 12 April 1994.

2. The applicant, who had been granted legal aid, was represented by P. J. McGrory & Company, a firm of solicitors practising in Belfast. The Government of the United Kingdom and Northern Ireland (“the Government”) were represented by their Agent, Mr C. Whomersley.

3. The applicant invoked Articles 6, 13 and 14 of the Convention. He alleged that the issue of a certificate emanating from the Secretary of State, under section 42 of the Fair Employment (Northern Ireland) Act 1976, which was deemed conclusive evidence that the applicant’s employment was terminated for the purpose of protecting public safety and public order, operated under the terms of the 1976 Act to deny him access to a court or tribunal, in violation of Article 6 § 1. He also claimed that he had no effective remedy before a national authority in breach of Article 13, and that he has been discriminated against contrary to Article 14 in conjunction with Article 6.

4. The application was declared admissible by the Commission on 24 February 1997 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

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 of the Rules of Court. Sir Nicolas Bratza, the judge elected in respect of the United Kingdom, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr M.P. Pellonpää, the judge elected in respect of Finland, to sit in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

6. In the light of the similarities between the present application and the Court's judgment of 10 July 1998 in the case of *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (*Reports of Judgments and Decisions* 1998-IV, p. 1643), neither the Government nor the applicant filed observations on the merits (Rule 59 § 1). Submissions were made concerning just satisfaction under Article 41 of the Convention.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

8. On 18 August 1992, the applicant began work in the Culloden Hotel, Belfast, as a silver service waiter. This hotel is owned by Moyola Cellars Limited, which is subsidiary of Hastings Hotels Group Limited. Initially the applicant had been doing very well and was optimistic about promotion. On 31 October 1992, the restaurant manager informed the applicant that he was being dismissed forthwith. The applicant was given no reason whatsoever for his peremptory dismissal. Various attempts to get an explanation for the dismissal were unsuccessful. Ultimately the general manager told the applicant on 1 November 1992 that he was dismissed because he did not meet the grade and there was no other reason. Of all the full-time and permanent staff in the restaurant the applicant believes that he was the only Catholic.

9. The applicant made a complaint to the Fair Employment Tribunal that he had been unlawfully discriminated against on the grounds of religious belief or political opinion. The applicant and thirteen of his fifteen siblings are not involved in any politically related activity.

10. By a letter of 22 December 1992, the applicant's solicitors wrote to the Chief Constable of the Royal Ulster Constabulary ("RUC") stating that they had been informed that the reason for the applicant's dismissal from his employment at the Culloden Hotel was an approach made to the Hotel by members of the RUC who had stated that the applicant was a suspect. The

solicitors requested that the RUC provide information as to what the applicant was suspected of and on what basis the applicant had been allegedly described as a suspect. The RUC replied to this letter, stating that they were unable to comment on such matters, it not being force policy to do so.

11. On 29 March 1993 the solicitors acting on behalf of the applicant's employers wrote to the Fair Employment Tribunal.

"We return herewith Notice of Appearance in relation to the application presented by Mr Liam Devenney. On our instructions, the acts of which complaint is made, were done for the purpose of protecting public safety, and in the circumstances by virtue of Section 42 of the Fair Employment Act 1976, the Fair Employment (Northern Ireland) Acts do not apply so that the tribunal does not have jurisdiction to entertain the complaint."

12. The Fair Employment Tribunal then of its own motion fixed a preliminary hearing for determination of the following issue:

"Whether the tribunal has jurisdiction to consider the applicant's complaint in view of the provisions of Section 42 of the Fair Employment (Northern Ireland) Act 1976."

13. On 3 December 1993 the Fair Employment Commission, acting on behalf of the applicant, wrote to the solicitors acting on behalf of the applicant's employers requesting to know, *inter alia*, whether the Secretary of State or any other Agency had been approached with a view to obtaining a Section 42 (2) certificate. By reply of 6 December 1993 the employers' solicitors stated:

"We today received your letter dated 3 December 1993 in relation to the above. You will be pleased to hear that during the writer's holiday last week a Section 42 certificate was received from the Crown Solicitor's office (a certified copy of which is enclosed herewith) so that it now seems unnecessary to take any further action, and that you may close your file in this matter."

14. The applicant stated that he did not know the basis upon which the certificate was issued. He had never been shown, and was not entitled to demand, sight of the information, if any, which was placed before the Secretary of State which led to the certificate being issued. The applicant did not know whether this information was correct or incorrect, whether it was complete or incomplete, and whether it was reliable or not. Nor did he know whether the information provided could reasonably support the view expressed in the certificate.

15. The matter first came before the Fair Employment Tribunal on 3 June 1994. On that occasion the Tribunal declared that the certificate presented did not affect the applicability of the Fair Employment Acts to the dismissal of the applicant by Moyola Cellars Limited, since the certificate referred to an act done by the Hastings Hotel Group.

16. At a resumed hearing on 5 January 1995 the Fair Employment Tribunal were presented with a new certificate signed by the Secretary of State for Northern Ireland and certifying that the decision by Moyola

Cellars Limited to terminate its contract of employment with the applicant was for the purpose of protecting public safety and public order. In light of the certificate, the Fair Employment Tribunal found that the Fair Employment Act did not apply to the termination of the applicant's contract, nor to the decision summarily to terminate the contract and accordingly that:

“there is nothing for this Tribunal to consider in relation to that act [of termination].”

The tribunal dismissed the applicant's complaints in relation to his dismissal and the manner of his dismissal.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

17. By virtue of Section 17 of the Fair Employment (Northern Ireland) Act 1976 (“the 1976 Act”) it is unlawful for an employer to discriminate against a person on grounds of religious belief or political opinion in relation to employment in Northern Ireland, *inter alia*, by dismissing him or subjecting him to any other detriment. By virtue of section 24 of the 1976 Act as amended, a complaint of unlawful discrimination may be presented to the Fair Employment Tribunal, which is established by statute to investigate complaints of unlawful discrimination on grounds of religious belief or political opinion.

18. Section 42 of the 1976 Act provides as follows:

“(1) The Fair Employment (Northern Ireland) Acts shall not apply to an act done for the purpose of safeguarding national security or protecting public safety or public order.

(2) A certificate signed by, or on behalf of the Secretary of State and certifying that an act specified in the certificate was done for the purpose mentioned in sub-section (1) shall be conclusive evidence that it was done for that purpose.

(3) A document purporting to be a document such as is mentioned in sub-section (2) shall be received in evidence and, unless the contrary is proved, shall be deemed to be such a certificate.”

## THE LAW

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

19. The applicant complained that the issue of the section 42 certificate deprived him of access to the tribunal to which he was entitled. In

consequence of this alleged denial of access to a tribunal or court, the applicant claimed a violation of his rights under Article 6 § 1 of the Convention, which provides as relevant:

“1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal...”

### **A. Applicability of Article 6 § 1 of the Convention**

20. The Court notes that the 1976 Act guaranteed persons a right not to be discriminated against on grounds of religious belief or political opinion in relation to their employment, *inter alia*, by dismissing them or subjecting them to any other detriment. The Fair Employment Tribunal is empowered to assess individuals’ financial loss if they are so discriminated against and award compensation when appropriate. Accordingly, the applicant’s pecuniary rights were affected by being denied access to the Fair Employment Tribunal.

21. The operation of section 42(1), which states that the Fair Employment (Northern Ireland) Acts shall not apply to an act done for the purpose of safeguarding national security or protecting public safety or public order, does not define the scope of the substantive right *in limine* but provides a respondent with a defence to a complaint of unlawful discrimination (cf. the Powell and Rayner v the United Kingdom judgment of 21 February 1990, Series A no. 172, §§ 34-36). Accordingly the Court considers that the applicant has a clearly defined statutory right which, having regard to the context in which it applied and its pecuniary nature, can be classified as a “civil right” within the meaning of Article 6 § 1. The Court refers to its reasoning in its judgment of 10 July 1998 in the case of Tinnelly & Sons Limited and Others and McElduff and Others v the United Kingdom (*Reports of Judgments and Decisions* 1998-IV, p. 1643).

22. Accordingly the Court concludes that the present case concerns the applicant’s civil rights and that Article 6 § 1 is applicable.

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

23. The Court recalls that Article 6 § 1 embodies the “right to a court”, of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect. However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied, do not restrict or reduce the access left to the individual

in such a way, or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see among other authorities, *Stubbings and Others v. the United Kingdom* judgment of 22 October 1996, *Reports* 1996-IV, p.1502, § 50).

24. It is against this background of principles that the Court must consider the present case.

25. The Court notes that the fact that the certificate issued by the Secretary of State constituted under section 42 of the 1976 Act *conclusive proof* that the dismissal of the applicant was carried out for the purpose of safeguarding national security or protecting public safety or public order meant that there could be no independent scrutiny whatsoever either as to the basis for the issue of such a certificate or as to whether the applicant was justified in his claim that he was dismissed on grounds of religious or political belief. In its decision of 5 January 1995, the Fair Employment Tribunal found that due to the existence of the section 42 certificate the Fair Employment Act did not apply to the termination of the applicant's employment and that accordingly there was nothing remaining for it to consider.

26. The Court accepts that the protection of national security is a legitimate aim which may entail limitations on the right of access to a court, including withholding information for the purposes of security. As in the *Tinnelly* case therefore, it is necessary to consider whether there is a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicant's right of access to a court or tribunal.

27. The Court is mindful of security considerations regarding employees in public buildings, such as hotels, in the centre of town, particularly if frequented by military or police personnel. As against this, the dismissal had an immediate and dramatic effect upon the applicant, removing his means of livelihood. Further, the operation of section 42 meant that he was unable to challenge the dismissal or pursue any potential claim for pecuniary loss. He was not informed of the basis upon which the certificate was issued, has never been shown, and is not entitled to demand, sight of any information, which may have been placed before the Secretary of State which led to the certificate being issued. The applicant does not know whether any such information is correct or incorrect, complete or incomplete and whether it is reliable or not. Nor does he know whether the information provided could reasonably support the view expressed in the certificate.

28. The Court observes moreover that the Government have failed to identify any new elements which could lead it to depart from its conclusion

in the Tinnelly case that the severity of the restriction imposed by the conclusive section 42 certificate, which was tantamount to removal of the courts' jurisdiction by executive *ipse dixit*, was not mitigated by other available mechanisms of complaint, and that the situation in Northern Ireland did not exclude the introduction of special judicial procedures more apt to provide the individual with procedural justice. It noted that "the introduction of a procedure, regardless of the framework used, which would allow an adjudicator or tribunal fully satisfying the Article 6 § 1 requirements of independence and impartiality to examine in complete cognisance of all relevant evidence, documentary or other, the merits of the submissions of both sides, may indeed serve to enhance public confidence" (Tinnelly & Sons Limited and Others and McElduff and Others judgment cited above, p. 1663, § 78).

29. For these reasons, the Court finds in the present case that the issue by the Secretary of State of a section 42 certificate constituted a disproportionate restriction on the applicant's right of access to a court. There has, accordingly, been a breach of Article 6 § 1 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 14 AND OF ARTICLE 13

30. The applicant complains of discrimination under Article 14. He alleges that his rights under Article 6 § 1 have been subject to discrimination on the grounds of religion, political opinion or association with a national minority. He further complains that in breach of Article 13, he has not had any effective remedy before a national authority in respect of his alleged violations of his rights and freedoms.

31. Article 14 provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 13 provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

32. The Court considers that it is not necessary to determine whether there has been a violation of Article 14 in conjunction with Article 6 § 1, having regard to its conclusion that the facts of the case disclose a breach of the latter provision. Likewise the Court does not consider it necessary to determine whether there has been a breach of Article 13, the requirements of which are less strict than those of Article 6 (see *mutatis mutandis* the

Leander v. Sweden judgment of 26 March 1987, Series A no. 116, pp. 31-32, §§ 83-84).

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

33. 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. Damages

34. The applicant claims compensation of two or three years of employment for pecuniary damage, namely, about 20,000 to 30,000 pounds sterling (GBP). Relying on a medical report which refers to problems of clinical depression contributed to by his lack of employment, he claims a sum of GBP 5,000.

35. The Government consider that these claims are excessive and refer to the sums awarded in similar cases.

36. The Court cannot speculate as to what would have been the outcome of the proceedings brought by the applicant under the 1976 Act had the section 42 certificate not been issued. However the Court nevertheless considers that the applicant was denied the opportunity to obtain a ruling on the merits of his claim that he was the victim of unlawful discrimination. Having regard to previous cases (see, most recently, *Devlin v. the United Kingdom*, no. 29545/95 [Section 3], judgment of 30 October 2001, §§ 38-39) and, deciding on an equitable basis, it awards the applicant the sum of GBP 10,000.

#### B. Costs and expenses

37. The applicant claims GBP 3,550 for solicitors' fees (25 hours at GBP 142 per hour) and GBP 165 for the medical report supporting his claims.

38. The Government consider that a lesser sum is more appropriate.

39. The Court recalls that this application raised issues which were, to a large extent, identical to those considered in the Tinnelly and Devlin cases (cited above). Nor was this a case in which the Court requested assistance from the parties at any oral hearing or in which lengthy written submissions were submitted. Making an assessment on an equitable basis and taking into account the amount of legal aid awarded by the Council of Europe, it

awards the sum of GBP 2,500, plus any value-added tax which may be chargeable.

### C. Default interest

40. 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 UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* that it is not necessary to examine further the complaints made under Articles 13 or 14 of the Convention;
3. *Holds*
  - (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, the following amounts:
    - (i) GBP 10,000 (ten thousand pounds sterling) in respect of loss of opportunity ;
    - (ii) GBP 2,500 (two thousand five hundred pounds sterling) in respect of costs and expenses, plus any value-added tax which 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;
4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English and notified in writing on 19 March 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ  
Registrar

J.-P. COSTA  
President