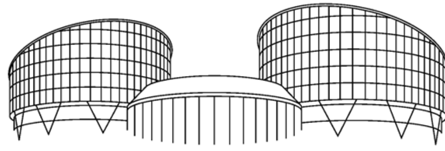

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 29804/10
Colm KEENA and Geraldine KENNEDY
against Ireland

The European Court of Human Rights (Fifth Section), sitting on 30 September 2014 as a Chamber composed of:

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 19 May 2010,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Colm Keena and Ms Geraldine Kennedy, are Irish nationals, born in 1960 and 1951 respectively and both resident in Dublin. They were represented before the Court by Mr A. O'Rorke of Hayes Solicitors, Dublin. The Government were represented by their Agent Mr P. White of the Department of Foreign Affairs.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

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CONSEIL DE L'EUROPE

3. At the time of the lodging of this application, the first applicant was the public affairs correspondent and the second applicant was the editor of the newspaper *The Irish Times*.

4. A Tribunal of Inquiry into Certain Planning Matters and Payments (hereafter "the Tribunal") was established by a parliamentary resolution in 1997 to investigate allegations of corruption in relation to real estate development in the Dublin area.

5. In the course of its confidential investigative phase, the Tribunal wrote on 29 June 2006 to a Mr K, a businessman and friend of the then *Taoiseach* (Prime Minister), Mr Ahern, seeking his assistance in reconciling certain receipts of funds by the latter in or about December 1993 at a time when he had been Minister for Finance. The Tribunal requested a detailed statement from K on matters including who requested the payment and why it was required. The envelope containing this letter was marked "strictly private and confidential – to be opened by the addressee only". The confidential character of the letter was further stipulated in its final paragraph. K's solicitor sent a reply to that letter.

6. On 19 September 2006, a copy of this exchange of confidential correspondence was delivered, unsolicited and anonymously, to the first applicant. He conferred with the second applicant, who advised him to work on the story and to take care to authenticate the materials. Being satisfied by the following day that the correspondence was true, the first applicant wrote an article on the matter, entitled "Tribunal examines payments to Taoiseach". This appeared on the front page of *The Irish Times* on 21 September 2006. The article related the contents of the Tribunal's letter to K, using certain phrases that corresponded exactly to the text of that letter. It reported that K was one of a number of persons contacted by the Tribunal concerning payments to Mr Ahern totalling between €50,000 and €100,000. It noted that proceedings between Mr Ahern and the Tribunal were pending in the High Court. The article stated that inquiries into the politician's finances were understood to have begun following allegations about supposed payments to him by a property developer. It recorded that Mr Ahern and the said developer had stated publicly that no such payments had been made.

7. On the day the article was published, the Tribunal wrote to the second applicant to express its concern that the newspaper had relied on material that was strictly private and confidential and which was expressed to be so. It stated that since its inception the Tribunal had been concerned that the publication of confidential material in the media, in advance of such material being considered in its proper forum, was damaging to its work and interfered with the rights of individuals named in such publications. The Tribunal claimed that the publication was in breach of an earlier Supreme Court injunction granted on 7 October 2005 of which the applicants had been made aware and it reserved the right to apply to the Supreme Court

arising from the apparent breach of that injunction. The applicants also received correspondence from K's solicitors complaining of a very serious breach of confidentiality and an invasion of their client's rights.

8. The second applicant replied to the Tribunal on 22 September 2006 confirming that the newspaper had received an unsolicited and anonymous communication. She considered that it was an important matter in the public interest to verify and publish it. She acknowledged the important public function of the Tribunal and referred to the newspaper's separate duty to publish matters in the public interest.

9. On 25 September 2006, the Tribunal issued an order directing the applicants to produce and hand over all documents that comprised the communication upon which the article was based. The second applicant replied on the same day that the relevant material had been destroyed. In any event, she disputed the right of the Tribunal to make the said order. She claimed it jeopardized the primary obligation of editors and journalists to protect their sources and that it was in the public interest that this obligation and right be protected.

10. On 26 September 2006, the Tribunal served summonses on the applicants, directing them to attend before it on 29 September 2006, to hand over copies of all the documents they had received, and to answer any question from the Tribunal about the source and present whereabouts of the documents in question.

11. The applicants attended the Tribunal on 29 September 2006. The first applicant stated that upon receipt of the Tribunal's order to hand over the documents, he had consulted the newspaper's legal advisers and then, at the request of the second applicant, he had destroyed the documents. He considered that this was a matter of professional duty. The second applicant stated that in deciding to publish the article, she had been conscious of the possibility that the Tribunal might have ruled that the payments were outside of its terms of reference and so these might never have become a matter of public knowledge. She had instructed the first applicant to destroy the documents and had destroyed her own copies too. The applicants declined to answer any question which they considered might lead to the identification of the source of the leak of confidential information. Notably, the first applicant refused to state whether he had seen the original letter (with the Tribunal's letterhead) or merely a copy of the text of that letter.

12. On 5 October 2006 the Tribunal delivered a ruling on the matter. It considered that the applicant's behaviour was in breach of the Tribunal's orders and of the relevant statutory provisions. While the Tribunal did not have any power of sanction, it would apply to the High Court so as to compel the applicants to comply with its orders. Its primary concern was to protect the integrity of its inquiries. It considered that this objective was best served by taking all necessary steps to establish the identity of the person or persons who had divulged confidential documents to the press. It noted that

media reports had assumed that the leak had occurred from within the Tribunal itself, in other words that it had breached confidence, which would be a gross dereliction of its duty. It asserted that the three Tribunal members, being members of the judiciary, applied the same standards of probity to the inquiry as they did to their judicial work. It rejected the inference that there had been an internal leak of confidential information. Public confidence in the integrity of the Tribunal was essential to its work; any suggestion that it had singled out or damaged the interests of any party would do considerable harm to the good standing of the Tribunal.

13. On 13 February 2007, the Tribunal commenced proceedings against the applicants in the High Court and sought a number of orders, including, an order compelling the applicants to comply with the Tribunal's order of 25 September and an order compelling them to appear before the Tribunal to answer its questions concerning the source and whereabouts of the relevant documents. In its grounding affidavit it explained the need to protect the confidentiality of the private stage of its inquiry. Conducting its proceedings in private, initially, would limit the damage to any person's reputation from unfounded allegations. It deemed it essential, both for its work and for the protection of those against whom allegations were made, to ensure the utmost confidentiality. It had given such a guarantee regarding all information received by it during the preliminary investigative stage and was concerned to ensure the integrity of its proceedings. This was vital to maintaining public confidence in the process, as well as the confidence of all those who had dealings with the Tribunal. The allegation that documents had been leaked directly from the Tribunal was highly damaging and unfounded and it was essential to reveal the true source.

14. In their replying affidavits, the applicants relied on the need to protect their sources. Journalists must not reveal the identities of those who had provided them with information in confidence. If journalists were compelled to reveal their sources, it would make people wary of coming forward with information, leading to less effective journalism, which would be detrimental for the public good.

1. Judgment of the High Court

15. The judgment of the High Court, composed of three judges, was given by Johnson P. on 23 October 2007. It first considered whether it was within the power of the Tribunal to conduct an inquiry into the leak and found that it did. The Tribunal's decision to impose confidentiality on its letter to K was also binding on any third party who came into possession of it. Given the manifest breach of confidentiality that had occurred, it was within the powers expressly conferred on the Tribunal to try to ascertain the source of the leak.

16. The High Court then considered whether the Tribunal had the right to impose confidentiality over the materials associated with the private

investigative stage of its work. It noted that it had been expressly provided for in the parliamentary resolutions governing the Tribunal's work that there should be an initial private stage in the inquiry. The duty to respect the confidentiality of documents was a corollary of that. Maintaining confidentiality was essential to the work of the Tribunal and the leak was thus very damaging to the conduct of the inquiry. It was therefore justified to enforce the confidentiality asserted by the Tribunal.

17. The third issue considered by the High Court was the balance between the Tribunal's functioning in which there was a public interest and the applicants' right under Article 10 of the Convention to refuse to disclose their journalistic sources. It referred to eleven judgments of this Court concerning the freedom of expression of journalists and recalled the importance of a free press as an essential organ in a democratic society. The ability to protect sources was an acknowledged, integral element of this, and there did not appear to be any European case that had permitted the compulsory disclosure of a journalist's sources.

18. However, when considering a journalist's rights under Article 10, the rights and interests of other persons and institutions also had to be taken into account. In a democratic society, that was a task reserved for the courts. There was no basis for the applicants to fear that their rights would not have been given just consideration and vindicated as appropriate. Their decision to destroy the documents after they had received a summons from the Tribunal, and after having taken legal advice, was "an astounding and flagrant disregard of the rule of law". The High Court continued:

> "[The applicants] cast themselves as the adjudicators of the proper balance to be struck between the rights and interests of all concerned. This is a role reserved by the Constitution and the law exclusively to the courts. The defendants then proceeded to determine the issue summarily in their own favour, without any consideration of the rights of others or any opportunity given to them to make their case known.
>
> It need hardly be said, that such a manner of proceeding is anathema to the rule of law and an affront to democratic order. If tolerated it is the surest way to anarchy. Journalists must realise that paying lip service to democratic values is not enough. They are bound as are all other members of society including politicians and judges, to name but a few, by the Constitution and the laws, to obedience to the law. Journalists are not above the law nor are they entitled to create for themselves, where their own particular vocational interest is involved, a reserve into which the law may not go. Neither are they entitled to usurp the function of this Court as happened here."

19. The High Court considered that the destruction of documents by the applicants was a relevant consideration to which "great weight" must be given in striking the correct balance between the rights and interests at issue in the application. It stated that the starting point in the balancing exercise was that freedom of expression is of the highest order of importance in a democratic society. It considered that the interference sought here was "prescribed by law", as required by Article 10 of the Convention. As to whether it was "necessary in a democratic society ... for preventing the

disclosure of information received in confidence”, it was essential to consider whether compelling the applicants to answer the Tribunal’s questions could or would lead to the identification of the source. In this context, the destruction of the documents was of direct relevance. Where a source was anonymous, the privilege against non-disclosure should not be invoked at all or only given the slightest weight, since if a journalist does not, in fact, know the source then there could not be a professional obligation to protect it from disclosure. If the questions to be asked might reveal the source or assist in its identification, then a claim of privilege against disclosure could be invoked. As the documents had been destroyed, neither the Tribunal nor the High Court could examine them; nor could they be subjected to forensic testing. Therefore, the only means for the Tribunal to learn anything of the circumstances of the leak was to question the applicants. The only information that might be obtained would be whether the documents were originals, that is, whether they bore a letterhead and signature. This would indicate whether the documents came from within the Tribunal or from elsewhere. As K had strongly denied that he passed the letter to the applicants, the most that could now be achieved through questioning would be to indicate that the Tribunal itself was not responsible for the leak. The identity of the source would remain “shrouded in impenetrable mystery”.

20. The High Court concluded:

> “In these circumstances, we are of opinion that because of the destruction of the documents and the consequent deliberate frustration of forensic inquiry thereby brought about, there is little or no risk of the questions proposed to be asked leading to the identification of the source who provided these documents to the defendants. Because of this we are of opinion, therefore, that very slight weight indeed is to be attached to the defendants’ privilege against disclosure of their sources in this case. On the other hand, there is the potential of a real benefit to the Tribunal if the answers to the questions give rise to an indication that the Tribunal was not the source of the leak.
>
> This is an important matter. In a democratic society inquiries into matters of public interest conducted at the behest of Parliament are an essential tool in the formulation of legislative policy. In our jurisdiction this is done through the Tribunal of Inquiry Acts. A feature of this form of inquiry as set out in the Terms of Reference of the Tribunal is the conducting of an inquiry through a private investigative phase. Essential to the success of this scheme is the maintenance of confidentiality as discussed above. In our view, nothing could be more damaging to the capacity of the Tribunal to carry out its functions than the perception that the Tribunal itself leaked information given to it in confidence. Thus, where a leak occurs as in this case, the Tribunal must inquire to establish the source of that leak as it has sought to do. Establishing that the Tribunal itself was not the source of the leak is in itself a legitimate aim and a pressing social need. At this stage, having regard to the destruction of the documents, the only means remaining to pursue that aim is by way of the proposed questioning of the defendants. If a Tribunal is not enabled to pursue the aim of establishing that it was not the source of the leak, even if it is not able to ultimately identify the source of the leak, the process of public inquiry in private

investigative phase will be damaged to such an extent that there would be an inevitable loss of confidence in the integrity of the process and in all probability a significant reduction in the voluntary co-operation of the public in its inquiry.

In the circumstances of this case we conclude that the defendants' privilege against disclosure of sources, is overwhelmingly outweighed by the pressing social need to preserve public confidence in the Tribunal and as there is no other means, by which this can be done other than the enquiry undertaken by the Tribunal, we are of opinion that the test "necessary in a democratic society" is satisfied."

2. *Judgment of the Supreme Court*

21. The applicants appealed to the Supreme Court. In a decision of 31 July 2009 the Supreme Court allowed the appeal. Fennelly J. (delivering the unanimous judgment of the court) noted that the case turned entirely on the issue of the balance struck by the High Court between the power of the Tribunal to investigate and the applicants' right to protect their source. Regarding the former, he observed that the Tribunal had the right and was under a duty to protect confidential information communicated to it and by it during its investigative phase. The Tribunal was right to investigate unauthorised disclosure of such information and the courts should support its efforts. On the other hand, it was clear and had not been disputed that the information in question was a matter of public interest which a newspaper would, in the ordinary way, be entitled to print.

22. The key issue was whether the High Court had been correct in ordering the applicants to appear before the Tribunal and to answer its questions. That depended on whether the High Court was correct in the way in which it had approached the balancing exercise. He described as correct and unexceptionable the High Court's view that the function of deciding between competing interests was reserved to the courts. The European case-law under Article 10 allowed a certain margin of appreciation to States and their courts. It did not, however, propose that such matters could be decided other than by courts. The unilateral decision of a journalist to destroy evidence with the intent to deprive the courts of their jurisdiction was designed to subvert the rule of law. The courts could not shirk their duty to penalise journalists who refuse to answer questions legitimately and lawfully put to them. He continued:

"61. ...I raise the question as to whether it can truly be said to be in accord with the interests of a democratic society based on the rule of law that journalists, as a unique class, have the right to decide for themselves to withhold information from any and every public institution or court regardless of the existence of a compelling need, for example, for the production of evidence of the commission of a serious crime. While the present case does not concern information about the commission of serious criminal offences, it cannot be doubted that such a case could arise. Who would decide whether the journalist's source had to be protected? There can be only one answer. In the event of conflict, whether in a civil or criminal context, the courts must adjudicate and decide, while allowing all due respect to the principle of journalistic privilege. No citizen has the right to claim immunity from the processes of the law."

23. Referring to this Court's judgment in the case *Goodwin v. United Kingdom* (27 March 1996, *Reports of Judgments and Decisions* 1996-II) he noted that while the respondent State was found to have violated the applicant's rights under Article 10 of the Convention, the judgment did not say that the national court could not, in principle, order disclosure. It was implicit in its analytical process that it could.

24. The Supreme Court did not disagree with the High Court's language about the destruction of the very documents that were at the core of the inquiry. Nonetheless, it had to accept that the issue was not whether the act was a wrongful one and deserving of the opprobrium applied to it by the High Court but rather the narrower question whether, where in the circumstances that the documents no longer exist, there was a logical or causal link between that act and the order made. It did not appear to the Supreme Court that there was such a link. The order now to be made had to be justified "by the situation as it now exists" and not by the need to mark disapproval of the "unquestionably reprehensible conduct" of the applicants. For the same reason, Fennelly J. did not think that the High Court was correct in reaching the conclusion that the destruction of the documents was a relevant consideration to which "great weight" must be given in striking the balance between the competing rights and interests at issue.

25. On the implications of the anonymity of the source the Supreme Court found it difficult to follow the logic of the High Court about what could be achieved by questioning the applicants. It stated:

> "65. If the "leaked" document was not headed and thus, as a matter of probability, came from a Tribunal source, that might possibly assist the Tribunal in its endeavour to identify the source. At the same time, a number of other hypotheses cannot be excluded. One must recall that the person "leaking" the document would, in all probability, have wished to disguise the source. Thus, by the use of a photocopying machine, the heading might be removed from an original letter. Equally, an original might have been photocopied prior to its dispatch from the Tribunal.
>
> 66. On the contrary hypothesis that it did not come from a Tribunal source, but was, as the High Court expressed it *"shrouded in impenetrable mystery,"* it clearly would not be possible to justify the making of the order.
>
> 67. If the apparent anonymity of the source weakens the appellants' case for resisting the order, it must correspondingly weaken the Tribunal's case for obtaining it. If, as was the case in *Goodwin,* the source was a person known to the journalist, it could, at the least, be argued that there was some concrete benefit to be obtained from the making of the order. Where the source is anonymous, the benefit is speculative at best ..."

26. Noting that the European case-law proceeded on a functional theory, namely, whether there was a pressing social need for the imposition of the restriction, the Supreme Court concluded:

> 68. Looking at the High Court judgment as a whole, I have come to the conclusion that the great weight which it attached to the reprehensible conduct of the appellants

in destroying documents led it to adopt an erroneous approach to the balancing exercise.

69. According to the reasoning of the European Court in *Goodwin,* an order compelling the appellants to answer questions for the purpose of identifying their source could only be *"justified by an overriding requirement in the public interest."* Once the High Court had devalued the journalistic privilege so severely, the balance was clearly not properly struck. On the other side, I find it very difficult to discern any sufficiently clear benefit to the Tribunal from any answers to the questions they wish to pose to justify the making of the order.

70. I would, therefore, allow the appeal and substitute an order dismissing the Tribunal's application."

3. The Supreme Court ruling on costs

27. The issue of costs was dealt with in a separate unanimous ruling, delivered on 26 November 2009. The Court briefly summarised the substance of the case and noted the strong criticism of the applicants' actions that had been made by the High Court and the Supreme Court. Murray CJ (as he then was) recalled that the applicants had "cast themselves as adjudicators of the proper balance to be struck between the rights and interests concerned". He cited the passage from the substantive Supreme Court judgment in which the court had held that the unilateral decision of a journalist to destroy evidence with the intent to deprive the courts of jurisdiction was designed to subvert the rule of law. Noting the "narrower question" which the Supreme Court had had to accept in circumstances where the documents no longer existed, he stated:

"Thus, it was the very act of destroying the document that decisively shifted the balance and deprived the Tribunal of any effective power to conduct an inquiry and, by extension, deprived the courts of any power to give effect to any order of the Tribunal. This act was calculated and deliberate and was performed with that clear purpose in mind. That "*reprehensible conduct*" determined the course which these proceedings took and was at the root of balancing the issue which the Court had to determine.

In the view of the Court the deliberate behaviour of the appellants was directly related to and was intended to achieve the outcome of the case, which has in fact occurred.

As explained in *Dunne v Minister for the Environment* [2008] I.R. 775 at 780, (per Murray C.J.), there "*has been no fixed rule or principle determining the ambit of* [the exercise of the court's] *discretion and, in particular, no overriding principle which determines that it must be exercised in favour of an unsuccessful plaintiff in specified circumstances or in a particular class of case*." More generally, it is not in doubt that the Court has jurisdiction, to be exercised in exceptional cases, to order a successful party to pay the costs of the unsuccessful party.

The behaviour of the appellants was such as to deprive them of their normal expectation that the Court would, in the exercise of its discretion, award costs in their favour in accordance with Order 99. The Tribunal was, on the other hand, fully entitled to conduct its inquiry and to seek the assistance of the High Court. The Court

> will, in these exceptional circumstances, order that the respondents are entitled to recover the costs of both the High Court and this Court from the appellants."

28. The *quantum* of costs has not yet been determined. The Tribunal served a Bill of Costs on the applicants' solicitors in October 2010, claiming the sum of €393,055.42. Costs claimed in legal proceedings are subject to taxation (assessment) by the Taxing Master of the High Court. The applicants applied for a postponement of the taxation of the Tribunal's costs, pending the determination of their case by this Court. The Tribunal agreed to a 12 month adjournment. In January 2011 the Taxing Master decided to adjourn the matter generally, with liberty to re-enter. The costs in issue have not, to date, been determined by the Taxing Master or, on appeal therefrom, by the High Court.

B. Relevant domestic law

29. The power of a Tribunal of Inquiry is defined by section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, as follows:

> "A tribunal may make such orders as it considers necessary for the purposes of its functions, and it shall have, in relation to their making, all such powers, rights and privileges as are vested in the High Court or a judge of that Court in respect of the making of orders."

The Tribunals of Inquiry (Evidence) (Amendment) Act, 1997 provides at section 4:

> "Where a person fails or refuses to comply with or disobeys an order of a tribunal, the High Court may, on application to it in a summary manner in that behalf by the tribunal, order the person to comply with the order and make such other order as it considers necessary and just to enable the order to have full effect."

The Tribunals of Inquiry (Evidence) (Amendment) Act, 2004 added the following provision to section 4 of the 1997 Act:

> "4A.—(1) A tribunal or, where the tribunal consists of more than one member, the chairperson may, whenever the tribunal or chairperson considers it appropriate to do so, apply to the High Court for directions relating to the performance of the functions of the tribunal or the chairperson under the *Tribunals of Inquiry (Evidence) Acts 1921* to *2004*, including their functions under section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 relating to costs.
>
> (2) On an application under subsection (1), the High Court may give such directions and make such orders as it considers appropriate.
>
> ..."

Article J(5) of the terms of reference of the Tribunal, included in the parliamentary resolution of 17 November 2004, provided:

> "Nothing in these amended Terms of Reference shall preclude the Tribunal from conducting hearings or investigations into any compliance or non-compliance by any person with the orders or directions of the Tribunal."

Order 99 of the Rules of the Superior Courts provides, as relevant:

> "I. Right to costs.
>
> 1. Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:
>
> (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.
>
> (2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.
>
> (3) The costs of every action, question, or issue tried by a jury shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct.
>
> (4) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event.
>
> ..."

COMPLAINTS

30. The applicants complained under Article 10 that there had been an interference with their right to protect their journalistic sources. They contended that the interference did not have a clear or adequate legal basis, did not pursue any of the legitimate aims recognised in Article 10 § 2, and could not in any event be considered necessary in a democratic society. Under Article 6 they complained that the award of costs against them, as the successful party, was unfair, unreasonable and arbitrary. The applicants further complained under Article 13 that they did not have an effective remedy for their complaints under the Convention. Relying on Article 1 of Protocol No. 1, they also complained that the costs order against them breached their property rights. Lastly, they complained under Article 14, taken in conjunction with the provisions referred to above, that they had been subjected to an unjustified difference in treatment in comparison with persons in analogous situations.

THE LAW

A. The Article 10 complaint

31. The applicants complained that the award of costs against them was in violation of their right to freedom of expression as it applies to journalists. Article 10 of the Convention provides:

> “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 and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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 health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

1. The parties’ submissions

(a) The Government

32. The Government argued that the applicants had failed to exhaust domestic remedies. While the Supreme Court’s ruling on costs was final, this only concerned the principle of costs and not the *quantum*, which had yet to be determined. That was a matter for the Taxing Master, against whose determination an appeal lay to the High Court. A considerable reduction in costs claimed (up to 70% in one case) could be made by the Taxing Master. Until the taxation procedure had been conducted, or until the parties reached agreement on the amount of costs, the issue of the *quantum* of costs could only be speculative. The Court ought therefore to confine its assessment to the mere principle or fact of costs having been awarded and should not presume any specific figure.

33. The Government stressed the public importance of the Tribunal’s work and how the leaking and publication of confidential materials was a matter of public interest, indeed, of the utmost seriousness. While the Tribunal had regarded this as a matter of extreme urgency and had acted legitimately in consequence, this was not in fact germane to the application since it was only the courts that had power to enforce the Tribunal’s summons. It was only the courts that could determine whether any steps could be taken to compromise the confidentiality of the applicants’ sources. Thus, at the time the documents were destroyed, there was no threat to the confidentiality of sources. In both domestic courts, very significant consideration and weight was given to the journalistic right to protect their sources and the jurisprudence of this Court was hugely relevant in the judgments of the domestic courts - focusing, correctly, on whether there was a pressing social need to make the orders sought by the Tribunal. The issue was finally determined by the Supreme Court in the applicants’ favour. Its judgment was emphatic on the importance of permitting journalists to preserve the confidentiality of their sources. Pivotally, the Supreme Court drew a causal link between the applicants’ conduct and the rationale of its judgment, highlighting the fact that it was because the documents in

question had been destroyed, there would have been little public benefit in granting the orders sought. The decision of the Supreme Court on the substantive question in the case did not place any restriction on the applicants' ability to go about their jobs and it restated in emphatic terms the importance of the confidentiality of journalistic sources.

34. The Government submitted that the Supreme Court had decided to award costs against the applicants because of their deliberate destruction of the documents which they had been ordered by the Tribunal to produce. This action had had the effect of ensuring the outcome and preventing the Supreme Court from conducting a complete evaluation of the case. The applicants had decided that it would be they and not the Supreme Court who would assume jurisdiction over the question of whether the relevant documents should be produced. This had had a determinative effect on the case as a whole. The leaked documents had been at the heart of the case. By destroying them, the applicants rendered one part of the Tribunal's order (to produce) devoid of purpose and had compromised the ability of the courts to consider the other aspects of the case (to attend) which were closely linked to the physical evidence. In this way, the judicial function had been undermined. The applicants had taken the law into their own hands in furtherance of a misguided belief as to how they should protect the source of the documents. It was a clear breach of the rule of law that both courts had criticised very sharply.

35. The Government rejected the applicants' argument that they had been punished for seeking to vindicate their rights and for defending the proceedings. This revealed a fundamental misunderstanding. It had been open to the applicants to assert their rights from the outset, which would have been vindicated by the domestic courts, and ultimately, if necessary, by the European Court. Had they permitted the action to proceed in the usual way, their defence may well have been successful, in which case they certainly would not have had costs awarded against them. It was wrong to argue that the destruction of the documents proved to be irrelevant because the courts had in fact reached a decision on the case. The illegal actions in question were instrumental in ensuring the outcome. In reality, the Supreme Court had not been able to evaluate the totality of the relevant issues in balancing the applicants' right to protect their source and the public interest in respecting the confidentiality of that stage of the Tribunal's work.

36. The Government regarded it as highly significant that the applicants did not make any submissions on whether there had actually been a restriction of their rights under Article 10. It submitted that there had been no such restriction nor was there any "chill" on journalistic freedom. The applicants' freedom of expression had not, in fact, been interfered with since the improper destruction of evidence – for which they had been sanctioned – could not be regarded as a legitimate exercise of any right under Article 10, there being no support for such a notion in the European

case-law. The Supreme Court had actually vindicated the applicants' rights by allowing their appeal and declining to enforce the Tribunal's order. There was nothing in that decision to restrict publication of a public interest story, to compel disclosure of sources or to interfere in any other way with the work of journalism. Nor should it be assumed that, had the documents still been in existence, the Supreme Court would have decided the case against the applicants. The cost order did not have any "chilling effect" on journalism. It had no impact at all on journalists engaged in public interest journalism who vehemently protect their sources yet recognised and respected the rule of law. There was no restriction, actual or potential, on any rights to freedom of expression. What the ruling signified was that all persons must respect the role of the courts, and that nobody, journalists included, could usurp the judicial function. The applicants were positing an untenable proposition that because they were journalists and because they were facing consequences for their abuse of rule of law, this must by definition concern Article 10. They could not claim that, being journalists, the consequences that they had brought upon themselves in this case necessarily engaged Article 10.

37. Even assuming that there had been an interference with the applicants' rights under Article 10, the Government rejected the idea that this had not been adequately provided for by law. Order 99 explicitly left the issue of costs to the discretion of the courts. Although the normal rule was that the winning side would retrieve its costs from the other party, the courts could depart from that principle for "special cause". It was clearly established in domestic case-law that the issue of costs was ultimately at the discretion of the courts. The case-law confirmed that the improper conduct of a successful party may be a reason why an order of costs might be made against him or her. The Supreme Court's decision was therefore both a possible and predictable consequence of the applicants' actions, which they, having taken legal advice, ought to have anticipated. It could not be said that the Supreme Court had acted in an arbitrary manner as there was good reason for its decision on costs. More generally, the Irish courts exercised their discretion with care, in light of the actual facts of each particular case and provided reasons for so doing.

38. As to the purpose of any interference with the applicants' freedom of expression (which was denied), the Government submitted that the Supreme Court's costs ruling served the aim of maintaining the authority of the judiciary. By their actions the applicants had disempowered the courts, compromising their ability to decide all of the issues in the case. Not to have imposed some consequences on the applicants would have sent the message that litigants could flout the authority of the courts with impunity. The court did not take any step impinging on journalistic freedom (for example, by requiring the applicants to attend before the Tribunal).

39. As regards the necessity of any interference, the Government argued that the applicants had not been simply trying to protect their sources, but had ensured that the courts would have no effective jurisdiction over the issue of disclosure, which was not encompassed by the case-law of this Court. The destruction of the documents had not been irrelevant to the examination of the case, but entirely fundamental to how it was ultimately decided by the Supreme Court, since it led it conclude that there was no point in granting the order sought by the Tribunal. The award of costs against the applicants was consistent with the legitimate aim of upholding the authority of the judiciary and protecting the integrity of the judicial process. It represented, from the perspective of freedom of expression, the least restrictive means of fulfilling that legitimate purpose and was necessary in a democratic society.

(b) The applicants

40. The applicants argued that the Supreme Court's ruling on costs interfered with their right under Article 10 to protect their journalistic sources. They argued that the proceedings taken by the Tribunal to discover the source of the leak had been misconceived from the outset in view of the fact that they had immediately asserted journalistic privilege and had informed the Tribunal of the destruction of the documents. When the Tribunal had persevered, they had had no choice but to defend the proceedings. Thus there was an inextricable link between the assertion of their rights under Article 10, their defence of the proceedings against them, and the Supreme Court's decision on costs. They had been penalised for exercising their Convention right to protect their source. They were critical of the Supreme Court's rationale that the applicants had prevented the courts from examining the case. This was contradicted by the fact that, in its consideration of the merits, the Supreme Court had been able to reach a decision on the Tribunal's application. It had overturned the High Court's decision with reference to the principles laid down in the European case-law. The Supreme Court could well have reached the opposite conclusion and granted the orders sought by the Tribunal if it had considered this justified. It was, therefore, mistaken to say that the destruction of the documents had effectively determined the course of the proceedings or rendered the Tribunal's application vain. The applicants disputed that their actions were in defiance of the authority of the courts. The documents had been destroyed before they had been summonsed to attend the Tribunal and before the commencement of legal proceedings. Once commenced, the only way, in hindsight, they could have avoided being penalised for asserting their rights would have been by not defending the action, that is, by complying with the Tribunal's order and effectively relinquishing their Article 10 rights. There was a strong chilling effect here, since it was clear to the press, to potential sources and to the public that

journalists could be compelled, under the threat of an order of costs, to disclose the source of information given in confidence. This was all the more unacceptable in light of the highly political subject-matter of the case, which warranted the highest protection. The applicants further contended that their actions had not been contrary to the standards of responsible journalism.

41. The interference with their rights had not been "prescribed by law", the applicants argued, since the relevant provision in domestic law was so vague that it lacked the requisite quality in terms of foreseeability and safeguards. The Supreme Court had not acted in a foreseeable manner. Subsequent judicial pronouncements on the exercise of the discretion allowed by Order 99 showed the anomalous nature of the decision. The case showed that there were in fact no safeguards against arbitrariness.

42. The applicants further contended that the interference had not pursued any of the aims set forth in Article 10 § 2. It could not be claimed that the Supreme Court's purpose had been to maintain the authority of the judiciary, since the applicants had not subverted it. The Supreme Court had not referred to any of the aims permitted under Article 10; its purpose had simply been to sanction the applicants. The idea that it had been necessary to send a message about respecting the role of the courts was wrong.

43. Furthermore, the interference could not be regarded as "necessary in a democratic society", since it did not correspond to any pressing social need. It was disproportionate and the reasons provided for it were not "relevant and sufficient" as required by the case-law of the Court. They had simply acted on the obligation of journalists to protect their sources and had defended subsequent proceedings aimed at thwarting journalistic privilege. They asserted furthermore that since the Tribunal had no entitlement to demand disclosure of the documents, the domestic courts could not have considered them anyway, even had they not been destroyed. As the Supreme Court had in fact been able to examine the substance of the case, the reason it gave for the costs order was incorrect. Moreover, the interference was excessive, since the Supreme Court could have used lesser means to express its disapproval of the applicants' conduct. To place the heavy burden of both parties' costs on the applicants was unjustified.

2. The Court's assessment

44. The Court considers that it need not examine the objection raised by the Government alleging the non-exhaustion of domestic remedies, since it finds that this complaint is inadmissible for the following reasons.

45. The Court does not consider that the Supreme Court's ruling on costs should be characterised as an interference with the applicants' right under Article 10 to protect the secrecy of the source who provided them with the confidential documents of the Tribunal. In applying this Court's case-law, the Supreme Court found that an order compelling the applicants

to answer questions for the purpose of identifying their source could only be justified by "an overriding requirement in the public interest". Such a requirement was not established having regard to the situation as it existed at the time. While the applicants referred to the Court's leading judgments on the protection of journalistic sources, notably *Goodwin v. the United Kingdom*, the Court considers that the facts of the present case are essentially different.

46. Central to the applicants' complaint is their contention that the attempt by the Tribunal to discover the source of the leak was inherently misconceived and presented a direct threat to their right under the Convention to protect their source. This, they contend, justified their actions. It is not for the Court to pronounce on the relative merits of the arguments that could have been made for and against ordering the applicants to produce the leaked documents and to answer the Tribunal's questions. Even so, the Court does not accept the applicants' assertion that the Tribunal's interest in ascertaining the source of the leak was misconceived or necessarily devoid of merit. That issue, which would have involved the balancing of competing public interests, was for the domestic courts to resolve in the first place, guided by the relevant Convention case-law. The domestic courts would have been in a position to do so, had the applicants not destroyed the documents. The Court observes that both the High Court and the Supreme Court referred extensively to the relevant Article 10 case-law principles, their differing conclusions arising out of the consequences that each drew from the applicants' actions. Where competing public interests were in issue, the correct course in the circumstances would have been to allow for a proper judicial determination of the matter in its entirety. There were no grounds to fear that the safeguards provided by the domestic courts might have been deficient. As the Court has stated in a leading case on the protection of journalistic sources *(Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 90, 14 September 2010):

> "First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. The principle that in cases concerning protection of journalistic sources "the full picture should be before the court" was highlighted in one of the earliest cases of this nature to be considered by the Convention bodies (...). The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not."

47. Permitting the High Court, and subsequently the Supreme Court, to adjudicate the matter in full would have been fully consonant not only with Article 10, but also with the rule of law, a fundamental principle of the Convention as a whole.

48. It follows that the course of action adopted by the applicants in this case was not, in the Court's view, a legitimate exercise of their right under Article 10 to refuse to disclose their source. The protection of the courts was available to them in order to vindicate their rights. The Convention does not confer on individuals the right to take upon themselves a role properly reserved to the courts. As the domestic courts underscored, this is, effectively, what the applicants did through the deliberate destruction of the very documents that were at the core of the Tribunal's inquiry. Even if, as the applicants submitted, they did not intend, at that point in time, to prevent full judicial examination of the issue, this was clearly the effect of their actions. The Court does not accept that the applicants could not have reasonably foreseen that the Tribunal would react as it did when confidential information was published in a national newspaper or that it would take such steps as were available to it to uphold the integrity of the inquiry. This was indicated in its first letter to the applicants on the date of the publication (see paragraph 7 above). It was after the Tribunal had signalled its right to have recourse to the courts and after it had ordered the production of documents that the applicants decided to destroy the evidence that would be central to the courts' resolution of the competing public interests in issue.

49. The applicants maintained that notwithstanding the destruction of the documents the domestic courts were still able to rule on the case. For the Court, that is to misconstrue the Supreme Court's decisions. In its judgment on the merits, the Supreme Court stated that it had to consider the order sought by the Tribunal and to conduct the requisite balancing exercise in light of the situation as it existed at that time, that is, after the destruction of the documents. Since that situation was purposely brought about by the applicants, who presented the Tribunal and the domestic courts with a *fait accompli*, the Court considers that the role of the judiciary was indeed undermined. This was made clearer still by the Chief Justice in the ruling on costs, where he observed that the destruction of the documents had "decisively shifted the balance and deprived the Tribunal of any effective power to conduct an inquiry and, by extension, deprived the courts of any power to give effect to any order of the Tribunal".

50. Though the applicants complained of the chilling effect of the costs order on freedom of expression, the Court does not agree with this characterization of the ruling. Firstly, it observes that, as a general principle, costs are a matter for the discretion of the domestic courts (see, *mutatis mutandis*, *Christodoulou v. Cyprus*, no. 30282/06, § 66, 16 July 2009). Furthermore, it considers that the order for costs in the circumstances of this case can have no impact on public interest journalists who vehemently protect their sources yet recognise and respect the rule of law. The Court can discern nothing in the costs ruling to restrict publication of a public interest story, to compel disclosure of sources or to interfere in any other

way with the work of journalism. What the ruling signified was that all persons must respect the role of the courts, and that nobody, journalists included, may usurp the judicial function. The Court considers that the true purport of the Supreme Court's ruling was to signal that no party is above the law or beyond the lawful jurisdiction of the courts.

51. In light of the foregoing, the Court concludes that there was no interference with the applicants' right to freedom of expression. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. The other complaints

52. The applicants complained that the costs order was in violation of their rights under Articles 6, 13 and 14 of the Convention, as well as Article 1 of Protocol No. 1. Having regard to all material in its possession, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

53. It follows that this part of the application must be rejected as manifestly ill-founded in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Mark Villiger
President