The European Commission of Human Rights sitting in private on 3 December 1986, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
E. BUSUTTIL
G. JÖRUNDSSON
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
A. WEITZEL
J.C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
H. VANDENBERGHE
Mrs G.H. THUNE
Sir Basil HALL
Mr. F. MARTINEZ

Mr. J. RAYMOND, Deputy Secretary to the Commission

Having regard to Article 25 (Art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 24 August 1984 by M.D. against Ireland and registered on 16 April 1985 under file No. 11489/85;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Irish citizen born in 1926 and is resident at St. Margarets, County Dublin. The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant brought a civil action for libel and assault against the Sunday Newspapers Ltd., two journalists and a cameraman. The action was heard before a judge and jury between 2 and 15 February 1982. The jury found for the defendants on the assault claim whilst on the libel claim, they brought in an apparently contradictory verdict in answering the twelve questions put to them. The applicant was of the view that they found in his favour and assessed damages at £100. The judge however held the verdict was in favour of the defendants and did not give effect to the £100 award.

The applicant appealed to the Supreme Court on 19 February 1982 claiming, inter alia, that the judge had misdirected the jury on the assault claim and acted wrongly in refusing to enter judgment for the sum of £100. The defendants issued a motion on 28 April 1982 to have the appeal dismissed for want of prosecution. The Supreme Court, including Mr. Justice Hederman, heard the motion on 7 May 1982 and ordered the applicant to lodge an amended notice of appeal and to pay within 14 days £4,000 for the printing of the shorthand notes of the trial. An application to the Supreme Court to extend the time-limit for payment was refused, Mr. Justice Hederman again sitting on the bench at the time. The applicant duly paid the money and received a transcript from the stenographer. He claimed that there were significant errors in the printed text and on 10 and 26 January 1983 issued motions for discovery of the original shorthand notes of the

stenographer.

These motions were dismissed by the Supreme Court on 21 January and 7 February 1983 respectively. On both occasions the applicant claims Mr. Justice Hederman was present. The appeal was dismissed on 28 March 1984. On the morning of the appeal hearing, the Registrar of the Supreme Court informed the applicant that one of the judges of the Supreme Court had shares in Independent Newspapers Ltd. which wholly owns Sunday Newspapers Ltd. The applicant made no objection before or during the hearing for fear of alienating the judges. He subsequently discovered that Mr. Justice Hederman, who had sat on the hearing of the first motion for discovery as well as on the appeal, held 2,812 shares in Independent Newspapers Ltd.

COMPLAINTS

The applicant complains that he has been denied a fair and public hearing by an independent and impartial tribunal in that:

i) the Supreme Court denied him access to the original shorthand notes and relied on an inaccurate transcript during the appeal;

ii) one of the judges, who sat on the motions and appeal, owned shares in the parent company of the defendant company and was therefore disqualified from participating in the proceedings;

iii) the stenographer, who produced the notes and allegedly admitted to burning the originals, was a journalist and therefore prejudiced against him; and

iv) the trial judge revised the true verdict of the jury and misdirected them as to the assault claim.

The applicant also invokes Arts. 3, 5, 8, 10, 13, 14 and 18 (Art. 3, art. 5, art. 8, art. 10, art. 13, art. 14, art. 18) of the Convention in respect of the facts outlined above.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 24 August 1984 and registered on 16 April 1985. The Commission examined its admissibility on 4 December 1985 and decided, in accordance with Rule 42 (2)(b) of its Rules of Procedure, to invite the Government of Ireland to submit written observations on the admissibility and merits of the complaint concerning the impartiality of the Supreme Court. After one extension of the time-limit originally set, the Government's observations were submitted on 15 April 1986. The applicant's observations in reply were submitted on 7 July 1986.

WRITTEN OBSERVATIONS OF THE PARTIES

1. The respondent Government

a) The facts

The Government submit that Mr. Justice Hederman sat only on the first motion for discovery, not the second. This is borne out by the Court orders. On the morning of 27 March 1984 before the commencement of the two day appeal hearing, the Registrar of the Supreme Court, at the request of the Court, informed the parties that one of the judges had a small shareholding in Independent Newspapers Ltd., which wholly owns the Sunday Newspapers Ltd, one of the defendants. The applicant made no objection to the composition of the Court either at that time or during the hearing of the appeal. The Government do not accept the applicant's version of the conversation between the applicant and the Registrar. The Registrar recalls that he invited the applicant to make an objection if he wished and did not add anything to discourage

the applicant from doing so.

The applicant states Mr. Justice Hederman held 2,812 shares in Independent Newspapers Ltd. The total number of voting shares at the end of February 1984 was 14,935,000.

b) The domestic law

It is provided by Article 34 that every judge make a prescribed declaration upon his appointment:

"Every person appointed a judge under this Constitution shall make and subscribe the following declaration:

'In the presence of Almighty God I ..... do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief Justice (or as the case may be) without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me.'"

With regard to the independence of the judiciary Article 35 of the Constitution provides:

"2. All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.

3. No judge shall be eligible to be a member of either House of the Oireachtas or to hold any other office or position of emolument."

The principle nemo judex in sua causa is an accepted principle of Irish law and has long been regarded as a rule of natural justice.

In O'Donoghue v. Veterinary Council (1975 IR 398) the High Court stated:

"the test to be applied in determining whether a tribunal (be it judge or jury or disciplinary committee) is impartial is that a member is not impartial if his own interest might be affected by the verdict, or if he is so connected with the complainant that a reasonable man would think that he would come to the case with prior knowledge of the facts or that he might not be impartial".

The practice of the Supreme Court as stated by the Chief Justice is as follows:

"Since I was appointed Chief Justice in January 1985, the practice in the Supreme Court has been that where there might be a conflict of interest in respect of any member of the Court, concerning either of the parties, or issues arising in an appeal before the Court, arrangements are made that that individual does not sit for that specific case and a different Court is constituted. In exceptional circumstances, where an apparent, but not a real possible conflict of interest is discovered, the Court may, having informed all the parties of its existence and having ascertained that none of them has any objection proceed with the originally constituted Court, rather than put the parties to the inconvenience or cost of an adjournment."

The Government also wishes to draw attention to the recent Supreme Court judgment in the case of NEAL DUGGAN v. Mr. Justice Griffin and others.

The plaintiff in that case commenced Constitutional proceedings in the High Court in January 1984 against the Chief Justice and two other members of the Supreme Court claiming damages and seeking an Order that the Plaintiff was deprived of his personal right to natural justice in relation to an appeal which had been heard by the Supreme

Court in 1982. He claimed that Mr. Justice Hederman was a stockholder and member of the Bank of Ireland (which was one of the defendants in the appeal) and that he had no prior notice of this fact in 1982. On learning of the proceedings, the Supreme Court immediately took steps to vacate the 1982 Order and it directed a rehearing of the appeal proceedings complained of. Nonetheless the plaintiff proceeded with his High Court Constitutional proceedings, to which the three defendants lodged a defence. The High Court refused the Order requested in 1985. An appeal was taken to the Supreme Court. None of the three members of the Supreme Court who heard this appeal had heard the 1982 appeal. The Supreme Court's oral judgment of 11 March 1986 was recorded and stated inter alia:

"What has occurred in this case is that after the conclusion of the hearing of an appeal by the Supreme Court, it being a Court of final and ultimate appeal under our Constitution, it discovered some considerable time afterwards that there was an apparent conflict or the possibility of an apparent conflict of interest because one of the members constituting the Court owned a small number of shares in the defendant corporation. That being so, I am satisfied that once it became aware that the aggrieved party who had lost that appeal, namely, the Plaintiff, was complaining about that (and he did so in the most concrete and express terms in the proceedings he issued in the High Court) in my view, not only had the Supreme Court a right and a jurisdiction to vacate its own Order, but it had a positive duty to do so."

The present case is very different from the facts in Mr. Duggan's case, since Mr. Duggan was not aware of any possible conflict at the time, whereas the applicant in this case was expressly informed.

c) Admissibility and merits

The Government relies inter alia on the Piersack case (Eur. Court H.R., Piersack judgment of 1.10.82, Series A No. 53) and Albert and Le Compte (Eur. Court H.R., Albert and Le Compte judgment of 10.2.83, Series A No. 58) where the Court held that the personal impartiality of members of a tribunal must be presumed until there is proof to the contrary.

i. As to the hearing of 21 January 1983

The applicant cannot claim to be a victim. A second notice of motion was issued on 26 January 1983 also for the discovery of the shorthand notes based on the same grounds as the first motion but supplemented by affidavits and exhibits. Mr. Justice Hederman was not one of the members of the Supreme Court which heard and refused the second motion on 4 February 1983 and there is no ground for claiming the Court was not impartial.

The Government also submit that complaint in respect of this motion would be out of time since the application was introduced more than six months later on 24 August 1984.

ii. The hearing of 27 and 28 March 1984

The Government submit that the applicant has not exhausted his domestic remedies since he failed to ask the Court to reconstitute itself to deal with the appeal or, on a later date, to apply to the Supreme Court to remedy the situation. He also did not seek the constitutional remedy which Mr. Duggan had sought in the previously-cited case.

The applicant complains that Mr. Justice Hederman was not qualified to take part in the appeal. The Government submit that the Court, ex abundante cautela, brought to the parties' attention the fact that it had discovered an apparent, but not a real, possible conflict of

interest. Having acquiesced in the hearing continuing and having failed to win his appeal, the applicant seems with hindsight to take the view there was legitimate reason to fear a lack of impartiality on the part of the Supreme Court but does not specify where the conflict of interest lay. The Government takes the view that there was no legitimate reason to fear a lack of impartiality since there is not a sufficient link between the ownership of one of the three members of the Court of a small number of shares in a parent company and the specific legal issues and parties before the Court. Indeed the applicant acquiesced in the proceedings, not even requesting a short adjournment to think the matter over and cannot now claim to be a victim.

In the Government's submission, this application is inadmissible, manifestly ill-founded and without merit.

2. The applicant

a) The facts

The applicant states that he told the Registrar that if it was one of the sitting judges who had a shareholding he wanted to object. The Registrar failed to pass this on or the Court sat regardless. The practice as stated by the Chief Justice in the Government's observations was not followed in his case.

The applicant also submits that the Mr. Justice Hederman sat on both motions for discovery and the appeal, as well as other hearings dealing with want of prosecution and the extension for payment of £4000 security.

b) The law

The applicant claims Article 35 of the Constitution was not satisfied and quotes Brian Doolan on Constitutional Law and Constitutional Rights in Ireland at page 70 last paragraph:

"A Judge who heard a case in which he had a pecuniary interest such as a shareholder in a Defendant Company, offends the rule of natural justice (nemo judex in sua causa)- No one shall be Judge in his own cause- and the other party could have the decision set aside".

c) Admissibility and merits

The applicant relies on the Piersack case (Eur. Court H.R., judgment of 1.10.82, Series A No. 55) in which it was stated:

"It is sufficient to find that the impartiality of the tribunal which has to determine the merits of the charge was capable of appearing open to doubt..."

The applicant also relies on the principle as set out in Dimes v. Grand Junction Canal (HLC 1852 p. 793), a case which concerned a judge's shareholding:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern: but my Lords, it is of the last importance that the maxim that no man is to be a Judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of the Queen's Bench, we have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that the High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that

account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest but to avoid the appearance of labouring under such an influence."

i. Hearing of 21 January 1983

The applicant submits that the discovery of the shorthand notes was a vital part of his appeal and that Article 6 para. 1 (Art. 6-1) is intended to protect a person throughout legal proceedings.

ii. Hearing of 27 and 28 March 1983

The applicant claims he has exhausted domestic remedies since under the Constitution "the decisions of the Supreme Court in all cases shall be final and conclusive" (Article 34.4.6).

The applicant states he did not object in open court in case he alienated the judges but that he told the Registrar beforehand that if one of the sitting judges was concerned he did wish to object.

The Government suggest that if the applicant had asked, the Court would have reconstituted itself at the time or at a later date. The applicant however would ask, if the Court was aware of the fact, why did they not move of their own motion as in the Duggan case.

Finally, the applicant denies that he acquiesced in the proceedings.

THE LAW

1. The applicant complains that he did not receive a fair hearing before an impartial tribunal in his appeal on 27-28 March 1984 and in several motions which dealt with discovery and payment for a transcript, since one of the judges, Mr. Justice Hederman, sitting in the Supreme Court during those proceedings, held shares in the parent company of the defendant company in the action.

Article 6 para. 1 (Art. 6-1) of the Convention provides that:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...".

The Commission has first considered whether the subject matter of the proceedings in respect of which the applicant invokes Article 6 (Art. 6) concerned the determination of civil rights within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. The Commission recalls that the applicant had instituted these proceedings in order to claim damages for alleged defamation and assault. The Commission is satisfied therefore that having regard to the previous case-law of the Commission and the European Court of Human Rights (see e.g. Eur. Court H.R. König judgment of 28.6.78, Series A no. 28, Application No. 7116/75, Dec. 4.10.76, D.R. 7 p. 91 and Application No. 8366/78, Dec. 8.3.79, D.R. 16 p. 196) the proceedings, including both the appeal and the motions which were ancillary to the appeal, concerned the determination of civil rights and accordingly that Article 6 para. 1 (Art. 6-1) is applicable in the present case.

The applicant complains of a lack of impartiality on the part of the Court which heard several motions and the appeal in his case. It indeed appears from the submissions of the parties that Mr. Justice Hederman held 2,812 shares in Independent Newspapers Ltd, the parent company of Sunday Newspapers Ltd, one of the defendants in the action. The total number of voting shares in the company at the end of February 1984 was 14,935,000. It also appears that Mr. Justice Hederman participated in two motions concerning an order that the

applicant pay £4,000 for a transcript, that he sat on the hearing of the applicant's motion for discovery in the action on 21 January 1983 with two other Supreme Court judges and also in the hearing of the applicant's appeal on 27-28 March 1984, also with two other judges. While the applicant contends that Mr. Justice Hederman also sat on another motion for discovery, on 7 February 1983, the Commission notes that the Court's order issued in respect of the hearing records that the motion was heard before the Chief Justice, Mr. Justice Walsh and Mr. Justice Henchy. In these circumstances, the Commission proposes to deal only with the applicant's complaints concerning his appeal and the motion for discovery of 21 January 1983 and the two motions concerning payment for the transcript.

The Commission recalls however that the Registrar of the Supreme Court was requested by the Chief Justice, before the appeal was to begin on 27 March 1984, to inform both parties that one of the judges to sit on the hearing had a small holding in Independent Newspapers Ltd and to report to the Chief Justice if either side had any objection. The Registrar did so inform the parties and reported that there was no objection on either side. The Commission notes that the applicant claims to have wished to object but did not do so for fear of alienating the judges. The Commission is of the opinion however that the applicant was given the opportunity to object and to have the appeal court reconstituted, but nonetheless did not pursue any objection which he claims to have felt. In the light of these circumstances, the Commission finds that his complaints disclose no appearance of a violation of Article 6 (Art. 6) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains inter alia of assault, defamation, that he was denied access to the original shorthand notes of the first instance proceeding, that the stenographer was a journalist and prejudiced against him and that the trial judge revised the true verdict of the jury and misdirected them as to the assault claim. He invokes Articles 3, 5, 6, 8, 10, 13, 14 and 18 (Art. 3, art. 6, art. 8, art. 10, art. 13, art. 14, art. 18) of the Convention in respect of these complaints.

The Commission has examined these complaints as they have been submitted by the applicant. However, the Commission finds that there is no substance in any of these complaints and that they do not disclose a breach of any of the rights and freedoms guaranteed by the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE DECISION INADMISSIBLE.

Deputy Secretary of the Commission — President of the Commission

(J. RAYMOND) — (C.A. NØRGAARD)