The European Commission of Human Rights sitting in private on 2 December 1986, the following members being present:

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

Mr. H.C. KRÜGER, 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 7 April 1984 by N.D. against Ireland and registered on 28 April 1986 under file No. 12234/86;

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 1939 and resident in Dublin. The facts as submitted by the applicant may be summarised as follows.

The applicant brought an action unsuccessfully against the Governor and company of the Bank of Ireland in the High Court. The applicant, a shareholder in the Bank of Ireland, was seeking inter alia an injunction to prevent the Bank carrying out activities which were unauthorised and orders that the Bank provide him with various documents, including copies of the Articles of Association, the register of members, addresses of persons receiving notices of Annual General Courts and minutes of all General Courts. On 24 November 1982, his appeal against this decision was heard by the Supreme Court, consisting of Mr. Justice Griffin, Mr. Justice Hederman and Mr. Justice O'Higgins. The appeal was dismissed and the applicant was required to pay the defendants' costs.

In January 1984 the applicant discovered that at the time of the appeal Mr. Justice Hederman was a stockholder of the Bank of Ireland. This had not been disclosed to the applicant at or before the hearing in the Supreme Court. It is the applicant's understanding that stockholders of the Bank are in the event of winding-up liable to contribute without limit in proportion to their interest towards payment of the notes issued by the Bank. The issued stock of the Bank at 24 November 1982 amounted to £43.661,420 and the applicant discovered that Mr. Justice Hederman held at least £254.27 of capital stock at that time.

The applicant states that meanwhile following the appeal the Bank of Ireland had effectively conceded to the applicant the majority of the points which had been the subject of his claim.

On 27 January 1984 the applicant commenced an action in the High Court against the judges who had sat on his appeal claiming inter alia compensation and a declaration that Mr. Justice Hederman had been automatically disqualified and ought to have withdrawn from the appeal. The action was heard before Mr. Justice Keane on 30 and 31 October 1985 who dismissed it with costs against the applicant. Mr. Justice Keane in giving judgment related that when the applicant had commenced this action, the Registrar of the Supreme Court had written to the applicant on 17 February 1984 expressing the Chief Justice's concern over the matter and indicating that the case was listed for mention before the Supreme Court on 24 February 1984. He wrote again on 22 February. The applicant did not answer either letter and did not appear. The Registrar had then written again informing the applicant that the case was listed for mention on 2 March 1984 and again received no response. On 2 March 1984, the applicant not appearing, the Supreme Court consisting of the same panel of judges which heard the applicant's appeal set aside their earlier decision and ordered that the appeal be reheard before a differently composed court. This was communicated by letter to the applicant, who states that he never received such a letter. The applicant did however write to the Registrar on 8 March 1984 informing him that proceedings were now being conducted in the High Court and were no longer a matter for the Supreme Court. The appeal was listed for rehearing on 12 March 1984 before Messrs. Justices Walsh, Henchy and O' Hanlon but the applicant failed to appear. The case was adjourned with liberty to re-enter and with question of costs reserved. In light of these events, Mr. Justice Keane concluded:

"In those circumstances for this Court, even if it were empowered to do so, to set aside the Order of the Supreme Court of November 1982 would be an entirely futile and meaningless exercise and that is even assuming that the High Court had any such jurisdiction in relation to an Order of the Supreme Court. The position now is that as a result of the Order of the Supreme Court dated 12 March 1984, a Court composed of members in respect of whom it is not suggested that any of them had any interest in the defendant Bank, the appeal has simply been adjourned so that it is open at any stage to the plaintiff to come back to the Supreme Court - liberty to apply has been expressly reserved - and if the Supreme Court on a full re-hearing of the appeal from the Order of Miss Justice Carroll should take a different view from the Court composed of the defendants to the present proceedings they would of course then be in a position to deal with and would deal with the question of costs and any other matter that might arise as justice required and in those circumstances for the plaintiff to persist in these proceedings is an exercise in utter futility which no Court administering justice which is what I am required to do should under any circumstances condone."

The applicant appealed against this decision to the Supreme Court by notice dated 18 November 1985. On 11 March 1986, his appeal was dismissed by the Supreme Court consisting of Messrs. Justices Henchy, Walsh and Finlay and costs awarded against him. In its judgment, the Supreme Court stated that contrary to the applicant's submission, the Supreme Court had not only the power, but the duty to vacate its own order on discovering there had been the possibility of an apparent conflict of interest on the part of one of the members of the Court. Mr. Justice Finlay giving judgment for the Court said:

"I am satisfied that it complied with the duty as soon as was reasonably practicable, having given to the plaintiff the most ample notice of its intention so to do, and the most ample opportunity, as I have quoted from the correspondence, of making submissions with regard to any consequential matters and in particular with regard to the question of costs, he having paid costs on foot of the Order of 24 November 1982, in the intervening period. Unfortunately, the plaintiff had instituted proceedings in the High Court, and adamantly refused to

pursue any other remedy, though all his grievances, I am satisfied, could have been dealt with and disposed of in this Court. He did so in, what I am satisfied, against a second major issue in the case, was a total misapprehension as to the powers and jurisdiction of the High Court. The High Court is a Court of unlimited originating jurisdiction, but that can not be interpreted under the Constitution as in any way conflicting with the final nature of the decisions of this Court as the ultimate Court of Appeal, and as I have indicated, the very fact that the remedies which the plaintiff was seeking in the High Court included an Order by the High Court reviewing and setting aside an Order of the Supreme Court and even an Order of the High Court directing individual members of the Supreme Court as to how they were to act, indicates the total inappropriateness and lack of jurisdiction in the High Court to deal with the claims of the plaintiff.

Unfortunately, the plaintiff's present position is entirely due to the fact that he maintained those proceedings, having instituted them in an incorrect view of the law and that he refused, for some reason or other that I still do not follow or understand, to apply to this Court, though he got the most ample opportunity to remedy the situation which has arisen. In those circumstances, I am quite satisfied that this appeal must be dismissed and these proceedings are not maintainable."

COMPLAINTS

The applicant complains that the participation of Mr. Justice Hederman as one of the judges in the Supreme Court which dealt with his appeal deprived him of a fair hearing by an independent and impartial tribunal since Mr. Justice Hederman was a stockholder in the Bank of Ireland, one of the parties to the appeal. The applicant contends that Mr. Justice Hederman was automatically disqualified by that interest and should have withdrawn from the case. The applicant also contends that he cannot be expected to incur further expense in returning to the Supreme Court for a re-hearing since the Bank of Ireland has conceded most of the points which he was litigating. He complains that he is still left in a worse position however in that he had to pay the defendants' costs after the appeal was dismissed.

The applicant also contends that he did not receive a fair hearing on 11 March 1986 before the Supreme Court since it consisted of two of the same judges who had on 12 March 1984 sat on the re-opened appeal and adjourned it indefinitely (namely, Messrs. Justices Henchy and Walsh). The applicant claims that he had no opportunity to object to these judges participating. He alleges that the decisions of the Supreme Court on 2 March and 12 March 1984 to set aside his appeal and hold it adjourned unfairly interfered with and frustrated the proceedings in his constitutional action in the High Court. He further complains that he was prevented by the President of the High Court and Mr. Justice Finlay from issuing subpoenas directing the three Supreme Court judges who heard his appeal to appear to give evidence. He also contends that Mr. Justice Finlay should not have participated in the appeal of 11 March 1986 since he had already been involved in the proceedings in this context.

The applicant further complains that there was no effective remedy available to him in respect of his complaint concerning Mr. Justice Hederman notwithstanding his attempts to obtain a remedy by a constitutional action in the High Court (subsequently appealed to the Supreme Court) or in respect of his complaint concerning the appeal of 11 March 1986.

The applicant accordingly invokes Articles 6 para. 1 and 13 (art. 6-1, art. 13) of the Convention.

THE LAW

APPEAL OF 24 NOVEMBER 1982

1. The applicant complains that he did not receive a fair hearing of his appeal on 24 November 1982 since one of the Supreme Court judges sitting at the time held shares in one of the defendants to the action.

Article 6 para. 1 (art. 6-1) provides inter alia:

"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 recalls that the action in question concerned the applicant's claim as a shareholder in the Bank of Ireland that the Bank was engaging in unauthorised activities and failing to provide him with various relevant information to which he claimed to be entitled as a shareholder. The Commission must first decide whether the subject matter of these proceedings can be said to concern the determination of civil rights and obligations and thus whether Article 6 para. 1 (art. 6-1) of the Convention is applicable in the present case.

The European Commission of Human Rights held in the König case (Eur. C.H.R., König judgment of 28.6.78, Series A No. 28):

"Whilst the Court thus concludes that the concept of 'civil rights and obligations' is autonomous, it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance. Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States (see, mutatis mutandis, the above-mentioned Engel and others judgment, p. 35 § 82)."

The Commission notes that the applicant, as shareholder in the Bank of Ireland, is under an obligation, in the event of the Bank being wound up, of contributing proportionally to the debts of the company. The Commission also notes that the applicant as shareholder has corresponding rights as against the Bank of Ireland including the right to bring an action if the Bank acts in an unauthorised fashion. The Commission concludes therefore that the subject matter of the action was sufficiently connected to the applicant's proprietary and contractual rights as shareholder in a company and must therefore be considered as concerning civil rights and obligations within the meaning of Article 6 para. 1 (art. 6-1) of the Convention.

However, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of this provision as, under Article 26 (art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

In the present case the applicant has failed to re-apply to the Supreme Court to have his appeal heard before a Court of different judges. The Commission recalls that the judges who heard the original appeal sat on 2 March 1984, nullified their original order and ordered that the appeal be reheard before a differently composed Court. The applicant failed to appear when the appeal was listed for rehearing and the case was adjourned with liberty for the applicant to re-apply

in the future. The Commission recalls that the applicant complains of having to pay the costs of the original appeal but notes that the Supreme Court would be able to deal with any question of costs if the applicant availed himself of the opportunity to appear before a differently constituted bench.

The Commission concludes therefore that the applicant has not exhausted the remedies available to him under Irish law.

Moreover, an examination of the case, as it has been submitted, does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies and his application must in this respect be rejected under Article 27 para. 3 (art. 27-3) of the Convention.

2. The applicant also complains that he has no remedy in respect of his complaints against the participation in his appeal of the Supreme Court judge who held shares in the Bank of Ireland contrary to Article 13 (art. 13) of the Convention.

Having regard to its decision on Article 6 (art. 6) of the Convention however, it follows that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (art. 27-2) of the Convention.

CONSTITUTIONAL PROCEEDINGS AND APPEAL OF 11 MARCH 1986

3. The applicant also complains of receiving an unfair hearing by the Supreme Court on 11 March 1986 since the Court consisted of two of the judges who had adjourned the original appeal and of Mr. Justice Finlay, who also had already been involved in refusing the applicant's application concerning witnesses. He further complains of being prevented from calling the judges as witnesses and of the actions of the Supreme Court prejudicing his action in the High Court. He invokes Article 6 and Article 13 (art. 6, art. 13) of the Convention in this respect.

The Commission recalls that these proceedings concerned the applicant's claim for compensation in respect of an alleged breach of natural justice contrary to the Irish Constitution.

The Commission has examined the applicant's complaints concerning these proceedings as they have been submitted by him. However, after considering the case as a whole, the Commission finds that, even assuming the constitutional proceedings can be said to involve the determination of civil rights and obligations, the applicant's complaints do not disclose any appearance of a violation of Article 6 para. 1 (art. 6-1) of the Convention or of any of the other rights and freedoms set out in the Convention.

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

The applicant also complains of a violation of Article 13 (art. 13) of the Convention. The Commission considers however that where, as in this case, a violation of the rights conferred by the Convention by the highest court of the domestic legal system is being alleged, the application of Article 13 (art. 13) is subject to an implied limitation (see e.g. Application No. 8603/79, Dec. of 18.12.80, D.R. 22 p. 147). Consequently, the applicant's complaints must be considered manifestly ill-founded within the meaning of Article 27

para. 2 (art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission	President of the Commission
(H.C. KRÜGER)	(C.A. NØRGAARD)