AS TO THE ADMISSIBILITY OF

Application No. 12839/87
by Thomas ECCLES and Others
against Ireland

The European Commission of Human Rights sitting in private on 9 December 1988, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

Mr. H.C. KRÜGER Secretary to the Commission

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

Having regard to the application introduced on 27 March 1986 by Thomas Eccles and Others against Ireland and registered on 1 April 1987 under file No. 12839/87;

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 first applicant, Mr. Thomas Eccles, was born in 1959 and is a glazier by profession. The second applicant, Mr. Patrick McPhillips, was born in 1955 and is a labourer by profession. The third applicant, Mr. Brian McShane, was born in 1964 and is also a labourer by profession. All of the applicants are Irish citizens and are at present detained in Portlaoise prison, Ireland. The applicants are represented before the Commission by Mr. Desmond Lavery of Lavery & McGahon, Solicitors, Dundalk, and Messrs. R. Mackey S.C., P. McEntee S.C. and P. Gageby B.L., of counsel.

The facts are not in dispute between the parties and may be summarised as follows:

In August 1984 the applicants were arrested and subsequently charged before the Special Criminal Court in Ireland for the offence of capital murder and robbery. They were accused inter alia of robbing a post office and killing a member of the police force.

The applicants applied to the High Court on 22 February 1985 for an interim order prohibiting their trial before the Special Criminal Court on the ground that it was not an independent court.

The application was refused by Mr. Justice Barrington in the High Court on 22 February 1985. An appeal to the Supreme Court against this decision was refused on 25 February 1985.

The trial of the applicants commenced on 25 February 1985 and concluded on 28 March 1985. Each applicant was found guilty of capital murder and robbery and sentenced to death on the first charge and twelve years' imprisonment on the second charge.

At the conclusion of the trial the applicants sought a declaration before the High Court that Section 39 of the Offences Against the State Act 1939 was unconstitutional insofar as it permitted the trial of a criminal offence by a court which was not independent. This application was rejected by Mr. Justice Barrington on 12 July 1985. An appeal to the Supreme Court was rejected on 1 November 1985.

Relevant domestic law and practice concerning the Special Criminal Court

The Special Criminal Court was established for the first time in 1939 and remained in existence until 1962. In 1972, due to the troubles in Northern Ireland, the Government invoked its powers to establish a Special Criminal Court under Part V of 1939 Act. Part V of 1939 Act does not come into force unless the Government is satisfied "that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and publishes a Proclamation to this effect".

A panel of judges is appointed by the Government to the Special Criminal Court. The panel consisted of eleven members in 1977 and was reduced to nine members in 1984.

Sub-sections 1-4 of Section 39 of 1939 Act provide as follows:

1. Every Special Criminal Court established under this part of this Act shall consist of such uneven number (not being less than three) of members as the Government shall from time to time determine, and different numbers of members may be so fixed in respect of different Special Criminal Courts.

2. Each member of a Special Criminal Court shall be appointed, and be removed at will by the Government.

3. No persons shall be appointed to be a member of a Special Criminal Court unless he is a Judge of the High Court or the Circuit Court or a Justice of the District Court or a Barrister of not less than 7 years standing or a Solicitor of not less than 7 years standing, or an officer of the Defence Forces not below the rank of Commandant.

4. The Minister for Finance may pay to every member of a Special Criminal Court such (if any) remuneration and allowances as the said Minister may think proper and different rates of remuneration and allowances may be so paid to different members of any such Court, or to the members of different such Courts."

Section 40 of 1939 Act provides that the determination of the Special Criminal Court is to be according to the opinion of the majority and the existence or content of individual opinions, whether assenting or dissenting, is not to be disclosed. Section 41 provides that the Special Criminal Court shall have power to regulate its own sittings and shall have control of its own procedure in all respects and that it shall, with the concurrence of the Minister for Justice,

make rules for this purpose. The Special Criminal Court Rules 1972 (Statutory Instrument No. 147 of 1972) were made in accordance with this Section and came into operation on 12 June 1972. They were replaced by the Special Criminal Court Rules 1975 (Statutory Instrument No. 234 of 1975). Section 53 of 1939 Act provides for the immunity from any action, prosecution or other proceedings, civil or criminal, of members of the Special Criminal Court.

Section 43 of 1939 Act gives the Special Criminal Court jurisdiction to try and to convict or acquit any person lawfully brought before the Court. It also confers ancillary jurisdictions such as the power to sentence convicted persons to suffer the punishment provided by law in respect of the offence in question and the power to admit to bail, and to administer oaths.

Section 44 of 1939 Act provides that convictions or sentences of a Special Criminal Court are subject to appeal to the Court of Criminal Appeal in the same way as convictions or sentences of the Central Criminal Court. Furthermore, in the case of The State (Coveney) v. Members of the Special Criminal Court [1982] ILRM 284, the Special Criminal Court was treated as an inferior court for the purpose of the order of prohibition so as to be subject to the supervisory control of the High Court in the exercise of its jurisdiction, including the power of the High Court to prohibit it from taking any action contrary to the law or inconsistent with its powers.

The rules of evidence which apply in the ordinary courts also apply in the Special Criminal Court, apart from the provisions of the Criminal Law (Jurisdiction) Act 1976, permitting the taking of evidence on commission in Northern Ireland (cf. Section 11 of 1976 Act).

The provisions of 1939 Act dealing with the establishment procedures and powers of the Special Criminal Court were enacted pursuant to the provisions of Article 38.3 of the Constitution which provides:

"1°. Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.

2°. The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law."

Section 6 of Article 38 of the Constitution provides that:

"The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article."

Article 35 contains constitutional guarantees of the independence of the judiciary. In particular sub-sections 2 and 5 provide:

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

5°. The remuneration of a judge shall not be reduced during his continuance in office."

In its decision of 1 November 1985 (Eccles and Others v. Ireland, the Attorney-General and Others [1986] ILRM 343), the Supreme Court found that the above guarantees of judicial independence did not apply to persons sitting as members of the Special Criminal Court but

that this did not resolve the issue as to whether that court lacked judicial independence. The Supreme Court referred to a previous decision of the Court in which it had been held that the presumption of constitutionality carried with it the presumption that "proceedings, procedures, discretions and adjudications" provided for in legislation are to be conducted in accordance with the principles of constitutional justice. Any departure from these principles would be restrained and corrected by the courts. Chief Justice Finlay added:

"This principle applies to the powers granted to the Government and to the Minister, respectively, by these sub-sections. If either of these authorities were to seek to exercise its power in a manner capable of interfering with the judicial independence of the Court, in the trial of persons charged before it, it would be attempting to frustrate the constitutional right of persons accused before that Court to a trial in due course of law. Any such attempt would be prevented and corrected by the courts established under the Constitution. Whilst, therefore, the Special Criminal Court does not attract the express guarantees of judicial independence contained in Article 35 of the Constitution, it does have, derived from the Constitution, a guarantee of independence in the carrying out of its functions.

The Court is, therefore, satisfied that the plaintiffs have not established that S. 39 of the Act of 1939 is invalid, having regard to the provisions of the Constitution and this appeal must, therefore, be dismissed."

The applicants then appealed against their conviction and sentence to the Court of Criminal Appeal which dismissed their appeal on 10 February 1986. The Court of Criminal Appeal also refused on the same date an application for a certificate under Section 29 of the Courts of Justice Act 1924 enabling the applicants to appeal to the Supreme Court. An application was subsequently made to the Attorney General for a certificate of leave to appeal on a point of law of exceptional public importance. This was refused by letter of 19 August 1986.

In the meantime, on 21 February 1986, the President of Ireland remitted the death sentences imposed on each of the applicants and substituted sentences of forty years' imprisonment.

The court which tried the applicants was constituted by Mr. Justice Hamilton, President of the High Court of Ireland, His Honour Judge Desmond, a judge of the Circuit Court of Ireland, and Mr. Cathal O'Flynn, a former President of the District Court. Mr. O'Flynn had retired as President of the District Court in 1979, a post which he had held since 1961. As a member of the Special Criminal Court he continued to be paid the same salary as that which he received as President of the District Court.

COMPLAINTS

The applicants point out that Section 39 of the Offences Against the State Act 1939 provides that the judges of the Special Criminal Court are removable at the will of the Government and that the amount of their salaries is within the discretion of the Minister for Finance.

The applicants complain they were tried by a court that was not independent in fact or in law in breach of Article 6 para. 1 of the Convention. They point out that they were tried by a court composed of judges who had no judicial tenure in the court.

They base their case on sub-sections 2 and 4 of Section 39 contending that the separate or combined effect of these two

sub-sections was to deprive persons sitting as members of the Special Criminal Court of judicial independence and that persons tried before that court were deprived of the right to a trial in due course of law guaranteed by Article 38.1 of the Constitution.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 27 March 1986 and registered on 1 April 1987. On 8 October 1987 the Commission decided that notice should be given to the respondent Government of the application and that the Government should be invited to submit written observations on the admissibility and merits of the application in so far as it raised issues under Article 6 paragraph 1 of the Convention. These observations were submitted on 8 March 1988. The applicants' observations in reply were received on 3 June 1988. The Government submitted comments on these observations in reply on 11 July 1988.

SUBMISSIONS OF THE PARTIES

The respondent Government

The respondent Government note that the independence and impartiality of the individual members of the Special Criminal Court are not at issue in the present application and that there has been no suggestion that the applicants did not receive a fair trial on account of any absence of personal independence in any member of that court. Furthermore, the Government submit that there is no question but that the Special Criminal Court is wholly independent in fact and in law of the Executive in its functioning and of the parties in matters considered by it.

Facts

While the respondent Government recognise that the issue to be determined relates primarily to Section 39 (2) and (4) of the Offences against the State Act 1939, it nevertheless wishes to rebut any assertion that might be made that Mr. O'Flynn was retired at the time of his appointment and that he was therefore not validly appointed to the Special Criminal Court under Section 39 (3) of that Act. The Government point out that Mr. O'Flynn was correctly and validly appointed to the Court during his tenure in office as President of the District Court, and that it is established that Section 39 (3) of 1939 Act does not require that he should have requalified for continuing membership upon his retirment from the District Court (State (McGlinchey) v. Governor of Portlaoise Prison, unreported decision of the High Court, 14 December 1987).

Furthermore, Mr. O'Flynn did not receive any additional remuneration as a member of the Special Criminal Court for as long as he continued to hold the position of President of the District Court. Upon his retirement from this latter position, he continued to be paid the same salary at the then current rate as he had received before his retirement as President of the District Court, until he ceased to be a member of the Special Court on 4 September 1986 at the age of 77.

Domestic law and practice

The Government submit that it is clear from the relevant provisions of the Constitution, from the text of Part V of the Offences against the State Act 1939 and from the Supreme Court decision in the applicants' case of 1 November 1985 (Eccles v. Ireland [1986] ILRM 343), that the independence and impartiality of the Special Criminal Court is wholly guaranteed under Irish law.

In particular, the Court must exercise its functions with

constitutional propriety and with due regard to natural justice (Burke v. Minister for Labour [1979] IR 354). Furthermore, Article 38.6 of the Constitution does not take away the High Court's power to exercise a "superintendence" of the Special Criminal Court in this respect (State (Coveney) v. Members of the Special Criminal Court [1982] ILRM 284, and Attorney General v. Connolly [1947] IR 213). Moreover, the above-cited decision of the Supreme Court establishes that, if the Government or the Minister for Finance were to seek to exercise their powers under Section 39 (2) or (4) of 1939 Act in a manner capable of interfering with the judicial independence of the Special Criminal Court in the trial of persons charged before it, they would be attempting to frustrate the constitutional rights of persons accused before that Court to a trial in due course of law and any such attempt would be restrained and corrected by the superior courts (cf. East Donegal Co-operative Livestock Marts Ltd. v. Attorney General [1970] IR341).

The Government further point out that as the Special Criminal Court iself has not been set up for any determined period and as it may at any time be dissolved by a resolution of Dail Eireann under Section 35 (5) of 1939 Act, the membership of the Special Criminal Court is not and cannot be fixed with regard to security of tenure as is the case with the ordinary courts.

The Government submit further that, their actions in relation to the Special Criminal Court are effectively confined to nominating the panel of members. Since 1972, this panel has been entirely composed of serving or retired members of the judiciary and, since Sepember 1986, wholly of serving members of the ordinary courts. Beyond this, the Government submit that they have no control over how the Court conducts its business.

In this connection, the Government draw particular attention to the following guarantees of the court's independence. Section 40 of 1939 Act obliges the Court to deliver a single judgment, so the Government are not privy to the individual opinions of members of the court in particular cases. Section 41 of that Act provides that the Special Criminal Court shall have power to regulate its own sittings and to have control of its own procedure in all respects. The Court has adopted its own rules of procedure for this purpose (S.I. No. 234 of 1975). Furthermore, appeals may be taken to the ordinary courts of appeal against conviction and sentence in the same way as appeals from ordinary courts (Section 44 of 1939 Act). In addition, with one minor exception, there are no rules of evidence which apply to the Special Criminal Court which do not also apply to the ordinary courts. Finally, Section 53 of 1939 Act provides that members of the Court are immune from civil proceedings and criminal prosecution in respect of acts done by them as members.

As regards the powers of the Minister for Finance under Section 39(4) of 1939 Act, the Government submit that there is a practice of maintaining the previous salary at the then current rate of any members of the Special Criminal Court who are retiring from another judicial office. The facts of the present application disclose that this was the position for the only member of the Court as constituted in the applicants' case who had so retired from other judical office i.e. Mr. O'Flynn, the former President of the District Court. In the Government's submission, the exercise of the Minister's powers under Section 39(4), rather than cutting across the independence of the Special Criminal Court, serves only to promote and to preserve its independence in accordance with the principles inherent in Article 35.5 of the Irish Constitution.

Article 26 of the Convention

The Government submit that, as the personal independence of the individual members of the Special Criminal Court was not

questioned in the course of the domestic proceedings in the Irish courts, any allegations concerning their personal independence must be rejected as inadmissible for failure to exhaust domestic remedies under Article 26 of the Convention.

Article 6(1) of the Convention

The Government note that in their decision as to admissibility in the case of X and Y v. Ireland (No. 8299/78, Dec. 10.10.80, D.R. 22 p. 51, at para. 19), the Commission considered that the Special Criminal Court sitting in the applicants' case was independent and impartial within the meaning of Article 6 para. 1 of the Convention.

The Government further observe that the term "independent" in that Article has been interpreted by the Commission and by the Court as comprising two elements, namely a court's independence from the executive on the one hand and its independence from the parties on the other (cf. Eur. Court H.R., Ringeisen judgment, 16 July 1971, Series A No. 13, para. 95). In the light of all the considerations of domestic law and practice outlined above, the Special Criminal Court is clearly independent of the executive in its functioning and of the parties in matters considered by it. In this connection, particular attention is drawn to the established jurisprudence of the Supreme Court that whilst the Special Criminal Court does not attract the express guarantees of judicial independence contained in Article 35 of the Irish Constitution, it does have, derived from the Constitution, a guarantee of independence in the carrying out of its functions. This guarantee prevails over any inconsistent application of Section 39 (2) or (4) of 1939 Act by the Government or by the Minister for Finance respectively. The Government also stress that as the Special Criminal Court itself has not been set up for any determined period and as it may at any time cease to exist by resolution of Dail Eireann under Section 35 (5) of 1939 Act, the membership of the Special Criminal Court is not and cannot be fixed with regard to security of tenure as is the case with the ordinary courts.

The Government further submit that in the case of Zand v. Austria (Comm. Rep. 12.10.78, D.R. 15 p. 70), the Commission considered that even if the wide discretion given to the Minister could facilitate the intrusion of extraneous considerations, the mere possibility of that was not sufficient to warrant a finding that the Austrian Labour Court's independence was generally affected. It would have to be shown by reference to particular cases that the practice of the authorities is as a whole unsatisfactory, or that at least the establishment of the particular court deciding the case was influenced by improper motives. In the Government's submission, no such evidence of a particular nature has been adduced in the present application. Nor has reference been made to particular facts which would lead to a conclusion that the functioning of the Special Criminal Court was anything other than satisfactory.

The Government conclude that the application should be declared inadmissible as being manifestly ill-founded within the meaning of the Convention.

The applicants

Article 6 para. 1 of the Convention

The applicants complain that the members of the Special Criminal Court at the time of their trial were removable at the will of the Government and that their salaries could be diminished at the will of the Minister for Finance, contrary to Article 6 para. 1 of the Convention.

The applicants indicate that no argument is made that the

members of the Special Criminal Court at the time of their trial were not appointed or did not hold office otherwise than in accordance with the domestic law.

Nor is it alleged that any attempt was made either by the Government or by the Minister for Finance to interfere with the judicial independence of the Court in the trial of the applicants before it. Consequently, it is submitted that the reliance by the Government on the judgment of the Supreme Court in the case taken by them does not address their complaint under Article 6 para. 1 of the Convention, because the guarantees of judicial independence referred to in that judgment are of no effect if in fact the judges are removable and were so removed.

In this connection, the applicants point out that on 4 September 1986, the five members of the Special Criminal Court who were not then also judges of the ordinary courts, including one of the members of the Court constituted in their case, were removed from the Special Criminal Court by the Government. The solicitors for the applicants have subsequently requested information from the Ministers for Justice and Finance as to the reasons for the termination of these appointments. By letter of 24 May 1988, the Department of Justice gave the following reply:

> "The appointments were terminated by decision of the Government in accordance with Section 39 of the Offences against the State Act, 1939".

The applicants submit that the refusal by the Government to advance the reason for the removal of the judges places serious doubt on the Government's reliance on the above judgment of the Supreme Court.

THE LAW

The applicants complain that they were not tried by an independent court as required by Article 6 para. 1 (Art. 6-1) of the Convention. They complain, in particular, that the judges of the Special Criminal Court were not independent since they could be removed at will by the Government in accordance with Section 39 (2) of the Offences Against the State Act 1939 and since their salaries could be reduced by the Minister of Finance under Section 39 (4) of the same Act.

The relevant part of Article 6 para. 1 (Art. 6-1) of the Convention reads as follows:

> "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's task is to consider the issues raised by the concrete case before it. It is not called upon, in the present case, to examine the general compatibility of those provisions of the Offences Against the State Act 1939 which establish the Special Criminal Court with Article 6 para. 1 (Art. 6-1) of the Convention. Its function is limited to an examination of whether the applicants were tried by an independent court within the meaning of this provision (see, in this context, Eur. Court H.R., Young, James and Webster judgment of 13 August 1981, Series A no. 44, p. 22, para. 53).

The Commission has previously found the Special Criminal Court to be an independent and impartial tribunal although the applicants in that case did not question the independence of the Court with reference to the removability of the judges or to their remuneration

and the Commission did not examine these issues (see No. 8299/78, X and Y v. Ireland, Dec. 10.10.80, D.R. 22 pp. 551-75).

In determining whether a court may be considered to be "independent" both of the executive and of the parties to the case, regard must be had to the manner of appointment of its members and the duration of their term of office, to the existence of guarantees against outside pressures and to whether the body presents an appearance of independence (see Eur. Court H.R., Campbell and Fell judgment of 28 June 1984, Series A no. 80, pp. 39-40, para. 78).

The applicants do not question, in any respect, the personal independence of the members of the Special Criminal Court who tried them. They limit their complaint to the situation in law that the members of the Court could be removed at will by the executive and, therefore, do not enjoy judicial tenure and that their salaries could be diminished by the executive.

The Commission observes that members of the Special Criminal Court are appointed by the Government under Section 39 (2) of 1939 Act. Since the Court is not a permanent Court it follows that its members cannot, as such, enjoy the same judicial tenure as judges of the ordinary courts.

Both the Commission and Court have stated that, in general, the irremovability of judges by the executive during their term of office must be considered as a corollary of their independence and thus included in the guarantees of Article 6 para. 1 (Art. 6-1) of the Convention (see e.g. Campbell and Fell judgment, loc. cit., para. 80, and Zand v. Austria, Comm. Report 12.10.78, D.R. 15 p. 82, para. 80). However, in assessing this issue regard must be had not only to the legal provisions concerning the composition of the court but also how these provisions are interpreted and how they actually operate in practice. In so doing the Commission must look at the realities of the situation.

In this connection the Commission notes the decision of the Supreme Court in the applicants' case (Eccles & Others v. Ireland, The Attorney-General and Others [1986] ILRM 343) where the Court held that, notwithstanding Section 39 (2) of 1939 Act, any attempted interference with the judicial independence of the Special Criminal Court would be prevented and corrected by the courts, such interference being regarded as an attempt to "frustrate the constitutional right of persons accused before that Court to a trial in due course of law". The Supreme Court added that in this way the Special Criminal Court derived from the Constitution a guarantee of independence in the carrying out of its functions.

Furthermore, the Commission notes that the Special Criminal Court is subject to the supervisory jurisdiction of the High Court which can review any action taken by the Court alleged to be illegal or ultra vires (The State (Coveney) v. Members of the Special Criminal Court [1982] ILRM 284).

The Commission also attaches significance to the fact that the Special Criminal Court was composed of persons with a judicial background, two of whom were serving members of the judiciary (the President of the High Court and a Circuit Court judge) and the third a former President of the District Court. Moreover, the judgment of the Court can be appealed to the ordinary courts of appeal in the same way as appeals from the ordinary criminal courts (Section 44 (1) and (2) of 1939 Act). In addition, the Special Criminal Court regulates its own procedure and generally applies the same rules of evidence as the ordinary criminal courts (Section 41 of 1979 Act).

Finally, the Commission finds that there is no evidence of executive interference with the Court in the performance of its

functions. Nor is such interference alleged by the applicants either generally or on the facts of the present case. It is true that in September 1986 five members of the Court, one of whom was a judge in the applicants' case (Mr. O'Flynn), were replaced by decision of the Government. The Commission has no reason to suppose that this decision was in any respect improper since it would appear from the Government's submissions that the reason was to ensure that the Court consisted entirely of judges who were also judges of the ordinary courts (see above p. 7). Furthermore Mr. O'Flynn had reached an age in excess of normal retiring age.

The applicants also complain that the remuneration of members of the Special Criminal Court is entirely at the discretion of the executive. However, there is no evidence of any attempt to undermine the independence of the Court by an abusive exercise of the power contained in Section 39 (4) of 1939 Act in a manner calculated to influence the Court in the performance of its functions. Moreover, any attempted influence in a particular case, in this way, would also be restrained by the courts as an unconstitutional encroachment on judicial independence (Eccles & Others v. Ireland, the Attorney-General & Others, loc. cit.).

Against the above legal and constitutional background, the Commission concludes that the Special Criminal Court that tried and convicted the applicants is an "independent" court within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that the present 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 APPLICATION INADMISSIBLE

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NØRGAARD)