CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 34720/97
by Anthony HEANEY and William McGUINNESS
against Ireland

The European Court of Human Rights (Fourth Section) sitting on 21 September 1999 as a Chamber composed of

Mr M. Pellonpää, *President*,
Mr G. Ress,
Mr A. Pastor Ridruejo,
Mr I. Cabral Barreto,
Mr V. Butkevych,
Mrs N. Vajić,
Mrs S. Botoucharova, *Judges*,

with Mr V. Berger, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 17 January 1997 by Anthony HEANEY And William McGUINNESS against Ireland and registered on 4 February 1997 under file no. 34720/97;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 1 December 1998 and the observations in reply submitted by the applicants on 30 March 1999;

Having deliberated;

Decides as follows:

THE FACTS

Both applicants are Irish citizens. The first applicant was born in 1955 and is currently in Portlaoise prison, Co. Laois. The second applicant was born in 1956, resides in Co. Derry and is currently unemployed. Both applicants are represented by Garrett Sheehan and Company, a firm of solicitors practising in Dublin.

A. Particular circumstances of the case

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

On 24 October 1990 an explosion occurred at a British Army checkpoint in Derry in which five British soldiers and one civilian were killed. The Irish police suspected that the attack had been organised by the Irish Republican Army (an illegal paramilitary organisation known as the IRA). On 24 October 1990 the applicants were arrested and detained by the police pursuant to section 30 of the Offences Against the State Act 1939 ("the 1939 Act") on suspicion of membership of the IRA and of having been involved in the explosion. Both applicants were cautioned by police officers that they were not required to say anything unless they wished to do so and they were also informed that anything they did say would be taken down in writing and could be given in evidence against them. Subsequently, both applicants were requested by the same police officers, pursuant to section 52 of the 1939 Act, to give a full account of their movements and actions between 6.00pm on 23 October and 6.55am on 24 October 1990 (as regards the first applicant) and between 1.00am and 7.15am on 24 October 1990 (the second applicant). Both applicants declined to provide the account requested and to answer any questions put to them.

On 25 October 1990 the applicants were charged with the offence of membership of an illegal organisation contrary to section 21 of the 1939 Act and of failing to account for their movements contrary to section 52 of the 1939 Act. On 19 April 1991 both were acquitted by the Special Criminal Court of the charge of membership of an illegal organisation. On 28 June 1991 the applicants were convicted by that court, under section 52 of the 1939 Act, for failing to provide the account requested. The court rejected their arguments that section 52 must be read as including a right to refuse to provide such information on reasonable grounds and about the confusion caused by the same officers both giving a caution and then making a request for information under section 52 of the 1939 Act. Both applicants were sentenced to a six month term of imprisonment as foreseen by section 52. Their sentences commenced on 28 June 1991 and they were released on 11 November 1991.

Subsequently, the applicants appealed against their conviction and sentence under section 52 to the Court of Criminal Appeal. As regards their conviction, the applicants submitted that the Court had erred in finding that the applicants were not confused as a result of the caution and the conflicting request for information under section 52 by the same officers and they argued that section 52 should have been read as including the possibility of a refusal to give information based on a reasonable excuse. As to their sentence, they argued that the confusion caused by the conflicting caution and request for information under section 52 should have been a mitigating factor; that there was no evidence that they warranted the maximum sentence; and that the court failed to take into account the time the applicants had spent in custody prior to their trial.

On 3 May 1992 the applicants took proceedings in the High Court to have the constitutionality of section 52 of the 1939 Act determined. The proceedings before the Court of Criminal Appeal were consequently adjourned.

By judgment dated 24 June 1994, the High Court rejected the application. The High Court based a suspect's right not to answer questions as regards his movements on Article 38 of the Constitution rather than on Article 40 noting that the case dealt with suspects in custody and not with accused persons on trial. However, it was considered that section 52 constituted a proportionate interference with the applicants' right to silence. The objective was to assist police investigations into serious crimes of a subversive nature involving the security of the State (although it was recognised that persons can be arrested under section 30 of the 1939 Act for non-subversive non-politically motivated offences once they are scheduled offences). In addition, the restrictions were not arbitrary or irrational.

The High Court also considered that the restriction did not excessively impair the right to silence given the objective pursued by section 52 and the other legal protections applicable to persons in custody under section 30 of the 1939 Act including the requirement that a police officer must have a *bona fide* suspicion prior to arrest; the obligatory informing of the suspect of the offences under the 1939 Act and of the scheduled offences of which he is suspected; the right to legal assistance when reasonably requested; the right to medical assistance; the right of access to court; the right to remain silent and to be told of that latter right; the obligations to provide appropriate cautions to detainees and to abstain from cross-examining and from unfair and oppressive questioning of such detainees; and the conditions attaching to any extension of the length of detention under section 30 of the 1939 Act.

The applicants appealed to the Supreme Court. By judgment dated 23 July 1996 the Supreme Court rejected the appeal finding that section 52 of the 1939 Act was not inconsistent with the Constitution. The Supreme Court considered that the right to silence was a corollary to freedom of expression guaranteed by Article 40 of the Constitution. The Supreme Court also considered that the relevant assessment was the proportionality of the restriction on the right to silence in view of the public order exception in Article 40 of the Constitution. It noted that the 1939 Act was aimed at actions and conduct calculated to undermine public order and the authority of the State and that the proclamation made pursuant to section 35 of the 1939 Act remained in force.

As to whether section 52 restricted the right to silence more than was necessary in light of the disorder against which the State was attempting to protect the public, the court noted that an innocent person has nothing to fear from giving an account of his or her movements even though such a person may wish, nevertheless, to take a stand on grounds of principle and to assert his constitutional rights. However, it considered that the entitlement of citizens to take such a stand must yield to the right of the State to protect itself. The entitlement of those, with something relevant to disclose concerning the commission of a crime, to remain silent must be regarded as of an even lesser order. The court concluded that the restriction in section 52 was proportionate to the State's entitlement to protect itself.

The applicants did not subsequently pursue their appeal to the Court of Criminal Appeal in relation to their conviction under section 52 of the 1939 Act.

B. Relevant domestic law and practice

1. Pertinent Constitutional provisions

Article 38(1) of the Irish Constitution provides that no person shall be tried on any criminal charge save in due course of law. By Article 40, the State guarantees liberty for the exercise, subject to public order and morality, of the right of citizens to express freely their convictions and opinions.

2. The Offences Against the State Act 1939

The Offences Against the State Act 1939 ("the 1939 Act") is described in its long (explanatory) title as an Act to make provision for actions and conduct calculated to undermine public order and the authority of the State and, for that purpose, to provide for the punishment of persons guilty of offences against the State, and to establish Special Criminal Courts.

Part III of the 1939 Act deals with unlawful organisations and makes it an offence to be a member of an unlawful organisation as defined in the Act. Section 30 deals with the arrest and detention of suspected persons and provides that a member of the police can arrest and detain a person whom he suspects of having committed an offence under the 1939 Act or an offence scheduled under Part V of the 1939 Act. This power of arrest is a permanent power (that is, it is not dependent on a section 35 proclamation - see below). A person detained under section 30 may be asked to state his name and address and a person who refuses to do so is guilty of an offence and liable to six months' imprisonment.

Section 35 of the 1939 Act provides that Part V (which contains section 52) is to come into force by means of a proclamation by the Government made when 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 when the Government therefore makes and publishes a proclamation to that effect. The proclamation was made in 1972 and is still in force. Accordingly, section 52 of the 1939 Act has been in force since 1972 to date. By section 36 of the 1939 Act the Government may declare that a particular class or kind of offence is a scheduled offence for the purpose of the 1939 Act and such offences are to be tried by the Special Criminal Courts established under section 38 of the 1939 Act.

Section 52 of the 1939 Act reads as follows:

> "1. Whenever a person is detained in custody under the provisions in that behalf contained in Part IV of this Act, any member of the <police> may demand of such person, at any time while he is so detained, a full account of such person's movements and actions during any specified period and all information in his possession in relation to the commission or intended commission by another person of any offence under any section or sub-section of this Act or any scheduled offence.
>
> 2. If any person, of whom any such account or information as is mentioned in the foregoing sub-section of this section is demanded under that sub-section by a member of the <police>, fails or refuses to give to such member such account or any such information or gives to such member any account or information which is false or misleading, he shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months."

3. The Courts of Justice Act 1924

Section 29 of the 1924 Act reads as follows:

> "The determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that court to the Supreme Court, unless that court or the Attorney general shall certify that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court, in which case an appeal may be brought to the Supreme Court, the decision of which shall be final and conclusive."

4. Relevant jurisprudence

Although in the case of The People v. McGowan (1979 IR 45) it was indicated that statements made pursuant to section 52 of the 1939 Act were admissible in evidence, the Supreme Court in the case of National Irish Bank Ltd (In the matter of National Irish Bank Ltd and the Companies Act 1990, judgment of 21 January 1999) found that compelling a person to confess and then convicting him on the basis of the compelled confession would be contrary to Article 38 of the Constitution. Accordingly, in that case the Supreme Court found that a confession of a bank official obtained by Inspectors as a result of the exercise by them of their powers under Section 10 of the Companies Act 1990 would not, in general, be admissible at a subsequent criminal trial of such official unless, in any particular case, the trial judge was satisfied that the confession was voluntary.

COMPLAINTS

The applicants complain that section 52 of the Offences Against the State Act 1939 constituted a violation of their rights guaranteed by Article 6 §§ 1 and 2 and by Article 8 and Article 10 of the Convention.

PROCEDURE

The application was introduced before the European Commission of Human Rights on 17 January 1997 and registered on 4 February 1997.

On 1 July 1998 the Commission decided to communicate the applicants' complaints under Articles 6 and 10 of the Convention.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

The Government's written observations were submitted on 1 December 1998 after two extensions of the time-limit fixed for that purpose. The applicants replied on 30 March 1999 also after two extensions of the time-limit.

THE LAW

The applicants complain that section 52 of the Offences Against the State Act 1939 violates the right not to incriminate oneself guaranteed by Article 6 § 1 of the Convention and inverts the presumption of innocence guaranteed by Article 6 § 2. They also submit that section 52 constitutes an unjustified interference with their right to respect for their private lives in violation of Article 8 of the Convention and with their right not to speak or furnish information guaranteed by Article 10 of the Convention.

1. Article 35 of the Convention

The Government contend, in the first place, that the applicants have not satisfied the requirements of Article 35 § 1 of the Convention. They submit that the applicants did not apply for bail pending their appeal against conviction under section 52 to the Court of Criminal Appeal and that they also failed to pursue that appeal. Moreover, the failure to pursue that appeal meant that the applicants did not leave open the "possibility" that the Court of Criminal Appeal or alternatively, on petition, the Attorney General "might" have referred a question from the appeal to the Supreme Court for determination as a point of law of exceptional public importance pursuant to section 29 of the Courts of Justice Act 1924.

The applicants point out that the Court of Criminal Appeal enjoys no jurisdiction to embark upon a consideration of the constitutionality of a statute and, accordingly, the applicants submit that the constitutional action was the most appropriate remedy for their complaints.

The Court recalls that an applicant is required to make normal use of domestic remedies which are effective, sufficient and accessible (No. 24196/94, O'Reilly v. Ireland, Dec. 22.1.96, D.R. 84-B, at p. 81). As to whether this means that the present applicants should have pursued their appeal against conviction under section 52 to the Court of Criminal Appeal together with a concurrent bail application, the Court recalls that, in the event of there being a number of remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance (Airey v. Ireland judgment of 9 October 1979, Series A No. 32, p. 12, § 23). Moreover, a declaratory action before the High Court, with the possibility of an appeal to the Supreme Court constitutes the most appropriate method under Irish law of seeking to assert and vindicate constitutional rights. In a legal system which provides constitutional protection for fundamental rights, it is incumbent on the aggrieved individual to test the extent of that protection and, in a common law system, to allow the domestic courts to develop those rights by way of interpretation (No. 24196/94, O'Reilly v. Ireland, *loc. cit*., at p. 82).

The Court observes that the applicants essentially complain that their conviction for refusing to provide information pursuant to section 52 of the 1939 Act breaches their right to silence as guaranteed by the Convention. It therefore considers that it was acceptable for the applicants to choose, in May 1992, to challenge the constitutionality of section 52 of the 1939 Act in the High and Supreme Courts and to adjourn the appeal before the Court of Criminal Appeal in the meantime.

As to whether an appeal against conviction should have been pursued after the rejection of the constitutional action by the Supreme Court, the Court notes that the Court of Criminal Appeal had the power, in principle, to quash their conviction. However, the

essential facts constituting an offence under Article 52 of the 1939 Act, the request for and the refusal to provide information, were not in dispute in the domestic proceedings and it is recalled that an applicant, who has made use of a remedy which is apparently effective and sufficient, cannot be required to try others which are available but probably ineffective (No. 14838/89, Dec. 5.3.91, D.R. 69, p. 286). In addition, by the time the Supreme Court had rejected the applicants' constitutional action, more than five years had elapsed since their conviction under section 52 of the 1939 Act in June 1991 (no. 24196/94, O'Reilly v. Ireland, *loc. cit*., at p. 82).

Moreover, the Court does not consider that the applicants were obliged to pursue their appeal to the Court of Criminal Appeal in order to benefit from the "possibility" of a reference of a question of exceptional public importance by the Court of Criminal Appeal or by the Attorney General to the Supreme Court. The Court notes the terms of section 29 of the Courts of Justice Act 1929 and recalls that an extraordinary remedy, the use of which depends on the discretionary power of a public authority, cannot be considered to be an effective remedy within the meaning of Article 35 § 1 of the Convention (No. 8395/78, Dec. 16.12.81, D.R. 27, p. 50).

The Government further point out that the applicants did not, and do not before this Court, complain about the fairness of the proceedings by which they were convicted under section 52 of the 1939 Act. The applicants do not dispute this but contend that there is an issue under Article 6 because they are challenging their conviction and sentencing following their refusal to answer the questions of the police. The Court also notes that the applicants were acquitted in the proceedings on the charges of membership of the IRA. Insofar as an issue as to whether the applicants can claim to be victims of a violation of Article 6 arises, the Court considers that it is appropriate to join any such issue to the merits of the application.

Accordingly, the Court finds that the application cannot be declared inadmissible on grounds of non-exhaustion of domestic remedies or incompatible *ratione personae* with the provisions of the Convention.

2. Article 6 of the Convention

The applicants submit that section 52 of the 1939 Act violates the right against self-incrimination guaranteed by Article 6 § 1 and inverts the presumption of innocence guaranteed by Article 6 § 2 of the Convention. Article 6, insofar as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... .
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Government underline that section 52 of the 1939 Act is in force only as long as a proclamation under section 35 of the 1939 Act is in force. As such, section 52 is a part of Irish law only as long as it is considered warranted by a subsisting terrorist and security threat. The Government summarise the length and level of violence to date consequent on the Northern Ireland question and consider that the maintenance of the section 35 proclamation is necessary. This necessity is constantly reviewed, most recently in March 1998 when it was

decided to maintain the proclamation in force. In the Agreement following the Multi-Party Negotiations in Northern Ireland of 10 April 1998, the Government outlined its commitment to initiate a "wide ranging review" of, *inter alia*, the 1939 Act and the Government indicate that arrangements to establish the necessary mechanisms are well advanced.

The Government submit that section 52 of the 1939 Act does not specifically provide for the use in subsequent criminal proceedings against an individual of information obtained from that person. Indeed, they point out that, while the High Court in the applicants' case left the question open, the Supreme Court has subsequently clarified that compelling a person to confess and then convicting him on the basis of the compelled confession would be contrary to Article 38 of the Constitution (In the matter of National Irish Bank Ltd and the Companies Act 1990, judgment of 21 January 1999).

Section 52, according to the Government, merely empowers a police officer to make a demand of a person in custody pursuant to section 30 coupled with a warning that failure to reply is an offence. The State is frequently required in civil matters (such as, for example, tax matters) to seek information of its citizens in default of which the relevant person will be guilty of an offence and it is all the more necessary in criminal matters where the information sought can be shown to be necessary for the investigation of and the fight against serious and subversive crime. Moreover, in certain circumstances it is not objectionable for the State to exact a price from a suspect in custody for his refusal to provide information, on the basis of his right against self-incrimination, which information it is believed the individual possesses and would assist an investigation. As such section 52 is justified in the interests of the effective administration of justice and the preservation of public peace and order.

The Government add that section 52 of the 1939 Act can only be used in limited circumstances namely, while a section 35 declaration is in force and where the individual has been arrested pursuant to section 30 of the 1939 Act. Even if the response to a section 52 demand is the confession of a crime, the person confessing is immune from punishment for that crime unless and until he is tried in due course of law. If, as in the present case, the individual refuses to provide the information requested, no sanction will follow unless and until conviction under section 52 by a competent court. Moreover, the domestic courts are vigilant in ensuring that the arrest powers under section 30 are not abused or used for improper purposes (The People (D.P.P.) v. Quilligan and O'Reilly 1986 IR 495 and The State (Trimbole) v. the Governor of Mountjoy Prison 1985 IR 550). Furthermore, the Government do not accept that the section 52 request was made to secure the applicants' incriminating admissions since they were not at the relevant time yet charged and section 52 does not provide for the use of replies in evidence against the individual who supplied the information. In any event, had any information been obtained pursuant to section 52, the applicants could have later challenged the admissibility of any such evidence.

The Government distinguish the Saunders v. the United Kingdom case (judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, no. 24) on the basis that the Court condemned the use at trial of evidence obtained from the accused under compulsion but not the means by which that evidence was initially obtained. They distinguish the Funke v. France case (judgment of 25 February 1993, Series A no. 256-A), pointing out that Mr Funke was subjected to a continuing sanction as long as he refused to provide the requested information. The John Murray v. the United Kingdom judgment is also distinguished (judgment of 8 February 1996, *Reports* 1996-I no. 1), the Government emphasising that Mr Murray's case related to the drawing of negative inferences during his trial from his silence

during questioning whereas the present applicants were acquitted and their silence did not found a basis for their conviction. The Government consider the Serves v. France case (judgment of 20 October 1997, *Reports* 1997-VI, no. 53) to be similar to the present but, nevertheless, also distinguishable in that Mr Serves' objection was premature because he refused to take the oath rather than being forced to answer questions. The present applicants refused to provide the information and section 52 constitutes a sanction against a refusal to provide information and not against invoking the right not to incriminate oneself.

The Government also consider it pertinent to recall the substantial safeguards which exist in order to minimise the risk that an individual may wrongfully confess to a crime, many of which safeguards were referred to by the High Court in the present applicants' case.

The applicants submit that a central part of the guarantees afforded by Article 6 is the right of a person not to be compelled to give evidence (John Murray v. the United Kingdom judgment, loc. cit., at § 45). They consider that their punishment for not providing the information puts them in an even worse position than Mr Funke (Funke v. France judgment, *loc.cit*.) The demands were made of them in police custody, the request was for oral admissions and not for independent real evidence as in Mr Funke's case and they served substantial prison terms for refusing to provide the information requested of them. They were in a worse situation than Mr Murray (cited-above) since he was only sanctioned by the drawing of adverse inferences at his trial. Moreover, the effect of section 52 is to undermine the adversarial quality of the criminal process mandated by Article 6 and, since it goes against the presumption that the State bears the burden of establishing guilt, it inverts the presumption of innocence.

The applicants also underline the precise nature of their complaints before the Court. Information was demanded of them while in police custody. On the one hand, they were warned that a failure to answer could entail itself a criminal conviction and, on the other, as the law then stood in Ireland, the provision of a response could be used in evidence against them, the National Irish Bank Ltd case (cited above) not having clarified the matter until January 1999. While they do not deny that the State is entitled to have certain information gathering powers, the State is not entitled to force a person to provide it and to use that information thereafter to convict that person. The applicants emphasise that they relied on their right not to incriminate themselves noting, as was accepted by the High Court in their case, that the fairness of a trial can be compromised because of what has happened prior to it. The fact that the section 52 request was made prior to their being charged is irrelevant given the possibility of conviction if they refused to answer questions.

The applicants consider the Government's reliance on matters of public policy and proportionality to be misplaced noting that the Court in the above-mentioned Saunders case pointed out (at § 74) that the public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during later trial proceedings. In any event, the public policy and security concerns could be addressed otherwise. Accordingly, if the purpose of the section 52 request for information is to prosecute the person to whom the section 52 request is made, then certain negative inferences could be drawn from that accused's silence as in the above-cited John Murray case. If the objective of the section 52 request is to investigate a crime committed by others, then the section 52 request can be coupled with a clear immunity from prosecution in favour of the addressee of the request in respect of and based upon answers so provided.

In view of the arguments of the parties, the Court considers that the application raises serious and complex issues under Article 6 §§ 1 and 2 of the Convention which require determination on the merits. It follows that these complaints cannot be dismissed as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring them inadmissible has been established.

3. Articles 8 and 10 of the Convention

The applicants further complain that section 52 constitutes an unjustified interference with their right to respect for their private lives in violation of Article 8 of the Convention and with their right not to speak or furnish information guaranteed by Article 10 of the Convention. Article 8, insofar as relevant, provides as follows:

> "1. Everyone has the right to respect for his private ... life, ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety ..., for the prevention of disorder or crime, ... or for the protection of the rights and freedoms of others."

Article 10, insofar as relevant, provides as follows:

> "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 ....
>
> 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 the reputation or rights of others, ... or for maintaining the authority and impartiality of the judiciary."

The Government submit that there has been no violation of either Article pointing out that any interference with the applicants' rights under those Articles was in accordance with the law and proportionate to legitimate aims pursued, taking account of the margin of appreciation afforded to the State in such cases. The section 52 request made of the applicants could have served either in the investigation of crimes of which the applicants were suspected or of crimes committed by others. Moreover, the background to the present case was the commission of an atrocity by subversives and, given the secrecy surrounding the activities of subversives, the Government consider it difficult to see how the relevant information could have been otherwise obtained.

The applicants refer to the correlative right not to speak or furnish information guaranteed by Article 10 and to their entitlement to maintain the privacy of their own personal lives and maintain that their conviction and sentencing under section 52 of the 1939 Act constituted a disproportionate interference with their rights protected by Article 8 and Article 10 of the Convention.

The Court considers that the application raises issues under Articles 8 and 10 of the Convention which require determination on the merits. It follows that these complaints cannot be dismissed as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring them inadmissible has been established.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Vincent Berger
Registrar

Matti Pellonpää
President