AS TO THE ADMISSIBILITY OF

Application No. 29099/95
by Mícheál Ó'FAOLAIN
against Ireland

The European Commission of Human Rights (First Chamber) sitting in private on 17 January 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

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

Having regard to the application introduced on 12 July 1995 by Mícheál Ó'FAOLAIN against Ireland and registered on 8 November 1995 under file No. 29099/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The facts as submitted by the applicant may be summarised as follows. The applicant is an Irish citizen, was born in 1950 and is resident in Co. Westmeath, Ireland.

Particular circumstances of the case

On 30 November 1994 a member ("a T.D.") of the Dáil (the lower house of the legislature) accused a former Minister for Education of colluding in irregularities in the running of Westmeath Vocational Educational Committee ("VEC") and of later covering up relevant evidence. The T.D. continued and his comments were reported in the press as follows:

> "... <the T.D.> said he knew of a close political ally of <the former Minister for Education> who was appointed to a position funded by the EU Petra Programme. Questions had been raised about the effectiveness of the programme, ... It was a "gross waste" which could not be countenanced. ... When it came up for discussion at a meeting of Westmeath VEC however, one Fianna Fáil <the former Minister's political party> member asked why there were so many questions - the money, this member said, had all

come from Europe. The funding for the project ended in 1993, but the petty cash account of the VEC dealing with it was in deficit for £900,000.00. It was beyond credibility that there should be such a huge deficit and that a petty cash account should be used to pay salaries."

It was also reported that the acting Minister for Education responded to the T.D. by stating that the individuals involved would be first given an opportunity to see a forthcoming report on the matter after which he was anxious to have the issues debated in the Dáil.

On 1 December 1994 an Inspector in the Department of Education mentioned to the applicant in a jocular fashion that he had been referred to in the Dáil the previous day. On 10 December 1994, having seen the relevant newspaper report and since the applicant felt that he had been defamed because of his involvement in the programme referred to in the T.D.'s statement, the applicant wrote to the Chairman of the Dáil Committee on Procedure and Privileges ("the Committee") complaining about the T.D.'s statement. In December 1994 the Chairman responded to the applicant in writing referring to the privilege attaching, inter alia, to utterances in the Dáil and that the T.D. was thus not in breach of Dáil privilege when he made the remarks.

On 27 January 1995 the Clerk of the Committee wrote to the applicant referring to his letter of 10 December 1994 confirming that his grievances had been put before the Committee on 26 January 1995, that a decision had been made to set up a sub-committee to examine the area of members' privilege and that the applicant's complaints would be also considered by that sub-committee. By letter dated 6 April 1995 the Clerk of the Committee informed the applicant that the Committee had now proposed a formal procedure for dealing with alleged abuses of members' privilege which proposal was to be put before the Dáil but that the proposed scheme was only to be implemented in respect of any future complaints.

The applicant and his solicitor also wrote to the T.D. in question asking him to retract or to repeat the relevant statement outside the Dáil. The correspondence was acknowledged by the T.D.

The programme, the subject of the T.D.'s comments, has ended. The applicant is due to return to his former teaching post. He claims that the T.D.'s remarks have been mentioned to him on numerous occasions since then including during an interview for a job.

Relevant domestic law and practice

Article 15.10 of the Constitution states that each house of the Oireachtas (the legislature - of which the Dáil is one house) shall have the power to ensure freedom of debate. Article 15.12 provides that all official reports and publications of the Oireachtas or of either house thereof and utterances made in either house wherever published shall be privileged. Article 15.13 goes on to provide that:

"The members of each house of the Oireachtas ... shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself."

After each general election various T.D.s are appointed to the Committee on Procedure and Privileges which committee considers matters of procedure generally, recommends any necessary changes to the Standing Orders and considers and reports, as and when requested to do so, on the privileges attaching to T.D.s.

COMPLAINTS

The applicant complains that statements were made by a T.D. in

the Dáil which, upon any reasonable construction, referred to him in such a way as to defame him personally and professionally and that, because of the immunity provided by Article 15.13 of the Constitution, he has no recourse to the courts to obtain compensation. He invokes Articles 6, 8, 14, 17 and Article 1 of Protocol 1.

THE LAW

The applicant raises a number of complaints in relation to statements made by a T.D. to which an immunity attaches pursuant to the relevant provisions of Article 15 of the Irish Constitution. The Commission finds that it is not necessary to determine whether the applicant's recourse to the Committee on Procedure and Privileges interrupted the running of the six month period referred to in Article 26 (Art. 26) of the Convention because the application is, in any event, inadmissible for the reasons set out below.

1. The Commission has first considered the applicant's complaint, as regards the immunity attaching to the T.D. in relation to his statement in the Dáil, under Articles 6 and 8 (Art. 6, 8) of the Convention. The relevant parts of these Articles read as follows:

Article 6 (Art. 6-1) "1. In the determination of his civil rights ... , everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ..."

Article 8 (Art. 8-1) "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 ..., the economic well being of the country, ..., or for the protection of the rights and freedoms of others."

The Commission recalls that it previously rejected a complaint under Article 6 para. 1 (Art. 6-1) of the Convention that there had been a failure to determine civil rights by reason of parliamentary immunity (No. 3374/67 Collection of Decisions 29, p. 29). In that case, the Commission considered that Article 6 para. 1 (Art. 6-1) of the Convention was to be interpreted subject to the traditional recognition by Contracting States of that immunity. Subsequently, the Commission's Report in the Golder case (No. 4451/70, Comm. Report 1.6.73, p. 44 para. 93) clarified that parliamentary immunity involves a lack of access to the defendant rather than to court and that the right of access to court, contained in Article 6 para. 1 (Art. 6-1) of the Convention, does not require unlimited jurisdiction.

More recently the Court has had occasion to consider the concept of privilege in its Fayed judgment (Eur. Court H.R., Fayed judgment of 21 September 1994, Series A no. 294-B) and the Commission considers it appropriate to follow the approach of the Court in that case for the purposes of the present application.

Accordingly, the Commission does not consider it necessary to determine, in the circumstances of this case, the precise nature of the immunity accorded by Article 15 of the Irish Constitution - namely, whether it is of a procedural nature removing the jurisdiction of the courts and thus within the scope of Article 6 para. 1 (Art. 6-1) of the Convention or whether it is of a substantive nature limiting the extent of a civil right and thus more properly considered within the scope of Article 8 (Art. 8) of the Convention - because the same central issues of legitimate aim and proportionality are posed by these two complaints (Eur. Court H.R., Fayed judgment, loc. cit., pp. 49-51, paras. 65-68).

The Commission has therefore considered the legitimacy of the

aims pursued by the relevant provisions of Article 15 of the Irish Constitution together with the proportionality between the means employed and those aims in determining the applicant's complaints under Articles 6 para. 1 and 8 (Art. 6-1, 8) of the Convention about an attack on his reputation for which he had no recourse to the courts.

The underlying aim of the immunity accorded to T.D.s is clearly in furtherance of the public interest to allow T.D.s to engage in meaningful debate and represent their constituents on matters of public interest (in the present case use of public funds and public appointments) without having to restrict their observations or edit their opinions because of the danger of being amenable to a court or other such authority.

Turning to whether the immunity was proportional in the circumstances of the present case the Commission recalls, in the first place, that in the above-mentioned Fayed judgment the Court did not find it decisive even if the relevant privilege was to be considered as absolute (Fayed judgment, loc. cit., p. 53, para. 77).

The Commission notes that the impugned statement did not mention the applicant by name and that the thrust of the T.D.'s remarks was aimed at the actions of a former Minister for Education rather than the applicant. The Commission considers it difficult to conceive of a manner in which a T.D. could challenge the making of certain public appointments by Ministers or the use of public funds without at least indirectly referring to the person so appointed, to persons who appear to have been responsible for those funds or to persons involved in the relevant funded project. Having found the aim of free debate in the public interest legitimate, it is not open to the Commission to apply the test of proportionality in such a manner as to render meaningful debate impracticable (Fayed judgment, loc. cit., p. 55, para. 81). In addition, the Commission notes the restrained response of the Minister for Education in reply to the T.D.'s statement.

In such circumstances the Commission considers that a reasonable relationship of proportionality could be said to exist between the immunity accorded to T.D.s in relation to statements made in parliament and the legitimate aim of free debate pursued in the public interest.

Accordingly, the Commission concludes that the applicant's complaints under Articles 6 and 8 (Art. 6, 8) of the Convention are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also invokes Article 1 of Protocol 1 (P1-1) and even assuming that the applicant's complaints fall within the scope of this Article the Commission has found as follows. Insofar as the applicant complains in this context about an attack made on his professional reputation without his having any recourse to the courts because of the immunity attaching to the T.D.'s comments, the Commission considers that this complaint does not give rise to any issue separate to those dealt with under Articles 6 and 8 (Art. 6, 8) of the Convention. Insofar as the applicant's complaint under Article 1 of Protocol 1 (P1-1) relates to the consequent negative impact of the T.D.'s statement on his subsequent career and earnings, the Commission considers any such complaint unsubstantiated. In particular, the Commission notes that the project the applicant had been working on at the time of the relevant debate has ended and considers that the applicant has not demonstrated that the project terminated because of the T.D.'s remarks. In addition, the Commission notes that the applicant is to resume his prior teaching position.

The Commission therefore concludes that the applicant's complaints under Article 1 of Protocol 1 (P1-1) are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also invokes Article 14 (Art. 14) of the Convention in respect of the immunity attaching to T.D.s in relation to their Dáil statements, which Article, insofar as relevant, reads as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... political or other opinion, ... property or other status."

The Commission recalls that this Article protects individuals in analogous situations from a discriminatory difference in the exercise of the rights and freedoms recognised by the Convention and its Protocols. Article 14 (Art. 14) has, therefore no independent existence and the Commission has accordingly considered this complaint of the applicant in conjunction with Articles 6 and 8 (Art. 6, 8) of the Convention, into the scope of which Articles a complaint, relating to an inability to take proceedings in respect of an allegedly defamatory statement, can be said to fall.

However, such a difference in treatment will only be discriminatory within the meaning of Article 14 (Art. 14) of the Convention if the difference in treatment relates to personal status, has "no objective and reasonable justification" namely, if it does not pursue a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, for example, Eur. Court H.R., Darby judgment of 23 October 1990, Series A no. 187, p. 12, para. 31). Furthermore, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law; the scope of this margin will vary according to the circumstances, the subject matter and the background (Eur. Court H.R., Lithgow judgment of 8 July 1986, Series A no. 102, pp. 66-67, para. 177).

The Commission considers that a difference in treatment arises in that those who are the subject of allegedly defamatory comment by a T.D while in the Dáil cannot pursue the T.D through the courts as a consequence of the relevant provisions of Article 15 of the Irish Constitution whereas those challenging statements made outside of that context can take civil proceedings in defamation. However and insofar as this involves a difference in treatment based on personal status, in view of the conclusions of the Commission above in relation to the applicant's complaints under Articles 6 and 8 (Art. 6, 8) and having regard to the margin of appreciation enjoyed by the Contracting States in this area, the Commission considers that this difference in treatment is not discriminatory within the meaning of Article 14 (Art. 14) of the Convention.

Accordingly, the Commission finds this complaint manifestly ill-founded pursuant to Article 27 para. 2 (Art. 27-2) of the Convention.

4. Finally, the applicant invokes Article 17 (Art. 17) of the Convention. However, the Commission does not find that the applicant has demonstrated in any way that the retention of the relevant immunity in the Irish Constitution was aimed at the destruction of any of the Convention rights or limited them to a greater degree than is permissible under the Convention (No.9285/81, Dec. 6.7.82, D.R. 29 p. 212). Accordingly, the Commission finds this aspect of the application manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber President of the First Chamber

(M.F. BUQUICCHIO) (C.L. ROZAKIS)