CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 54725/00
by Desmond O'REILLY and Others
against Ireland

The European Court of Human Rights (Third Section), sitting on 28 February 2002 as a Chamber composed of

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr P. KŪRIS,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mr K. TRAJA, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 1 November 1999 and registered on 8 February 2000,

Having deliberated, decides as follows:

THE FACTS

The applicants, Desmond O'Reilly, James McGurren, Carol Moore, William Moore, Kevin Ludlow, Agnes Ludlow, Patrick Heddy, Patrick Brady, Maura Egan, Maureen Leddy and John Wilson are Irish nationals living in Belturbet, County Cavan, Ireland. They are represented before the Court by Gabriel Toolan, a lawyer practising in County Leitrim, Ireland.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows. The applicants all reside on a public road in Belturbet, County Cavan.

Since in or round 1974 the County Council ("the Council") had not carried out any repairs to the applicants' road (save some minor works in 1994) and that road had deteriorated to such an extent that it was dangerous to vehicles. The road constituted the sole access to the applicants' homes and premises.

On 25 July 1994 the applicants were granted leave to apply for judicial review by way of an order of mandamus in respect of the Council's failure to maintain the road. It was not disputed that the Council had a statutory duty to repair the roads, but the Council argued that, given their relatively small income and the failure of central government to advance the necessary funds, the only way they could answer the statutory duty was to tackle the repair programme over a period of years and to endeavour to apply limited resources they had in a rational and systematic order, having regard to certain criteria.

On 3 April 1995 the application for judicial review was heard by the High Court. On 6 December 1996 the High Court made an order of mandamus against the Council requiring it to repair the road. The High Court concluded its judgment in the following terms:

> "The [Government] having imposed and continued a statutory obligation on a local authority to maintain roads, must, as long as that obligation remains unqualified, make it possible for the local authority to perform its statutory duties. ... The Central Fund must make up the shortfall. This is not a case of telling the Government how it must spend money. It is a case of the [Government] having imposed a statutory duty on local authorities, being required to provide the means of carrying out that duty. Mandamus is the appropriate remedy ... . It is not impossible for the [Council] to carry out its statutory duties vis-à-vis the applicants. The objection raised by the [Council] is that the applicants will get precedence over other similarly disadvantaged residents in County Cavan. That may well be so. But the fact is that they have applied to the Court for relief and they are entitled to it. The floodgates are a problem for another day unless the statutory duties are amended. In my opinion, there are no discretionary grounds which would warrant refusing the relief sought."

In 1997 the Council commenced repair work on the relevant road which was completed by the end of 1998.

In the meantime, on 9 January 1997 the Council appealed to the Supreme Court. The Attorney General was also granted leave to make submissions as *amicus curiae* given the public importance of the issues in the case.

On 18 February 1998 the Supreme Court commenced and adjourned the appeal hearing. The appeal hearing resumed and concluded on 26 February 1999. Although by that time the repair work had been completed, the Supreme Court considered that the appeal should proceed given the public importance of the issues.

On the 17 June 1999 the Supreme Court delivered its judgment and allowed the Council's appeal.

The following facts were not disputed. Of the 1,350 "discrete" roads in Cavan, approximately 600, including those where the applicants lived, were in "very poor or critical condition". The cost of putting all of these roads into a satisfactory condition would be the order of 40 million Irish pounds (IR£) which funding the Council did not have. The County Engineer had recommended an eight-year recovery programme costing almost IR£10 million but noted that, on the basis of the finances available, it would take 22 years before the entire road network in Cavan could be brought into a satisfactory condition. That Engineer went on to outline the criteria by which the Council determined the maintenance priority of the roads: the degree of deterioration of the road, the number of families availing of the road, the needs of industry and employment, the types of traffic using the road, the volume of traffic, whether there exist particular cases of social or medical needs, the potential for tourism development and representations from local elected representatives and from private individuals.

Since neither the bad state of roads in County Cavan including the applicants' road (although they contended that their road was in an exceptional state of neglect) nor the Council's duty to repair them were in dispute, the single issue before the Supreme Court was whether the applicants were entitled to an order of mandamus requiring the Council to comply with that statutory duty.

The Supreme Court noted that an order of mandamus would have the practical effect of selecting, under threat of legal proceedings, certain roads from approximately 600 acknowledged to be in very poor condition. This would not ensure the fulfilment of the Council's statutory duty but rather would mean that the Council's responsibilities were being discharged in an arbitrary fashion by the elevation of the relevant road to an unjustified priority in their road repair programme. The only effect therefore of any order of mandamus would be the repair of that particular road, the rest of the roads in County Cavan remaining in a state of disrepair.

Accordingly, the Supreme Court was not inclined to bring the rigours of a mandamus order to bear on a public authority where it was acknowledged

that it did not have the means of complying with the order (fulfilment of statutory duty) and where successful implementation depended on other bodies not before the Court (the Government).

> "There is no suggestion in this case that the Council can meet the huge financial costs of the road repair programme by diverting resources from other applications which are merely discretionary:...I am satisfied, that while the granting of *mandamus* is a discretionary remedy, the learned High Court judge erred in principle in the manner in which she exercised that discretion, having regard to the futility of granting the order where the Council had not the means to carry out their undoubted statutory duty...
>
> I do not in any way underestimate the hardship which has been caused to some of the applicants in the present case, which extends beyond mere inconvenience, and, in one instance at least, to the sustaining of personal injuries. But if the arguments on behalf of the applicants are well founded it would follow that an order of *mandamus* should similarly be granted in respect of the non-repair of the road, where the inconvenience suffered by the applicants was significantly less and might not even be capable of being classified as a serious hardship."

The Court made no order for costs, setting aside the costs order made in the High Court in favour of the applicants.

B. Relevant domestic law and practice

Section 82 of the Local Government (Ireland) Act 1898 reads as follows:

> "It shall be the duty of every county and district council, according to their respective powers, to keep all public works maintainable at the costs of their county or district in good condition and repair and to take all steps necessary for that purpose."

By virtue of section 109 of the 1898 Act, "public works" includes roads.

COMPLAINTS

The applicants complain under Article 6 § 1 of the Convention about the length of the proceedings, that the Supreme Court decision was wrong, that its effect was to deny access to court and that the costs order was unfair.

They also complain under Article 1 of Protocol No.1 that the Council's failure to carry out the repairs amounted to an unjustified interference with their possessions and under Article 8 of the Convention that that failure constituted a disproportionate interference with their private and family lives.

Finally, they invoke Article 13 of the Convention alleging that they have no effective domestic remedy in respect of any of their complaints.

THE LAW

1. Article 6 § 1 alone and in conjunction with Article 13 of the Convention: length of proceedings

The applicants complain under Article 6 § 1 of the Convention about the length of the proceedings and under Article 13 of the Convention about the lack of any domestic remedy in that respect.

Article 6 § 1, in so far as relevant, reads as follows:

> "In the determination of his civil rights..., everyone is entitled to a ... hearing within a reasonable time ... ."

Article 13 reads, in so far as relevant, as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority ... ."

Leave to issue judicial review proceedings was granted on 25 July 1994 and the final judgment was delivered on 17 June 1999. It is noted that, while the High Court hearing took place in April 1995, judgment was delivered on 6 December 1996. In addition, the appeal was lodged in January 1997, the appeal hearing began in February 1998 and, having been adjourned, resumed and finished in February 1999.

However, the Court considers that it cannot, on the basis of the case file, determine the admissibility of the complaints concerning the length of the proceedings and the availability of an effective remedy under Articles 6 § 1 and 13 and that it is therefore necessary, in accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of this complaint to the respondent Government.

2. Article 6 § 1 of the Convention: remaining complaints

The applicants also complain under Article 6 § 1 about a denial of access to court.

In so far as they complain that they were denied access to court, it is noted that they brought an application for judicial review by way of an order of mandamus in respect of the undisputed failure by the Council to fulfil its statutory responsibility to maintain their road. They were successful before the High Court and the Council repaired the relevant road. The fact that the Supreme Court disagreed with the High Court's exercise of its discretion and decided against the applicants, does not change the fact that they had a full hearing before, and access to, the domestic courts on the question of whether the courts could make an order of mandamus against the Council obliging it to repair their road.

They further complain that, by considering the Council's statutory obligation to maintain roads only in relation to the total road network in

County Cavan and not individual roads, the Supreme Court effectively excluded future actions by individual residents or road users. The Court recalls that it is only competent to consider complaints made by those who can claim to be victims of a violation of the Convention. A complaint by the present applicants that access to court of undisclosed persons would be affected in the future is, without more, incompatible *ratione personae* with the provisions of the Convention.

They also take issue with the costs' order of the Supreme Court submitting, *inter alia*, that the appeal, and consequently their legal costs' burden, continued simply to clarify a matter of public importance when the point was moot for them given that their road had been repaired. The Court notes that the applicants instituted proceedings in which an appeal by the Council could not have been considered unlikely. It also recalls that the rule that costs follow the event in civil litigation is reasonable as, *inter alia*, it acts as a disincentive to unnecessary litigation (application no. 15434/89, decision of 15 February 1990, Decision and Reports (DR) 64, p. 232). In the present case, the impugned costs' order of the Supreme Court was more favourable to the applicants: while the case was decided against them in the end, they were not made responsible for any of the other parties' costs. The Court will examine the applicants' submission that their legal costs increased with the alleged delays experienced before the courts, in the context of their complaints, outlined above, under Article 6 § 1 about the overall length of the proceedings.

The applicants further complain under Article 6 § 1 that the Supreme Court decision was wrong and they take issue with that court's assessment of the submissions and facts before it including those relating to the degree of deterioration of their road and the relevance of the Council's prior offer to repair the road on the basis of applicants' contribution to the costs. However, the Court recalls that, as a general rule, it is for the national courts to assess evidence and submissions before it as well as the relevance of those matters sought to be adduced. The Court's role is to determine whether the proceedings as a whole, including the manner in which the evidence and submissions were heard, were fair as required by Article 6 § 1 of the Convention (see, for example, the Barberà, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, p. 31, § 68). There is no evidence of any procedural unfairness in the proceedings before the Supreme Court: the applicants were legally represented both at first instance and on appeal and had every opportunity to make their submissions and case both orally and in writing.

Accordingly, these complaints are inadmissible as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

3. Article 8 of the Convention and Article 1 of Protocol No. 1

The applicants further complain about the Council's failure to maintain their road under Article 8 of the Convention (referring to their private and family lives) and under Article 1 of Protocol No. 1 (referring to their homes, farms, business premises, their agricultural vehicles and machinery, business transport vehicles and their cars).

They submit, *inter alia*, that resident farmers were hampered in their activities, that certain suppliers would not deliver to businesses on the road, that it took persons four times longer to travel on the road, that school buses and a bus collecting a handicapped resident refused to enter, that the same handicapped resident as well as some school children fell on the road because of the state of the road, that cars, other means of transport and equipment were damaged on the road, that school children had to cease cycling to school, that emergency services refused or were unable to enter the road and that a funeral undertaker refused to enter until the residents made emergency repairs to the road. They contend that the decision of the Supreme Court was contrary to public policy.

Article 8 of the Convention provides, in so far as relevant, as follows:

> "1. Everyone has the right to respect for his private and family life, his home ... .
>
> 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 ..., public safety or the economic well-being of the country, ..., for the protection of health ..., or for the protection of the rights and freedoms of others."

Article 1 of Protocol No. 1 also provides, in so far as relevant, as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. ... "

Even assuming that the applicants' complaints fall to be analysed in terms of a positive duty on the State to take measures to secure the applicants' private and family lives and possessions, (the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 15, § 31; the Gaskin v. the United Kingdom judgment of 7 July 1989, Series A no. 160, § 49; the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 19, § 49; application no. 20357/92, decision of 7 March 1994, Whiteside v. the United Kingdom; application no. 41877/98, decision of 15 September 1998, Province of Bari and Others v. Italy; and application no. 36811/97, decision of 4 May 2000, Bielectric SRL v. Italy), regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and to the margin of appreciation enjoyed by states in determining the steps to be taken to ensure

compliance with the Convention (Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, § 37).

In this respect, the State enjoys a wide margin of discretion (see, *mutatis mutandis*, the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, § 51; the Mellacher and others v. Austria judgment of 19 December 1989, Series A no. 169, § 53; and the Botta v. Italy judgment of 24 February 1998, *Reports* 1998-I, § 33). This margin is even wider when the issues involve an assessment of the priorities as to the allocation of limited State resources (see, *mutatis mutandis*, the Osman v. the United Kingdom judgment of 28 October 1998, *Reports* 1998-VIII, § 116).

In the present case, the Court notes the hardship and inconvenience to which the applicants refer and that the Council had a statutory obligation to maintain public roads within its jurisdiction. However, and on the other hand, it was undisputed that the Council did not have sufficient resources to fulfil this obligation and was, therefore, obliged to chose and prioritise, according to the criteria outlined above, the roads to be repaired given the limited resources available to it. It was in response to that lack of funds that the Supreme Court did not make an order of mandamus because the effective result of such an order would have been to ensure the repair of the roads in County Cavan in an arbitrary fashion by the elevation of certain roads to an unjustified priority in the road repair programme.

Accordingly, and having regard to the margin of appreciation open to the State in this context, the Court does not consider disproportionate the Council's choice to maintain the relevant road network in accordance with those criteria and its limited resources. In such circumstances, it cannot be said that the State has failed to ensure respect for the applicants' private and family lives or their peaceful enjoyment of their possessions. These complaints are therefore is inadmissible as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

4. Article 13 of the Convention in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1

The applicants argue, under Article 13 of the Convention, that they had no domestic remedy in relation to their complaints under Article 8 of the Convention and Article 1 of Protocol No.1. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

However, Article 13 is not applicable since the application does not involve any arguable complaints of breaches of Article 8 or of Article 1 of

Protocol No. 1 (Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131).

The Court therefore also finds these complaints under Article 13 also inadmissible as manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicants' complaints about the length of proceedings and a domestic remedy in that respect;

Declares inadmissible the remainder of the application.

Vincent BERGER
Registrar

Georg RESS
President