AS TO THE ADMISSIBILITY OF

Application No. 24196/94
by Mary O'REILLY
against Ireland

The European Commission of Human Rights sitting in private on 22 January 1996, the following members being present:

MM. S. TRECHSEL, President
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL

Mr. M. de SALVIA, Deputy Secretary to the Commission

Having regard to:

- Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

- the application introduced on 23 March 1994 by Mary O'Reilly against Ireland and registered on 25 May 1994 under file No. 24196/94;

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 2 February 1995 and the observations in reply submitted by the applicant on 3 March 1995;

- the further observations of the Government dated 8 January 1996;

- the parties' oral submissions at the hearing on 22 January 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Irish national and was born in 1956. She married in or around 1978, has four children and currently resides in Limerick. She is represented before the Commission by Lucy Collins, a solicitor practising in Limerick. The application concerns the applicant's detention in a psychiatric institution pursuant to the application of her husband and the facts as submitted by the parties may be summarised as follows.

A. Particular circumstances of the case

In 1987 serious marital differences arose between the applicant and her husband and the applicant was allegedly assaulted by her husband on a number of occasions including on 11 December 1988.

On 12 December 1988 the applicant instructed her solicitors to institute proceedings for a barring order against her husband (to bar the husband from the family home). Later that day, at 20.00 hours approximately, the applicant's husband attended at a doctor's surgery with the applicant's father in order to discuss the applicant's mental condition with the doctor ("Doctor A"). The applicant was not a patient of Doctor A though she had met Doctor A on one occasion approximately five years previously.

In subsequent proceedings before the High Court (see below) there was a conflict of evidence before the judge on what transpired at that meeting but the judge accepted the following evidence of Doctor A. Both the husband and father expressed concern about the behaviour of the applicant towards the children and her husband, both were apprehensive that the applicant might kill herself and both were anxious for the welfare of the applicant and her four children. Doctor A was aware of the on-going marital difficulties and he therefore questioned the applicant's father about the applicant. The applicant's father informed Doctor A that the applicant had come to see him earlier that day, they had a disagreement and the applicant had threatened to kill herself. The applicant's father told Doctor A that his daughter was sick and "gone in the head". Both the applicant's husband and her father wanted Doctor A to act that evening. (The applicant's father claimed, during the High Court hearing, that he argued with the applicant that day because of false information supplied to him by her husband and that he did not make any of the above described statements to Doctor A).

The following evidence of Doctor A, in respect of his subsequent visit to the family home, was also accepted by the High Court judge. Based on what he had heard at the above-described meeting with the husband and the applicant's father, Doctor A went the same evening with the applicant's husband to the family home.

When the applicant opened the door and saw her husband she became extremely hysterical, verbally abusive and violent towards her husband, over a period of a minute or so, driving her husband back from the door of the house. Doctor A, who was standing 12 to 15 yards away from the door, noted the applicant's reactions, felt it confirmed the history already given to him and concluded that the applicant "was in an extremely disturbed mental state, very agitated, acutely anxious and very hysterical". Doctor A took the view that it would not be possible to interview the applicant and therefore he did not speak to, physically examine or make his presence known to the applicant.

Later that evening the applicant's husband signed the "Application Form", in prescribed form, constituting his application to have the applicant committed involuntarily as a temporary patient to a psychiatric hospital. Doctor A then signed the "Certificate", also a prescribed form certifying the husband's application. In signing, Doctor A certified that he had "examined" the applicant and had formed the view that she was suffering from mental illness requiring involuntary committal on a temporary basis.

At 22.30 hours on the same evening two members of the Gardai Siochana (the Irish police force), a nurse and an ambulance driver arrived at the applicant's house. The applicant allowed them into her home, she co-operated with them and did not offer any resistance. She was told that a medical certificate had been signed by a doctor and she was brought to the psychiatric hospital. One of the policemen indicated in evidence, at the High Court hearing, that the applicant was calm and composed when he arrived at the family home.

Later that night at the psychiatric hospital the applicant was examined physically and interviewed by another doctor ("Doctor B") who noted certain bruising on the applicant which the applicant explained was caused by marital violence. Doctor B, before making her diagnosis, spoke on the telephone with Doctor A and the consultant psychiatrist on duty. Doctor B formed the opinion that the applicant might have been suffering from mental illness and required detention to be assessed and therefore asked the applicant whether she would voluntarily admit herself. The applicant would not and thus Doctor B signed a Reception Order. The applicant was accordingly received and detained in the psychiatric hospital as an involuntary temporary patient for a potential period of six months.

On 15 December 1988 the applicant was released as she was found not to be suffering from mental illness. The applicant claims that while in the psychiatric hospital, she had requested and was refused access to a telephone to contact her solicitor and her priest.

The applicant wished to take an action against Doctor A and the Mid-Western Health Board (Doctor B's employer and the proprietor of the institution). However, the applicant first had to apply, to the High Court, for leave to institute proceedings pursuant to section 260 of the 1945 Act under which section the applicant had to demonstrate that she had "substantial grounds" for contending that the proposed defendants had acted in bad faith or without reasonable care.

The main argument of the applicant before the High Court (and later in the Supreme Court), was that Doctor A did not comply with section 184(4). By judgment of Mr. Justice Murphy dated 7 June 1991 the High Court refused the applicant leave to institute proceedings, finding that the examination of the applicant by Doctor B showed the highest degree of care and consideration. In respect of the actions of Doctor A, Mr. Justice Murphy accepted that the applicant's evidence was not fanciful and that liberty to institute proceedings would be given except for the fact that he had heard the issue in full and was in a position to decide where the truth lay after a hearing and cross-examination of over three days. Having preferred the account of Doctor A there was only one issue to consider, that is, whether there had been adequate examination for the purposes of the certificate which that doctor had signed.

Mr. Justice Murphy quoted a previous Supreme Court decision to the effect that "in a situation such as existed on the night in question the law does not require a standard of precision such as might be appropriate to other aspects of medical practice". Mr Justice Murphy concluded his judgment as follows:

> "Having regard to those observations <the previous Supreme Court decision> and having regard to the critical history which had been given to the doctor some short time ago by the Plaintiff's father and husband and observing conduct which would appear to be inappropriate but entirely consistent with the history of which he was informed it seems to me that this was an adequate examination."

Thus Mr Justice Murphy found that the attendance by Doctor A at the family home on 12 December 1988 was sufficient "examination" for the purposes of section 184(4) of the 1945 Act. Accordingly, no "substantial grounds" for a claim existed within the meaning of section 260(1) of the 1945 Act. The defendants' costs were awarded against the applicant with a stay on the execution of that order for costs for twenty-one days and with a proviso that should the applicant appeal to the Supreme Court execution of the order for costs should be stayed pending the determination of that appeal.

The applicant lodged an appeal to the Supreme Court in relation

to Doctor A only. In the course of submissions to the Supreme Court, the applicant's counsel argued that if the court was to hold that sufficient examination had taken place, for the purposes of section 184(4) of the 1945 Act, then that would be a breach of the applicant's constitutional rights.

On 16 November 1993 the Supreme Court, by a majority of 2 to 1, endorsed the High Court judge's approach to the conflicting evidence presented at the High Court hearing, upheld that judge's interpretation of sections 184(4) and 260 of the 1945 Act and therefore rejected the applicant's appeal. Mr. Justice Blayney, in his dissenting opinion, was satisfied that the applicant had established a prima facie case that there were substantial grounds for contending that Doctor A had acted without reasonable care. He concluded his judgment as follows:

> "If the appellant were not given the right to sue, she would be being deprived of a remedy for what is quite clearly a wrong. The manner in which she was deprived of her liberty contravened one of the basic requirements of natural justice, namely, audi alteram partem. The appellant was given no opportunity to defend herself before being removed from her home. If she had been examined by <Doctor A> she could have put her side of the case to him. But she was not. And the learned trial judge accepted that not only was she not examined by <Doctor A> but that she never saw him. To deny her the right to sue in such circumstances would be a total denial of justice."

No order as to the costs of the appeal was made the court taking the view that the applicant had suffered enough as a result of her ordeal.

B. Relevant domestic law and practice.

1. Application for and making of a temporary chargeable patient reception order

Section 184(2) of the Mental Health Act 1945 provides that an application for the making of a temporary chargeable patient order can be made by, inter alia, a spouse. Section 184(4) provides, insofar as relevant, as follows:

> "An application under this section shall be accompanied by a certificate in the prescribed form of the authorised medical officer certifying that he has examined the person to whom the application relates on a specified date .... and is of the opinion .... - [emphasis added]
>
> (a) that such person -
>
> (1) is suffering from mental illness, and
>
> (2) requires, for his recovery, not more than six months suitable treatment, and
>
> (3) is unfit on account of his mental state for treatment as a voluntary patient ...."
>
> (5) After the consideration of an application ... and of the certificate accompanying the application, the person to whom the application is made may, if he so thinks proper, make such an order in the prescribed form."

The relevant prescribed forms (Application Form, Certificate and Reception Order) are provided for by Regulation 27 of the Mental Treatment Regulations 1961.

2. Powers and duties of the police

Section 186(1) of the 1945 Act allows the applicant for a temporary chargeable patient order to authorise others (for example, the police) to convey the person to whom the order relates to the psychiatric institution. The police also have a common law and constitutional duty to assist in the protection of life and property.

3. Restriction on access to court

Section 260(1) of the 1945 Act reads as follows:

> "No civil proceedings shall be instituted in respect of an act purporting to have been done in pursuance of this Act save by leave of the High Court and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the person against whom the proceedings are to be brought acted in bad faith or without reasonable care."

4. Other provisions of the 1945 Act

(a) Removal to a police station of a person believed to be of unsound mind and requiring control is governed by section 165(1) of the 1945 Act, which section reads as follows:

> "Where a member of the <police> is of the opinion that it is necessary that a person believed to be of unsound mind should, for the public safety or the safety of the person himself, be placed forthwith under care and control, he may take the person into custody and remove him to a <police station>. ..."

(b) If a person is received into a psychiatric institution pursuant to sections 163 and 171 of the 1945 Act (as amended) by way of a statutory medical certificate and reception order, pursuant to section 172 of the 1945 Act that person can be detained until his removal or discharge by a proper authority or until death.

5. Constitutional actions

Order 60 Rule 1 of the Rules of the Superior Courts 1986 provides that the Attorney General, if not already a party, must be served by the party having carriage of the proceedings with notice in any action where the constitutional validity of an Act is in question and the Attorney General is thereupon entitled to appear and be a party to the case insofar as it concerns the validity of the legislation. A finding of constitutional invalidity is, in principle, retroactive in its effects and not merely for the case in point (Murphy v. the Attorney General 1982 IR 241).

6. Relevant jurisprudence

(a) In Re. Philip Clarke [1950] IR 235 - A constitutional challenge to section 165 of the 1945 Act was dismissed by the Supreme Court, that court describing the provision as being of "paternal character clearly intended for the care and custody of persons suspected to be suffering from mental infirmity and for the safety and well-being of the public generally".

(b) R.T. v. Director of the Central Mental Hospital, judgment of Costello J, 16 February 1995, [1995] 2 ILRM 354 and Croke v. Smith (no. 2), unreported judgment of Budd J., 27 and 31 July 1995 - In the former case the High Court was of the opinion that section 207 of the 1945 Act infringed the constitutional right to liberty. In the latter case the High Court was of the opinion that sections 163, 171 and 172 of the 1945 Act were unconstitutional. In both cases the Attorney General was joined to the proceedings and both cases are pending before the Supreme Court.

(c) Meskill v. C.I.E. (1973 IR 121) - In that case it was stated that if a person suffered damage by virtue of a breach of his constitutional rights he is entitled to sue for and obtain damages. In Kennedy v. Ireland (1987 IR 587) the State was made vicariously liable in damages for the actions of the former Minister for Justice and of certain police officers in respect of the unlawful interference with the plaintiff's constitutional right to privacy.
(d) Best v. Welcome Foundation Limited, Dr. M. O'K, The Southern Health Board, The Minister for Health and the Attorney General, judgment of 3 June 1992, [1992] ILRM 609 - In an action alleging negligence against the manufacturers of a vaccine, a claim was also made that the State owed a constitutional obligation, once they permitted the giving of the vaccine, to compensate the rare number of cases in which children reacted badly. The Supreme Court found that the Welcome Foundation was negligent and, based on that finding, the State could no longer be regarded as the appropriate defendant.

(e) Hegarty v. O'Loughlin [1990] ILRM 403 - Chief Justice Finlay of the Supreme Court, in a case involving the interpretation of a certain statutory provision, stated as follows:

> "If and when a challenge is made to the constitutional validity of this subsection by a person adversely affected by it, and the matter is fully argued and the facts established in a particular case, it will be necessary for the court to make a decision upon it. Until that time, however, I would reserve my view on the question of its constitutional validity other than to presume it constitutional which I must do."

COMPLAINTS

The applicant complains of violations of Articles 5, 6, 8 and 13 of the Convention.

As to Article 5 para. 1 of the Convention she complains that the procedure prescribed under section 184(4) of the 1945 Act was not complied with. Alternatively, if it was complied with then section 184(4) of the 1945 Act allowed an arbitrary deprivation of the liberty of the applicant without the involvement of an appropriate authority.

As to Article 5 para. 3 of the Convention she complains that she was not brought promptly before a judge or other officer authorised by law to exercise judicial power.

As to Article 5 para. 5 of the Convention she complains that she did not have an enforceable right to compensation because of the operation of sections 184(4) and 260(1) of the 1945 Act.

The applicant also claims that she was denied access to a lawyer while in the psychiatric hospital.

As to Article 6 para. 1 of the Convention she complains that section 260 of the 1945 Act, in obliging her to seek leave to institute proceedings, constituted an unfair procedural bar and denied her a fair and public hearing into her detention.

As to Article 8 para. 1 of the Convention she complains about the intrusion of the policemen into her home in order to take her to the psychiatric hospital.

As to Article 13 of the Convention she complains that she had no effective remedy under domestic law in respect of her committal to the psychiatric hospital.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 23 March 1994 and was

registered on 25 May 1994.

On 17 October 1994 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit written observations on the admissibility and merits.

The Government's observations were submitted on 2 February 1995 after one extension in the time limit fixed for that purpose. The applicant's observations in reply were submitted on 3 March 1995.

On 3 March 1995 the Commission decided to grant legal aid to the applicant.

On 4 September 1995 the Commission decided to invite the parties to an oral hearing. The Government subsequently submitted further observations dated 8 January 1996. An oral hearing took place on 22 January 1996. At the hearing the Government were represented by Ms. Emer Kilcullen, Agent, Department of Foreign Affairs, Mr. Paul Gallagher S.C., Counsel, Mr. Diarmaid McGuinness B.L., Counsel together with Mr. Matthew Feely and Mr. Brian Howard, as advisers. The applicant was represented by Mr. A. Sexton, B.L., Counsel and Ms. L. Collins, Solicitor.

THE LAW

1. Articles 5 paras. 1 and 5 (Art. 5-1, 5-5) of the Convention

Article 5 paras. 1 and 5 (Art. (-1, 5-5) of the Convention, insofar as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> > e. the lawful detention ... of persons of unsound mind ...;
>
> 5. Everyone who has been the victim of ... detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. As to exhaustion of domestic remedies

The Government essentially maintain that a challenge to the constitutionality of section 184(4) of the 1945 Act would have been an effective domestic remedy and that the applicant did not exhaust this remedy.

In the first place, the Government refer to recent jurisprudence where provisions of the 1945 Act have been found to be unconstitutional by the High Court (Croke v. Smith, loc. cit. and R.T. v. the Director of the Central Mental Hospital, loc. cit.).

In addition, the Government submit that the constitutionality of legislative provisions can be subsequently considered by a court even if the courts have previously interpreted those provisions in a particular way and even if the applicant is complaining about the application of legislative provisions in her case rather than the provisions per se (Hegarty v. O'Loughlin & Another, loc. cit.).

As to how and when the applicant could have taken such a constitutional action, the Government point out that the applicant would have had a choice. In the proceedings which she did initiate, she could have claimed in the alternative that section 184 as a whole did not comply with constitutional guarantees. If the entire section was declared invalid then there would have been no detention pursuant to law. Alternatively, she could have commenced proceedings separately after the adverse determination of the High Court or the Supreme Court, claiming that section 184 as applied was unconstitutional and

inadequate. There is no time limit for bringing an action for a declaration of unconstitutionality.

Furthermore, the Government submit that, while damages against the State do not flow directly from a finding as to unconstitutionality, it is well established that the State would have a liability in damages for maintaining unconstitutional legislation pursuant to which other people acted and the claim could be pursued by way of a separate plenary summons for damages against the State. While it has not been definitively determined, a very recent decision of the High Court suggests that a limitation period of six years from the occurrence of damage would apply to an action in damages against the Government so that the applicant would have had until 1994 to bring that damages claim.

Finally, the Government refer, mainly within the context of Article 5 para. 5 (Art. 5-5) of the Convention, to the applicant's failure to take an action against her husband, her father and the police or to pursue the action against the health board to the Supreme Court.

The applicant submits that a constitutional challenge to section 184(4) of the 1945 Act would not have been normal use of domestic remedies and would not have amounted to an effective domestic remedy for a number of reasons.

In the first place, such an action would be unlikely to succeed in light of domestic jurisprudence in relation to provisions similar to section 184(4) of the 1945 Act (In Re Philip Clarke [1950] I.R. 235). Secondly, the applicant's grievance essentially relates to the application of section 184(4) of the 1945 Act in her case and not to the existence of the section per se. Therefore, to have then challenged the unconstitutionality of section 184(4) (at the same time or subsequent to the leave proceedings) would have been inconsistent.

Thirdly and since the Irish courts will not find legislation unconstitutional when it is capable of interpretation in a constitutional manner (there being a presumption as to constitutionality), it was unlikely that a constitutional action about the application of the section in her case would succeed.

Fourthly, an effective remedy would necessarily require a prospect of recovering damages requiring another set of proceedings (in addition to the constitutional proceedings) and the relevant period of limitation applicable to such a damages action would be three years - detention pursuant to unconstitutional legislation being considered as a "tort". There is no specific limitation period set down in Irish law for a constitutional action.

The applicant accepts that, since she did not give notice to the Attorney General of the proceedings, her raising of constitutional issues before the Supreme Court during the appeal in the leave proceedings did not properly constitute a constitutional challenge.

The Commission recalls that according to the constant case-law of the Convention organs the obligation to exhaust domestic remedies requires only that an applicant make normal use of remedies which are effective, sufficient and accessible (see, for example, No. 12742/87, Dec. 3.5.89, D.R., 61 p. 206).

The Commission considers, from the submissions of the parties, that the applicant could have challenged the constitutionality of section 184(4) of the 1945 Act as it was applied to her either as an alternative argument before the High Court, after the High Court decision against the applicant in June 1991 or after the Supreme Court decision in November 1993 (no limitation period applying to such declaratory constitutional actions). As an individual at liberty, in order for the constitutional remedy to be effective the applicant

required damages and thus a separate action commenced by plenary summons, the summons to issue contemporaneously with the constitutional claim or after a successful constitutional challenge. The period of limitation for such an action is in dispute (between three and six years from the applicant's detention).

The Commission finds that the applicant was initially entitled to choose which remedy to exhaust and she chose, quite reasonably in the Commission's view, to initiate leave proceedings to take an action against, inter alia, Doctor A on the basis that her essential grievance was the nature of his examination of her (No. 9118/80, Dec. 9.3.83, D.R.32 p. 159 and Eur. Court H.R., Airey judgment dated 9 October 1979, Series A no. 32, p. 12, para. 23).

However, the applicant also appears to have had the opportunity to institute a constitutional and related damages action against the State in relation to the application of section 184(4) of the 1945 Act in her case after the June 1991 decision of the High Court against her. At that stage the High Court after a detailed hearing with witnesses, had outlined in a lengthy judgment against the applicant the interpretation of section 184(4) of the 1945 Act and she was still within the lesser of the limitation periods as regards damages submitted by the parties.

The Commission has therefore considered whether the applicant's failure to take the actions outlined in the preceding paragraph renders these complaints inadmissible on grounds of non-exhaustion.

In this respect, the Commission recalls that 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 (No. 15141/89, Dec. 15.2.90, D.R. 64 p. 203). It is also recalled that 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. 18670/91, Dec. 1.12.93, unpublished).

However, Article 26 (Art. 26) of the Convention must be applied with some degree of flexibility and without excessive formalism (see, for example, Eur. Court. H.R., Cardot judgment of 19 March 1991, Series A no. 200, p. 18, para. 34) and, in this context, certain special circumstances can, in accordance with the generally recognised rules of international law, absolve an applicant from the obligation to exhaust a domestic remedy (see, for example, No. 14556/89, Dec. 5.3.91, D.R. 69 p. 261).

As to whether the applicant can be so absolved, in the circumstances of this case, from a declaratory action and a corresponding action in damages against the State after the High Court decision in June 1991, the Commission notes the following. In the first place, there is a conflict between the parties as to the limitation period applicable to an action in damages against the State (the Government referring to a 1995 domestic judgment as authority for a six year limitation period). Secondly, the Government did not, at the time of their observations or oral submissions, provide any case-law indicating or establishing the liability of the State to pay damages pursuant to a finding of unconstitutionality of a legislative provision enacted years beforehand. In the only case referred to by the Government in this respect (Best v. Welcome Foundation Limited, Dr. M. O'K, The Southern Health Board, The Minister for Health and the Attorney General, loc. cit.) the vaccine manufacturer, and not the State, was eventually found liable in tort.

Thirdly, the Commission is cognisant of the reasonableness of the applicant's decision to pursue the leave proceedings as regards Doctor

A and of her decision to have, what was for her, an unexpected interpretation of the word "examine" in section 184(4) of the 1945 Act confirmed by the Supreme Court. Fourthly, the Commission also notes the relative novelty in claiming damages from the State in such circumstances (evidenced by the difficulty experienced by the parties in clarifying when and how this could be done). Finally, even assuming that the six year limitation period applied to the damages action, allowing the applicant to commence the constitutional and damages actions after the Supreme Court decision of November 1993, this would involve commencing complex proceedings almost five years after the applicant's detention.

As regards the Government's submissions as to an action against the police, the Commission notes that there is no allegation that the police exceeded their duties in any way. As regards separate actions, also suggested by the Government, against the applicant's husband and father and as regards the applicant's failure to appeal to the Supreme Court the High Court's decision against the health board, the Commission recalls that the substance of the applicant's complaint is the nature of the examination carried out by Doctor A which led to her detention and that she appealed this issue to the Supreme Court. In such circumstances the Commission is of the opinion that the same considerations of reasonableness, noted above, apply to the choice of remedies made by the applicant which did not include these additional actions raised by the Government.

In all of these circumstances, the Commission finds that the applicant is absolved from taking the actions proposed by the Government and that the applicant's complaints under Article 5 paras. 1 and 5 (Art. 5-1, 5-5) of the Convention are not therefore inadmissible on grounds of non-exhaustion of domestic remedies.

B. As to the substance of the applicant's complaints.

(i) Article 5 para. 1 (Art. 5-1) of the Convention

The applicant submits, inter alia, that her detention was unlawful as section 184(4) of the 1945 Act was not complied with (in light of the nature of the examination of Doctor A) and that, in the alternative, her committal constituted an arbitrary deprivation of her liberty without the involvement of an appropriate authority. She does not accept that the situation constituted an emergency referring, inter alia, to the failure by Doctor A even to attempt to address himself to her by which he could have finalised his views as to the emergency nature of the situation and to the failure to use section 165 of the 1945 Act, that being, according to the applicant, the emergency provision in the 1945 Act. The applicant also points out that her potential period of confinement was six months.

The Government submit, inter alia, that the Irish courts confirmed on the basis of the evidence before them that an emergency existed on the evening in question and that the applicant had the additional protection of a full examination by a second doctor (who consulted with Doctor A and a consultant psychiatrist). The Commission is only concerned with the particular circumstances of each case and, in the present case, whatever the potential period of detention, the applicant was released after three days.

(ii) Article 5 para. 5 (Art. 5-5) of the Convention

The applicant complains that the basis of her domestic action was that Doctor A acted without reasonable cause, that sections 184(4) and 260 of the 1945 Act operated to deprive her of her enforceable right to compensation in this regard and that theoretical causes of action against other persons were largely irrelevant to her grievance.

The Government submit that the applicant had an enforceable right

to compensation but did not attempt to take the necessary proceedings to enforce any such right. The Government refer in particular to the applicant's failure to complete the proceedings against Doctor B and the relevant health board in charge of the psychiatric institution together with her failure to take proceedings for compensation against her husband, her father, the police, the State and the Attorney General (the latter as regards the constitutionality of section 184(4)). The Government argue therefore that the applicant simply did not seek to avail herself of the remedies available to her and thus it cannot be said that she was deprived of an enforceable right to compensation.

The Commission finds, in light of the parties' submissions that the complaints of the applicant under Article 5 paras. 1 and 5 (Art. 5-1, 5-5) of the Convention raise serious and complex issues of fact and law which require determination on their merits. It follows that these complaints of the applicant cannot be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring them inadmissible has been established.

2. Articles 8 and 13 (Art. 8, 13) of the Convention

Article 8 (Art. 8) of the Convention, insofar as relevant, read as follows:

> "1. Everyone has the right to respect for his private and family life, his home ..."

Article 13 (Art. 13) of the Convention 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."

The applicant complains about the intrusion of the policemen into her home in order to take her to the psychiatric hospital. The Government submit that Article 5 para. 1 (e) (Art. 5-1-e) is the lex specialis in relation to such detention and that, even if Article 8 (Art. 8) is found to be applicable, the interference was justified under the second paragraph of Article 8 (Art. 8-2) of the Convention. As regards Article 13 (Art. 13) of the Convention, the applicant complains that she had no effective remedy under domestic law in respect of her committal to the psychiatric hospital and the Government submit that the applicant had an effective remedy in respect of her claims about her admission to and detention in the psychiatric institution, the High and Supreme Courts determined those claims and, had her claims been upheld, redress would have followed under Irish law.

Insofar as the Government argue non-exhaustion of domestic remedies in relation to the applicant's complaints under these Articles, the Commission refers to its opinion expressed at 1. A above as to the applicant's choice of remedies. The Commission therefore considers that these complaints of the applicant cannot be declared inadmissible on grounds of non-exhaustion of domestic remedies.

As to the merits of these complaints and in light of the parties' submissions, the Commission finds that the complaints of the applicant under Articles 8 and 13 (Art. 8, 13) of the Convention, being closely connected on the facts to the complaints under Article 5 paras. 1 and 5 (Art. 5-1, 5-5) of the Convention, raise issues of fact and law which require determination on their merits. It follows that these complaints of the applicant cannot be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring them inadmissible has been established.

3. Article 5 (Art. 5) of the Convention - denial of access to a lawyer

The applicant also claims that she was denied access to a lawyer while in the psychiatric hospital. She does not invoke any specific Article of the Convention in this respect. Her claims in this regard were included in her affidavits before the High Court which affidavits the applicant was allowed to "confirm" and she was thereby taken as having given sworn oral evidence as to their contents. This evidence remained uncontested in the High Court. In addition, the refusal of access was an act done in pursuance of the 1945 Act, since the applicant was detained in pursuance of that Act and thus leave of the court under section 260 would be required to take any action as regards a denial of access to a lawyer. The clear refusal by the High Court to accept wrongdoing on the part of the health board's doctor (Doctor B) indicated little point in pursuing an appeal against the health board.

The Government argue that the applicant has not exhausted domestic remedies in that she failed to pursue an appeal against the health board to the Supreme Court or issue separate proceedings against the health board as regards a refusal of such access, for which latter proceedings she would not have required leave pursuant to section 260. The Government also argue that the applicant has failed to substantiate her claim in this respect, provide the result of their own enquiries and dispute the allegation.

Even assuming that this complaint falls to be considered under Article 5 (Art. 5) of the Convention, the Commission notes the dispute between the parties as to whether leave of the court under section 260 of the 1945 Act is required to take proceedings against the health board as regards this allegation against their staff at the psychiatric hospital.

The Commission notes that any denial of access to a lawyer would not prima facie fall within the scope of Section 260 of the 1945 Act. However and even assuming the necessity to obtain leave, the Commission notes that leave proceedings were commenced by the applicant against, inter alia, the health board in which certain affidavits referring to the above allegation against health board staff were filed and subsequently "confirmed" during the hearing. However, the allegation was not specifically pursued at all by the applicant in oral evidence and the only legal submission made by the applicant's counsel as to health board staff conduct related to the actions of Doctor B on the night of the applicant's committal. The applicant's appeal to the Supreme Court did not concern the health board at all. Her justification for this, the High Court's strong endorsement of Doctor B's conduct on the night of the applicant's committal, is irrelevant to the issue of whether other members of staff working for the health board denied the applicant access to her lawyer in the days following her detention.

In the circumstances, the Commission considers that the applicant has not exhausted domestic remedies as regards her complaints about a denial of access to a lawyer and the complaint must, accordingly, be declared inadmissible pursuant to Article 27 para. 3 (Art. 27-3) of the Convention.

4. Article 5 para. 3 (Art. 5-3) of the Convention

Article 5 para. 3 (Art. 5-3) of the Convention, insofar as relevant, reads as follows:

> "3. Everyone ... detained in accordance with the provisions of paragraph 1. c. of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial."

The applicant complains that she was not brought promptly before a judge or other officer authorised by law to exercise judicial power and there is no provision for such a procedure in the 1945 Act and raises this complaint under Article 5 para. 3 (Art. 5-3) of the Convention. However, the Commission recalls that the protections contained in this paragraph relate to persons detained in accordance with the provisions of paragraph 1(c) of Article 5 (Art. 5-1-c) and the applicant does not suggest that she was so detained. Accordingly this complaint of the applicant is incompatible ratione materiae with the provisions of the Convention and, accordingly, must be declared inadmissible pursuant to Article 27 para. 2 (Art. 27-2) of the Convention.

5. Article 6 para. 1 (Art. 6-1) of the Convention

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

> "1. In the determination of his civil rights ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

Insofar as the applicant complains about the existence of section 260 of the 1945 Act, the Commission notes that she accepts, in light of the decision of the Commission in a previous Irish case (No. 10296/83, Dec. 3.12.86, unpublished), that she has not exhausted domestic remedies. In that case, as in the present application, the applicant had not directly challenged the constitutionality of section 260 of the 1945 Act by serving the Attorney General as required by Order 60 Rule 1 of the Rules of the Superior Courts 1986.

Insofar as the applicant seeks to distinguish between the existence and the application of section 260 of the 1945 Act in her case, the Commission considers the distinction unreal in the circumstances of this case. In practice a challenge to the constitutionality of legislation by an individual affected is based on factual assertions as to its application to them and their locus standi. In addition and unlike the question of damages against the State following a declaration of unconstitutionality (see 1. A above), there would be no obscurity as to the effect of a declaration of invalidity of section 260 - the applicant would no longer have to obtain the leave of the court to take proceedings in relation to acts done in pursuance of her statutory detention.

The Commission therefore finds that the applicant has not exhausted domestic remedies in relation to this complaint and an examination of the case discloses no special circumstances which might have absolved her, according to the generally recognised rules of international law, from exhausting this domestic remedy. Accordingly, this complaint must be declared inadmissible pursuant to Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons the Commission,

by a majority,
DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaints relating to the nature of her examination by a doctor leading to her involuntary committal to a psychiatric institution; and

unanimously,
DECLARES THE REMAINDER OF THE APPLICATION INADMISSIBLE.

Deputy Secretary to the Commission — President of the Commission

(M. de SALVIA) — (S. TRECHSEL)