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. 36887/97
by Paul QUINN
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 6 March 1997 by Paul Quinn against Ireland and registered on 16 July 1997 under file no. 36887/97;

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 applicant on 8 February 1999, the supplementary observations of the applicant received on 8 March 1999 and the Government's reply received on 6 April 1999;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Irish citizen, born in 1973 and resides in Limerick. He is represented by Mr Michael Farrell, a solicitor practising in Dublin. The facts as submitted by the parties may be summarised as follows.

A. Particular circumstances of the case

On 7 June 1996 a detective police officer was murdered in the course of an attempted armed robbery in Adare, Co. Limerick, a town relatively close to the applicant's home. The Irish Republican Army (an illegal paramilitary organisation known as the IRA) later claimed responsibility for the murder.

In the morning of 19 July 1996 the applicant was arrested under section 30 of the Offences Against the State Act 1939 ("the 1939 Act") on suspicion of being a member of the IRA. He was cautioned that he was not obliged to say anything but that anything he did say would be taken down in writing and could be given in evidence. The applicant was questioned repeatedly during the 48 hours extended detention for which provision is made under section 30 of the 1939 Act, certain questions relating to the murder in Co. Limerick. During this period he saw his solicitor on several occasions but his solicitor was not present during his interviews with the police. On 19 July 1996 that solicitor made a written complaint at the police station that the applicant had been verbally abused and obliged to stand during his first interview and that the interviewing police officers did not identify themselves to the applicant as required.

During those interviews with the police the applicant was asked about his movements on 6 and 7 June 1996 and he was informed that a failure to provide this information would constitute an offence under section 52 of the 1939 Act. The applicant denied any connection with the events in Co. Limerick, indicated that he was in London when he heard the news of the police officer's murder but otherwise refused to give an account of his movements stating that he had been advised by his solicitor not to answer questions. The applicant was released on 21 July 1996 on the expiry of the 48 hour period.

On 17 January 1997 the applicant was charged on three counts of refusing to give an account of his movements under section 52 of the 1939 Act. On 15 May 1997 one charge was dismissed, the applicant was convicted on one charge and no ruling was made on the remaining charge. He was sentenced by the District Court to six months imprisonment. The applicant appealed against conviction and sentence to the Circuit Court and was released on bail pending the appeal. He appealed on the basis, *inter alia*, of an overlap in the times referred to in the charge which was dismissed by the District Court and the charge of which he was convicted by the latter court. In early October 1997 the Circuit Court rejected this latter portion of his appeal. The rest of his appeal was withdrawn by the applicant at the resumed appeal hearing on 20 January 1998 and that portion of the appeal was, accordingly, struck out by the Circuit Court on that day. The applicant commenced serving his six-month sentence in January 1998.

Two of the applicant's brothers and his mother were also arrested in connection with the murder in Co. Limerick. One of those brothers has been charged with the attempted robbery.

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. Relevant jurisprudence

It was indicated in the case of The People v. McGowan (1979 IR 45) that statements made pursuant to section 52 of the 1939 Act may be admissible in evidence. Subsequently, the Supreme Court upheld the constitutionality of section 52 of the 1939 Act (Heaney and McGuinness v. Ireland and the Attorney General, 1996 IR 80).

However, 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 applicant complains that he was prosecuted and convicted under section 52 of the 1939 Act in violation of his rights protected by Article 6 §§ 1 and 2, Article 10 and Article 13 of the Convention.

PROCEDURE

The application was introduced before the European Commission of Human Rights on 6 March 1997 and registered on 16 July 1997.

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

The Government's written observations were submitted on 1 December 1998, after two extensions of the time-limit fixed for that purpose, and the applicant replied on 8 February 1999. Further to the release of the approved judgment on 5 March 1999 of the Irish 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), the applicant submitted supplementary observations on 8 March 1999 and the Government responded on 6 April 1999.

On 25 January 1999 the Court granted the applicant legal aid.

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 LAW

The applicant complains that his conviction and sentencing under section 52 of the Offences Against the State Act 1939 violates his right not to incriminate himself guaranteed by Article 6 § 1 together with the closely linked principle of the presumption of innocence guaranteed by Article 6 § 2 of the Convention. He also submits that section 52 constitutes a violation of his right not to impart information guaranteed by Article 10 of the Convention and that he did not have an effective domestic remedy in violation of Article 13 in conjunction with Article 6 and 10 of the Convention.

1. Article 35 of the Convention

The Government contend, in the first place, that the applicant has not satisfied the requirements of Article 35 § 1 of the Convention. They point out that, after the rejection of the applicant's preliminary point in October 1997, the applicant withdrew the remainder of his appeal to the Circuit Court in January 1998.

The applicant points out that he never contested the accusation that he failed to give an account of his movements when requested to do so under Section 52 and, once the preliminary claim made as to the overlapping times had been rejected by the Circuit Court, there was little point in continuing with the appeal. The applicant takes issue with section 52 itself and the Circuit Court has no jurisdiction to consider the constitutionality of a statute. Constitutional proceedings were not issued by him because the Supreme Court had already upheld the constitutionality of section 52 in the above-cited case of Heaney and McGuinness.

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). It is also 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). Moreover, the burden of proving the existence of effective and sufficient remedies lies upon the State invoking the rule (No. 12686/87, Dec. 3.10.90, D.R. 60, p. 105).

The sole question arising in this context is whether the applicant should have continued his appeal to the Circuit Court after October 1997, which court had, in principle, the power to quash his conviction. The Court notes that the constitutionality of section 52 had already been confirmed by the Supreme Court (see the above-cited Heaney and McGuinness case). The parties do not dispute before this Court that the applicant accepted in the domestic proceedings that there had been a request made to him for, and a refusal to provide, information pursuant to section 52. Given the clear terms of section 52 and in light of these key undisputed facts before the domestic courts, the Court considers it pertinent that the Government have not given any indication whatsoever of what other plea was reasonably open to the applicant in any such appeal and that they have not provided any examples of cases where individuals, despite accepting such key elements of the charge, nevertheless successfully challenged a section 52 conviction.

The Government also submit, in the context of exhaustion of domestic remedies, that no evidence has been adduced to suggest that the reason for his silence was that any truthful responses would be self-incriminating rather than merely helpful in investigating the crime concerned. In any event, had the applicant given incriminating information and been

convicted on the basis of it, he could have challenged the constitutionality of his conviction. That challenge would have been successful, as the National Irish Bank Limited case (cited above) demonstrates. However, the Court does not consider that the applicant was, or is now, obliged to divulge the information requested pursuant to section 52 in order to satisfy the requirements of Article 35 § 1 of the Convention.

The Government further point out that the applicant did not (in the domestic courts), and does not before this Court, complain about the fairness of the proceedings by which he was convicted under section 52 of the 1939 Act. The applicant does not dispute this but contends that there is an issue under Article 6 because he is challenging his conviction and sentencing following his refusal to answer the questions of the police. The Court also notes that the applicant was never charged or tried on matters arising out of his arrest and detention in July 1996. Insofar as an issue as to whether the applicant can claim to be a victim 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 applicant submits that section 52 of the 1939 Act violates the right against self-incrimination guaranteed by Article 6 § 1 and the connected right to be presumed innocent 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 above-cited Heaney and McGuinness 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). The Government

comment that their enquiries with the office of the Director of Public Prosecutions indicate that prior to the latter judgment it was only in "rare" cases where information, obtained pursuant to section 52 of the 1939 Act, was subsequently used at trial against the individual who provided the information.

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 applicant's incriminating admissions since he was not at the relevant time 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 applicant could have later challenged the admissibility of any such evidence in any subsequent and relevant trial.

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 applicant was never charged or tried on any matters arising out of his arrest and detention in July 1996. 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 applicant 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 above-cited Heaney and McGuinness case.

The applicant, citing the above-mentioned John Murray, Funke and Saunders judgments, argues that Article 6 applies to his complaints even though his complaints refer to an early stage of the preliminary investigation into an offence. He also maintains that the right to remain silent and the right against self-incrimination lie at the heart of the notion of fair procedure under Article 6 of the Convention and that these rights were violated by requiring the applicant (under threat of imprisonment) to provide the specific information requested in the context of his arrest and his being questioned about specific serious offences then under investigation. His right to be presumed innocent was also violated because this right means that the prosecuting authorities cannot compel or attempt to compel the accused to furnish evidence. The applicant adds that, although he has denied any involvement in the murder of 7 June 1996, testimony which appears to be non-incriminating may nevertheless be used to support a prosecution case (the above-cited Saunders judgement, at § 71).

The applicant considers that the Government overstate the threat to national security at the relevant time. He underlines the fact that the section 35 proclamation referred to by the Government has been in force since 1972 and, accordingly, has become a quasi-permanent part of Irish law. Nevertheless, the applicant submits that there has been a steady decline in the pattern and level of violence since the early 1990s and he cites detailed statistics taken from the second report by Ireland under the International Covenant on Civil and Political Rights (1992-6) and from figures supplied by the Government in other (unspecified) domestic proceedings. The applicant submits that there is no provision for regular or periodic independent reviews of the necessity for the continuance of the section 35 proclamation. According to the applicant no announcement has been made about the proposed review body for the 1939 Act to which the Government refer and there has been no indication of its proposed composition, terms of reference or the time scale envisaged for its work. He also refers to the fact that section 30 of the 1939 Act is also used in connection with non-subversive activities meaning that the number of section 30 arrests is relatively high there having been approximately 2000 such arrests each year in the early 1990s. Section 52 of the 1939 Act can be used in each such case.

The applicant further considers unreal the distinction made by the Government to the effect that section 52 of the 1939 Act is a sanction against a refusal to respond to a demand for information and not a sanction against invoking the right against self-incrimination.

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. Article 10 of the Convention

The applicant also complains that section 52 constitutes an unjustified interference with his right not to furnish information guaranteed by Article 10 of the Convention, which Article, insofar as relevant, reads 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 applicant's 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 applicant could have served either in the investigation of crimes of which the applicant was 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 applicant refers to the K. v. Austria case which he considers similar to his own (judgment of 2 June 1993, Series A no. 255-B, no. 16007/90 Comm Report, 13.10.92). He points out that the Commission held that the prosecution and conviction of that applicant was a violation of the right not to impart information guaranteed by Article 10 of the Convention.

The Court considers that the application raises issues under Article 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.

4. Article 13 of the Convention

Finally, the applicant complains under Article 13 of the Convention that Irish law provided no effective remedy to him for the breaches of Articles 6 and 10 above. Article 13, insofar as relevant, reads as follows:

> "Everyone whose rights and freedoms 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 Government argue that Article 13 is not relevant in the present case as no rights guaranteed to the applicant under the Convention were violated. The applicant points out that the Irish Supreme Court had already upheld the constitutionality of section 52 of the 1939 Act, thus a constitutional action was not open to him (see the above cited Heaney and McGuinness case). The Special Criminal Court had already rejected an application to judicially review the continuation of the proclamation made under section 35 of the 1939 Act which has been maintained since 1972 (Joseph Kavanagh v. the Government of Ireland, the Director of Public Prosecutions, the Attorney General and the Special Criminal Court,

unreported judgment of 18 December 1996). No other avenue of redress was open to the applicant as the Convention has not been incorporated into Irish Law.

The Court recalls that Article 6 is the *lex specialis* as regards complaints falling within its scope (Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, p. 45, § 110). Quite apart from this, the Court notes that the Convention does not guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic norms (Leander v. Sweden judgment of 26 March 1987, Series A no. 116, pp. 29-30, § 77). Moreover, Article 13 of the Convention does not oblige a State to incorporate the Convention into domestic law (No. 13013/87, Dec. 14.12.88, D.R. 58, p. 163).

In such circumstances, this complaint of the applicant is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaints under Article 6 §§ 1 and 2 and Article 10 of the Convention;

DECLARES INADMISSIBLE the remainder of the application.

Vincent Berger
Registrar

Matti Pellonpää
President