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

CASE OF TINNELLY & SONS LTD AND OTHERS AND McELDUFF AND OTHERS v. THE UNITED KINGDOM

(62/1997/846/1052–1053)

JUDGMENT

STRASBOURG

10 July 1998

In the case of Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mrs E. PALM,
Sir John FREELAND,
Mr M.A. LOPES ROCHA,
Mr K. JUNGWIERT,
Mr E. LEVITS,
Mr T. PANTIRU,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 28 April and 24 June 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 July 1997 and by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") on 11 July 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in two applications against the United Kingdom lodged with the Commission under Article 25: firstly, on 27 May 1992 by John Tinnelly & Sons Ltd, a limited company based in Northern Ireland, and Mr Patrick Tinnelly and Mr Gerard Tinnelly, respectively the managing director and company secretary of the applicant company (no. 20390/92); and then on 26 August

Notes by the Registrar

1. The case is numbered 62/1997/846/1052–1053. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The third number indicates the case's position on the list of cases referred to the Court since its creation and the last two numbers indicate its position on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

1992 by Mr Kevin McElduff, Mr Michael McElduff, Mr Paddy McElduff and Mr Barry McElduff, self-employed workers (no. 21322/93). The two applications were later joined by the Commission. The individual applicants are all British nationals.

2. The Commission's request referred to Articles 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6, 8, and 13 of the Convention as well as under Article 14 taken together with Article 6.

3. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

4. The Chamber to be constituted included *ex officio* Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 27 August 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Macdonald, Mr C. Russo, Mrs E. Palm, Mr M.A. Lopes Rocha, Mr K. Jungwiert, Mr E. Levits and Mr V. Toumanov (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal as President of the Chamber following the death of Mr Ryssdal on 18 February 1998 (Rule 21 § 6). At a later stage, Mr A. Spielmann, Mr J. De Meyer and Mr T. Pantiru, substitute judges, replaced, respectively, Mr Russo, Mr Macdonald and Mr Toumanov who were unable to take part in the further consideration of the case (Rule 22 § 1).

5. As President of the Chamber at the time (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicants' joint memorial on 5 January 1998 and the Government's memorial on 6 February 1998.

6. On 26 January 1998 Mr Ryssdal, the then President of the Chamber, granted leave to the Standing Advisory Commission on Human Rights, an independent statutory body based in Northern Ireland, to submit written observations in the case (Rule 37 § 2). These observations were received on

24 February 1998 and communicated to the Agent of the Government, the representatives of the applicants and the Delegate of the Commission. The Government submitted observations in reply on 17 March 1998.

7. On 3 March 1998 the applicants filed with the registry details of their claims under Article 50 of the Convention. The Government replied to these claims by letter received at the registry on 30 March 1998. The applicants submitted additional claims for just satisfaction on 8 April 1998 and sought leave to have them admitted to the file notwithstanding that the fresh claims had been submitted out of time. Without prejudice to a decision on whether to admit these claims, the President of the Chamber decided to forward them to the Government and the Delegate of the Commission for their observations. The Government submitted their response to the new claims by letters received at the registry on 8 April and 19 May 1998. On 24 June 1998 the Chamber decided to admit the applicants' additional claims to the file.

8. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 April 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr C. WHOMERSLEY, Foreign and Commonwealth Office, *Agent*,
Mr R.E. WEATHERUP QC,
Mr B. MCCLOSKEY, *Counsel*,
Mr O. PAULIN,
Mr D. MCCARTNEY,
Mr H. CARTER, *Advisers*;

(b) *for the Commission*
Mrs J. LIDDY, *Delegate*;

(c) *for the applicants*
Lord LESTER of HERNE Hill QC,
Ms E. DIXON,
Mr B. MACDONALD, *Counsel*,
Ms D. HAWTHORNE,
Ms F. CASSIDY, *Solicitors*.

The Court heard addresses by Mrs Liddy, Lord Lester of Herne Hill and Mr Weatherup.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicants

9. Tinnelly & Sons Ltd (hereinafter "Tinnelly"), the first applicant, is a contracting firm based in Northern Ireland with experience in the demolition and dismantling of industrial plants as well as asbestos stripping. Mr Patrick Tinnelly, the second applicant, is the firm's managing director and his brother, Mr Gerard Tinnelly, the third applicant, is its company secretary. The second and third applicants are Catholics.

10. Mr Kevin McElduff, Mr Michael McElduff, Mr Paddy McElduff and Mr Barry McElduff, the remaining applicants (hereinafter "the McElduffs"), are all self-employed joiners based in Northern Ireland. They are all Catholics.

11. The applications lodged with the Commission stem from a similar factual background and administrative practice and raise the same issues under the Convention. The facts pertaining to the complaint lodged by Tinnelly are set out in section 1; the facts pertaining to the McElduffs' complaints are set out in section 2.

1. The complaints brought by Tinnelly

(a) The invitation to tender

12. Sometime in 1984 Northern Ireland Electricity Services (hereinafter "NIE") considered inviting tenders for the demolition of the Ballylumford "A" Power Station and the purchase of the resulting scrap. The Tinnelly firm expressed interest in working on the contract and following contacts with NIE submitted a tender on 28 March 1985. Tinnelly, which was on a NIE list of approved contractors, submitted the lowest tender. Having regard to their competitive bid as well as to the firm's track record in demolition work an executive committee of NIE, meeting on 2 May 1985, recommended that the firm's bid be accepted. It would appear that NIE officials were satisfied both with the financial backing which Tinnelly had secured as a condition of being awarded the contract and its capacity to undertake and complete the work. Having regard to the frequency of its contacts with NIE around this time, Tinnelly proceeded on the understanding that it had been awarded the contract.

13. However, on 26 June 1985 a revised recommendation was drawn up recommending that the contract be given to another firm which had submitted the second lowest offer in response to the invitation to tender, namely the Glasgow-based firm of McWilliam Demolition Ltd (hereinafter "McWilliam"). The contract was subsequently awarded to McWilliam with a starting date of 5 August 1985. Tinnelly received a letter on 28 June 1985 confirming that it had not been awarded the contract. The firm was not informed of the reasons for this decision.

(b) The proposed subcontract with McWilliam

14. Subsequently, on 21 August 1985, Tinnelly submitted a detailed quotation to McWilliam for the removal of asbestos from the Ballylumford site. McWilliam contacted the firm with a view to discussing the terms of a subcontract. A meeting was arranged at Tinnelly's Newry office for 29 August 1985. However, the firm was informed on the day of the planned meeting that McWilliam had decided to cancel it. Tinnelly learnt subsequently from the managing director of McWilliam that Tinnelly's employees were not considered acceptable by NIE on security grounds and for that reason the subcontract was withheld from it. In its particulars of complaint submitted to the Fair Employment Agency (see paragraph 15 below), Tinnelly maintained that, according to McWilliam, Tinnelly had been the favourites to obtain the Ballylumford contract but were not awarded it since the trade unions at Ballylumford would not allow employees of Tinnelly access to the site and "there was no way they were going to have IRA sympathisers working with them".

(c) The complaint to the Fair Employment Agency ("the FEA")

15. Tinnelly considered that it had been refused the contracts with NIE and McWilliam because of the perceived religious beliefs and/or political opinions of its management and workforce and for that reason had been the victim of unlawful discrimination. It relied on the information gleaned from McWilliam (see paragraph 14 above). Tinnelly lodged complaints on 24 July and 2 September 1985 with the Fair Employment Agency for Northern Ireland ("the FEA"), the statutory body charged under the Fair Employment (Northern Ireland) Act 1976 ("the 1976 Act"), with the duty to promote equality of opportunity in the province and to eliminate religious and political discrimination in the employment sector and related areas (see paragraphs 41–43 below). Since 1989 the FEA has been known as the Fair Employment Commission (see paragraph 43 below).

(d) The FEA's attempted investigation

16. The FEA served particulars of the allegations of unlawful discrimination on NIE on 13 September 1985. NIE replied on 24 September stating that the contract at Ballylumford had been awarded to McWilliam on account of that company's proven experience in the safe dismantling of power stations and of handling asbestos and for that same reason NIE did not want the asbestos-stripping part of the contract sub-contracted to another firm. NIE's letter also referred to Tinnelly's failure to take steps to execute the guarantee submitted at the time of tendering for the Ballylumford contract, which explained the frequent contacts between the two sides at the material time (see paragraph 12 above).

17. The FEA, acting under the powers given to it under section 23 of the 1976 Act (see paragraphs 42 and 43 below), agreed to investigate Tinnelly's complaint that there were suspicions that NIE's decision had been brought about by sectarian pressure exerted by the trade unions at Ballylumford. NIE took the view that the FEA had no jurisdiction to investigate the complaint on the ground that the protection afforded by section 23 did not extend to corporate bodies such as Tinnelly. NIE sought an order of prohibition to prevent the FEA from investigating the complaint as well as a declaration that no valid complaint had been made and that the FEA had no jurisdiction to investigate it. This argument was dismissed by Mr Justice Nicholson in the High Court of Justice of Northern Ireland on 9 September 1987. NIE did not appeal against that decision and the FEA proceeded with the investigation.

(e) The issue of the section 42 certificate and the legal challenge to it

18. On 20 October 1987 a senior official of NIE made a formal request to the Secretary of State for Northern Ireland via a civil servant in the Department of Economic Development (hereinafter "the DOD") for the issue of a certificate under section 42 of the 1976 Act to the effect that the decision not to grant Tinnelly the contract in question was "an act done for the purpose of safeguarding national security or of protecting public safety or public order" (see paragraph 45 below). The Secretary of State issued the certificate on 28 October 1987. By virtue of section 42(2) of the 1976 Act, the certificate was conclusive evidence that the act was done for the stated purpose (see paragraph 45 below).

19. The FEA commenced judicial review proceedings in the High Court of Justice of Northern Ireland before Mr Justice Nicholson seeking an order of *certiorari* to quash the Secretary of State's decision to issue the section 42 certificate and a declaration that that decision was null and void.

Lawyers for the FEA contended that the certificate was procured and issued in bad faith, was irrational, unfair and unreasonable and made for an improper collateral purpose, namely to prevent the FEA from investigating a complaint of unlawful discrimination. NIE was made a notice party to the proceedings.

(f) The interlocutory proceedings for the discovery of documents

(i) Against the Secretary of State

20. In the course of the judicial review proceedings, the FEA sought an order for discovery of a number of documents in the possession, custody or power of the Secretary of State. Mr Justice Nicholson made the order on 10 May 1988 and the Secretary of State complied by producing a list of documents. However, some documents were sealed or covered up on the ground that their production, except as sealed or covered up, would be injurious to the public interest. These documents were covered by a public-interest immunity certificate issued by the Secretary of State on 13 September 1988. He stated in that certificate, *inter alia*:

> "6. To enable me to be satisfied that ... genuine reasons did exist in [signing the section 42 certificate], I considered it necessary for me to know the information upon which NIE claimed to have acted. I also considered that I should independently obtain information to enable me to confirm, so far as possible, that national security and/or public order was, in fact, endangered in that case.
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> 7. NIE is responsible for the provision ... of an uninterrupted supply of electricity in Northern Ireland. To fulfil this responsibility it must have available to it all relevant information which may reduce or avoid the risk of disruption to the supply ... for any unlawful reason including acts of terrorism, and in case of the [relevant] contract, I believe that it did obtain such information. The disclosure of certain information which was obtained by NIE would reveal to those who are engaged in unlawful activities including acts of terrorism, the nature of that information, the extent of the information known about them and possibly the source from which it originated. This could endanger life and would make it more difficult to obtain such information in the future ... [D]isclosure of the process by which this information is obtained could impair the effectiveness of that process.
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> 8. I am of the view that if the independent information which I obtained in the present case were to be disclosed it could enable terrorist organisations to know the nature and extent of the information known about them and would aid them in their unlawful acts...

> 9. I have read ten documents which are produced to me. Each of the said documents contains in part information of the kind described in paragraph 7 or paragraph 8... I am of the opinion that for the safeguarding of national security and the protection of public safety and public order, it would be contrary to the public interest that any of the said documents should be disclosed in these proceedings except as sealed and covered up to prevent disclosure of the aforesaid information."

21. The FEA did not dispute the Secretary of State's objection to the production of these documents on public interest grounds.

(ii) Against NIE, the notice party

22. On 8 December 1988, the FEA – again in the context of the challenge to the section 42 certificate – applied for an order for discovery of documents by NIE, a notice party to the judicial review proceedings (see paragraph 19 above). An order to produce a list of documents was made on 9 December 1988. Those documents were disclosed by NIE with the exception of nineteen documents relating to the decision not to award the contract to Tinnelly. NIE objected to the production of the latter documents on the ground that it would be injurious to the public interest.

23. The FEA challenged this objection and on 13 December 1988 the Secretary of State issued a further public-interest immunity certificate. It repeated the substance of paragraph 7 of the earlier certificate of 13 September 1988 (see paragraph 20 above) and continued:

> "5. I have read what I am informed are copies of seventeen documents held by NIE... These documents reveal the methods used by NIE to gain information which is required to protect the electricity system, the sources of the information and the information obtained.
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> 6. I have also read what I am informed are copies of a memorandum dated 7 September 1987 ... minutes of a [meeting] dated 26 April 1985 and a letter of 8 September 1987...
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> 7. For the reasons I have given in the foregoing paragraphs, I am of the opinion that for the safeguarding of national security, the protection of public safety and public order, none of the documents referred to in paragraph 5 or their contents should be admitted in evidence in these proceedings because they fall within the class of communication which I have described and because of the information they contain. I am also of the opinion that for these reasons the document referred to in paragraph 6 should not be admitted in evidence except as sealed and covered up."

24. On 16 March 1989 Mr Justice Nicholson considered an interlocutory application by the FEA challenging the Secretary of State's public-interest immunity certificate of 13 December 1988. He prefaced his judgment with comments to the effect that, because he had seen certain documents which had not been seen by all sides, he was of the opinion that it might be better if a different judge determined the substantive judicial review application.

25. Mr Justice Nicholson noted that the documents already disclosed to the court indicating the grounds on which NIE based their decision not to award the Ballylumford contract to the Tinnelly firm gave rise to a prima facie case of bad faith on the part of NIE and the advisers to the Secretary of State. Mr Justice Nicholson expressed the provisional view that the original reasons put forward by NIE for the refusal of the contract did not refer to security grounds, and the same reasons were repeated for a considerable time (see paragraph 16 above). He noted that there were inconsistencies in the alleged ground for refusing the contract: at one point the firm had been described as having experience of handling asbestos and having carried out subcontract demolition work on power stations, and later (after security information had been received) as having "no experience" in demolishing power stations. He recalled that Tinnelly had alleged that McWilliam, the successful tenderer, had said that the applicants were the favourites to obtain the contract but were not given it "as the unions at Ballylumford would not allow it" and that the unions had said that "there was no way they were going to have IRA sympathisers working with them".

26. As to the documents whose discovery was sought, Mr Justice Nicholson stated:

> "If this Court is of the opinion that a document was not disclosed because it bore on national security and could not be edited so as to eliminate the national security element I would not go on to balance the interests of national security against the interests of justice since this balance is for the Government to exercise…
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> If the Court is of the opinion that a document has no 'national security' implications, but has other 'public interest' implications and is very likely to assist and give substantial support to the Agency on the issues involved in this case, it will go on to consider the other 'public interest' objections to production and will go on to balance the competing interests of protection of the public interest in public safety or public order on the one hand and of the public interest in the administration of justice on the other hand – namely, that it is and is seen to be fair and open that a party is not deprived of documents which are likely or very likely to assist or substantially support his case…"

He continued:

> "I reject any contention that a High Court Judge in Northern Ireland is incompetent to decide whether a document *might* involve national security or whether a class of documents *might* involve national security. I do accept, however, that if disclosure of a document *might* imperil national security, it is not for the Court to balance national security against other considerations of public interest, but that it is for the relevant Minister of the Crown to do so…"

27. Mr Justice Nicholson ordered that the seventeen documents for which a "class claim" had been made should be produced for inspection by the court, and that the two documents which had been partly sealed or covered up should also be produced for inspection.

(iii) The inspection of the documents and the conclusion to the interlocutory proceedings

28. On 19 April 1989, having read the documents covered by the certificate of 13 December 1988 (which were not disclosed to the FEA or the applicants), Mr Justice Nicholson held that none of the withheld documents assisted the application for judicial review. He accepted the claim for public interest immunity in respect of documents 1 to 14, which related to confidential record checks carried out by the Royal Ulster Constabulary ("the RUC") on Tinnelly and on persons employed by it. He considered that documents 15 to 18, internal NIE documents, could be partly disclosed and that document 19 could be disclosed as a whole. He concluded:

"I am satisfied that the claim for immunity from production for all these documents was made in good faith. But in my opinion no person could reasonably say that for the safeguarding of national security or for the protection of public safety or public order documents 15 to 19 should not be produced or, if admissible, should not be admissible in evidence – so long as my directions are carried out about covering over portions of some of them."

29. Mr Justice Nicholson granted the Secretary of State leave to appeal on 24 April 1989. In so doing, he held:

"It is implicit in my ruling that I have rejected the 'class' claim set out in the certificate of the Secretary of State, as I take the view that it is too wide and too vague. It could involve, for example, protection of documents internal to NIE which emanated from a private detective agency or organisation within NIE acting as a private police force, independently of and outside the control of the RUC. A court might hold that no reasonable person could claim that national security was endangered by the production of documents emanating from such an agency or organisation. Such an agency or organisation might be a positive danger to national security. Such a 'class' claim could involve, for example, protection of documents emanating from employees of NIE about contractors and their employees based on gossip or hearsay or malice or sectarianism. Such documents might have existed in the present case, if the affidavit of McWilliam is true.

The five documents of which I have ordered production could have been caught by this wide and vague formula..."

(iv) The dismissal of the application for judicial review

30. At the substantive hearing on 3 December 1991, the judicial review application was dismissed. Mr Justice McCollum found, *inter alia*, as follows:

"The issue of course before me is not whether the Secretary of State was right or wrong in signing the certificate, but whether he had jurisdiction to do so, which is basically accepted by the parties, and whether the events leading up to his decision are such that his decision to certify can or cannot stand.

I must also remember that the process of judicial review is ill-suited to the resolution of disputed issues of fact, and particularly so when the primary issue is not the determination of what occurred, but the motives of those engaged in the relevant acts...

Even taking NIE's case at its highest, [one particular letter] was misleading because it made no mention of the true reason, according to them, i.e. the withdrawal of the contract from Tinnelly on security considerations...

It is a sad fact of life that in spite of the patient endeavours of the Agency there still remain those in Northern Ireland who hold deep hostility to the objectives and activities of the Agency.

I have no doubt whatever that such attitudes existed within NIE in 1985, and possibly still do, and I am afraid that the assurances by [NIE officials] did nothing to persuade me to the contrary, when viewed against their overt activities in this case.

Paradoxically this view gives credence to part of the evidence of [the NIE official] on the important issue of the true reason for the withdrawal of the contract from Tinnelly.

It is virtually inconceivable that a man who had risen to the eminence of Chairman of an important public body like NIE would conceal under a veil of untruths the making of what he saw as a perfectly justified and reasonable decision based on his concern for the safety and continued operation of a vital public utility, and in effect to lay a false trail to mislead those investigating the matter.

Two factors persuade me that it is a possibility that he might act thus:

(1) The attitude of quite unjustified mistrust and hostility towards the Agency which I have referred to, and which might greatly exaggerate his fears of an investigation; and

(2) The problems arising from pursuing the uncharted course of obtaining a section 42 certificate...

Therefore while NIE for two years failed to acknowledge the true reason for its decision, according to it, and gave untrue reasons which would in normal circumstances lead to the inevitable conclusion that the true reason was illegal or so shameful as to merit concealment, the factors I have referred to leave me in a state of mind where I can accept the proposition that the security factor may have been the factor uppermost in [the NIE official's] mind when he made his decision.

It must also be said that information did come to NIE from the Royal Ulster Constabulary at the end of May and the early June of 1985. I do not know its exact nature, and of the apparently twenty-nine applications for clearance, I have only seen twelve replies, of which a number (I think seven) appear not to give security clearance. And exactly when they arrived is difficult to say, but I think they may well have arrived in early June which was around the time of the apparent change of heart.

I do not know the exact nature of that security information, although I have a general picture, but I do know enough about it to realise that it may have been significant...

... It is impossible not to harbour suspicions since many of the actions taken by NIE give rise to suspicions and will do so in the mind of any reasonable person. Among other suspicious factors is indeed the fact that Nicholson J. was assured that Tinnelly was still an acceptable contractor during the course of the hearing before him of the privilege claim. That was even more particularly so when coupled with the removal, after his judgment, of their names as prospective tenderers. Moreover, the second application for authorisation to [recommend] McW. on the basis of superior experience appears to have been an undoubted attempt to lay a false trail among the documents and records of NIE.

In spite however of all those matters I have referred to, I am nonetheless not satisfied that the application for the section 42 certificate by NIE was an abuse of the process as it is understood by the parties, nor that it was an act of fraud in the legal sense on the part of NIE.

I am not satisfied that the security information received by [the NIE official] was not the deciding factor in the decision to withdraw the contract from Tinnelly. While NIE's actions and attitudes can be roundly criticised ..., and are such that they leave considerable doubt in the matter, nevertheless they of themselves do not vitiate the making of the section 42 certificate and do not in the event satisfy me that the application was in legal terms a fraudulent one.

I believe that it is possible that [the NIE official] was unsure of his position when he received the RUC's response to the application for routine clearance of Tinnelly's workers, and that rather than face up to the possible problems arising from a withdrawal of the contract on security grounds he decided to follow the course he did, i.e. to choose McW. on the spurious grounds of their greater experience in the demolition of power stations.

He no doubt expected that Tinnelly would never discover that they were the lowest tenderers and when they did so and involved the Agency, it would seem that a decision was made to continue and elaborate upon the original false premise for choosing McW.

One of the great problems which is quite beyond my power to resolve is that Tinnelly insists that it previously had always received security clearance for workers in highly sensitive installations...

I have not been permitted to inspect the RUC response to the individual requests for clearance. I do not understand why persons who may have got clearance earlier, may have been refused in this case... However, having regard to the evidence given and to the unchallenged affidavit of the Secretary of State about the effect of the RUC response, and indeed to those parts of the documents which I have been permitted to see, I must accept that, in response to some individuals at least, the response was unfavourable, and this may have been to such a degree as to justify the view that a serious security risk was involved if the contract was granted to Tinnelly...

... [The] heart of the matter was whether security information had in fact become available to NIE at the relevant time which would have justified its decision to withdraw the contract.... Had it transpired that no such information existed, then the application for the section 42 certificate would have been exposed as bogus...

As I have already indicated, I have not seen that information in detail, but I am bound to accept the judgment of the Secretary of State that the information was such as to justify the decision. And I may add that those parts of the documents that I have seen confirm that view. When it was confirmed that such security information was made available, it was in my view reasonable for the Department to accept that the NIE application was made in good faith...

[The civil servant in the Department of Economic Development (see paragraph 18 above)] ... could not have been expected to undertake an investigation similar to that which the Agency might have undertaken... There was no machinery by which he could bring in other parties. There was no machinery by which he could interrogate NIE, or compel it to produce documents to him, except by the use of what one might describe as moral persuasion. Once he accepted that the application was made in good faith for genuine reasons, then he was bound to support it whatever view he might have taken of the follies and inconsistencies which were apparent.

It is clear from this hearing that he was not going to get any acknowledgement from NIE or any of its officials that anything untoward had occurred, and he had no remit, as I indicated, to consult with any other person who might have alleged to the contrary, and if he had, he had no machinery of procedures to resolve the consequent dispute.

I find it difficult to imagine how he could have adopted an inquisitorial role and cross-examined [an NIE official] about the contradictions and inconsistencies in NIE's case. All that he could do was to record what seemed to him to be relevant and to try to gather the facts by interview with [the NIE official]...

It seemed to me that the Department acted with the utmost propriety in pursuing its own investigations into the central issue of security, and that the application to the Secretary of State was only processed further when the Department were satisfied that there was a genuine security consideration involved in the case...

> The Secretary of State [in his affidavit to the court] goes on to say `having seen [the RUC report on which [the civil servant's] submission had been based] I was quite satisfied that there would have been a genuine risk to national security, public safety or public order, if the contract had been awarded to Tinnelly and that notwithstanding that a different reason had been given by NIE for not awarding the contract to the Tinnellys, he felt satisfied that he could accept the assurance by NIE that the security issue had been the fundamental one from the outset...
>
> It would be impossible for any court to hold that this was not a tenable view reached after due consideration of the submissions presented to him, and having regard to the fact that the consideration of what constitutes a risk to national security, public safety or public order, are matters very much within the exclusive competence of the Secretary of State to determine...
>
> Much of the criticism of the [Department] arose from the fact that it did not appear to act in the role of court or tribunal, and to sift the evidence and follow up inconsistencies. As I have indicated, the procedure used was necessarily quite unsuitable for determining the real motives which lay behind the decision taken.
>
> However, once it is accepted that it was appropriate for NIE to seek a section 42 certificate to justify its withdrawal of the contract from Tinnelly, and that the procedures followed were lawful, and did not fall short of any legal requirement, and add to that the finding that the procedures were followed in good faith and with proper attention and consideration, then clearly it is not open to the court to interfere by way of judicial review.
>
> It is not the function of judicial review to re-try issues."

31. The judge expressed sympathy for the position of the FEA and the civil servants at the DOD, and again criticised the NIE for misleading the other parties to the dispute over a period of years. He concluded:

> "However, I am satisfied that there was sufficient evidence, honestly and competently presented to the Secretary of State in accordance with reasonable procedures, and carefully considered by the Secretary of State to justify the decision taken by him, which decision is therefore unimpeachable in this court."

32. Senior Counsel advised the FEA that an appeal against the decision of 3 December 1991 would not succeed. The section 42(2) certificate being valid, the applicant's complaint to the FEA did not receive further investigation and hence no settlement attempts were effected or county court proceedings taken under the Fair Employment (Northern Ireland) Act 1976.

2. The complaints brought by the McElduffs

(a) The acceptance of the applicants' tender

33. In or about May 1990 the applicants were informed by a building contractor that he had obtained a contract with the Department of the Environment for Northern Ireland (hereinafter "the DOE") to build premises at the site of the Northern Ireland Area Architect's Office in Omagh, Co. Tyrone. The contractor invited the applicants to tender for the joinery subcontract. Their tender was accepted and they were advised by the contractor that they could start the work, subject to security clearance from the DOE.

(b) The refusal of security clearance

34. The applicants supplied their names, addresses and dates of birth to the contractor, who forwarded them to the Contracts Branch of the DOE. Approximately six weeks later they were informed that they had not been granted security clearance and that they could not therefore be awarded the subcontract. The recommendation that security clearance be refused emanated from the Security Branch of the Department of Finance and Personnel ("the DFP"), a government department in Northern Ireland, which based its recommendation on information supplied by the RUC (including officers of its Special Branch).

35. The applicants have no criminal convictions of any kind, except for minor motoring offences. They state that they are not and never have been involved in any criminal or terrorist activity and know of no good reason why they should have been refused security clearance. They believe that they were discriminated against by the DOE on the grounds of religious belief or political opinion. In broad terms they would be perceived as having nationalist views, although they are not members of any political party and are not engaged in any form of political activity. They wrote to the DOE through their solicitors requesting an explanation as to why they had been refused clearance to be employed on this contract, but the DOE, following re-examination by the DFP Security Branch of the information originally supplied by the police, refused to provide an explanation.

(c) The intervention of the Fair Employment Commission

36. The applicants sought the assistance of the Fair Employment Commission for Northern Ireland and in August 1990 they made a

complaint to the Fair Employment Tribunal ("the Tribunal") alleging that the contractor and the DOE had discriminated against them contrary to the 1976 Act. The applicants had in the past been stopped and mistaken by members of the security forces for different persons of the same name, and they suspected that this was a case of mistaken identity.

37. The contractor resisted the complaint on the grounds that he had been willing to offer employment to the applicants but that the DOE had not been prepared to give them security clearance. By notice of appearance of 3 December 1990, the DOE resisted the complaint on the grounds that it had not done anything which would constitute an act of unlawful discrimination under the Act and, in the alternative, that "any act of the respondent in relation to the applicant was an act done for the purpose of safeguarding national security, and thus any such act is not an act to which the [1976 Act] or the Fair Employment (Northern Ireland) Act 1989 apply".

38. In relation to the first ground relied upon by the DOE, the DOE applied for an interlocutory hearing on the questions whether it should be dismissed from the proceedings, whether the applicants sought employment from it within the meaning of the Act and whether in the circumstances it could have discriminated against the applicants contrary to section 23 of the Act (see paragraph 42 below). On the morning of the interlocutory hearing, 26 September 1991, the DOE withdrew its application. On 22 October 1991 the Tribunal ordered the DOE to provide discovery of all relevant documents relating to the matter. It also ordered the DOE to provide further particulars of its case, *inter alia,* requiring the DOE to specify the national security grounds relied upon in relation to the applicants.

(d) The issue of the section 42 certificate

39. On 6 February 1992, the Secretary of State for Northern Ireland issued a certificate pursuant to section 42(2) of the 1976 Act to the effect that the decision to refuse the applicants' admission to the site of the contract was done for the purpose of safeguarding national security. Counsel advised the applicants that the effect of issuing the certificate was to bar the Tribunal from determining the complaint in the applicants' favour. In view of the fact that an award of costs could have been made against the applicants if they had unreasonably proceeded to a hearing in the face of the certificate, they withdrew their application, which was accordingly dismissed by the Tribunal on 27 March 1992.

II. RELEVANT DOMESTIC LAW

A. Background

40. The European Court of Human Rights has referred to the difficulties experienced by the Catholic community in Northern Ireland since the partition of the island of Ireland in its Ireland v. the United Kingdom judgment of 18 January 1978 (Series A no. 25) and in particular at page 12, § 19, with further reference to the Cameron Commission.

B. The fair employment legislation

41. The Fair Employment (Northern Ireland) Act 1976 ("the 1976 Act") is, according to its preamble, "An Act to establish an agency with the duties of promoting equality of opportunity in employments and occupations in Northern Ireland between people of different religious beliefs and of working for the elimination of discrimination which is unlawful by virtue of the Act...".

42. The Act applies only to the employment field and related areas. Section 17(1) of the 1976 Act makes it unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland, where that person is seeking employment, *inter alia*, by refusing or deliberately omitting to offer that person the employment for which he applies. Under section 23 of the 1976 Act, it is unlawful for a person who has power to confer on another a qualification, which is needed for his engagement in employment or occupation, to discriminate against him by refusing or deliberately omitting to confer that qualification. The agency referred to in the preamble to the 1976 Act was the Fair Employment Agency ("the FEA").

43. The FEA, known since 1989 as the Fair Employment Commission, is a statutory body established under the 1976 Act. It has the duty to promote equality of opportunity in Northern Ireland and the elimination of religious and political discrimination. Until 1989, if the FEA, following an investigation, reached the conclusion that there had been unlawful discrimination, it had power to attempt a settlement of the matters in dispute or if necessary to commence proceedings in the County Court against the relevant party in order to recover damages or secure injunctive relief on behalf of the victim.

44. Following amendments made by the Fair Employment (Northern Ireland) Act 1989 ("the 1989 Act"), applicable to the complaints brought by the McElduffs (see paragraphs 35 and 36 above), the remedy available to a person who has been a victim of discrimination contrary to the 1976 Act is to make a complaint to the Fair Employment Tribunal, which is empowered to make various orders and recommendations, including an order for financial compensation "of any amount corresponding to any damages [which] could have been ordered ... if the complaint had been a claim in tort", up to a maximum of 30,000 pounds sterling (GBP). The amended legislation enables an intending complainant to request a party who has allegedly discriminated to respond to a questionnaire on the reasons for that party's conduct. The questionnaire and any reply are admissible in proceedings before the Tribunal, which may draw adverse inferences from a party's failure to reply.

45. Section 42 of the 1976 Act provides as follows:

> "(1) This Act shall not apply to an act done for the purpose of safeguarding national security or of protecting public safety or public order.
>
> (2) A certificate signed by or on behalf of the Secretary of State and certifying that an act specified in the certificate was done for a purpose mentioned in subsection (1) shall be conclusive evidence that it was done for that purpose."

C. Other laws dealing with discrimination

46. Discrimination on the grounds of sex is prohibited in Northern Ireland by the Sex Discrimination Act 1975, which contains provisions analogous to section 42 of the 1976 Act, supplemented by the Sex Discrimination (Northern Ireland) Order 1976, section 53(1).

47. In Johnston v. Chief Constable of the Royal Ulster Constabulary, Case 222/84 [1986] ECR 1663, a reference for a preliminary ruling by the Industrial Tribunal for Northern Ireland to the Court of Justice of the European Communities in a sex discrimination case, the Court of Justice had regard to Article 6 of the Convention and held the certification provisions to infringe Community law in so far as they permitted a certificate issued by the Secretary of State to be treated as conclusive evidence and hence prevent an industrial tribunal from considering the merits of the complainant's case.

48. Domestic law was in consequence amended by the Sex Discrimination (Amendment) Order 1988 (SI 1988 no. 249) so as to disapply the certification provisions in relation to complaints of sex discrimination in employment-related matters. In the course of the

parliamentary debate which preceded enactment of the amending legislation, the Minister of State for Northern Ireland distinguished the factors considered relevant to the issue of section 42 certificates from those taken into account in the issue of similar certificates under sex discrimination legislation:

> "[In sex discrimination cases] a person's gender cannot be taken into account when a Minister certifies that something is necessary on the grounds of national security... However, ... it would not be appropriate or necessary to follow a similar approach in relation to religion and political opinion...
>
> First, unlike gender, issues of religion and political opinion can have a particularly intimate bearing on matters of national security in Northern Ireland. Accordingly, there are issues that it might be appropriate and necessary to take into account when certain matters of national security arise. This is both unfortunate and regrettable, but it is the hard reality in Northern Ireland...
>
> Secondly, [European Community law] does not cover the issues of religion and political opinion. The Government took steps to amend the sex discrimination legislation when it became clear that it was in conflict with our European obligations. There is no such conflict in the case of section 42, so it is a perfectly permissible and appropriate provision."

49. Since the entry into force of the Sex Discrimination (Amendment) Order 1988, the Industrial Tribunal is now able to determine whether a particular act was taken on grounds of national security or not, subject to appropriate safeguards of the interests of national security, public safety and public order. Following the preliminary ruling of the Court of Justice of the European Communities in the above-mentioned Johnston case, the Industrial Tribunal hearing the plaintiff's complaint took evidence from one witness in camera for reasons of national security.

50. Since 4 August 1997, racial discrimination has been made unlawful in Northern Ireland by virtue of the enactment of the Race Relations (Northern Ireland) Order 1997 (SI 1997 no. 869). The order mirrors broadly the race relations legislation which was adopted in 1976 for other parts of the United Kingdom. However section 66 of the order contains a certification provision equivalent to section 42 of the Fair Employment Act 1976. No such certification provision has been included in the Disability Discrimination Act 1995 although section 59(3) of that Act states that nothing in the Act makes unlawful any act done for the purpose of safeguarding national security.

D. The observations of *amicus curiae*

51. The Standing Advisory Commission on Human Rights ("the SACHR"), an independent statutory body established by section 20 of the Northern Ireland Constitution Act 1973 to advise the Secretary of State for Northern Ireland on the adequacy and effectiveness of the law in preventing discrimination on the grounds of religious belief and political opinion in Northern Ireland, presented to Parliament on 27 June 1997 a wide-ranging review of fair employment and other social and economic policies relevant to employment equality in Northern Ireland.

In its brief to the Court (see paragraph 6 above), the SACHR has drawn attention to the recommendation contained in its report to Parliament that there should be an effective judicial scrutiny of whether an act was in fact done for the purpose of safeguarding national security or of protecting public safety or public order. The SACHR has recommended in effect the repeal of section 42(2) and (3) of the 1976 Act so that the issue of a certificate would no longer be conclusive evidence that an act was done for the purposes of safeguarding national security or of protecting public safety or public order. According to SACHR a system could be devised which would allow the person affected by an act allegedly carried out for such purposes to be provided with the fullest documentation and information which is possible in the circumstances of the case. The extent to which this can be done could be decided at a private or *ex parte* hearing conducted by the president or vice-president of the Fair Employment Tribunal or another chairman competent to hear fair employment cases. If it is at all possible, the person affected should be entitled to challenge the documentation and information relied on by the respondent authority.

E. Other materials

52. The applicants drew attention in their memorial to the Special Immigration Appeals Commission Bill, which had recently been introduced by the Government in the wake of the Court's Chahal v. the United Kingdom judgment of 15 November 1996 (*Reports of Judgments and Decisions* 1996-V, p. 1831). The Bill would set up a tribunal, the Special Immigration Appeals Commission, which, following the Canadian model, would adjudicate on appeals against decisions of the immigration authorities as to, *inter alia*, exclusion, removal or deportation of individuals from the United Kingdom for the public good and/or for national security, etc. This bill would extend to Northern Ireland and allow for a full appeal on the merits against a decision of the Secretary of State or an immigration

officer made on the grounds of, *inter alia*, national security. Provision was made for the appointment of a special advocate to assist the commission in any proceedings from which the appellant and his lawyer are excluded on national security grounds. According to the bill the Secretary of State would be required to provide the appellant with the schedule of any evidence which he wished to adduce in the appellant's absence. The commission would be enabled to conduct proceedings in the absence of the appellant and his representative in order to ensure that information was not disclosed contrary to the public interest. A special advocate would be appointed to assist the commission in such proceedings. The commission would be required to give a summary of the evidence taken in the absence of the appellant to the extent that this would be possible without disclosing information contrary to the public interest.

The bill, as amended in the course of its passage through Parliament, has been subsequently enacted as the Special Immigration Appeals Act 1997.

PROCEEDINGS BEFORE THE COMMISSION

53. The first applicant, John Tinnelly & Sons Ltd, and the second and third applicants, Mr Patrick Tinnelly and Mr Gerard Tinnelly, applied to the Commission on 27 May 1992 (application no. 20390/92). They complained that they had been denied access to an independent and impartial tribunal, that the authorities had interfered with their right to respect for their private and family lives, and that they had no effective remedy in respect of their Convention grievances. They also maintained that they were victims of discrimination on, *inter alia*, religious grounds. They relied on Articles 6, 8, 13 and 14 of the Convention.

The remaining applicants, Mr Kevin McElduff, Mr Michael McElduff, Mr Paddy McElduff and Barry McElduff, lodged their application with the Commission on 26 August 1992 (application no. 21322/93). They raised the same complaints and relied on the same Articles of the Convention as the first three applicants.

54. The Commission joined the applications on 27 February 1995. On 20 May 1996 it declared the applications admissible. In its report of 8 April 1997 (Article 31), it expressed the unanimous opinion that there had been a violation of Article 6 of the Convention; that it was not necessary to determine whether there had been a breach of Article 8 of the Convention; that it was not necessary to determine whether there had been a violation of Article 13 taken together with Article 8 of the Convention; and that it was not necessary to determine whether there had been a violation of Article 14 taken together with Article 6 of the Convention. The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

55. The applicants in their joint memorial and at the hearing requested the Court to decide and declare that they had been victims of violations of Article 6 § 1 of the Convention taken alone or together with Article 14 of the Convention as well as of Article 8 of the Convention. They invited the Court to find a violation of Article 13 taken together with Article 8 of the Convention should it conclude that no breach of Article 6 § 1 had been established. Finally, they requested the Court to award them just satisfaction under Article 50 of the Convention.

The Government for their part requested the Court in their memorial and at the hearing to find that the facts of the case disclosed no breach of any of the Articles relied on by the applicants.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

56. The applicants contended that the issue by the Secretary of State of conclusive certificates under section 42 of the 1976 Act as amended by the 1989 Act (see paragraphs 41–45 above) blocked their access to a court or tribunal for a determination of their claims that they had been unlawfully refused public works contracts or the security clearance necessary to obtain those contracts on account of their religious beliefs or political opinions. In consequence, there had been a violation of their rights under Article 6 § 1 of the Convention, which provides as relevant:

> “1. In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing … by an independent and impartial tribunal…”

57. The Commission agreed with the applicants’ submissions whereas the Government disputed the applicability of Article 6 § 1 to the facts in issue, maintaining in the alternative that there had been no breach of that provision.

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1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission’s report is obtainable from the registry.

A. Applicability

58. The Government maintained that the proceedings instigated by the applicants under the fair employment legislation could not be said to involve the determination of "civil rights" within the meaning of Article 6 § 1 of the Convention. In the first place, there was no free-standing right in the Convention system not to be subjected to unlawful discrimination. Secondly, the applicants could not rely on any acquired contractual rights given that their bids for the contracts in issue had never been accepted. In any event, they had submitted their offers to undertake the work in full knowledge that acceptance was subject to security clearance. Before the Court the Government observed that the public-law nature of the contracts was sufficient in itself to exclude the applicability of Article 6 § 1.

The Government further reasoned that the applicants could not in fact rely on any substantive right under the fair employment legislation given that section 42(1) of the 1976 Act had been brought into play. It followed from that provision that the substantive right under the legislation could not be relied on since the acts impugned by the applicants were not acts of unlawful discrimination but acts done for the protection of, *inter alia,* national security.

59. The applicants disputed these arguments and maintained that the proceedings which had been blocked by the section 42 certificates would have involved a determination of their civil rights. They relied essentially on the reasons adduced by the Commission to ground its finding that Article 6 § 1 was applicable.

60. The Commission considered that the applicants could claim a right under the relevant domestic legislation not to be discriminated against on account of their religious beliefs or political opinions. While not taking any final view on the applicants' contention that that right was in itself a "civil right", the Commission noted that it was asserted with respect to the pursuit by the applicants of commercial activities aimed at earning profits through the establishment of contractual relations with prospective clients. Furthermore, the applicants had a sufficient pecuniary interest in the proceedings which they had sought to take under the fair employment legislation since their aim was to obtain compensation for the wrong which they alleged they had suffered. For these reasons, the Commission concluded that Article 6 § 1 was applicable.

In the Commission's view, this conclusion was not affected by the Government's reasoning on the scope of section 42. It considered that the effect of the section 42 certificates was equivalent to the assertion by the authorities of a claim of immunity in respect of acts engaging their liability. Accordingly, the real issue was not, as the Government maintained, whether the applicants had a substantive right but whether the impact of the section 42 certificates on the applicants' access to a court or tribunal satisfied the requirement of proportionality.

61. The Court notes that the 1976 Act guaranteed persons a right not to be discriminated against on grounds of religious belief or political opinion in the job market including, and of relevance to the instant case, when bidding for a public works contract or subcontract (see paragraphs 41 and 42 above).

In the opinion of the Court that clearly defined statutory right, having regard to the context in which it applied and to its pecuniary nature, can be classified as a "civil right" within the meaning of Article 6 § 1 of the Convention. It observes in this regard that in submitting their complaints in accordance with the procedures laid down in the 1976 and 1989 Acts, the applicants were seeking a ruling that they had been denied the opportunity to compete for and obtain work on the basis of their abilities and competitiveness alone and to be given security clearance for this purpose without regard to their religious beliefs or political opinions. Had it been established that the applicants were indeed the victims of unlawful discrimination, the County Court in the case of Tinnelly and the Fair Employment Tribunal in the case of the McElduffs were ultimately empowered under the 1976 and 1989 Acts to assess the extent of the applicants' loss and order financial reparation in their favour including for direct and indirect loss of profits. The fact that the contracts in issue were public procurement contracts or that the applicants' offers were never accepted cannot prevent that right from being considered a "civil right" for the purposes of Article 6 § 1.

62. The Court does not accept the Government's plea that the applicants did not enjoy a substantive right under the domestic legislation having regard to the terms of section 42(1) of the 1976 Act. Whether or not the act of refusing the contracts and the security clearance necessary for obtaining them was an act done for the purposes of protecting, *inter alia,* national security is a matter which can properly be submitted for examination by a court or tribunal. To allow section 42(1) to operate so as to oust automatically the jurisdiction of the bodies set up under the 1976 and 1989 Acts would limit considerably the scheme of protection contained in the legislation and, as noted by the Commission, render private or public bodies immune from liability in respect of complaints that they had committed acts

of unlawful discrimination (see, *mutatis mutandis,* the Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B, p. 49, § 65).

For these reasons, the Court considers that section 42(1) does not define the scope of the substantive right *in limine* but provides a respondent with a defence to a complaint of unlawful discrimination. In the instant case, that defence was asserted in the form of the certificates issued under section 42(2) of the 1976 Act after proceedings were commenced by the applicants. It is to be noted that even in the proceedings before the High Court of Justice of Northern Ireland involving Tinnelly, the legality of such a certificate was open to challenge at the very least on grounds of bad faith. For these reasons, the Court considers that the operation of section 42 of the 1976 Act is an issue which falls to be examined when assessing the lawfulness of the limitations which were imposed on the applicants' right of access to a court or tribunal (see the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172).

63. The Court concludes that Article 6 § 1 is applicable to the proceedings instigated by the applicants under the 1976 and 1989 Acts.

B. Compliance

1. *Arguments of those before the Court*

(a) The applicants

64. The applicants maintained that the Secretary of State's reliance on the section 42 certificates amounted to a disproportionate interference with their right to an independent judicial determination of whether they had been refused the contracts in issue on account of their religious beliefs or political opinions or, as the authorities contended, for reasons exclusively motivated by national security concerns. They stressed that the conclusive nature of the section 42 certificate prevented Mr Justice McCollum from ascertaining whether there existed any factual basis for the alleged risk or threat which the Tinnelly firm and its workforce represented for national security. In the substantive review proceedings, Mr Justice McCollum proceeded on the understanding that the assessment of any danger to national security was exclusively a matter for the Secretary of State, and that the latter had properly exercised his judgment to approve NIE's decision to refuse Tinnelly security clearance on the basis of the security reports which NIE had submitted to him (see paragraph 30 above). The content of those reports was never subjected to any judicial scrutiny since Mr Justice McCollum, like Tinnelly and the FEA, never had sight of the categories of information whose disclosure had been withheld by Mr Justice Nicholson.

65. The applicants accepted that the protection of national security was a legitimate aim which could be invoked in order to justify limitations being placed on the right of access to a court. However, in the instant case the conclusive nature of the section 42 certificates impaired the very essence of the applicants' rights. They contended that the procedure used for testing the merits of a decision based on national security grounds under the Sex Discrimination (Amendment) Order 1988 (see paragraph 49 above) demonstrated that it was possible to reconcile the need to protect national security imperatives and the guarantee of an effective access to a court or tribunal. The feasibility of so doing was also confirmed by the procedures proposed by the Government in the Special Immigration Appeals Commission Bill to allow the merits of a deportation decision based on national security considerations to be reviewed (see paragraph 52 above).

(b) The Government

66. The Government pleaded that there was a reasonable degree of proportionality between the aim pursued by the Secretary of State's decisions to issue the certificates and the restrictions which resulted for the applicants' right of access to a court. In the Government's submission, it could not be said that the essence of that right had been impaired. The crux of Tinnelly's complaint was that the firm had been refused the Ballylumford contract because of the religious beliefs or political opinions of its employees. However, Mr Justice McCollum was satisfied that NIE's decision not to award Tinnelly the contract was an act done for the protection of national security. In reaching that conclusion, Mr Justice McCollum heard the evidence of NIE officials and of the civil servant who had advised the Secretary of State that NIE's request for a section 42 certificate had been substantiated. The Government maintained that Mr Justice Nicholson would have ordered the production of any materials which supported the applicants' allegations; likewise, Mr Justice McCollum would have quashed the impugned certificate had he considered that there was evidence to show that NIE's decision had not been motivated by national security concerns.

67. The Government underlined that the limitations on the judicial review proceedings had to be seen in the context of the security situation in Northern Ireland and the need for security-vetting procedures to be carried out on potential contractors before public works contracts involving access to security-sensitive installations could be awarded. Having regard to the need to safeguard the confidentiality of matters such as intelligence sources, the extent of the applicants' access to a court or tribunal was as effective as could be in the circumstances. Furthermore, the limitations resulting from the issue of the section 42 certificates were compensated by the existence of mechanisms such as the Independent Commission for Police Complaints

and the statutory controls on the activities of the security services, which secured the accountability of the police and the security services in the performance of their intelligence-gathering functions. The Government submitted that such safeguards had to be taken into consideration when assessing the proportionality of the limitations imposed on the applicants' right of access to a court or tribunal.

68. Furthermore, the security context which justified recourse to the issue of the section 42 certificates also constituted a telling argument against the transposition of the procedure introduced under the Sex Discrimination (Amendment) Order 1988 which the applicants had canvassed in support of their pleadings on the issue of proportionality. The Government stressed that the national security concerns which may be pleaded in defence of an alleged act of sex discrimination were of a fundamentally different nature since, and unlike gender, the issues of religious belief and political opinion were intertwined with the intercommunal violence and the terrorist threat to national security, public safety and public order in Northern Ireland. The assessment of whether or not an act was done for one of the purposes set out in section 42 of the relevant legislation necessitated the collection of sensitive security data which, by their nature, should not be disclosed to a party or scrutinised by a tribunal with a jurisdiction relating to the right not to be discriminated against on grounds of religious belief or political opinion. Nor would it be appropriate to introduce a procedure modelled on the Canadian Immigration Act 1976 which had been averted to by the Court in its Chahal v. the United Kingdom judgment of 15 November 1996 (*Reports of Judgments and Decisions* 1996-V, p. 1866, §§ 131 and 144). The Government submitted that in Northern Ireland the standing of the judiciary is a matter of critical importance and it is essential that public confidence in the administration of justice be maintained and that the independence of the judiciary be upheld in dealing with secret data on terrorist activity.

69. For the above reasons, the Government requested the Court to find that there had been no violation of Article 6 § 1 in the circumstances of the case.

(c) The Commission

70. The Commission accepted the applicants' case that there had been a violation of Article 6 § 1. It considered that there had been a very limited review of the factual basis of the decision to issue the section 42 certificate with respect to Tinnelly's application to the FEA. The narrowness of the review of the grounds for issuing the certificate was compounded by the cumbersome and dissipated procedures which Tinnelly had to invoke in order to produce that limited result. The Commission agreed with the applicants' contention that alternative procedures could have been envisaged which would have allowed the Secretary of State's decision to be

subjected to independent judicial scrutiny and at the same time ensured protection for the imperatives of national security. In this respect, the Government had not provided any convincing reasons why a procedure such as that instituted pursuant to the Sex Discrimination (Amendment) Order 1988 could not be transposed to the type of issue at stake in the instant case.

71. For the above reasons, the Commission concluded that the use of the section 42 certificates amounted to a disproportionate restriction on the applicants' right of effective access to a court or tribunal.

2. The Court's assessment

72. The Court recalls that Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect.

However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, the Stubbings and Others v. the United Kingdom judgment of 22 October 1996, *Reports* 1996-IV, p. 1502, § 50).

73. Against the background of this statement of principles of relevance to its consideration of the instant case, the Court notes that at no stage of the proceedings was there any independent scrutiny by the fact-finding bodies set up under the 1976 and 1989 Acts of the facts which led the Secretary of State to issue the conclusive certificates under section 42 of the 1976 Act. The primary fact-finding body in the Tinnelly case, the Fair Employment Agency, could not pursue its investigation into Tinnelly's complaint with a view to determining whether sectarian pressure had been brought to bear on NIE to reject Tinnelly's offer in favour of McWilliam's (see paragraph 17 above); nor was it able to determine whether there existed a basis in fact for refusing Tinnelly security clearance. As to the latter issue, that Agency was obliged, in view of the issue of the section 42 certificate, to have the proceedings moved to the High Court of Northern Ireland in order to seek judicial review of the Secretary of State's decision to exercise his discretion under section 42(2) of the 1976 Act.

As to the McElduffs, the Fair Employment Tribunal was never presented with any evidence as to why the complainants were considered a security risk by the Department of the Environment and the weight of the McElduffs' assertion that they were victims of mistaken identity could not be verified by the Tribunal since its further consideration of the case was brought to a halt by the issue of a section 42 certificate.

74. The Court would also observe that the judicial review proceedings in the High Court of Northern Ireland in the Tinnelly case never led to a full scrutiny of the factual basis of the Secretary of State's certificate affirming that NIE's decision to refuse Tinnelly the Ballylumford contract was an act done for the safeguarding of national security or the protection of public safety or public order. Mr Justice McCollum felt himself unable to go behind the terms of the section 42 certificate in order to verify whether grounds in fact existed for considering Tinnelly a security risk or whether NIE's decision was in any way influenced by its concern to appease the unions at Ballylumford. While it is true that the judge heard the evidence of senior officials of NIE and of the civil servant who advised the Secretary of State that the issue of a section 42 certificate was justified, this testimony went to the assessment of whether or not the certificate had been procured or issued in bad faith or in breach of proper procedures (see paragraph 30 above).

Having accepted that the assessment of the security risk represented by Tinnelly was exclusively a matter for the Secretary of State (see paragraph 30 above), Mr Justice McCollum had to decline jurisdiction to assess whether there was indeed any sound factual basis for withholding the contract on valid security grounds and which would have allayed at the same time the concerns which he had about certain features of NIE's application for the section 42 certificate (see paragraph 30 above). His hands were tied by the conclusive nature of the certificate and the Secretary of State's invocation of national security considerations.

75. It must also be observed that any substantive review of the grounds motivating the issue of the certificate would have been impaired in any event on account of the fact that Mr Justice McCollum did not have sight of all the materials on which the Secretary of State had based his decision. Any appraisal of whether the Secretary of State had based himself on relevant considerations or had taken into account irrelevant considerations would inevitably have been restricted since the evidence before him was circumscribed by the terms of Mr Justice Nicholson's disclosure order withholding production of a number of documents in NIE's possession.

76. The Court is naturally mindful of the security considerations at stake in the instant case and of the need for the authorities to display the utmost vigilance in the award of contracts for work involving access to vital power supplies or public buildings situated in town centres in Northern Ireland.

Indeed, the applicants have not disputed the justification for the system of security vetting of potential contractors and the collection of data for that purpose having regard to the security situation in the province; nor do they contest that the protection of national security is a legitimate aim which may entail limitations on the right of access to a court, including for the purposes of ensuring the confidentiality of security-vetting data.

On that understanding, and having regard to the above-mentioned statement of principles (see paragraph 72 above), the Court will assess whether there existed a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicants' right of access to a court or tribunal.

77. As noted above, the conclusive nature of the section 42 certificates had the effect of preventing a judicial determination of the merits of the applicants' complaints that they were victims of unlawful discrimination. The Court would observe that such a complaint can properly be submitted for an independent judicial determination even if national security considerations are present and constitute a highly material aspect of the case. The right guaranteed to an applicant under Article 6 § 1 of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive (see, *mutatis mutandis,* the above-mentioned Chahal judgment, p. 1866, § 131).

It is to be stressed in this respect that the requirements of an "effective remedy" for the purposes of Article 13 of the Convention are less strict than those of Article 6 § 1 (see, *mutatis mutandis*, the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, pp. 31–32, §§ 83–84; and the British-American Tobacco Company Ltd v. the Netherlands judgment of 20 November 1995, Series A no. 331, p. 29, § 89). For this reason, the Government's assertion that the access enjoyed by the applicants was as effective as could be in the circumstances cannot be sustained (see paragraph 67 above). Furthermore, the mechanisms which they rely on to illustrate that procedures exist for securing the control and accountability of the intelligence agencies involved in the making of negative-vetting decisions such as those taken against Tinnelly and the McElduffs (see paragraph 67 above) would not have resulted in any independent judicial scrutiny of the facts grounding those decisions. Such mechanisms cannot be considered therefore to compensate for the severity of the limitations which the section 42 certificates imposed on the applicants' right of access to a court and cannot be weighed in the balance when assessing the proportionality of those limitations for the purposes of Article 6 § 1 of the Convention.

78. The Court notes that in other contexts it has been found possible to modify judicial procedures in such a way as to safeguard national security concerns about the nature and sources of intelligence information and yet accord the individual a substantial degree of procedural justice (see paragraphs 49, 51 and 52 above). It is not persuaded by the Government's claim that the adjustment of procedures under the fair employment legislation or the introduction of other special judicial procedures to accommodate both of these interests need in any way undermine the independence of the judiciary in Northern Ireland or impair public confidence in the administration of justice in the province (see paragraph 68 above). The introduction of a procedure, regardless of the framework used, which would allow an adjudicator or tribunal fully satisfying the Article 6 § 1 requirements of independence and impartiality to examine in complete cognisance of all relevant evidence, documentary or other, the merits of the submissions of both sides, may indeed serve to enhance public confidence. The Court observes in addition that Mr Justice McCollum was unable under the present arrangements to dispel his own doubts about certain disturbing features of the Tinnelly case (see paragraph 30 above) since he, like Tinnelly and the Fair Employment Agency, was precluded from having cognisance of all relevant material in the possession of NIE, the respondent in the proceedings instituted by Tinnelly under the 1976 Act. This situation cannot be said to be conducive to public confidence in the administration of justice.

79. For the above reasons, the Court concludes that the issue by the Secretary of State of section 42 certificates constituted a disproportionate restriction on the applicants' right of access to a court or tribunal. It finds that there has been a breach of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION AND OF ARTICLE 8 TAKEN ALONE OR IN CONJUNCTION WITH ARTICLE 13 OF THE CONVENTION

80. In the proceedings before the Commission the applicants submitted that the facts of the case also gave rise to violations of the above-mentioned Articles.

81. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

82. Article 8 provides:

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

83. Article 13 provides:

"Everyone whose rights and freedoms as set forth in [the] 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."

84. At the hearing the applicants stated that they did not wish to pursue these complaints should the Court find a violation of Article 6 § 1 of the Convention.

85. The Government contended in their memorial that there had been no violation of these Articles. However, they did not address the substance of the applicants' complaints in their submissions before the Court.

86. The Commission for its part found that it was not necessary to reach any separate conclusion on the complaints in view of its finding of a violation of Article 6 § 1 of the Convention.

87. The Court agrees with the Commission's conclusion and considers that it is not necessary to determine whether there has been a violation of the Articles invoked by the applicants having regard to its conclusion that the facts of the case disclose a breach of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

88. Article 50 of the Convention provides as follows:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary and non-pecuniary damage

89. The applicants claimed compensation in respect of pecuniary (Tinnelly and the McElduffs) and non-pecuniary damage (the McElduffs alone) which they alleged resulted from their loss of opportunity to secure a

determination of their claims that they had been victims of unlawful discrimination and to clear their business names and reputations. Relying on the estimates of loss drawn up by a firm of accountants, they quantified their claims in terms of the profits they lost through being refused the contracts in issue, as well as the business opportunities which they lost through being tarnished as security risks. According to the applicants, Tinnelly's loss was estimated at GBP 777,086 inclusive of interest, and the McElduffs' loss, inclusive of interest, at GBP 119,584 which amount also comprised GBP 30,000 in respect of non-pecuniary damage (injury to feelings).

90. The applicants submitted that they would be prepared to abandon their claims for just satisfaction if the respondent Government undertook, in the light of a finding of a violation of Article 6 § 1 of the Convention, to withdraw the section 42 certificates and to support the continuation of the domestic proceedings which they had attempted to bring. In the event of such an assurance being given, they reserved their right to seek compensation under the 1976 Act.

91. The Government disputed the sums claimed in respect of pecuniary and non-pecuniary damage, contending that the sums were speculative and that the applicants had not established any causal connection between the breach alleged and the claimed loss. In their view, a finding of a violation of Article 6 § 1 of the Convention would in itself constitute sufficient just satisfaction. In the alternative, they submitted that if the Court were minded to make an award of compensation the question should be reserved to allow a more detailed inquiry to be conducted into the merits of the applicants' claims.

92. The Delegate of the Commission did not comment on the applicants' claims.

93. While it cannot speculate as to what would have been the outcome of the proceedings brought by Tinnelly and the McElduffs under the 1976 and 1989 Acts had the section 42 certificates not been issued, the Court nevertheless considers that the applicants were denied the opportunity to obtain a ruling on the merits of their respective claims that they were victims of unlawful discrimination. Deciding on an equitable basis, it awards Tinnelly the sum of GBP 15,000 and the McElduffs the sum of GBP 10,000.

B. Costs and expenses

94. The applicants did not submit any claims in respect of legal costs and expenses. They claimed the sum of GBP 1,200.14 in respect of the expenses incurred by Mr Patrick Tinnelly and Mr Gerard Tinnelly in attending the hearing.

95. The Government did not comment on the expenses claimed in respect of the attendance of Mr Patrick Tinnelly and Mr Gerard Tinnelly at the hearing.

96. The Delegate of the Commission did not comment on the amount claimed by the applicants.

97. The Court considers that the sum claimed by Mr Patrick Tinnelly and Mr Gerard Tinnelly in respect of their attendance at the hearing should be awarded in full, namely GBP 1,200.14.

C Default interest

98. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that Article 6 § 1 of the Convention is applicable in the instant case and has been violated;

2. *Holds* that it is not necessary to consider the applicants' complaints
(a) under Article 6 § 1 of the Convention in conjunction with Article 14 of the Convention;
(b) under Article 8 of the Convention either alone or in conjunction with Article 13 of the Convention;

3. *Holds*
(a) that the respondent State is to pay, within three months, Tinnelly 15,000 (fifteen thousand) pounds sterling and the McElduffs 10,000 (ten thousand) pounds sterling by way of compensation for loss of opportunity;
(b) that the respondent State is to pay Mr Patrick Tinnelly and Mr Gerard Tinnelly, within three months, 1,200 (one thousand two hundred) pounds sterling and 14 (fourteen) pence in respect of expenses;
(c) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 10 July 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the concurring opinion of Mr De Meyer is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

CONCURRING OPINION OF JUDGE DE MEYER

1. The right not to be discriminated against on grounds of religious belief or political opinion is in itself a civil right.

2. In the present case the very essence of the applicants' right of access to a court was impaired. The respondent State could not rely on any "margin of appreciation" to deny them that right.