CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF DEVLIN v. THE UNITED KINGDOM

(Application no. 29545/95)

JUDGMENT

STRASBOURG

30 October 2001

FINAL

30/01/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Devlin v. the United Kingdom,

The European Court of Human Rights (Third Section) sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Sir Nicolas BRATZA,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 11 April and 9 October 2001,

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

PROCEDURE

1. The case originated in an application (no. 29545/95) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Mr Francis William Devlin ("the applicant"), on 30 November 1995.

2. The applicant was represented before the Court by Mr E. O'Neill, solicitor to the Equality Commission, Belfast. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley.

3. The applicant complained of the circumstances in which his application for a post in the Northern Ireland Civil Service was rejected and his complaints of discrimination on grounds of religion blocked by a certificate issued under section 42 of the Fair Employment (Northern Ireland) Act 1976. He invokes principally Article 6 of the Convention, as well as Articles 8, 9, 10, 13 and 14 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 11 April 2001, the Chamber declared the application admissible.

7. The applicant and the Government each filed observations. The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. In June 1991, the applicant applied for a position as an administrative assistant with the Northern Ireland Civil Service, the lowest grade in the non-industrial civil service. He passed a written test but was not invited for interview at that stage. In 1992, the applicant was invited for interview, and was informed on 15 September 1992 that he was being recommended for appointment "subject to the satisfactory outcome of various pre-appointment enquiries". He was informed on 21 October 1992 that he had been unsuccessful. No reasons were given.

9. The applicant believed that the decision not to appoint him must have been taken on grounds of his religious beliefs – he is a Catholic and a member of an association known as the Irish National Foresters – and not for any legitimate security ground. A number of his relatives are involved in public service in various capacities, and neither he nor any member of his family had ever been involved in any form of criminal activity. He had some unpleasant encounters with the police, but there was no question of proceedings against him. On one occasion, the applicant lodged a complaint about his treatment by the police, which was resolved when the applicant was informed that the officers involved would be "spoken to". According to the applicant, a further incident with the police occurred about a week after he was informed that his job application had been unsuccessful: a police officer at a vehicle checkpoint in Cookstown referred to the unsuccessful job application.

10. The applicant made an application, through the Fair Employment Commission, to the Fair Employment Tribunal, alleging discrimination contrary to the Fair Employment (Northern Ireland) Act 1976 ("the 1976 Act"). The Northern Ireland Civil Service affirmed that the refusal had been made on security grounds, and claimed that the 1976 Act did not therefore apply.

11. On 21 September 1993, the Secretary of State for Northern Ireland issued a certificate under section 42 (2) of the 1976 Act, certifying that the refusal of employment to the applicant was an act "done for the purpose of safeguarding national security and of protecting public safety".

12. The applicant attempted to challenge the Secretary of State's decision to issue the section 42 certificate by way of an application for judicial review in the High Court. Leave to apply for judicial review was granted on 4 January 1994.

13. In the affidavits sworn on behalf of the Secretary of State, it was stated that, in accordance with the usual procedure, the security questionnaire completed by the applicant had been forwarded to the Royal Ulster Constabulary ("the RUC"), which had provided security information relating to the applicant. This information was such that the assessing officer in the Department's security branch had recommended that the applicant was unsuitable for employment in the Northern Ireland Civil Service.

14. After an unsuccessful application for discovery, the application for judicial review was dismissed by Mr Justice Kerr in the High Court on 6 September 1995. After referring, *inter alia*, to the judgment of Mr Justice McCollum of 3 December 1991 in the case of Tinnelly & Sons Limited and Others and McElduff and Others (judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1633), he considered that:

> "the effect of section 42 (1) as enacted is to remove entirely from the sphere of Fair Employment legislation acts done for the purpose of safeguarding national security and protecting public order or safety. ... [There] may be occasions when the Secretary of State will choose not to invoke his powers under section 42 (2) and the Tribunal may investigate whether the act complained of was done for all or any of the purposes specified under Section 42 (1). Where a certificate has been validly issued under Section 42 (2), however, I do not believe that the Tribunal retains any role in the hearing or adjudication of the complaint."

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. By virtue of the Fair Employment (Northern Ireland) Act 1976 ("the 1976 Act"), it is unlawful for an employer to discriminate against a person on grounds of religious belief or political opinion in relation to employment in Northern Ireland, *inter alia*, by dismissing him or subjecting him to any other detriment.

16. By virtue of section 24 of the 1976 Act (as amended by the Fair Employment (Northern Ireland) Act 1989), a complaint of unlawful discrimination may be presented to the Fair Employment Tribunal, which is established by statute to investigate complaints of unlawful discrimination on grounds of religious belief or political opinion.

17. Section 42 of the 1976 Act (as amended) provides as follows:

> "(1) The Fair Employment (Northern Ireland) Acts shall not apply to an act done for the purpose of safeguarding national security or 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 the purpose mentioned in sub-section (1) shall be conclusive evidence that it was done for that purpose.

(3) A document purporting to be a document such as is mentioned in sub-section (2) shall be received in evidence and, unless the contrary is proved, shall be deemed to be such a certificate."

18. The Northern Ireland Constitution Act 1973 (as amended by the 1976 Act) provides as follows in section 19:

"(1) Subject to sub-section (4) below it shall be unlawful for a Minister of the Crown ... and any authority or body listed ... in ... Schedule 1 to the Parliamentary Commissioner Act (Northern Ireland) 1969 ... to discriminate, or aid, induce or incite another to discriminate, in the discharge of functions relating to Northern Ireland against any person or class of persons on the grounds of religious belief or political opinion. ...

(4) This section does not apply to any act or omission which is unlawful by virtue of the Fair Employment (Northern Ireland) Act 1976 or would be unlawful but for some exception made by virtue of Part V of that Act."

19. Schedule 1 to the Parliamentary Commissioner Act (Northern Ireland) 1969 lists the departments and authorities subject to investigation by the Parliamentary Commissioner. The list includes the Northern Ireland Civil Service Commission and all Government Departments, including the Department of Finance and Personnel. However, section 42 of the 1976 Act falls within Part V of that Act. Accordingly, where a section 42 certificate has been issued (claiming an act was done for the purpose of safeguarding national security or protecting public safety or public order), section 19(1) of the Northern Ireland Constitution Act 1973 (as amended) has no effect.

THE LAW

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

20. The applicant complained that he had been deprived of the right to have his claim under the Fair Employment Act determined by a court, invoking Article 6 § 1 of the Convention which provides as relevant:

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

A. Applicability of Article 6 § 1 of the Convention

1. The parties' submissions

21. The applicant submitted that the present case concerned the right not to be discriminated against on grounds of religious belief or political opinion in the job market, which right was as such a "civil" right falling within the ambit of Article 6 § 1 of the Convention. He was not claiming a right of access to the civil service but a right of equal treatment. There was a civil right at stake in the proceedings brought by him in the Fair Employment Tribunal and Article 6 was applicable.

22. The Government submitted that the applicant's complaints fell outside the scope of Article 6 § 1 of the Convention as they arose out of his unsuccessful application for a civil service post and therefore did not concern the determination of a "civil" right. The Government quoted the Court's jurisprudence in this area which recognised the special status accorded in Contracting States to public servants and, in particular, their right to maintain the procedures necessary to ensure the integrity of those recruited into the civil service (see, amongst others, the Glasenapp v. Germany judgment of 28 August 1986, Series A no. 104; the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, and the Commission's decision in Quinn v. the United Kingdom, no. 33694/96, 23 October 1997, unpublished). In the more recent case of *Pellegrin v. France* ([GC] no. 28541/95, ECHR 1999-II), disputes concerning posts involving the exercise of state authority were still excluded, and this applicant would have been working in a position of trust in a Department which wielded a portion of the State's sovereign power. In their view, Tinnelly case (Tinnelly & Sons Limited and Others, and McElduff and Others v. the United Kingdom judgment of 10 July 1998, *Reports* 1998-IV, p. 1633) was not relevant to the present case which concerned, in their view, a dispute about recruitment to the civil service which fell outside the scope of the Convention.

2. The Court's assessment

23. The Court must determine whether Article 6 § 1 of the Convention is applicable to the present case, in particular whether the claim submitted by the applicant before the Fair Employment Tribunal concerned the determination of a civil right. It recalls that in the Tinnelly case (cited above, pp. 1656-1657, §§ 61-63) the Court considered that the 1976 Act, which was also invoked by the applicant in this case, guaranteed persons a right not to be discriminated against on grounds of religious belief or political opinion in the job market. That clearly defined right, having regard to the context in which it operated and to its pecuniary nature, was

accordingly classified by the Court as a "civil right" within the meaning of Article 6 § 1 of the Convention.

24. The Government have argued that this case should be distinguished from that of Tinnelly as it concerned, not disputes about works contracts, but access to the civil service to which special considerations have always attached. They have relied on previous precedents in not dissimilar cases, including the case of Quinn v. the United Kingdom decided by the Commission (no. 33694/96, decision of 23 October 1997). That case concerned the dismissal of an individual working in the Northern Ireland Passport Office and the subsequent issue of a section 42 certificate, denying him access to the Fair Employment Tribunal. The Commission held that Mr Quinn's application was inadmissible, following the Court's decision in Neigel v. France (judgment of 17 March 1997, *Reports* 1997-II) that the dispute between the applicant, a civil servant, and his State employer did not determine his "civil" rights within the meaning of Article 6.

25. However, the Court must now take into account its subsequent judgment in *Pellegrin v. France* (cited above), which reviewed the case-law concerning civil servants and sought to resolve the uncertainties which had arisen. That case laid down a new test to be applied in order to determine the applicability of Article 6 § 1 to public servants. Under this test the only disputes *excluded from* Article 6 § 1 are those which are raised by public servants "whose duties typify the specific activities of the public service in so far as the latter is acting as the depository of public authority responsible for protecting the general interests of the State or other public authorities" (see § 66). The Court referred to individuals in the public-service sector who "wield a portion of the State's sovereign power," as being those whose disputes are likely to fall outside the ambit of Article 6 § 1.

26. The Court is of the view that the post of administrative assistant (which is described as the lowest grade in the non-industrial Civil Service) is not a post where it can be said the incumbent was wielding "a portion of the State's sovereign power". Even if such a postholder were part of a Department which did have such influence and could, potentially, apply for higher post, the Court does not find that an administrative assistant of this kind falls within the category of public servant described in the Pellegrin case. There is no reason to exclude the applicant's dispute from the ambit of Article 6 and the applicant can therefore claim, as in the Tinnelly case, that he had a "civil right" under the 1976 Act not to be discriminated against in the employment sphere. Accordingly, Article 6 is applicable to the proceedings alleging discrimination which he brought under that Act.

B. Compliance with Article 6 of the Convention

1. The parties' submissions

27. The applicant submitted that he had been denied access to court in the determination of his civil right, relying on the Tinnelly judgment (cited above) in which the Court found a breach of Article 6 due to the effect of a section 42 certificate in blocking proceedings in the Fair Employment Tribunal. In his view, section 42 of the 1976 Act did not operate to define the scope of the substantive right but provided the employer with a defence to a complaint of unlawful discrimination. The section 42 certificate, due to its conclusive nature, destroyed the very substance of the right of access to court. Further, the applicant argued that section 42, even taking account of the aim of protecting national security, represented a disproportionate interference with his right of access to a court.

28. The Government denied that the applicant had been denied access to court. They contended that a certificate issued under section 42 of the 1976 Act negatived the existence of any civil right in cases of national security, public safety or public order. Even assuming therefore that Article 6 was applicable, the Government submitted that the Secretary of State's certificate under section 42 pursued a legitimate aim by proportionate means. Had the applicant been appointed to the post he would have had free access to buildings of the government department and to papers of a sensitive character. In the area of national security, they argued that a wide margin of appreciation should apply.

2. The Court's assessment

29. 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. The right is not however absolute. It may be subject to legitimate restrictions, for example, statutory limitation periods, security for costs orders, regulations concerning minors and persons of unsound mind (see the Stubbings and Others v. the United Kingdom judgment of 22 October 1996, *Reports* 1996-IV, pp. 1502-3, §§ 51-52; the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, pp. 80-81, §§ 62-67; the Golder judgment, cited above, p. 19, § 39). Where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and in particular whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). If the restriction is compatible with these principles, no violation of Article 6 will arise.

30. In the present case, the Court notes that at no stage of the proceedings brought by the applicant was there any independent scrutiny of 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 certificate under section 42 of the 1976 Act. No evidence as to why the applicant was considered a security risk was ever presented to the Fair Employment Tribunal, nor was there any scrutiny of the factual basis of the Secretary of State's decision in the proceedings for judicial review brought in the High Court. In this regard, the present application is identical to the Tinnelly case (cited above, §§ 72-79), where the Court considered that the conclusive nature of the section 42 certificate had the effect of preventing a judicial determination on the merits of the applicants' complaints, and that they were victims of unlawful discrimination.

31. The Government have sought to justify any restriction on access to court by security considerations. As in the Tinnelly case therefore, it is necessary to consider whether there is 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 applicant's right of access to a court or tribunal. The Court observes however that the Government have failed to identify any new elements which could lead it to depart from its conclusion in the Tinnelly case that the severity of the restriction imposed by the conclusive section 42 certificate, which was tantamount to removal of the courts' jurisdiction by executive *ipse dixit*, was not mitigated by other available mechanisms of complaints, and that the situation in Northern Ireland did not exclude the introduction of special judicial procedures more apt to provide the individual with procedural justice. It noted that "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" (§ 78).

32. For these reasons, the Court finds in the present case that the issue by the Secretary of State of a section 42 certificate constituted a disproportionate restriction on the applicant's right of access to a court. There has, accordingly, been a breach of Article 6 § 1 of the Convention.

II. THE APPLICANT'S REMAINING COMPLAINTS

33. The applicant has also invoked Articles 8 (right to respect for private and family life), 9 (right to freedom of religion), 10 (freedom of expression), 13 (right to an effective remedy for a Convention breach) and 14 (prohibition of discrimination), claiming that breaches of these

provisions are disclosed by the circumstances set out above (paragraphs 8-14 above).

34. The Court notes that it has found a breach of Article 6 arising from the issue of the section 42 certificate which prevented the applicant's claims of unlawful discrimination being investigated by a body satisfying that provision's requirements. In the circumstances of this case and on the basis of the material before it, it does not consider it necessary to examine these complaints further.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

36. The applicant claimed that he had been denied a fair hearing of his complaint of unlawful discrimination and he was unable therefore to discover why he was unsuitable for appointment or correct any misapprehensions. He has suffered feelings of frustration, uncertainty and anxiety, with strains on his family life because of his failure to obtain employment since the denial of the appointment in 1992. He requested that compensation be awarded to reflect the damage and hurt caused to him.

37. The Government considered that the applicant had not substantiated any claim for either pecuniary or non-pecuniary loss and that any judgment in itself would constitute just satisfaction to the applicant.

38. The Court notes that it is not possible to speculate as to what would have been the outcome of the proceedings brought by the applicant had the section 42 certificate not been issued. Nonetheless, the applicant was denied the opportunity to obtain a ruling on the merits of his claims that he was a victim of unlawful discrimination. In addition, he suffered non-pecuniary damage through feelings of frustration and injustice. The Court thus concludes that the applicant sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention.

39. Deciding on an equitable basis, it awards the applicant the sum 10,000 pounds sterling (GBP).

B. Costs and expenses

40. The applicant claimed a total of GBP 28,170.63, inclusive of value added tax (VAT), for legal costs and expenses, which included GBP 8078.13 for the work of junior counsel and GBP 20,092.50 for senior counsel. No claims were made for the work done by the legal staff of the Equality Commission on the applicant's behalf.

41. The Government submitted that the sums claimed were grossly excessive, bearing in mind in particular that the case had not gone beyond the written stage. They disputed that it was necessary for both senior and junior counsel to have been engaged and considered that the claims did not sufficiently specify the hours or rates charged.

42. The Court recalls that this case raised issues which were, to a large extent, identical to those considered in the Tinnelly case (cited above). Nor was this a case in which the Court requested assistance from the parties at any oral hearing or in which lengthy written submissions were submitted. Making an assessment on an equitable basis, it awards the sum of GBP 12,000, inclusive of any VAT which may be chargeable.

C. Default interest

43. 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 there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* that it is not necessary to examine further the complaints made under Articles 8, 9, 10, 13 or 14 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

(i) 10,000 (ten thousand) pounds sterling in respect of non-pecuniary damage;

(ii) 12,000 (twelve thousand) pounds sterling in respect of costs and expenses, inclusive of any VAT which may be chargeable;

(b) 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 applicant's claims for just satisfaction.

Done in English, and notified in writing on 30 October 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President