

# THE SUPREME COURT

No. 354 2007

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 4 OF  
THE TRIBUNALS OF INQUIRY (EVIDENCE) (AMENDMENT) ACT, 1997  
AS AMENDED BY SECTION 3 OF THE TRIBUNALS OF INQUIRY  
(EVIDENCE) (AMENDMENT) ACT, 2004

*Murray C.J.*

*Geoghegan J.*

*Fennelly J.*

*Macken J.*

*Finnegan J.*

BETWEEN

HIS HONOUR JUDGE ALAN P. MAHON,  
HER HONOUR JUDGE MARY FAHERTY and  
HIS HONOUR JUDGE GERALD B. KEYES,  
MEMBERS OF THE TRIBUNAL OF INQUIRY INTO  
CERTAIN PLANNING MATTERS AND PAYMENTS

**Plaintiffs/Respondents**

-and-

COLM KEENA and  
GERALDINE KENNEDY

**Defendants/Appellants**

**JUDGMENT of Mr. Justice Fennelly delivered the 31<sup>st</sup> day of July, 2009.**

1. Where, as in this case, fundamental rights are invoked as a restraint on the exercise of statutory powers, the courts are increasingly called upon to strike a balance. In the present case, the Planning Tribunal wants to investigate a “leak” of confidential information to the Irish Times and is met with a countervailing claim based on confidentiality of journalists’ sources.
2. The appeal is taken against an Order made by the High Court pursuant to section 4 of the Tribunal of Inquiries (Evidence) (Amendment) Act, 1997 directing a journalist and the editor of that newspaper to answer questions posed by the Tribunal intended to unveil the source of documents published in the Irish Times.
3. The plaintiffs are the Members of the Tribunal of Inquiry into Certain Planning Matters and Payments (hereinafter referred to as “the Tribunal”) established pursuant to Resolution of Dáil Éireann passed on 7th October, 1997 and by a number of instruments of the Minister for the Environment and Local Government from 1997 to 2004. I will refer to them as “the Tribunal.”
4. The first-named appellant has been a journalist for over twenty years. He is the Public Affairs Correspondent of the *Irish Times*. I will refer to him as Mr Keena. The second-named appellant is the editor of *The Irish Times*. I will refer to her as Ms Kennedy.
5. On 29<sup>th</sup> June, 2006, as part of its private investigations the Tribunal wrote to Mr. David McKenna seeking information in relation to certain payments said to have been made to Mr. Bertie Ahern, T.D. The letter asked Mr McKenna for a detailed narrative statement setting out the circumstances in which he had made any such payment. The letter specified a number of the matters to be included in the statement.
6. The envelope which contained this letter was marked “strictly private and confidential – to be opened by addressee only.” The final paragraph of the letter was as follows:

*“This inquiry is being made of you as part of the Tribunal’s confidential inquiry in private. The fact of this letter or its content should not be disclosed to any third party save your legal advisor, if you should choose to seek legal advice in respect of this request.”*

The Tribunal regarded this phase of its investigations as private and confidential. It claimed the power to impose an obligation of confidentiality on the recipient of the letter and did not consent to its publication.

7. On 19<sup>th</sup> September 2006, Mr. Keena received anonymously an unsolicited copy of the letter from the Tribunal to Mr McKenna. It contained information relating to payments alleged to have been made to An Taoiseach, Bertie Ahern T.D., in 1993 when he was the Minister for Finance.

On 21<sup>st</sup> September, 2006 the *Irish Times* published on its front page, under the name of Mr Keena, a report under the headline “Tribunal examines payments to Taoiseach.” It read as follows:

*“A wealthy businessman, David McKenna, has been contacted by the Mahon Tribunal about payments to the Taoiseach, Bertie Ahern.*

*The Tribunal is investigating a number of payments to Mr. Ahern in or around December, 1993 including cash payments, the Irish Times has learned.*

*Mr. McKenna is one of three or four persons contacted by the Tribunal concerning payments to Mr. Ahern totalling between €50,000 and €100,000. The Tribunal has been told that the money was used to pay legal bills incurred by Mr. Ahern around this time. In a letter to Mr. McKenna in June of this year and seen by the Irish Times he was told the ‘Tribunal has been informed that you made payment of money to Mr Bertie Ahern, TD, or for his benefit, in or about December 1993. The Tribunal seeks your assistance in reconciling certain receipts of funds by Mr Ahern during this period.’*

*The Tribunal requested a detailed statement from Mr McKenna. He was asked to name the person who requested the payment and his understanding as to*

*why it was required. He was also asked who the payment was given to and whether it was in cash or another form.*

*It is understood a solicitor who was an associate and personal friend of Mr Ahern's, the late Gerry Brennan, may have played a role in the matters being inquired into. Mr Brennan, a former director of Telecom Éireann, died in 1997.*

*Mr McKenna, a friend of Mr Ahern's and a known supporter of both him and his party, was estimated to be worth more than €60 million a number of years ago. However, his publicly-listed recruitment firm, Marlborough Recruitment, collapsed in 2002.*

*Mr McKenna is also a friend and business associate of Des Richardson, the businessman appointed by Mr Ahern in 1993 as full-time fundraiser for Fianna Fáil and who also fundraises for Mr Ahern's constituency operation. The Tribunal was told in private that Mr McKenna was one of the people who made a payment to Mr Ahern.*

*Special adviser to the Taoiseach Gerry Howlin was not available for comment as he was on leave.*

*When contacted by The Irish Times the Government press secretary, Mandy Johnston, passed the query on to the Fianna Fáil press officer Olivia Buckley, who said Mr Ahern did not comment on Tribunal matters.*

*Mr McKenna, when asked about the matter, said: 'Contact my solicitor.' His solicitor said he had no comment.*

*The Mahon Tribunal and Mr Ahern are scheduled to make representations about the matter before the President of the High Court, Mr Justice Joseph Finnegan, next month.*

*In December 1993, Mr Ahern was Minister for Finance and Fianna Fáil treasurer.*

*The inquiries into Mr Ahern's finances are understood to have begun after allegations were made about supposed payments to him by property developer Owen O'Callaghan in relation to the Quarryvale development in west Dublin.*

*Both Mr Ahern and Mr O'Callaghan have stated publicly that no such payments were made.”*

This article quoted from the contents of the letter of 29th June, 2006 from the Tribunal to Mr. McKenna.

8. The Tribunal wrote to Ms Kennedy on the day of publication of Mr Keenas’s article stating that it quoted “the content of a letter written to Mr David McKenna by a solicitor acting on behalf of the Tribunal” and asserting that “such communication was confidential to the Tribunal and was expressed to be so.” The Tribunal letter also claimed that the publication of this material was in breach of an injunction granted by the Supreme Court on 7th October, 2005.

By a letter of 29<sup>th</sup> September, 2006 Ms Kennedy replied:

*“... the circumstances of this matter are straightforward. The Irish Times received an unsolicited and anonymous communication that I considered an important matter in the public interest for this newspaper to verify and publish. The vital issue of public interest which I considered I had a duty to publish was that the Taoiseach, Mr. Ahern, whilst a serving minister was in receipt of certain payments of money. The fact of these payments is a matter that this newspaper has a proper interest in publishing.*

*This is not a situation where an allegation of a payment has been made that is denied or is false. The fact of these payments is admitted. ...*

*The Irish Times does respect the important public function of the Tribunal. This does not, however, mean that this newspaper will desist from discharging its separate duty to publish matters in the public interest. I think you might*

*agree that no single person or entity in this State (including this newspaper) has a monopoly on supporting constitutional democracy. ...”*

Ms Kennedy’s letter also denied that there had been a breach of any court order. That is not an issue in this case.

**9.** On 25<sup>th</sup> September, 2006 the Tribunal made an order, expressed to be made pursuant to its powers under the Tribunals of Inquiry (Evidence) Acts 1921 to 2004 in particular section 1(i)(b) of the Tribunals of Inquiry (Evidence) Act 1921 as amended by section 3 Tribunals of Inquiry (Evidence) (Amendment) Act 1979 requiring Ms Kennedy and Mr Keena to produce to the Tribunal at its offices all documents which comprised the communication received by the Irish Times which led to the publication of the article of 21st September, 2006. The reference to section 3 (which deals with the power of the High Court) of the Act of 1979 should presumably be a reference to section 4. No point has ever been taken in that respect.

**10.** By a reply of the same date Ms Kennedy stated that the Irish Times was not in a position to comply with this order as the material sought had been destroyed. She also disputed the right of the Tribunal to make the order. She said that “the production of any such material would run the risk of identifying sources.” It would, she said, “put in jeopardy the primary obligation of every editor and journalist to protect their sources of information.” Finally, she asserted that it was in the public interest that this obligation and right be protected, in the production of a story, which in itself was published in the public interest.

**11.** On 26<sup>th</sup> September, 2006 the Tribunal served summonses on Mr Keena and Ms Kennedy commanding them to attend before it on Friday, 29<sup>th</sup> September, 2006 and to produce and hand over copies of all documents comprising the communication between the Tribunal and Mr. David McKenna received by the Irish Times which had led to the publication of the article in question and also to answer all questions to which the Tribunal might “require answers in relation to the source and present whereabouts of the documents... referred to...”

**12.** On 29<sup>th</sup> September, 2006 Mr Keena and Ms Kennedy furnished written statements of their evidence to the Tribunal. Mr Keena, in his written statement, said that, on Tuesday 19<sup>th</sup> September he had received “information” concerning payments to Mr Bertie Ahern while he was Minister for Finance in 1993. He said that, following receipt of the order of the Tribunal of 25<sup>th</sup> September and a meeting with legal advisors, Ms Kennedy had requested that he destroy any documents in his possession concerning the story and that he had done so. He said: “I fully agreed with this decision because I felt I had a duty and an obligation to protect my sources.”

**13.** Ms Kennedy, in her written statement, said that it was a matter of legitimate public interest that the Taoiseach of the day had received monies from businessmen while he was Minister for Finance in 1993.” She said that “in making the decision to publish she was conscious of the possibility that the Tribunal could find that the matter was outside its terms of reference and that it might never enter the public domain.” She said that she had instructed Mr Keena to destroy the documents and that she had also destroyed any copies in her own possession.

**14.** On the same day the appellants appeared before the Tribunal. They were unable to produce the documents sought by the Tribunal, because they had destroyed them. They declined to answer any questions which in their view would give any assistance in identifying the source of the anonymous communication. Mr Keena, in particular, refused to say whether the version of the letter from the Tribunal which he had seen and which was referred to in the article was an original (with letter heading) or a copy.

**15.** The Tribunal considered that the behaviour of Mr Keena and Ms Kennedy amounted to breaches of its orders and of the Tribunals of Inquiry (Evidence) Acts, 1921 to 2004. It decided to exercise the powers conferred upon it by section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997 and to seek orders from the High Court compelling Ms. Kennedy and Mr. Keena to comply with the Tribunal’s orders.

**16.** On 13<sup>th</sup> day of February, 2007 the Tribunal commenced proceedings in the High Court by special summons. In view of the destruction of the documents, the

Tribunal no longer seeks any order requiring their production. It seeks a number of orders pursuant to section 4 of the Tribunal of Inquiries (Evidence) (Amendment) Act, 1997 (as amended) requiring that the appellants be ordered to appear before it for purposes which may be summarised as follows:

- to answer all questions to which the Tribunal may require answers in relation to the source and present whereabouts of the documents;
- to answer all questions to which the Tribunal may require answers relating to or arising from the article written by Mr Keena;
- to answer all further questions to which the Tribunal may require answers.

Ms Susan Gilvarry, swore at the grounding affidavit on behalf of the Tribunal. She explained the vital necessity to protect the confidentiality of the Tribunal's private or preliminary investigations as follows:

*"Large numbers of allegations and issues have been raised which fall within the remit of the Tribunal. The manner in which the Tribunal has dealt with these allegations and issues is to investigate them in the first instance in private in order to determine whether or not they merit public Inquiry (the holding of hearings in public). In adopting this approach, the Tribunal was conscious that it would limit damage which might be suffered by parties as a consequence of unfounded allegations being made against them. In such circumstances, it would obviously be highly damaging to such persons if such allegations could be circulated in advance of any decision being made to hold a public hearing. A significant number of allegations have been investigated by the Tribunal which the Tribunal has decided should not be the subject of a public hearing. The Tribunal has taken the view that it is essential -- both for the Tribunal's own purposes and for the protection of those against whom allegations are made—that utmost confidentiality should be observed in relation to documents circulating during the private investigative stage. In those circumstances, all information received by the Tribunal in its*

*preliminary private inquiry was received under a guarantee of confidentiality....”*

17. Ms Gilvarry explained the difficulties encountered by the Tribunal over a number of years in seeking to prevent unauthorised disclosure and publication of confidential material. The Tribunal expresses concern, in particular, that the cooperation of individuals with its investigations is dependent on the extent of its ability to ensure confidentiality. Ms Gilvarry added:

*“In seeking to identify the source of the unauthorised disclosure of confidential material in this case, the primary concern of the Tribunal is to protect the integrity of its enquiries and to maintain the confidence of the public and the confidence of those who had dealings with the Tribunal in the ongoing work of the Tribunal. Given the task which has been entrusted to the Tribunal by the Oireachtas, the Tribunal believes that it is essential that the work of the Tribunal must enjoy public confidence. The Tribunal is particularly concerned that it has been strongly suggested in the media that the source of the leak is the Tribunal itself. This is a highly damaging and unfounded allegation and the Tribunal believes that it is therefore essential that the true source of the unauthorised disclosure of this confidential information should be revealed.”*

The principal tenor of the replying affidavits, apart from lengthy accounts of the journalistic careers of the two appellants, was that the article in question was concerned with matters of clear public interest together with the need to protect journalistic sources. Mr Keena says:

*“The key issue of journalism is that people who approach reporters in confidence with information of legitimate public interest, do not subsequently have their identities revealed by the reporters. If this occurs, it serves to make future disclosures less likely, as people would be more wary of coming forward. This makes it less effective journalism. It is also detrimental to the public good.”*

## **The High Court judgment**

**18.** The proceedings were heard in the High Court by a Divisional Court composed of the Johnson P, Kelly J and O’Neill J. Judgment was delivered on 23<sup>rd</sup> October 2007. The Court made orders pursuant to section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997 in accordance with the Special Summons. Essentially, the appellants are required to attend before the Tribunal and “*to answer all questions to which the Tribunal may require answers in relation to the source and present whereabouts of the documents mentioned in the witness summons*” dated 26<sup>th</sup> September 2006.

**19.** The High Court, in its judgment, asserted that it had to consider and determine three issues, which I summarise as follows:

1. Whether the Tribunal had power to conduct an inquiry to ascertain the source of the unsolicited and anonymous communication to the Irish Times and to summon the appellants to appear before it to produce documents and to answer the questions;
2. Whether the Tribunal is entitled to conduct investigations in private and to impose an obligation of confidentiality in respect of communications from it to persons with whom it wishes to make inquiries as part of its private investigation and to enforce such an obligation of confidentiality against third parties who come into possession of materials in respect of which the Tribunal asserts an obligation of confidentiality;
3. Assuming positive answers to the first two questions, how that right of the Tribunal is to be balanced against the defendants’ right to freedom of expression as guaranteed in Article 40, section 6,1<sup>o</sup>.i of the Constitution, and Article 10 of the European Convention on Human Rights and in particular the public interest in the preservation from disclosure of journalistic sources, as an essential prerequisite of a free press in a democratic society.

**20.** The High Court described the first question as an *ultra vires* issue. The Court was satisfied that the Tribunal had ample power to conduct an inquiry into the source of the leak to the Irish Times and to summon the appellants to appear before it and to produce the documents which were the subject matter of the communication to them. It held that the manifest breach of the direction in respect of confidentiality came within the express terms of Clause J (5) of the Terms of Reference of the Tribunal adopted by Resolution of Dáil Éireann passed on 17th November, 2004. That Clause is as follows:

*“Nothing in these amended terms of reference shall preclude the Tribunal from conducting hearings or investigations into any compliance or non-compliance by any person with the orders or directions of the Tribunal.”*

It also held that section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 provided an ample legal basis for the power exercised by the Tribunal, citing the judgment of Blayney J in *Kiberd v. Hamilton* [1992] 2 I.R. 257. That section is as follows:

*“A tribunal may make such orders as it considers necessary for the purpose of its functions, and it shall have, in relation to their making, all such powers, rights and privileges as are vested in the High Court or a judge of that court in respect of the making of orders.”*

**21.** The High Court then turned to the second question. It noted that the appellants did not dispute the right of the Tribunal to conduct its enquiry initially through a private investigative stage. The Court held that the Tribunal enjoys a right to impose confidentiality in respect of material assembled in its private investigative phase. That right was a corollary of its right to conduct an inquiry by way of private investigation. It considered that the express provision in the Dáil resolutions for a private investigative phase necessarily carried with it an obligation on the part of the Tribunal to impose confidentiality in these inquiries and the materials they yield and with that, the right to enforce that obligation of confidentiality against those who would breach it. It distinguished the communication from the Tribunal to a person such as Mr McKenna in that phase of the investigation from the issue which had arisen in *Mahon*

*v Post Publications* [2007] 3 I.R. 338, of disclosure of material which is authorised by the Tribunal to be released and circulated such as where evidence is circulated in the form of briefs in advance of a public hearing. The Court was “*satisfied that a perception amongst the public that material provided under an assurance of confidentiality to the Tribunal could be leaked to the media would be very damaging to the proper functioning of the Tribunal. Inevitably this would lead to a loss of public confidence in the Tribunal and would deter members of the public from voluntary cooperation with the Tribunal which would hinder the Tribunal in pursuing the inquiries directed by the Oireachtas.*”

**22.** The High Court thus concluded “*that the disclosure or leaking of this material as occurred here of itself inflicts sufficient damage on the capacity of the Tribunal to properly function as to warrant the upholding and enforcement of the confidentiality asserted by the Tribunal.*”

**23.** The High Court then considered how the rights of the Tribunal to enforce confidentiality should be balanced against the entitlements of the appellants as journalists pursuant to Article 10 of the European Convention on Human Rights. It reviewed a number of decisions of the European Court of Human Rights and noted the “*great emphasis laid upon the importance of the right to freedom of expression in a democratic society.*” The Court then addressed the question of protection of journalistic sources in an important passage:

*“Going hand in hand with this, is the critical importance of a free press as an essential organ in a democratic society. An essential feature of the operation of a free press is the availability of sources of information. Without sources of information journalists will be unable to keep society informed on matters which are or should be of public interest. Thus there is a very great public interest in the cultivation of and protection of journalistic sources of information as an essential feature of a free and effective press. As between the parties in this case there was no dispute whatever concerning these fundamental aspects of the right to freedom of expression as set out in Article 10 of the Convention.*”

*These cases also illustrate on the part of the European Court of Human Rights a stalwart defence of freedom of expression, and a trend of strictly construing potential interferences with that right that might claim justification under the variety of justifiable interferences set out in Article 10(2). This approach by the European Court of Human Rights is particularly evident in cases involving publications relating to political matters. There was no reported case opened to us in which the European Court of Human Rights has upheld an order of a domestic court ordering the disclosure of a journalistic source.”*

Following this passage, the High Court embarked on the task of balancing the relevant rights. It observed that the exercise of deciding on the balance to be struck between competing rights and interests *“in a democratic society based on the rule of law is reserved to courts established by law for that purpose.”*

It insisted that *“journalists should have little to fear and certainly no grounds for thinking that their right not to reveal sources does not or would not be given just consideration and vindicated where appropriate.”*

It then proceeded to make a number of remarks in an extremely critical vein on the deliberate destruction, on the orders of Ms Kennedy, of the documents. The court described this as *“an outstanding and a flagrant disregard of the rule of law.”* It said that:

*“In so doing the defendants cast themselves as the adjudicators of the proper balance to be struck between the rights and interests of all concerned.”*

**24.** The Court condemned the action in the following words:

*“It need hardly be said, that such a manner of proceeding is anathema to the rule of law and an affront to democratic order. If tolerated it is the surest way to anarchy.”*

Although the Court observed that this *“reprehensible conduct”* had not been brought before it as an issue of contempt of court, it went on to say: *“the destruction of these*

*documents by the defendants is a relevant consideration to which great weight must be given in striking the correct balance between the rights and interests at issue on this application.”*

25. The Court reiterated the high order of importance of freedom of expression in a democratic society and that “*the non-disclosure of journalistic sources enjoys unquestioned acceptance in our jurisprudence and interference in this area can only happen where the requirements of Article 10(2) as set out above are clearly met.*”

26. The Court addressed itself to the requirements of Article 10(2) of the Convention. It held that the order of the Tribunal was “*prescribed by law.*” Finally and most crucially, it had to ask whether the relief restricted “*as it is now to simply a direction to answer questions, can be said to be necessary in a democratic society for the prevention of the disclosure of information received in confidence in this case.*”

27. In addressing this question, the Court said that it was an essential step that it consider “*whether the relief which is sought in this case, namely that the defendants be directed to answer questions concerning the nature of the documents received by them would or could lead to the identification of the source of this material.*”

In that context, the Court said, once more, that “*the destruction by the defendants of these documents becomes of direct relevance.*”

It said:

*“If, of course, the questions to be asked could or would lead to the source or give assistance which could result in the identification of the source then we are satisfied that the privilege against disclosure can be invoked.”*

Its final and decisive analysis of the factual situation was as follows:

*“Thus, the only means the Tribunal has of learning anything about these documents is through the questions which it proposes to put to the defendants. The content of the letter addressed to Mr. McKenna and his reply are of course well known to the Tribunal, therefore nothing is to be revealed in that*

*regard. The only additional information that can be revealed by the defendants is whether or not the version or copy of the letter seen by them had the Tribunal's letter heading on it or whether it was signed. All that this information would do is to indicate whether or not the copy of the letter furnished to the defendants came from inside the Tribunal or from elsewhere. Insofar as answers to these queries would tend to indicate that the documents furnished to the defendants came from elsewhere, it is clear from the evidence given that Mr. McKenna and his solicitor vehemently deny any role in furnishing these documents to the defendants. Thus, in all probability, having regard to the fact that the documents are now destroyed, the most that can be achieved by way of answers to questions proposed to be asked by the Tribunal of the defendants is to indicate that as a matter of probability the Tribunal was not the source of the leak. Beyond that the source will remain, as of course the source always intended, shrouded in impenetrable mystery with its anonymity safely beyond the reach of forensic inquiry.*

*“In these circumstances, we are of opinion that because of the destruction of the documents and the consequent deliberate frustration of forensic inquiry thereby brought about, there is little or no risk of the questions proposed to be asked leading to the identification of the source who provided these documents to the defendants. Because of this we are of opinion, therefore, that very slight weight indeed is to be attached to the defendants' privilege against disclosure of their sources in this case.*

*On the other hand, there is the potential of a real benefit to the Tribunal if the answers to the questions give rise to an indication that the Tribunal was not the source of the leak.”*

**28.** The High Court held accordingly that:

*“In the circumstances of this case we conclude that the defendants' privilege against disclosure of sources, is overwhelmingly outweighed by the pressing social need to preserve public confidence in the Tribunal and as there is no other means, by which this can be done other than the enquiry undertaken by*

*the Tribunal, we are of opinion that the test “necessary in a democratic society” is satisfied.”*

Based on that judgment, the High Court, on 9<sup>th</sup> November 2007 made an order pursuant to section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997, in the following terms:

- (i) the [ appellants] to comply with the Order of the Tribunal dated the 25<sup>th</sup> Day of September 2006;
- (ii) the [ appellants] to attend before the Tribunal and then to answer all questions to which the Tribunal may require answer is in relation to the source and present whereabouts of the documents mentioned in the witness summons;
- (iii) the [ appellants] to attend before the Tribunal and then to answer all further questions to which the Tribunal may require answers.

### **The appeal**

**29.** The appellants did not contest the power of the Tribunal to make an order pursuant to section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, as interpreted by this court in *Kiberd v. Hamilton*, cited above. Mr Donal O’Donnell, Senior Counsel, for the appellant’s submitted that Clause J (5) of the Terms of Reference of the Tribunal, being expressed in negative form, did not apply. He also argued that the Tribunal was engaging in a “leak inquiry” which would not assist it in enquiring into matter the subject matter of its Terms of Reference. The appellants argued in their written submissions that the documents at issue are not confidential and the Tribunal did not have any authority to create the confidentiality for which it contends. They relied on *Mahon v. Post Publications Limited* [2007] 3 I.R. 338.

**30.** The principal, indeed almost the exclusive, focus of Mr O’Donnell’s submissions was a critique of the balance struck by the High Court between the rights of the Tribunal and of the appellants. He said that, by virtue of the provisions of the

European Convention on Human Rights Act, 2003, Article 10 of the Convention applied, respectively, to the Tribunal as an "organ of the State" and to the High Court when interpreting either the common law or relevant statutes.

**31.** Following a comprehensive survey of the case-law of the European Court of Human Rights, he submitted that the balance has almost always been struck by that court in favour of protection of journalists' sources. Extraordinarily strong countervailing circumstances are required before a journalist can be obliged to disclose sources.

**32.** Mr O'Donnell criticised what he called the "fallacious logic" of the High Court judgment. In effect, he said, the judgment requires questions to be asked only in circumstances where they cannot achieve the object of identifying the source. The view of the High Court was that the Tribunal could require questions to be answered for the purpose of exculpating the Tribunal itself and not to enable the actual source to be identified. The High Court, he argued, was, in particular, led into error by reason of its extremely critical views regarding the destruction by the appellants of the documents. For that reason, the High Court had erroneously taken the view that the journalists' privilege against disclosure had almost no weight.

**33.** Mr Michael Collins, Senior Counsel, for the Tribunal, accepted the link between the fundamental right of freedom of expression, guaranteed by Article 10 of the Convention, the privilege of journalists with regard to their sources and the need to recognise the "chilling effect" of an order for disclosure of sources. He referred to the trust and confidence which exists between the journalist and the source but argued that this is significantly weakened and the privilege would be entitled to very slight weight when the source is anonymous.

Mr Collins laid particular emphasis on the right of Tribunals generally to carry on preliminary investigations in private and to protect the confidentiality of persons cooperating with it in its private phase. The Tribunal has a legitimate interest, in Convention terms, in seeking to identify the source of a leak of confidential information.

Mr Collins referred to case-law in the United States, in particular the decision of the United States Supreme Court in *Branzburg v Hayes*, discussed later, declining First Amendment protection to journalists refusing to give evidence before a grand jury.

### **Confidentiality of information; Power of Tribunal**

34. The appellants do not seriously contest the power of the Tribunal to inquire into the unauthorised disclosure of its confidential information. The decision of this Court in *Kiberd v Hamilton*, cited above is conclusive on the point. It concerned an inquiry by Mr Justice Hamilton as Chairman and sole member of the Tribunals of Inquiry into the Beef Processing Industry into an unauthorised disclosure and publication in a newspaper of information confidential to the Tribunal. The newspaper contested the power of the Tribunal. Blayney J delivered the unanimous judgment of this Court. In reliance on the judgment of this Court in *State (Lynch) v Cooney* [1982] I.R. 337, he held that what had to be considered was, "*firstly, whether the Tribunal's opinion that the making of the order was necessary for the purpose of its functions was bona fide held, secondly, whether that opinion was supported by the facts, and finally, whether it can be said of it that it was not unreasonable.*" The learned judge rejected the challenge to the jurisdiction of the Tribunal, noted that it was not contested that its opinion was bona fide held, and concluded that there were grounds to support the view of the Tribunal which was not unreasonable.

35. It is notable that the central issue of concern for the Tribunal in that case was the fear that, if people invited to cooperate with the Tribunal believed that information furnished confidentially by them would appear in the press, there was a real danger that witnesses would be dissuaded from coming forward with material relevant to the Tribunal's inquiry. *Kiberd v Hamilton*, therefore, constitutes sufficient authority for the proposition that the Tribunal has power to investigate unauthorised disclosure of its confidential information. However, I am also satisfied that the High Court was correct to hold that Clause J (5) of the Terms of Reference of the Tribunal adopted by Resolution of Dáil Éireann passed on 17th November, 2004 confirmed the existence of that power.

It is not necessary to consider the English case of *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133, which was discussed by counsel for the appellants at the hearing of the appeal, although that case and a number of cases which followed confirm the existence of a power in the courts to order disclosure of confidential information which has come into the possession even of innocent parties.

**36.** Both in the High Court and in argument before this Court, reference was made to the case of *Mahon v Post Publications*, cited above. That case concerned enforcement of the confidentiality of documents circulated in briefs to persons affected by a matter to be inquired into in public by the Tribunal. This court, by a majority, upheld the decision in the High Court (Kelly J) dismissing the application of the Tribunal to enforce confidentiality in those circumstances. In the course of my own judgment for the majority, I said:

*“Clearly, a matter which I wish to make perfectly clear, none of this concerns the confidentiality of the entirely private proceedings of the Tribunal in its investigative phase, conducted prior to the decision to go on to public hearings and to circulate briefs. That is the ordinary right to confidentiality that any person or body possesses in respect of his, her or its own internal activities. That type of confidentiality has already been dealt with by this Court in O’Callaghan v. Mahon ... [2006] 2 I.R. 32. ....Nobody, whether in or out of the media, has the right to invade or trespass upon the internal workings of any individual or organisation.”*

**37.** The communications between the Tribunal and Mr McKenna, which gave rise to the publication of Mr Keena’s article, took place during the private, investigative phase of the work of the Tribunal. The Tribunal had not decided, at that stage, whether it would hold any public hearings about the payment of monies to Mr Bertie Ahern. Ms Kennedy herself, if unintentionally, highlighted the essential confidentiality of the information by justifying publication precisely for the reason that the matter might never be disclosed in public. Ms Gilvarry emphasised in her affidavit the “concern of the Tribunal ...to protect the integrity of its enquiries and to maintain the confidence of the public and the confidence of those who had dealings with the Tribunal...”

38. I am satisfied that these concerns are legitimate. The information communicated to Mr McKenna was highly confidential and sensitive. The Tribunal was not only entitled but bound to make every effort to keep it so. It was, of course, quite clear to every person reading the Tribunal's letter to Mr McKenna that it was and was expressed to be entirely private and confidential.

39. The High Court was, in my view, perfectly correct to uphold the power of the Tribunal to conduct an inquiry into the source of the unauthorised disclosure and to hold that the documents were confidential.

40. The appeal, therefore, turns entirely on the third point, namely on the balance struck by the High Court between the power of the Tribunal to investigate and the right of the appellants to refuse to disclose any information about their sources.

### **The European Convention on Human Rights**

41. I have postponed to this point reference to the Convention and the decisions of the European Court of Human Rights. Both have, of course, been considered in great detail by the High Court in its judgment and have been argued by both parties to the appeal. Those decisions are relevant to the outcome of the present proceedings because of the effect that has been given to the Convention in Irish law.

42. The European Convention on Human Rights Act, 2003 was, as its long title states, passed in order to give "*further effect subject to the Constitution to certain provisions*" of the Convention (emphasis added). The Act is necessarily, as it says, "subject to the Constitution."

Section 2(1) of the Act provides that:

*" In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions. "*

Section 3(1) provides:

*“Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.”*

The definition of an “*organ of State*” in section 1 includes “*a tribunal..... which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised.*” The Tribunal undoubtedly comes within that definition.

Section 4 provides:

*Judicial notice shall be taken of the Convention provisions and of—*

*(a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,*

*(b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,*

*(c) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction,*

*and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.*

**43.** The combined effect of these provisions for the purposes of the present case is that the relevant sections of the Tribunals of Inquiry legislation must be interpreted *in “a manner compatible with the State’s obligations under the Convention provisions.”* For that purpose, the court must take judicial notice of the Convention provisions

themselves and of the various documents mentioned in section 4 of the Act of 2003. Foremost among those are the judgments of the European Court of Human Rights. The requirement that the Court take judicial notice of the Convention and of the various documents referred to means that they can be relied upon by the Court without special proof. The Court must, in addition, as the concluding words of the provision make clear, “*take due account*” of the principles laid down in those judgments. This is not the same as saying that they constitute binding precedents.

44. Although no issue arises in the present case of conflict between the Convention provisions and the Constitution, it is important to recall that, in the event of such a conflict, it is the Constitution which must prevail. Both the High Court and this Court on appeal have been concerned with the effect that is to be given in Irish law to the provisions of the Tribunals of Inquiry Acts and the orders made by the Tribunal. It is to state the obvious that a distinction must be made between this exercise of jurisdiction and that performed by the Court at Strasbourg exercising jurisdiction in international law, potentially leading to decisions binding on the State.

45. Article 10 of the European Convention on Human Rights provides as follows:

*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”*

46. The rights of the appellants to freedom of expression pursuant to Article 10.1 are not in issue. Everything turns on whether the encroachment upon that right by means of the inquiry instituted by the Tribunal is “*necessary in a democratic society.....for preventing the disclosure of information received in confidence...*”

47. The appellants cited from a large number of judgments of the European Court of Human Rights dealing with restrictions or penalties imposed by Member States claiming reliance on Article 10.2. Amongst these decisions were *Lingens v. Austria* (1986) 87 EHRR 329 *Castells v. Spain*, (1992) 14 EHRR 445 *Fressoz and Roire v. France*, (1999) 31 EHRR 28 *Tromso v. Norway*, (1999) 29 EHRR 12 *Radio Twist AS v. Slovakia*, (Unreported, European Court of Human Rights, 19 December 2006). These judgments emphasise not merely the fundamental right to freedom of expression but, in the case of the press, its indispensable contribution to the functioning of a democratic society.

The following statements from the judgment of the court in *Lingens v. Austria* in 1986 show the general approach of the Court:

“39. The adjective ‘*necessary*’, within the meaning of Article 10.2, implies the existence of a ‘*pressing social need*’. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a ‘*restriction*’ or ‘*penalty*’ is reconcilable with freedom of expression as protected by Article 10.

40. In exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned court decisions in isolation; it must look at them in the light of the case as a whole, including the articles held against the applicant and the context in which they were written. The Court must determine whether the interference at issue was

*'proportionate to the legitimate aim pursued' and whether the reasons adduced by the Austrian courts to justify it are 'relevant and sufficient'.*

41. *In this connection, the Court has to recall that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.*

*These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, inter alia, for the 'protection of the reputation of others', it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. In this connection, the Court cannot accept the opinion, expressed in the judgment of the Vienna Court of Appeal, to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader.*

42. *Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.*

*The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large,*

*and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.”*

**48.** The European Court has been at pains to emphasise that the right to freedom of expression is not unlimited. It usually states, as in the above passage, that the press must not "overstep certain bounds." The court has said that "*Article 10 does not..... guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern.*" For example, it may be necessary, depending on the circumstances, to balance an individual's right to private and family life guaranteed by Article 8 of the Convention. Member States have a "*certain margin of appreciation in assessing whether*" there is a need for a restriction.

**49.** Nonetheless, the court constantly emphasises the value of a free press as one of the essential foundations of a democratic society, that the press generates and promotes political debate, informs the public in time of elections, scrutinises the behaviour of governments and public officials and, for these reasons, that persons in public life must expect to be subjected to disclosure about their financial and other affairs, to criticism and to less favourable treatment than those in private life. Generally, therefore, restrictions on freedom of expression must be justified by an "*overriding requirement in the public interest.*"

**50.** One of the public interests recognised by Article 10.2 as potentially justifying a restriction on the exercise of freedom of expression is "*preventing the disclosure of information received in confidence.*" It is cases concerning this precise issue that are the most relevant to the present appeal. Two cases deserve careful consideration.

In the case of *Fressoz and Roire*, cited above, the applicants were a publisher and a journalist with the French satirical newspaper, *Le Canard enchaîné*. During a period of industrial unrest involving the motor-car manufacturer, Peugeot, the applicants published an article including details of the personal notices of assessment to tax of

the chairman and managing director of the company. The second applicant said that the documents had been sent anonymously in an envelope addressed to him by name. The applicants were prosecuted and ultimately convicted by a Paris court of an offence of handling these documents which had been obtained through a breach of professional confidence by an unidentified tax official. They were fined 10,000 and 5,000FF respectively and ordered to pay the managing director 1FF for non-pecuniary damage and 10,000FF for costs.

51. The European Court reiterated its general case-law, emphasising, in particular, the public interest in the subject matter of the article: an industrial dispute at one of the major French motor car manufacturers. The court accepted, at paragraph 52, that *"people exercising freedom of expression, including journalists, undertake 'duties and responsibilities' the scope of which depends on the situation and technical means they use."* The court proceeded:

*"While recognising the vital role played by the press in a democratic society, the court stresses that journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Indeed, paragraph 2 of article 10 defines the boundaries of the exercise of freedom of expression."*

The court went on to explain, at paragraph 53, that it *"must ...determine whether the objective of protecting fiscal confidentiality, which in itself is legitimate, constituted a relevant and sufficient justification for the interference."*

The court then explained the extent to which information about the tax affairs of individuals is, in fact, generally available in France. The French government had accepted that *"a degree of transparency exists regarding earnings and pay rises."* The extent of this transparency was significant:

*"Thus local taxpayers may consult a list of the people liable to tax in their municipality, with details of each taxpayer's taxable income and tax liability. While that information cannot be disseminated, it is thus accessible to a large number of people who may in turn pass it on to others. Although publication*

*of the tax assessments in the present case was prohibited, the information they contained was not confidential..... Accordingly, there was no overriding requirement that the information to be protected as confidential.”*

The court noted that there had been no dispute about the accuracy of the article or the good faith of the journalist, who acted in accordance with the standards governing his profession. This led to the court to find a violation of Article 10. It concluded, at paragraph 56, that there was not: *"a reasonable relationship of proportionality between the legitimate aim pursued by the journalists' conviction and the means deployed to achieve that aim given the interest of democratic society has in ensuring and preserving freedom of the press."*

**52.** *Goodwin v United Kingdom* (1996) EHRR 123, although decided some years prior to the *Canard enchaîné* case just described comes in conveniently at this point, since it is directly concerned with an order that a journalist disclose his source. That case concerned commercial information of a highly confidential and secret character: the corporate plan for the refinancing of an important company. It was claimed that disclosure would threaten the business and the livelihood of its employees. The information was communicated to the journalist by a person who, though known to the journalist, wished to remain anonymous. The company managed to secure an interim injunction restraining publication: it had learned of the disclosure of the information because the journalist had contacted it to make some enquiries. The fact of this injunction was highly material to the decision of the court. The English courts, all the way to the House of Lords, made orders requiring the journalist to disclose his source. He refused. The House of Lords fined him £5000 for contempt of court. In its judgment on the journalist's case, the European court had this to say about journalistic sources:

*“Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be*

*undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”*

The court laid emphasis on the need for any restriction on freedom of expression to be “*convincingly established.*” It said that the “*national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press.*” Therefore, “*limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the court.*”

The court then analysed the justification put forward by the company in the national court and by the United Kingdom government in its defence to the application. It attached great weight to the fact that the injunctions granted to the company effectively prevented further dissemination of the confidential information, which had largely achieved the objective sought by the disclosure order. It accepted, nonetheless, that the injunctions could not prevent direct communication from the journalist’s original source to the company’s customers or competitors. While accepting that these were undoubtedly relevant considerations, it considered that the additional restriction which they entailed “*was not supported by sufficient reasons for the purposes of Article 10(2) of the Convention.*” Ultimately, the court considered that the interests protected by that Article 10 “*tip the balance of competing interests in favour of the interest of Democratic society in securing a free press*” and that “*the residual threat of damage through dissemination of the confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, not sufficient to outweigh the vital public interest in the protection of the applicant journalist’s source.*”

It should be noted that the European Court did not doubt that there was a “pressing social need” for restraint of publication of the information.

## Journalistic privilege in the United States of America

53. It is not surprising that there is a large body of law concerning journalistic privilege in the United States of America. Mr Collins cited the sole relevant decision of the Supreme Court of the United States in *Branzburg v Hayes* (1972) 408 US 665, where it was decided that the First Amendment to the Constitution accorded no testimonial privilege to a journalist seeking to protect his sources. The Opinion of the court contains the following at page 690:

*“Fair and effective law enforcement aimed at providing security of the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.”*

However, the matter is not as clear as might appear at first sight. The decision was by a 5 to 4 majority. Powell J, though part of the majority, stressed, at page 709, *“the limited nature of the Court’s holding.”* He argued for recognition of the constitutional rights of journalists *“with respect to the gathering of news or in safeguarding their sources.”* Moreover, later cases have suggested that *Branzburg v Hayes* is authority only in the case of a summons to testify before a grand jury. A number of recent high-profile cases in the federal courts show that journalists cannot claim any general privilege against disclosure when required to testify before a grand jury investigating the possible commission of criminal offences.

54. Mr Collins referred us to a comprehensive article by Randall D. Eliason entitled *“Leakers, Bloggers and Fourth Estate Inmates: the Misguided pursuit of a reporter’s privilege.”* 2006. 24 Cardozo Arts & Ent. LJ 385. That article shows that multiple distinctions need to be borne in mind between, for example: constitutional and common law; criminal and civil law; statute and judge-made law; state and federal law. Many states have laws protecting journalists’ privilege. It is protected, for example, in the Constitution of the State of California.

**55.** There is no federal legislative protection of journalists' sources. Moreover, it seems fair to say that the existence of a journalistic privilege of nondisclosure is highly contested in the federal courts and that, at the very least, it is certainly not regarded, where it is recognised, as absolute. The author, Mr Eliason, is himself highly critical "of a profession whose members believe that their professional obligations require them to break the law." He observes of journalists "claiming the right to decide for themselves how best to protect an institution: the free press." The American courts display a notable reluctance to allow to journalists a form of immunity from the obligation incumbent on all other citizens to obey the law, in particular, to give evidence when summoned and generally to participate in the judicial process. The federal courts have shown themselves willing, in the very recent past, to imprison journalists for contempt of court for refusal to give evidence before a grand jury, where a source would be revealed.

#### **Consideration of the High Court judgment**

**56.** As already stated, it is clear that the High Court was perfectly correct to hold that the Tribunal had the power, pursuant to section 4 of the Act of 1979, to conduct an inquiry into the source of the unauthorized disclosure of information communicated during its private investigative phase. It is equally clear that the information communicated by the Tribunal in its letter of 29<sup>th</sup> June 2006 to Mr McKenna had the character of confidential information. The Tribunal had the right and was under a duty to protect confidential information communicated to it and by it during its private investigative phase. The Tribunal is right to investigate unauthorised disclosure of such information and the courts must support its efforts.

**57.** It is also clear, on the other hand, and has never been disputed on the part of the Tribunal, that the information in question, relating, as it did, to allegations of the payment of monies to an important political figure, was a matter of public interest, which a newspaper would, in the ordinary way be entitled to print.

**58.** This Court, like the High Court, has the duty of giving effect to the applicable legal provisions concerning the powers of Tribunals of Inquiry. It is bound, while performing that task, by the provisions of the Act of 2003. In strictly legal terms, the

Court is bound to interpret the provisions of the Tribunals of Inquiry Acts “*in a manner compatible with the State’s obligations under the Convention provisions.*”

**59.** The key issue in the appeal is, therefore, whether the High Court was correct in deciding to make its order of 9<sup>th</sup> November 2007 which requires the appellants to appear before the Tribunal and to answer questions in relation to the source and present whereabouts of the documents which Mr Keena had received anonymously. The answer to that question depends on whether the High Court was correct in the way in which it balanced the right and interest of the Tribunal in seeking to uncover the source of the unauthorised disclosure and the interests of the appellants in protecting their source.

**60.** Following an extensive examination of the case-law of the European Court of Human Rights, the High Court expressed the view that the exercise of deciding between competing interests “*in a democratic society based on the rule of law is reserved to courts established by law for that purpose.*” That, it seems to me, is a correct and unexceptionable principle. I have summarised, as did the High Court, the judgments of the European Court concerning the balance which the courts must strike between the right to freedom of expression, on the one hand, and the interests recognised in article 10.2 of the Convention, on the other. That court accords a margin of appreciation to the Contracting States, and their courts, when they decide those matters. It does not propose that these matters can be decided other than by courts. The High Court correctly said that the appellants had “*cast themselves as the adjudicators of the proper balance to be struck between the rights and interests of concerned.*” The courts cannot and should not abdicate their responsibility to decide when a journalist is obliged to disclose his or her source. The unilateral decision of a journalist to destroy evidence with intent to deprive the courts of jurisdiction is, as the High Court has held, designed to subvert the rule of law. The Courts cannot shirk their duty to penalise journalists who refuse to answer questions legitimately and lawfully put to them.

**61.** Careful consideration needs, of course, to be given to the *Goodwin* case. The court must “take due account” of the principles it lays down. At this point, I raise the question as to whether it can truly be said to be in accord with the interests of a

democratic society based on the rule of law that journalists, as a unique class, have the right to decide for themselves to withhold information from any and every public institution or court regardless of the existence of a compelling need, for example, for the production of evidence of the commission of a serious crime. While the present case does not concern information about the commission of serious criminal offences, it cannot be doubted that such a case could arise. Who would decide whether the journalist's source had to be protected? There can be only one answer. In the event of conflict, whether in a civil or criminal context, the courts must adjudicate and decide, while allowing all due respect to the principle of journalistic privilege. No citizen has the right to claim immunity from the processes of the law.

**62.** The result of the *Goodwin* case naturally speaks for itself: the court decided that the United Kingdom was in violation of Article 10. But it is important to note the clear implication of the analysis carried out by the court at Strasbourg. It carefully analysed the legitimate interests of the company whose confidential information had been unlawfully disclosed. It attached great importance to the fact that there were injunctions in place which would prevent public dissemination of its confidential information via the press. It referred to the possibility of the "source" communicating the confidential information to the company's competitors or customers as "residual." The court did not say at any point that the national court could not, in principle, order disclosure. It is implicit in its analytical process that it could. The court accepted that "*it is in the first place for the national authorities to assess whether there is a 'pressing social need' for the restriction and [that], in making their assessment they enjoy a certain margin of appreciation.*" The margin of appreciation does not, of course, arise in the national court. Here the question is whether, in interpreting the Tribunals of Inquiry Acts, the restriction is *necessary in a democratic society.*"

**63.** I do not disagree with the language used by the High Court in reference to the deliberate destruction by the appellants of the very documents that were at the core of the enquiry. Nonetheless, I have to accept that the issue is not whether that act was a wrongful one and deserving of the opprobrium applied to it by the High Court, but the narrower question of whether, in circumstances where the documents no longer exist, there is a logical or causal link between that act and the order made. It does not appear to me that there is. The order now to be made has to be justified by the situation as it

now exists and not by the need to mark disapproval of the unquestionably “*reprehensible conduct*” of the appellants. For the same reason, I do not think that the High Court was correct in reaching the conclusion that the “*destruction of these documents by the defendants is a relevant consideration to which great weight must be given in striking the correct balance between the rights and interests at issue on this application.*”

64. The High Court then considered the implications of the anonymity of the source. Because of this, the High Court considered that “*either the privilege against non-disclosure should not be invoked at all or, if it is to be invoked, only the slightest of weight should be attached to it for the plain reason that if a journalist cannot identify the source of his information it is nonsense to say that there is a professional obligation to protect that source from disclosure.*” Plainly, there is a difference between a source whose identity is known to the journalist and a completely anonymous source. Greater weight will attach to the privilege in the case of the former than the latter. But the matter is not quite as simple as that. The appellants have refused to say whether the copy of the letter addressed to Mr McKenna, which came into their possession, bore the letter heading of the Tribunal. The High Court was of the opinion that the “*only additional information that can be revealed by the defendants is whether or not the version or copy of the letter seen by them had the Tribunal’s letter heading on it or whether it was signed.*” In other words, the only fruit that can be yielded from questioning the appellants is the possibility of discovering whether the letter, a copy of which they saw, came or did not come from a Tribunal source. It is difficult to follow the logic of the following paragraph:

*“Thus, in all probability, having regard to the fact that the documents are now destroyed, the most that can be achieved by way of answers to questions proposed to be asked by the Tribunal of the defendants is to indicate that as a matter of probability the Tribunal was not the source of the leak. Beyond that the source will remain, as of course the source always intended, shrouded in impenetrable mystery with its anonymity safely beyond the reach of forensic inquiry.”*

**65.** If the “leaked” document was not headed and thus, as a matter of probability, came from a Tribunal source, that might possibly assist the Tribunal in its endeavour to identify the source. At the same time, a number of other hypotheses cannot be excluded. One must recall that the person “leaking” the document would, in all probability, have wished to disguise the source. Thus, by the use of a photocopying machine, the heading might be removed from an original letter. Equally, an original might have been photocopied prior to its despatch from the Tribunal.

**66.** On the contrary hypothesis that it did not come from a Tribunal source, but was, as the High Court expressed it “*shrouded in impenetrable mystery,*” it clearly would not be possible to justify the making of the order.

**67.** If the apparent anonymity of the source weakens the appellants’ case for resisting the order, it must correspondingly weaken the Tribunal’s case for obtaining it. If, as was the case in *Goodwin*, the source was a person known to the journalist, it could, at the least, be argued that there was some concrete benefit to be obtained from the making of the order. Where the source is anonymous, the benefit is speculative at best. Mr Collins submitted, on behalf of the Tribunal, that the relationship of trust and confidence between the journalist and the source which is the basis of the journalist’s privilege was absent where the source was anonymous. There has been some discussion in the United States of theories of privilege: is it there to protect the source or the journalist? I do not find any such notion in the European case-law, which seems to proceed on a functional theory: is there a pressing social need for the imposition of the restriction?

**68.** Looking at the High Court judgment as a whole, I have come to the conclusion that the great weight which it attached to the reprehensible conduct of the appellants in destroying documents led it to adopt an erroneous approach to the balancing exercise.

**69.** According to the reasoning of the European Court in *Goodwin*, an order compelling the appellants to answer questions for the purpose of identifying their source could only be “*justified by an overriding requirement in the public interest.*” Once the High Court had devalued the journalistic privilege so severely, the balance

was clearly not properly struck. On the other side, I find it very difficult to discern any sufficiently clear benefit to the Tribunal from any answers to the questions they wish to pose to justify the making of the order.

**70.** I would, therefore, allow the appeal and substitute an order dismissing the Tribunal's application.