EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 18139/91

Nikolai Tolstoy Miloslavsky

against

the United Kingdom

REPORT OF THE COMMISSION

(adopted on 6 December 1993)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a United Kingdom citizen born in 1935. He lives in Southall, Berkshire, and is represented before the Commission by Messrs. Theodore Goddard, solicitors, London.

3. The application is directed against the United Kingdom whose Government are represented by their Agent, Mrs. A. Glover, Foreign and Commonwealth Office, London.

4. The application concerns libel proceedings brought against the applicant following the distribution of a pamphlet accusing Lord Aldington, Warden of Winchester College, of war crimes in May and June 1945. It raises issues under Article 6 para. 1 and Article 10 of the Convention.

B. The proceedings

5. The application was introduced on 18 December 1990 and registered on 26 April 1991.

6. On 20 February 1992 the Commission declared the application partly inadmissible and adjourned its examination of the remainder of the application.

7. At the invitation of the Commission written observations were submitted by the respondent Government on 2 June 1992 and observations in reply were submitted by the applicant on 6 October 1992.

8. An oral hearing was held on 12 May 1993 after which the application was declared admissible. At the hearing the parties were represented as follows: for the Government: Mrs. A. Glover, Agent, Mr. David Pannick QC, Mr. J. Witherston and Mrs. Emma Matthews, Lord Chancellor's Dept., Mr. Iain Christie, Foreign & Commonwealth Office; for the applicant: Mr. Anthony Lester QC, Ms. Dinah Rose.

9. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present report

10. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C.A. NØRGAARD, President
A. WEITZEL
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
H.G. SCHERMERS
H. DANELIUS
Sir Basil HALL
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. J.-C. GEUS

M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO

11. The text of this Report was adopted on 6 December 1993 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

12. The purpose of the Report, pursuant to Article 31 of the Convention, is:

i) to establish the facts, and

ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

13. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

14. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

15. In March 1987 a pamphlet written by the applicant was circulated by a Mr. Watts to parents, boys and staff at Winchester College. The pamphlet was also circulated to Members of Parliament, Members of the House of Lords, the press and to former members of the school. Mr. Watts had a grievance against Lord Aldington, Warden of Winchester College, in his capacity as Chairman of an insurance company. The pamphlet is entitled "War Crimes and the Wardenship of Winchester College" and it refers to events in Austria in May and early June of 1945. The pamphlet stated, inter alia, the following:

> "Between Mid-May and early June 1945 some 70,000 Cossack and Yugoslav prisoners-of-war and refugees were handed over to Soviet and Titoist communist forces as a result of an agreement made with the British 5 Corps administering occupied Austria. They included a large proportion of women, children, and even babies. The majority of Cossack officers and their families handed over held League of Nations passports or those of the Western European countries in which they had found refuge after being evacuated from Russia by their British and French Allies in 1918-20, and were hence not liable to return under the terms of the Yalta Agreement, which related only to Soviet citizens.
> ...
>
> As was anticipated by virtually everyone concerned, the overwhelming majority of these defenceless people, who reposed implicit trust in British honour, were either massacred in circumstances of unbelievable horror immediately following their handover, or condemned to a lingering death in Communist gaols and forced labour camps. These operations were achieved by a combination of duplicity and brutality without parallel in British history since the Massacre of Glencoe. Outside Lienz may be seen today a small Cossack cemetery, whose tombstones commemorate men, women and children shot, clubbed, or bayonetted to death by British troops.
> ...

> The man who issued every order and arranged every detail of the lying and brutality which resulted in these massacres was Brigadier Toby Low, Chief of Staff to General Keightley's 5 Corps, subsequently ennobled by Harold Macmillan as the 1st Baron Aldington. Since 1979 he has been Warden of Winchester College, one of the oldest and most respected of English public schools. Whether Lord Aldington is an appropriate figure for such a post is primarily a matter for the College to decide. But it is also surely a legitimate matter of broader public concern that a man responsible for such enormities should continue to occupy a post of such honour and prominence within the community, in particular one which serves as exemplar for young people themselves likely one day to achieve high office and responsibility.
>
> ... The truth is, however, that Lord Aldington knows every one of his pleas to be wholly or in large part false. The evidence is overwhelming that he arranged the perpetration of a major war crime in the full knowledge that the most barbarous and dishonourable aspects of his operations were throughout disapproved and unauthorised by the higher command, and in the full knowledge that a savage fate awaited those he was repatriating.
>
> ... Those who still feel that a man with the blood of 70,000 men, women and children on his hands, helpless charges whom the Supreme Allied Commander was making every attempt to protect, a suitable Warden for Winchester might care to ask themselves (or Lord Aldington, if they can catch him) the following questions:
> ...
>
> Lord Aldington has been repeatedly charged in books and articles, by press and public, with being a major war criminal, whose activities merit comparison with those of the worst butchers of Nazi Germany or Soviet Russia. ..."

16. Lord Aldington sued for libel. The proceedings were originally brought against Mr. Watts and the applicant was joined later at his own request.

> In his statement of claim Lord Aldington claimed that
>
> "In their natural and ordinary meaning the words contained in the said document meant and were understood to mean:
>
> 1. That the plaintiff in the full knowledge of the savage fate of his victims and in the full knowledge that his actions were throughout disapproved and unauthorised by higher command, arranged every detail of the massacre of 70,000 men, women and children, and by a combination of duplicity and brutality without parallel in British history since the massacre of Glen Coe, compelled his subordinates to commit horrifying and nightmarish atrocities and was guilty of gross violation of the laws of war and humanity and flagrant contravention of the Geneva Convention on Prisoners of War, and
>
> 2. That the plaintiff was a major war criminal whose activities merit comparison with those of the worst butchers of Nazi Germany or Soviet Russia."

17. The defence pleaded "justification" and "fair comment", the particulars of justification including the following:

> "The plaintiff was therefore responsible for the torture, brutal treatment and/or death of about 35,000 Yugoslavs following the Second World War."

18. Lord Aldington initially wanted the trial to be before a single judge, but the applicant exercised his right to a jury trial.

The trial began on 2 October 1989. The judge devoted some 10 pages of his summing-up to the question of the assessment of damages if defamation was established. He advised the jury, inter alia, as follows:

> "... Let us now, members of the jury, ... deal with the aspect of damages... I have to give you this direction in law because damages may arise ... If the plaintiff wins, you have got to consider damages ... the means of the parties - the plaintiff or the defendant - is immaterial ...
>
> Neither, as I think I said earlier but I say it now, is the question whether Lord Aldington or Count Tolstoy, or for that matter Mr. Watts, have been or will be financially supported by any well wishers as to damages relevant at all. Nor is it relevant the undoubted fact that legal aid is not available in libel cases to a plaintiff or a defendant. All irrelevant, and if it is to be changed it is up to Parliament to do something about it...
>
> ... what you are seeking to do, what a jury has to do, is to fix a sum which will compensate the plaintiff - to make amends in financial terms for the wrong done to him, because wrong has been done if you have got to the stage of awarding damages. It is not your duty or your right to punish a defendant ...
>
> What [Lord Aldington] does claim, of course, is for 'general damages', as lawyers call it, a sum of money to compensate him. First of all, you have to take into account the effect in this case, as in every case where there is libel, on the position, standing and reputation of the successful plaintiff ...
>
> Members of the jury, of course, you must not, as a result of what I have just said, just bump and bump the damages up. You must, at all times, as they say, keep your feet on the ground.
>
> ... You have to take into account the extent and nature of the publication.
>
> ... whilst you must leave aside any thought of punishing the defendants if you find for the plaintiff, juries are always entitled, as I have hinted already, to take into account any conduct of the defendant which has aggravated the damages - that is to say, made the damage more serious and the award higher - or mitigated them - made the damage done less serious and the award smaller.
>
> ...
>
> Now, two general remarks which I make in every case: nobody asks you how you arrive at your verdict, and you do not have to give reasons like a Judge does, so it is exceedingly important that you look at the matter judicially, and that means that you should not be outrageously or unreasonably high, or outrageously or unreasonably low.
>
> The second matter I say to every jury is: please, I beg you, if you come to damages, do not pay the slightest attention to any other case or the result of any other case you may have read about or heard about. The facts and the legal considerations are like to have been completely different. There is no league of damages in defamation cases. There is no first division, there is no fourth division, there is no Vauxhall conference, if any of you are interested in football.

So, members of the jury, please forget other cases. Use your own common sense about it. How do you translate what I have said into money terms? By our rules and procedure, members of the jury, counsel can use, and a judge can use, words like 'very substantial' or 'very small', but we do not either of us, counsel or judges, mention figures. Some people again, who have not really considered the matter very carefully, wonder about that, and they say juries should be given guidance, and I say to you what I say to every jury in these cases, it would not be a great deal of help for you, because inevitably, it is human nature and it would be their duty - counsel for the plaintiff would be at the top end of the scale and perhaps in some cases, I do not suggest this one, off the clock, and counsel for the defendant would be at the bottom end of the scale in the basement. Now, that would not be much good to anybody. As for the Judge, well the jury might think - you may have an exactly opposite view - a jury might think; 'Well, on the whole, whatever other people say about this particular Judge in this case, we think he tried to be fair, why doesn't he suggest a figure to us?'

Supposing a Judge, myself in this case, were to suggest a figure to you, or a bracket between so and so and so and so, there would be two possibilities: one is that you would ignore what I said and either go higher than my figure or bracket, or much lower, in which case of course the losing party that did not like it would be off to the Court of Appeal saying: 'Look, the Judge suggested a figure and the jury went above it or below it'.

Supposing you accepted my suggestion, and gave a figure that I recommended, or close to it. Well, all I can say is that you would have been wasting your valuable time in considering the matter of damages because you would just have been acting as a rubber stamp for me, or the Judge, whoever it was. So we do not have that over-bidding or under-bidding, as the Court of Appeal has called it, by counsel, and we do not have Judges trying to lay down to juries what they should award, and I do not hesitate to say, whatever other people say, I hope and pray, for the sake of our law and our court, we never get the day when Judges dictate to juries so that they become rubber stamps.

I am, however, allowed - indeed encouraged - by the Court of Appeal just to say a little bit more. I say it not perhaps in the words of the Court of Appeal, but in my own way, which may be too homely for some, but I say to you that you must remember what money is. You do not deal in Mickey Mouse money just reeling off noughts because they sound good, I know you will not. You have got to consider money in real terms. Sometimes it is said 'Well, how much would a house cost of a certain kind', and if you are giving a plaintiff as compensation so much money how many houses is he going to buy? I do not mean to suggest that Lord Aldington or any other plaintiff would take his damages and go and buy a house or a row of houses, but that relates it to the sort of thing, if you will allow me to say, you and I do know something about, because most of us have a pretty good idea how much houses are worth. So remember that."

19. On 30 November 1989 the jury returned its verdict that the statements of fact made in the pamphlet were not substantially true, that the pamphlet contained expressions of opinion, that those expressions of opinion were not fair, in the sense that they could not honestly be made by a fair-minded man, that they found for Lord Aldington and not for the defendants, and awarded damages amounting to £1,500,000. An order that the applicant should pay Lord Aldington's costs was also made.

20. The applicant gave notice of appeal, setting out eight grounds

of appeal:

1. The learned judge displayed throughout the course of the hearing overt animosity towards the defendant.

2. The learned judge sought unfairly to discredit this defendant's case by continual interruption, sarcasm and abuse of counsel acting on his behalf.

3. The learned judge insulted and disparaged witnesses called on the defendant's behalf.

4. At no time did the learned judge display any such animus or prejudice towards the plaintiff, his counsel or his witnesses.

5. The learned judge invited the jury to accept statements made by Dr. Robert Knight on behalf of the plaintiff about matters of expertise regarding which Dr. Knight was manifestly unqualified to speak.

6. Above all, the learned judge, throughout his summing-up wholly or in large part suppressed or ignored many of the most important aspects of the case for the defence, presented others in so confused, abbreviated or disparaging a manner as to nullify their effect; and distorted others in a fashion calculated seriously to mislead the jury on issues central to this defendant's case.

7. When directing the jury on the question of damages, the tenor of the learned judge's remarks was in large part to urge the jury to award high damages to the plaintiff and to discount the alternatives which were reasonably available on the evidence.

8. The damages awarded were in any event unreasonable and excessive.

21. Lord Aldington applied for security for costs under Order 59, Rule 10, para. 5 of the Rules of the Supreme Court 1965, that is, that the applicant should be required to give security in an amount which would cover the costs of Lord Aldington's representation if the appeal were to be unsuccessful. It was not disputed that the applicant would not be able to pay Lord Aldington's appeal costs if the appeal were unsuccessful.

22. The application for costs was heard by the Registrar of the Court of Appeal. In the course of the hearing he reduced Lord Aldington's solicitors' estimate of their costs on appeal from £188,000 to £124,900. The Registrar gave a reserved, 22-page judgment on 18 May 1990. He recalled that impecuniosity was not a ground for awarding security for costs at first instance, although it was in respect of the costs of an appeal to the Court of Appeal. In deciding whether, in the exercise of its discretion, it would award security for costs, the Court would take into account the merits or otherwise of the appeal concerned. The Registrar referred to an open offer by Lord Aldington on 2 February 1990 of an undertaking not to enforce £1,200,000 of the damages awarded. The Registrar considered that, subject to the question of whether an appeal on quantum only would be academic because of the offer to accept reduced damages, security for costs should not be awarded in respect of the appeal on quantum. As to liability, the Registrar considered the facts raised by the applicant, together with purported new evidence, and concluded that, in respect of five points, his case had "just enough strength to lead [him] to conclude that security for costs should not be awarded in this case." He stated that

> "...It may be that, if (and I emphasise if) Count Tolstoy succeeds in convincing the Court of Appeal that he has not had a fair trial, and his case has not been fairly and clearly put to the jury, the Court of Appeal might well conclude that a new

trial had to be ordered (following the approach adopted recently by this Court in X v. Cain), notwithstanding the fact that the chances of the appellant succeeding on the new trial were slim.

Having reached the conclusion that security should not be awarded even on the liability appeal, it is not necessary for me to deal with the question whether security on a quantum only appeal would be called for on the grounds that it was academic."

He decided that security for costs should not be awarded.

23. Lord Aldington appealed against the Registrar's decision to the full Court of Appeal, which heard the matter for six days from 9 to 17 July 1990 and gave judgment on 19 July 1990. Sir Stephen Brown, presiding, recalled the law, and recalled that the Court now had to consider the application afresh and to decide whether to order security would amount to a denial of justice to the applicant, having regard to the merits of his appeal. He then went through the proceedings, noting that no criticism was made in the applicant's grounds of appeal of the judge's directions on the law. Criticism was directed particularly at the way in which the judge behaved to the applicant and the way in which the judge dealt with three particular issues of fact. He went on:

"Each member of this court has perused the transcripts with great care. I have read the transcript of the summing-up and the transcripts of the addresses of counsel, both before and after hearing the criticisms which have been made by Count Tolstoy. I do not consider that Count Tolstoy's criticisms are justified. The judge clearly left to the jury the decision on the facts of the case. All the major matters were in my judgment dealt with fully and fairly.

The judge's repetition of Mr. Rampton's questions at the end of his summing-up quite clearly brought to the jury's minds the matters which the defence contended were of primary significance. Counsel were given full opportunities to raise matters of alleged error, and when they deemed it necessary they did so. Furthermore the principal witnesses were in the witness box for some 13 days in all. Lord Aldington, who was the central witness in the case in the sense that it was his conduct which was the subject of examination, was in the witness box for no less than six and a half days. It is inconceivable that the jury did not take fully into account and act on the evidence of the principal witnesses who were so comprehensively examined and cross-examined upon all the material issues in the case.

This was essentially a case for a jury. It is to be observed that at a preliminary stage when Lord Aldington had asked for the case to be tried by a judge alone, Count Tolstoy resisted his application. The case was duly tried by a jury. In my judgment it was correct that this case should have been tried by a jury. It was a classic case for a jury to decide. It is further clear from the judge's enquiry made in the course of the trial as to the status of the jurors, though not their identities, that this was an intelligent jury.

In the result I do not believe that Count Tolstoy has any reasonable chance of making good his grounds of appeal or any of them. There is no merit in them.
...

... on the issue of liability I am unable to discern any merit in the appeal.

The quantum of damage is a very large sum. However, there is no doubt that the learned judge gave an impeccable direction on

damages. Count Tolstoy has argued that the judge invited the jury to give excessive damages. A correct reading of the transcript shows that he did just the opposite. There is no merit in that submission. The award was entirely within the jury's discretion and they received a very full direction about it. I have no doubt that it was meant to mark their view of the enormity of the gross libel which had been published and persisted in.

...

In my judgment this is a clear case for an order for security for costs. The Registrar at the hearing before him considered the amount of the estimated costs of the plaintiff on the proposed appeal and he reduced his solicitors' estimate of £188,000 to £124,900, using his knowledge and expertise in this particular field. I would adopt the learned Registrar's approach on that particular matter. Accordingly I would allow the plaintiff's appeal from the Registrar, and order that security for costs be provided by the defendant in the amount of £124,900 within 14 days."

24. Lord Justice Russell, agreeing, added:

"The court will be very slow to interfere with the jury's verdict unless there has been some material irregularity in the proceedings which renders the verdict unsafe or unsatisfactory, or it can properly be said that the verdict is perverse. Much the same considerations must apply in the instant case.

As to any irregularity in the proceedings, I detect none. ...

This case, and the jury's verdict, depended essentially upon the veracity of Lord Aldington. No document or documents were produced which on their face could destroy Lord Aldington's credibility. If the jury had disbelieved Lord Aldington, there would have been an end of his case. The fact that the jury found in his favour and awarded him the damages that they did demonstrates that upon the vital issues of the case they must have accepted the plaintiff's evidence. Was that a course which was open to the jury? In my judgment, it plainly was.

The reality of this case is that Count Tolstoy at all stages wanted the verdict of a jury. Lord Aldington, because of the costs involved, wanted trial by judge alone. Count Tolstoy's preference prevailed. He has fought this case and he has lost. He has lost because it was the jury that found against him. They saw and heard the witnesses. They were not misled by the judge. The verdict was the jury's verdict and Count Tolstoy should now accept it. If he cannot accept it he should at least acknowledge that it was a verdict the jury was entitled to return.

There is not in my judgment the remotest chance of the Court of Appeal interfering with the jury's finding in the plaintiff's favour and directing a retrial of that issue, either on the basis that the verdict cannot stand or on the basis of fresh evidence which Count Tolstoy seeks to introduce. ...

Finally, upon the issue of damages, Count Tolstoy had been offered in an open letter the substitution of £300,000 for the one and a half million pounds awarded by the jury. The libel remains as serious a libel as it is possible to imagine. Any appeal upon quantum alone would be no more than an academic exercise. Count Tolstoy wishes to re-open the whole case. In my judgment, the defendant being impecunious, justice demands that he should provide security for the plaintiff's costs of any appeal."

25. Lord Justice Beldam, also agreeing, considered that:

> "It would be difficult to conjecture an allegation more calculated to bring the respondent into the hatred and contempt of his fellow men and the evidence showed that it was deliberately circulated with the aim of encouraging the respondent to sue him, thus giving the appellant the opportunity to challenge in public the respondent's conduct 45 years ago. ...
>
> That this archaeology of the archives failed to convince the jury of the truth of the very grave charges levelled against the respondent was amply demonstrated by their award to the respondent of the unprecedented and enormous sum of damages of £1.5 million. It was as resounding a demonstration of public reproof of the appellant's conduct as could possibly be imagined."
>
> He also stated:
>
> "It is not for this court to grant a retrial after the verdict of a jury, even if it thought that a reasonable jury ought to have found differently. The test which, on the hearing of the appeal, this court would have to apply is whether the finding of the jury is absolutely unreasonable that it can be said that they have not performed the judicial duty cast upon them. Again I have listened to the skilful development of the facts and evidence by the appellant. He has failed to satisfy me that he has any reasonable chance of success in this appeal. Even if he persuaded the court to grant a retrial on the issue of the amount of the damages, I would regard as negligible the prospect of any jury, doing their judicial duty, awarding the respondent [Lord Aldington] less then the sum which he has in reality already offered to accept in compromise of this appeal."

26. The Court ordered the applicant to provide security for Lord Aldington's costs in respect of the appeal in the sum of £124,900. The Court further ordered that in the absence of such payment the applicant's appeal stand dismissed. A request by the applicant for more than 14 days to attempt to raise the money was refused. The applicant was ordered to pay Lord Aldington's costs in the security for costs proceedings. The Court's judgment runs to 23 pages.

The applicant did not furnish the required security and his appeal was dismissed on 3 August 1990.

B. Relevant domestic law and practice

27. Halsbury's Laws of England describes the domestic law on libel and slander as follows:

> "In English law ... every man is entitled to his good name and to the esteem in which he is held by others, and has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse.
>
> If a defamatory statement is made in writing or printing or some other permanent form the tort of libel is committed and the law presumes damage.
> ...
>
> The actions of libel and slander are ... private legal remedies, the object of which is to vindicate the plaintiff's reputation and to make reparation for the private injury done by the wrongful publication to a third person or persons of defamatory statements concerning the plaintiff. The defendant in these

actions may prove the truth of the defamatory matter and thus show that the plaintiff has received no injury. For although there may be damage accruing from the publication, yet, if the facts published are true, the law gives no remedy by action.
...

A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.
...

Actionable libel. A libel for which an action will lie is a defamatory statement made or conveyed by written or printed words or in some other permanent form, published of and concerning the plaintiff to a person other than the plaintiff."

[from: Halsbury's Laws of England, Fourth Edition, Vol. 28, paras. 1 and 10].

28. Order 59 Rule 11 of the Rules of the Supreme Court provided at the relevant time

"(1) On the hearing of any appeal the Court of Appeal may, if it thinks fit, make any such order as could be made in pursuance of an application for a new trial or to set aside a verdict, finding or judgment of the court below.

(2) The Court of Appeal shall not be bound to order a new trial on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned.

(3) A new trial may be ordered on any question without interfering with the finding or decision on any other question; and if it appears to the Court of Appeal that any such wrong or miscarriage as is mentioned in paragraph (2) affects part only of the matter in controversy, or one or some only of the parties, the Court may order a new trial as to that party only, or as to that party or those parties only, and give final judgment as to the remainder.

(4) In any case where the Court of Appeal has power to order a new trial on the ground that damages awarded by a jury are excessive or inadequate, the Court may, in lieu of ordering a new trial -

(a) with the consent of all parties concerned, substitute for the sum awarded by the jury such sum as appears to the Court to be proper;

(b) with the consent of the party entitled to receive or liable to pay the damages, as the case may be, reduce or increase the sum awarded by the jury by such amount as appears to the Court to be proper in respect of any distinct head of damages erroneously included in or excluded from the sum so awarded;

but except as aforesaid the Court of Appeal shall not have power to reduce or increase the damages awarded by a jury.
..."

29. With effect from 1 February 1991 the Court of Appeal has power in certain circumstances to substitute its own assessment for that of the jury by virtue of Section 8 of the Courts and Legal Services Act 1990, which provides as follows:

> "(1) In this section 'case' means any case where the Court of Appeal has power to order a new trial on the ground that damages awarded by a jury are excessive or inadequate.
>
> (2) Rules of court may provide for the Court of Appeal, in such classes of case as may be specified in the rules, to have power, in place of ordering a new trial, to substitute for the sum awarded by the jury such sum as appears to the court to be proper.
>
> (3) This section is not to be read as prejudicing in any way any other power to make rules of court."

30. In consequence a new Rule 11 para. 4 was instituted which provides as follows:

> "(4) In any case where the Court of Appeal has power to order a new trial on the ground that damages awarded by a jury are excessive or inadequate, the court may, instead of ordering a new trial, substitute for the sum awarded by the jury such sum as appears to the court to be proper, but except as aforesaid the Court of Appeal shall not have power to reduce or increase the damages awarded by a jury."

In the case of Rantzen v. Mirror Group Newspapers [Times Law Reports 6 April 1993] the Court of Appeal exercised its powers under Section 8 (2) of the Courts and Legal Services Act 1991 and under new Order 59, Rule 11 (4). It held, inter alia, as follows:

> "It is always to be remembered that the Convention is not part of English domestic law and therefore the courts have no power to enforce Convention rights directly. Nevertheless, as Lord Bridge explained in Brind [1991] 1 AC 696 at 747 the United Kingdom is obliged 'to secure to everyone within its jurisdiction the rights which the Convention defines including both the right to freedom of expression under Article 10 and the right under Article 13 to 'an effective remedy before a national authority' for any violation of the other rights secured by the Convention. It is therefore clear that the Convention may be deployed for the purpose of the resolution of an ambiguity in English primary or subordinate legislation (see Brind at 760 per Lord Ackner), and that where there is an ambiguity the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it (see Brind at 747 per Lord Bridge). It is also clear that Article 10 may be used when the court is contemplating how a discretion is to be exercised
> ...
> Where freedom of expression is at stake, however, recent authorities lend support for the proposition that Article 10 has a wider role and can properly be regarded as an articulation of some of the principles underlying the common law. In Attorney General v. Guardian Newspapers (No. 2) [1990] 1 AC 109 Lord Goff at 283 referred to the requirement that in order to restrain the disclosure of Government secrets it had to be shown that it was in the public interest that they should not be published. He continued:
>
> > '... I can see no inconsistency between English law on this subject and Article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has

existed in any other country in the world.
...'

How then should the Court of Appeal interpret its power to order a new trial on the ground that the damages awarded by the jury were excessive? How is the word 'excessive' in Section 8 (1) of the 1990 Act to be interpreted?

After careful consideration we have come to the conclusion that we must interpret our power so as to give proper weight to the guidance given by the House of Lords and by the Court in Strasbourg. In particular we should take account of the following passage in Lord Goff's speech in Attorney General v. Guardian Newspapers (No. 2) (supra) at 283:

'The exercise of the right to freedom of expression under Article 10 may be subject to restrictions (as are prescribed by law and are necessary in a democratic society) in relation to certain prescribed matters which include 'the interests of national security' and 'preventing the disclosure of information received in confidence'. It is established in the jurisprudence of the European Court of Human Rights that the word 'necessary' in this context implies the existence of a pressing social need, and that interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued. I have no reason to believe that English law, as applied in the courts, leads to any different conclusion.'

If one applies these words it seems to us that the grant of an almost limitless discretion to a jury fails to provide a satisfactory measurement for deciding what is 'necessary in a democratic society' or 'justified by a pressing social need'. We consider therefore that the common law if properly understood requires the courts to subject large awards of damages to a more searching scrutiny than has been customary in the past. It follows that what has been regarded as the barrier against intervention should be lowered. The question becomes: Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to re-establish his reputation?

...

A very substantial award was clearly justified for the reasons which Mr. Hartley explained. ... Judged by any objective standards or reasonable compensation or necessity or proportionality the award of £250,000 was excessive.

We therefore propose to exercise our powers under Section 8(2) of the 1990 Act and Order 59 r. 11(4) and substitute the sum of £110,000."

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

31. The Commission has declared admissible the applicant's complaints that the requirement that he find security for the costs of his appeal denied him access to court, contrary to Article 6 (Art. 6) of the Convention, and that the award of £1,500,000 and the injunction against him were such as to constitute an interference with his freedom of expression which was neither prescribed by law nor necessary in a democratic society.

B. Points at issue

32. The issues to be determined are:

- whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention, and

- whether there has been a violation of Article 10 (Art. 10) of the Convention.

C. As to Article 6 para. 1 (Art. 6-1) of the Convention

1. Applicability

33. Article 6 para. 1 (Art. 6-1), first sentence, provides as follows:

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

34. The Commission recalls that the right to enjoy a good reputation is a civil right within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention (cf. Al Fayed and Others v. the United Kingdom, Comm. Rep. 7.4.93, para. 69, with further references, [pending before the European Court of Human Rights)]. The applicability of Article 6 (Art. 6) to the proceedings at issue has not been contested. The Commission finds that the proceedings in the present case determined the applicant's civil obligations within the meaning of Article 6 (Art. 6) of the Convention.

2. Compliance with Article 6 para. 1 (Art. 6-1)

35. The Commission has already declared inadmissible the applicant's complaints of unfairness of the proceedings brought against him (see Appendix II to the present Report). The sole question left to be determined is whether the applicant's access to the Court of Appeal was denied by the requirement that he give security for costs before being allowed to proceed with his appeal against the first instance decision of 30 November 1989.

36. The applicant considers that the requirement of security for costs denied him the access to court to which he is entitled under Article 6 para. 1 (Art. 6-1) of the Convention.

37. The Government submit that the requirement to find security was reasonable in that the applicant's appeal was found to have little or no prospects of success, and that if the appeal had been allowed to continue and had failed, Lord Aldington would not have been able to recover the costs which would have been ordered in his favour as the successful party.

38. The Commission here recalls that where an appeal is provided, the way in which Article 6 (Art. 6) is to be applied must depend on the special features of such proceedings (cf, in the context of a criminal case, Eur. Court H.R., Delcourt judgment of 17 January 1970, Series A no. 11, pp. 14,15, paras. 25 and 26). In particular, the Commission must take account of the entirety of the proceedings in the legal order and the role of the appellate court therein (Eur. Court H.R., Helmers judgment of 29 October 1991, Series A no. 212-A, p. 15, para. 31). In general in considering limitations on access to court, the Commission must examine whether the limitation on access impaired the essence of that right, pursued a legitimate aim and bore a reasonable relationship of proportionality to that aim in the circumstances (see above-mentioned Al Fayed and Others, Comm. Rep. 7.4.93, paras. 71 and 72 with further references)

39. The present case relates to a requirement that an appellant

should find security for the opponent's costs in the event of the opponent being successful on appeal and being awarded costs. There is no question of the State imposing a financial requirement, by way of court costs, on the individual purely on grounds of impecuniosity. Rather, the domestic authorities had to balance the applicant's prospects of success on appeal against the chances of his being able to find costs to satisfy an appeal judgment against him. The Commission finds that the aim of the restriction on access to court in the present case was to safeguard the interests of the other party to the proceedings. Moreover, the order related only to the costs before the Court of Appeal, and not to the other costs incurred in the proceedings. Such an aim is compatible with the requirements of Article 6 (Art. 6) of the Convention.

40. As to the proportionality of the actual limitation on access to that aim, the Commission first notes that the limitation was not imposed without due consideration. The Registrar of the Court of Appeal initially considered that the applicant should not be required to give security. He heard the parties and gave a 22-page reserved judgment on 18 May 1990. He concluded that there was just enough chance of the applicant succeeding on appeal for him not to order security. He also considered in some detail the likely extent of Lord Aldington's costs on appeal, and reduced the estimate from £188,000 to £124,900.

41. The Court of Appeal then heard further argument for the parties for six days before concluding that security should be required. The Court of Appeal found that there was no merit in the procedural complaints, that its own powers of ordering a retrial were restricted, that an appeal on quantum was not what the applicant wished and that in any event it was academic because of the open letter from Lord Aldington offering to accept a lower sum of damages. The Court of Appeal's judgment of 19 July 1990 on the interlocutory issue runs to 23 pages.

42. It is not for the Commission to re-decide the issues before the Court of Appeal. It is, however, clear that very extensive consideration was given to the question of whether to order security, and indeed the merits of the appeal were canvassed in some depth. Moreover, whilst a requirement to find security for costs in the amount at issue in the present case could well raise different issues under Article 6 (Art. 6) of the Convention if an individual was thereby prevented from having a hearing of his case at all, the Commission must bear in mind in the present case that although the applicant's access to the Court of Appeal was ultimately effectively barred, the issues before the courts were heard at three instances: at first instance, and then again (in the security proceedings) before the Registrar of the Court of Appeal and before the Court of Appeal itself. Before the full Court of Appeal the parties were present in court to put their arguments for six days.

43. In the light of these considerations, the Commission is of the opinion that the requirement that the applicant find security for costs before being allowed to pursue his appeal did not impair the essence of his right of access to court, or transgress the principle of proportionality.

Conclusion

44. The Commission concludes by ten votes to five that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention.

D. As to Article 10 (Art. 10) of the Convention

45. The applicant considers that the order of damages and costs and the injunction against him violated his right to freedom of expression under Article 10 (Art. 10) of the Convention. Article 10 (Art. 10)

provides, so far as relevant, 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. ...
>
> 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, ... for the protection of the reputation or rights of others, ..."

46. The applicant considers that the fact that jury awards at the time in question were effectively subject to neither guidelines nor review necessarily meant that the award against him was both a disproportionate interference with the Article 10 (Art. 10) rights, and that it was not "prescribed by law", as required by Article 10 (Art. 10). He points out that the next largest awards of libel damages until 1992 were of £600,000 (set aside by the Court of Appeal), and £500,000 and that there were three awards in the £400,000 - £499,000 band. He also considers that the injunction imposed on him was too broad to be compatible with Article 10 (Art. 10).

47. The Government submit that the applicant was found by a jury to have uttered a defamation which was as serious as it was possible to conjecture, that the aim of damages in defamation cases is to put, so far as possible, the victim in the position he would have been in had the violation not occurred, that the applicant had deliberately had the pamphlet distributed amongst a group of individuals in relation to whom Lord Aldington had a special relationship, and that the applicant voluntarily joined the action. With regard to the costs, the Government submit that it is a normal and proper incident of civil proceedings for the unsuccessful party to pay the adversary's costs. In connection with the injunction against the applicant, the Government consider that a final injunction, as in the present case, need not be as closely scrutinised as an interlocutory injunction, that it was right to prevent the applicant from repeating the civil wrong he had been found to have committed, and that the applicant had said that he would not be able to pay the award of damages, so that the risk of repetition was greater. The Government also point out that it remains open to the applicant to apply for a variation of the order, and that he has not done so.

48. The European Court of Human Rights has recently summarised the major principles of its case-law on the "necessity" test in Article 10 (Art. 10) of the Convention as follows:

> "(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (Art. 10-2), 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. Freedom of expression, as enshrined in Article 10 (Art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.
>
> (b) These principles are of particular importance as far as the press is concerned. ...
>
> (c) The adjective 'necessary', within the meaning of Article 10 para. 2 (Art. 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 law and the decisions applying it, even those given by independent

courts. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10 (Art. 10).

(d) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 (Art. 10) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'."

(Eur. Court H.R., Sunday Times (No. 2) judgment of 26 November 1991, Series A no. 217, p. 29, para. 50).

49. The Commission notes that the present case involves not the imposition by the State of a penalty for breach of criminal law, but a decision by the State, represented by its courts, in a dispute between two individuals. The results of the dispute are therefore the State's conclusions in the balancing exercise, inherent throughout the Convention but particularly in Article 10 (Art. 10), which must be undertaken in setting the rights of one individual or group of individuals against those of others. It is not, however, contested, and the Commission finds, that the findings and orders made against the applicant constitute an interference with his freedom of expression under Article 10 (Art. 10) of the Convention.

50. The Commission next notes that the Court of Appeal underlined the narrowness of its ability to remit a case to the court of first instance or to substitute its own opinion of what would be an appropriate figure of damages in a particular case. Thus Sir Stephen Brown considered (cf. para. 23 above):

"The quantum of damage is a very large sum. However, there is no doubt that the learned judge gave an impeccable direction on damages. Count Tolstoy has argued that the judge invited the jury to give excessive damages. A correct reading of the transcript shows that he did just the opposite. There is no merit in that submission. The award was entirely within the jury's discretion and they received a very full direction about it. I have no doubt that it was meant to mark their view of the enormity of the gross libel which had been published and persisted in."

Lord Justice Russell stated (cf. para. 24 above):

"The court will be very slow to interfere with the jury's verdict unless there has been some material irregularity in the proceedings which renders the verdict unsafe or unsatisfactory, or it can properly be said that the verdict is perverse. Much the same considerations must apply in the instant case."

Lord Justice Beldam found that (cf. para. 25 above):

"It is not for this court to grant a retrial after the verdict of a jury, even if it thought that a reasonable jury ought to have found differently. The test which, on the hearing of the appeal, this court would have to apply is whether the finding of the jury is absolutely unreasonable that it can be said that they have not performed the judicial duty cast upon them. Again I have listened to the skilful development of the facts and evidence by the appellant. He has failed to satisfy me that he

> has any reasonable chance of success in this appeal. Even if he persuaded the court to grant a retrial on the issue of the amount of the damages, I would regard as negligible the prospect of any jury, doing their judicial duty, awarding the respondent [Lord Aldington] less than the sum which he has in reality already offered to accept in compromise of this appeal."

51. The position in domestic law has changed substantially since the events in the present case occurred. In particular, Section 8 of the Courts and Legal Services Act 1990 has given rise to the new paragraph 4 of Order 59, Rule 11 of the Rules of the Supreme Court (para. 30 above). The new provision in terms applies only to cases where the Court of Appeal has power to order a new trial, and it does not purport to affect that power. However, it is clear from the judgment of the Court of Appeal in Rantzen v. Mirror Group Newspapers [TLR 6 April 1993] that the common law power to order a new trial has been reconsidered in the light of the amendment brought about by Section 8, in particular in the passage, also set out above (at para. 30), which reads as follows:

> "...it seems to us that the grant of an almost limitless discretion to a jury fails to provide a satisfactory measurement for deciding what is 'necessary in a democratic society' or 'justified by a pressing social need'. We consider therefore that the common law if properly understood requires the courts to subject large awards of damages to a more searching scrutiny than has been customary in the past. It follows that what has been regarded as the barrier against intervention should be lowered. The question becomes: Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to re-establish his reputation?"

52. It is apparent to the Commission that in jury cases in the United Kingdom at the relevant time, the judge could give only general guidance as to the criteria to be used (for example, relating damages to the cost of a house) in assessing damages, but could not make any reference to other cases or specific sums of money. Moreover, the findings of the jury give no indication of the reasons for assessing damages at one level rather than at another. It appears from the statements of law in the courts in the present case and from the subsequent development outlined above, that the Court of Appeal was unable in any real way to review or to control the size of the jury awards in the present case.

53. The Commission notes that in the present case the award of £1,500,000 was three times the size of the next largest award ever made. The Commission accepts that the allegations made against Lord Aldington (and found by the domestic courts to be unjustified) were very serious. However, the Commission cannot accept that an award of £1,500,000 to vindicate pure damage to reputation, as distinct from compensating actual financial loss, can be proportionate to the legitimate aim pursued.

54. In the light of these considerations, the Commission finds that there is no need to consider whether the interference was sufficiently foreseeable to be "prescribed by law", or whether the injunction against the applicant was in violation of Article 10 (Art. 10) of the Convention.

Conclusion

55. The Commission concludes unanimously that there has been a violation of Article 10 (Art. 10) of the Convention.

E. Recapitulation

56. The Commission concludes by ten votes to five that there has been

no violation of Article 6 para. 1 (Art. 6-1) of the Convention (para. 44).

57. The Commission concludes unanimously that there has been a violation of Article 10 (Art. 10) of the Convention (para. 55).

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)

(Or. English)

DISSENTING OPINION of MM. Weitzel, Busuttil, Gözübüyük, Reffi and Cabral Barreto

We are unable to agree with the Commission's conclusion concerning Article 6 of the Convention (para. 44 of the Report).

Article 6 guarantees the right of access to court, and that includes access to appeal courts, although the criteria will not be identical to the criteria for access to courts of first instance. Limitations on access to court may be permitted provided that they pursue a legititimate aim and are proportionate to the pursuit of that aim.

In this case the aim of the restriction was not the effective administration of justice as such, but a desire to avoid the risk to Lord Aldington that he would not be able to recoup his costs if Count Tolstoy's appeal was unsuccessful.

We accept that it will often be appropriate for a successful litigant to be awarded his costs involved in pursuing or defending a claim. However, the sum required by way of security in the present case (£124,900) was so enormous that, even if it may be permissible to require a litigant to compensate his opponent for his reasonably incurred costs after the event, it is not for the State to put such a substantial barrier in the way of an appeal before the event.

Moreover, we note that Count Tolstoy was refused an extension of the extremely short period allotted for finding security.

We find that the denial of access to the Court of Appeal in the present case bore no relationship of proportionality to the aim which was being pursued.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
18 December 1990	Introduction of the application
	Registration of the application
Examination of Admissibility	
20 February 1992	Commission's partial decision and decision to invite the Government to submit observations on the admissibility and merits of the application
2 June 1992	Government's observations
6 October 1992	Applicant's observations in reply

8 February 1993	Commission's deliberations and decision to hold an oral hearing
12 May 1993	Oral hearing on admissibility and merits, Commission's deliberations and decision to declare remainder of the application admissible
Examination of the merits	
17 May 1993	Decision on admissibility transmitted to the parties
16 October 1993	Commission's consideration of the state of proceedings
30 November 1993	Commission's deliberations on the merits and final votes.
6 December 1993	Adoption of the Report