



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

COURT (CHAMBER)

CASE OF MINELLI v. SWITZERLAND

(Application no. 8660/79)

JUDGMENT

STRASBOURG

25 March 1983

In the Minelli case,

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

Mr. G. WIARDA, *President*,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. R. MACDONALD,
Mr. C. RUSSO,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 19 October 1982 and on 21 February 1983,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") and the Government of the Swiss Confederation ("the Government"). The case originated in an application (no. 8660/79) against that State lodged with the Commission on 20 June 1979 under Article 25 (art. 25) of the Convention by Mr. Ludwig Minelli, a Swiss national.

2. The Commission's request and the Government's application were filed with the registry of the Court within the period of three months laid down by Articles 32 § 1 and 47 (art. 32-1, art. 47) - the former on 13 October and the latter on 15 October 1981. The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Swiss Confederation recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The purpose of the request and the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 2 (art. 6-2).

* Note by the registry: In the version of the Rules applicable when proceedings were instituted. A revised version of the Rules of Court entered into force on 1 January 1983, but only in respect of cases referred to the Court after that date.

3. The Chamber of seven judges to be constituted included, as ex officio members, Mrs. D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 § 3 (b) of the Rules of Court). On 22 October 1981, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. M. Zekia, Mr. J. Cremona, Mr. F. Gölcüklü, Mr. L.-E. Pettiti and Mr. C. Russo (Article 43 in fine of the Convention (art. 43) and Rule 21 § 4).

4. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 § 5), ascertained, through the Registrar, the views of the Agent of the Government and the Delegate of the Commission regarding the procedure to be followed. On 26 November, he decided that the Agent should have until 15 February 1982 to file a memorial and that the Delegate should be entitled to reply in writing within two months from the date of the transmission of the Government's memorial to him by the Registrar.

The Government's memorial was received at the registry on 22 February. On 5 May, the Secretary to the Commission informed the Registrar that the Delegate would submit his own observations at the hearings.

5. After consulting, through the Registrar, the Agent of the Government and the Delegate of the Commission, the President directed on 22 June that the oral proceedings should open on 26 October 1982.

By Order of 6 October 1982, the President requested the Government and the Commission to produce certain documents; these were received at the registry on various dates.

6. The hearings were held in public at the Human Rights Building, Strasbourg, on 26 October. Immediately before their opening, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government:

Mr. O. JACOT-GUILLARMOD, of the Council of Europe
Division of the Federal Justice Department, *Agent*,

Mr. R. HAUSER, Professor
at the University of Zürich,

Mr. B. MÜNGER, of the Federal Department of Justice, *Counsel*;

- for the Commission:

Mr. J. FROWEIN, *delegate*,

Mr. L. MINELLI, applicant,
assisting the Delegate (Rule 29 § 1, second sentence, of
the Rules of Court).

The Court heard their addresses and their replies to its questions. They filed several documents during the hearings.

7. At the deliberations on 21 February 1983, Mr. G. Lagergren, Mr. F. Matscher and Mr. R. Macdonald, substitute judges, took the place of Mr. M. Zekia, Mr. J. Cremona and Mr. L.-E. Pettiti, who were prevented from

taking part in the further consideration of the case (Rules 22 § 1 and 24 § 1 of the Rules of Court).

AS TO THE FACTS

A. The particular facts of the case

8. The applicant, a Swiss national born in 1932, is resident at Forch, in the Canton of Zürich; he is a journalist by profession.

9. On 27 January 1972, he published in the "National Zeitung" - a Basel daily newspaper which is no longer in existence - an article containing accusations of fraud against a company, Télé-Répertoire S.A., and its director, Mr. Vass. In the article he called for a search to be effected at Mr. Vass' home, offices and other premises and, should the search prove positive, for his arrest. Six days earlier, Mr. Minelli had lodged with the Uster District Attorney's office (Bezirksanwaltschaft) a complaint which, for reasons of jurisdiction, was transferred to the Ticino authorities. The latter, after hearing evidence from Mr. Minelli on 10 February, discharged the case on 10 May 1972.

The facts recounted by the applicant had already been the subject of an article by another journalist, Mr. Fust, which appeared on 19 January 1972 in the daily newspaper "Blick". Mr. Fust complained that in order to promote sales of a telephone directory, the company in question had been using subscription forms (Einzahlungsscheine) that resembled telephone bills. In his view, such conduct could create the impression that this was an ordinary service provided by the Swiss postal authorities, giving rise to a debt that had to be paid in the same way as a periodical invoice.

10. Télé-Répertoire S.A. and Mr. Vass brought against both journalists a criminal complaint of defamation (Ehrverletzung) committed through the press.

The complaint against Mr. Minelli was filed on 29 February 1972 in the Uster (Zürich) District Court (Bezirksgericht). On 6 June, the investigating judge questioned the parties in the presence of their lawyers. Previously, the applicant's lawyer, Mr. Kuhn, had supplied certain documents and called for evidence to be submitted; on 28 June, he requested that several witnesses be heard. However, on 3 July 1974 the District Court suspended the proceedings, at Mr. Vass' request, until completion of the proceedings instituted against Mr. Fust, the "Blick" journalist.

The latter proceedings, which had begun on 28 February 1972 and had encountered numerous procedural vicissitudes, resulted on 2 September 1975 in a judgment of the 1st Criminal Chamber of the Canton of Zürich

"Higher Court" (Obergericht): Mr. Fust was fined 200 SF and ordered to pay about 1,400 SF in court costs, together with compensation of 1,400 SF to each of the private prosecutors in respect of their expenses.

11. On 22 August 1975, even before that judgment had been delivered, Mr. Vass had formally requested that the proceedings against Mr. Minelli be resumed; when doing so, he drew the Uster court's attention to the statutory limitation period.

On 12 September 1975, the court granted the request and asked Mr. Minelli to indicate whether he demanded that his case be heard before an assize court. Mr. Kuhn replied in the affirmative and the District Court therefore relinquished jurisdiction on 1 October 1975.

On 6 November 1975, the Prosecution Chamber (Anklagekammer) of the Zürich Higher Court declared the complaint admissible and directed that the case be remitted to the Canton of Zürich Assize Court (Geschworenengericht) (Article 305 of the Zürich Code of Criminal Procedure). On 24 November 1975, the applicant entered a public law appeal against this decision; it was dismissed by the Federal Court on 6 January 1976.

On 19 November 1975, the registry of the Assize Court had told Mr. Weber, Mr. Vass' lawyer, by telephone that the hearings would be held between 19 and 21 January 1976, but they were subsequently postponed to await the Federal Court's judgment. When that judgment was delivered on 6 January, it was too late, according to the Government, to hold the hearings on the date originally envisaged. However, on 21 January 1976 the Assize Court invited the parties to present their submissions on the apportionment of costs, having regard to the fact that the "absolute" limitation period (see paragraph 17 below) was close to expiring. Both parties did so in writing. Mr. Minelli also asked the Assize Court to obtain certain evidence.

12. On 12 May 1976, the Chamber of the Canton of Zürich Assize Court (Gerichtshof des Geschworenengerichts) decided that it could not hear the complaint (Nichtzulassung der Anklage) against the applicant because the "absolute" limitation period of four years had expired on 27 January 1976 (Articles 72 and 178 of the Swiss Criminal Code; see paragraph 17 below). It directed that Mr. Minelli should bear two-thirds of the court costs (Kosten der Untersuchung und des gerichtlichen Verfahrens), namely 374 SF out of a total of 562 SF, the balance being payable by the private prosecutors; it also ordered him to pay to each of them compensation of 600 SF in respect of their expenses, as against their claim of 3,600 SF.

13. The decision on this point was based on Article 293 of the Zürich Code of Criminal Procedure, whereby the losing party is to bear the costs of the proceedings and is to pay to the other party compensation in respect of his expenses, unless special circumstances warrant a departure from this rule.

The Chamber of the Canton of Zürich Assize Court found that in the instant case it was the private prosecutors who were the losing party: as a result of limitation, they had not obtained the applicant's conviction. It then referred to Zürich case-law according to which, in cases ending in an acquittal (*Freispruch*) on account of criminal irresponsibility or in a decision to terminate the proceedings (*Einstellung*) following the death of the accused, it is of significance to know, when the costs are being apportioned, what the judgment would have been had the accused been criminally responsible or survived. In its opinion, the same applied when the prosecution was terminated on account of limitation; "the obligation to bear the costs and expenses" must in such circumstances "depend on the judgment which would have been given had there not been limitation". The Chamber added that the costs of a private prosecution could never be left to be borne by the State and that according to the established practice in the matter there was no call to conduct a further investigation into the facts.

To discover what the result of the prosecution would have been in the absence of limitation, the Chamber referred to the judgment (which has since become final) which the Higher Court had given on 2 September 1975 in the case of the journalist, Mr. Fust (see paragraph 10 above). After summarising the judgment and citing extensive extracts, the Chamber stated (translation from German into French supplied by the Government):

"It can be accepted, as is done by the private prosecutors, that the present case is, with slight variations, the same as that referred to, namely the proceedings before the Cantonal Court against the journalist F. for defamation. In fact, Minelli, by maintaining that there had been fraud in the instant case and calling for Mr. Vass to be placed in detention on remand, has brought much more serious accusations against the private prosecutors. Unlike F., the accused apparently made no effort to verify his accusations. Minelli was a target of the private prosecutors' publicity campaign when, in January 1972, he received from the company *Télé-Répertoire Editions Vass* a printed subscription form. However, according to his own statement, he was not deceived. Looking at the card more carefully, he found on the back a printed note 'which gave it to be understood in a rather indirect manner that the invoice was intended to pay for an entry in heavy print in a telephone directory' (ref. 5/28). When, a few days later, F.'s article appeared in "*Blick*", Minelli himself formulated the accusations in question, with the object, according to his own statement, of inducing the postal authorities to take action. Nevertheless, he did not previously contact either the private prosecutor Mr. Vass or his company because the facts seemed to him so clear that he did not consider it necessary to do so (ref. 5/26 p. 4).

By failing to obtain more precise information from the private prosecutors, the accused committed a breach of his duty of care. He ought in fact to have made himself aware of the steps taken by them with a view to avoiding all risk of confusion. After obtaining this information he could at most have indicated his disapproval of their methods, but he did not have the right to accuse them of fraud publicly and in such a flagrant manner. As he nevertheless did so, he would in all probability have been convicted of defamation if the present proceedings had not been terminated on account of limitation. This conclusion is rendered more compelling by the fact that the proceedings for fraud initiated on the complaint of the accused against Mr. Vass in the

Canton of Ticino ended in a discharge (10 May 1972); the costs of the proceedings were ordered to be paid by the State. The discharge was based on the absence of facts which would have made it possible to find that the constituent elements of the offence of fraud existed (ref. 5/20 and 21). The arguments the accused adduces against this decision can no longer be examined in the present proceedings. That would have been possible if the Assize Court had been required to reach a decision on the merits of the charge.

Given that Article 293 of the Code of Criminal Procedure authorises the court to take account of the 'special circumstances', this means that it must take into consideration all the relevant circumstances in making its decision on the apportionment of costs. As stated by the Canton of Zürich Court of Cassation in its unpublished decision of 2 April 1973, cited above, these circumstances include the fact that the private prosecutors contributed by their behaviour to the initiation of the proceedings, within the meaning of Article 189 of the Code of Criminal Procedure. The fact that the subscription forms were sent without envelopes until the end of 1971 and, sporadically, in 1972 may have given the accused the impression that the prosecutors had sought to create confusion or were at least not concerned about it. The fact of combining the offer and the invoice in their communication must also be considered as improper, as was moreover already noted by the Higher Court in its judgment. The private prosecutors' commercial practices, which had already been publicly denounced, were indeed the cause of the article complained of. The accused's reactions were accordingly provoked by the private prosecutors. Even though the accused acted for a specific purpose, his attack was nevertheless excessive. It clearly went beyond the bounds of what was tolerable.

It must therefore be assumed that if the proceedings had not been terminated on account of limitation, the article against which the complaint was filed would very probably have led to the conviction of the accused; on the other hand, it was the private prosecutors' behaviour which caused the accused to draw their reprehensible commercial practices to the attention of the public and the competent authorities. It is therefore justified to order the accused to pay two-thirds of the court costs and the prosecutors one-third. The parties' expenses must be settled in the same proportions, on the basis that the total sum involved amounts to 3,600 francs; ..."

14. On 26 July 1976, Mr. Kuhn filed, on behalf of Mr. Minelli, an application for this decision to be quashed (Nichtigkeitsbeschwerde); reliance was placed, inter alia, on Article 6 § 2 (art. 6-2) of the Convention.

The Canton of Zürich Court of Cassation (Kassationsgericht) dismissed this application on 30 September 1976. It treated the presumption of innocence as being a rule of evidence. It noted that it was undisputed that the publication complained of was defamatory. Accordingly, the applicant could not have avoided conviction, if the proceedings had not been terminated on account of limitation, unless he had had grounds for believing his allegations to be true; however, the Chamber of the Assize Court had found that this was not the case. According to the Court of Cassation, Article 6 § 2 (art. 6-2) could not be interpreted to mean that the good faith of a person charged with defamation must be presumed until the contrary was proved, in other words, that it was for the private prosecutor to prove bad faith on the part of the accused. It could not be supposed that the

Convention intended to overturn (umwälzen) in such a way the criminal law of the Contracting States. Moreover, the field of application of Article 6 § 2 (art. 6-2) was not very clear. For the reason stated, it could not be accepted that it extended to the establishment of the truth in a criminal prosecution for defamation. It followed that the Chamber of the Assize Court had not violated this provision by reaching the conclusion, without taking evidence (Beweisverfahren), that Mr. Minelli had not succeeded in proving the truth of his allegations against the private prosecutors.

The Court of Cassation directed that the applicant was to pay 251 SF in court costs and ordered him to pay to the private prosecutors compensation of 600 SF in respect of their expenses.

15. On 1 November 1976, Mr. Kuhn, on behalf of Mr. Minelli, filed with the Federal Court a public-law appeal based on Article 6 § 2 (art. 6-2) of the Convention.

On 5 January 1977, at the applicant's request, the President of the Court suspended the proceedings, on the ground that various cases raising similar issues were pending before the European Commission of Human Rights (applications nos. 6281/73 and 6650/74, Neubecker and Liebig, respectively, against the Federal Republic of Germany; application no. 7640/76, Geerk against Switzerland). The proceedings were resumed after these cases had formed the subject of friendly settlements under Article 28, sub-paragraph (b) (art. 28-b), of the Convention.

16. The Public-Law Chamber of the Federal Court dismissed the appeal on 16 May 1979.

It recalled first of all that since this was a private prosecution for defamation, without the intervention of the public prosecutor, the costs could not be borne by the State: they had to be apportioned (aufteilen) between the parties in some way or another. Account also had to be taken of the fact that not only the accused's criminal responsibility but also the private prosecutor's reputation were at stake in such proceedings. This special situation might have repercussions on the method of apportioning the costs.

According to the Federal Court, if, owing to a subsequent procedural obstacle, criminal proceedings did not terminate in a judgment on the merits but in a decision which left open the question of guilt (discharge or declaration that the complaint could not be heard), reasons of equity might necessitate the taking into account, in the decision on costs, of the probable result of the proceedings in the absence of such obstacle. It was therefore justified to consider, after a provisional examination of the merits of the case ("aufgrund einer provisorischen Prüfung der materiellen Rechtslage"), which party would probably have been successful in the absence of limitation.

In the instant case, there had been no violation of the presumption of innocence as the result of the imposition of a punishment without guilt

being established in accordance with the law. Neither had there been any measure implicitly amounting to a judicial finding of a criminal offence, equivalent to a conviction. Admittedly, the Chamber of the Assize Court came to the conclusion, "by anticipating partially the assessment of the evidence, that the applicant should probably have been convicted of defamation". This was, however, not "a formal finding of criminal guilt, but an estimation of the probable result of the proceedings ("Würdigung der Prozesschancen")". As the Chamber had to come to its decision on the basis of the evidence before it and as Cantonal practice prohibited its making any further investigation into the facts for the sole purpose of apportioning the costs, it was still possible that the proceedings might have resulted in an acquittal had they run their ordinary course. An order to pay costs was not in itself to be regarded as equivalent to a criminal conviction. Since the Chamber had rendered a decision only on the apportionment of costs and not on criminal guilt, the applicant (and also the private prosecutor) could not rely on Article 6 § 2 (art. 6-2) of the Convention to insist that the provisional examination undertaken in the present case should follow the procedure required for a decision on the merits.

The Federal Court added that the criterion of the probable result of the proceedings could be utilised only if the data available enabled a sufficiently reliable estimate to be made and if the parties had previously had an opportunity to express their views on the matters relevant to the apportionment of costs. However, the limits to be respected in this context were based not on the presumption of innocence but on the general principle forbidding arbitrary decisions and on the right to be heard. And the applicant had made no complaint in this respect.

Finally, the Federal Court noted that the Chamber of the Assize Court had not only considered whether the proceedings would have ended in Mr. Minelli's conviction had there not been limitation, but had also had regard to the conduct of the two private prosecutors before the trial. The Federal Court directed that the applicant was to pay 643 SF in court costs and ordered him to pay to the respondents' compensation of 800 SF in respect of their expenses.

B. Relevant legislation

17. Offences involving an attack on a person's honour (délits contre l'honneur) are governed by Articles 173 to 178 of the Swiss Federal Criminal Code of 21 December 1937. Simple defamation (diffamation) entails liability to a sentence of imprisonment for not more than six months (Article 173) and serious defamation (calomnie), a sentence of imprisonment for not more than three years (Article 174 combined with Article 36).

Under Article 178, prosecution for these offences is subject to a two-year limitation period. However, the running of time will be interrupted and will commence afresh whenever any measure of investigation is taken. Nevertheless, for offences involving an attack on a person's honour there is in any event "absolute" limitation after four years, that is twice the normal limitation period (Article 72 § 2 of the Criminal Code).

18. In Switzerland, criminal proceedings for such offences are instituted by means of a private complaint (Strafantrag). In the Canton of Zürich, as in several other Cantons, the proceedings are known as Privatstrafklageverfahren (Article 287 of the Zürich Code of Criminal Procedure): it is for the injured party, not the State authorities, to take the initiative. The public prosecutor does not take part in the proceedings.

Cases are normally heard by a District Court (Bezirksgericht), but the accused may apply for a transfer to the Assize Court if the alleged defamation has been committed through the press (Article 294 of the Code of Criminal Procedure and section 56 of the Zürich Constitution of the Courts Act). In that event, the Prosecution Chamber of the Canton of Zürich Higher Court - rather than the President of the District Court - rules on the admissibility (Zulassung) of the complaint (Article 305 of the Zürich Code of Criminal Procedure).

If the court decides that the complaint cannot be heard, the private prosecutor may appeal (Article 169 of the same Code), but if the court decides that the complaint can be heard, the accused cannot appeal except on the ground that the court lacks jurisdiction.

Under section 160 § 8 of the Constitution of the Courts Act, judgments in criminal matters must include decisions both on the question of guilt and the consequences thereof - acquittal, sentence, imposition of measures of prevention or assistance - and on damages (Schadenersatz), costs and compensation (Entschädigungen).

Details of the apportionment of costs and expenses, unlike those of the sentence passed, are entered only in the court's register of criminal cases and not in the judicial criminal records (casier judiciaire).

19. In the context of private prosecutions, costs include compensation to the parties in respect of their expenses (Prozessentschädigung) as well as court costs properly so-called (court and registry fees); their incidence is determined by reference, inter alia, to what caused the court costs and expenses to arise. It follows that the costs are in principle never paid by the State but must be borne by the parties themselves (Article 190 of the Zürich Code of Criminal Procedure). In this connection, Article 293 of the Code of Criminal Procedure provides:

"The losing party shall bear the court costs and shall pay compensation to the other party in respect of his expenses; a departure from this rule can be made only if special circumstances so warrant."

When determining the apportionment of costs and expenses, the court, according to the Government, enjoys a certain discretion in the choice of the criteria to be applied. It can take account, *inter alia*, of reprehensible or irresponsible behaviour by the parties before or during the investigation (Articles 189 and 286 of the Code of Criminal Procedure); of their having violated the principles of good faith or morality; of the principle of equity; and, finally, of questions of causation, which may lead it to form an estimate of the probable result of the proceedings.

PROCEEDINGS BEFORE THE COMMISSION

20. In his application of 20 June 1979 to the Commission (no. 8660/79), Mr. Minelli complained of the decision of 12 May 1976 of the Chamber of the Canton of Zürich Assize Court, ordering him, pursuant to Article 293 of the Canton of Zürich Code of Criminal Procedure, to pay two-thirds of the costs of the investigation and trial and compensation in respect of the private prosecutors' expenses. He alleged that this decision amounted to "a punishment on suspicion" and thus violated Article 6 § 2 (art. 6-2) of the Convention.

21. On 17 December 1980, the Commission declared the application admissible.

In its report of 16 May 1981 (Article 31 (art. 31) of the Convention), the Commission expressed the unanimous opinion that there had been a violation of Article 6 § 2 (art. 6-2).

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

22. At the hearings of 26 October 1982, the Government requested the Court to hold that Switzerland had not violated the Convention and that there was therefore no call to afford the applicant just satisfaction under Article 50 (art. 50).

AS TO THE LAW

23. The applicant claimed to have been the victim of a violation of Article 6 § 2 (art. 6-2) of the Convention, which reads as follows:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

He submitted that the violation arose from the decision of 12 May 1976 whereby the Chamber of the Canton of Zürich Assize Court, whilst terminating the prosecution on account of limitation, ordered him to pay part of the costs of the proceedings, together with compensation to Télé-Répertoire S.A. and Mr. Vass in respect of their expenses (see paragraphs 12-13 above).

I. THE APPLICABILITY OF ARTICLE 6 § 2 (art. 6-2)

24. The Government's principal plea was that the present case fell outside the ambit of the above-cited provision both *ratione materiae* and *ratione temporis*.

A. The field of application of Article 6 § 2 (art. 6-2) as regards subject-matter

25. As regards the first point, Article 6 § 2 (art. 6-2) was said to be inapplicable on account of the nature both of the prosecution in question and of the functions exercised by the Chamber of the Assize Court on this occasion.

1. Nature of the prosecution in question

26. The Government accepted that Mr. Minelli was "charged with a criminal offence", within the meaning of paragraph 2 of Article 6 (art. 6-2). They considered, however, that a private prosecution for defamation was not a "criminal matter" ("*matière pénale*", in the French text of paragraph 1 (art. 6-1)) but was basically civil in character. They relied on case-law of the Commission to the effect that the right to enjoy a good reputation was a "civil right" and that "private prosecution proceedings do not fall within the scope of Article 6 § 1 (art. 6-1)".

The Commission observed that there was a misunderstanding on the part of the Government and disagreed with their submissions: although, for the individual entitled thereto, the right to a good reputation was civil in character, a person on trial for defamation was undoubtedly the object of a "criminal charge" and could therefore invoke paragraphs 2 and 3 of Article 6 (art. 6-2, art. 6-3). The applicant was of the same opinion.

27. The Court has to determine whether Mr. Minelli, who it was not contested was "charged with a criminal offence" ("*accusé d'une infraction*", Article 6 § 2 (art. 6-2)), had to answer a "criminal charge against him" ("*accusation en matière pénale dirigée contre lui*, Article 6 § 1 (art. 6-1)); as the Government recalled, the presumption of innocence enshrined in paragraph 2 of Article 6 (art. 6-2) is one of the elements of the fair criminal trial that is required by paragraph 1 (art. 6-1) (see the Deweer judgment of

27 February 1980, Series A no. 35, p. 30, § 56, and the Adolf judgment of 26 March 1982, Series A no. 49, p. 15, § 30).

28. The infringement of an individual's "civil" right sometimes also constitutes a criminal offence. To determine whether there is a "criminal charge"/"accusation en matière pénale", one has, inter alia, to examine the situation of the accused - as it arises under the domestic legal rules in force - in the light of the object of Article 6 (art. 6), namely the protection of the rights of the defence (see the above-mentioned Adolf judgment, *ibid.*).

In Switzerland, defamation is included amongst the offences defined by and punishable under the Federal Criminal Code (see paragraph 17 above). A prosecution for defamation may take place only if the victim has filed a complaint (Strafantrag), but the conduct of the prosecution is governed by the Cantonal Codes of Criminal Procedure, in this case that of the Canton of Zürich; the proceedings may lead to penalties, in the shape of a fine or even of imprisonment, which will be entered in the judicial criminal records (see paragraph 18 above).

Accordingly, the Court has no doubts as to the criminal nature of the proceedings brought against Mr. Minelli by Télé-Répertoire S.A. and Mr. Vass on 29 February 1972 (see paragraph 10 above).

2. Nature of the functions exercised by the Chamber of the Assize Court

29. The Government also submitted that when ruling on the question of costs after it had declared the prosecution barred on account of limitation, the Chamber of the Canton of Zürich Assize Court was exercising a purely administrative function that was intrinsically distinct from its judicial functions; it rendered a procedural decision to which the presumption of innocence - which was no more than a rule of evidence - was irrelevant.

According to the Commission, on the other hand, Article 6 § 2 (art. 6-2) is also applicable to a prosecution which terminates without a judgment in the strict sense. Moreover, in the present case, it was by means of a single procedural act that the Chamber of the Assize Court decided not to proceed further with the complaint and to order the applicant to pay part of the court costs and compensation in respect of the prosecutors' expenses.

30. In the Court's opinion, Article 6 § 2 (art. 6-2) governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge (see, *mutatis mutandis*, the above-mentioned Adolf judgment, Series A no. 49, p. 16, § 33 *in fine*).

In the Canton of Zürich, a decision on the apportionment of costs is a normal part of criminal proceedings for defamation and is designed to settle certain consequences thereof. In this connection, it is of little moment that the decision was adopted after the ruling on the merits or that its text appears in a separate document.

In fact, one finds here neither partial procedural acts, effected concurrently or at intervals, nor even - as in the Adolf case where the Court likewise held that Article 6 (art. 6) was applicable in the different circumstances there obtaining (see the above-mentioned judgment, Series A no. 49, p. 16, § 32) - a "single procedural act effected in several stages", but rather a single all-embracing procedural act. The decision of 12 May 1976, after establishing that the statutory limitation period had expired, directed Mr. Minelli to bear two-thirds of the court costs and ordered him to pay compensation to Télé-Répertoire S.A. and Mr. Vass in respect of their expenses (see paragraph 12 above). It can be seen that the two parts of the reasons for the decision cannot be dissociated: the apportionment of the costs was the corollary of and necessary complement to the termination of the prosecution; moreover, the Government acknowledged this at the hearings. This is confirmed clearly by the operative provisions: immediately after a first point declaring that the charge could not be heard came the points dealing with the court costs and the compensation in respect of expenses.

B. The field of application in time of Article 6 § 2 (art. 6-2)

31. According to the Government, the decision complained of fell at least outside the field of application in time of Article 6 § 2 (art. 6-2). They maintained that Mr. Minelli had the benefit of the presumption of innocence at the very most until 27 January 1976, the date when limitation intervened (see paragraph 12 above) and that the Chamber of the Assize Court confined itself to taking notice of the legal effects of limitation and then apportioning the costs.

The Commission did not subscribe to this argument. In its view, judicial proceedings can come formally to a close in several stages rather than all at once; here, it was the decision of 12 May 1976, with its extensive reasoning, that constituted the final stage.

32. The Court concurs with the Commission. Admittedly, limitation had extinguished the criminal action instituted against the applicant, but an official procedural act of the Chamber of the Assize Court was required to establish the fact (see, *mutatis mutandis*, the Artico judgment of 13 May 1980, Series A no. 37, pp. 6-7 and 15-18, §§ 8-11 and 31-37), and it is precisely such a finding that is contained in the decision complained of. It stated firstly that "the charge cannot be heard" and then that "the accused" had to bear two-thirds of the court costs and pay to each of the private prosecutors compensation in respect of his expenses (points 1, 3 and 4 of the operative provisions). This wording shows clearly that at this final stage of the proceedings the Chamber of the Assize Court still regarded the applicant as being "charged with a criminal offence", within the meaning of Article 6 (art. 6).

C. Recapitulation

33. Article 6 § 2 (art. 6-2) was therefore applicable in the present case.

II. COMPLIANCE WITH ARTICLE 6 § 2 (art. 6-2)

A. Limits of the Court's task

34. The applicant and the Government agreed that the case raised a question of principle: is it consonant with the presumption of innocence to direct that a person shall pay court costs and compensation in respect of expenses where he has been acquitted or where the case has been discontinued, discharged or, as here, terminated on account of limitation?

As the Government emphasised by way of alternative plea, the system which permits the adoption of such a solution in certain cases is deeply rooted in Swiss legal tradition: it is enshrined in Federal legislation and in that of most Cantons, including the Canton of Zürich, and has been developed by case-law and practice. According to Mr. Minelli, on the other hand, it is the State which should bear all the risks of criminal proceedings, not only as regards evidence but also as regards costs.

In the Commission's view, the system in question could not of itself run counter to Article 6 § 2 (art. 6-2) of the Convention; however, a problem arose if the reasons for the court's decision or some other precise and conclusive evidence showed that the apportionment of costs resulted from an appraisal of the guilt of the accused.

35. The Court in principle concurs with the Commission. However, it would point out, in conformity with its established jurisprudence, that in proceedings originating in an individual application, it has to confine itself, as far as possible, to an examination of the concrete case before it (see, *inter alia*, the above-mentioned *Adolf* judgment, Series A no. 49, p. 17, § 36). Accordingly, it has to give a ruling not on the Zürich legislation and practice in abstracto but solely on the manner in which they were applied to the applicant.

B. The decision of the Chamber of the Canton of Zürich Assize Court (12 May 1976)

36. According to the Government, the decision of 12 May 1976 took account of the applicant's conduct, amongst other factors, only "as a pure hypothesis" for the purpose of apportioning costs: it did no more than endeavour to estimate the prospects of success of the complaint filed by *Télé-Répertoire S.A.* and Mr. Vass in the event of judgment on the merits.

In these circumstances, so the Government submitted, there had been no violation of Article 6 § 2 (art. 6-2).

The Commission, for its part, expressed the contrary opinion: in its view, the Chamber of the Canton of Zürich Assize Court had considered that Mr. Minelli was guilty.

37. In the Court's judgment, the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty. The Court has to ascertain whether this was the case on 12 May 1976.

38. The Chamber of the Assize Court based its decision on Article 293 of the Zürich Code of Criminal Procedure, which, in the case of a private prosecution for defamation, permits a departure, in special circumstances, from the rule that the losing party is to bear the court costs and pay compensation to the other party in respect of his expenses (see paragraph 19 above). In the light of Zürich case-law, it found that in the present case "the incidence of the costs and expenses should depend on the judgment that would have been delivered" had the statutory period of limitation not expired. To decide this point, it had regard to four matters (see paragraph 13 above): the fact that the case was virtually identical to that of the journalist Fust, which had resulted on 2 September 1975 in a conviction (see paragraph 10 above); the seriousness of the applicant's accusations against Mr. Vass; the applicant's failure to verify his allegations; and the negative outcome of the 1972 prosecution of Mr. Vass (see paragraph 9 above).

For these reasons, which were set out at length and cannot be dissociated from the operative provisions (see the above-mentioned Adolf judgment, Series A no. 49, p. 18, § 39), the Chamber of the Assize Court concluded that, in the absence of limitation, the "National Zeitung" article complained of would "very probably have led to the conviction" of the applicant. In setting out those reasons, the Chamber treated the conduct denounced by the private prosecutors as having been proved; furthermore, the reasons were based on decisions taken in two other cases to which, although they concerned the same facts, Mr. Minelli had not been a party and which, in law, were distinct from his case.

In this way the Chamber of the Assize Court showed that it was satisfied of the guilt of Mr. Minelli, an accused who, as the Government acknowledged, had not had the benefit of the guarantees contained in paragraphs 1 and 3 of Article 6 (art. 6-1, art. 6-3). Notwithstanding the absence of a formal finding and despite the use of certain cautious phraseology ("in all probability", "very probably"), the Chamber proceeded

to make appraisals that were incompatible with respect for the presumption of innocence.

C. The Federal Court's judgment (16 May 1979)

39. The Government put forward a final argument, which was based on Article 26 (art. 26) of the Convention, to the effect that before the Strasbourg institutions they were answerable solely for the last judicial decision rendered in the present case, namely the Federal Court's judgment of 16 May 1979; they claimed that that judgment had removed any ambiguity that might be contained in the decision of 12 May 1976.

40. The 1976 decision certainly has to be read in the light of the 1979 judgment (see the above-mentioned Adolf judgment, *ibid.*, p. 19, § 40). The Federal Court noted, in the first place, that reasons of equity might necessitate the taking into account, in the decision on costs, of the probable result of the prosecution had there not been limitation; it deduced from this that it was justified to consider, after a provisional examination of the merits of the case, which party would probably have been successful in the absence of this procedural obstacle. It added that the Chamber of the Canton of Zürich Assize Court had taken no measure implicitly amounting to a judicial finding of a criminal offence, equivalent to a conviction; the Chamber had indeed observed that the applicant should probably have been found guilty of defamation, but that was a mere estimation and not a formal finding (see paragraph 16 above).

The judgment of 16 May 1979 thus added certain nuances to the decision of 12 May 1976; however, it was confined to clarifying the reasons for that decision, without altering their meaning or scope. By rejecting Mr. Minelli's appeal, the judgment confirmed the decision in law; at the same time, it approved the substance of the decision on the essential points.

The Federal Court might perhaps have arrived at a different decision had the applicant invoked before that court his right to be heard (see paragraph 16 above), as he subsequently did - without the Government pleading a failure to exhaust domestic remedies - before the Commission and the Court. However, this possibility in no way affects the conclusion that follows from an examination of the decision of 12 May 1976, even if it is seen in conjunction with the judgment of 16 May 1979.

D. Conclusion

41. Accordingly, there has been a violation of Article 6 § 2 (art. 6-2)

III. THE APPLICATION OF ARTICLE 50 (art. 50)

42. At the hearings, the applicant claimed

- for non-pecuniary loss, such sum as the Court might see fit;
- the reimbursement of court costs, lawyer's fees and expenses and his personal expenses, referable to the proceedings brought against him in Switzerland;
- the reimbursement of his lawyer's fees and expenses and his personal expenses, referable to the proceedings in his case before the Commission and the Court.

As the Agent of the Government has submitted detailed observations on the matter, the Court considers that the question is ready for decision (Rule 50 § 3, first sentence, of the Rules of Court). In accordance with the usual practice, it is proper to distinguish here between damage caused by a violation of the Convention and the costs and expenses necessarily incurred by the victim (see, *inter alia*, the *Le Compte, Van Leuven and De Meyere* judgment of 18 October 1982, Series A no. 54, p. 7, § 14).

A. Non-pecuniary loss

43. According to the Government, if the Court were to find a breach of the requirements of Article 6 § 2 (art. 6-2) of the Convention, then the public pronouncement of, and the publicity attaching to, its judgment would already constitute sufficient just satisfaction for the alleged non-pecuniary loss.

44. The Court would recall that it was an article in the press that lay at the origin of the case. In that article Mr. Minelli accused third parties of improper commercial dealings to which he wished to draw the attention of the relevant authorities (the Swiss Post Office) and of the public. The prosecution brought against him was set in motion by a complaint by those third parties that they had been defamed. The applicant may have suffered some degree of non-pecuniary loss as a result of the infringement of the presumption of innocence in the subsequent proceedings but, in the circumstances of the case, adequate compensation has already been furnished by the finding of violation, contained in the present judgment (see, as the most recent precedent, the above-mentioned *Le Compte, Van Leuven and De Meyere* judgment, *ibid.*, p. 8, § 16).

B. Costs and expenses

45. To be entitled to an award of costs and expenses under Article 50 (art. 50), the injured party must have incurred them in order to seek, through the domestic legal order, prevention or rectification of a violation, to have the same established by the Commission and later by the Court or to obtain redress therefore (see the *Neumeister* judgment of 7 May 1974, Series A no.

17, pp. 20-21, § 43). Furthermore, it has to be shown that the costs and expenses were actually incurred, were necessarily incurred and were also reasonable as to quantum (see, inter alia, the above-mentioned *Le Compte, Van Leuven and De Meyere* judgment, Series A no. 54, p. 8, § 17).

1. Costs and expenses incurred in Switzerland

46. Mr. Minelli claimed reimbursement of the costs and expenses which he allegedly incurred in the principal proceedings before the District Court and the Assize Court and in appealing to the Court of Cassation and the Federal Court (see paragraphs 10, 11, 12, 14 and 15 above).

Before examining each of these claims, the Court would point out that the complaint which it has accepted in paragraph 41 above concerned not the actual substance of the prosecution for defamation brought against the applicant but exclusively the reasons adopted on that occasion by the Swiss courts in their decisions on the apportionment of the costs and expenses.

(a) Costs and expenses referable to the District Court and the Assize Court proceedings

47. In respect of the principal proceedings before the Uster District Court and the Canton of Zürich Assize Court (29 February 1972 - 12 May 1976), the applicant claimed firstly reimbursement of the court costs (374.65 SF) and the compensation in respect of expenses (1,200 SF), which he was ordered to pay in the decision of 12 May 1976 (see paragraph 12 above).

He is entitled to recover these sums in view of the direct link between them and the reasons for the decision, which the Court has held to be incompatible with the presumption of innocence.

48. Mr. Minelli also claimed 1,800 SF for loss of earning-power and 3,600 SF for lawyer's fees and expenses.

The Court sees no cause to accept the first of these claims, in respect of which the applicant has, moreover, supplied no details. (see the above-mentioned *Le Compte, Van Leuven and De Meyere* judgment, *ibid.*, p. 11, § 25 in fine). As regards the second claim, the only relevant period is that after 21 January 1976, the date on which the approaching expiry of the "absolute" limitation period led the Assize Court to raise the question of the apportionment of the costs. For this phase of the proceedings, which might have resulted in the prevention of the breach of the requirements of Article 6 § 2 (art. 6-2), the Court fixes, on an equitable basis, the sum to be awarded to the applicant at 600 SF.

(b) Costs and expenses referable to the appeals against the decision of 12 May 1976

49. The appeals of 26 July 1976 to the Canton of Zürich Court of Cassation and of 1 November 1976 to the Federal Court (see paragraphs 14-

16 above) were designed to obtain redress for the violation that arose from the decision of 12 May 1976. Mr. Minelli is therefore entitled to reimbursement of the court costs and the compensation in respect of expenses which he was ordered to pay in the judgments of 30 September 1976 and 16 May 1979, that is to say a total of 2,294 SF.

The same applies to the lawyer's fees and expenses which he incurred in making those appeals, which were filed on his behalf by Mr. Kuhn; they were said to amount to 600 SF and 800 SF respectively. Since these figures appear plausible and reasonable, the Court does not deem it necessary to call for the vouchers requested by the Government.

(c) Costs and expenses referable to the appeal of 24 November 1975 to the Federal Court

50. The appeal of 24 November 1975 to the Federal Court on a question of procedure, for its part, concerned the admissibility of the complaint and its transfer to the Assize Court (see paragraph 11 above). It therefore had no connection with the decisions on the apportionment of costs and was not designed to prevent, or to obtain redress for, the violation of Article 6 § 2 (art. 6-2). From this the Court concludes, like the Government, that the corresponding costs and expenses (a total of 1,279 SF, according to Mr. Minelli) do not fall to be taken into account.

2. Strasbourg costs and expenses

51. The applicant, who did not have the benefit of free legal aid before the Commission or in his relations with the Commission's Delegate before the Court, claimed 2,400 SF for lawyer's fees and expenses and 400 SF for personal expenses, together with 1,560 SF for loss of earning-power.

The Government raised no objection as regards reimbursement of the fees paid by Mr. Minelli to Mr. Kuhn and the travel and subsistence expenses incurred by each of them; they left it to the Court to fix the amount thereof having regard to any evidence provided by the applicant.

52. Before the Court, the applicant himself assisted the Commission's Delegate; the lawyer's fees and expenses in question therefore relate only to the proceedings before the Commission. The Court does not deem it necessary to call for vouchers, since the figure of 2,400 SF appears plausible and reasonable.

The same remark also applies to the 400 SF claimed for travel and subsistence expenses incurred by the applicant in coming to Strasbourg. Having regard to the nature of the case, there was real value in the presence of Mr. Minelli before the Commission, and even more so before the Court since he himself appeared at the hearings of 26 October 1982 (see notably, *mutatis mutandis*, the above-mentioned *Le Compte, Van Leuven and De Meyere* judgment, Series A no. 54, p. 11, § 25).

On the other hand, the claim for loss of earning-power (1,560 SF) falls to be rejected, as has already been done by the Court for the District Court and the Assize Court proceedings (see paragraph 48 above).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 6 § 2 (art. 6-2) of the Convention;
2. Holds that the respondent State is to pay to the applicant eight thousand six hundred and sixty-eight Swiss francs and sixty-five centimes (8,668.65 SF) in respect of costs and expenses and rejects the remainder of the claim for just satisfaction.

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-fifth day of March, one thousand nine hundred and eighty-three.

Gérard WIARDA
President

Marc-André EISSEN
Registrar