AS TO THE ADMISSIBILITY OF

Application No. 29473/95
by Lawrence GRECH and Anthony MONTANARO
against Malta

The European Commission of Human Rights (First Chamber) sitting in private on 21 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 23 October 1995 by Lawrence GRECH and Anthony MONTANARO against Malta and registered on 6 December 1995 under file No. 29473/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are citizens of and residents in Malta. They are the editors of a newspaper, the Sunday Times. The first applicant was born in 1948 and the second in 1921. In the proceedings before the Commission they are represented by Mr. G. Bonello, a lawyer practising in Malta.

The facts of the case, as they have been submitted by the applicants, may be summarised as follows:

A. The particular circumstances of the case

On 24 March 1985 the Sunday Times published the following letter in its readers' column under the title "A fishy story":

> "SIR, - While doing the family shopping, the other day, I overheard a customer asking for a tin of tuna fish. The grocer proudly produced a tin, bearing a familiar brand name, from beneath the counter. Sensing that my wife would appreciate the endeavour, I promptly asked for a dozen tins. On being politely told that I was only allowed a maximum of three tins, I graciously accepted them.

Whilst my wife was helping me to stow away the goods, she asked me why on earth I had purchased three tins of sardines. Taking a closer look I was surprised to see that it was indeed "sardines" I had purchased. I wondered why the grocer had so stingily allowed me to buy only three tins and therefore decided to open one of them. Sure enough a solid packed tin of tuna fish lay before my eyes. After some homework, I feel that some pertinent questions arise:

(1) Tuna fish is being sold as "sardines", quite clearly a case of misrepresentation if ever there was one. Do we have the equivalent of a Trade Description Act?

(2) The brand name used is Japanese and therefore cannot be imported (even though, as in this case, it is not made in Japan).

(3) Tuna fish is a commodity failing within the Bulk Buying Scheme and presumably contributes toward the Price Stabilisation Fund. Has the importer of the "sardines" (sive tuna) concerned effected any such contribution?

(4) The "sardines" in question cost 28c, while a can of tuna fish of the same size (7 ozs.) retails at 32c. This is another proof, it proof were needed, of the raw deal the Maltese consumer is receiving thanks to the Bulk-Buying Scheme.

(5) Why is it that Government-imported tuna fish is so scarce while a private entrepreneur seems able to supply it without difficulty?

An official reply to the above questions would not be amiss.

Yours truly,
Hamrun. VIGILANT"

Within 24 hours from the publication of the letter, the Department of Trade asked the representatives of Paolo Bonnici Ltd, the only company which imported and distributed solid pack sardines in Malta, to provide explanations. Moreover, it withdrew the company's import licences of sardines until the completion of the investigation.

Paolo Bonnici Ltd sued the second applicant, as editor of the Sunday Times, for commercial libel under Article 29 of the Press Act. The action was heard by the First Hall of the Civil Court which on 24 May 1990 pronounced against the second applicant. The court considered that the plaintiffs had established that the letter published in the Sunday Times referred to their business and that it contained false information. The second applicant, by publishing the letter, had adopted it, for the purposes of the law, as his own. If the second applicant had been duly diligent, he would have known that the letter was false and that it was likely to cause harm to the plaintiff's business. The plaintiff "not only established the potentiality of harm which he might suffer, but brought sufficient proof to show that his import licences, which were pending, were withdrawn." The court, taking into account the amount of damages caused by the article, the type of the article and the fact that it did not mention the name of the importer and the product, decided to condemn the second applicant to pay the plaintiff 250 liri as damages as well as judicial expenses.

The second applicant appealed. In a judgment pronounced on 26 May 1992, the Court of Appeal upheld the decision of the First Hall. The appeal court considered that, contrary to what the second applicant had argued, the law did not require dolus. It was sufficient if a

person was negligent and failed to exercise the diligence required by law. The potentiality of damage was more of an objective rather than subjective element. The applicant had not verified the facts stated before publishing the letter. Moreover, there was no doubt that the facts were likely to cause harm, since it had been alleged that an importer was giving a false indication to his product in breach of administrative regulations and the commercial code. In fact damage had been done. It occurred immediately after the publication of the false declarations and consisted of the official administrative measures taken against the plaintiff.

Following this judgment, both applicants instituted civil proceedings for human rights redress before the Civil Court. They argued that the second applicant "could be held to blame if his negligent act caused damage. (However, i)t would be unfair and in violation of freedom of expression if an editor was held to blame for an act of the Government. An editor should not be responsible if the Government irresponsibly abused its discretion in issuing and withdrawing licences and inflicted damage to an importer unjustly."

On 25 February 1994 the First Hall of the Civil Court rejected the applicants' action on the ground that Paolo Bonnici Ltd had every right to sue for libel and that the Government's act was irrelevant.

The applicants appealed against the judgment of 25 February 1994 to the Constitutional Court. In a judgment delivered on 15 May 1995 the Constitutional Court considered that the judgments of 24 May 1990 of the First Hall and of 26 May 1992 of the Court of Appeal did not support the applicants' view that the Government had abused its powers by taking measures after the publication of the letter in the Sunday Times. The above-mentioned judgments had not gone into the matter whether the Department of Trade had acted abusively by cancelling the import licences of Paolo Bonnici Ltd. This was not at issue since the Government authorities were not parties to the proceedings. The second applicant had not alleged in the proceedings for libel that the Department of Trade had acted abusively and arbitrarily as he did in his complaint under the Constitution. It was not the task of the Constitutional Court to say whether the Government's act was correct or abusive.

The Constitutional Court considered that it should only take into account that the two above-mentioned judgments had not declared the Government to have acted abusively or irresponsibly. These two judgments said that, after the publication of the letter, the Government took administrative measures which badly affected the business of Paolo Bonnici Ltd. This had been mentioned with a view to establishing the element of damage which was required under Article 29 of the press Act. Actual damage had been shown to have ensued and not just the potentiality of damage. Therefore, it was not possible to maintain that the two judgments penalised the applicants for abuse of power by the Government. There was absolutely no connection between the fine of 250 liri and the damages of over 12,000 liri which Paolo Bonnici Ltd suffered as a result of the measures of the administration. In the light of all the above, the Constitutional Court upheld the judgment of 25 February 1994 of the First Hall of the Civil Court.

B. Relevant Domestic Law

Article 29 of the Press Act provides as follows:

> Whosoever, by any means mentioned in section 3 of this Act, shall publish any statement which he knows or with due diligence could have known to be false and which is likely to damage any business concern or other property, shall be liable to pay, in addition to the damages which may be due under any law for the time being in force in respect of any actual loss or injury, a sum not exceeding

two thousand liri to be fixed by the competence court.

COMPLAINTS

The applicants complain that the finding of the domestic courts that they were responsible in damages to Paolo Bonnici Ltd constitutes a violation of their right to freedom of expression under Article 10 of the Convention. They stress that, according to the judgments in question, a newspaper is responsible in damages not only for the consequences of its negligent or reckless reporting, but also for the consequences of abuses of power committed by the public authorities. The applicants further submit that the motives of the withdrawal of the licences from Paolo Bonnici Ltd were political, since the directors of that company were identified with the opposition party.

THE LAW

The applicants complain that the finding of the domestic courts that they were responsible in damages to Paolo Bonnici Ltd constitutes a violation of their right to freedom of expression under Article 10 (Art. 10) of the Convention.

The Commission recalls that Article 10 (Art. 10) of the Convention, insofar as relevant, provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Commission further recalls that, in accordance with the case-law of the Court, information of a commercial nature is not excluded from the scope of Article 10 (Art. 10) of the Convention (Eur. Court HR, Markt Intern Verlag GmbH v. Germany judgment of 20 November 1989, Series A no. 165, p. 17, para. 26). An interference with the right to impart information infringes the Convention, if it does not satisfy the requirements of paragraph 2 of Article 10 (Art. 10-2). It should, therefore, be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" to achieve such aims (see Markt Intern Verlag GmbH v. Germany judgment, op. cit., pp. 17-18, para. 27). The Contracting States have a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this margin of appreciation is subject to a European supervision as regards both the legislation and the decision applying it, even those given by an independent court. Such a margin of appreciation is essential in commercial matters. The review exercised under the Convention must be, therefore, confined to the question whether the measures taken on the national level are justifiable in principle and proportionate (see Markt Intern Verlag GmbH v. Germany judgment, op. cit., pp. 19-20, para. 33). However, the impugned court decision must be looked in the light of the case as a whole (see Markt Intern Verlag GmbH v. Germany judgment, op. cit., p. 20, para. 34).

The Commission notes that it was the second applicant who was

condemned, in his capacity as editor of the Sunday Times, to pay 250 liri in damages to Paolo Bonnici Ltd. Although the first applicant was also the editor of the above-mentioned newspaper and although he instituted together with the second applicant civil proceedings for human rights redress before the Civil Court, he was not a party to the first set of proceedings for damages. However, the Commission does not consider it necessary to decide whether the first applicant can claim to be a victim of a violation of the Convention, within the meaning of Article 25 (Art. 25) thereof, because the application is in any event inadmissible as manifestly ill-founded for the reasons stated below.

The Commission considers that the award of damages in commercial libel resulting from the publication of a letter in the Sunday Times of 24 March 1985 constituted an interference with freedom of expression. It also considers that this interference was prescribed by a law within the meaning of paragraph 2 of Article 10 (Art. 10-2), Article 29 of the Press Act, and that it pursued one of the legitimate aims set out in that paragraph, the protection of the reputation or rights of another, the Paolo Bonnici Ltd. The Commission must, therefore, examine whether the interference was necessary in a democratic society.

The Commission notes in this connection that the applicants do not dispute that the information contained in the letter they published on 24 March 1985, namely that tins of sardines traded in the local market had been found to contain tuna fish, was false. Furthermore, the Commission considers that the domestic courts could have reasonably concluded that the information was likely to cause damage to the plaintiff company in the action for damages, since it was the sole importer of tins of sardines at the time. Moreover, the Commission notes that the Constitutional Court in its judgment of 15 May 1995 concluded that, given the amount of damages awarded, the courts had not penalised the applicants for the action taken against the plaintiff company by the Department of Trade upon publication of the letter in question. As the Constitutional Court observed, the damages caused to the plaintiff company by the revocation of its import licences by the Department of Trade amounted to 12,000 liri and not to 250 liri which was the amount of damages awarded in the libel proceedings.

In the light of all the above and taking also into consideration the nature of the award, the Commission considers that is has not been established that the measures taken on the national level were not justifiable in principle and disproportionate. It follows that, in the particular circumstances of the case, it was within the State's margin of appreciation for its courts to have awarded the particular amount of damages and it follows that the third requirement of paragraph 2 of Article 10 (Art. 10), that the interference be necessary in a democratic society, has also been complied with.

As a result, the Commission concludes that no appearance of a violation of Article 10 (Art. 10) of the Convention is disclosed. The applicants' complaint must, therefore, be rejected as manifestly ill-founded under Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber