CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 73797/01
by Michalakis KYPRIANOU
against Cyprus

The European Court of Human Rights (Second Section), sitting on 8 April 2003 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 9 August 2001,

Having regard to the partial decision of 7 May 2002,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Michalakis Kyprianou, is a Cypriot national, who was born in 1937 and lives in Nicosia. He is represented before the Court by Mr C. Clerides, Mr L. Clerides, Mr M. Triantafyllides, Mr E. Efstathiou, Mr A. Angelides, Mrs E. Vrahimi, lawyers practising in Nicosia, and Mr B. Emerson and Mr M. Muller, lawyers practising in the United Kingdom.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant is an advocate who has been in practice for forty years. He was formerly a lawyer at the Office of the Attorney-General and a member of the Cypriot House of Representatives.

The complaints made in this application arise from the applicant's conviction for contempt of court. On 14 February 2001 the applicant was involved in a murder trial, defending an accused before the Assize Court of Limassol.

The applicant was conducting the cross-examination of a prosecution witness, a police constable. After the applicant had asked a question to the witness, the court interrupted him. Whereupon, the applicant felt aggrieved and sought permission to withdraw from the case. The following dialogue took place between the applicant and the court:

> "Court: We consider that your cross-examination goes into detail beyond the extent it could go at this stage of the main trial regarding questions...
>
> Applicant: I stop my cross-examination....
>
> Court: Mr Kyprianou...
>
> Applicant: Since the Court considers that I am not doing my job properly in defending this man, I ask for your leave to withdraw from this case.
>
> Court: Whether an advocate is to be granted leave to withdraw or not, is a matter within the discretionary power of the Court and, in the light of what we have heard, no such leave is granted. We rely on the case of Kafkaros and Others v. the Republic and we do not grant leave.
>
> Applicant: Since you prevent me from continuing my cross-examination on significant points of the case, then my role here does not serve any purpose.
>
> Court: We consider your persistence...
>
> Applicant: And I am sorry when I was cross-examining, the members of the Court were talking to each other, sending "ravasakia" to each other, which is not compatible

with allowing me to continue with the required strength the cross-examination, when my cross-examination is under the scrutiny of the Court in a secret manner.

Court: What has just been said by Mr Kyprianou and in particular the manner with which he speaks to the Court is considered by us as a contempt of court and Mr Kyprianou has two choices: either to insist on what he said and to give reasons why no sentence should be imposed on him or it is a matter for him to decide whether he should not insist. We give him this opportunity exceptionally. Article 44.1 (a) of the Courts of Justice Law applies fully.

Applicant: You can try me.

Court: Would you like to say anything?

Applicant: I saw with my own eyes the small pieces of paper going from one judge to the other when I was cross-examining, in a way not very flattering for the defence. How can I find the stamina to defend a man who is accused of murder?

Court (Mr Photiou): It happens that the document to which Mr Kyprianou refers, is still in the hands of brother Judge Mr. Economou and Mr. Kyprianou may inspect it.

Court (Mrs Michaelidou): The exchange of written views between the members of the bench as to the manner in which Mr Kyprianou conducts the case does not give any rights to Mr Kyprianou and I consider Mr Kyprianou's behaviour utterly unacceptable.

Court (Mr Fotiou): We shall have a break in order to consider the matter. The accused (in the main trial), should in the meantime remain in custody.

Court: We examined the matter during the adjournment and continue to believe that what Mr Kyprianou said, the content, the manner and the tone of his voice, constitute a contempt of court as provided in Article 44. 1 (a) of the Courts of Justice Law 14/60, that is non-respect of the court by way of words and conduct. We have asked Mr Kyprianou if he has anything to add before we pass sentence on him. If he has something to add, let's hear him, otherwise the Court should proceed.

Applicant: Mr President, during the break, I wondered what was the offence which I had committed. The events took place in a very tense atmosphere. I defend a very serious case; I felt that I was interrupted in my cross-examination and said what I said. I have been a lawyer for forty years, my record is unblemished and it is the first time that I face such an accusation. That is all I have to say.

Court: We shall adjourn for ten minutes and shall continue with the pronunciation of a sentence."

After a short break the Assize Court, by a majority, sentenced the applicant to five days' imprisonment.

The court referred to the above dialogue between the applicant and its members and stated the following:

"...It is not easy, through words, to convey the atmosphere which Mr. Kyprianou had created since, beside the unacceptable content of his statements, the intensity of his voice as well as his manner of expression and gestures towards the Court, not only

created an unacceptable image for any civilised place, and a court room in particular, but were apparently aimed at creating a feeling of intimidation and terror within the Court. We are not exaggerating at all in saying that Mr. Kyprianou was yelling and gesturing towards the Court.

It was pointed out to him that his statements and his behaviour amounted to contempt of court and he was given the opportunity to speak. And while there was a reasonable expectation that Mr. Kyprianou's explosion would calm down and that he would express his apologies, Mr. Kyprianou, in the same tone and with the same intensity already referred to, shouted, "You can try me".

Later, after a long break, Mr Kyprianou was given a second chance to say something to the Court, in the hope that he would express his apologies and would mitigate the damage caused by his behaviour. Unfortunately, at this stage Mr. Kyprianou still showed no signs of regret or, at least, of apprehension for the unacceptable situation he had created. On the contrary, he stated that during the break he wondered what his crime had been, merely attributing his behaviour to the "very tense atmosphere". However, he was solely responsible for the creation of that atmosphere and, therefore, he cannot use it as an excuse.

Mr. Kyprianou did not hesitate to suggest that the exchange of views between the members of the bench amounted to exchange of "ravasakia", that is, "love letters" (See: "Dictionary of Modern Greek - Spoudi ravasaki (Slavic ravas), love letter, written love note"). And he accused the Court which was trying to regulate the course of the proceedings, as it had the right and the duty to do, of restricting him and of making secret justice.

It is impossible for us to imagine another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate.

The persons of the judges, whom Mr. Kyprianou has insulted gravely, are the least of our concern. What really concerns us is the authority and integrity of justice. If the Court's reaction is not immediate and drastic, we feel that the injury to justice will be tremendous. An insufficient reaction on the part of the lawful and civilised order, as expressed by the courts, would result to the acceptance of the humiliation of the authority of justice.

It is with great sadness that we conclude that the only adequate response, in the circumstances, is the imposition of a sentence of a preventive nature, which can only be imprisonment.

We deeply apprehend the repercussions of this decision since the person concerned is an advocate of long practice, but it is Mr. Kyprianou himself who, through his conduct, brought matters to this end.

In the light of the above we impose a sentence of imprisonment of 5 days".

The president of the Court also decided to impose a fine of CYP 75 (€130).

The applicant served the sentence of imprisonment.

On 15 February 2001 the applicant filed an appeal with the Supreme Court, which was dismissed on 2 April 2001. At ground 8 of his appeal, he

asserted that contempt should not be used to suppress offensive methods of advocacy so that the advocate has sufficient freedom to enable him to conduct his client's case as he sees fit.

The Supreme Court stated that the relevant constitutional provisions of Cypriot law on contempt of court reflected the principles of English law. It relied on Article 162 of the Constitution which enables the enactment of legislation giving jurisdiction to any court to order the imprisonment for up to 12 months of any person who does not comply with a judgment or order of that court, and to punish contempt of court. It held that Article 44.2 of the Courts of Justice Law is lawfully authorised by Article 162. Finally, it concluded that it was the applicant who had created a tense atmosphere with his disdainful attitude and by undermining his mission.

The Supreme Court stated *inter alia*:

> "It is not accidental that the successive objectives of the constitutional legislator, which are embodied in Article 30 and Article 162 of the Constitution, exist side by side with each other. The power to sanction contempt of court is aimed at the protection of judicial institutions, which is essential in order to safeguard a fair trial. ...The role of the judge is nothing more than that of the defender of judicial proceedings and of the court's authority, the very existence of which are necessary to secure a fair trial. The lawyer, a servant of justice, is not a party to the case. By abusing the right to be heard and being in contempt of court, the lawyer intervenes in the procedure, as any third person, and intercepts its course, to the detriment of justice. The judicial sanctioning of contempt, where this becomes necessary, is a judicial duty exercised for the sake of the unhindered holding of a fair trial."

The Supreme Court concluded as follows:

> "It is our finding that Mr Kyprianou, by words and conduct, showed disrespect to the court and committed the offence of contempt in the face of the court contrary to section 44(2) of the Law".

As regards the sentence imposed on the applicant, the Supreme Court stated *inter alia* the following:

> "It was up to the Assize Court to deal with the contempt and to decide the means for the treatment and punishment of the person responsible for the contempt. No reason has been shown which justifies our intervention as regards the sentence imposed".

B. Relevant domestic law and practice

1. The Courts of Justice Law 1960

Article 44.1 (a) reads as follows:

> "Any person who ... on the premises where any judicial proceedings are being held or taken, or within the precincts of the same, shows disrespect, in speech or manner, of or with reference to such proceeding or any person before whom such proceedings are being held or taken ... is guilty of a misdemeanour and is liable to imprisonment for

six months or to a fine not exceeding one hundred pounds, or to both imprisonment and a fine."

Article 44.2 provides as follows:

"When any offence against paragraphs (a), (b), (c) or (I) of sub-section 1 is committed in full view of the court, the court may cause the offender to be detained in custody and, at any time before the rising of the court on the same day, may take cognisance of the offence and sentence the offender to a fine of seventy-five pounds or to imprisonment of up to one month, or to both imprisonment and a fine."

2. The Constitution

Article 162 of the Constitution reads as follows:

"The High Court shall have jurisdiction to punish any contempt of itself, and any other court of the Republic, including a court established by a communal law under Article 160, shall have power to commit any person disobeying a judgment or order of such court to prison until such person complies with such judgment or order, and in any event for a period not exceeding twelve months.

A law or a communal law, notwithstanding anything contained in Article 90, as the case may be, may provide for the punishment of contempt of court."

COMPLAINTS

1. The applicant complains under Article 6 § 1 of the Convention that his case was not heard by an impartial tribunal because the same court before which the alleged contempt was committed also found him guilty and sentenced him.

2. The applicant also complains under Article 6 § 2 of the Convention that he was presumed guilty as of his initial objection to the Assize Court's conduct.

3. The applicant next complains under Article 6 § 3 a) of the Convention that the Assize Court failed to inform him in detail of the accusation against him.

4. The applicant further complains under Article 6 § 3 b) of the Convention that he was given no opportunity to instruct a lawyer to represent him or to prepare his own defence.

5. Finally, the applicant complains under Article 10 of the Convention that his conviction for contempt of court constituted an unjustified interference with his freedom of expression.

THE LAW

1. The applicant contends that he was not heard by an independent and impartial tribunal. The same court before which the alleged contempt was committed found him guilty and sentenced him. In this respect the Assize Court prosecuted the offence, was the sole witness in that prosecution, tried the offence and pronounced sentence. He alleges a violation of Article 6 § 1 which, insofar as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an independent and impartial tribunal..."

The Government submit that the applicant's allegation relies on the assumption that the judges were involved in the matter as complainants and therefore had a personal interest in the proceedings that followed. This approach betrays a fundamental misunderstanding of the nature and function of proceedings for contempt in the face of the court in common law jurisdictions. These are not proceedings brought by a party or complainant. They are a *sui generis* type of proceedings aimed at securing the unimpeded functioning of the courts and safeguarding the authority of the judiciary. These proceedings are not adversarial in the sense that one person is opposed to another; they concern the integrity of the judicial system. No single judge has any interest in them. The long-established power granted to common law courts to sanction improper conduct committed in their face is a necessary and indispensable element of a fair trial itself. The Assize Court's own duty to ensure a fair trial of the persons accused of murder in the present case, required that it have the summary power to deal with any contempt before it. The applicant did not insult the judges in their individual capacity but sought to undermine the authority of the judicial system itself.

The Government further submit that if the judicial power to sanction attempts, by any person in the courtroom, to dominate the court and determine himself the course of the trial, is to be exercised effectively, it has to be exercised immediately. Otherwise, the contemnor, in effect, succeeds in his purpose. Moreover, if contempt proceedings are commenced before a different bench, there would be certain undesirable consequences that cannot be overlooked: The members of the bench themselves would have to testify about the events which took place before their eyes. Their credibility in connection with the facts, of which they became aware while performing their functions, would have to be scrutinised by other judges and, thus, the very integrity of the judiciary would be unnecessarily questioned.

According to the Government, it is only if one assumes (wrongly) that the Assize Court was acting in a personal capacity in trying the applicant that he can allege a breach of the impartiality rule. There is no basis for a finding of objective bias when one appreciates the context and the fact that there is no complainant. Furthermore, the fact that the applicant was able to

appeal to the Supreme Court, a judicial body with full jurisdiction to review facts and law, cured any possible breach of the impartiality requirement.

The applicant maintains that the sentence of five days' imprisonment, imposed on an experienced lawyer of high reputation for what (on the court's findings) was a minor transgression, in itself suggests the existence of bias. In proceedings for contempt, a judge should refer the matter to another judge or to the Attorney General, especially if the former has prematurely expressed a view as to guilt. The conduct of the bench in the present case suggests bias, both on the subjective test (due to their words and the intemperate sentence imposed on the applicant) and on the objective test (due to their position as judges in their own cause). The members of the bench in question were both "complainants" and witnesses to the conduct which was alleged to have constituted a contempt.

It was particularly important that the issue should be determined by an independent tribunal given that (a) there was a dispute as to the applicant's intended meaning in using the word "ravasakia" which was a matter of inference; (b) there was a dispute as to whether he was justified in complaining about the conduct of the court in the first place; (c) there was a dispute as to whether his demeanour was intended to be, or was perceived to be intimidating; and (d) the court was contemplating the imposition of a prison sentence on a lawyer for his conduct in court.

The review by the Supreme Court in the present case did not rectify the alleged partiality. It did not conduct a rehearing of the case, confining itself to points of law. Moreover, it upheld the manifestly disproportionate sentence imposed on the applicant.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant next complains that he was presumed guilty as soon as he objected to the Assize Court's conduct. He was in essence only expected to provide mitigation on his own behalf before the delivery of the court's final ruling. He alleges a violation of Article 6 § 2 of the Convention, which provides as follows:

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

In this connection, the Government refer to their arguments on the question of impartiality. Further, the Government emphasise that this was a case where there was no dispute on the underlying facts as to what had happened. Therefore the ordinary procedure, where the facts constituting the offence are proved through witnesses, would be absurd in this situation.

Finally, there is no indication that the rebuttable presumption of innocence was not applied. What happened in this case is that the judges automatically applied the presumption in the process of their decision making, but the facts before them were such as to rebut that presumption.

The applicant submits that his appearance and that of the members of the bench before an independent tribunal in a hearing to assess whether the applicant's words and actions amounted to contempt, would have been entirely practicable and fair to both sides. The presumption of innocence required the court to refrain from making any decision as to the applicant's guilt until all parties had had an opportunity to make representations. It is clear that the court made up its mind as to his guilt immediately, and all he was offered was an opportunity to provide mitigation as to sentence. This transpires from the Assise Court's judgment, where it is stated: "Later, after, a long break, Mr Kyprianou was given a second chance to say something to the Court, in the hope that he would express his apologies and would mitigate the damage caused by his behaviour" (page 11 above).

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

3. The applicant contends that the Assize Court failed to inform him in detail of the accusations against him. In its decision on sentence, the Assize Court held that the gestures of the applicant were intended to create a feeling of "intimidation and terror within the court". The applicant claims that he could not have known of the court's fears and that this accusation should have been specifically put to him. He alleges a violation of Article 6 § 3 a) of the Convention, which provides as follows:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; ..."

The Government submit that it transpires from the transcript of the proceedings before the Assize Court that the court expressly referred both to the facts that constituted the offence as well as to the relevant statutory provisions. The Supreme Court concluded that the applicant had been sufficiently informed of the matters constituting the contempt.

The Government stress that the events which constituted the offence were brief and simple and had just taken place in the courtroom; there was no dispute as to what had occurred. The court expressly told the applicant that what amounted to contempt was the content of his specific statement and the tone in which it was made. The transcript of the proceedings can

neither catch nor convey the tone in which the applicant spoke, but he himself was well aware of it.

The applicant submits that the information as to the charge which was put to him by the members of the bench was lacking in detail and did not enable the applicant to prepare his defence. Contrary to the conclusion of the Supreme Court, neither the allegation of creating an atmosphere of "intimidation and terror", nor the suggestion that the court had interpreted the word "ravasakia" to mean "love letters", were put to the applicant by the court.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

4. The applicant submits that he was given no opportunity to instruct a lawyer to represent him or to prepare his own defence. The court stated that it regarded his conduct as contemptuous and offered him the opportunity to speak. No adjournment was granted so that the applicant could take legal advice, prepare arguments or contact character witnesses. The fact that the applicant stated, "You can try me", did not amount to a waiver of his rights. The charge of contempt was a complex one and required time for proper preparation. The applicant alleges a violation of Article 6 § 3 b) of the Convention, which provides as follows:

> "Everyone charged with a criminal offence has the following minimum rights: ...
>
> (b) to have adequate time and facilities for the preparation of his defence; ..."

The Government stress that the applicant was a highly-experienced lawyer of 40 years standing. He was well aware of his rights both as to representation and adjournments. However, as part and parcel of his extreme disrespect towards the Assize Court, he simply decided that he would take no active part in the proceedings. Thus, when the Assize Court indicated to the applicant that his words and conduct were contemptuous, his answer was, "You can try me". The applicant did not say that he needed more time either to obtain legal advice or to prepare his defence. Immediately after the applicant had stated that he was ready to proceed, the court asked him whether there was anything he wished to say. Again he did not ask for extra time. However, the court of its own motion adjourned the proceedings, which were resumed later in the day. In the meantime the applicant was not in custody and was free to take legal advice. He did not do so. The applicant's failure to ask for an adjournment which he, allegedly, had considered necessary for the preparation of his defence, operates as a waiver and precludes him from putting such a complaint before the Court.

The applicant submits that the fact that he is a lawyer does not in any way diminish his right to instruct counsel or to have time to prepare his defence. As the Court has recognised in other contexts, a person's involvement as a litigant in contested proceedings may be incompatible with the degree of objectivity necessary for effective advocacy in court. There was no opportunity provided to the applicant by the court to instruct a lawyer prior to their decision regarding his guilt, which was made immediately after the event. His failure, therefore, to ask for an adjournment did not constitute a waiver of his right to legal representation.

The Court considers the applicant's complaint to be wholly unsubstantiated, taking into account the following: When the applicant was faced by the Assize Court directly with the possibility of being penalised for the offence of contempt of court he answered, "You can try me". Again, after a short adjournment, when the court gave him an opportunity to add anything before passing sentence, he responded by trying to justify his conduct, asserting that he had not committed an offence. In the circumstances and considering that the applicant was an experienced lawyer, the fact that he did not ask for an adjournment or any facilities to prepare his defence but, on the contrary, he undertook to defend himself, shows that there is no basis for the present complaint.

It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

5. The applicant maintains that the interference with his freedom of expression was not prescribed by law and that the imposition of a fine and a term of imprisonment were disproportionate to the legitimate aim pursued. He alleges a violation of Article 10 which provides insofar 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 maintaining the authority and impartiality of the judiciary."

The Government submit that the applicant did not exhaust domestic remedies as regards this complaint, because he did not raise the matter before the Supreme Court. The grounds of appeal that were filed and subsequently argued before the Supreme Court did not include any allegation of a violation of Article 10, which is reflected in Article 19 of the Constitution.

The applicant maintains that at ground 8 of his appeal to the Supreme Court, he asserted that contempt should not be used to suppress offensive methods of advocacy so that the advocate has sufficient freedom to enable

him to conduct his client's case as he sees fit. It is clear therefore that, in substance, the complaint under Article 10 was raised.

The Court reiterates that the purpose of the rule of exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before the matter is submitted to the Court. That rule must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that the complaints intended to be made subsequently in Strasbourg should have been raised, "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law", before the national authorities (see the *Castells v. Spain* judgment of 23 April 1992, Series A no. 236, p. 19, § 27, and the *Akdivar and Others v. Turkey* judgment of 16 September 1996, Reports of Judgments and Decisions, 1996-IV, pp. 1210-11, §§ 65-69).

The Court considers that it was implicit in the applicant's Supreme Court appeal that he challenged the imposition of a sentence of imprisonment on an advocate for his conduct in court, on the facts of the case, as a disproportionate interference with his right to conduct the case as he judged fit and thus to express himself accordingly. The Court finds that freedom of expression was indeed at issue, if only implicitly, in the proceedings before the Supreme Court and that the legal arguments made by the applicant in that court included a complaint relevant to Article 10 of the Convention.

Accordingly, the Court concludes that the applicant has exhausted domestic remedies in this matter, and dismisses the Government's objection.

As to the merits, the Government submit that the applicant's allegations in relation to Article 10 are based on the misconception that participants in judicial proceedings are enabled, as of right, to say whatever they wish in a personal capacity. However, this is not the case. An advocate appearing before a court is a servant of justice and his personal rights and interests do not come into play. The alleged limitations on an advocate's freedom of expression are not imposed by the impugned domestic law. Rather, they derive from the very nature of his or her mission and function in the courtroom.

Even if an advocate has personal free speech rights in a courtroom, they may be limited for the purpose of maintaining the authority of the judiciary. There is no doubt that the reason for the contempt proceedings in the present case was the protection of the authority of the judiciary. The only issue of substance is whether the punishment by way of imprisonment was justified.

The Government contend that the degree of insult to the judicial process cannot be underestimated and the sanction imposed on the applicant was well within the margin of appreciation of the Assize Court. The applicant rudely prevented the court from even speaking and then, insultingly,

accused its members of sending love letters to one another rather than listening to his cross-examination. It is clear that the applicant went beyond his professional remit of representing his client and decided to engage in a personal and abusive attack on the judges. At no time, even on appeal, did he consider apologising for his behaviour.

As found by the Supreme Court, the applicant sought to vilify the court for his own personal purposes and the sanction which was imposed on him was justified given the seriousness of his behaviour and the contempt he displayed for the judicial process. Bearing in mind that the contemptuous behaviour was manifested by a well-known advocate, with forty years' practice, having previously been a member of Parliament and a member of the Office of the Attorney General, one could assume that any tolerance on the part of the Assize Court of such behaviour would have resulted in a serious lack of confidence in the judiciary. The power of a court to convict a person for contempt in the face of it, must be sparingly exercised. However, as a matter of principle, resort to imprisonment must be available where the gravity of the contempt calls for it; the determination of the "weight" of the contempt in a given case is a function entrusted to the domestic courts.

The applicant submits that Article 10 applies to all forms of expression, including the expression of an advocate in court. He stresses that the former Commission had confirmed this principle (*Bossi v. Germany*, n° 30339/96, unpublished). The expression in question was made by the applicant as a professional advocate while attempting to protect the interests of his client. At worst, he was guilty of an error of judgment.

In judging whether the interference was necessary in a democratic society, regard must be had in particular to the severity of the penalty imposed. To sentence a respected advocate, with an exemplary professional record, to five days' imprisonment for what was no more than a momentary intemperate outburst, is plainly disproportionate. Where a court considers that an advocate has transgressed the proper boundary of acceptable speech, there is a range of potential responses. He can be admonished, reported to his professional body, or warned about his future conduct. The court can even adjourn the hearing to allow tempers to cool.

The imposition of such a plainly disproportionate penalty is liable to have a general "chilling effect" on the conduct of the advocates in court. It is the primary duty of a criminal defence lawyer fearlessly to defend his client, according to his independent professional judgment. In so doing it will sometimes be necessary to raise complaints about the conduct of the court itself and to stand up to pressure or discourtesy from the court. If advocates are given to understand that a court can lawfully send them to prison for a significant period of time for the use of an emphatic tone of voice or colourful language which the court disapproves of, or for the slightest show of emotion under stress, then there is a real risk that advocates will tailor their conduct in court, to the potential detriment of

their clients' cases. To impose a prison sentence in a trivial case like the present strikes at the heart of the lawyer/client relationship and has implications not only for the lawyer's rights under Article 10, but for the client's rights under Article 6 of the Convention. It is essential to recall that the power of a court to deal with contempt is designed to prevent a real threat to the administration of justice. It is not a tool to protect the personal dignity of the judge, still less a means of exacting personal retribution where an advocate has caused offence.

The Court considers, in the light of the parties' submissions, that this complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints concerning the impartiality of the Assize Court, the presumption of innocence, the detailed reasons for the accusation against him and his freedom of expression;

Declares the remainder of the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President