AS TO THE ADMISSIBILITY OF

Application No. 20169/92
by Vladimir MATUSEVITCH
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 5 July 1993, the following members being present:

MM. F. ERMACORA, Acting President of the First Chamber
A.S. GÖZÜBÜYÜK
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
MM. M. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI

Mrs. M.F. BUQUICCHIO, Secretary to the First 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 12 May 1992 by Vladimir Matusevitch against the United Kingdom and registered on 18 June 1992 under file No. 20169/92;

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 applicant is a citizen of the United States born in 1936 and resident in Pullach, Germany. The facts as submitted by the applicant may be summarised as follows.

The applicant is a radio journalist who at the material time was working in London for Radio Liberty. He read an article in the Daily Telegraph by a certain Mr. Telnikoff concerning, inter alia, the recruitment of journalists for the BBC's Russian Service. The applicant wrote a reply which the newspaper published, whereupon Mr. Telnikoff sued the applicant in defamation, alleging inter alia that the applicant had stated that Mr. Telnikoff was an anti-semite, had advocated the dismissal of employees of the BBC Russian Service on racial grounds and had made statements inciting racial hatred. In defence the applicant pleaded that the impugned passages were fair comment on a matter of public interest. He did not submit that if the passages in issue contained statements of fact that they were justified as being true.

The first trial which found in favour of the plaintiff was set aside since the applicant had not been properly served with the summons.

The second trial before a jury took place in the High Court from 22-24 May 1989. The trial judge however ruled that the statements of the applicant taken in the context of the preceding article fell into the category of comment on a matter of public interest rather than statements of fact and thereafter found for the applicant. Accordingly there was no issue for the jury to decide.

The other party appealed. The Court of Appeal rejected the appeal on 16 May 1990 but granted leave to appeal to the House of Lords. The Court of Appeal had considered that the letter should be read in the context of the article and the passages in issue were thus to be understood as comment. Lloyd LJ commented that applicant's counsel had initially supported that contrary view, that in determining whether the passages were to be construed as statements of fact or comment the examination should be restricted to the letter alone.

The House of Lords held, on 14 November 1991, that certain paragraphs of the applicant's letter, taken alone without regard to the plaintiff's original article, could be deemed statements of fact rather than mere comment, and that the case should have gone to the jury.

Lord Keith stated:

I am of the opinion ...that if the letter alone is looked at it would be open to a reasonable jury properly to find that the offending paragraphs contained statements of fact...Paragraph 6 states in the form of a statement of fact that the plaintiff demands that the BBC Russian Service should switch from professional testing to a blood test. It seems to me that this is capable of being read as something else that the plaintiff has said in his article. As regards paragraph 7, the words "Mr. Telnikoff is stressing his racialist recipe" are undoubtedly pure comment but what follows "by claiming that no matter how high the standards and integrity of "ethnically alien" people Russian staff may be they should be dismissed" is in my view capable of being read as a fact upon which <the applicant> is commenting, the fact being that the plaintiff has made such a claim in his article. The reader might be the more likely to think that the plaintiff has made such a claim by reason that the words "of ethnically alien" are placed in inverted commas, thus indicating that they are a quotation from the article (where in fact no such words appear). Drake J. <the first instance judge> took the view that paragraphs 6 and 7 did no more express what would be the logical outcome in the views stated in the plaintiff's article were given effect to, while Lloyd LJ...said that the sense of the words in paragraph 6 was "Mr. Telnikoff in effect demands..." But the fact remains that the writer of the letter has used no such words nor any others apt to indicate that what he has written are inferences drawn from the terms of the article..."

Lord Keith held further that in deciding whether the passages in question were fact or comment the jury should have been directed not to have regard to the previous article since many readers of the newspaper would not have had access to that material. What on its face appeared to be a statement of fact could not be turned into comment by reference to the subject matter. In the view of the majority, the previous case-law only established that where the words complained of were recognised as comment, then the subject matter could be looked at in the context of determining whether the comment was fair.

Lord Keith commented in the context of the possible effect of their decision:

"<the Court of Appeal> also considered that if juries were not allowed to consider the terms of articles upon which newspaper correspondents chose to comment, the whole text of the article would have to be set out in the letter, a condition which would be unacceptable to newspaper editors, so that free discussion of matters of public interest would be restricted. That apprehension is not, in my view, well founded. The writer of a letter to a newspaper has a duty to take reasonable care to make clear that he is writing comment and not making misrepresentations about the subject-matter upon which he is commenting. There is no difficulty about using suitable words for the purpose, such as those which Lloyd L.J. thought capable of being implied. Likewise any newspaper editor should be under no difficulty in observing whether his correspondent has used language apt to make clear that what he writes is pure comment and does not contain misrepresentations about what he is commenting on."

He concluded that the first instance judge was wrong in failing to leave to the jury the question whether paragraphs 6 and 7 contained statements of fact.

There was a retrial which took place from 9-16 March 1992. The jury found against the applicant. An order against repetition was made and he was ordered to pay £240,000 to the plaintiff.

COMPLAINTS

The applicant complains to the Commission that the judgment of the House of Lords was in breach of Articles 10 and 14 of the Convention. He claims that the House of Lords have invented a novel legal theory to distinguish comment and statement of fact in misapplication of existing domestic law. He alleges that they have thereby placed restrictions on his freedom of expression.
Since the applicant's article was in response to what he alleges to have been a racist attack on a national minority, he submits the English courts have failed to offer protection against discrimination.

THE LAW

1. The applicant complains that the House of Lords' decision in the defamation proceedings brought against him discloses a violation of Article 10 of the Convention which 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 recalls that the House of Lords' decision had the effect of overturning the first instance judgment in the applicant's favour and sending the case for a retrial at which the applicant was ultimately unsuccessful. It finds that it is therefore sufficiently connected with adverse result suffered by the applicant so as to fall within the scope of the first paragraph of Article 10.

The Commission must consider whether the resulting interference was "prescribed by law" and whether it was necessary in a democratic society for one or more of the purposes set out in Article 10 para. 2.

As regards the lawfulness of the restriction, the applicant submits that the House of Lords misapplied the applicable law and invented a novel legal theory which it would not have been possible to an individual to foresee with reasonable certainty.

The Commission recalls that in the Sunday Times case, Court stated:

"In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules

applicable to a given case. Secondly, a norm cannot be regarded as a 'law', unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

(Eur. Court H.R., Sunday Times judgment of 26 April 1979, Series A no. 30, p.31, para. 49.)

The Commission notes that the judgements in this case reveal that there was no direct authority on the point in issue in the case. However the decision of the House of Lords did not overrule or contradict past case-law or academic opinion but clarified the application of the distinction drawn in the law of defamation between fact and comment to the circumstances of the particular case - that the passages in issue taken in isolation were capable of being construed as statements of fact or comment and should be left to the jury to decide. The Commission is satisfied in the circumstances of this case that both the applicability and the substantive content of this area of the law had been developed with sufficient precision so as to make it reasonably accessible and foreseeable to an applicant with the assistance of appropriate legal advice (see eg No. 8710/79, Dec. 7.4.82, D.R. 28 p.77). That the House of Lords did not exceed the limits of reasonable interpretation in this respect is illustrated by the fact that applicant's counsel before the Court of Appeal initially argued, as found in the House of Lords, that in distinguishing whether the statements were fact or comment the examination should be restricted to the letter alone. The Commission accordingly finds the restriction was "prescribed by law" within the meaning of Article 10 para. 2 of the Convention.

As regards the purpose of the restriction, the Commission notes that the proceedings concerned alleged defamation of the plaintiff and must therefore be considered as pursuing the legitimate aim under Article 10 para. 2 of protecting the rights and reputation of others.

It remains to be considered whether the restriction was necessary in a democratic society for this aim, in particular, whether a "pressing social need" justified the restriction, taking into account that the States have a certain margin of appreciation (Eur. Court H.R., Lingens judgment of 8 July 1986, Series A no. 103, pp. 25-26, paras. 39-41).

The applicant submits that there was no pressing social need for the House of Lords' interpretation in his case. He submits that his article appeared in a public newspaper in response to another published article and that the context as a whole constituted comment by a person directly affected which should not have been restrained. He also considers that the case should not have been sent back to a jury of laymen.

The Commission has had regard to the importance of the free flow of information and openness of debate in matters of public interest (Eur. Court H.R., Sunday Times judgment and Lingens judgment, loc. cit.). It recalls however that the House of Lords' decision did not decide whether the passages contained fact but that since it was possible to so construe them the matter should have been left to the jury. The involvement of a jury in deciding this matter is not, in the Commission's view sufficient basis to render it in violation of the provisions of

the Convention. The Commission is also not persuaded that the applicant was as a result prohibited from commenting on what was to his view a racist attack. As stated by the House of Lords, the writer of a letter to a newspaper is able to take care to use language which indicates that what he writes is pure comment and does not contain misrepresentations about what he is commenting on.

In light of these considerations, the Commission finds that the restriction can be regarded as necessary in a democratic society within the meaning of Article 10 para. 2 of the Convention.

It follows that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The applicant complains that the decision of the House of Lords interfered with his defence to a racist attack on a minority. He invokes in this respect Article 14 of the Convention which provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Commission notes that the above provision prohibits difference in treatment in the enjoyment of the substantive rights under the Convention. It finds no indication that the applicant has been subject to any difference in treatment in the present case, the law of defamation applying generally. This complaint is accordingly unsubstantiated and must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — Acting President of the First Chamber

(M.F. BUQUICCHIO) — (F. ERMACORA)