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

FIRST SECTION

CASE OF McVICAR v. THE UNITED KINGDOM

(Application no. 46311/99)

JUDGMENT

STRASBOURG

7 May 2002

FINAL

07/08/2002

In the case of McVicar v. the United Kingdom,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Sir Nicolas BRATZA,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr V. ZAGREBELSKI, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 18 April 2002,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 46311/99) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr John Roger McVicar ("the applicant"), on 18 December 1998.

2. The applicant was represented before the Court by Mr D. Price, a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr H. Llewellyn, of the Foreign and Commonwealth Office.

3. The applicant alleged that the inability of a defendant to a libel action to claim legal aid constituted a violation of Articles 6 § 1 and 10 of the Convention. He submitted also that the exclusion of witness evidence at his trial, the burden of proof which he faced in pleading a defence of justification, the order for costs made against him and the injunction restricting future publication violated Article 10 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 10 May 2001, the Court declared the application partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). Within that Section, the Chamber that would consider

the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Court having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a British national, born in 1940 and living in London.

9. The applicant, who has a sociology degree, is a journalist and broadcaster. He has written for many national newspapers and magazines and has made a number of appearances on radio and television.

In September 1995 an article was published in *Spiked* magazine in which the applicant suggested that the athlete Linford Christie used banned performance-enhancing drugs. The article stated, *inter alia*:

> "On the basis of circumstantial evidence many believe, but cannot prove that Christie has been taking performance-enhancing drugs ... If he has been outwitting the testers for years, it is extremely unlikely that Christie will be caught in the few months left before his likely retirement from competitive sprinting. Nevertheless, there is no bloody hypodermic needle, and no direct evidence that points the finger at Christie. ...
>
> Certainly the ten days between injuring himself in Gothenburg and winning in Zurich would have allowed Christie to recover from a slight hamstring injury and, without fear of a random test, put in seven days intensive training, boosted by banned drugs, and perhaps human growth hormone, that would give him the explosiveness and power to run 10.03 seconds into a headwind. We don't know. ...
>
> Christie exhibits a number of other possible effects of these performance-enhancing drugs. His remarkable physique, in regard to both its bulk and definition, is consistent with the use of anabolic steroids. ... Similar considerations apply to speed (*sic*) with which he put on weight. In the early part of his career, he was a beanpole sprinter but between 1986 and 1988 he put on 13 kg in bodyweight to come in at the 70 kg powerhouse that he has stayed at since. Steroids have other side-effects ... Three of the commonest are grandiosity, fixated delusions and a persecution complex. Linford genuinely seems to think that running a hundred metres faster than anyone else is rather more than an exciting, even unique spectacle, but some kind of monumental contribution to human culture. ...
>
> Human growth hormone ... costs £1,200 for a week's supply. Miboerone is a steroid that is even more expensive ... Christie is rich. He also shows most of the physical, behavioural and psychological features of an athlete that regularly uses steroids. This conclusion is reinforced generally by the performances that he continues to turn in at

an age when psychologically he should be in decline and specifically by his uncanny quick recovery from his injury at Gothenburg. ...

Aside from all the non-testing criteria that provide circumstantial evidence to suggest that Christie may be a regular user, the final clinching one is Christie's own character and attitude to competition. He is a win-at-all-cost athlete and his determination to succeed may lead people to believe that he would not deprive himself of an advantage enjoyed by some of his rivals, thereby denying himself his only chance of fame and fortune."

10. In December 1995 Mr Christie commenced an action in the High Court for defamation against the applicant, the magazine's editor and the publishing company. The editor and publishing company were represented by a solicitor-advocate specialising in defamation and media litigation, Mr David Price. Mr Price had advised the publishing company prior to publication about the legality of the article in question. A separate action was launched by Mr Christie against the printers and various distributors of the magazine.

11. During the greater part of the proceedings the applicant represented himself because he could not afford to pay legal fees and because, under Schedule 2, Part II, of the Legal Aid Act 1988, legal aid was not available for defamation actions. His defence was that the allegations made in the article were true in substance and in fact.

In a newspaper article among the papers submitted by the applicant to the Court, it was reported that the applicant had, in June 1996, successfully defended himself in criminal proceedings concerning a charge of assaulting a neighbour.

12. On 28 June 1996 there was a directions hearing at which Mr Price (on behalf of the editor and publishing company), the applicant and counsel for Mr Christie made representations. An order was made requiring, *inter alia*, that the plaintiff and the defendants should exchange statements of witnesses of fact by 2 October 1996, and could each call four expert witnesses (a physiologist, a pharmacologist, a psychologist and an athletics coach), but only if the substance of each expert's evidence was disclosed in a report to be exchanged by 30 October 1996. These time-limits were subsequently extended by consent to some time in December 1996 and April 1997 respectively.

13. The applicant wished to rely on the evidence of an athlete, Geoffrey Walusimbi, who had allegedly told the applicant that Mr Christie had introduced him to performance-enhancing drugs. In respect of Mr Walusimbi the applicant served the following document dated 19 December 1996, which purported to be a statement of the nature of the evidence intended to be adduced under the Rules of the Supreme Court (RSC), Order 38, Rule 2A(5) (see below):

"The second defendant has issued a subpoena on Mr Geoffrey Walusimbi ... He intends to adduce evidence from him concerning:

(a) his masked appearance on the *Panorama* [television] programme 'Drug Olympics' ... in which he admitted taking performance-enhancing drugs;

(b) his training relationship with Linford Christie;

(c) his trips abroad with Linford Christie to various Sports Clinics, in particular one in Florida, 'First Medical';

(d) his knowledge of Linford Christie's own use of performance-enhancing drugs."

14. One of the expert witnesses whom the applicant wished to call was an osteopath called Terry Moule. Mr Moule had been involved in sports medicine for over twenty years and had treated Mr Christie. He allegedly told the applicant that as a result of his experience he was able to tell by the look and feel of an athlete's body whether that athlete had taken performance-enhancing drugs, and that he was certain that Mr Christie had been a regular user. However, because of his previous association with Mr Christie, Mr Moule did not wish to give a statement. The applicant did not, therefore, serve any form of report in respect of Mr Moule's expert evidence as required by the order for directions. Instead, in April 1997, he served the following document, which he mistakenly believed to be acceptable under the RSC, Order 38, Rule 2A(5) in place of an expert's report:

"Terry Moule is a professional physiotherapist and went to the 1992 Barcelona Olympic Games as team physiotherapist for the athletics squad. He is conversant with the effects of steroids on the body and talks about 'steroid feel' and the particular look of a body that has been built up using anabolic-androgenic steroids. He is an expert on how the body responds to these drugs when supplemented by power lifting. He understands the effects of ageing on the performance of 'fast-twitch' muscle. He has massaged the Plaintiff in the early part of his career.

A subpoena has been taken out for Terry Moule."

15. The trial was listed to start on 15 June 1998. By this time, the applicant was the sole defendant in the proceedings because the editor had been killed in a traffic accident in September 1996 and the publishing company had become insolvent. On 30 April 1998 the applicant instructed Mr Price, who had had no involvement in the case since the death of the editor, to represent him as his solicitor-advocate. Mr Price had previously given advice to the editor and the publishing company both prior to, and following, publication of the article and had drafted a defence to Mr Christie's action on the limited information then available.

16. Mr Christie applied to prevent Mr Price from acting on the grounds that he had previously been responsible for the decision to publish the article concerned, having given legal advice to the editor, and that the legality of that decision was itself now at issue. As a result, Mr Christie argued that Mr Price had a conflict of interest. Mr Christie's application was granted by the trial judge, Mr Justice Popplewell, in the High Court on

8 June 1998, but his decision was reversed by the Court of Appeal three days later. The applicant was represented by Mr Price at both hearings.

17. About a week before the trial Mr Christie's solicitors indicated that they intended to make an application to the trial judge seeking to prevent the applicant from calling a number of witnesses, including Mr Moule and Mr Walusimbi. Mr Price had, since being instructed by the applicant, made efforts to secure full statements from those witnesses. Following the indication received from Mr Christie's solicitors, Mr Moule agreed to make a signed statement, in which he described, *inter alia*, the effects of steroids and the high level of usage amongst athletes, and stated that "it would be almost impossible to succeed at the highest levels in the 100 metre [event] without the use of banned performance-enhancing drugs". This statement was served on Mr Christie's solicitors at 3 p.m. on Friday 12 June 1998, one working hour before the trial was due to commence.

18. On 15 and 16 June 1998 Mr Justice Popplewell heard preliminary submissions from Mr Price on behalf of the applicant and counsel for Mr Christie as to the admissibility of the evidence of the witnesses concerned. On 15 June 1998, in relation to the admissibility of the expert evidence of Mr Moule and a Professor Beckett on behalf of the applicant, he ruled as follows:

> "The rules [on disclosure of evidence] are designed to avoid an ambush. ... They are not to beat inefficient litigants. There is provision for the Judge in exercise of his duty to give leave for evidence to be called. Mr Price at the forefront of his argument says the obligation was on the Plaintiff to ensure that the Plaintiff was not taken by surprise. That is a misunderstanding of the rules of the Court. The rules provide that if the party wants to call an expert he should provide the substance of the expert's report. Mr Price contends that Mr Moule's expert statement leads to one conclusion; having observed the Plaintiff and massaged his body, everybody should understand what Mr Moule was going to say. I think there is another way of reading the evidence. The Plaintiff might have concluded that it was useless evidence. This is compounded by the fact that Mr Moule's statement deals with the ability to observe the effect of anabolic steroids but nowhere does he say that about the Plaintiff. The nearest he gets is at paragraph 8 where he says that at least 70% of athletes use steroids systematically. That statement adds nothing to the defence as pleaded.
>
> There is no obligation on a party to draw the attention of the other party to the defect in its witness statements. At trial the admissibility of statements is often dealt with. There is criticism of the Plaintiff on this point but it is false. The obligation is on the party to make sure that it complies with Orders. It has not been suggested that the Defendant was unable to obtain written statements. The fact that he has statements suggests quite the contrary. The Defendant was a litigant in person but Mr Price acted for a period of time and Mr McVicar is not inexperienced. He has very much in mind what is involved. It may be said that Mr Price did not have full conduct but he has had since 30 April 1998. A review would have revealed that the statements did not comply with the Orders made. ... That I have discretion is clear. The exercise of that discretion is to ensure a fair disposal. ..."

The judge continued that he had to balance the prejudice that would be suffered by the applicant if the evidence were excluded against that which would be suffered by Mr Christie if Mr Moule's testimony were admitted. It would be unfair to allow Mr Moule to give evidence at trial without giving Mr Christie time to call counter-evidence, but to order an adjournment for this purpose would itself be prejudicial to Mr Christie because the applicant did not have sufficient means to provide an indemnity for the extra costs which would be incurred as a result. The judge concluded: "If there is more prejudice to the Defendant than the Plaintiff he is the person who is responsible. The fault lies with him. I will not allow Mr Moule's evidence." He also refused the applicant leave to adduce that part of Professor Beckett's evidence which dealt with the efficacy of drug testing and the ease with which the ban on drug taking could be evaded on the basis that these issues were not pleaded by the applicant and an amendment to the pleading should not be allowed.

19. On 16 June 1998 the judge refused to grant the applicant's request for leave to admit Mr Walusimbi's evidence, on the ground that it would be unfair to Mr Christie to be faced with wide allegations about his drug taking, the details of which he would not know until Mr Walusimbi took the stand.

20. The applicant appealed against these rulings to the Court of Appeal. He was again represented by Mr Price at the appeal hearing, which took place on 18 June 1998. Lord Justice May, delivering the judgment of the court, commented, as had the trial judge, that the interests of the applicant were "identical" to those of his previous co-defendants, the editor and the publishing company. He went on:

> "I deal with Mr Moule's statement first. The gist statement served in April 1997 relating to Mr Moule contained very little detail of the substance of the evidence that he might give. It refers only to Mr Moule's experience and qualifications as a physiotherapist and then says baldly that he massaged the plaintiff during the early part of his career. The witness statement now served gives a more detailed account of his experience and names some of the sportspeople, including the plaintiff, whom he has treated. It refers to the benefit and effect of anabolic steroids for athletes, particularly in the 100 metres event. It states that in Mr Moule's experience a large proportion of professional athletes use steroids. It says that from his experience Mr Moule is generally able to tell by looking whether an athlete is taking steroids and that he can also tell this if he manipulates their muscles. ...
>
> Mr Price accepts that the gist statement did not put forward any affirmative version of what Mr Moule might say, but he submits that it could be inferred that Mr Moule would give the evidence that the look and feel of the plaintiff's body indicates use of banned drugs. I do not accept this submission. This gist statement is not even inferentially a statement of the evidence intended to be adduced such as is referred to in Order 38, Rule 2A(5). ...
>
> Matters which Mr Price would have us infer are intended to be said by Mr Moule are neither pleaded nor the subject of any previously served witness statement or

expert's report and I see no reason why the plaintiff should have anticipated the sudden arrival of this material at the very last moment.

Mr Price says that there is a strong public interest in allowing all relevant and probative evidence to be adduced lest there may be a verdict which is contrary to the truth. ... The judge took this important submission into account and so do I. The fact is that there are competing public interests, one of which is that parties to litigation should not turn up at the very last moment with unheralded evidence which puts another party at a disadvantage, and another of which is that the general administration of justice demands, for reasons which have been articulated frequently by this court, that fixed trial dates should not be abandoned at the last moment other than in quite exceptional circumstances. ...

It seems to me that the case for exercising the judge's discretion in relation to Mr Moule as he did is clear and overwhelming. Mr Moule's evidence was not heralded in the gist statement. The statement was served at the latest possible moment before the start of the trial. Without an adjournment of the trial (which the judge rightly regarded as out of the question and which would in any event have prejudiced the plaintiff) the plaintiff would be prejudiced by not being able properly to deal with the evidence. Any prejudice to the defendant was his own fault.

The judge had to make a balancing judgment, which in my view he did upon proper and unassailable principles. Accordingly, I would not disturb the judge's finding in relation to Mr Moule's evidence."

In relation to Mr Walusimbi's evidence, he said:

"A gist statement was served in relation to Mr Walusimbi and referred to what he had said in a *Panorama* programme. A transcript of the programme was provided on discovery. The [applicant] now wants to call Mr Walusimbi to say that the use of performance-enhancing drugs by athletes is widespread and that there are means of evading tests. Before the judge, he wanted to call Mr Walusimbi to give first-hand evidence that the plaintiff had taken drugs. This was neither pleaded nor included in the *Panorama* material. The judge rightly excluded it and there is no application for leave to appeal against that part of the decision. The judge held that the general evidence added little or nothing to the issue of widespread drug taking. I agree, not least since I would permit Professor Beckett's evidence to be adduced and this deals with the same topic. Further general evidence about widespread drug use by athletes does not go to establish that the plaintiff has taken drugs or that he is reasonably suspected of having done so. This again was very late evidence tendered in breach of court orders and the rules, and I consider that the judge exercised his discretion correctly to exclude it."

21. The main trial commenced on the same day, 18 June 1998. The applicant represented himself as his funds were exhausted. On 3 July 1998 the jury found, by a majority of ten to two, that the article complained of bore the meaning that

"Mr Christie is a cheat who regularly used banned performance-enhancing drugs to improve his success in athletic competition."

It found also that the applicant had not proved that the article as so interpreted was substantially true.

Although Mr Christie did not seek damages, the applicant was ordered to pay the costs of the action and was made subject to an injunction

> "... restraining the [applicant] whether by himself, his servants, agents or otherwise howsoever from further publishing or causing the publication of the allegation (express or by implication) that the plaintiff is a cheat who has regularly used performance-enhancing drugs to improve his success in athletic competition or any words to the same or similar effect ..."

22. Following the verdict, the distributors and printers involved in the separate action reached a settlement with Mr Christie which required the payment of damages to him (see paragraph 10 above).

II. RELEVANT LAW AND PRACTICE

A. The United Kingdom

1. Defamation

23. Under English law the object of a libel action is to vindicate the plaintiff's reputation and to make reparation for the injury done by the wrongful publication of defamatory statements concerning him or her. A defence of justification applies where the defamatory statement is substantially true. The burden is on the defendant to prove the truth of the statement on the balance of probabilities.

2. Legal aid

24. Throughout the relevant time, the allocation of civil legal aid in the United Kingdom was governed by the Legal Aid Act 1988. Under Schedule 2, Part II, paragraph 1, of that Act, "proceedings wholly or partly in respect of defamation" were excepted from the scope of the civil legal-aid scheme.

3. Exchange of witness statements

25. At the relevant time, civil procedure before the High Court was governed by the Rules of the Supreme Court (RSC). Under RSC Order 38, Rule 2A:

> "(1) The powers of the Court under this rule shall be exercised for the purpose of disposing fairly and expeditiously of the cause or matter before it, and saving costs ...
>
> (2) At the summons for directions in an action commenced by writ the Court shall direct every party to serve on the other parties, within fourteen weeks (or such other period as the Court may specify) of the hearing of the summons and on such terms as the Court may specify, written statements of the oral evidence which the party intends to adduce on any issues of fact to be decided at the trial. ...

...

(4) Statements served under this rule shall –

(a) be dated and, except for good reason (which should be specified by letter accompanying the statement), be signed by the intended witness and shall include a statement by him that the contents are true to the best of his knowledge and belief;

...

(5) Where a party is unable to obtain a written statement from an intended witness in accordance with paragraph (4)(a), the Court may direct the party wishing to adduce that witness's evidence to provide the other party with the name of the witness and (unless the Court otherwise orders) a statement of the nature of the evidence intended to be adduced. ...

...

(7) Subject to paragraph (9), where the party serving the statement does call such a witness at the trial –

...

(b) the party may not without the consent of the other parties or the leave of the Court adduce evidence from that witness the substance of which is not included in the statement served ...

(10) Where a party fails to comply with a direction for the exchange of witness statements he shall not be entitled to adduce evidence to which the direction related without the leave of the Court. ..."

Statements served under Rule 2A(5) are commonly referred to as "gist" statements.

4. Expert reports

26. According to the RSC, Order 38, Rule 37:

"(1) ... in respect of expert oral evidence, then, unless the Court considers that there are special reasons for not doing so, it shall direct that the substance of the evidence be disclosed in the form of a written report or reports to such other parties and within such period as the court may specify."

As in Rule 2A(10) in respect of witness statements (see above), the court may, pursuant to a general power set out at RSC, Order 3, Rule 5, grant leave to allow expert evidence to be adduced late when the order for directions has not been complied with by either party.

B. The United States of America

27. In New York Times *v. Sullivan* ((1964) 376 US 254), the Supreme Court of the United States ruled that a State could not, under the First and

Fourteenth Amendments to the United States Constitution, award damages to a public official for defamatory falsehood relating to his official conduct unless he proved "actual malice". This was shown where the statement concerned had been made with knowledge of its falsity or with reckless disregard as to whether it was true or false. In delivering the judgment of the court, Mr Justice Brennan commented:

> "Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defence as an adequate safeguard have recognised the difficulties of adducing legal proof that the alleged libel was true in all its factual particulars. ... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'."

COMPLAINTS

28. The applicant contended that the unavailability of legal aid in defamation proceedings violated his right to effective access to a court under Article 6 § 1 of the Convention. He drew attention to, *inter alia*, the complexity of the law and procedure in connection with defamation actions, the fact that the evidence of Mr Moule and Mr Walusimbi had been excluded and the burden of proof imposed upon him to prove the truth of the allegations in mounting his defence before the High Court.

29. He contended further that the unavailability of legal aid, exclusion of witness evidence and burden of proof which he faced, together with the order that he pay Mr Christie's costs and the injunction prohibiting repetition of the allegations, violated his right to freedom of expression under Article 10 of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

30. The applicant complained that the unavailability of legal aid in defamation proceedings violated his right to effective access to a court under Article 6 § 1 of the Convention.

The relevant part of Article 6 § 1 provides:

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

A. The parties' submissions

1. The applicant

31. The applicant stated that he had been denied effective access to a court by reason of the unavailability of legal aid for the purpose of defending the defamation action brought against him by Mr Christie. He argued that the relevant provisions of the Legal Aid Act 1988 ("the 1988 Act") were arbitrary in that they barred those involved in defamation proceedings from legal aid whatever the justice and facts of the particular case. He asserted that such a blanket refusal could not constitute a legitimate prioritisation of legal-aid resources by the government.

32. In particular, the applicant submitted that the exclusion of defamation proceedings from legal aid under the 1988 Act was inconsistent with the importance attached to such proceedings under English law and procedure. He highlighted the fact that defamation is one of the few types of civil proceedings which can generally only be heard in the High Court before a judge and jury. The applicant asserted that the action in which he had been involved was one of many defamation cases raising issues of public importance and that, given also the comparative wealth of his opponent, he should have been granted legal aid so as to allow him to present his case on a level playing field.

33. The applicant pointed to a number of similarities between his position and that of the applicant in *Airey v. Ireland* (judgment of 9 October 1979, Series A no. 32). First, the law and procedure applicable to his case were complex. Second, he was faced with a significant burden of proof which would require witness evidence, including by way of detailed cross-examination, if it was to be met. Third, the proceedings were conducted in a "highly charged emotional environment" and, in his case, had been subject to extensive media coverage. He indicated that both his reputation as a journalist and his finances were at stake in the proceedings, with the result that he could not present his defence to the court with the required degree of objectivity.

34. The applicant distinguished his case from the European Commission of Human Rights' ("the Commission") previous decisions in *Winer v. the United Kingdom* (no. 10871/84, 10 July 1986, Decisions and Reports (DR) 48, p. 154); *Munro v. the United Kingdom* (no. 10594/83, 14 July 1987, DR 52, p. 158); *Steel and Morris v. the United Kingdom* (no. 21325/93, 5 May 1993, unreported); and *Stewart-Brady v. the United Kingdom* (no. 27436/95, 2 July 1997, unreported). He argued that each of those

decisions was based upon its individual facts and that, in contrast to the present case, the applicants had been unable to show prejudice as a result of their failure to secure legal aid. As an indication of the prejudice which he had suffered, the applicant referred to the exclusion of the evidence of two of his best witnesses as a consequence of his misunderstanding of the requirements laid down for valid service of evidence. He cited also technical deficiencies in the drafting of his defence pleadings which led in part to the exclusion of Mr Moule's evidence and restricted the applicant's ability to cross-examine Mr Christie and his witnesses at trial. He alleged further prejudice as a result of his ignorance about how to force disclosure of Mr Christie's drug-testing records and how he might seek to have certain evidence given by Mr Christie's witnesses excluded from the trial on the basis that it had not been anticipated.

35. The applicant drew attention to the limited assistance which he had received from Mr Price in the proceedings as a whole (see paragraphs 11, 15 and 21 above). He highlighted the fact that Mr Price had not spoken to any witnesses while acting for the editor and publishing company and had given them no advice as to how they should seek to substantiate the allegations made in the article. Nor had he been instructed when it came to compliance with the directions made in June 1996 (see paragraph 12 above). Once he had instructed Mr Price in April 1998, the applicant indicated that it was not feasible for the errors which had been made to be remedied bearing in mind the amount of work which had to be done, in particular as a result of Mr Christie's pre-trial strategy (see paragraphs 16-21 above).

2. The Government

36. The Government contended that there had been no denial of effective access to a court in this case.

37. They drew attention to *Winer, Munro, Steel and Morris* and *Stewart-Brady*, cited above, in which the Commission had found that the non-availability of legal aid for defamation proceedings did not involve any violation of Article 6 § 1. They explained these decisions by reference to three factors. Firstly, the absence of an express provision relating to civil proceedings, equivalent to the Article 6 § 3 (c) right to legal assistance in criminal proceedings, which implied that the obligation to provide legal aid under Article 6 § 1 must be restricted. Secondly, the fact that the Convention left States a free choice as to the means to be used in ensuring a right of effective access to a court. Such means may comprise, for example, simplification of rules of procedure rather than provision of legal aid. Thirdly, the legitimacy, given limited resources, of operating systems of civil legal aid which restrict eligibility so long as such restrictions were not arbitrary.

As shown in *Steel and Morris*, this analysis was not affected by a litigant's status as defendant. Indeed, the Government maintained that it

would be improper to favour defamation defendants over plaintiffs for the purposes of determining entitlement to legal aid.

38. The Government drew attention to the fact that, prior to being instructed by the applicant, Mr Price had represented the publishing company and the editor in the same action, with the result that he had been fully informed of the facts and issues of the case at all material times. He had then acted for the applicant for a period of over six weeks up to commencement of the trial. In particular, he had appeared at the hearings on the admissibility of the evidence of Mr Moule and Mr Walusimbi. They said that it was clear from the judgments of Mr Justice Popplewell and the Court of Appeal that, if the applicant had disclosed that evidence in proper form some weeks before commencement of the trial, rather than at the last minute, the balance in favour of admitting the evidence may have been very different.

39. The Government argued that the applicant was a successful professional journalist and was thus in a position to formulate and express arguments effectively and should have been well capable of comprehending the law and rules of procedure with which he was faced even in the absence of legal advice.

40. In all the circumstances, the Government argued that the applicant's position could not be compared with that of the applicant in *Airey*, cited above.

41. The Government argued also that the allocation to the applicant under domestic law of the burden of proving that the allegations were substantially true was not arbitrary. It was fair to place the burden of proof on the person who positively asserted a particular state of affairs, rather than the person who denied that a state of affairs existed, given the difficulties which arose where proof of a negative was required. Journalists must act responsibly in checking their sources and ensure that allegations which they made had an objective basis before publishing them.

42. The Government pointed out that the existence of a legal burden of proof was not unique to English law of defamation, but was almost invariably a feature of every civil legal action. The fact that, in the present case, that burden rested upon the applicant as defendant did not, they said, indicate that he must be provided with legal aid.

43. As to complexity, the Government submitted that the rules governing the service of expert and other evidence (see paragraphs 25-26 above) were straightforward and designed to promote, in a proportionate manner, an objective which was both legitimate and easy to understand, namely to allow each party to have fair notice of the case which they would face at trial. Indeed, in this case the High Court had, on an occasion when the applicant was present, made a clear and specific order as to the procedure to be followed (see paragraph 12 above).

44. The Government commented that the law of defamation was not complex in the context of the applicant's case as the only real issue before the court had been whether the allegations made were substantially true.

45. They argued that the fact that defamation proceedings were heard before a High Court judge and jury neither founded nor strengthened an argument that Article 6 § 1 required the applicant to be granted legal aid. The trial judge had a responsibility to ensure that the hearing was conducted fairly, and that each party had a proper opportunity to put their case effectively for consideration by the jury. His decision to exclude certain of the applicant's evidence did not amount to a denial of such an opportunity, but rather resulted from the applicant's failure to avail himself of it. Indeed, the exercise of discretion so as to exclude the evidence of Mr Moule and Mr Walusimbi, while allowing other of the applicant's evidence which had equally been served in violation of the requirements of the rules, represented a fair balance between the rights of each party and reduced delay in the proceedings as a whole.

B. The Court's assessment

46. The Court recalls that the right of access to a court constitutes an element which is inherent in the right to a fair trial under Article 6 § 1 of the Convention (see, among other authorities, *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 18, § 36).

47. It recalls further that, despite the absence of a clause similar to Article 6 § 3 (c) of the Convention in the context of civil litigation, Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to a court, either because legal representation is rendered compulsory, or by reason of the complexity of the procedure or of the case (see *Airey*, cited above, pp. 14-16, § 26).

48. However, as the *Airey* case itself made clear (pp. 12-16, §§ 24 and 26), Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants a right of effective access to a court. The question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer.

49. In *Airey*, the Court highlighted a number of circumstances which cumulatively led to a finding that Mrs Airey had been denied an effective right of access to a court by the State's refusal of legal aid. Firstly, the proceedings, which concerned an application for a decree of judicial separation from the applicant's husband, were commenced by petition and conducted in the High Court, where the procedure was complex. Secondly, litigation of the kind at issue, in addition to involving complicated points of

law, necessitated proof of adultery, unnatural practices or cruelty, which might have required the tendering of expert evidence or the calling and examining of witnesses. Thirdly, marital disputes often entailed an emotional involvement that was scarcely compatible with the degree of objectivity required by advocacy in court. The Court drew attention also to the fact that the applicant was from a humble background, had gone to work as a shop assistant at a young age before marrying and having four children, and had been unemployed for much of her life.

In all the circumstances, the Court considered it most improbable that Mrs Airey could effectively present her own case. It considered further that this view was corroborated by the fact that, in each of the 255 judicial separation proceedings initiated in Ireland between January 1972 and December 1978, the petitioner had been represented by a lawyer.

50. Turning to the present case, the Court considers that the relevant question is not whether the applicant had access to a court as such, since he was defendant in the proceedings. Rather, the applicant's complaints relate to the fairness of libel proceedings generally and his right under Article 6 § 1 of the Convention to present an effective defence. However, the principles which apply to his complaint are identical to those which applied in *Airey*.

51. The Court notes that the applicant was defendant in a libel action brought against him by a comparatively wealthy and famous individual. The proceedings were conducted in the High Court before a judge and jury and attracted a great deal of media and public interest. The applicant was faced with the burden of having to prove, on the balance of probabilities, that the allegations which he had made against his opponent were substantially true, and in order to do so was required to call witness and expert evidence, some of which was excluded as a result of his failure to comply with the rules of court. He was also required to scrutinise evidence submitted on behalf of the plaintiff and to cross-examine the plaintiff's witnesses and experts in the course of a trial which lasted over two weeks. He had no formal legal training and, although it appears that he had previously defended himself successfully in relatively minor criminal proceedings (see paragraph 11 above), the Court considers that the libel trial must have taken a significantly greater physical and emotional toll on the applicant than would have been the case on an experienced legal advocate.

However, the question remains whether, in all the circumstances, the lack of legal aid operated to deprive the applicant of a fair trial and breached his right to present an effective defence in violation of Article 6 § 1 of the Convention.

52. The Court does not consider the fact that the proceedings were held before a High Court judge and jury conclusive as regards this question. As it said in *Airey* (pp. 14-16, § 26), there may be occasions when the possibility of appearing before the High Court in person, even without a lawyer's assistance, will meet the requirements of Article 6 § 1. This is not a case

where domestic law required representation by counsel before the court concerned.

53. Similarly, the fact that the applicant was faced with the burden of proving the truth of the allegations made against Mr Christie cannot automatically require the provision of legal aid. It is true that the imposition of a burden of proof required the applicant to call witness and expert evidence and to rebut evidence submitted by the plaintiff. However, the Court notes that the applicant was a well-educated and experienced journalist who would have been capable of formulating cogent argument. His position in this respect can be contrasted with that of the applicant in *Airey*.

54. The Court considers that the rules pursuant to which both the trial judge and Court of Appeal excluded the evidence of Mr Moule and Mr Walusimbi were clear and unambiguous. In particular, Order 38, Rule 2A(5) set out the requirements for a valid "gist" statement in respect of witnesses of fact, while Order 38, Rule 37, provided no equivalent facility in respect of expert evidence (see paragraphs 25-26 above). The order for directions made on 28 June 1996 was also clear and unambiguous in setting out a timetable for the exchange of witness statements and expert reports. That timetable was subsequently amended by consent of the parties (see paragraph 12 above).

In all the circumstances, the Court believes that the applicant should have understood what was expected from him under the rules and the order for directions as regards submission of his own witness and expert evidence. If he was unsure as to any particular issue, he could have sought guidance during the hearing of 28 June 1996, at which he was present.

55. So far as the law of defamation is concerned, the Court does not consider that this was sufficiently complex to require a person in the applicant's position to have legal assistance under Article 6 § 1. The outcome of the libel action turned on the simple question of whether or not the applicant was able to show on the balance of probabilities that the allegations at issue were substantially true.

56. The Court notes that the applicant was represented by Mr Price from 30 April 1998 until commencement of the trial (see paragraphs 15 and 21 above). Mr Price had previously acted for the applicant's co-defendants in the action, whose interests were described by the trial judge and the Court of Appeal as "identical" to those of the applicant (see paragraph 20 above).

57. In relation to the excluded evidence of Mr Moule, the trial judge commented that a review would have revealed that the "gist" statement served in April 1997 did not comply with the order for directions (see paragraph 18 above). Indeed, Mr Price himself accepted in the Court of Appeal that the statement did not put forward any affirmative version of what Mr Moule might say. A fuller witness statement was not served until the afternoon of 12 June 1998, some six weeks after Mr Price had been

instructed and, in the words of the Court of Appeal, "the latest possible moment before the start of the trial" (see paragraph 20 above).

58. The exclusion of Mr Walusimbi's evidence about widespread drug taking and test evasion in international athletics does not appear to have diminished the applicant's ability to present his defence effectively because, as indicated by the Court of Appeal, that part of his evidence made no specific reference to Mr Christie and the subject was in any event dealt with by Professor Beckett. As for the more specific aspects of Mr Walusimbi's evidence, these were excluded by the trial judge on the basis that they had been neither sufficiently pleaded nor included in material referred to in the "gist" statement. The applicant did not appeal against this aspect of the trial judge's decision.

As a whole, that part of Mr Walusimbi's evidence elaborating on the "gist" statement was, in the words of the Court of Appeal, "very late evidence tendered in breach of court orders and the rules" (see paragraph 20 above).

59. It is therefore apparent that the applicant's failure to comply with the procedural requirements when submitting purported "gist" statements in respect of Mr Moule and Mr Walusimbi was not the only factor which weighed in the domestic judges' minds when deciding to exercise their discretion so as to exclude the evidence of those witnesses. Had fuller details of those witnesses' evidence been given earlier, or had the applicant's defence been amended prior to trial once he had a legal representative, those judges might have exercised their discretion differently and the applicant might have been able to present a fuller defence at trial.

60. The Court considers that the fact that the applicant was represented between 30 April 1998 and the commencement of the trial by a specialist defamation lawyer who had worked previously for the applicant's co-defendants in the action illustrates further that he was not prevented from presenting an effective defence to the libel action by his ineligibility for legal aid. The importance of this factor is not diminished by the fact that his lawyer was extremely busy reacting to Mr Christie's pre-trial strategy during the weeks leading up to the trial (see paragraphs 16-21 above). To the extent that the applicant was confused about any aspects of the relevant law and procedure in connection with the trial proceedings, it was open to him to seek guidance from Mr Price before they began.

61. Finally, as regards the applicant's emotional involvement in the case, the Court recalls that, in *Munro*, cited above, the Commission commented that the general nature of a defamation action, being one protecting an individual's reputation, is clearly to be distinguished from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family. For this reason, and with regard to the applicant's background and experience (see paragraph 9 above), the Court considers that the applicant's

emotional involvement was not incompatible with the degree of objectivity required by advocacy in court, notwithstanding the factors identified at paragraph 51 above.

62. In all the circumstances, the Court concludes that the applicant was not prevented from presenting his defence effectively to the High Court, nor was he denied a fair trial, by reason of his ineligibility for legal aid. It follows that there has been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

63. The applicant contended further that the unavailability of legal aid, exclusion of witness evidence and burden of proof which he faced, together with the order that he pay Mr Christie's costs and the injunction prohibiting repetition of the allegations, violated his right to freedom of expression under Article 10 of the Convention.

The relevant parts of Article 10 provide:

> "1. Everyone has the right to freedom of expression. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ..."

A. The parties' submissions

1. The applicant

64. The applicant submitted that the exclusion of defamation proceedings from the scope of legal aid under the 1988 Act was inconsistent with the importance of freedom of expression on the facts of his case, which concerned a defendant of limited means facing a defamation action brought against him by a wealthy claimant.

65. He argued that unrepresented defendants in defamation actions would often be at a material disadvantage as against their opponents, bearing in mind the complexity of law and procedure in the area and the fact that they carried the burden of proving the truth of the allegations at issue. This prospect might deter writers and publishers from publishing material of public interest which was in fact true. In support of this argument, the applicant cited a passage from the judgment of the Supreme Court of the United States in New York Times *v. Sullivan* (see paragraph 27 above). Alternatively, such a prospect might lead a writer or publisher to lose a defamation action which he or she would otherwise have won, which could in turn lead to an injunction and even closure or bankruptcy.

66. The applicant submitted further that the refusal to allow the evidence of Mr Moule and Mr Walusimbi violated Article 10 of the Convention. As a result of the refusal, his defence had failed and, ultimately, he had been bound by an injunction prohibiting repetition of allegations which he said were true. In the circumstances, it was disproportionate for the domestic courts to have excluded the evidence merely on the basis that, if it were allowed, an adjournment would have been necessary.

67. The applicant complained also that the imposition upon him of the burden of proving the truth of the allegations made against Mr Christie was itself disproportionate. He pointed to trends in the domestic common law which indicated that, although the standard of proof concerned was nominally the "balance of probabilities" test, in practice the more serious the allegation the more cogent was the evidence required to prove it. He proposed that a proper balance between freedom of speech and the protection of reputation would have required Mr Christie as plaintiff to prove that the allegations were false. Such a reversal of the current position would not drastically reduce the protection given to a plaintiff's reputation because publishers would still need to check the truth of proposed articles prior to publication.

68. The applicant claimed also that the order to pay Mr Christie's costs and the injunction prohibiting repetition of the allegations disproportionately interfered with his right to freedom of expression.

2. The Government

69. The Government recalled that the freedom of speech conferred by Article 10 of the Convention was not absolute and that, in particular, the Article did not authorise the publication of defamatory material.

70. They submitted that, if the unavailability of legal aid and the application of rules of procedure about submission of evidence were compatible with Article 6 of the Convention in the circumstances of a particular case, they must also be compatible with Article 10. Indeed, the "rights of others" for the purposes of Article 10 § 2 included the rights of plaintiffs in defamation proceedings to have a fair trial within a reasonable time. A person who had made a statement without prior restraint in exercise of their freedom of expression could legitimately expect no more than that, if it came to defending himself in court proceedings, he should have an opportunity of doing so in accordance with Article 6 § 1.

71. Examining Article 10 alone, the Government submitted that the rules of procedure were prescribed by law, pursued the legitimate aim of the protection of the rights of others, and were proportionate to that aim in striking a fair balance between the interests of opposing litigants. As for the allocation of the burden of proof in relation to the issue of justification, this did not interfere with freedom of expression and was, in any event, legitimate in light of the responsibilities placed upon journalists and

recognised by Article 10. The way in which the national authorities had struck the balance between the rights of defamation plaintiffs under Articles 6 § 1 and 8, and the rights of defamation defendants under Articles 6 § 1 and 10, fell well within the margin of appreciation which applied wherever a balance was sought to be struck between competing Convention rights.

B. The Court's assessment

1. General principles

72. The Court recalls that, as a general principle, whilst the mass media must not overstep the bounds imposed in the interests of the protection of the reputation of private individuals, it is incumbent on them to impart information and ideas concerning matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III).

73. However, Article 10 of the Convention does not guarantee wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article, the exercise of this freedom carries with it "duties and responsibilities" which are liable to assume significance when, as in the present case, there is a question of attacking the reputation of private individuals and undermining the "rights of others". By reason of these "duties and responsibilities", the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, among other authorities, Bladet Tromsø *and Stensaas*, cited above, § 65).

2. Unavailability of legal aid and exclusion of witness evidence

74. The applicant complained under Article 10 about the unavailability of legal aid in defamation proceedings and the exclusion of the evidence of Mr Moule and Mr Walusimbi.

75. The Court has concluded in relation to Article 6 § 1 of the Convention that the applicant was not prevented from presenting his defence to the defamation action effectively in the High Court, nor were the proceedings made unfair, by reason of his ineligibility for legal aid (see paragraph 62 above). As a result, it considers that such ineligibility did not, on the facts of this case, interfere with the applicant's right to freedom of expression under Article 10 of the Convention.

76. As for the exclusion of the evidence of Mr Moule and Mr Walusimbi, the Court has already commented above that the rules

pursuant to which the exclusion was ordered were clear and unambiguous (see paragraph 54). It has noted also that the applicant and his legal representative could have taken certain steps earlier in the proceedings which might have had a bearing on the decision to exclude that evidence, but failed to do so (see paragraph 59).

77. The Court notes that the evidence concerned was not excluded on the simple ground that the relevant rules and the order for directions had not been complied with. Rather, the exclusion was ordered in the exercise of a judicial discretion provided by the rules and following detailed analysis by the trial judge and Court of Appeal of the competing public interests at stake and the balance which had to be struck between those interests on the facts of the applicant's case (see paragraph 20 above).

78. The Court notes further that, as a result of the balance which was struck by the Court of Appeal, the applicant was allowed to rely on the evidence of Professor Beckett at trial notwithstanding the fact that it had not been submitted in accordance with the rules. It considers that there are no grounds for criticising the way in which the trial judge and Court of Appeal balanced the competing interests involved.

79. Therefore, to the extent that the exclusion of the evidence of Mr Moule and Mr Walusimbi interfered with the applicant's right to freedom of expression under Article 10 of the Convention, the Court considers that such interference was justified under Article 10 § 2 as being necessary for the protection of the rights of Mr Christie.

3. The order to pay Mr Christie's costs and injunction prohibiting repetition of the allegations

80. It is noted that Mr Christie did not seek damages and so no award was made in that regard. As for the injunction (see paragraph 21 above), the Court does not consider this to have been phrased in unduly wide terms given the seriousness of the allegations which the applicant had failed to prove substantially true.

81. In light of the conclusions which it has reached in relation to the applicant's Article 6 § 1 complaint (see paragraph 62 above) and the nature of the allegations at issue (see paragraph 86 below), and in light of the applicant's failure to prove on the balance of probabilities that the allegations were substantially true, the Court considers that it was not disproportionate to require the applicant to pay Mr Christie's costs in relation to the defamation proceedings. Nor was it disproportionate to prohibit repetition of the allegations.

82. To the extent that the order and injunction were capable of discouraging the participation of the applicant and other journalists in debates over matters of legitimate public concern in the future, it follows that this was justified under Article 10 § 2 as being necessary for the protection of the reputation and rights of Mr Christie.

4. Burden of proof

83. The Court recalls that a careful distinction is made in its case-law between the reporting of factual statements on the one hand, and value judgments on the other. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible to proof (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 28, § 46).

84. It recalls further that, in Bladet Tromsø *and Stensaas* (cited above, § 66) it commented that special grounds were required before a newspaper could be dispensed from its ordinary obligation to verify factual statements that were defamatory of private individuals. The question whether such grounds existed depended in particular on the nature and degree of the defamation in question and the extent to which the newspaper could reasonably regard its sources as reliable with respect to the allegations.

85. In the present case, the jury found, by a majority of ten to two, that the allegations made against Mr Christie in the article at issue amounted to a factual statement that Mr Christie was a cheat who regularly used banned performance-enhancing drugs to improve his success in athletic competition (see paragraph 21 above). Furthermore, the Court notes that the article was directed specifically and exclusively at Mr Christie. The Court considers that the potential consequences of the allegations made in the article for an individual who had achieved fame and fortune purely as a result of his athletic achievements were very grave.

86. The Court is not in a position to comment as regards the extent to which the applicant could reasonably rely on his sources when writing the article, since the identity of those sources is unclear. However, the Court notes that a number of factors exist which indicate that the applicant was concerned with verifying the truth or reliability of the allegations to a high standard only after the event, once the defamation proceedings had been commenced against him. Firstly, the applicant stated in his application to the Court that the assessment of whether Mr Christie used or was justifiably to be suspected of using performance-enhancing drugs was inevitably going to involve considerable expert evidence, access to which was constrained by the applicant's limited financial means. Secondly, the offending article itself made no mention of any authoritative basis for the drug-taking allegation. Indeed, the applicant conceded in the article that "there is no bloody hypodermic needle, and no direct evidence that points the finger at Christie", and that the allegation was supported only by "circumstantial evidence" (see paragraph 9 above). Thirdly, the evidence of Mr Moule and Mr Walusimbi, which the applicant described as crucial to his case, was initially presented in very vague terms more than a year after the article was published, and was elaborated upon only immediately before the commencement of the trial.

87. In all the circumstances, the Court considers that the requirement that the applicant prove that the allegations made in the article were

substantially true on the balance of probabilities constituted a justified restriction on his freedom of expression under Article 10 § 2 of the Convention in the interests of the protection of the reputation and rights of Mr Christie.

5. Summary

88. For these reasons, the Court concludes that the unavailability of legal aid, exclusion of witness evidence, the order to pay Mr Christie's costs and the injunction as well as the rule on the burden of proof did not violate Article 10 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 6 § 1 of the Convention;

2. *Holds* that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 7 May 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President