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

FIRST SECTION

CASE OF ALITHIA PUBLISHING COMPANY LTD & CONSTANTINIDES v. CYPRUS

(Application no. 17550/03)

JUDGMENT

STRASBOURG

22 May 2008

FINAL

22/08/2008

This judgment may be subject to editorial revision.

In the case of Alithia Publishing Company Ltd and Constantinides v. Cyprus,

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

Christos Rozakis, *President,*
Nina Vajić,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni, *judges,*
Myron Nicolatos, ad hoc *judge,*
and André Wampach, *Section Registrar*,

Having deliberated in private on 29 April 2008,

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

PROCEDURE

1. The case originated in an application (no. 17550/03) against the Republic of Cyprus lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Alithia Publishing Company Ltd, a company registered in Cyprus, and Mr Alecos Constantinides, a Cypriot national ("the applicants"), on 28 May 2003.

2. The applicants were represented by Mr C. Pourgourides and Mr A. Demetriades, lawyers practising in Limassol and Nicosia, Cyprus, respectively. The Cypriot Government ("the Government") were represented by their Agent, Mr P. Clerides, Attorney-General of the Republic of Cyprus.

3. The applicants alleged, in particular, that the defamation proceedings brought against them had given rise to violations of their rights to freedom of thought under Article 9 of the Convention and to freedom of expression under Article 10.

4. By a decision of 19 January 2006, the Court gave notice of the complaint concerning Article 10 of the Convention to the Government. It also decided, under Article 29 § 3 of the Convention, to examine the merits of the application at the same time as its admissibility.

5. Mr L. Loucaides, the judge elected in respect of Cyprus, withdrew from sitting in the case (Rule 28 of the Rules of Court) and the Government accordingly appointed Mr M. Nicolatos to sit as an *ad hoc* judge (Rule 29).

6. In their letter of 22 November 2006, the applicants requested an oral hearing on the admissibility and merits of the case. On the date of the

adoption of the present judgment the Court decided that a hearing would not be necessary (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant, Alithia Publishing Company Ltd, is registered under Cypriot law and is the publisher of the daily morning newspaper *Alithia*. The second applicant, Alecos Costantinides, is the editor-in-chief of *Alithia*. He was born in 1930 and lives in Nicosia.

A. The impugned publications

8. Between December 1992 and 31 January 1993 the first applicant published a series of twelve articles written by the second applicant. These articles concerned the conduct of Mr Aloneftis, who at the relevant time was Minister of Defence of the Republic of Cyprus. The articles claimed that he had been involved in a conspiracy with armaments traders for the misappropriation of public funds.

9. According to the applicants, Mr Aloneftis, acting on behalf of the Government, was in the habit of accepting more expensive armaments contracts in return for generous commissions from certain armament traders. It was alleged that he used these commissions to fund his gambling habit in London casinos. It was further reported that Mr Aloneftis, while betting in casinos in the company of his friends - the armaments traders -, would discuss classified information concerning the Republic's armament programme, and that this was how such information had been divulged to the international press. It was also claimed that he had instigated a bomb attack against the second applicant.

10. In particular, in an article of 15 January 1993, written by the second applicant, the newspaper "revealed" that the Republic of Cyprus had purchased a French armament system which was effectively useless, given that the Cypriot Republic did not possess the equipment that was necessary to maintain it. It was claimed that various officials had received commissions of at least 10 million Cypriot pounds (CYP) in respect of this purchase. The President of the Republic and the Minister of Defence, amongst others, were well aware of the identity of the beneficiaries, but journalists daring to investigate in such matters should be very careful.

11. A second article published on the same date and entitled "People in hiding: a reply to an anonymous article by Mr Aloneftis, Minister of

Defence", the second applicant expressed his concern about the fact that the Minister of Defence, who was "certainly" aware of the individuals who were receiving commissions from the purchase of armaments, did not denounce them to the relevant authorities. It read: "such questions... [should be] addressed to Mr Aloneftis, who is a connoisseur of ... casinos". It was added that, should the Attorney-General wish to proceed with a criminal investigation into these matters, he should start with the acts of those "who are gambling in casinos, laughing at us, while we, the fools, are required to pay for their chips".

12. A subsequent article by the second applicant, dated 16 January 1993 and entitled "The Attorney-General and the clowns [*μασκαράδες*]", stated that the Minister of Defence, Mr Aloneftis, through an article in another Cypriot newspaper, had had the "incredible nerve" to request *Alithia* to name the suppliers of armament systems who were paying commissions to State officials. The article read as follows:

> "Those names, however, were well known to everyone, and firstly to the President of the Republic and the Minister of Defence. The latter regularly appears in casinos alongside the most important arms supplier, and attends receptions given by another. No one attends receptions given by people whom he does not know, or embarks on cruises in the yachts of strangers. The Attorney-General should interfere where he ought to do so. There are many clowns and crooks in this place, who are beyond the reach of the short and crooked arm of the law."

13. The closing paragraphs of the article read:

> "The last time that our paper covered the great feast hosted by defence officials, the Attorney-General had not been invited. In fact, certain hit men were employed to terrorise our newspaper and, to a certain extent, their attempt has been successful. Cyprus is a small country and everyone knows what is going on. Everyone is aware of the names that we were called on to reveal. Everyone knows about the casinos. Everyone knows about the bomb attack and the people who instigated it. So the clowns (*μασκαράδες*) should stop acting in a provocative [and] hypocritical manner."

14. In another article of 20 January 1993 the second applicant stated:

> "According to information from a serious source, at one stage an arms firm had offered us [the Republic of Cyprus] 150 tanks. We did not accept the offer because the tanks had been offered for free. Had we agreed to take these tanks, there would have been no commissions - and then what would happen to the casinos?"

15. A further article by the second applicant, dated 27 January 1993 and entitled "Aloneftis's newspaper, casinos and missiles", stated:

> "A Cypriot newspaper, to which the Minister of Defence Mr Aloneftis is transmitting poppycock [*σπερμολογίες*, literally, spermologies] against the newspaper *Alithia*, published the following in its edition of 26 January:
>
> 'Recent publications, appearing on a daily basis for the few last weeks in a morning daily newspaper, have prompted a threatening statement from the Turkish Prime Minister Suleiman Demirel. The Turks were particularly worried by information

published concerning the intention of the National Armed Forces to purchase Exoset missiles.'

The above statement obviously concerns *Alithia* and warrants a reply:

Alithia has never stated anything concerning Exoset missiles. The reference to negotiations conducted by the Republic of Cyprus for the purchase of Exoset missiles was published in the foreign military journal *Defence News* approximately one year ago and was mentioned in the newspaper *Cyprus Mail* some days ago.

On the contrary, *Alithia* merely stated that it would be foolish for the Republic of Cyprus to buy such missiles, which are primarily launched from airplanes that we do not possess.

The Turks have therefore heard about the missiles from elsewhere. And it is well known where *Defence News* obtained its information. When our ministers gamble in casinos together with various arms suppliers and become merry, they start shouting about matters concerning missiles and rockets, and everyone can hear them."

16. A further short article of the same day was entitled "Casinologists" and was accompanied by a picture of Mr Aloneftis. It referred to an article in another Cypriot newspaper reminding a well-known Cypriot politician that the Cypriot electoral body was not a casino in Las Vegas. It added that there was no need to refer to casinos in Las Vegas since the London casino *Maxim* was closer. In this respect, the *Alithia* article stated:

"You should ask Aloneftis and his team who will be in a position to confirm this. Of course, Aloneftis would not know how people exit from casinos in their underwear but he is well aware of how you get in there".

17. On 28 January 1993, an article entitled "Call 451313 and ask why the Minister of Defence is entertaining himself with armament dealers", stated:

"Mr Clerides' promotional film ... could invite taxpayers to call Mr Vasiliou [President of the Republic at the time] and ask him why his Minister of Defence is having fun in restaurants alongside arms dealers, why he is playing *Banko Punto* with them in London casinos and why [he] always insists on purchasing everything from those particular arms dealers."

18. Another article, of the same date, called on the Minister of Defence to explain why Cyprus had paid twice as much as Greece for an identical armament system. The Minister was further called on to explain the exact nature of his relations with a French company involved in the armaments trade (Sofma).

19. A further article of the same date, written by the second applicant and entitled "Casinos and Panties", read:

"The Minister of Defence, Mr Aloneftis, ... is a regular in casinos; the publisher of *Alithi*a ... said...the following about him:

> 'We saw him having fun in various night spots in Athens alongside representatives of arms manufacturers; we saw him cruising in their luxurious yachts; we saw him gambling with them in casinos'.
>
> The reference to casinos.... is made in a literal sense and refers to the London casino *Maxim*, where hundreds of thousands of pounds are at stake, to the detriment of our defence...
>
> When *Alithia* first reported on the issue of enormous commissions being paid to State officials by arms dealers, a year and a half ago, it was targeted by nocturnal assailants. As is very well known, the orders behind this were issued from the London casino. (In the meantime, we took our measures and would like to warn such assailants, who dare to speak about morality, that we are not affected by their new threats....).

20. On 31 January 1993 the second applicant stated, in an article entitled "Defence In and Out":

> "The main interest of the Minister of Defence... in recent years was not to improve the defence of Cyprus, but the purchase of excessively expensive systems from Sofma at prices which at times were seven times the price of similar and indeed better systems. His goal was to spend as much as possible for well-known reasons, and not that of the ensuring an effective ... defence...
>
> The defence of Cyprus has accordingly been vested in the hands of a foreign company, Sofma, while Cyprus's defence policy is in reality being considered and developed at London's *Maxim*, where all decision-making is taking place.
>
> The defence of Cyprus in the hands of amateurs, and Sofma has become a lucky game like *banco punto*, roulette or black jack. And what we fools have not yet realised is that these people are gambling with our own money..."

B. Proceedings before the District Court of Nicosia

21. By originating summons of 22 March 1993, Mr Aloneftis instituted civil proceedings for defamation before the District Court of Nicosia. Mr Aloneftis requested compensation for defamation as well as a court order prohibiting further reporting of his conduct in a defamatory manner. The trial took place before Judge Nathanael. It lasted for 18 months, a period considered as extraordinary by the district court. The defendants invited 26 witnesses to give oral evidence and at least 50 written exhibits and other pieces of documentary evidence were admitted.

22. The applicants accepted during the trial that the contested publications were defamatory toward the plaintiff. In particular, it was stated on their behalf that the publications "were intensely defamatory toward the plaintiff and injured, *inter alia*, his integrity, honesty, reputation, personality, patriotism and good fame, and caused serious injury and damage to his private, social and public life". Nevertheless, they argued that the publications were covered by the defence of justification and fair

comment and constituted a legitimate exercise of their right to freedom of expression. In this context, they maintained that their allegations concerning Mr Aloneftis's conduct were true.

23. On 29 November 1999 Judge Nathanael delivered the district court's judgment, by virtue of which the applicants were found liable for defamation. In relation to the defence of justification, the district court noted that where this defence was raised, the burden of proof fell on the defendant to show the accuracy of the facts referred to in a publication. Should the defendant fail to discharge it, then this defence would fail even in cases where a defendant honestly and reasonably believed that the relevant statements were true.

24. It was noted that the defence of fair comment applied when a published statement constituted a fair and reasonable comment on a matter of public interest. The comment had to be made on the basis of facts that were set out correctly and without malice. The defendant would bear the burden of proof in showing that the facts on which the comment was based were true and that the comment could be justified as one that could have been made by a reasonable man. If the defendant succeeded in establishing the fairness of the comment, then the burden would shift to the plaintiff, who would have to show the existence of malice on the part of the defendant. Judge Nathanael added that "there would be a further limitation when a comment concerned a person holding a public post and imputed to him immoral, dishonest or corrupt behaviour, in which case a defendant would have to show the truth of his allegations."

25. The testimony of the first applicant's director and the second applicant demonstrated that they had had no evidence or other sources in support of their allegations at the time of publication. Their positions were further undermined by the fact that the applicants had apologised to a certain armaments dealer for their defamatory allegation that he had been conspiring with Mr Aloneftis. The second applicant had been found to be an unreliable and evasive witness. His testimony demonstrated that there had been no research or other attempt to verify most of the allegations made in the impugned publications. Moreover, the second applicant had been entirely contradictory as to whether any effort had been made to contact Mr Aloneftis prior to publication. His evidence was rejected. The evidence of the first applicant's director was also rejected: his allegations had been found to be clearly unsubstantiated and showed his prejudice against Mr Aloneftis.

26. In relation to the award of damages, Judge Nathanael took into account, *inter alia*, the seriousness of the defamatory allegations and the complete lack of evidence. He also considered that the overall behaviour of the applicants at trial showed malice: they had insisted on the truth of their defamatory publications and had pursued a defamatory campaign against the plaintiff by a series of clearly defamatory and unverified articles, which

continued to be published even while the proceedings were pending. On this basis an award of 30,000 Cypriot pounds (CYP) [equivalent to approximately 51,258.04 euros ("EUR")] was made as ordinary damages in addition to an award of CYP 5,000 (equivalent to approximately EUR 8,543.01) for exemplary damages.

C. Proceedings before the Supreme Court of Cyprus

27. On 7 January 2000 the applicants lodged an appeal against the district court's judgment with the Supreme Court. In their grounds of appeal they challenged, *inter alia*, the compatibility of Cypriot defamation law, as set out in the Civil Wrongs Act Cap. 148 (see paragraph 35 below), with the right to freedom of speech as guaranteed in the Constitution of the Republic of Cyprus and the Convention.

28. On 29 November 2002, the President of the Supreme Court Pikis delivered the Supreme Court's majority judgment, which upheld the district court's judgment and the corresponding award of damages. It was noted that the applicants had stated in their statement of defence, filed with the district court that the publication of the impugned articles amounted to an exercise of their right to freedom of expression and, as such, should have been protected. On this basis, they argued before the Supreme Court that they had explicitly raised the defence of qualified privilege in their defence statement and that their plea had been ignored by the first-instance court. The majority found that, given that the applicants had not properly raised this defence in their pleadings, the first-instance court had been correct not to examine it.

29. There had been no evidence presented in court supporting the applicants' allegations and the lack of such evidence was even admitted by the second applicant and the first applicant's director. The latter's testimony had been rejected as unreliable. Despite the lack of supporting evidence, the applicants had not presented their serious allegations to Mr Aloneftis prior to publication, which was indicative of their motives and their indifference as to the truth of the facts presented and discussed in the articles. The articles not only imputed to Mr Aloneftis the commission of criminal offences but had disparaged his moral character by presenting him as an unscrupulous criminal driven purely by self-interest. The lack of supporting evidence and the seriousness of the defamatory allegations demonstrated the existence of malice on the part of the applicants as well as their intent to defame the plaintiff.

30. It was observed that the defence of qualified privilege was based on the duty to transmit information, correlated by the right to receive such information. Its establishment depended on a number of factors concerning the nature of the information in issue, the extent of any public interest in the matter, the sources of such information, the measures taken to verify the facts and whether the plaintiff had been requested to comment on the

allegations made in the publication. The protection of freedom of expression entailed that the courts should not easily reach the conclusion of lack of public interest over the subject-matter of a publication. In cases of doubt, freedom of expression should be favoured. The majority thus endorsed the House of Lords' leading judgment in *Reynolds v. Times Newspapers* [2001] 2 AC 127, at 205. However, it was considered that even assuming that the defence of qualified privilege had been properly raised, in the light of the circumstances of this case it would not have succeeded.

31. Defamation as a tort predated the enactment of the Constitution and it had therefore to be examined whether the provisions of Cap. 148, concerning an action in defamation, were compatible with Article 19 of the Constitution protecting the right to freedom of expression (see paragraph 34 below). Cap. 148 constituted a justified limitation on the right to freedom of expression since its provisions aimed to protect the reputation of another. The limits on freedom of expression had to be directly connected with the aim that rendered them legitimate and the necessity requiring the protection of that aim. Whenever there appeared to be conflict between two rights, the courts should take into account in their balancing exercise that fundamental rights were of equal importance. Reputation was considered to be an integral and important part of the dignity of an individual which, once besmirched by unfounded allegations, could be damaged forever. Its protection was vital for the protection of the rights of individuals and was in the public interest. Hence, the provisions of Cap. 148 did not run counter to the Constitutional protection of freedom of expression.

32. The defence of justification ensured the essence of the right to freedom of expression. However, it was conditional on the existence of good faith on the part of a defendant in defamation proceedings. In the present case, the facts on which the publications had been based were inaccurate and the defendants had acted in flagrant disregard of the requirement to verify the factual allegations they had published.

33. Mr Justice Hadjihambis delivered a dissenting opinion. He considered that the defence of qualified privilege had been raised properly by the applicants in their pleadings, since they had added therein that the action was contrary to their free speech rights. Section 21 (1) of Cap.148 explicitly referred to the defence of qualified privilege in setting out the balance that must be struck between freedom of expression and the right to reputation. Under this provision, a publication would be privileged only if it was made *bona fide* and did not exceed what would be reasonable under the circumstances. In his view, given that the first-instance court had not considered the relevant defence, the Supreme Court should have ordered a re-trial of the case.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

34. In so far as relevant, Article 19 of the Constitution of the Republic provides:

> "(1) Every person has the right to freedom of speech and expression in any form.
>
> (2) This right includes freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers.
>
> (3) The exercise of the rights provided in paragraphs 1 and 2 of this Article may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic or the constitutional order, public safety, public order, public health, public morals or for the protection of the reputation or rights of others, or for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary."

B. Legislative provisions

35. The Civil Wrongs Act (Cap. 148) sets out the law of defamation. In so far as relevant, section 18 (1) provides:

> "A person publishes defamatory matter if he causes the printing, writing, painting, effigy, gesturing, spoken words, or other sounds or other means by which the defamatory matter is conveyed to be dealt with, either by exhibition, reading, recitation, description, delivery, communication, distribution, demonstration, expression or utterance, or otherwise, so that the defamatory meaning thereof becomes known."

36. The defences available in an action for defamation are set out in Section 19 of the Civil Wrongs Act which, in so far as relevant, provides:

> "In an action for defamation it shall be a defence -
>
> (a) that the matter concerning which the complaint was made was true:
>
> Provided that where the defamatory matter contains two or more distinct charges against the plaintiff, a defence under this paragraph shall not fail by reason only that the truth of every charge is not proved, if the defamatory matter not proved to be true does not materially injure the plaintiff's reputation having regard to the truth of the remaining charges:
>
> (b) that the matter of which complaint was made was a fair comment on some matter of public interest:
>
> Provided that where the defamatory matter consists partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason

only that the truth of every allegation of fact is not proved, if the expression of opinion is a fair comment having regard to such of the facts alleged or referred to in the defamatory matter complained of as are proved:

Provided further that a defence under this paragraph shall not succeed if the plaintiff proves that the publication was not made in good faith within the meaning of subsection (2) of section 21 of this Act;

(c) that the publication of the defamatory matter was privileged under sections 20 and 21 of this Act;

(d) that the defamation was unintentional under section 22 of this Act."

37. Section 21 addresses the situation where a publication of defamatory matter is conditionally privileged. In so far as relevant, it provides:

"(1) The publication of defamatory matter is privileged, on condition that it is published in good faith, in any of the following cases, namely:-

(a) if the relation between the parties by and to whom the publication is made is such that the person publishing the matter is under a legal, moral or social duty to publish it to the person to whom the publication is made and the last-mentioned person has a corresponding interest in receiving it or the person publishing the matter has a legitimate personal interest to be protected and the person to whom the publication is made is under a corresponding legal, moral or social duty to protect that interest;

Provided that the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion."

38. Section 21 (2) provides:

"The publication of defamatory matter shall not be deemed to have been made in good faith by a person, within the meaning of subsection (1) of this section, if it is made to appear either-

that the matter was untrue, and that he did not believed it to be true; or

that the matter was untrue, and that he published it without having taken reasonable care to ascertain whether it was true or false; or

that, in publishing the matter, he acted with intent to injure the person defamed to a substantially greater degree or substantially otherwise than was reasonably necessary for the interest of the public or for the protection of the private right or interest in respect of which he claims to be privileged."

39. Section 21 (3) provides:

"In any action brought in respect of the publication of any defamatory matter if such publication might be privileged under the provisions of subsection (1) of this section, and the defence of privilege is raised, the onus of proving that such publication was not made in good faith shall be upon the plaintiff."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 9 AND 10 OF THE CONVENTION

40. The applicants complained that the outcome of the defamation proceedings violated their rights as guaranteed by Articles 9 and 10 of the Convention.

41. The Court considers that the applicants' complaint concerns essentially their right to freedom of expression and will proceed to examine the case under Article 10 of the Convention, which provides:

> "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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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."

A. Admissibility

42. In the view of the Court the applicants' complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible. Pursuant to Article 29 § 3 of the Convention, the Court will now consider the merits of the applicants' complaints.

B. Merits

1. Existence of interference

43. The Court notes that it is common ground between the parties that the judgments pronounced in the libel proceedings constituted an interference with the applicants' right to freedom of expression as protected by Article 10 § 1.

2. Whether the interference was justified

44. An interference entails a violation of Article 10 if it does not fall within one of the exceptions provided for in paragraph 2. The Court must therefore examine in turn whether the interference was "prescribed by law", whether it had an aim that was legitimate under Article 10 § 2 and whether it was "necessary in a democratic society".

(a) Was the interference "prescribed by law"?

i. The Government's submissions

45. The Government did not deal with this argument in their written submissions.

ii. The applicants' submissions

46. The applicants did not dispute that the District Court's judgment had a basis in national law, namely the Law on Civil Wrongs (Cap. 148, see paragraph 35 above). However, they maintained that the relevant national law failed to satisfy the foreseeability requirement because in their view the test concerning the defence of qualified privilege, as applied by the district court and Supreme Court in the present case, was too vague and uncertain.

iii. The Court's assessment

47. The Court reiterates that, under its case-law, the relevant national law must be formulated with sufficient precision to enable the persons concerned - if need be with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law that confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see, for instance, the *Tolstoy Miloslavsky v. the United Kingdom* judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, § 37; *Goodwin v. the United Kingdom,* judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II, at § 31).

48. The Court observes that qualified privilege is an exceptional defence intended to ensure free communication without fear of litigation, even if that involves making defamatory statements of fact which cannot be proved to be true. It exempts newspapers from their ordinary obligation to verify factual statements that are defamatory so long as they have, taking into account all the relevant circumstances, acted in accordance with the standards of "responsible journalism" (see *Times Newspaper Ltd v. the United Kingdom* (dec.), no. 23676/03 and 3002/03, 11 October 2005).

49. In previous cases, when the Court has been called upon to decide whether to exempt newspapers from their ordinary obligation to verify factual statements that are defamatory of private individuals, it has exercised a discretion after taking into account various factors, particularly the nature and degree of the defamation and the extent to which the newspaper could have reasonably regarded its sources as reliable with regard to the allegations (*Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 66, ECHR 1999-III). These factors, in turn, require consideration of other elements such as the authority of the source (*Bladet Tromsø and Stensaas*, cited above), whether the newspaper had conducted a reasonable amount of research before publication (*Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, § 37), whether the newspaper presented the story in a reasonably balanced manner (*Bergens Tidende and Others v. Norway*, no. 26132/95, § 57, ECHR 2000-IV) and whether the newspaper gave the persons defamed the opportunity to defend themselves (*Bergens Tidende and Others v. Norway*, cited above, § 58). Hence, the nature of such an exemption from the ordinary requirement of prior verification of defamatory statements of fact is such that, in order to apply it in a manner consistent with the case-law of this Court, the domestic courts have to exercise a degree of discretion after taking into account the particular circumstances of the case under consideration.

50. In the view of the Court, the consideration by the Supreme Court of the factors to be taken into account in ascertaining whether the standards of "responsible journalism" have been met had the effect of limiting the scope of that discretion (see *Times Newspaper Ltd v. the United Kingdom*, cited above). Moreover, these were the same factors relied upon by the Court in determining whether a newspaper should be exempted from its ordinary obligation to verify factual statements that are defamatory of private individuals (see *Bladet Tromsø and Stensaas*, cited above, § 66, and *McVicar v. the United Kingdom*, no. 46311/99, § 84, ECHR 2002-III). The Court does not accept that consideration of such factors creates legal uncertainty.

51. Lastly, the Court notes that the district court that heard and examined in detail the applicants' evidence concluded that the applicants had acted maliciously in that they had published their extremely defamatory allegations without making sufficient effort to verify them prior to publication, thus demonstrating the applicants' indifference as to the truth of their statements. It also notes that the Supreme Court agreed with these findings by the district court. The applicants have failed to show any impropriety in the sound reasoning and findings of the domestic courts that would require the Court's intervention. On this basis, the Court considers that the applicants should have realised that by publishing a whole series of articles making seriously defamatory statements of fact, which were based on dubious sources, without affording the person defamed a reasonable

opportunity to comment on them or, at least, to attempt to put his side of the story, they might well be considered to have failed to comply with the standards of "responsible journalism" and that, as a result, they would not be able to benefit from the defence of qualified privilege.

52. In view of the above, the Court does not consider that the interpretation of the relevant law by the domestic courts in the present case has gone beyond what could be reasonably foreseen in the circumstances. Nor does it find any other indication that the law in question did not afford the applicants adequate protection against arbitrary interference.

(b) Did the interference pursue a legitimate aim?

53. The Court notes that it is common ground between the parties that the interference pursued the legitimate aim of protecting the rights and reputation of others, an aim which is consistent with the protection afforded to the right to reputation under Article 8 of the Convention (see, *inter alia*, *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007; *White v. Sweden*, no. 42435/02, § 19, 19 September 2006; *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI; and *Abeberry v. France* (dec.) no. 58729/00, 21 September 2004).

(c) Was the interference necessary to achieve that aim?

i. The Government's submissions

54. The Government noted that the articles had levelled grave accusations against the plaintiff and that the applicants had failed to establish in the course of the domestic proceedings that they had acted in good faith. The Court should not accept that the press should be immune from defamation proceedings when reporting on the acts of politicians. The protection of the limitation set out in Article 10 § 2 extended to politicians even when the latter were acting in their official capacity. Thus, when reporting on the acts of politicians and other public figures the press was not exempted from its ordinary obligation to act in good faith and in a reliable manner so as to provide information that was accurate. The obligation on journalists to verify defamatory factual statements required them to rely on a sufficiently accurate and reliable factual basis. There was a relationship of proportionality between the seriousness of an allegation and the reliability of the relevant factual basis: the more serious an allegation, the more solid the factual basis would have to be. Special grounds had to be shown before dispensing with the above ordinary obligation to verify factual statements that were defamatory.

55. The domestic law did not require a defendant to prove the truth of a value judgment. It only required him to satisfy the courts that the comment was "fair". However, the defence of fair comment did not exonerate from liability a defendant who had published a defamatory comment with intent

to injure the plaintiff to a substantially greater degree than was reasonably necessary for the protection of public interest. The defence of qualified privilege exempted a defendant from liability in relation to factual statements or comments which, although defamatory, had been published in "good faith" and in one of the circumstances set out in the relevant domestic law. In the absence of good faith, the privilege would not apply. This would be the case where the factual statement or the factual basis of a comment was untrue and where the defendant had published the statement or comment without taking reasonable care to ascertain the accuracy of its factual basis. The same would apply where a defendant published a statement or comment with intent to injure the plaintiff to a substantially greater degree than was reasonably necessary for the protection of public interest.

56. A successful plea of the defence of qualified privilege would place the burden of proof on the plaintiff to show that the factual statement was untrue and had been published without reasonable care to ascertain its accuracy, or that it was published with intent to injure the plaintiff to a substantially greater degree than was reasonably necessary for the protection of public interest. However, the placement of the burden of proof on the plaintiff in this way would not exonerate a defendant who had also raised the defence of justification from proving the truth of his factual statements.

57. The relevant domestic-law provisions were not in any way incompatible with the Convention requirements. They merely reflected the Court's case-law concerning the duties and responsibilities of the press. The applicants in the present case had based their allegations against the plaintiff on inaccurate facts and published them without any prior inquiry. Moreover, they proceeded with publication without first bringing them to the attention of the plaintiff. They had therefore denied him of any opportunity to present his own views on the matter.

ii. The applicants' submissions

58. The applicants maintained that they had suffered a disproportionate interference with their right to freedom of expression, contrary to Article 10 § 2. First, they contended that they were entitled to benefit from the defence of qualified privilege because they had been acting within the normal functions of journalists reporting on the public functions of a public figure. They argued that, in the absence of malice, the press was entitled to the protection of the defence of qualified privilege in respect of all reports concerning matters in the public interest and, in particular, the public functions of politicians. This would effectively allow for the publication of information which could not be shown to be accurate.

59. Secondly, they argued that the defence of fair comment as it had been interpreted by the domestic courts had disproportionately required

them to prove the truth of their comments. In particular, in the view of the first-instance judge, subsequently upheld by the majority of the Supreme Court, when the defence of fair comment was raised in respect of a defamatory publication that imputed immoral, indecent or corrupt behaviour to a person holding a public post, the defendant should prove the truth of his allegations. Thirdly, they contended that the domestic courts had failed to acknowledge that Mr Aloneftis was not only a public figure but also a politician and as such the press was entitled to greater liberty in commenting upon his actions.

60. Lastly, they argued that the domestic courts' interpretation of the relevant domestic law and their imposition of a requirement on the press to show that they had taken sufficient measures to verify the accuracy of their allegations, both as a condition for raising the defence of qualified privilege and in reply to the claim of falsehood, had been disproportionate. They contended that the presumption of falsity that applies even in respect of articles reporting on the public functions of a public figure and, especially, a politician placed a disproportionate burden on the press. The latter were unjustifiably required to prove the truth of their allegations by evidence which could be successfully admitted in court.

61. In the view of the applicants, the allegations made in their articles were based on reliable sources and they had taken all reasonable measures to verify the relevant facts prior to publication. They relied on extensive documentary evidence and, in particular, on certain letters from French armaments dealers and a Member of Parliament who, at the material time, had been a member of the Parliamentary Committee on Defence. They submitted that they had attempted to contact Mr Aloneftis prior to publication but that he had been particularly uncooperative and denied them the possibility of ascertaining his position on their findings.

iv. The Court's assessment

62. The fundamental principles relating to this question are well established in the Court's case-law and have been summarised as follows (see, *inter alia*, *Lindon and Others v. France* [GC], nos. 21279/02 and 36448/02, § 45, 22 October 2007):

> "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

> The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.
>
> The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether it was "proportionate to the legitimate aim pursued". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts.
>
> There is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance ... – or in matters of public interest ... .
>
> Furthermore, the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance."

63. Article 10 of the Convention does not, however, guarantee a wholly unrestricted freedom of expression even in respect of coverage by the press of matters of serious public concern. Where, as in the present case, there is question of attacking the reputation of individuals and thus undermining their rights as guaranteed in Article 8 of the Convention (see, *inter alia*, *Pfeifer v. Austria*, no. 12556/03, § 35, cited above), regard must be had to the fair balance which has to be struck between the competing interests at stake. Also of relevance for the balancing which the Court must carry out in the present case is that, under Article 6 § 2 of the Convention, everyone has the right to be presumed innocent of any criminal offence until proven guilty.

64. The Court must weigh a number of factors when reviewing the proportionality of an impugned measure. In the instant case, the applicants accepted that their allegations had been defamatory and the domestic courts found that the applicants had made no effort to verify the allegations prior to publication and, in fact, had acted maliciously. The Court notes that the applicants had instigated a well-instrumented campaign against the plaintiff by publishing a series of articles which made seriously defamatory allegations about him. The allegations imputed to the plaintiff amounted to

a criminal offence. Moreover, while journalists are entitled to recourse to a degree of exaggeration, or even provocation, the applicants presented their defamatory allegations as statements of fact rather than value judgments.

65. Under the terms of paragraph 2 of Article 10, the exercise of freedom of expression carries with it "duties and responsibilities" which also apply to the press. By reason of these "duties and responsibilities", which are inherent in the exercise of the freedom of expression, 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 *Bladet Tromsø and Stensaas*, § 65, cited above). The Court will examine whether there were any special grounds for dispensing the applicants from their ordinary obligation to verify factual statements that were defamatory. In the Court's view, this depends in particular on the nature and degree of the defamation at hand and the extent to which the applicants could reasonably regard their sources as reliable with respect to the allegations in question. The latter issue must be determined in light of the situation as it presented itself to the applicants at the material time, rather than with the benefit of hindsight (see *Bladet Tromsø and Stensaas*, cited above, § 66).

66. The Court notes that the domestic courts' imposition of a requirement on the press to act in good faith in order to provide accurate and reliable information is implicit in the protection of Article 10 of the Convention. This would equally apply in respect of reports on matters of public interest, even where such reports deal with the conduct of senior public officials acting in their official capacity. The applicants in the present case disputed the domestic courts' findings that they had acted in malice. They maintained that they had taken all reasonable steps to verify the accuracy of their statements prior to publication and had relied on certain documentary evidence. They also contended that they had attempted to contact Mr Aloneftis prior to the publication of the series of articles. However, the district court conducted an extensive analysis of the applicants' evidence and concluded that the applicants had not in fact made sufficient effort to investigate the matters they alleged in their reports or to obtain and present the plaintiff's position on the relevant allegations. It is crucial in this regard that the evidence of the first applicant's director, as well as that of the second applicant, was dismissed as unreliable and that both the district court and the Supreme Court agreed that the applicants had acted maliciously. The Court does not see any reason to depart in this respect from the well-reasoned findings of the domestic courts, which are, in any event, better placed to assess the credibility and reliability of the applicants' evidence.

67. Given the lack of good faith on the part of the applicants, the Court does not find it necessary to examine whether there were any special

grounds in the present case for dispensing the applicants from their ordinary obligation to verify factual statements that were defamatory of private individuals or, indeed, public officials.

68. Lastly, as to the complaint about the burden of proof, the Court considers that it is not, in principle, incompatible with Article 10 to place on a defendant in libel proceedings who wishes to rely on the defence of justification the onus of proving to the civil standard the truth of defamatory statements (see *McVicar v. the United Kingdom*, cited above, § 87, and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 93, ECHR 2005-II).

69. The Court points out that, in accordance with its case-law, in order to assess the justification of an impugned statement, a distinction needs to be made between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which a value judgment may be excessive (see, *inter alia*, *Lindon and Others v. France* [GC], cited above, § 55). The applicants relied on the defence of fair comment, which required them to prove the alleged factual basis on which their statements had been based. The Court considers that it is not, in principle, incompatible with Article 10 to place the onus of proving, to the civil standard, the truth of the factual basis on which a value judgment was based.

70. In the present case, the relevant domestic law provided that where a publication was deemed to be privileged, because special grounds required its communication, the onus would be on the plaintiff to show that the factual statement made had been untrue or that it had been published with intent to injure him to a substantially greater degree than was necessary. This is consistent with the Court's case-law concerning the circumstances in which a defendant in libel proceedings may be exempted from its ordinary obligation to verify factual statements that are defamatory (see paragraph 49 above). However, the Court does not accept that a defendant in libel proceedings who has failed, because he acted with malice, to establish that his publication was privileged should be exempted from showing the accuracy of such statements in trial. Hence, the obligation on the applicants, who failed to establish that their publications were privileged and relied on the defence of justification, to prove that the allegations made in their articles were substantially true on the balance of probabilities, constituted a justified restriction on their right to freedom of expression under Article 10 § 2 of the Convention, with the aim of protecting Mr Aloneftis's right to his reputation.

71. Consequently, as the applicants acted in flagrant disregard of the duties of responsible journalism and had thus undermined the Convention rights of others, the interference with the exercise of their right to freedom of expression was justified.

72. In conclusion, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Declares the applicants' complaint of a disproportionate interference with their right to freedom of expression admissible;

Holds that there has been no violation of Article 10 of the Convention;

Done in English, and notified in writing on 22 May 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President