In the case of **Tolstoy Miloslavsky v. the United Kingdom** (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr B. Walsh,
Mr C. Russo,
Mrs E. Palm,
Mr I. Foighel,
Mr R. Pekkanen,
Sir John Freeland,
Mr B. Repik,
Mr P. Jambrek,

and also of Mr H. Petzold, Registrar,

Having deliberated in private on 26 January, 24 February and 23 June 1995,

Delivers the following judgment, which was adopted on the last-mentioned date:

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Notes by the Registrar

1. The case is numbered 8/1994/455/536. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 March 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 18139/91) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Count Nikolai Tolstoy Miloslavsky, who is a British citizen, on 18 December 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 para. 1 and 10 (art. 6-1, art. 10) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 March 1994, in the presence of the Registrar, the President drew by lot the names of the

other seven members, namely Mr B. Walsh, Mr C. Russo, Mrs E. Palm, Mr I. Foighel, Mr R. Pekkanen, Mr B. Repik and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 23 September 1994 and the Government's memorial on 27 September. On 28 October the Secretary to the Commission indicated that the Delegate would submit his observations at the hearing.

5. On 14 October the applicant submitted further observations on his claim under Article 50 (art. 50) of the Convention.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 January 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr I. Christie, Assistant Legal Adviser, Foreign and Commonwealth Office, Agent,
Mr D. Pannick, QC, Counsel,
Mr M. Collon, Lord Chancellor's Department, Adviser;

(b) for the Commission

Sir Basil Hall, Delegate;

(c) for the applicant

Lord Lester of Herne Hill, QC,
Ms D. Rose, Barrister, Counsel,
Ms K. Rimell, Solicitor,
Mr M. Kramer, Solicitor, Advisers.

The Court heard addresses by Sir Basil Hall, Lord Lester and Mr Pannick, and also replies to questions put by one of its members individually.

AS TO THE FACTS

I. Particular circumstances of the case

7. Count Nikolai Tolstoy Miloslavsky, a British citizen, lives in Southall, Berkshire, in the United Kingdom. He is a historian.

A. The impugned pamphlet

8. In March 1987 a pamphlet written by the applicant and entitled "War Crimes and the Wardenship of Winchester College" was circulated by Mr Nigel Watts to parents, boys, staff and former members of the school as well as to Members of Parliament, Members of the House of Lords and the press. Mr Watts bore a grievance against the Warden of Winchester College, Lord Aldington, at the time Chairman of an insurance company, concerning an insurance claim. The pamphlet included the following statements:

"Between mid-May and early June 1945 some 70,000 Cossack and Yugoslav prisoners-of-war and refugees were handed over to Soviet and Titoist communist forces as a result of an agreement made with the British 5 Corps administering occupied Austria. They included a large proportion of women, children, and even babies.

The majority of Cossack officers and their families handed over held League of Nations passports or those of the Western European countries in which they had found refuge after being evacuated from Russia by their British and French Allies in 1918-20, and were hence not liable to return under the terms of the Yalta Agreement, which related only to Soviet citizens.

...

As was anticipated by virtually everyone concerned, the overwhelming majority of these defenceless people, who reposed implicit trust in British honour, were either massacred in circumstances of unbelievable horror immediately following their handover, or condemned to a lingering death in Communist gaols and forced labour camps. These operations were achieved by a combination of duplicity and brutality without parallel in British history since the Massacre of Glencoe. Outside Lienz may be seen today a small Cossack cemetery, whose tombstones commemorate men, women and children shot, clubbed, or bayonetted to death by British troops.

...

The man who issued every order and arranged every detail of the lying and brutality which resulted in these massacres was Brigadier Toby Low, Chief of Staff to General Keightley's 5 Corps, subsequently ennobled by Harold Macmillan as the 1st Baron Aldington. Since 1979 he has been Warden of Winchester College, one of the oldest and most respected of English public schools. Whether Lord Aldington is an appropriate figure for such a post is primarily a matter for the College to decide. But it is also surely a legitimate matter of broader public concern that a man responsible for such enormities should continue to occupy a post of such honour and prominence within the community, in particular one which serves as exemplar for young people themselves likely one day to achieve high office and responsibility.

...The truth is, however, that Lord Aldington knows every one of his pleas to be wholly or in large part false. The evidence is overwhelming that he arranged the perpetration of a major war crime in the full knowledge that the most barbarous and dishonourable aspects of his operations were throughout disapproved and unauthorised by the higher command, and in the full knowledge that a savage fate awaited those he was repatriating.

... Those who still feel that a man with the blood of 70,000 men, women and children on his hands, helpless charges whom the Supreme Allied Commander was making every attempt to protect, is a suitable Warden for Winchester might care to ask themselves (or Lord Aldington, if they can catch him) the following questions:

...

Lord Aldington has been repeatedly charged in books and articles, by press and public, with being a major war criminal, whose activities merit comparison with those of the worst butchers of Nazi Germany or Soviet Russia ..."

B. Libel proceedings

1. Proceedings in the High Court

9. Lord Aldington instituted proceedings against Mr Watts for libel in the High Court of Justice (Queen's Bench Division). The applicant was subsequently joined to these proceedings at his own request. The defendants pleaded "justification" and "fair comment".

10. Lord Aldington asked that the case be heard by a single judge without a jury. However, the applicant exercised his right to trial by jury.

11. The trial began on 2 October 1989 and lasted until 30 November when the jury

of twelve returned its verdict. In the course of the trial Lord Aldington gave evidence for some six and a half days and was cross-examined. The applicant gave evidence for more than five days and a number of witnesses were called.

Mr Justice Michael Davies devoted some ten pages of his summing-up to the question of the assessment of damages if defamation were to be established. He directed the jury, inter alia, as follows:

"... Let us now, members of the jury, ... deal with the aspect of damages ... I have to give you this direction in law because damages may arise ... If the plaintiff wins, you have got to consider damages. Some would say that the only direction on damages necessary in this particular case was to say: [the applicant] says that if damages are to be payable he agrees they should be enormous. Mr Rampton [defence counsel], I do not think, in his final speech could quite bring himself to utter that word, but he said they will be very generous - and I could stop there. But that is not the way, you see, because the parties do not dictate (even if they are making concessions) how you should approach damages. You do it in accordance with the law, and that is what I am now going to tell you. You have to accept my directions about it, and you will apply them of course as you think fit.

... the means of the parties - the plaintiff or the defendant - is immaterial ...

Neither, as I think I said earlier but I say it now, is the question whether Lord Aldington or [the applicant], or for that matter Mr Watts, have been or will be financially supported by any well wishers as to damages relevant at all. Nor is it relevant the undoubted fact that legal aid is not available in libel cases to a plaintiff or a defendant. All irrelevant, and if it is to be changed it is up to Parliament to do something about it ...

... what you are seeking to do, what a jury has to do, is to fix a sum which will compensate the plaintiff - to make amends in financial terms for the wrong done to him, because wrong has been done if you have got to the stage of awarding damages. It is not your duty or your right to punish a defendant ...

What [Lord Aldington] does claim, of course, is for 'general damages', as lawyers call it, a sum of money to compensate him. First of all, you have to take into account the effect in this case, as in every case where there is libel, on the position, standing and reputation of the successful plaintiff ...

... If they [the allegations made in the pamphlet] were untrue and not fair comment, where it is suggested that they were comment, he is entitled to be compensated for that, so that that will register your view of that.

Then you have got to consider ... the injury to his feelings. I told you that he cannot, of course, claim on behalf of his wife or any member of his family, although the affect on them may have had an affect on him which is a reaction, which you are entitled to take into account.

It is not just his feelings when he read this ... It is his feelings during the time whilst awaiting the trial ... and the publicity ...

... you have to consider ... what lawyers call `vindication' ...

You may think - it is a matter for you - that in this particular case vindication - showing that he was right - is the main reason for Lord Aldington bringing this action - that is what he says anyway - to restore his character and standing ... 'An award, an enormous award', to use [the applicant's] words - 'a very generous award' to use Mr Rampton's words, will enable him to say that put the record straight.

Members of the jury, of course, you must not, as a result of what I have just said, just bump and bump the damages up. You must, at all times, as they say,

keep your feet on the ground.

... You have to take into account the extent and nature of the publication.

... whilst you must leave aside any thought of punishing the defendants if you find for the plaintiff, juries are always entitled, as I have hinted already, to take into account any conduct of the defendant which has aggravated the damages - that is to say, made the damage more serious and the award higher - or mitigated them - made the damage done less serious and the award smaller.

...

Now, two general remarks which I make in every case: nobody asks you how you arrive at your verdict, and you do not have to give reasons like a Judge does, so it is exceedingly important that you look at the matter judicially, and that means that you should not be outrageously or unreasonably high, or outrageously or unreasonably low.

The second matter I say to every jury is: please, I beg you, if you come to damages, do not pay the slightest attention to any other case or the result of any other case you may have read about or heard about. The facts and the legal considerations are like[ly] to have been completely different. There is no league of damages in defamation cases. There is no first division, there is no fourth division, there is no Vauxhall conference, if any of you are interested in football.

So, members of the jury, please forget other cases. Use your own common sense about it. How do you translate what I have said into money terms? By our rules and procedure, members of the jury, counsel can use, and a judge can use, words like 'very substantial' or 'very small', but we do not either of us, counsel or judges, mention figures. Some people again, who have not really considered the matter very carefully, wonder about that, and they say juries should be given guidance, and I say to you what I say to every jury in these cases, it would not be a great deal of help for you, because inevitably, it is human nature and it would be their duty - counsel for the plaintiff would be at the top end of the scale and perhaps in some cases, I do not suggest this one, off the clock, and counsel for the defendant would be at the bottom end of the scale in the basement. Now, that would not be much good to anybody. As for the Judge, well the jury might think - you may have an exactly opposite view - a jury might think: 'Well, on the whole, whatever other people say about this particular Judge in this case, we think he tried to be fair, why doesn't he suggest a figure to us?'

Supposing a Judge, myself in this case, were to suggest a figure to you, or a bracket between so and so and so and so, there would be two possibilities: one is that you would ignore what I said and either go higher than my figure or bracket, or much lower, in which case of course the losing party that did not like it would be off to the Court of Appeal saying: 'Look, the Judge suggested a figure and the jury went above it or below it.'

Supposing you accepted my suggestion, and gave a figure that I recommended, or close to it. Well, all I can say is that you would have been wasting your valuable time in considering the matter of damages because you would just have been acting as a rubber stamp for me, or the Judge, whoever it was. So we do not have that over-bidding or under-bidding, as the Court of Appeal has called it, by counsel, and we do not have Judges trying to lay down to juries what they should award, and I do not hesitate to say, whatever other people say, I hope and pray, for the sake of our law and our court, we never get the day when Judges dictate to juries so that they become rubber stamps.

I am, however, allowed - indeed encouraged - by the Court of Appeal just to say a little bit more. I say it not perhaps in the words of the Court of Appeal, but in my own way, which may be too homely for some, but I say to you that you must remember what money is. You do not deal in Mickey Mouse money just reeling off

noughts because they sound good, I know you will not. You have got to consider money in real terms. Sometimes it is said 'Well, how much would a house cost of a certain kind', and if you are giving a plaintiff as compensation so much money how many houses is he going to buy? I do not mean to suggest that Lord Aldington or any other plaintiff would take his damages and go and buy a house or a row of houses, but that relates it to the sort of thing, if you will allow me to say, you and I do know something about, because most of us have a pretty good idea how much houses are worth. So remember that."

12. In its unanimous verdict of 30 November 1989, the jury answered the questions put by Mr Justice Davies as follows:

"1. Have [the applicant] and Mr Watts proved that the statements of fact in the pamphlet are substantially true?

... No.

2. Does the pamphlet contain expressions of opinion?

... Yes.

3. Have [the applicant] and Mr Watts proved that those expressions of opinion are fair, in the sense that they are such as a fair-minded man could honestly make on the facts proved to be true?

... No.

4. (1) Do you find for Lord Aldington or for Mr Watts?

... Lord Aldington.

(2) Do you find for Lord Aldington or for [the applicant]?

... Lord Aldington.

5. What sum in damages do you award Lord Aldington?

... £1,500,000."

Accordingly, Mr Justice Davies directed that judgment should be entered against the applicant and Mr Watts for the above-mentioned sum, which was approximately three times the largest amount previously awarded by an English libel jury. In addition he granted an application by Lord Aldington for an injunction (section 37 of the Supreme Court Act 1981) restraining, inter alios, the defendants from publishing or causing or permitting to be published or assisting or participating in or conniving at the publication of the words contained in the impugned pamphlet or

"any other words or allegations (however expressed) to the following or any similar effect namely that the Plaintiff [Lord Aldington] in connection with the handover in 1945 to Soviet or Yugoslav forces of military or civilian personnel was guilty of disobedience or deception or criminal or dishonourable or inhumane or other improper or unauthorised conduct or was responsible for the subsequent treatment of any such personnel by the Soviets or the Yugoslavs the said defendants being at liberty to apply to vary or discharge this injunction."

The applicant was also ordered to pay Lord Aldington's costs.

2. Proceedings in the Court of Appeal

13. The applicant (but not Mr Watts) gave notice of appeal to the Court of Appeal setting out a number of grounds, several of which went to the fairness of the proceedings. He criticised Mr Justice Davies among other things for having displayed overt animosity towards the defendants and for his continual

interruption, sarcasm and abuse of defence counsel. The Judge had, he alleged, insulted and disparaged the defence witnesses. Throughout his summing-up he had wholly or largely suppressed or ignored many of the most important aspects of the case for the defence and had misled the jury on issues central to the defendants' arguments. When directing the jury on the question of damages, the tenor of the judge's remarks had been in large part to urge the jury to award high damages to the plaintiff and to discount the alternatives which had been reasonably available on the evidence; the damages had in any event been unreasonable and excessive.

14. On 9 January 1990 Lord Aldington applied to the Court of Appeal for an order requiring the applicant, under Order 59, Rule 10 (5) of the 1965 Rules of the Supreme Court, to give security in an amount which would cover the costs of his opponent's representation if the appeal were to be unsuccessful. It was not disputed that the applicant would be unable to pay the relevant costs.

15. In an open letter of 2 February 1990, Lord Aldington offered not to enforce £1,200,000 of the damages awarded. In his reply the applicant confirmed that he was unable to provide any security for Lord Aldington's costs in the appeal proceedings and, maintaining that the trial had been a travesty of justice, declined the offer.

16. In a twenty-two-page judgment of 18 May 1990 the Registrar of the Court of Appeal examined the facts raised by the applicant and rejected the application for security for costs. The Registrar stated that impecuniosity was a ground for awarding security for costs in respect of the costs of an appeal to the Court of Appeal. In exercising its discretion in this regard, the Court of Appeal would attach particular weight to the merits, or otherwise, of the appeal concerned. If the appeal had little or no merit, a security for costs order would normally be made against an impecunious appellant. If the appeal had reasonable prospects of success, the court would be reluctant to order security for costs.

The Registrar pointed out that he had not found it easy to decide whether the applicant's appeal on liability had sufficient strength to justify allowing him to proceed without furnishing security for costs, given that, if his appeal failed, he would not have the funds to pay Lord Aldington's costs of the appeal. He added that, with some hesitation, he found that on several specific points the appeal had just enough strength to lead him to conclude that security for costs should not be awarded in this case. There was a possibility that if the applicant succeeded in convincing the Court of Appeal that he had not had a fair trial, and his case had not been fairly and clearly put to the jury, the Court of Appeal would conclude that a new trial had to be ordered, notwithstanding the fact that the chances of his succeeding on the new trial were slim.

In view of the above conclusion the Registrar did not find it necessary to deal with an argument made by counsel for Lord Aldington that the appeal on quantum would be academic because of his offer of 2 February 1990 (see paragraph 15 above).

17. Lord Aldington appealed successfully against the Registrar's decision to the full Court of Appeal, which heard the matter for six days between 9 and 17 July 1990 and gave judgment on 19 July 1990. The members of the Court of Appeal gave, in summary, the following reasons.

(a) The President, Sir Stephen Brown

The Court of Appeal had to consider the application afresh and decide whether to order security would amount to a denial of justice to the applicant, having regard to the merits of his appeal. The criticism made in the applicant's grounds of appeal did not concern Mr Justice Davies's directions on the law but, in particular, what the applicant characterised as bias and partiality on the part of the judge towards Lord Aldington and the way in which the judge had dealt with three particular issues of fact. The criticism was however not justified. Mr Justice Davies had clearly left to the jury the decision on the

facts of the case and all the major matters had been dealt with fully and fairly. The judge's summing-up had quite clearly brought to the jury's minds the matters which the defence had contended were of primary significance. Counsel had been given full opportunities to raise matters of alleged error, and when they had deemed it necessary they had done so. Furthermore the principal witnesses had been in the witness-box for some thirteen days in all. Lord Aldington, who had been the central witness in the case in the sense that it was his conduct which was the subject of examination, had been in the witness box for no less than six and a half days. It was inconceivable that the jury had not taken full account of and acted on the evidence of the principal witnesses who had been so comprehensively examined and cross-examined upon all the material issues in the case.

The case had been an entirely appropriate one for a jury and had duly been tried by a jury. In this connection Sir Stephen noted that at a preliminary stage, when Lord Aldington had asked for the case to be tried by a judge alone, the applicant had resisted his application.

The new evidence adduced by the applicant did not carry any weight in the light of all the evidence which had been given at the trial.

The applicant's submission that Lord Aldington was supported by Sun Alliance Insurance Company was irrelevant.

In the result, on the issue of liability there was no merit in the appeal.

Sir Stephen Brown added:

"The quantum of damage is a very large sum. However, there is no doubt that the learned judge gave an impeccable direction on damages. [The applicant] has argued that the judge invited the jury to give excessive damages. A correct reading of the transcript shows that he did just the opposite. There is no merit in that submission.

The award was entirely within the jury's discretion and they received a very full direction about it. I have no doubt that it was meant to mark their view of the enormity of the gross libel which had been published and persisted in.

[The applicant] has however made it clear that he is not really interested so much in the question of the amount of damages as in the issue of liability. He wishes to continue to pursue Lord Aldington if he can and to persist in his allegation at a new trial. In fact he was offered a substantial reduction in the damages to the extent of £1.2 million. This he rejected. This move was not a concession by the plaintiff's solicitors that the award was too high, but was made recognising that the plaintiff was unlikely to receive the amount awarded and was content with the fact that the jury had by their verdict rejected in an overwhelming manner the truth of the libel which had been published."

(b) Lord Justice Russell

"The court will be very slow to interfere with the jury's verdict unless there has been some material irregularity in the proceedings which renders the verdict unsafe or unsatisfactory, or it can properly be said that the verdict is perverse. Much the same considerations must apply in the instant case.

As to any irregularity in the proceedings, I detect none ...

This case, and the jury's verdict, depended essentially upon the veracity of Lord Aldington. No document or documents were produced which on their face could destroy Lord Aldington's credibility. If the jury had disbelieved Lord Aldington, there would have been an end of his case. The fact that the jury found in his favour and awarded him the damages that they did demonstrates that upon the vital issues of the case they must have accepted the plaintiff's evidence. Was that a course which was open to the jury? In my judgment, it

plainly was ...

There is not in my judgment the remotest chance of the Court of Appeal interfering with the jury's finding in the plaintiff's favour and directing a retrial of that issue, either on the basis that the verdict cannot stand or on the basis of fresh evidence which [the applicant] seeks to introduce.

...

Finally, upon the issue of damages, [the applicant] had been offered in an open letter the substitution of £300,000 for the one and a half million pounds awarded by the jury. The libel remains as serious a libel as it is possible to imagine. Any appeal upon quantum alone would be no more than an academic exercise. [The applicant] wishes to reopen the whole case. In my judgment, the defendant being impecunious, justice demands that he should provide security for the plaintiff's costs of any appeal."

(c) Lord Justice Beldam

"It would be difficult to conjecture an allegation more calculated to bring the respondent into the hatred and contempt of his fellow men and the evidence showed that it was deliberately circulated with the aim of encouraging the respondent to sue him, thus giving the appellant the opportunity to challenge in public the respondent's conduct 45 years ago ...

It is not for this court to grant a retrial after the verdict of a jury, even if it thought that a reasonable jury ought to have found differently. The test which, on the hearing of the appeal, this court would have to apply is whether the finding of the jury is so absolutely unreasonable that it can be said that they have not performed the judicial duty cast upon them. Again I have listened to the skilful development of the facts and evidence by the appellant. He has failed to satisfy me that he has any reasonable chance of success in this appeal. Even if he persuaded the court to grant a retrial on the issue of the amount of the damages, I would regard as negligible the prospect of any jury, doing their judicial duty, awarding the respondent [Lord Aldington] less than the sum which he has in reality already offered to accept in compromise of this appeal. The appellant has therefore failed to satisfy me that he has any such real and substantial grounds of appeal as would justify this court in saying that the special circumstances of his inability to pay the respondent's costs if he fails can be disregarded."

18. The Court of Appeal ordered the applicant to provide security for Lord Aldington's costs in respect of the appeal in the sum of £124,900 within fourteen days, failing which the appeal would stand dismissed. It rejected a request by the applicant for more than fourteen days to attempt to raise the money. In addition the Court of Appeal ordered the applicant to pay Lord Aldington's costs (£22,000) in the security for costs proceedings. The judgment runs to twenty-three pages.

The applicant did not furnish the required security and his appeal was dismissed on 3 August 1990.

19. No part of the damages or costs have to date been paid by the applicant to Lord Aldington.

C. Proceedings pending before the domestic courts

20. In 1993 the applicant applied to the Court of Appeal for leave to appeal out of time against the High Court's judgment of 30 November 1989 and for leave to adduce new evidence. The Registrar informed him in September 1993 that the Court of Appeal had no jurisdiction since the subject-matter was the same as an appeal which had already been dismissed.

On 21 February 1994 the applicant issued a writ against Lord Aldington in the

High Court, applying for an order that the judgment of 30 November 1989 be set aside on the grounds of fraud. He also sought damages and other relief. Lord Aldington applied to strike out the action as an abuse of process and as being vexatious and frivolous.

By judgment of 14 October 1994, Mr Justice Collins struck the case out as being an abuse of the process of the court, on the ground that the applicant was unable to establish a reasonable possibility that the new evidence might show that Lord Aldington had committed perjury. In a judgment of 30 November 1994 Mr Justice Collins ordered the applicant's solicitors, who had funded the new action by acting without a fee, to pay 60% of Lord Aldington's costs in the proceedings. An appeal by the applicant to the Court of Appeal is pending.

II. Relevant domestic law

A. Liability and damages in defamation cases

21. Under English law the actions of libel and slander are private legal remedies, the object of which is to vindicate the plaintiff's reputation and to make reparation for the injury done by the wrongful publication to a third person or persons of defamatory statements concerning the plaintiff. The defendant in these actions may prove the truth of the defamatory matter and thus show that the plaintiff has received no injury. Although there may be damage accruing from the publication if the facts published are true, the law gives no remedy by action (see Halsbury's Laws of England, Fourth Edition, vol. 28, paragraph 1).

22. A strict liability rule applies to the tort of libel:

"A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention." (Lord Loreburn LC in Hulton v. Jones [1910] Appeal Cases 20 (House of Lords), at pp. 23-24)

The law presumes in the plaintiff's favour that the words are false, unless and until the defendant proves to the contrary (Gatley, Libel and Slander, Eighth Edition, paragraph 5, p. 6).

If the defendant attempts unsuccessfully to prove that the words are true, this is likely to increase the damages (Duncan and Neill on defamation, Second Edition, paragraph 18.14, p. 129).

23. The purpose of damages in the law of libel is as stated by Lord Hailsham in Broome v. Cassell & Co. Ltd ([1972] Appeal Cases 1027, at p. 1071, quoted by Lord Donaldson in Sutcliffe v. Pressdram Ltd [1991] 1 Queen's Bench 153, p. 189):

"In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before his wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. `... [A] man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public and as consolation to him for a wrong done.' ... Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant ..."

B. Functions of judge and jury in the High Court in defamation cases

24. If the words in question are reasonably capable of being understood in a defamatory sense, the judge must leave it to the jury to say whether they did, in fact, defame the plaintiff. If not, he must give judgment for the defendant without leaving the case to the jury.

The proper course to adopt for the judge in civil proceedings for libel or slander, or criminal proceedings, where there is a case to go to the jury, is to define what is libel in point of law, and leave it to the jury to decide as a matter of fact whether the particular publication falls within that definition or not.

The assessment of damages is peculiarly the province of the jury, and the judge, unless sitting alone, must not himself decide the amount. He should direct the jury as to the relevant factors, such as the extent of publication, the degree to which the words would be believed or the range of persons having special knowledge needed to perceive an innuendo meaning, the position and standing of the plaintiff, the conduct of the plaintiff and of the defendant and all the circumstances of the case (see Halsbury's Laws of England, Fourth Edition, vol. 28, paragraphs 225, 227 and 232).

25. There is no upper or lower limit to the sum of damages which a jury in a libel trial may award. In the above-mentioned case of Sutcliffe v. Pressdram Ltd, Lord Donaldson stressed that referring juries to other cases would confuse rather than assist the jury and that any attempt by counsel or the judge to discuss figures would lead to unhelpful overbidding and underbidding and would risk usurping the true function of the jury. However, the judge might give some guidance to a jury to assist it in appreciating the real value of very large sums of money, for example by inviting it to consider what regular income could be obtained if the sum was invested (see the above-mentioned case of Sutcliffe v. Pressdram Ltd, Lord Donaldson, p. 178; see also Lord Nourse, p. 186, and Lord Russell, pp. 190-91).

C. Court of Appeal's powers to review a jury's award of damages

26. At the relevant time, under Order 59, Rule 11, of the Rules of the Supreme Court 1965, the Court of Appeal had power to set aside a High Court judgment and order a new trial. Rule 11 (1)-(3) read:

"(1) On the hearing of any appeal the Court of Appeal may, if it thinks fit, make any such order as could be made in pursuance of an application for a new trial or to set aside a verdict, finding or judgment of the court below.

(2) The Court of Appeal shall not be bound to order a new trial on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned.

(3) A new trial may be ordered on any question without interfering with the finding or decision on any other question; and if it appears to the Court of Appeal that any such wrong or miscarriage as is mentioned in paragraph 2 affects part only of the matter in controversy, or one or some only of the parties, the court may order a new trial as to that party only, or as to that party or those parties only, and give final judgment as to the remainder.

(4) ..."

As to what test the Court of Appeal should apply in exercising its powers to set aside a jury's verdict on damages, Lord Kilbrandon in Broome v. Cassell & Co. Ltd ([1972] Appeal Cases 1027, p. 1135) stated that it was not sufficient for the court to conclude that the award was excessive; it had to ask whether the

award could have been made by sensible people, or whether it must have been arrived at capriciously, unconscionably or irrationally.

27. According to Rule 11 (4), as in force at the material time, the Court of Appeal had no power, in lieu of ordering a new trial, to reduce or increase the damages awarded by the jury, unless the party or parties concerned consented.

Since the entry into force on 1 February 1991 of the Courts and Legal Services Act 1990, the Court of Appeal has a power under section 8 (2) of that Act to substitute its own assessment of damages for that of the jury irrespective of whether the parties agree or not. Order 59, Rule 11 (4), as amended in the light of the above section 8, provides:

"In any case where the Court of Appeal has power to order a new trial on the ground that damages awarded by a jury are excessive or inadequate, the court may, instead of ordering a new trial, substitute for the sum awarded by the jury such sum as appears to the court to be proper, but except as aforesaid the Court of Appeal shall not have power to reduce or increase the damages awarded by a jury."

28. In the case of Rantzen v. Mirror Group Newspapers (1986) Ltd ([1993] 3 Weekly Law Reports, p. 953) the Court of Appeal exercised its powers under section 8 of the Courts and Legal Services Act 1990 and under the new Order 59, Rule 11 (4). In interpreting its power to order a new trial or to substitute another award on the ground that the damages awarded by the jury were excessive, the Court of Appeal observed that the grant of an almost limitless discretion to a jury failed to provide a satisfactory measurement for deciding what is "necessary in a democratic society" or "justified by a pressing social need" for the purposes of Article 10 (art. 10) of the European Convention on Human Rights. The common law, if properly understood, required the courts to subject large awards of damages to a more searching scrutiny than had been customary in the past. It followed that what had been regarded as the barrier against intervention should be lowered. The question became:

"Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to re-establish his reputation?"

As to what guidance the judge could give to the jury, the Court of Appeal was not persuaded that the time had come to make references to awards by juries in previous libel cases. Nor was there any satisfactory way in which awards made in actions involving serious personal injuries could be taken into account. It was to be hoped that in the course of time a series of decisions of the Court of Appeal, taken under section 8 of the Courts and Legal Services Act 1990, would establish some standards as to what would be "proper" awards. In the meantime the jury should be invited to consider the purchasing power of any award which they may make and to ensure that any award they make is proportionate to the damage which the plaintiff has suffered and is a sum which it is necessary to award him to provide adequate compensation and to re-establish his reputation.

The Court of Appeal concluded that although a very substantial award was clearly justified in the case, judged by any objective standards of reasonable compensation or necessity or proportionality, the award of £250,000 was excessive. It substituted the sum of £110,000.

PROCEEDINGS BEFORE THE COMMISSION

29. In his application of 18 December 1990 (no. 18139/91) to the Commission, Count Tolstoy complained that he had not had a fair hearing by an impartial tribunal as required under Article 6 para. 1 (art. 6-1) of the Convention. Moreover, invoking Article 13 (art. 13) of the Convention (right to an effective remedy) initially, but subsequently relying on Article 6 para. 1 (art. 6-1), the applicant further alleged that the Court of Appeal's order making his right to appeal conditional upon his paying £124,900 as security for Lord Aldington's costs gave rise to a breach of his right of access to court. Finally, he claimed

that the award of £1,500,000 and injunction ordered by the High Court constituted a violation of his right to freedom of expression as guaranteed by Article 10 (art. 10) of the Convention.

30. On 20 February 1992 the Commission declared inadmissible the complaint that the proceedings had been unfair; on 12 May 1993 it declared the remainder of the application admissible. In its report of 6 December 1993 (Article 31) (art. 31) the Commission expressed the opinion that there had been no violation of the applicant's right of access to court under Article 6 para. 1 (art. 6-1) (by ten votes to five), but that there had been a breach of his right to freedom of expression under Article 10 (art. 10) (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment (1).

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1. Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 316-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS MADE TO THE COURT

31. At the public hearing on 21 January 1995 the Government, as they had done in their memorial, invited the Court to hold that the facts disclosed no violation of Article 6 (art. 6) or Article 10 (art. 10) of the Convention in the present case.

32. On the same occasion the applicant likewise maintained the requests to the Court stated in his memorial to decide that there had been violations of Articles 6 and 10 (art. 6, art. 10) and to award him just satisfaction under Article 50 (art. 50) of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

33. The applicant alleged a violation of Article 10 (art. 10) of the Convention, which reads:

"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 (art. 10) 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."

He maintained that the quantum of the damages awarded against him could not be considered to have been "prescribed by law". In addition, the size of the award and the breadth of the injunction had been disproportionate to the aim of protecting Lord Aldington's "reputation or rights" and had thus not been "necessary in a democratic society".

34. The Government disputed these contentions. The Commission shared the applicant's view that the award was disproportionate but did not state any opinion on his other complaints.

35. The Court observes in the first place that the case before it is limited solely to a complaint concerning the amount of damages awarded and the court's injunction. In this regard it is unlike the defamation cases it has examined hitherto (see, for instance, the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, pp. 24-28, paras. 34-47; the Castells v. Spain judgment of 23 April 1992, Series A no. 236, pp. 20-24, paras. 33-50; and the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, pp. 24-28, paras. 55-70), which have concerned either the decision determining liability alone or both that and the sanction.

Both the award of damages and the injunction clearly constituted an interference with the exercise by the applicant of his right to freedom of expression, as guaranteed by paragraph 1 of Article 10 (art. 10-1) and this was not disputed before the Court. Such an interference entails a violation of Article 10 (art. 10) unless it was "prescribed by law", pursued an aim or aims that is or are legitimate under Article 10 para. 2 (art. 10-2) and was "necessary in a democratic society" to attain the aforesaid aim or aims.

A. Was the award "prescribed by law"?

36. As regards the amount of damages awarded, the applicant complained that it was not "prescribed by law".

1. General principles

37. The expression "prescribed by law" in Article 10 para. 2 (art. 10-2) must be interpreted in the light of the general principles concerning the corresponding words "in accordance with the law" in Article 8 para. 2 (art. 8-2) (see the Sunday Times v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, pp. 30-31, paras. 48-49; cf. the Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, p. 31, para. 66), which have been summarised in the Margareta and Roger Andersson v. Sweden judgment of 25 February 1992 (Series A no. 226-A, p. 25, para. 75), as follows:

"... the expression ... requires firstly that the impugned measures should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them - 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 which 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."

The Court further reiterates that the word "law" covers not only statute but also common law (see the above-mentioned Sunday Times judgment, p. 30, para. 47).

2. Application of the above principles

38. The applicant did not deny that the award had a basis in domestic law. However, he complained that the law in question did not enable him to foresee to a reasonable degree that the amount would be as high as £1.5 million.

At English common law there was no upper or lower limit on the amount of damages. The extent to which a judge could give guidance was strictly circumscribed. No specific figures could be suggested and awards of damages in other libel cases or even in personal injury cases had to be disregarded for the purposes of comparison. Guidance could only be given to help the jury to appreciate the real value of large sums of money, for instance by inviting them to reflect on the value of a house (see paragraph 25 above). At the material time, there had been no principle recognised in English law that required the award to be proportionate to the aim of repairing the damage to the plaintiff's

reputation. The jury gave no reasons for its decision and the award could be overturned by the Court of Appeal only if it was so unreasonable that it could not have been made by sensible people but must have been arrived at capriciously, unconscionably or irrationally (see paragraphs 24, 26 and 28 above).

The applicant pointed out that, as a result of the above, in his case the trial judge had not directed the jury to ensure that the award was proportionate to the damage that Lord Aldington had suffered. The jury had, on the contrary, been encouraged to consider "enormous damages" and had been informed by the judge that "there is no league of damages in defamation cases" (see paragraph 11 above). The award made, although it had supposedly not included any punitive damages, had been three times the largest amount previously awarded by an English libel jury (see paragraph 12 above) and had been substantially greater than the sum that would be awarded to a plaintiff suffering permanent and extremely severe physical or mental disablement in a personal injury action. It would have been impossible for the applicant's legal advisers to predict that an award of the magnitude in question would be made.

39. The Government argued that a remedy such as the libel award made in the applicant's case needed to be flexible to accommodate the facts of each individual case, especially the facts of so exceptional a case as the present one. Only by maintaining such flexibility could the law achieve the purpose of compensation under the law of libel, namely to empower the jury to award, in the light of the relevant criteria at common law (see paragraph 23 above), the sum that it considered to be appropriate in the circumstances. In any event, it was not for the Court to assess English libel law in the abstract.

40. The Court notes in the first place that the libel as found by the jury was of an exceptionally serious nature. Indeed, during the hearing at the High Court, counsel for the applicant and the applicant himself had accepted that, if libel were to be established, the jury would have to award a very substantial sum in damages (see paragraph 11 above).

41. The Court accepts that national laws concerning the calculation of damages for injury to reputation must make allowance for an open-ended variety of factual situations. A considerable degree of flexibility may be called for to enable juries to assess damages tailored to the facts of the particular case. Indeed, this is reflected in the trial judge's summing-up to the jury in the present case (see paragraph 11 above). It follows that the absence of specific guidelines in the legal rules governing the assessment of damages must be seen as an inherent feature of the law of damages in this area.

Accordingly, it cannot be a requirement of the notion of "prescribed by law" in Article 10 (art. 10) of the Convention that the applicant, even with appropriate legal advice, could anticipate with any degree of certainty the quantum of damages that could be awarded in his particular case.

42. It is further observed that the discretion enjoyed by the jury in the assessment of damages was not unfettered. A jury was bound to take into account such factors as injury to feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, the reaffirmation of the truth of the matters complained of, vindication of the plaintiff's reputation (see paragraph 23 above). It was for the trial judge to direct the jury on the law. In addition, the Court of Appeal had power to set aside an award, inter alia on the ground of irrationality and to order a new trial. It therefore appears that, although the principle of proportionality as such may not have been recognised under the relevant national law, decisions on awards were subject to a number of limitations and safeguards.

43. In jury trials, the lack of reasoning for awards of damages is the norm and is to a large extent unavoidable. The applicant's submission to the effect that the absence of reasons affected the foreseeability of a particularly high award being made in his case is thus not persuasive. Moreover, the argument could

apply to any award whatever the magnitude and concerns less the size of the award than the very nature of the jury system itself.

44. Having regard to the fact that a high degree of flexibility may be justified in this area (see paragraph 41 above), the various criteria to be taken into account by juries in the assessment of damages as well as the review exercised by the Court of Appeal, the Court reaches the conclusion that the relevant legal rules concerning damages for libel were formulated with sufficient precision. In short, the award was "prescribed by law".

B. Did the award and the injunction pursue a legitimate aim?

45. The award and the injunction clearly pursued the legitimate aim of protecting the "reputation or rights of others". This was not disputed.

C. Were the award and the injunction "necessary in a democratic society"?

1. The award

46. The applicant and the Commission were of the view that the amount of damages awarded - £1.5 million - was disproportionate to the legitimate aim of protecting Lord Aldington's reputation or rights. The applicant pointed out that, at the relevant time, judicial control over the award of damages in defamation cases had been insufficient to ensure that such awards were proportionate.

He further emphasised that the jury had not been directed to consider, in mitigation of damages, that the libellous criticism had concerned acts performed by Lord Aldington as a public officer acting in an official capacity, and had raised matters of very great public interest. These factors, which militated in favour of the allowance of wide limits to acceptable criticism, were not relevant under English law.

The jury had also been directed that an attempt to justify the allegations aggravated the damage suffered. This principle, in conjunction with the strict liability rule in libel cases, resulted in the imposition of a harsher penalty on a defendant who made his allegations in good faith but who failed to prove them to be true, than on a defendant who spoke knowing himself to be lying and did not attempt to defend his allegations (see paragraph 22 above).

47. The Government maintained that there was a reasonable relationship of proportionality between the amount of the award and the aim of compensating the damage done to Lord Aldington and restoring his reputation. They pointed out that Article 10 (art. 10) imposed "duties and responsibilities". The applicant's pamphlet had been false and unfair and had been expressly designed to provoke a libel action. Although no reasons had been given by the jury, it was, as noted by the Court of Appeal, obvious that the jury awarded so large a sum by way of damages because of the enormity of the libel. The Court of Appeal had been satisfied that the award of £1.5 million had been a rational response by the jury to the exceptional circumstances of the libel which they were considering. Otherwise, as amply demonstrated by its ruling in Sutcliffe v. Pressdram Ltd, the Court of Appeal would have been able to set the award aside and order a new trial.

The Government further submitted that in the Court of Appeal's opinion the jury had received a very full direction from the trial judge (see paragraph 17 above). Moreover, as explained by the judge to the jury, it would have been inappropriate and unhelpful to the jury for him to refer to other cases, because the facts and circumstances were so different, or refer to specific sums of money, since the quantum of damages was exclusively a matter for the jury (see paragraph 11 above).

In addition, before the High Court both counsel for the applicant and the applicant himself had acknowledged that if Lord Aldington won his libel action,

he must receive a very substantial sum (see paragraph 11 above). In the Court of Appeal the applicant had been unconcerned about the size of the damages award and he had earlier declined Lord Aldington's offer to accept £300,000 (see paragraphs 15 and 17 above). The offer remained open and the applicant could at any time reduce his liability by £1.2 million if he really wished to do so.

48. The Court recalls at the outset that its review is confined to the award as it was assessed by the jury, in the circumstances of judicial control existing at the time, and does not extend to the jury's finding of libel. It follows that its assessment of the facts is even more circumscribed than would have been the case had the complaint also concerned the latter.

In this connection, it should also be observed that perceptions as to what would be an appropriate response by society to speech which does not or is not claimed to enjoy the protection of Article 10 (art. 10) of the Convention may differ greatly from one Contracting State to another. The competent national authorities are better placed than the European Court to assess the matter and should therefore enjoy a wide margin of appreciation in this respect.

49. On the other hand, the fact that the applicant declined to accept Lord Aldington's offer to settle for a lesser sum (see paragraph 15 above) does not diminish the United Kingdom's responsibility under the Convention in respect of the contested damages award.

However, the Court takes note of the fact that the applicant himself and his counsel accepted that if the jury were to find libel, it would have to make a very substantial award of damages (see paragraph 11 above). While this is an important element to be borne in mind it does not mean that the jury was free to make any award it saw fit since, under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.

The jury had been directed not to punish the applicant but only to award an amount that would compensate the non-pecuniary damage to Lord Aldington (see paragraph 11 above). The sum awarded was three times the size of the highest libel award previously made in England (see paragraph 12 above) and no comparable award has been made since. An award of the present size must be particularly open to question where the substantive national law applicable at the time fails itself to provide a requirement of proportionality.

50. In this regard it should be noted that, at the material time, the national law allowed a great latitude to the jury. The Court of Appeal could not set aside an award simply on the grounds that it was excessive but only if the award was so unreasonable that it could not have been made by sensible people and must have been arrived at capriciously, unconscionably or irrationally (see paragraph 26 above). In a more recent case, Rantzen v. Mirror Group Newspapers Ltd, the Court of Appeal itself observed that to grant an almost limitless discretion to a jury failed to provide a satisfactory measurement for deciding what was "necessary in a democratic society" for the purposes of Article 10 (art. 10) of the Convention. It noted that the common law - if properly understood - required the courts to subject large awards of damages to a more searching scrutiny than had been customary. As to what guidance the judge could give to the jury, the Court of Appeal stated that it was to be hoped that in the course of time a series of decisions of the Court of Appeal, taken under section 8 of the Courts and Legal Services Act 1990, would establish some standards as to what would be "proper" awards. In the meantime the jury should be invited to consider the purchasing power of any award which they might make and to ensure that any award they made was proportionate to the damage which the plaintiff had suffered and was a sum which it was necessary to award him to provide adequate compensation and to re-establish his reputation (see paragraph 28 above).

The Court cannot but endorse the above observations by the Court of Appeal to the effect that the scope of judicial control, at the trial and on appeal, at the time of the applicant's case did not offer adequate and effective safeguards

against a disproportionately large award.

51. Accordingly, having regard to the size of the award in the applicant's case in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award, the Court finds that there has been a violation of the applicant's rights under Article 10 (art. 10) of the Convention.

2. The injunction

52. The applicant further alleged that the injunction (see paragraph 12 above) was disproportionate to the aim of protecting Lord Aldington's reputation or rights. It was sweepingly broad and was ordered as a consequence of a verdict of the jury for which no reasons were given and which the judge had interpreted in the widest possible way. It prevented any comment on the role of Lord Aldington in relation to the handover of Cossacks and Yugoslavs, and the publication of any critical comment on the activities of 5 Corps which would reflect adversely on Lord Aldington, whether he was named or not. In the absence of a successful appeal, an application to vary or discharge the injunction could never have succeeded, given the state of English law. It constituted a permanent and serious interference with the applicant's opportunity to carry on his profession as a historian, preventing him from publishing the fruits of his research on the events in question.

At any rate, the injunction was disproportionate if considered together with the award, as the measures served in part the same function. The jury was not aware when it made the award that the judge would order an injunction. It was thus very likely that the award was intended not only to compensate Lord Aldington but also to deter the applicant from publishing in the future.

53. The Government contested these allegations. They maintained that in the light of the jury's verdict the judge had been entitled to prevent future repetition of the libel by the applicant and this had been the purpose of the injunction. Although the applicant's counsel at the trial had been given the opportunity to comment on the wording of the injunction, no objections had been made at the trial, or thereafter. The applicant had not availed himself of the possibility, which is still open to him, of asking for the injunction to be varied or discharged; nor had he lodged an appeal against it. In these circumstances the Court should not entertain the complaint.

As to the applicant's argument that the injunction overlapped with the damages award, the Government stressed that, whilst the former measure was aimed at preventing future injury, the latter was designed only to compensate for the past loss and to vindicate Lord Aldington's reputation.

54. As the Court has already observed, it is not claimed that the jury's finding of libel was incompatible with Article 10 (art. 10). The injunction was only a logical consequence of this finding and was framed precisely to prevent the applicant from repeating the libellous allegations against Lord Aldington. There is nothing to indicate that the injunction went beyond this purpose. Nor is there any other ground for holding that the measure, either taken alone or in conjunction with the award, amounted to a disproportionate interference with the applicant's right to freedom of expression as guaranteed by Article 10 (art. 10).

D. Recapitulation

55. In sum, the Court concludes that the award was "prescribed by law" but was not "necessary in a democratic society" as there was not, having regard to its size in conjunction with the state of national law at the relevant time, the assurance of a reasonable relationship of proportionality to the legitimate aim pursued. Accordingly, on the latter point, there has been a violation of Article 10 (art. 10). On the other hand, the injunction, either taken alone or together with the award, did not give rise to any breach of that Article (art. 10).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

56. The applicant maintained, in addition, that there had been a violation of his right of access to a court as guaranteed by Article 6 para. 1 (art. 6-1) of the Convention on account of the order by the Court of Appeal requiring him to pay £124,900 as security for Lord Aldington's costs in the appeal as a condition for the applicant's appeal to be heard by that court. In so far as is relevant Article 6 para. 1 (art. 6-1) provides:

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

57. The Government and the Commission disagreed with the above contention.

A. Applicability of Article 6 para. 1 (art. 6-1)

58. Notwithstanding the fact that the issue was not in dispute before it, the Court must ascertain whether Article 6 para. 1 (art. 6-1) is applicable in the instant case. The previous defamation cases dealt with by the Court under Article 6 para. 1 (art. 6-1) have all concerned applicants who have sought to protect their own reputation by bringing proceedings before a court. According to established case-law, the provision (art. 6-1) applies to such proceedings, the right to enjoy a good reputation being a "civil right" within the meaning of Article 6 para. 1 (art. 6-1) (see, for instance, the Helmers v. Sweden judgment of 29 October 1991, Series A no. 212-A, p. 14, para. 27). Article 6 (art. 6) must also apply in relation to a defendant in such proceedings, where the outcome is directly decisive for his or her "civil obligations" vis-à-vis the plaintiff.

Accordingly, Article 6 para. 1 (art. 6-1) applies to the present case.

B. Compliance with Article 6 para. 1 (art. 6-1)

59. The Court reiterates that the right of access to the courts secured by Article 6 para. 1 (art. 6-1) may be subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, for instance, the Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, para. 65).

It follows from established case-law that Article 6 para. 1 (art. 6-1) does not guarantee a right of appeal. Nevertheless, a Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees in Article 6 (art. 6) (see, in particular, the Delcourt v. Belgium judgment of 17 January 1970, Series A no. 11, pp. 14-15, para. 25). However, the manner of application of Article 6 (art. 6) to proceedings before such courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see, for instance, the Monnell and Morris v. the United Kingdom judgment of 2 March 1987, Series A no. 115, p. 22, para. 56; and the above-mentioned Helmers judgment, p. 15, para. 31).

The Court's task is not to substitute itself for the competent British authorities in determining the most appropriate policy for regulating access to the Court of Appeal in libel cases, nor to assess the facts which led that court to adopt one decision rather than another. The Court's role is to review under the Convention the decisions that those authorities have taken in the exercise

of their power of appreciation (see in particular the above-mentioned Fayed judgment, p. 55, para. 81; and, mutatis mutandis, the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, para. 34).

60. The applicant submitted that the requirement that he pay £124,900 within a mere fourteen days had amounted to a total bar on his access to the Court of Appeal (see paragraph 18 above). It had impaired the essence of his right of access to that court and was disproportionate.

In the first place, the court had not been prepared to allow him more than fourteen days to pay the sum and had thereby denied him any realistic opportunity to raise the money and to pursue the appeal.

Furthermore, it had placed on the applicant the onus of showing that he had real and substantial grounds upon which to challenge the judgment against him, rather than requiring Lord Aldington, the party seeking the order which would effectively bar the right of appeal, to show that the appeal was frivolous or had no prospect of success. Also, the Court of Appeal should not have taken into account Lord Aldington's offer to settle for a lesser sum (see paragraph 17 above).

Moreover, the Court of Appeal had failed to have regard to the following factors. Legal aid was not available in libel actions, even to defendants, like the applicant, who were defending their fundamental right to freedom of expression. Lord Aldington's need for protection was diminished in that the costs in the High Court had in large part been covered by Sun Alliance Insurance Company, a well-endowed corporation (see paragraph 17 above).

Finally, the fact that the case had been heard at first instance was irrelevant to the question of effective access to the Court of Appeal. Nor was it significant that it had heard arguments from the parties before concluding that security should be required; it was the Court of Appeal's decision which had evinced the lack of proportionality complained of.

61. The Court considers that the security for costs order clearly pursued a legitimate aim, namely to protect Lord Aldington from being faced with an irrecoverable bill for legal costs if the applicant were unsuccessful in the appeal. This was not disputed. Further, since regard was also had to the lack of prospects of success of the applicant's appeal, the requirement could also, as argued by the Government, be said to have been imposed in the interests of a fair administration of justice (see paragraph 17 above).

62. Like the Government and the Commission, the Court is unable to share the applicant's view that the security for costs order impaired the very essence of his right of access to court and was disproportionate for the purposes of Article 6 (art. 6).

63. In the first place, the case had been heard for some forty days at first instance before the High Court, in the course of which Lord Aldington gave evidence for more than six days and was cross-examined, the applicant gave evidence for more than five days and a number of witnesses were called (see paragraphs 11 and 17 above). It is undisputed that the applicant enjoyed full access to court in those proceedings. It is true that he initially complained about their lack of fairness. However, that complaint was declared inadmissible by the Commission as being manifestly ill-founded.

The Court attaches great weight to the above considerations in its assessment of the compatibility with Article 6 (art. 6) of the restrictions on the applicant's access to the Court of Appeal. Indeed, as indicated earlier, the entirety of the proceedings must be taken into account.

64. Admittedly, the sum required - £124,900 - was very substantial and the time-limit - fourteen days - for providing the money was relatively short. However, there is nothing to suggest that the figure was an unreasonable estimate of Lord

Aldington's costs before the Court of Appeal or that the applicant would have been able to raise the money had he been given more time.

65. According to the relevant practice in the Court of Appeal, impecuniosity was a ground for awarding security for costs of an appeal to that court, but only on certain conditions. In exercising its discretion as to whether to grant an application for such an order, the Court of Appeal would consider whether the measure would amount to a denial of justice to the defendant, in particular having regard to the merits of the appeal (see paragraphs 16 and 17 above). If it had reasonable prospects of success, the Court of Appeal would be reluctant to order security for costs.

The disagreement between the applicant and Lord Aldington in the security for costs proceedings concerned the merits or lack of merits of the appeal. The Registrar of the Court of Appeal, with hesitation, decided that the appeal had just enough strength to allow the applicant to proceed without furnishing security for costs. This decision was subsequently reversed by the Court of Appeal because the applicant had failed to show real and substantial grounds for his appeal, both on liability and on damages. On the point of damages, the Court of Appeal observed, inter alia, that the applicant was not so interested in that issue as in the question of liability and that he had declined to accept Lord Aldington's offer to settle for £300,000. Therefore, an appeal on damages only would have been no more than an academic exercise (see paragraphs 16 and 17 above).

The Court does not find that the justification given by the Court of Appeal for ordering security for costs disclosed any arbitrariness.

66. Moreover, the security for costs issue was first examined by the Registrar of the Court of Appeal and then heard by the court for six days (see paragraphs 16 and 17 above). The Court of Appeal's decision was thus based on a full and thorough evaluation of the relevant factors (see the above-mentioned Monnell and Morris judgment, p. 25, para. 69).

67. In the light of the foregoing, the Court does not find that the national authorities overstepped their margin of appreciation in setting the conditions which they did for the applicant to pursue his appeal in the Court of Appeal. It cannot be said that those conditions impaired the essence of the applicant's right of access to court or were disproportionate for the purposes of Article 6 para. 1 (art. 6-1).

Accordingly, there has been no violation of that provision (art. 6-1).

III. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

68. Count Tolstoy Miloslavsky sought just satisfaction under Article 50 (art. 50) of the Convention, according to which:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Request for a "declaratory" judgment

69. The applicant did not claim compensation for non-pecuniary damage but requested the Court to give a "declaratory" judgment that would ensure that he was liable, if at all, to pay to Lord Aldington only such damages as were necessary to provide adequate compensation and to re-establish the latter's reputation and that the Government would indemnify the applicant for any greater sum which he was liable to pay Lord Aldington.

70. The Government considered that because the applicant had not paid any sums by way of compensation to Lord Aldington, no further remedy was required.

71. The Delegate of the Commission did not offer any comments on this point.

72. The Court is not empowered under Article 50 (art. 50) of the Convention to make a declaration such as that requested by the applicant (see, for instance, the Philis v. Greece judgment of 27 August 1991, Series A no. 209, p. 27, para. 79; the Pelladoah v. the Netherlands judgment of 22 September 1994, Series A no. 297-B, p. 36, para. 44; and the Allenet de Ribemont v. France judgment of 10 February 1995, Series A no. 308, p. 23, para. 65). Accordingly, the applicant's request under this head must be rejected.

B. Pecuniary damage

73. The applicant also asked the Court to award him compensation in an appropriate amount for his loss of opportunity to earn a living as a historian by reason of the effects of the permanent injunction.

74. The Court does not find it established that there existed a causal link between the matter found to constitute a violation (see paragraph 55 above) and any loss or damage which the applicant may have suffered as a result of the injunction. Therefore, his claim under this head must also be dismissed.

C. Costs and expenses

75. The applicant further claimed reimbursement of costs and expenses, totalling 104,000 Swiss francs (CHF) and £149,878.24, in respect of the following items:

(a) CHF 70,000 for work (200 hours at SF 350 per hour) from December 1990 to August 1992 by Mr C.F. O'Neall (resident in Switzerland), in connection with the preparation and filing of the initial application and written observations to the Commission;

(b) CHF 22,800 in respect of expenses incurred by Mr O'Neall in travelling to London for consultation and preparation of the above written observations to the Commission;

(c) CHF 11,200 for telephone, fax, postage, photocopying and binding in connection with the above;

(d) £144,492.67 for Theodore Goddard, Solicitors, and counsel's work from August 1992 to 23 January 1995 with the applicant's written and oral pleadings to the Commission and Court;

(e) £2,621.40 for travel and subsistence expenses in connection with the appearances of the aforementioned representatives before the Commission and Court;

(f) £2,764.17 for photocopying and miscellaneous expenses (including fax charges and fares) incurred between August 1992 and 23 January 1995.

76. The Government and the Delegate were of the view that the amounts claimed under items (a) and (d) in respect of fees were excessive. The Delegate of the Commission invited the Court to consider adoption of a uniform approach, irrespective of national standards. The Government did not object to any of the other claims, although they invited the Court to take a critical look at the amount of costs claimed.

77. The Court will consider the above claims in the light of the criteria laid down in its case-law, namely whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum.

On the point raised by the Delegate of the Commission, concerning the reasonableness of lawyers' fees, the Court reiterates that it does not consider itself bound by domestic scales and practices, although it may derive some assistance from them (see the König v. Germany judgment of 10 March 1980, Series A no. 36, pp. 18-19, paras. 22-23 and 25; the Sunday Times v. the United Kingdom (no. 1) judgment of 6 November 1980, Series A no. 38, p. 17, para. 41; and the Silver and Others v. the United Kingdom judgment of 24 October 1983, Series A no. 67, p. 10, para. 20). On the other hand, given the great differences at present in rates of fees from one Contracting State to another, a uniform approach to the assessment of fees under Article 50 (art. 50) of the Convention does not seem appropriate.

78. Turning to the applicant's claims, the Court is not satisfied that all the costs and expenses were necessarily incurred. Considering also that the applicant has succeeded only in respect of one of his complaints under the Convention (see paragraph 55 above) and deciding on an equitable basis, it awards CHF 40,000 with respect to items (a), (b) and (c) and £70,000 with regard to items (d), (e) and (f).

FOR THESE REASONS, THE COURT

1. Holds unanimously that the award was "prescribed by law" within the meaning of Article 10 (art. 10) of the Convention;

2. Holds unanimously that the award, having regard to its size taken in conjunction with the state of national law at the relevant time was not "necessary in a democratic society" and thus constituted a violation of the applicant's rights under Article 10 (art. 10);

3. Holds unanimously that the injunction, either taken alone or together with the award, did not give rise to a breach of Article 10 (art. 10);

4. Holds unanimously that Article 6 para. 1 (art. 6-1) of the Convention was applicable to the proceedings in the Court of Appeal;

5. Holds by eight votes to one that there has been no violation of the applicant's right of access to court as guaranteed by Article 6 para. 1 (art. 6-1) on account of the security for costs order by the Court of Appeal;

6. Holds unanimously that the United Kingdom is to pay to the applicant, within three months, in compensation for fees and expenses 40,000 (forty thousand) Swiss francs and £70,000 (seventy thousand);

7. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 July 1995.

Signed: Rolv RYSSDAL
President

For the Registrar
Signed: Vincent BERGER
Head of Division in the registry of the Court

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the partly dissenting opinion of Mr Jambrek is annexed to this judgment.

Initialled: R. R.

Initialled: V. B.

PARTLY DISSENTING OPINION OF JUDGE JAMBREK

1. According to the Court's case-law, the manner of application of Article 6 para. 1 (art. 6-1) of the Convention to proceedings before appellate courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein.

I agree with the majority that the order by the Court of Appeal requiring the applicant to pay £124,900 as security for Lord Aldington's costs in the appeal as a condition for the applicant's appeal to be heard by that court, pursued a legitimate aim for the purposes of Article 6 para. 1 (art. 6-1) of the Convention, namely to protect Lord Aldington from being faced with an irrecoverable bill for legal costs if the applicant were unsuccessful in the appeal (see paragraph 61 of the judgment).

However, I am not convinced that the legitimacy of the above aim in itself justified the restrictions imposed on the applicant's access to the Court of Appeal. In my view the security for costs order impaired the very essence of the applicant's right of access to court as guaranteed by Article 6 para. 1 (art. 6-1) and was disproportionate to the aim pursued (see paragraphs 61 to 67 of the judgment). Therefore, unlike the majority, I find that there has been a violation of this provision (art. 6-1).

2. As to the aims pursued, I agree with the applicant that, where a security for costs order results in a party being denied access to an appellate court because of poverty, it should only be made where the appeal can be shown to be frivolous, vexatious or otherwise unreasonable, or to be an abuse of the process of the court. The applicant's appeal could not be said to fall within that category.

3. In the first place it is to be noted that, whilst the Court of Appeal found that the appeal had no merit, the Registrar of that court had previously concluded that five of the seven grounds of the appeal had "just enough strength ... that security for costs should not be awarded" (see paragraphs 16 and 17 of the judgment). This difference of opinion clearly provides reason for doubting that the security for costs order, the effect of which was to bar the applicant's access to the Court of Appeal, was proportionate.

4. Moreover, I find it difficult to follow the Court of Appeal's reasoning that, in view of the applicant's rejection of Lord Aldington's offer to settle for £300,000, his appeal on quantum was "academic" (see paragraphs 15 and 17 of the judgment). The subject-matter of the applicant's appeal on damages was evidently the award of £1.5 million and not the sum of £300,000. Indeed, as also noted by the Court of Appeal, the offer "was not a concession by the plaintiff's solicitors that the award was too high ..." So, the fact that the applicant declined to accept the offer cannot be taken to mean that he was disinterested in the issue of damages. On the contrary, it suggests that he was aware of the fact that under English libel law the questions of liability and damages are interlinked. As stated by Lord Hailsham in Broome v. Cassell & Co. Ltd, the purpose of damages in the law of libel is that someone "must be able to point to a sum ... sufficient to convince a bystander of the baselessness of the charge" (see paragraph 23 of the judgment).

5. Furthermore, in examining this issue, regard must be had to the grounds on which we found a violation of Article 10 (art. 10), namely the size of the award taken in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award (see paragraphs 49 to 51 of the judgment). In this connection, I attach importance not only to the limited scope of judicial control of jury awards but also to the absence of reasoning for such awards and the resultant difficulty in challenging their reasonableness. These factors, in my view, militate strongly in favour of the conclusion that the restrictions placed on the applicant's access to the Court of Appeal were disproportionate for the purposes of Article 6 (art. 6).

6. In addition, the Court of Appeal failed to take into account that in appealing from the High Court's judgment the applicant was seeking to defend his fundamental right to freedom of expression, a right which is protected by Article 10 (art. 10) of the Convention and which constitutes one of the essential foundations of a democratic society (see, for instance, the Sunday Times v. the United Kingdom judgment (no. 2) of 26 November 1991, Series A no. 217, pp. 28-29, para. 50). It is essential that Article 6 para. 1 (art. 6-1) be construed in such a way as to guarantee a real and effective access to court for a person who wishes to challenge an interference with the exercise of his or her right to freedom of expression.

7. In any event, I do not consider that the Court of Appeal's refusal to grant the applicant an extension of the fourteen days' time-limit for providing the amount of security was justified (see paragraph 18 of the judgment). The applicant's interests in pursuing his appeal clearly outweighed those referred to by the Court of Appeal in support of the refusal, namely to avoid considerable time-constraints in relation to the timescale for the hearing of the appeal. Also, I respectfully disagree with the majority that "there is nothing to suggest ... that the applicant would have been able to raise the money had he been given more time" (see paragraph 64 of the judgment). It was implicit in his request for an extension that he was willing to furnish the security or at least make efforts to do so, but the Court of Appeal gave the applicant no realistic opportunity to show that he would be able to raise the required sum if given more time.

8. For these reasons, I reach a different conclusion from that of the majority. Notwithstanding the fact that the case had been extensively heard in the High Court, the conditions set for the applicant to pursue his appeal to the Court of Appeal exceeded the respondent's State's margin of appreciation; they impaired the very essence of the applicant's right of access to court and were disproportionate for the purposes of Article 6 para. 1 (art. 6-1). Consequently, I find that there has been a violation of Article 6 para. 1 (art. 6-1).