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

CASE OF KYPRIANOU v. CYPRUS

(Application no. 73797/01)

JUDGMENT

STRASBOURG

15 December 2005

In the case of Kyprianou v. Cyprus,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr B. ZUPANČIČ,
Mr G. BONELLO,
Mr L. LOUCAIDES,
Mr R. TÜRMEN,
Mrs F. TULKENS,
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr V. ZAGREBELSKY,
Mr L. GARLICKI,
Mrs E. FURA-SANDSTRÖM,
Mrs A. GYULUMYAN,
Mr K. HAJIYEV, *judges*,

and Mr T.L. EARLY, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 2 February 2005, 15 June 2005 and 2 November 2005,

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

PROCEDURE

1. The case originated in an application (no. 73797/01) 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 a Cypriot national, Mr Michalakis Kyprianou ("the applicant"), on 9 August 2001.

2. The applicant was represented by Dr C. Clerides, Mr L. Clerides, Mr M. Triantafyllides, Mr E. Efstathiou, Mr A. Angelides and Mrs E. Vrahimi, lawyers practising in Nicosia, and Mr B. Emmerson QC and Mr M. Muller, barristers practising in the United Kingdom. The Cypriot Government ("the Government") were represented by their Agent, Mr P. Clerides, Deputy Attorney-General of the Republic of Cyprus.

3. The applicant alleged that Article 5 §§ 3, 4 and 5, Article 6 §§ 1, 2 and 3 (a), (b) and (d), and Articles 7, 10 and 13 of the Convention had been

violated as a result of his trial, conviction and imprisonment for contempt of court.

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

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). The case was assigned to the newly composed Second Section (Rule 52 § 1).

6. On 7 May 2002 the application was declared partly inadmissible by a Chamber of that Section, composed of Mr J.-P. Costa, President, Mr A.B. Baka, Mr Gaukur Jörundsson, Mr L. Loucaides, Mr C. Bîrsan, Mr M. Ugrekhelidze, Mrs A. Mularoni, judges, and Mrs S. Dollé, Section Registrar.

7. On 8 April 2003 the application was declared admissible regarding the complaints under Article 6 §§ 1, 2 and 3 (a) and Article 10 by a Chamber of that Section, composed of Mr J.-P. Costa, President, Mr A.B. Baka, Mr L. Loucaides, Mr C. Bîrsan, Mr K. Jungwiert, Mr V. Butkevych, Mrs A. Mularoni, judges, and Mrs S. Dollé, Section Registrar.

8. On 27 January 2004 the same Chamber delivered a judgment in which it found unanimously a violation of Article 6 §§ 1 (impartial tribunal), 2 (presumption of innocence) and 3 (a) (information in detail of the nature and cause of the accusation) of the Convention and that it was not necessary to examine separately the applicant's complaint under Article 10. The applicant was awarded 15,000 euros (EUR) in respect of non-pecuniary damage and EUR 10,000 for costs and expenses.

9. On 19 April 2004 the Government requested that the case be referred to the Grand Chamber, in accordance with Article 43 of the Convention and Rule 73. A panel of the Grand Chamber accepted this request on 14 June 2004.

10. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

11. Third-party comments were received from the Governments of the United Kingdom and Ireland who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2 (a)). Third-party comments were also received from the Government of Malta who had been invited to intervene in the written procedure by the President (Article 36 § 2 of the Convention and Rule 44 § 2 (a)).

12. The applicant and the Government each filed observations on the merits (Rule 59 § 1) in which they included their replies to the third-party comments (Rule 44 § 5). The applicant also submitted his claims for just

satisfaction. The Government made their comments on that matter and the applicant replied thereto.

13. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 February 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr P. CLERIDES, Deputy Attorney-General
of the Republic of Cyprus, *Agent*,
Lord LESTER OF HERNE HILL QC,
Mr P. SAINI, Barrister-at-law,
Mrs S.-M. JOANNIDES, Senior Counsel of the Republic, *Counsel*;

(b) *for the applicant*
Mr B. EMMERSON QC,
Mr D. FRIEDMAN, Barrister-at-law,
Mr M. MULLER, Barrister-at-law, *Counsel*,
Mr P. KYPRIANOU, Barrister-at-law, *Adviser*,
Mr L. CHARALAMBOUS, *Solicitor.*

The applicant was also present.

The Court heard addresses by Mr Emmerson, Mr Clerides and Lord Lester and the answers of the parties' representatives to questions put by judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

14. The applicant was born in 1937 and lives in Nicosia.

15. He is an advocate who has been practising for over forty years. He was formerly a lawyer at the Office of the Attorney-General and a member of the Cypriot House of Representatives.

16. On 14 February 2001 the applicant was defending a person accused of murder before the Limassol Assize Court. He alleged that, while he was conducting the cross-examination of a prosecution witness, a police constable, the court interrupted him after he had put a question to the witness. He claimed that he had felt offended and had sought permission to withdraw from the case. In their written observations, the Government

stated that the court had attempted to make a routine intervention with a simple and polite remark regarding the manner in which the applicant was cross-examining the witness. The applicant had immediately interrupted, without allowing the court to finish its remark and refusing to proceed with his cross-examination.

17. The verbatim record of the proceedings reports the following exchange (translation):

> "Court: We consider that your cross-examination goes into detail beyond the extent to which it should go at this stage of the main trial regarding questions...
>
> Applicant: I will stop my cross-examination...
>
> Court: Mr Kyprianou...
>
> Applicant: Since the Court considers that I am not doing my job properly in defending this man, I ask for your leave to withdraw from this case.
>
> Court: Whether an advocate is to be granted leave to withdraw or not is a matter within the discretionary power of the court and, in the light of what we have heard, no such leave is granted. We rely on *Kafkaros and Others v. the Republic* and we do not grant leave.
>
> Applicant: Since you are preventing me from continuing my cross-examination on significant points of the case, then my role here does not serve any purpose.
>
> Court: We consider your persistence...
>
> Applicant: And I am sorry that when I was cross-examining the members of the Court were talking to each other, passing *ravasakia* among themselves, which is not compatible with allowing me to continue the cross-examination with the required vigour, if it is under the secret scrutiny of the Court.
>
> Court: We consider that what has just been said by Mr Kyprianou, and in particular the manner in which he addresses the Court, constitutes a contempt of court and Mr Kyprianou has two choices: either to maintain what he said and to give reasons why no sentence should be imposed on him, or to decide whether he should retract. We give him this opportunity exceptionally. Section 44(1)(a) of the Courts of Justice Law applies to its full extent.
>
> Applicant: You can try me.
>
> Court: Would you like to say anything?
>
> Applicant: I saw with my own eyes the small pieces of paper going from one judge to another when I was cross-examining, in a way that is not very flattering to the defence. How can I find the stamina to defend a man who is accused of murder?
>
> Court (Mr Photiou): It so happens that the piece of paper to which Mr Kyprianou refers is still in the hands of brother Judge Mr Economou and Mr Kyprianou may inspect it.

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

Court (Mr Photiou): We shall have a break in order to consider the matter. The defendant [in the main trial] should in the meantime remain in custody.

...

Court: We considered the matter during the adjournment and continue to believe that what Mr Kyprianou said, the content, the manner and the tone of his voice, constitute a contempt of court as provided for in section 44(1)(a) of the Courts of Justice Law (no. 14/1960) ... that is showing disrespect to the court by way of words and conduct. We already asked Mr Kyprianou before the break if he had anything to add before we pass sentence on him. If he has something to add, let us hear him. Otherwise, the Court should proceed.

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

Court: We shall adjourn for ten minutes and shall then proceed with sentencing."

18. After a short break the Assize Court, by a majority, sentenced the applicant to five days' imprisonment. The court referred to the above exchange between the applicant and its members and held as follows:

"... It is not easy, through words, to convey the atmosphere which Mr Kyprianou created since, quite apart from the unacceptable content of his statements, the tone of his voice as well as his demeanour and gestures to the Court, not only gave an unacceptable impression of any civilised place, and a courtroom in particular, but were apparently aimed at creating a climate of intimidation and terror within the Court. We are not exaggerating at all in saying that Mr Kyprianou was shouting at and gesturing to the Court.

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

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

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

We cannot conceive of another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate.

The judges as persons, whom Mr Kyprianou has deeply insulted, are the least of our concern. What really concerns us is the authority and integrity of justice. If the Court's reaction is not immediate and drastic, we feel that justice will have suffered a disastrous blow. An inadequate reaction on the part of the lawful and civilised order, as expressed by the courts, would mean accepting that the authority of the courts be demeaned.

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

We are well aware of the repercussions of this decision since the person concerned is an advocate of long standing, but it is Mr Kyprianou himself who, through his conduct, has brought matters to this end.

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

19. The President of the Assize Court, however, considered that the imposition of a fine amounting to 75 Cyprus pounds (approximately 130 euros), that is, the maximum penal sum provided by section 44(2) of the Courts of Justice Law 1960 (Law no. 14/1960), would have been the appropriate sentence.

20. The applicant served his prison sentence immediately. He was in fact released before completing the full term, in accordance with section 9 of the Prison Law (Law no. 62(I)/1996 – see paragraph 39 below).

21. On 15 February 2001 the applicant lodged an appeal with the Supreme Court, which was dismissed on 2 April 2001.

22. In his appeal, the applicant relied on a total of thirteen grounds challenging the procedure followed by the Limassol Assize Court, its decision and the sentence imposed on him. The eighth ground of his appeal read as follows:

"According to established precedent, the imposition of a sentence on an advocate is practised with restraint and in serious cases, and never for the suppression of methods of advocacy that are simply offensive given that the advocate has sufficient freedom in the handling of his client's case. The conduct of the [applicant] counsel could not be described either as aggressive or as contemptuous of the Court under all the circumstances even though it constituted expression of the feelings of counsel under the pressure of cross-examination of witnesses in a murder case and the refusal of the Court after an intervention at the stage of cross-examination to allow counsel to withdraw from the case."

23. The Attorney-General was invited by the Supreme Court to take part in the proceedings as *amicus curiae.*

24. In its decision dismissing the applicant's appeal, the Supreme Court stated that the relevant constitutional provisions of Cypriot law on contempt of court reflected the principles of English law. It relied on Article 162 of the Constitution, which enables the enactment of legislation giving jurisdiction to any court to order the imprisonment for up to twelve months of any person who does not comply with a judgment or order of that court, and to punish contempt of court. It held that section 44(2) of the Courts of Justice Law was lawfully authorised by Article 162. Finally, it concluded that it was the applicant who had created a tense atmosphere by his disdainful attitude and by undermining the court's role.

25. The Supreme Court held, *inter alia*:

> "We think that there was nothing wrong in the determination of the acts of contempt. The Court gave Mr Kyprianou the chance to reply, predetermining indirectly its intention not to continue with imposing a sentence, should Mr Kyprianou dissociate himself from what he had said and did so with an expression of sincere apology. There was no apology.
>
> ...
>
> It is our finding that Mr Kyprianou, by words and conduct, showed disrespect to the Court, by committing the offence of contempt of court referred to in section 44(2) of the Law.
>
> ...
>
> It is not fortuitous that the successive objectives of the constitutional legislator, which are embodied in Article 30 and Article 162 of the Constitution, exist side by side. The power to sanction contempt of court is aimed at the protection of judicial institutions, which is essential in order to safeguard a fair trial. The identification of the judge with a prosecutor made by the applicant's lawyer overlooks the court's role and the purpose for which it is granted authority. Its authority is interwoven with the prerequisites for securing its judicial function. The role of the judge is nothing more than that of the defender of judicial proceedings and of the court's authority, the very existence of which are necessary to secure a fair trial. A lawyer, a servant of justice, is not a party to the case. By abusing the right to be heard and being in contempt of court, a lawyer intervenes in the proceedings, as any third party, and interferes with the course and thereby harms justice. The judicial sanctioning of contempt, where necessary, is a judicial duty exercised for the purpose of securing the right to a fair trial. The impersonal and objectively defined issue is associated with the facts of the case; any indifference of the court in the face of reproach regarding its function would leave it exposed to the charge that it does not conduct a fair trial. The fairness of the judges is the quintessence of the administration of justice.
>
> ...
>
> In this case, Mr Kyprianou tried to prevail over the court and direct the course of the trial. If the court remained indifferent before such a scene, this would constitute a betrayal of the performance of its duty."

26. The Supreme Court concluded as follows:

"We find that Mr Kyprianou, by words and conduct, showed disrespect to the court and committed the offence of contempt in the face of the Court contrary to section 44(2) of the Law."

27. In relation to the sentence imposed on the applicant, the Supreme Court stated, *inter alia*, the following:

"The exercise of the power of the court to impose sentence on persons who act in contempt of court is the ultimate measure, but it is indispensable whenever the dignity of the court is offended and the fulfilment of its mission impeded. Punishment is not a court's choice. It becomes its duty only when justice demands it. It is indicative of the rarity of a lawyer's conviction for contempt of court that this is the first time, since the establishment of the Republic, as far as we are able to ascertain, that a sentence of imprisonment has been imposed on a lawyer for contempt of court. This attitude is not unrelated to the awareness of the lawyer's mission. It is not possible, however, to allow the legal profession to act contrary to the lawyer's function. The lawyer who repudiates his role as a servant of justice also repudiates the protection that is given to him for putting his client's rights forward without fear or distraction. In setting himself against the court for his own purposes, he acts contrary to his vocation and shares the same fate as everyone else who acts in contempt of court.

It is sad that Mr Kyprianou did not withdraw what he said and did in the Assize Court. He did not apologise, even before us.

...

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

We feel sad because a lawyer like Mr Kyprianou, with forty years of service in the profession, was convicted and sentenced to imprisonment for contempt of court. But we are even sadder because a lawyer with so many years in service struck at Justice. We are relieved this is the first time that Justice has suffered in this way. We hope that this will also be the last time."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

1. Rights of the accused

28. The relevant parts of Article 12 §§ 4 and 5 of the Constitution provide as follows:

"4. Every person charged with an offence shall be presumed innocent until proved guilty according to law.

5. Every person charged with an offence has the following minimum rights:

(a) to be informed promptly and in a language which he understands and in detail of the nature and grounds of the charge preferred against him;

(b) to have adequate time and facilities for the preparation of his defence;

..."

2. Right to a fair trial

29. The relevant parts of Article 30 §§ 2 and 3 of the Constitution provide as follows:

"2. In the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent court established by law.

...

3. Every person has the right:

(a) to be informed of the reasons why he is required to appear before the court;

(b) to present his case before the court and to have sufficient time necessary for its preparation;

..."

3. Powers of the Attorney-General

30. Article 113 § 2 of the Constitution reads as follows:

"The Attorney-General of the Republic shall have power, exercisable at his discretion in the public interest, to institute, conduct, take over and continue or discontinue any proceedings for an offence against any person in the Republic. Such power may be exercised by him in person or by officers subordinate to him acting under and in accordance with his instructions."

4. Powers of the courts to impose sentences in respect of contempt of court

31. Article 162 of the Constitution reads as follows:

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

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

B. The Courts of Justice Law 1960 (Law no. 14/1960, as amended)

1. Appeals to the Supreme Court

32. Section 25(2) reads as follows:

"Subject to the provisions of the Criminal Procedure Law, but save as otherwise provided in the subsection, every decision of a court exercising criminal jurisdiction shall be subject to appeal to the Supreme Court. Any such appeal may be made as of right on any ground against a decision of acquittal or conviction or a decision imposing sentence."

Section 25(3) provides as follows:

"Notwithstanding anything contained in the Criminal Procedure Law or in any other Law or in any Rules of Court and in addition to any powers conferred thereby, the Supreme Court, on hearing and determining any appeal either in a civil or a criminal case, shall not be bound by any determinations on questions of fact made by the trial court and shall have power to review the whole evidence, draw its own inferences, hear or receive further evidence and, where the circumstances of the case so require, re-hear any witnesses already heard by the trial court, and may give any judgment or make any order which the circumstances of the case may justify, including an order of retrial by the trial court or any other court having jurisdiction, as the Supreme Court may direct."

2. Contempt of court

33. The relevant parts of section 44(1) read as follows:

"Any person who –

(a) on the premises where any judicial proceedings are being held or taken, or within the precincts of the same, shows disrespect, in speech or manner, of or with reference to such proceedings or any person before whom such proceedings are being held or taken;

...

... is guilty of a misdemeanour and is liable to imprisonment for six months or to a fine not exceeding one hundred pounds, or to both imprisonment and a fine."

The relevant parts of section 44(2) provide as follows:

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

C. The Criminal Procedure Law (Chapter 155, as amended)

1. Powers of the Supreme Court in respect of appeals

34. The relevant parts of section 145 provide as follows:

"(1) In determining an appeal against conviction, the Supreme Court ... may

(a) dismiss the appeal;

(b) allow the appeal and quash the conviction if it considers that the conviction should be set aside on the ground that it was, having regard to all the evidence adduced, unreasonable or the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law or on the ground that there was a substantial miscarriage of justice:

Provided that the Supreme Court, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the applicant, shall dismiss the appeal if it considers that no substantial miscarriage of justice has occurred;

(c) set aside the conviction and convict the appellant for any criminal offence of which he might have been convicted by the trial court on the evidence which has been adduced and sentence him accordingly;

(d) order a new trial before the court which passed the sentence or before any other court having jurisdiction in the matter.

(2) In determining an appeal against sentence, the Supreme Court may increase, reduce or modify the sentence."

2. Supplementary powers of the Supreme Court during the hearing of appeals

35. The relevant parts of section 146 read as follows:

"During the hearing of an appeal and at any stage thereof, before final judgment, the Supreme Court ... may

(a) call upon the trial court to furnish any information the Supreme Court may think necessary beyond that which is furnished by the file of the proceedings;

(b) hear further evidence and reserve judgment until such further evidence has been heard ..."

3. Change of trial court

36. The relevant parts of section 174 provide as follows:

"(1) Whenever, upon application as hereinafter provided, it is made to appear to the Supreme Court:

(a) that a fair and impartial preliminary inquiry or trial cannot be held in any court;

...

it may order that the preliminary inquiry or trial be held by or before a court other than the court before which, but for such order, it would have been held.

(2) Every application for the exercise of the powers conferred by this section shall be made by motion which shall, except when the application is made by or on behalf of the Attorney-General, be supported by affidavit.

(3) When an accused makes an application under this section, the Supreme Court may, if it thinks fit, direct him to execute a bond with or without sureties conditioned that he will, if convicted, pay the costs of the prosecution.

(4) Every accused making any such application shall give to the Attorney-General notice in writing of the application, together with a copy of the affidavit and no final order shall be made on the application, unless such notice and affidavit are served at least twenty-four hours before the hearing of the application."

D. The Advocates Law (Chapter 2, as amended)

1. Disciplinary responsibility of advocates

37. Section 15 of the Advocates Law reads as follows:

"Every advocate is an officer of justice and shall bear disciplinary responsibility and be subject to disciplinary proceedings provided for in this part."

2. Disciplinary offences and proceedings

38. The relevant parts of section 17 read, at the material time, as follows:

"(1) If any advocate is convicted by any court of any offence which, in the opinion of the Disciplinary Board, involves moral turpitude or if such an advocate is, in the opinion of the Disciplinary Board, guilty of disgraceful, fraudulent or unprofessional conduct, the Disciplinary Board may:

(a) order the name of the advocate to be struck off the Roll of Advocates;

(b) suspend the advocate from practising for such a period as it may think fit;

(c) order the advocate to pay, by way of fine, any sum not exceeding £500;

...

(d) warn or reprimand the advocate;

(e) make such order as to payment of the costs of the proceedings before the Disciplinary Board as the Disciplinary Board may think fit.

(2) Proceedings to enforce any of the penalties provided by subsection (1) above may be commenced:

(a) by the Disciplinary Board on its own motion;

(b) by the Attorney-General of the Republic;

(c) on a report made to the Disciplinary Board by any court or chairman of the local Bar committee;

(d) by an application, with leave of the Disciplinary Board, of any person aggrieved by the conduct of the advocate."

E. The Prison Law (Law no. 62 (I)/1996, as amended)

The release of prisoners

39. The relevant parts of section 9 of the Prison Law read as follows:

"...

(2) The release of a prisoner takes place not later than midday of the final day of the sentence of imprisonment.

(3) If the day of release is a Saturday or Sunday or an official holiday, the release takes place the immediately preceding working day."

F. Domestic case-law

Objections in cases of alleged bias on the part of the court

40. *Phaedeon Economides v. The Police (1983) 2 Cyprus Law Reports 301*

"An objection, where a bias is alleged, has to be taken at the earliest moment in the proceedings and has to be decided by the judge concerned whose decision is always subject to judicial review by appeal or by means of prerogative writs where no appeal lies from his final decision in the proceedings on which the question of bias was raised.

On the question of bias, the test to be applied is whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts could have reasonable suspicion that a fair trial for the applicant was not possible."

III. VOCABULARY

41. The Greek word *ραβασάκια* (*ravasakia*) is the plural of the word *ραβασάκι* (*ravasaki*) which has the following meanings:

(1) G. Babinioti, *Dictionary of Modern Greek Language*, p. 1542 (*Γ. Μπαμπινιώτη, Λεξικό Νέας Ελληνικής Γλώσσας*):

(i) short and secret letter or note with love content (*σύντομη και κρυφή επιστολή ή σημείωμα με ερωτικό περιεχόμενο*);

(ii) anything written (document, letter, etc.), mainly of an unpleasant nature, which is sent to someone. Synonyms: for example, letter, note (*οτιδήποτε γραπτό (έγγραφο, επιστολή κτλ), κυρίως. με δυσάρεστο περιεχόμενο, το οποίο αποστέλλεται σε κάποιον. Συνώνυμα π.χ. γράμμα, σημείωμα*).

(2) Bousnaki Brothers, *The Great Popular Dictionary*, 2002, p. 2983 (*Α/φοι Μπουσνάκη, Το Μεγάλο Λεξικό της Δημοτικής*):

(i) note (*σημείωμα*);

(ii) love letter (*ερωτικό γράμμα*).

(3) Aristotle University Thessaloniki, Institute of Modern Greek Studies, *Dictionary of the Common Modern Greek*, p. 1741 (*Λεξικό της Κοινής Νεοελληνικής, Αριστοτέλειο Πανεπιστήμιο Θεσσαλονίκης, Ινστιτούτο Νεοελληνικών Σπουδών*):

(i) love letter, note (that is sent secretly) (*ερωτική επιστολή, σημείωμα (που στέλνεται κρυφά)*);

(ii) short written message normally of an unpleasant nature (warning, threats, etc.) for the recipient (*σύντομο γραπτό μήνυμα, συνήθως με δυσάρεστο* (*προειδοποιητικό, απειλητικό*) *κτλ περιεχόμενο για τον παραλήπτη*).

IV. RELEVANT COMPARATIVE LAW AND PRACTICE

A. Introductory remark

42. In general, it can be observed that common-law jurisdictions and some civil-law jurisdictions allow courts to deal with disruption to their proceedings under a summary procedure conducted by the judge presiding over the main proceedings who is empowered to take immediate measures. In the majority of civil-law jurisdictions, however, disruptive behaviour is referred to the competent prosecuting authorities for the purposes of instituting criminal or disciplinary proceedings. In this latter respect there is a significant difference between the common-law and civil-law approaches.

B. Law and practice in the common-law systems of the intervening third-party States

43. The following paragraphs contain a summary of the information provided by the third-party intervening States as to the current position under their domestic law concerning contempt of court.

1. The United Kingdom

(a) England and Wales[1]

44. Under English and Welsh law, the courts enjoy extensive powers to deal with contempt of court, including contempt committed *in facie curiae* which falls within the category of criminal contempt. Acts which amount to contempt in the face of the court can take various forms such as assaulting the judge or an officer of the court in court, insulting the judge in court, intimidating a witness in court, interrupting the proceedings and tape recording or photographing the proceedings. If the contempt also constitutes a criminal offence, for example assault, it can be dealt with as a criminal offence instead and thus proceedings can be initiated by the Crown Prosecution Service following investigation by the police.

45. The power to commit for contempt *in facie curiae* is a part of the common law, developed by the courts through judicial decisions. This remains true as far as superior courts (Court of Appeal, High Court and Crown Court) are concerned. In the case of inferior courts, the power to commit for contempt *in facie curiae* has been placed on a statutory footing (Contempt of Court Act 1981, section 12, and County Courts Act 1984, section 118(1)). A practice note and a practice direction have been issued addressing contempt of court. One applies in magistrates' courts and the other in the High Court and county courts (practice note issued by the Lord Chief Justice in May 2001 and practice direction issued by the Lord Chief Justice, supplemental to Order no. 52 of the Rules of the Supreme Court and Order no. 29 of the County Court Rules).

46. According to the latter, for example, where the committal application relates to contempt in the face of the court it would normally be appropriate to defer consideration of the behaviour to allow the respondent a period of reflection. Furthermore, the judge should, *inter alia*: inform the respondent in detail, and preferably in writing, of the actions and behaviour of the respondent which have given rise to the committal application; notify the respondent of the possible penalties he faces; allow the respondent an opportunity to apologise to the court and provide explanations for his actions and behaviour; and allow for arrangements for legal representation. In addition, if there is a risk of the appearance of bias, the presiding judge should ask another judge to hear the committal application (sections 12-14 of the practice direction).

47. Overall, judges have the power to deal with and punish contempt committed before them, although the courts have recognised that this summary procedure should be used exceptionally and when categorically necessary in the interests of justice. Thus, while accepting that the

1. Northern Ireland: the law in Northern Ireland concerning contempt committed in the face of the court does not differ materially from that in England and Wales.

procedure must retain a summary nature in order for it to be effective, the courts have also sought to ensure that the procedure is fair and consistent with the provisions of Article 6 of the Convention. The Court of Appeal, through its judgments, has given courts guidance as to the safeguards they need to adopt in order to ensure that the summary process is fair for the alleged contemner. These include, *inter alia*, allowing a short period of reflection, the possibility of an adjournment, arrangements for legal representation, and giving an opportunity to apologise (see *R. v. Moran* [1985] 81 Criminal Appeal Reports 51; *R. v. Hill* [1986] Criminal Law Reports 457; and *Wilkinson v. S.* [2003] 2 All England Reports 184). It appears from the case-law that the courts have acknowledged the importance of avoiding the danger of a real possibility of bias, the applicable test being that of "*apparent bias*", namely, whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the court was biased (see *DPP v. Channel Four Television* [1993] 2 All England Reports 517, and *Porter v. Magill* [2002] 2 Appeal Court 357). The Court of Appeal recently stated in *R. v. Dodds* ([2003] 1 Criminal Appeal Reports 3) that the common-law requirements of natural justice in dealing with criminal contempt did not fall short of the Convention requirements.

(b) Scotland

48. The offence of contempt of court in Scotland is a *sui generis* offence. With limited exceptions, the law on contempt remains part of the common law. Contempt committed *in facie curiae* is normally dealt with summarily by the presiding judge. Where it also amounts to a criminal offence, it may be prosecuted on indictment or on summary complaint.

49. While the procedure remains in essence a summary one, in practice measures have been put in place in order to ensure fairness. In particular, judges follow a memorandum issued on 28 March 2003 by the Lord Justice-General that provides guidelines concerning the procedure to be adopted when judges are considering whether the conduct of any party during a trial constitutes a contempt of court. For instance, the act of contempt should be dealt with expeditiously but most importantly fairly and objectively; the alleged contemner must be given the opportunity to obtain legal advice and representation, to apologise for his conduct and make a statement in mitigation. Furthermore, although the normal rule is that the presiding judge will deal personally with the contempt, it is recognised that, exceptionally, another judge may need to deal with the case[1].

1. In his written submissions of 6 December 2004, the applicant pointed out that on 20 February 2004 the advice in the memorandum had been amended in the light of the Chamber judgment in the present case. In particular, he noted that the advice recommended that presiding judges should generally remit contempt applications to another judge, but the procedure following on a remit was not prescribed, and had to be determined in the light of

2. Ireland

50. Under Irish law, contempt of court is an offence *sui generis* within the inherent jurisdiction of the court. Contempt *in facie curiae* comes within the ambit of criminal contempt and is tried summarily by both superior and inferior courts.

51. The Irish courts have consistently observed that contempt of court is not an offence against the personal dignity of judges but rather it is the name given to the kind of wrongful conduct which consists of interference with the administration of justice. The power to adjudicate and punish such conduct is considered an essential adjunct of the rule of law and an inherent aspect of the authority of judges to control the proceedings before them.

52. For the purposes of safeguarding the rights of the alleged contemner and ensuring fairness, certain procedural guarantees are afforded in the case of contempt in the face of the court, including the requirement that judges should only determine such proceedings arising out of events in their court where it is necessary to do so.

3. Malta

53. In Maltese law, contempt of court is regulated by legislation in Title XVII of the Second Book of the Code of Organisation and Civil Procedure entitled "Of the Respect Due to the Court". These rules also apply to courts of criminal jurisdiction, by virtue of Article 686 of the Criminal Code.

54. According to the long-established practice of Maltese courts, contempt committed in the face of the court is punishable by the judge or magistrate presiding over the proceedings in the course of which the contempt is committed. Contempt may take the form of disturbance in the courtroom by way, for example, of exclamations of approval or disapproval, improper behaviour such as indecent words or gestures or insulting remarks (Article 990) or the use of insulting or offensive expressions in written pleadings or during the hearing (Article 994).

55. According to Article 990 of the Code, the following four types of sanction are available in respect of contempt committed *in facie curiae*: reprimand, expulsion from the court, a fine in terms of the Criminal Code and, lastly, arrest for a period not exceeding twenty-four hours in a place within the court building.

56. The only possible exception to this summary procedure is where contempt constitutes an offence under the Criminal Code (*The Court v. Angelo Pace*, 7 December 1990). In such circumstances, it is prosecuted as a criminal offence. The presiding judge or magistrate can order the arrest of the offender, draw up a *procès-verbal* of the fact and remit the party arrested to the magistrates' court (Article 992).

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the circumstances in the particular case (see *Mayer v. H.M. Advocate*, unreported, 16 November 2004).

57. Furthermore, special provision is made for acts of contempt committed by lawyers. The normal sanctions are not applied but, in serious cases, the judge or magistrate may "forthwith" suspend the lawyer from practising for a period not exceeding one month (Article 993).

C. Principles adopted by international organisations

58. According to paragraph 20 of the Basic Principles on the Role of Lawyers (adopted in 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders), lawyers should enjoy "civil and penal immunity for relevant statements made in good faith in written or oral pleadings in their professional appearances before a court, tribunal or other legal or administrative authority".

59. In its Recommendation Rec(2000)21, the Committee of Ministers of the Council of Europe recommends the governments of member States to take or reinforce, as the case may be, all measures they consider necessary with a view to implementing the freedom of exercise of the profession of lawyer. For instance, "lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards". Lawyers should, however, "respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards" (Principles I § 4 and III § 4; see *Nikula v. Finland*, no. 31611/96, §§ 27-28, ECHR 2002-II).

THE LAW

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

60. The applicant argued that he had not received a hearing by an impartial tribunal within the meaning of Article 6 § 1 of the Convention, the relevant parts of which provide:

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

A. Applicability

1. The Chamber's judgment

61. The Chamber, having regard to the criteria established by the Court's case-law (see *Engel and Others v. the Netherlands*, judgment of 8 June

1976, Series A no. 22, pp. 34-35, §§ 82-83), found that the requirements of Article 6 of the Convention in respect of the determination of a criminal charge, and the defence rights of everyone charged with a criminal offence, applied fully in the present case.

2. Arguments of those appearing before the Court

(a) The applicant

62. The applicant adopted the Chamber's reasoning in this respect.

(b) The Government

63. The Government did not contest the applicability of Article 6 of the Convention. They noted, however, that, although criminal sanctions could follow a finding of contempt, it was essential when considering the requirements of Article 6 to recognise that contempt proceedings were not akin to ordinary criminal proceedings, but were a *sui generis* form of proceedings which aimed at securing the unimpeded functioning of a court, the safeguarding of its authority and standing and the protection, in the public interest, of the integrity of the judicial process.

3. The Court's assessment

64. The applicability of Article 6 § 1 of the Convention under its criminal head is not in dispute between the parties. The Court, for its part, sees no reason to depart from the Chamber's conclusion concerning this issue (see paragraph 61 above). Thus, it concludes that the impugned domestic proceedings fall within the scope of Article 6 § 1.

B. Compliance

1. The Chamber's judgment

65. The Chamber considered that there had been a breach of the principle of impartiality, on the basis of both the objective and subjective tests, in regard to the "tribunal" determining the criminal charge of contempt of court against Mr Kyprianou. In reaching this conclusion, the Chamber considered that the defects in the proceedings before the Limassol Assize Court had not been rectified on appeal by the Supreme Court.

2. Arguments of those appearing before the Court

(a) The applicant

(i) The question of impartiality

66. The applicant pointed out that he did not seek to establish that the exercise by a domestic court of summary jurisdiction to punish contempt in the face of the court was inconsistent *per se* with the requirements of Article 6 in all circumstances. He agreed with the respondent and intervening Governments that the national courts in each of their common-law jurisdictions retained an exceptional power to punish contempt *in facie curiae* by way of summary trial conducted by the judge who was presiding in proceedings in which the contempt occurred. Cyprus was not alone in preserving this jurisdiction as it was based on the common law of the United Kingdom and mirrored in the legal systems of the intervening third-parties and, for instance, of the United States, Canada, Australia, New Zealand and South Africa.

67. In this context, the applicant noted that in certain circumstances summary jurisdiction could be exercised in a manner compatible with Article 6. For example, it might arguably be compatible with Article 6 for a judge to try a case involving an assault on a party to proceedings he was conducting, or on a lawyer, where the assault occurred outside the courtroom and the judge had not witnessed it; or where there was no dispute about what had occurred and the accused intended to plead guilty.

68. Nonetheless, the circumstances in which it was permissible for a judge to exercise this power had been strictly limited by the common law. The governing principle in the modern law of contempt was that a judge should not sit in judgment and rule on an allegation of contempt of his own court if, on the facts of the case, this would result in an appearance of bias. Thus, if there were objectively justifiable doubts about the judge's impartiality, the judge was bound to stand down. This common-law test was the same as and modelled on the test of objective impartiality established in the Court's case-law under Article 6 of the Convention.

69. According to the applicant, it was possible to identify certain situations in which objectively justified doubts about the impartiality of the tribunal would very likely arise. A reasonable and fair-minded observer would inevitably conclude that there was a real possibility of bias in at least three situations, all of which were of relevance to his case.

70. The first scenario was where the judges were the immediate target of an alleged contempt consisting of an attack on their moral or physical integrity (violent, threatening or insulting conduct directed at them personally). Such circumstances would generally require the charge to be determined by a different tribunal since an objective observer would

entertain justifiable doubts about the impartiality of a tribunal which was presided by the victim of the alleged offence. According to the applicant, it was only in this situation that the maxim *nemo judex in sua causa* applied. The theoretical justification put forward by the Government that the existence of the contempt jurisdiction was to prevent interference with the administration of justice rather than to protect the dignity of the judge overlooked the practical reality. In such a situation the judges had a personal interest in the outcome of the dispute which entailed an inevitable appearance of bias, however carefully they may have attempted to separate the personal from the professional, the two being so closely intertwined as to be effectively inseparable.

71. As to the facts of his own case, the applicant pointed out that the Assize Court judges had taken the words used by the applicant to be gravely insulting to them personally, and had found the tone of the applicant's voice to be personally threatening. The judges had thus been locked into a direct conflict with the applicant about the manner in which he had chosen to express an objection to the way they had been conducting the proceedings. An objective observer would have inevitably considered that there was a real possibility that the judges had a personal interest in the outcome of the dispute, a state of affairs which was fundamentally inconsistent with the impartiality required of a judge. The fact that the alleged contempt had consisted of a complaint directed at the judges was a highly material consideration which would ordinarily give rise to an appearance of bias if the same judges then determined the accusation.

72. The second situation was where the facts (or the inferences to be drawn from the facts) were in dispute and the judges witnessed the events in question. The judges in such a case would not be in a position to evaluate conflicting evidence and argument about the event fairly, objectively and dispassionately because their assessment would inevitably be influenced by their own perception and/or recollection of what had occurred. If there was a serious dispute as to the facts and as to whether the accused was guilty of criminal contempt, then the judges should stand down.

73. In the present case, the facts and the inferences to be drawn had been very much in dispute. Although the judges had only stated that they had found as a fact that the applicant had intended the ambiguous word *ravasakia* to be understood as “love letters” rather than “notes” when they had passed sentence, this had been disputed – or would have been disputed if it had been put to the applicant at any time prior to sentence. The same could be said of the conclusion of the judges that the applicant's tone had been intimidating and designed to instill “terror”. Moreover, as the applicant himself had made clear following the short adjournment, the entire question whether his conduct had amounted to contempt of court had been in dispute.

74. The third scenario was where the judges expressed the view that the accused was guilty of contempt of court before hearing the allegation,

and/or before hearing evidence or submissions on the point. Such a premature expression of opinion was not merely a breach of the requirements of objective and subjective impartiality under Article 6 § 1 of the Convention but also of Article 6 §§ 2 and 3 (a).

75. In the instant case, the Assize Court judges had concluded that the applicant was guilty as soon as he had spoken the words complained of, and before they had sought an explanation or examined the allegation in any way.

76. In view of the fact that the present case combined all the features highlighted in the above-mentioned situations, the application of the objective bias test demonstrated clearly that the Limassol Assize Court could not be considered an impartial tribunal and that it had been incumbent on the judges to stand down.

77. In addition, the applicant agreed with the Chamber's judgment that, on the facts of the present case, there had been subjective bias on the part of the judges. It had been apparent from the record of the proceedings as a whole that the judges had become personally involved in a dispute with him. They had taken grave personal offence at the words he had used and this perceived affront to their personal dignity had led them to react in an intemperate and disproportionate manner. In this respect the applicant pointed to several factors he considered essential in establishing the subjective bias of the judges.

78. Firstly, the judges had characterised his words as contempt as soon as he had spoken and before hearing his submissions or affording him any opportunity to respond. Secondly, when one of the members of the bench had offered the applicant an opportunity to inspect the note which had been passed between the judges, another had intervened saying that the applicant did not have "any rights" in respect of the note, and that his conduct had been "utterly unacceptable". Thirdly, the applicant had been offered an opportunity to speak, but only in mitigation of sentence. Fourthly, no attempt had been made to formulate an accusation in detail or to give the applicant any proper opportunity to respond. In particular, it had never been put to the applicant that the judges had interpreted the word *ravasakia* as meaning "love letters" rather than "notes", the latter being the recognised alternative (and much less offensive) definition of the word which appeared in all the major dictionaries. Nor had it been put to him that the judges considered his behaviour to have been intentionally threatening. These matters had been raised as findings of fact when the court had imposed sentence. Fifthly, the judges' loss of perspective was confirmed by the exaggerated language they had used in passing sentence.

79. Finally, the applicant averred that the judges had exercised their summary jurisdiction to convict and sentence him to five days' imprisonment immediately, without having taken any of the obvious alternative, less drastic, measures available to them. These included the

possibility of ordering an overnight adjournment to allow tempers on both sides to cool and to regain composure and objectivity; admonishing the applicant; referring the case to another bench of the Assize Court; asking or ordering the applicant to leave the court; and reporting the applicant to the Advocates Disciplinary Board which would have had the power to impose a range of sanctions including a reprimand, a fine or suspension from practice. Sentencing the applicant to five days' imprisonment had been a serious overreaction and was evidence in itself that at least two of the judges had, by that stage, lost their objectivity.

(ii) The review by the Supreme Court

80. The applicant agreed with the Chamber's finding that the Supreme Court had failed to remedy the defects in the proceedings before the Limassol Assize Court.

81. His complaints under Article 6 of the Convention could only have been rectified on appeal to the Supreme Court if that court had upheld the complaints and consequently quashed the conviction and the sentence (see *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, p. 19, § 33, and *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 282, § 79). Yet, in spite of the fact that the Supreme Court had jurisdiction to examine the questions of law and fact raised in the applicant's appeal, it had dismissed his complaints and failed to afford him any redress.

82. In the alternative, the applicant submitted that the Supreme Court was not a court of full jurisdiction in the sense that it could not have, and had not, conducted a *de novo* hearing of the accusation. The scope of the Supreme Court's jurisdiction was limited to errors of law and manifest or unreasonable errors of fact. It was not open to the Supreme Court to go behind the reasoning of the Assize Court and inquire into the correctness of its findings or to decide on the evidence submitted and set the conviction aside on the ground that it was not substantiated.

(b) The Government

(i) The question of impartiality

83. In their letter requesting that the case be referred to the Grand Chamber and in their written and oral observations to the Grand Chamber, the Government strongly objected to several aspects of the Chamber's judgment.

84. Firstly, the Government argued that the Chamber had adopted a rigid and inflexible rule in paragraph 37 of its judgment concerning contempt committed *in facie curiae*. In their view, the Chamber had not taken into account the unique nature and function of these proceedings in common-law jurisdictions. They submitted that this rule undermined the very existence of

the well-established common-law summary contempt jurisdiction and was based on a serious misunderstanding of law and practice in common-law jurisdictions not only in Convention States but also, for example, in Australia, Canada and the United States. In this connection, the Government pointed out that, contrary to what had been stated by the Chamber in paragraph 22 of its judgment, Cyprus was not alone among the Contracting States in having a summary jurisdiction.

85. Subject to justification on the facts of a case and procedural safeguards, it was not in principle incompatible with Article 6 of the Convention for a court itself to take summary proceedings in respect of contempt committed in its face. Even the applicant accepted this. The long-established power granted to the common-law courts to take immediate action against contemners and to sanction improper conduct committed in their face helped to secure the authority and impartiality of the judiciary and constituted a necessary and indispensable element of a fair trial.

86. Provided that domestic legal systems fully secured and protected Convention rights, the Convention system did not require uniform solutions or mechanical rules to be followed by national courts. Article 6 was included in the Convention as the embodiment both of the common-law and civil-law systems of justice and fairness.

87. The need for decisive and immediate action by a court itself when a party to the proceedings, a lawyer or a member of public acted in a contemptuous manner was an essential aspect of the rule of law and the need to maintain the integrity of the judicial process. The true issue was where one drew the line between cases which were amenable to summary disposal and those which required commencement of a separate procedure before a different judge. There was no rule that required all contempts committed in the face of the court to be independently prosecuted and investigated, and heard by a different judge.

88. Although a distinction could be drawn between those cases where abuse was directed at the bench itself (as in the present case), and those where, for example, a person caused a disturbance in the courtroom, the principle underlying the necessity for the court to act was in fact the same; there was a need to protect the authority of the judicial process. Even though abuse may be personal in certain cases, it was wrong in principle to assume that its personal nature constituted the reason for the court's response, which was guided by the public interest.

89. The Government considered that it was a misinterpretation of the role of the judge to suggest that a contempt may be “directed” at the judge. This assumed that the judge was seeking to vindicate some personal right when he or she took action and thus could not be independent and impartial. Rather, as the intervening third-party Governments made clear in their submissions, when judges acted in response to a contempt committed in the face of the court, they did not act to protect themselves but in order to

protect the integrity of the judicial system and the fair administration of justice. Contempt proceedings were not in the nature of a personal claim between a judge and an alleged contemner. Once this was appreciated, it was apparent that there was nothing wrong in principle with the Limassol Assize Court dealing with the matter. Indeed, as the Irish Government cogently explained, serious problems would arise if judges had to become witnesses in an independent prosecution brought by the State for contempt rather than themselves trying contempt committed in their courts.

90. On the facts of the present case, the application of the summary process had been wholly justified. This case was not about a lawyer defending his client freely but about a lawyer not behaving in a professional way. There was no conflicting evidence about the applicant's behaviour or what had been said.

91. The conduct of the applicant had taken the form of a repeated offensive attack on the judicial process which had been compounded in its seriousness (rather than mitigated) by the applicant's standing and experience at the Bar. It had not been a personal dispute between the judges of the Assize Court and the applicant as the Chamber had considered.

92. The translation of the verbatim record of the proceedings reporting the exchange that had taken place in the Limassol Assize Court failed to grasp the real meaning of what had actually been said and how a Greek speaker would have understood the words. This had been a case where the whole attitude and abusive approach of the applicant had shown that he had intended throughout to use the offensive meaning of the word *ravasakia*. It had only been through an *ex post facto* attempt to use dictionary definitions to suggest a neutral sense of the word that the applicant had been able to convince the Chamber that he had not intended to offend. The applicant had been well aware of what he had done and what the legal consequences were when he used the word *ravasakia* and then had continued to behave in an abusive manner. As stated by the Assize Court and as endorsed by the Supreme Court, the contemptuous conduct had consisted of what the applicant had actually said and the tone in which he had spoken. Although the applicant had been given the chance and time to apologise to the Assize Court on no fewer than three occasions, he had refused to do so each time.

93. The judges of the Assize Court could not be presumed to have lacked the necessary independence and impartiality because they had been victims of the applicant's intemperate misconduct. Further, as the record showed, they had not done anything in the course of the proceedings which suggested bias. They had treated the applicant with courtesy and respect, in marked contrast to his repeated abusive and insulting interventions.

94. Furthermore, according to the Government, the judges of the Assize Court had not been subjectively partial. There was no evidence that they had been biased and the factors on which the Chamber founded its conclusions in this respect did not establish such bias. In particular, as regards the

alleged "haste" with which the applicant had been tried and sentenced, the Government maintained that the judges had acted to protect the process of law in circumstances where the applicant had refused to apologise, had not asked for an adjournment and had positively and abusively invited the court to sentence him. As for the sentence of five days' imprisonment imposed on the applicant, this had been upheld on appeal by the Supreme Court, the impartiality and independence of which was not in question.

95. The Government emphasised that the right to a fair trial as provided under Article 6 of the Convention was specifically incorporated into domestic law by virtue of Article 30 §§ 2 and 3 and Article 12 §§ 4 and 5 of the Constitution.

96. In this context they pointed out that Cypriot law provided a panoply of safeguards available to an accused who had concerns about the impartiality of the judge who was to hear contempt proceedings. For instance, under section 174 of the Criminal Procedure Law, the Supreme Court had the power to order, on a motion made by the Attorney-General or the accused, that the trial of a case be held by or before another court. Such an order could be made if any of the conditions laid down in the above section were satisfied. Furthermore, a preliminary objection could be raised by the accused to the effect that a judge was disqualified from hearing the case on the ground of bias (see *Phaedeon Economides*, paragraph 40 above).

97. Further, although under Article 113 § 2 of the Constitution the Attorney-General of the Republic had the discretionary power to, among other things, institute, conduct or take over any proceedings for an offence against any person, the law of contempt in Cyprus, as in other common-law jurisdictions, authorised the courts to deal themselves with contempt in the face of the court by means of summary procedure. Once a court had invoked the summary procedure, as in the instant case, the Attorney-General had no role to play in the proceedings. In the present case, he had only appeared before the Supreme Court as *amicus curiae* following an invitation by that court.

98. Apart from contempt proceedings, disciplinary measures could have been taken against the applicant on the basis of the Advocates Law (Chapter 2) and the Disciplinary Rules thereto. However, as in other common-law jurisdictions, the role of the court in taking contempt proceedings against a lawyer was distinct from, and independent of, the power of professional bodies to impose disciplinary sanctions. In Cyprus, disciplinary proceedings followed a court conviction for contempt, rather than being a substitute for contempt action. While, as in most jurisdictions, parallel professional disciplinary procedures existed under which members of the Bar could be disciplined by their own professional bodies, the ancient right and duty of the court to protect the integrity of its own process could not be denied in favour of self-regulatory professional disciplinary process.

99. In this connection, the Government stressed that it was essential to affirm the compatibility of the contempt jurisdiction and the fairness of the process, so as not in any way to undermine or weaken the authority of domestic courts or the professional discipline required of advocates.

(ii) The review by the Supreme Court

100. The Government submitted that, contrary to the practice in other appeals in common-law systems, which are limited to a review of the decision rather than independent determination, the Supreme Court had full jurisdiction to review the facts and law and to reverse the decision of the Assize Court. It also had the competence, if requested, to hear oral evidence.

101. In the instant case, the Supreme Court had in fact conducted a *de novo* hearing and had provided a full review of the facts, the law and the sentence. In particular, in its judgment, it had addressed whether the applicant's conduct constituted contempt of court, the validity of the proceedings that followed and the justification for the penalty of imprisonment. After hearing all the arguments, the Supreme Court had found that the applicant was guilty of the offence of contempt and after considering the applicant's points in mitigation, it had concluded that there had been no reason justifying its intervention concerning the sentence imposed.

102. Although the applicant in his submissions suggested that the Supreme Court did not have full jurisdiction, the legal materials he cited made it clear that the Supreme Court had full jurisdiction to review all of the evidence and to make its own findings of fact. The lengthy judgment by the full Supreme Court demonstrated that this had been an appeal where all the facts had been reconsidered. The applicant had been fully aware of the charges against him and had enjoyed multiple legal representation from some of the most eminent members of the Cyprus Bar.

103. Finally, it was the submission of the Government that any procedural failings that may have occurred in the Assize Court, including any problem of partiality, had all been cured by the comprehensive review of the facts and substance of the case by the Supreme Court. Hence, the Government considered that the applicant's complaints under Article 6 of the Convention should be dismissed on this basis.

(c) Third-party interveners

Preliminary remark

104. In addition to their submissions focusing on the current position under their domestic law concerning contempt of court, the Governments of the United Kingdom and Ireland commented on the principles enunciated by the Chamber in its judgment pertaining to contempt proceedings.

(i) The United Kingdom Government

105. The United Kingdom Government accepted that the issue of impartiality had to be considered where an alleged contempt had taken place before a judge who would also have to determine the question of contempt. Nonetheless, they doubted whether the fact that the same judge who heard a contempt case was the judge before whom the contempt took place would be decisive of the question of impartiality in every case. They expressed their concern about the approach adopted by the Chamber in paragraph 37 of its judgment, particularly the absence of any margin of appreciation. In this regard and referring to domestic case-law, they stressed that there was a variety of acts which may amount to contempt in the face of the court. They submitted that objective bias would not exist in every case of contempt in the face of the court.

106. Referring to paragraph 35 of the Chamber's judgment, the United Kingdom Government noted that the behaviour amounting to contempt would not necessarily be directed at the judge personally. They pointed out that a number of English judges had expressed the view that the phrase "contempt of court" had been an unfortunate one, since it suggested that its essence was an affront to the dignity of the individual judge. In some cases it would be the administration of justice and not the dignity of the individual judge which had been threatened. In those cases, there may be no objective bias and no need for the matter to be referred to another judge. Furthermore, in some cases there would be no possibility of any dispute as to the facts or that they constituted contempt, and therefore no need either for the matter to be referred to the prosecuting authorities or to be heard by a different judge. Even where an insult was aimed at the judge, it did not follow that another judge must deal with the contempt. The insult could be expressed in general terms, such as "all judges are corrupt", in which case no one judge was likely to be any more or less impartial than any other. The issue was one of appearance of bias and the test which the court had to apply was whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased.

107. Some contempts required prompt action to be taken because the trial needed to continue; in others there was no need for urgency. Dealing with some contempts, such as the refusal by a witness to give evidence, may be considered to be a normal part of a judge's role in hearing a case. It would be disruptive of the trial and unnecessary for such a contempt to have to be referred to another judge.

108. Finally, the United Kingdom Government emphasised that the Court had recognised the need for courts to be able to control their own proceedings and to take appropriate steps to ensure that the administration of justice is not impeded (see *Ravnsborg v. Sweden*, judgment of 23 March 1994, Series A no. 283-B).

(ii) The Irish Government

109. The Irish Government submitted that the Chamber had erred in a number of important respects in connection with its determination of the case and had overlooked or diminished the dimensions and significance of the principle it had determined to impugn.

110. The position in Cyprus concerning contempt was the same as that in Ireland and the United Kingdom.

111. The effect of the decision of the Chamber was that an ancient and important aspect of the administration of justice as developed by the common law – the power and duty of a judge to maintain order in his or her court through the court's summary procedure jurisdiction – was contrary to the Convention. This approach disregarded the margin of appreciation enjoyed by the High Contracting Parties in making provision by their laws for the protection of order in, and the proper dignity of, court proceedings.

112. The dismissal of the contention that the offence was against the administration of justice rather than the individual judge was unjustified, and ignored the fact that in a range of circumstances judges were expected to and did disregard personal preference and opinion in the discharge of their functions. For this reason, it became critical for the purposes of the objective bias test to determine what the offence the judge was required to adjudicate on comprised, and who the injured party was. It was only in that context that the Convention jurisprudence as to whether there was a well-founded apprehension of bias could be properly and reasonably applied.

113. The Chamber's judgment disregarded the fact that referral of the alleged contempt to the prosecution would reduce the authority of the court and render the proper maintenance of order dependent upon the executive. In this connection, they emphasised that a system of referral to the prosecution authorities and the appointment of a second judge to try the case would result in the adjournment of any proceedings in which there was a disturbance or interference. In more remote areas, it might be difficult to bring a prosecution before a different judge. The inevitable time lag would greatly inconvenience the proper administration of justice by the first court. Secondly, the Chamber had ignored the important implications for the authority of the court if it could not immediately deal with and punish contempts as they occurred. Thirdly, the Chamber had failed to have regard to the important procedural protections that were afforded in the case of contempt in the face of the court, including the requirement that a judge should only determine such proceedings arising out of events in his or her court where it was necessary to do so.

114. Further, the Chamber's judgment did not resolve the issue of how sudden interferences with the court's authority or disruptions in the course of legal proceedings could be addressed in a manner that was consistent with the rights of litigants to have their cases disposed of properly and speedily, and the dignity of the court.

115. The Irish Government considered that there were sound practical reasons why it was appropriate for the judge before whom the contempt was committed to try the alleged contemner for contempt. That judge was undoubtedly in the best position to deal with the issue. Only the possibility of the immediate invocation of the summary procedure for contempt constituted an effective deterrent.

116. Finally, the involvement of the Director of Public Prosecutions interfered with the separation of powers. The judge before whom the disturbance occurred would be obliged to give evidence for the State prosecutors which was an undesirable role for an independent judiciary. This would deprive the courts of their right to enforce their own orders and deny the fundamental tripartite division of powers which underlay the entire Constitution.

(iii) The Maltese Government

117. The Maltese Government referred to the laws applicable in Malta concerning contempt in the face of the court (see paragraphs 53-57 above).

3. The Court's assessment

(a) General principles

118. The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused (see *Padovani v. Italy*, judgment of 26 February 1993, Series A no. 257-B, p. 20, § 27). To that end Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (see *Piersack v. Belgium*, judgment of 1 October 1982, Series A no. 53, pp. 14-15, § 30, and *Grieves v. the United Kingdom* [GC], no. 57067/00, § 69, 16 December 2003). As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance (see *Castillo Algar v. Spain*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3116, § 45, and *Morel v. France*, no. 34130/96, § 42, ECHR 2000-VI*)*. When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is

not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports* 1996-III, pp. 951-52, § 58, and *Wettstein v. Switzerland*, no. 33958/96, § 44, ECHR 2000-XII).

119. In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 21, § 47). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal reasons (see *De Cubber*, cited above, p. 14, § 25). The principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see, for example, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, Series A no. 43, p. 25, § 58). It reflects an important element of the rule of law, namely that the verdicts of a tribunal should be final and binding unless set aside by a superior court on the basis of irregularity or unfairness. This principle must apply equally to all forms of tribunal including juries (see *Holm v. Sweden*, judgment of 25 November 1993, Series A no. 279-A, p. 14, § 30). Although in some cases it may be difficult to procure evidence with which to rebut the presumption, it must be remembered that the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, p. 793, § 32). In other words, the Court has recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality and for this reason has in the vast majority of cases raising impartiality issues focused on the objective test. However, there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test).

120. The Court has held for instance that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty (see *Buscemi v. Italy*, no. 29569/95, § 67, ECHR 1999-VI). Thus, where a court president publicly used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it, his statements were such as to justify objectively the accused's fears as to his impartiality (ibid., § 68). On the other hand, in another case, where a judge engaged in public criticism of the defence and publicly expressed surprise that the accused had pleaded not guilty, the Court approached the

matter on the basis of the subjective test (see *Lavents v. Latvia*, no. 58442/00, §§ 118-19, 28 November 2002).

121. An analysis of the Court's case-law discloses two possible situations in which the question of a lack of judicial impartiality arises. The first is functional in nature: where the judge's personal conduct is not at all impugned, but where, for instance, the exercise of different functions within the judicial process by the same person (see *Piersack*, cited above), or hierarchical or other links with another actor in the proceedings (see court martial cases, for example, *Grieves*, cited above, and *Miller and Others v. the United Kingdom*, nos. 45825/99, 45826/99 and 45827/99, 26 October 2004), objectively justify misgivings as to the impartiality of the tribunal, which thus fails to meet the Convention standard under the objective test (see paragraph 118 above). The second is of a personal character and derives from the conduct of the judges in a given case. In terms of the objective test, such conduct may be sufficient to ground legitimate and objectively justified apprehensions as in *Buscemi*, cited above, but it may also be of such a nature as to raise an issue under the subjective test (see, for example, *Lavents*, cited above) and even disclose personal bias. In this context, therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct.

(b) Application of the above principles to the instant case

122. The applicant expressed his grievance as being that the judges of the Limassol Assize Court had failed to satisfy the requirement of impartiality under both the objective and subjective tests. The Court proposes to examine this complaint by following the objective and subjective approaches with reference to the considerations of functional and personal partiality set out above (see paragraphs 118-21 above).

(i) Objective test

123. The applicant claimed that, in the particular circumstances of his case, the fact that the same judges of the court in respect of which he had allegedly committed contempt tried, convicted and sentenced him, raised objectively justified doubts as to the impartiality of that court.

124. The Court observes that this complaint is directed at a functional defect in the relevant proceedings. In this connection it has first had regard to the arguments put forward by the Government and the intervening third parties concerning the evolution of the common law system of summary proceedings in respect of contempt of court and its compatibility with the Convention. It notes in particular the increasing trend in a number of common-law jurisdictions of acknowledging the need to use the summary procedure sparingly, after a period of careful reflection and to afford appropriate safeguards for the due process rights of the accused (see paragraphs 46-47, 49 and 52 above).

125. However, the Court does not regard it as necessary or desirable to review generally the law on contempt and the practice of summary proceedings in Cyprus and other common-law systems. Its task is to determine whether the use of summary proceedings to deal with Mr Kyprianou's contempt in the face of the court gave rise to a violation of Article 6 § 1 of the Convention.

126. In considering this question, the Court recalls that, both in relation to Article 6 § 1 of the Convention and in the context of Article 5 § 3, it has found doubts as to whether impartiality can be objectively justified where there is some confusion between the functions of prosecutor and judge (see, with regard to Article 6 § 1, *mutatis mutandis*, *Daktaras v. Lithuania*, no. 42095/98, §§ 35-38, ECHR 2000-X, and, regarding Article 5 § 3, *Brincat v. Italy*, judgment of 26 November 1992, Series A no. 249-A, pp. 11-12, §§ 20-22; *Huber v. Switzerland*, judgment of 23 October 1990, Series A no. 188, pp. 17-18, §§ 41-43; and *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, pp. 3298-99, §§ 146-50).

127. The present case relates to contempt in the face of the court, aimed at the judges personally. They had been the direct object of the applicant's criticisms as to the manner in which they had been conducting the proceedings. The same judges then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction, in this case a term of imprisonment. In such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench (see *Demicoli v. Malta*, judgment of 27 August 1991, Series A no. 210, pp. 18-19, §§ 41-42).

128. The Court therefore finds that, on the facts of the case and considering the functional defect which it has identified, the impartiality of the Assize Court was capable of appearing open to doubt. The applicant's fears in this respect can thus be considered to have been objectively justified and the Assize Court accordingly failed to meet the required Convention standard under the objective test.

(ii) Subjective test

129. The applicant further alleged that the judges concerned had acted with personal bias.

130. This limb of the applicant's complaint was therefore directed at the judges' personal conduct. The Court will accordingly examine a number of aspects of the judges' conduct capable of raising an issue under the subjective test.

Firstly, the judges, in their decision sentencing the applicant, acknowledged that they had been “deeply insulted” “as persons” by the

applicant. Even though the judges proceeded to say that this had been the least of their concerns, in the Court's view this statement in itself shows that the judges had been personally offended by the applicant's words and conduct and indicates personal involvement on their part (see paragraph 18 above).

Secondly, the emphatic language used by the judges throughout their decision conveyed a sense of indignation and shock, which runs counter to the detached approach expected of judicial pronouncements. In particular, the judges stated that they could not "conceive of another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate" and that "if the court's reaction is not immediate and drastic, we feel that justice will have suffered a disastrous blow" (see paragraph 18 above).

Thirdly, they then proceeded to impose a sentence of five days' imprisonment, enforced immediately, which they deemed to be the "only adequate response". In the judges' opinion, "an inadequate reaction on the part of the lawful and civilised order, as expressed by the courts would mean accepting that the authority of the courts be demeaned" (see paragraph 18 above).

Fourthly, the judges expressed the opinion early on in their discussion with the applicant that they considered him guilty of the criminal offence of contempt of court. After deciding that the applicant had committed the above offence they gave the applicant the choice either to maintain what he had said and to give reasons why a sentence should not be imposed on him, or to retract. He was, therefore, in fact asked to mitigate "the damage he had caused by his behaviour" rather than defend himself (see paragraphs 17 and 18 above).

131. Although the Court does not doubt that the judges were concerned with the protection of the administration of justice and the integrity of the judiciary and that for this purpose they felt it appropriate to initiate the *instanter* summary procedure, it finds, in view of the above considerations, that they did not succeed in detaching themselves sufficiently from the situation.

132. This conclusion is reinforced by the speed with which the proceedings were carried out and the brevity of the exchanges between the judges and Mr Kyprianou.

133. Against this background and having regard in particular to the different elements of the judges' personal conduct taken together, the Court finds that the misgivings of Mr Kyprianou about the impartiality of the Limassol Assize Court were also justified under the subjective test.

(iii) The review by the Supreme Court

134. Finally, the Court shares the Chamber's view that the Supreme Court did not remedy the defect in question. The possibility certainly exists

that a higher or the highest court might, in some circumstances, make reparation for defects that took place in the first-instance proceedings (see *De Cubber*, cited above, p. 19, § 33). In the present case, although the parties disagree as to the precise scope of the powers of the Supreme Court, it is clear that it had the power to quash the decision on the ground that the Limassol Assize Court had not been impartial. However, it declined to do so and upheld the conviction and sentence. As a consequence, it did not cure the failing in question (see *Findlay*, cited above, p. 282, §§ 78-79*, De Haan v. the Netherlands*, judgment of 26 August 1997, *Reports* 1997-IV, p. 1393, §§ 52-55).

135. In the light of the foregoing and having examined the facts of the case under both the objective and subjective tests enshrined in its case-law, the Court finds that the Limassol Assize Court was not impartial within the meaning of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

136. The applicant submitted that he had been presumed guilty by the Limassol Assize Court before he had been afforded an opportunity to defend himself. He claimed that when the court gave him the chance to make submissions, they had been limited to the issue of mitigation of penalty. He alleged a breach of Article 6 § 2 of the Convention, which provides as follows:

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

137. The Government maintained that the presumption of innocence guaranteed under this head had been respected. The fact that the court had stated that what had been said constituted contempt *prima facie* and had invited representations on the matter could not be considered contrary to Article 6 § 2 of the Convention. It had been open to the court to form a preliminary view and to invite representations from the applicant as to why he had not been guilty since the facts had been before the court itself and it had direct knowledge of the issue. If the applicant had produced a good explanation for his apparent misconduct, the result would have been a finding that he had not been in contempt.

138. In view of the grounds on which it has found a violation of Article 6 § 1 of the Convention (see paragraphs 122-35 above), the Grand Chamber considers that no separate issue arises under this head.

III. ALLEGED VIOLATION OF ARTICLE 6 § 3 (a) OF THE CONVENTION

139. The applicant submitted that the Assize Court had failed to inform him in detail of the accusation made against him, in breach of Article 6 § 3 (a) of the Convention, which provides as follows:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him."

140. The Government contested the applicant's claim and argued that he had been clearly informed by the Assize Court in sufficient detail of the nature and cause of the accusation against him. This was evident from the transcript of the proceedings. In particular, taking into account the applicant's seniority and experience, the Government stated that it would be far-fetched to suggest that he did not know and fully understand the substance of the charges and the nature of the allegations against him.

141. In view of the grounds on which it has found a violation of Article 6 § 1 of the Convention (see paragraphs 122-35 above), the Grand Chamber considers that no separate issue arises under this head.

IV. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

142. The applicant submitted that his conviction violated Article 10 of the Convention, the relevant parts of which provide as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to ... impart information and ideas without interference by public authority ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for maintaining the authority and impartiality of the judiciary."

A. The Government's preliminary objection

143. As they had done before the Chamber, the Government maintained that the applicant had not exhausted domestic remedies in relation to his complaint under this provision.

1. The Chamber's admissibility decision

144. In its final admissibility decision of 8 April 2003, the Chamber rejected the Government's preliminary objection as to non-exhaustion of domestic remedies under this head. It concluded as follows:

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

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

2. Arguments of those appearing before the Court

(a) The applicant

145. The applicant contested the Government's objection and argued that the Grand Chamber should uphold the Chamber's final admissibility decision of 8 April 2003 in which it dismissed that objection.

(b) The Government

146. The Government submitted that the applicant had not exhausted domestic remedies either expressly or in substance. The grounds of appeal that had been filed and subsequently argued by the applicant before the Supreme Court had not included any allegation of a violation of the provisions of Article 10 of the Convention, which, to all intents and purposes, was reproduced in Article 19 of the Cyprus Constitution. Consequently, the Supreme Court had had no opportunity to consider the matter and adjudicate on it.

3. The Court's assessment

147. The Grand Chamber agrees with the Chamber's reasoning and conclusions in its final admissibility decision and considers that the applicant raised in substance the question of freedom of expression before the Supreme Court, thereby exhausting domestic remedies as required by Article 35 § 1 of the Convention.

148. The Government's objection on the ground of non-exhaustion of domestic remedies under this head must therefore be dismissed.

B. Applicability

1. The Chamber's judgment

149. The Chamber concluded that it was not necessary to examine whether Article 10 of the Convention had also been violated since it

considered that the essential issues raised by the applicant had been examined under Article 6.

2. The Grand Chamber

150. The Grand Chamber considers that in the circumstances of the case a separate examination of the applicant's complaint under Article 10 is called for. Whereas the main issue under Article 6 is the impartiality of the court which determined the criminal charge against the applicant, the complaint under Article 10 concerns the impact of the applicant's conviction and sentence on his right to freedom of expression. It is therefore a complaint of a different nature from that under Article 6 and should be considered separately.

151. As regards the applicability of Article 10, it is not disputed by the parties that the freedom of speech guarantee extends to lawyers pleading on behalf of their clients in court (see *Nikula*, cited above, and *Steur v. the Netherlands*, no. 39657/98, ECHR 2003-XI).

C. Compliance

1. Arguments of those appearing before the Court

(a) The applicant

152. The applicant submitted that the conviction and sentence imposed on him amounted to a disproportionate "interference" with his right to freedom of expression.

153. In considering the proportionality of the punishment in the present case, the applicant stated that where a lawyer was involved, acting in his professional capacity and in good faith, the imposition of even a lenient criminal penalty could only be justified in the most exceptional of circumstances. Accordingly, the imposition of a sentence of imprisonment would require the gravest possible contempt.

154. Furthermore, to impose a prison sentence on an advocate who had been promoting what he had perceived (rightly or wrongly) to be in his client's best interests was likely to have a "chilling effect" on the conduct of advocates in court. It was the primary duty of the criminal defence lawyer to defend his client fearlessly, in accordance with his independent professional judgment. In so doing, it would sometimes be necessary for a lawyer to raise complaints about the conduct of the court itself, and to stand up to pressure or discourtesy from the court. However, if lawyers were given to understand that a court could lawfully send them to prison for a significant period of time for the use of an emphatic tone of voice or colourful language of which the court disapproved, or for the slightest show of emotion under

stress, then there was a real risk that advocates would tailor their conduct in court, to the potential detriment of their client's case. Consequently, imposing a prison sentence in a trivial case like the present one struck at the heart of the lawyer-client relationship and had implications not only for lawyers' rights under Article 10, but also for the fair trial rights of present and future defendants.

155. Where a court considered that a lawyer had transgressed the proper boundary of acceptable speech, and restrictions on freedom of expression could thus be justified, there was a range of potential responses (see paragraph 79 above). But to move directly to a criminal conviction and the imposition of a substantial term of imprisonment could not be regarded as a necessary means of protecting the authority of the judiciary, particularly in the case of a minor, isolated transgression.

156. In the present case, the Limassol Assize Court appeared to have lost all sense of perspective when balancing the important constitutional principles which were at stake. In particular, the words in question had been used by the applicant in his capacity as a professional lawyer while attempting to protect the best interests of his client. He had not refused to obey a court order, lied or misled the court; nor had he used foul language in court. The criticisms had been made in court, rather than outside the court or in the media. They concerned the Assize Court's apparent indifference to a line of cross-examination the applicant wished to pursue and were not comments that were made gratuitously with the sole purpose of insulting the judges or calling their integrity or honesty into question. What he had done was to complain, in strong and perhaps emotive terms, that the court had been unfairly restricting his cross-examination and that the judges had been talking and passing notes among themselves, instead of concentrating on the evidence.

157. In this connection the applicant pointed out that all lawyers found themselves in that position at one time or another and were thereby faced with a dilemma. Usually, the wisest course was to say nothing and move on, but sometimes an objection had to be raised. It was a matter of judgment. Lawyers did not always get that judgment right. In the heat of the moment they may use language which betrayed their emotions, or which was open to misinterpretation or appeared discourteous. Their objection may turn out to make matters worse rather than better. All this was part of the real world of the adversarial criminal trial. In this context the applicant noted that the language which he had used could not fairly be described as inevitably or grossly offensive; the word *ravasakia* could be interpreted in two ways.

158. Furthermore, the applicant's comments had been unplanned. They had been made in the heat of a stressful trial after his conduct of his client's case had been criticised by the court. The entire incident had lasted a matter of minutes. The Assize Court had not had occasion to complain about the

applicant's conduct at any earlier point in the trial. This had not been a case in which the applicant had been repeatedly rude despite a prior warning.

159. In view of the above, the applicant claimed that, at worst, he could be criticised for an isolated error of judgment in the manner in which he chose to express himself. This had been in the context of a long and unblemished career at the Cyprus Bar spanning forty years.

160. To convict a senior lawyer of exemplary standing of contempt of court and to sentence him to five days' imprisonment had been, on the facts of this case, a grossly disproportionate response to what had been – at worst – a momentary lapse of judgment on his part in the course of representing a client in the heat of a stressful murder trial.

161. Finally, the applicant averred that the ramifications of the case were much wider than an overheated exchange in a regional court in Cyprus. It involved reconciling the need to respect the dignity of a court and the need to protect the freedom and independence of the legal profession, both these imperatives being essential in their different ways for maintaining public confidence in the administration of justice.

(b) The Government

162. The Government submitted that the interference with the applicant's right to freedom of expression had been based on section 44(1) and (2) of the Courts of Justice Law 1960 and Article 162 of the Constitution and was thus "prescribed by law".

163. As to the "necessity" for the restriction of the applicant's right, the Government maintained that it was well established in the Court's jurisprudence that the judicial process and administration of justice needed to be protected from unwarranted attacks. In particular, judges were, by reason of their role and duties of discretion, unable to respond to personal attacks by using the media in the manner of politicians and other public figures (see, for example, *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149; *Schöpfer v. Switzerland*, judgment of 20 May 1998, *Reports* 1998-III; and *Skałka v. Poland*, no. 43425/98, 27 May 2003). Even if an advocate had personal free speech rights in a courtroom, these could be restricted for the purpose of maintaining the authority of the judiciary (see *Nikula*, cited above).

164. In view of the degree of insult and the seriousness of the applicant's contemptuous behaviour, the sanction that had been imposed was justified and fell within the margin of appreciation afforded to the Assize Court. In this regard, the Government noted that the applicant was a well-known lawyer with forty years' experience, a former member of parliament and a former official of the Office of the Attorney-General. His intemperate attack had created a real risk of undermining public confidence in the judiciary and the administration of justice. It was clear from the transcripts that the applicant had refused the repeated opportunities offered to him to proffer an

apology and instead had compounded his abuse by challenging that court. The proportionality of the sanction was pre-eminently a matter falling within the margin of appreciation enjoyed by Contracting States. In the present case, the term of imprisonment imposed was not the longest possible period but was within the margin which the domestic courts must enjoy to protect the administration of adversarial justice under the common law.

165. In this regard, the Government pointed out that there was a substantial difference between witnessing events in a courtroom and merely reading a transcript of proceedings at which the reader had not been present. The Assize Court had clearly been of the view that the applicant's behaviour which it had personally witnessed had been so extreme that it had crossed the threshold between contempt which may simply be reported to a professional body and that which required the more serious response of imprisonment. The Supreme Court had given due respect to that view and had confirmed the serious nature of the applicant's conduct. The Grand Chamber should be cautious in interfering with the local assessment of what type of sanction was warranted by what had clearly been conduct falling short of the behaviour expected of a highly experienced and senior advocate.

2. The Court's assessment

(a) Whether there was interference

166. It was not disputed that the applicant's conviction by the national courts for the offence of contempt of court amounted to "interference" with his right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. The Court sees no reason to conclude otherwise.

(b) Whether the interference was justified

167. An interference with a person's freedom of expression entails a violation of Article 10 of the Convention if it does not fall within one of the exceptions provided for in paragraph 2 of that Article (see The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 29, § 45, and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 85, ECHR 2004-XI).

168. The parties were in agreement that the applicant's conviction and sentence were "prescribed by law", namely section 44(1) and (2) of the Courts of Justice Law 1960 and Article 162 of the Constitution. Furthermore, it was common ground that the interference pursued the legitimate aim of maintaining the authority of the judiciary within the meaning of Article 10 § 2 of the Convention.

169. Accordingly, the only question in issue is whether the interference with the applicant's freedom of expression was "necessary in a democratic society".

(i) General principles

170. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to 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 delivered by an independent court (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III; *Cumpănă and Mazăre*, cited above, § 88; and *Nikula*, cited above, § 46).

171. In particular, the Court must determine whether the measure taken was "proportionate to the legitimate aims pursued" (see The Sunday Times *(no. 1)*, cited above, p. 38, § 62, and *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Zana v. Turkey*, judgment of 25 November 1997, *Reports* 1997-VII, pp. 2547-48, § 51). In addition, the fairness of the proceedings, the procedural guarantees afforded (see, *mutatis mutandis*, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 95, ECHR 2005-II) and the nature and severity of the penalties imposed (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I; *Skałka*, cited above, §§ 41-42; and *Lešník v. Slovakia*, no. 35640/97, §§ 63-64, ECHR 2003-IV) are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10.

172. The phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge (see *Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997-V, p. 1549, § 40). What is at stake as regards protection of the authority of the judiciary is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large (see, *mutatis mutandis*, among many other authorities, *Fey v. Austria*, judgment of 24 February 1993, Series A no. 255-A, p. 12, § 30).

173. The special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of

members of the Bar. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein (see *Amihalachioaie v. Moldova*, no. 60115/00, § 27, ECHR 2004-III; *Nikula*, cited above, § 45; and *Schöpfer*, cited above, pp. 1052-53, §§ 29-30, with further references).

174. Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. While lawyers too are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds. Moreover, a lawyer's freedom of expression in the courtroom is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions on this right. Nonetheless, even if in principle sentencing is a matter for the national courts, the Court refers to its case-law to the effect that it is only in exceptional circumstances that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society (see *Nikula*, cited above, §§ 54-55).

175. It is evident that lawyers, while defending their clients in court, particularly in the context of adversarial criminal trials, can find themselves in the delicate situation where they have to decide whether or not they should object to or complain about the conduct of the court, keeping in mind their client's best interests. The imposition of a custodial sentence would inevitably, by its very nature, have a "chilling effect", not only on the particular lawyer concerned but on the profession of lawyers as a whole (see *Nikula*, cited above, § 54, and *Steur*, cited above, § 44). They might for instance feel constrained in their choice of pleadings, procedural motions, etc., during proceedings before the courts, possibly to the potential detriment of their client's case. For the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation. The imposition of a prison sentence on defence counsel can in certain circumstances have implications not only for the lawyer's rights under Article 10 but also the fair trial rights of the client under Article 6 of the Convention (see *Nikula*, cited above, § 49, and *Steur* cited above, § 37). It follows that any "chilling effect" is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice.

(ii) Application of the above principles to the instant case

176. In the present case the applicant was convicted of the offence of contempt *in facie curiae* by the Limassol Assize Court whilst defending an accused in a murder trial. The judges considered that the applicant had showed manifest disrespect to the court by way of words and conduct.

177. The Court must ascertain whether on the facts of the case a fair balance was struck between, on the one hand, the need to protect the authority of the judiciary and, on the other hand, the protection of the applicant's freedom of expression in his capacity as a lawyer.

178. The Limassol Assize Court sentenced the applicant to five days' imprisonment. This cannot but be regarded as a harsh sentence, especially considering that it was enforced immediately. It was subsequently upheld by the Supreme Court.

179. The applicant's conduct could be regarded as showing a certain disrespect for the judges of the Assize Court. Nonetheless, albeit discourteous, his comments were aimed at and limited to the manner in which the judges were trying the case, in particular concerning the cross-examination of a witness he was carrying out in the course of defending his client against a charge of murder.

180. Having regard to the above, the Court is not persuaded by the Government's argument that the prison sentence imposed on the applicant was commensurate with the seriousness of the offence, especially in view of the fact that the applicant was a lawyer and considering the alternatives available (see paragraphs 79 and 98 above).

181. Accordingly, it is the Court's assessment that such a penalty was disproportionately severe on the applicant and was capable of having a "chilling effect" on the performance by lawyers of their duties as defence counsel (see *Nikula*, cited above, § 49, and *Steur*, cited above, § 44). The Court's finding of procedural unfairness in the summary proceedings for contempt (see paragraphs 122-35 above) serves to compound this lack of proportionality (see paragraph 171 above).

182. This being so, the Court considers that the Assize Court failed to strike the right balance between the need to protect the authority of the judiciary and the need to protect the applicant's right to freedom of expression. The fact that the applicant only served part of the prison sentence (see paragraph 20 above) does not alter that conclusion.

183. The Court accordingly holds that Article 10 of the Convention has been breached by reason of the disproportionate sentence imposed on the applicant.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

184. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Pecuniary damage

185. The applicant made no claim in respect of pecuniary damage.

2. Non-pecuniary damage

186. The Chamber's conclusion as regards the applicant's claims for non-pecuniary damage was as follows (see paragraphs 84-85 of the Chamber's judgment):

> "84. In the present case, the Court considers that the applicant must have suffered distress on account of the facts of the case. In particular, it considers that the seriousness of the conviction and the sentence of imprisonment imposed on the applicant must have had a negative impact on his professional reputation and on his political image, particularly in a small country like Cyprus. However, the Court does not find that the applicant has established a causal link between the deterioration of his health and the breaches of the Convention which have been found. Overall, therefore, it finds the applicant's claims excessive, albeit partly justified.
>
> 85. Taking into account the various relevant factors and making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 15,000 under this head."

187. The applicant invited the Grand Chamber to uphold the Chamber's award.

188. The Government did not contest the applicant's claims.

189. The Court accepts that the violation of the applicant's rights under Articles 6 § 1 and 10 of the Convention caused him non-pecuniary damage such as distress and frustration – resulting from the unfairness of his trial, the conviction and sentence – which cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, the Court awards the applicant 15,000 euros (EUR) under this head.

B. Costs and expenses

190. The Chamber's conclusion as regards the applicant's claims for reimbursement of his costs and expenses was as follows (see paragraphs 91-93 of the Chamber's judgment):

> "91. Firstly, the Court points out that it has already held that the use of more than one lawyer may sometimes be justified by the importance of the issues raised in a case (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 56, ECHR 2000-XI). Moreover, as the applicant's case before the Supreme Court essentially attempted to remedy the violations of the Convention alleged before the Court, these domestic fees may be taken into account in the assessment of the costs claim. However, it considers that, even if the instant case was to some degree complex and raised significant issues, it was not necessary to have the services of so many lawyers.

92. Secondly, although the Court does not doubt that the fees claimed were actually incurred, they appear to be excessive. It also notes that it dismissed a considerable part of the applicant's claims at the admissibility stage.

93. Taking the above into account, and deciding on an equitable basis, the Court awards the applicant a total of EUR 10,000 under this head."

191. The applicant contested the Chamber's award and reiterated his initial claims for costs and expenses incurred before the Supreme Court and the Court (Second Section) amounting to 20,180 Cypriot pounds (CYP) (approximately EUR 35,000). In addition, he sought reimbursement of the costs and expenses of the proceedings before the Grand Chamber, amounting to CYP 5,000 and 21,500 British pounds (GBP) (in total approximately EUR 40,000).

He detailed his claims as follows (supported by debit notes and invoices):

(a) CYP 2,520 for fees and expenses covering work carried out by six lawyers in Cyprus in the proceedings before the Supreme Court;

(b) CYP 17,660 for fees and expenses incurred in the Chamber proceedings. These included a total of CYP 5,160 in fees for the work of Dr C. Clerides, CYP 7,500 in fees for the work of his five other Cypriot lawyers (CYP 1,500 per lawyer) and CYP 5,000 in consultation fees for his two British lawyers;

(c) CYP 5,000 for fees and expenses covering work carried out for the proceedings before the Grand Chamber by Dr C. Clerides (a receipt was submitted in this respect);

(d) GBP 20,000 for fees and expenses covering work carried out for the proceedings before the Grand Chamber by Mr B. Emmerson QC, Mr D. Friedman, Mr M. Muller and Mr L. Charalambous (Simons, Muirhead and Burton, solicitors);

(e) GBP 1,500 for expenses covering the attendance of his representatives at the Grand Chamber hearing (disbursements bill provided by Simons, Muirhead and Burton).

192. The applicant argued that the costs and expenses claimed were reasonable considering the overall work done in the preparation of the case. The number of lawyers appointed had been necessary in both sets of proceedings before the Court considering the unprecedented nature of the case and its importance for Cypriot law and common-law jurisdictions. The significance of the case had also been acknowledged by the Government in their observations. The applicant submitted that, given the relevance of English common law in interpreting the Cypriot law of contempt, the appointment of English lawyers both before the Chamber and the Grand Chamber had been justified. In this connection, he pointed out that the Government had also appointed English lawyers. Finally, the referral of the case to the Grand Chamber required it to be determined afresh and, in view of the issues raised, comprehensive submissions had been necessary.

193. The Government contested the amounts claimed by the applicant. In particular, they asserted that the applicant's claims for costs and expenses incurred before the Supreme Court and the Chamber were excessive and maintained that the Chamber's decision in this respect should be upheld. The sums claimed for the proceedings before the Grand Chamber were also exorbitant. In this connection they noted that the applicant had appointed an unwarranted number of lawyers and that he had treated this stage of the proceedings as a *de novo* process.

194. The Government proposed an overall amount of EUR 20,000 to cover the applicant's costs and expenses at all stages of the proceedings (EUR 10,000 for the proceedings before the Supreme Court and Chamber and EUR 10,000 for the proceedings before the Grand Chamber).

195. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred, and were reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, for example, *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002, and *Sahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003-VIII).

196. The Grand Chamber sees no reason to depart from the Chamber's finding as to the amount to be awarded in respect of the legal costs and expenses incurred before the domestic courts and the Chamber.

197. As to the costs and expenses incurred before the Grand Chamber, the Court observes that it had requested the parties to answer numerous questions covering the issues that arose in the case. It is clear from the length and detail of the pleadings submitted by the applicant that a considerable amount of work was carried out on his behalf.

198. Nonetheless, the Court still considers that the total sum claimed in fees is too high.

199. Having regard to the circumstances of the case, the Court awards the applicant, in respect of all the costs incurred in the domestic and Convention proceedings, a total of 35,000 EUR, together with any tax that may be chargeable on that amount.

C. Default interest

200. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* by sixteen votes to one that it is not necessary to examine separately the applicant's complaint under Article 6 § 2 of the Convention;

3. *Holds* unanimously that it is not necessary to examine separately the applicant's complaint under Article 6 § 3 (a) of the Convention;

4. *Dismisses* unanimously the Government's preliminary objection concerning Article 10 of the Convention;

5. *Holds* unanimously that there has been a violation of Article 10 of the Convention;

6. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months, the following amounts to be converted into Cypriot pounds at the rate applicable at the date of settlement:
      (i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 35,000 (thirty-five thousand euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 December 2005.

Luzius WILDHABER
President

Lawrence EARLY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Sir Nicolas Bratza and Mr Pellonpää;
(b) concurring opinion of Mr Zupančič;
(c) concurring opinion of Mr Garlicki and Mr Maruste;
(d) partly dissenting opinion of Mr Costa.

L.W.
T.L.E.

CONCURRING OPINION OF JUDGES Sir Nicolas BRATZA AND PELLONPÄÄ

We have voted with the majority of the Court on all aspects of the case. We are also in general agreement with the majority's conclusions and reasoning in the judgment, save as to their opinion that the judges of the Limassol Assize Court were affected by subjective bias against the applicant when they tried and sentenced him for contempt in the face of the court.

For the reasons given in the judgment, the applicant's misgivings as to the impartiality of the members of the Assize Court were, in the particular circumstances of the present case, objectively justified. This would not always be the case where a contempt committed in the face of the court was tried by the court concerned and in this respect we consider that the Chamber went too far in paragraph 37 of its judgment in holding that in all situations where a court was faced with misbehaviour on the part of a person in the court room, the correct course dictated by the requirement of impartiality under Article 6 of the Convention would be to refer the question to the competent prosecuting authorities for investigation and to have the matter determined by a different bench than the one before which the problem arose. However, where, as in the present case, the words or actions which are alleged to constitute the contempt in question were directed at the judges personally and amounted to an outspoken criticism of the manner in which they had conducted the proceedings, the impartiality of those same judges in trying and punishing the contemner was in our view open to doubt and was such as to give rise to objectively justified misgivings.

Having found in paragraphs 123-28 of the judgment that the Assize Court did not satisfy the objective test of impartiality, it was in our view unnecessary to go on to examine the question whether the subjective test was also satisfied. Since the majority of the Court have not only done so but have based their finding of a violation of Article 6 on the further ground of subjective bias, we feel obliged to explain why in our view no convincing reasons have been given to rebut the presumption of the personal impartiality of the judges who tried the applicant for contempt.

Firstly, we recall the general context of the events in question. The court had interrupted the applicant during the course of the main proceedings to remark that his cross-examination was entering into excessive detail at that stage of the trial. This was in our view a normal and unexceptionable intervention by the court in the proper exercise of its function to control the proceedings before it and was not suggestive of any bias on the court's part against the applicant. The immediate reaction of the applicant was to request leave to withdraw as counsel from the case, a request which the court refused, relying on established case-law. There is no indication that this was a decision based on anything other than proper judicial considerations and,

once again, nothing to suggest any personal hostility on the part of the court towards the applicant.

Then followed the exchange containing the applicant's reference to "*ravasakia*" and the trial court's characterisation of the applicant's behaviour as contempt of court and its invitation to the applicant "either to maintain what he said and to give reasons why no sentence should be imposed on him, or to decide whether he should retract". The applicant, who, according to the Assize Court was shouting and gesturing at the court, replied: "You can try me." After an adjournment, the court reaffirmed its view that the applicant's words, as well as the manner and tone in which he had expressed them, constituted a contempt of court and, after giving the applicant a further opportunity to apologise, sentenced him to five days' imprisonment.

In concluding – very exceptionally, if not for the first time in its case-law – that the presumption of personal impartiality was rebutted in the present case, the majority of the Court attach importance to a number of aspects of the Assize Court judges' conduct which are said to amount to evidence of subjective bias on their part: the fact that the judges stated that they had been personally insulted and offended by the applicant's words; the emphatic language used by the judges which "conveyed a sense of indignation and shock"; the fact that the judges deemed a sentence of five days' imprisonment to be the only adequate response for the contempt in question; and the early expression of the judges' opinion that a contempt had been committed.

In our view none of these factors, whether considered individually or cumulatively, are sufficient to rebut the strong presumption, consistently applied by the Court, that professional judges are free from personal bias.

While, as noted above, the applicant's remarks plainly amounted to a personal attack on the judges of the Assize Court and objective appearances required that the alleged contempt be tried by a differently constituted bench, it by no means follows that, once having decided to try the applicant themselves, the judges of the Assize Court were influenced by their personal feelings of affront rather than by proper considerations of the need to preserve the authority of the tribunal and the due administration of justice. In this regard, we see no reason to doubt the Assize Court when it stated that the fact that the judges of the court had been personally insulted was the least of their concerns and that the real concern of the court was the authority and integrity of justice.

As to the emphatic language employed by the Assize Court, while the terms used by the judges to describe the applicant's conduct were unquestionably strong, we do not consider this to be of itself in any way indicative of personal bias against the applicant. We see it rather as a reflection of the seriousness with which the court regarded the applicant's words, tone of voice and general demeanour, which in the judges' view had shown disrespect for the authority of the court.

For substantially the same reason, we cannot agree that the fact that the Assize Court regarded an immediate custodial sentence of five days as being the only appropriate response as suggestive of subjective bias on the part of the judges of the court. For the reasons given in the Court's judgment, we consider that the sentence was, in the circumstances of the case, a disproportionate interference with the applicant's Article 10 rights. But the fact that the Assize Court took a different view of the gravity of the case – and one which was shared by the Supreme Court – cannot in our view serve as evidence of a lack of subjective impartiality on its part.

Nor are we convinced that the early expression of the opinion that the applicant was guilty of contempt of court justifies the rebuttal of the presumption of the subjective impartiality of the judges. While the present case is an illustration of the difficulties faced by a tribunal in trying cases of contempt which occur in the face of the court, the mere fact that the Assize Court formed an early view that the applicant's conduct amounted to a contempt of court is not in our view indicative of personal bias. Moreover, the court not only adjourned to reconsider the matter before reaffirming its initial view that a contempt had been committed, but gave the applicant an opportunity to retract his statements before imposing any sentence. We see no reason to doubt the conclusion of the Supreme Court, according to which the Assize Court thereby predetermined "indirectly its intention not to continue with imposing a sentence, should Mr Kyprianou dissociate himself from what he said and did with an expression of sincere apology".

For these reasons we cannot share the conclusion of the majority that the judges of the Limassol Assize Court were subjectively biased against the applicant and that the finding of a violation of Article 6 § 1 of the Convention was justified on this further ground.

CONCURRING OPINION OF JUDGE ZUPANČIČ

This is a case concerning impartiality. In the Grand Chamber judgment, especially in the key paragraph 128, we refer in turn to "personal partiality", "personal involvement on the part of the judges" and their "sense of indignation and shock, which runs counter to the detached approach expected of judicial pronouncement". These are the elements of the so-called "subjective partiality", which the European Court of Human Rights detected in this case. My intention here is simply to contribute an additional elucidation as to why, for example, a "personal involvement" should be seen as a negation of impartiality.

I do not think that "impartiality" in law is different from any other impartiality as for example in science, in historiography, etc. However, the Court's different formulas concerning "objective" and "subjective" impartiality, in my opinion, do not have a great explanatory value. In other words, if someone were to ask: "What, in the end, is impartiality?", I do not think he or she could derive a clear answer from our jurisprudence. Yet it would be useful to give a clear definition providing some further guidance.

Impartiality is clearly a mental attitude. That this attitude must be without prejudice and bias seems to be clear. Rational law-finding and adjudication require, on the part of the adjudicator, certain objectivity. This is why the objective rule of law is distinguishable from the subjective rule of the judges. The premise is that it is the judges personally who discover and interpret and apply the law – but that law nevertheless exists objectively and independently from the judges. In a very real sense, the complex meaning of "fair trial" is wholly about the impartial attitude of the judges.

The adversary nature of legal proceedings, too, serves the idea of impartiality. In law it is the conflict (adversariness) that both requires and produces impartiality. In a monocentric adjudicatory setting, judicial impartiality is a by-product of the two expected and accepted partialities of the two opposing parties. This may be the specificity of the judicial impartiality as distinguished, for example, from the scientific objectivity where, through scientific experiment, the objective reality itself is permitted to confirm or disconfirm the hypothesis advanced in the experiment.

Yet empirical scientists, because they are interested in the underlying perennial laws of nature, deal with repeatable events. The concrete and transient events are experimentally tested as mere "symptoms" of the underlying constant and continuing (in time) scientific law – the only real focus of scientific exploration.

In law, however, the events cannot be reiterated. We usually say that the legally relevant happenings are "historical". The idiom "historical events" derives from historiography because there, too, the object of a historian's scholarship cannot be replicated. Historical events thus cannot be

experimentally tested as to their objective veracity. In short, the epistemology of historical events is lacking compared to the scientific-empirical epistemology. We say that it lacks objectivity.

Yet, even in scientific epistemology it is the correctness of experimental *procedure* that guarantees its repeatability by other scientists. The confirmation of the underlying scientific principle depends on its falsifiability, in other words, on the possibility to disprove it in an unlimited number of further experiments. The legitimacy of the scientific hypothesis depends on the correctness of this procedure.

How much more so in judicial procedures where the historical event cannot be reproduced!

This is why the legitimacy of legal truth-finding depends completely and totally on the legitimacy of the *procedure* followed by the courts. A procedure flawed as to any element of the fairness of the trial, equality of arms, etc., cannot lead to a legitimate result. In legal matters, because it is impossible to ascertain a past historical event, the so-called "truth" can easily, as it did in witch trials, become a self-referential and non-falsifiable myth. These anomalies, at the time, were a direct consequence of the epistemologically flawed inquisitorial structure of legal procedure. In other words, a fair trial is not just an individual entitlement and a human right. A fair trial, with all its complex guarantees, is an intellectual, if not directly scientific, necessity. A fair trial is thus a key to the legitimacy of all adjudication.

This brings us to one of the elements of a fair trial, namely, to impartiality. Impartiality, to put it simply, is an open-minded mental attitude characterised by indecision. In a monocentric adjudicatory setting, an undecided judicial mind remains open to the influx of contradictory data coming from the two opposing parties. Impartiality means that the relevant channels of communications are not cut, in other words, that these data continue to be admitted. Article 6 of the European Convention on Human Rights, and more specifically §§ 2 and 3 (b), (c) and (d), can, for example, be seen not as human rights but as epistemological minimal standards[1].

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1. Article 6 – Right to a fair trial
...
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against

The opposite of impartiality is *pre-judice*. As the etymology of the word "*pre-judicium*" illustrates, "having a prejudice" denotes having a *decision* in mind before all the data are in. A pre-judiced judge does not listen to one or to both parties.

This prejudice may be exacerbated if the judge subscribes to criteria of premature decision that are *extrinsic* to the case at hand or to law in general. If, for example, we speak of "racial prejudice," we are referring to the employment of the legally extrinsic racial criterion where it has nothing to do with the legal substance of the case. If the judge dislikes one of the parties, he is deciding on the basis of an extrinsic, legally irrelevant and forbidden criterion. Needless to say, an impartial, objective, etc., attitude requires wisdom and experience in order that the judge may maintain the requisite *distance* from the evolving process before him. The institution of the lay jury, wholly passive and more receptive to the shifting burden of proof, too, may serve the enhancement of impartiality in the judicial process.

The word "decision", too, is appropriate. Its etymology indicates cutting off. Indeed, a decision, while it may be the end result of an impartial decision-making process (fair trial), is by definition partial. One is decided once he or she has cut off the influx of data that are contrary to the content of his or her decision.

The issue is therefore, *firstly*, the timing of the decision and, *secondly*, the absence of extrinsic decision-making criteria.

It follows logically that maintaining the channels of information open as long as possible during an adversary legal procedure is what impartiality is all about. The adversary nature of the trial in which the judge is not required to form a hypothesis as to the guilt of the accused – as is, for example, the continental investigatory judge in the inquisitorial model of procedure [1] – and in which he may maintain a receptive passivity, is conducive to impartiality. Moreover, if the burden of proof *de facto* shifts due to the persuasive effect obtained by one of the opposing parties, this contributes to the result that the judge will be of two minds and thus ambivalent. To be ambivalent also means to remain undecided.

In various codes of criminal procedure there are provisions as to what the trial court may do if the criminal event takes place before the very eyes of the judges during the same trial in the same courtroom. Often, the relevant

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him;

...

1. This problem is further aggravated by the fact that, for example, the investigating magistrate must of necessity form a hypothesis of guilt. Without it the investigation would make no sense. Little, therefore, remains of the postulated presumption of innocence in a setting that is not adversary but inquisitorial. It may not be too far-fetched to say that Mr Kyprianou was in fact tried in an inquisitorial setting.

provision permits the "eyewitness" court to adjudicate directly and pronounce the sanction forthwith.

Yet, resolution of the instant situation obtains from the tacit assumption that the court's role is limited to truth-finding. In such immediate situations the truth of the incriminated event seems so obvious. The assumption is, therefore, that the eyewitness judges themselves are in an ideal truth-finding situation.

Still, the role of any adjudicatory body is not only in truth-finding. The objective and impartial ascertainment of truth is merely an instrument to the resolution of the conflict. Judicial truth-finding is not an end in itself. Once the truth has been established to the best of their abilities, the judges must apply the law[1].

As is clear in the case before us, the application of the law, too, may be biased. This probability of bias, if the judge is a *judex in causa sua,* persists despite the fact that the incriminated event, called here the "contempt of court", is palpably obvious, true, etc.

This case is an excellent illustration of just how absurd the legal interpretation of the factual trivia may become.

In view of historical considerations since the Magna Carta of 15 June 1215, concerning the greater independence of the judiciary within the common-law jurisdictions, I would be the first to extend the indulgence of the margins of appreciation to the adversary model of criminal procedure. As I have pointed out elsewhere, this independence had been the source of much liberty and political stability.

It was truly an inspiration to the rest of the world.

So, many centuries later, it is therefore ironic that the common-law jurisdictions should be inclined to defend this patent anomaly in a case which flies in the face of every precept derived from the above two legal sources. "Contempt of court" is nothing other than an inquisitorial anomaly within an adversary model of criminal procedure. The very same model,

1. For the sake of simplifying the argument, I say "apply the law". But the subsequent "application of law", in turn, is epistemologically as complex, and more so, as the antecedent "truth-finding". In fact, the two mental processes can only artificially be separated one from the other. The choice of the norm to be applied (*la qualification du cas*) determines the selective apperception of the "legally relevant" facts. The "discovery" of those and additional "facts" (*éléments*) in turn modifies the choice of the norm as the major premise of legal syllogism. This is a two-way street. The choice of the applicable norm determines which facts are legally relevant. The choice of the applicable norm largely determines what the selective legal "truth-finding" will focus on in the first place. The fact that the accused, to paraphrase Camus, did not cry at his mother's funeral may suddenly become a pivotal element of the absurd legal "truth". Unaddressed and left non-explicit, this two-step sequence of the unexplored aspects of legal reasoning almost invariably generates in the mind of the unsophisticated something akin to a "belief". Due to the self-referential nature of such "application of the law", the inquisitorial witch-hunts may come to be seen as referring to an established "truth".

which was the true legal and moral source both of the general fair-trial doctrine and of the European Convention's Articles 5 and 6.

CONCURRING OPINION OF JUDGES GARLICKI AND MARUSTE

We share the majority's general conclusion regarding the finding of a violation of Article 10 because of the disproportionate sentence imposed on the applicant. We are also in agreement with the main line of reasoning of that finding. However, we consider it important to emphasise that the freedom of expression in court pleadings has its specific nature and limitations or, in other words, it does not apply in full scale. Our departing point is that the defence lawyers on court pleadings do not represent (express) themselves – their own ego, emotions, ambitions or views – but rather their clients' interests. In exercising their freedom of expression in court proceedings, lawyers are limited by the best interests of their clients and also by the interests of justice. Just as the judges never represent their own interests. It is true that this idea has been in principle recognised in the Court's doctrine and expressed in judgments such as *Nikula v. Finland* (no. 31611/96, ECHR 2002-II), and was once again explained in paragraphs 173-75 of the judgment. Our purpose is just to stress it clearly once again.

It has been well established that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. But this general principle has its bounds in judicial proceedings. In court proceedings it has always to be kept in mind that the form – choice of pleadings, strategy and manner of presentation of arguments – is always essentially dependent upon the defendant's defence position, and only secondly upon lawyers' personal preferences, etc. The representation should never become an unlimited solo performance of the defence lawyer where the essence and the very purpose of the mission as well as other relevant interests could be left aside, and expressing personal interests takes precedence.

A proper defence should never lead to the detriment or harm of the client's interests and case. We recall that the impulsive personal reaction of the defence lawyer as well as the bench in this case ended with the client receiving ineffective representation. It also interrupted the smooth and proper conduct of the proceedings and so harmed the interests of justice. This has jeopardised not only the authority of the judiciary but also the authority and credibility of the Bar and its members as well as the judiciary. That is why we see this case as above all an Article 6 case and that is why we believe that its Article 10 aspects are of a secondary and subordinate nature only.

PARTLY DISSENTING OPINION OF JUDGE COSTA

(Translation)

1. Where identical facts entail a breach of several of the rights guaranteed in the European Convention on Human Rights, judges at the European Court often find themselves in a difficult position. Should the Court conclude that there have been multiple violations of the Convention, or should it restrict itself to what appear to be the core aspects? The Court's case-law does not provide an unequivocal response to this question; much depends on the particular circumstances of each case, and also on the subjective assessment of the judges, who may be more or less sensitive to a particular aspect of the case. There are also "mono-violationist" and "poly-violationist" judges.

2. This is perhaps even more valid where, having given rise to a judgment by a Chamber of seven judges, a case is referred, in accordance with Article 43 of the Convention, to a Grand Chamber of seventeen judges, which decides the case by means of a final judgment. The very few judges (two at the most) who, under Article 27 § 3 of the Convention, sit (and therefore vote) twice, occasionally find themselves in a disconcerting position. Must they adhere strictly to their initial opinion (which, moreover, is now only of historical value, since the Chamber judgment, as *res judicata*, is invalidated with retrospective effect)? Or must they, with the benefit of hindsight, depart from or even overturn their previous opinion? Here again, everything depends on the specific features of the case – and on each judge's greater or lesser degree of stubbornness (or ability to reconsider his or her previous conclusions); once again, this depends on individual cases, more perhaps than on individual temperaments.

3. I wish to explain my successive positions in *Kyprianou v. Cyprus*. The Chamber in which I sat held unanimously that there had been a threefold violation of Article 6, namely of paragraphs 1 (lack of impartiality of the court), 2 (breach of the principle of presumption of innocence) and 3 (a) (violation of the right to be informed in detail of the nature and cause of the accusation against oneself); the Chamber also held, again unanimously, that there was no need to examine separately the applicant's complaint under Article 10, which protects freedom of expression.

4. After reading the observations of the parties and third-party interveners before the Grand Chamber, and having (carefully) listened to the addresses at the hearing and to my colleagues' arguments during the deliberations, I have changed my mind in two ways with regard to my initial conclusions in this case.

5. Needless to say, I have not changed my opinion with regard to the finding of both objective and subjective bias on the part of the Assize Court, which instantaneously – or at any rate after two short breaks – prosecuted

the applicant for contempt of court, convicted him and imposed a sentence of five days' imprisonment. This is the kernel of the dispute brought before our Court, and I have no comment to make concerning the Grand Chamber's reasoning, to which I subscribe without difficulty. Indeed, the vote on this point was unanimous, even if interesting separate opinions have been expressed.

6. Nor have I abandoned my unambiguous conclusion that there has been a violation of the presumption of innocence. I consider this violation to be self-evident: the lawyer, Mr Kyprianou, was presumed guilty by the judges, who merely offered him the choice between a plea of mitigating circumstances or retraction of his statement. However, a court may be biased even where the accused is, at least formally, presumed innocent. The two complaints are not necessarily identical. Equally, the presumption of innocence may be breached at the pre-trial stage without the court subsequently being accused of bias (I am thinking, for example, of *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308). Admittedly, it is not unreasonable here to argue that the two violations have overlapped to a certain extent. Nonetheless, the presumption of innocence is, to my mind, such a fundamental principle of fairness that I cannot resign myself to seeing a violation of it subsumed or absorbed into the issue of the court's bias. I have therefore voted, once again, in favour of finding a breach of Article 6 § 2, this time against all my colleagues, who considered that a separate examination under this head was unnecessary.

7. In contrast, I have realised that the third violation of Article 6, namely of paragraph 3 (a), was not only a clear duplication, but did not even occur! On this point, and on this point alone, the respondent Government have convinced me. The case was prejudged (and this indeed is precisely what the Assize Court is criticised for) and, given that it was, how could a lawyer with forty years' experience not be aware of the accusation against him? I considered this complaint to be genuine and distinct; on reflection, I consider it artificial and pointless. Accordingly, I have voted with all the other Grand Chamber judges on this point.

8. There remains the question of freedom of expression. This is where I hesitated most. The core of the application concerns defence rights, the words spoken by a lawyer in the heat of the action while defending, before a court, a client accused of a serious crime, words which the judges held to be so insulting that they convicted him too readily. Freedom of expression is the backdrop to this case rather than the key issue, which explains the view expressed by the Chamber in paragraph 72 of its judgment. However, it is also one of the most important democratic values. I accept that it is desirable for the Court to affirm that the lawyer (*advocatus*) is also entitled to benefit from this freedom, especially when he or she contributes through his or her words to the rights of the defence. In this connection, I undoubtedly attached insufficient importance to the leading judgment *Nikula v. Finland*

(no. 31611/96, ECHR 2002-II), which has been cited several times by the Grand Chamber. In the end, I have willingly voted with my colleagues on this occasion in favour of finding a violation of Article 10.

9. I would therefore conclude that, in my opinion at least, the referral of this case to the Grand Chamber has not been a pointless formality; it has bolstered my views while enabling me to correct them: one can always do better (or in any event less badly...).