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

COURT (CHAMBER)

CASE OF FAYED v. THE UNITED KINGDOM

(Application no. 17101/90)

JUDGMENT

STRASBOURG

21 September 1990

In the case of Fayed v. the United Kingdom[*],

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

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr C. RUSSO,
Mr S.K. MARTENS,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Sir John FREELAND,
Mr L. WILDHABER,
Mr J. MAKARCZYK,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 March and 25 August 1994,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 July 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 17101/90) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) on 30 August 1990 by Mr Mohamed Al Fayed, Mr Ali Fayed and Mr Salah Fayed, who are Egyptian citizens, and by a company they owned, namely House of Fraser Holdings PLC.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 para. 1 and 13 (art. 6-1, art. 13) of the Convention.

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[*] Note by the Registrar. The case is numbered 28/1993/423/502. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

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

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 25 August 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Bernhardt, Mr L.-E. Pettiti, Mrs E. Palm, Mr A.N. Loizou, Mr F. Bigi, Mr L. Wildhaber and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr S.K. Martens, Mr R. Pekkanen and Mr C. Russo, substitute judges, replaced respectively Mr Pettiti, who had withdrawn, and Mr Bigi and Mrs Palm, who were prevented from taking further part in the consideration of the case (Rules 22 para. 1 and 24 paras. 1 to 3).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the Government's memorial on 10 January 1994 and the applicants' memorial on 24 January 1994, the applicants' supplementary memorial on 1 March 1994, the Government's supplementary observations on 16 March 1994, and the applicants' and the Government's comments on the claims for just satisfaction on 10 and 18 March respectively. In a letter received on 3 March 1994 the Secretary to the Commission had informed the Registrar that the Delegate did not wish to submit argument in writing.

5. On 5 October 1993 the British company, Lonrho PLC (see paragraphs 10 and following below) sought leave to submit written comments under Rule 37 para. 2. However, by letter received at the registry on 17 November 1993 the company withdrew its request.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 March 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mrs A.F. GLOVER, Legal Counsellor,
Foreign and Commonwealth Office, *Agent*,
Mr M. BAKER, QC,
Mr J. EADIE, Barrister-at-law, *Counsel*,
Mrs T. DUNSTAN, Department of Trade and Industry,
Mr R. BURNS, Department of Trade and Industry,
Mr J. GARDNER, Department of Trade and Industry, *Advisers*;

- for the Commission

Sir Basil HALL, *Delegate*;
- for the applicants
Lord Lester of HERNE HILL, QC,
Mr P. GOULDING, Barrister-at-law, *Counsel*,
Mr R. FLECK,
Ms L. HUTCHINSON, Solicitors,
Mr D. MARVIN, Attorney-at-law (Washington, DC, USA),
Mr R. WEBB, Legal Director,
House of Fraser Holdings PLC, *Advisers*.

The Court heard addresses by Sir Basil Hall, Mr Baker and Lord Lester, and also replies to questions put by the President.

On the day of the hearing and subsequently on 12 April 1994 the applicants produced to the Court a number of documents referred to in argument by Lord Lester.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The applicants

7. The three applicants, Mr Mohamed Al Fayed, Mr Ali Fayed and Mr Salah Fayed, are brothers. They are businessmen.

B. Takeover of the House of Fraser PLC

8. In March 1985 the applicants acquired ownership of the House of Fraser PLC ("HOF"), a public company, for about £600 million in cash. HOF was then, and is now, one of the largest groups of department stores in Europe and includes one particularly well-known London store, Harrods. The acquisition of HOF was effected through a public company called House of Fraser Holdings PLC ("HOFH"), which at all material times was owned by the applicants. HOFH had previously been known as the Al Fayed Investment Trust (UK) Limited and assumed its present name in December 1985.

9. Prior to the HOF takeover, in or about early November 1984, the applicants appointed public relations consultants. With the latter's assistance, the brothers and their direct advisers led the press to receive and present a positive picture of their origins, wealth, business interests and resources. Upon the basis of this picture, which they had a part in painting,

they enjoyed, for a time, an esteem or reputation which was highly valuable to them. Between 2 and 10 November 1984 the first applicant gave separate interviews to The Observer, The Sunday Telegraph and The Daily Mail. A further interview involving the brothers took place on 10 March 1985. In these interviews the brothers described a wealthy, distinguished and established family background. They gave a similar picture to their merchant banker, who accepted it and, acting on their behalf, conveyed that picture by a press release in November 1984 and in a television interview in early March 1985. There were other press interviews about the family background for which the applicants were responsible.

They thus took active steps to promote their own reputations in the public domain. The acceptance of the brothers by the City of London and by the Government was later considered to be crucial to an understanding of the events surrounding their takeover of HOF.

10. The takeover was vigorously but unsuccessfully opposed by Lonrho PLC ("Lonrho") and, in particular, its Chief Executive, Mr Rowland, a former business associate, turned rival, of the applicants.

From about 1981, if not earlier, it had been Lonrho's wish to acquire HOF. In December 1981, following a report from the Monopolies and Mergers Commission the Secretary of State for Trade and Industry ("the Secretary of State") had sought and obtained from Lonrho undertakings not to acquire or control any further shareholdings beyond its then level of 29.9% of HOF. Thereafter Lonrho had sought to be released from these undertakings.

In 1984 Lonrho had sold its share-holding in HOF to the applicants, but when those directors representing Lonrho's interests were obliged to resign from HOF's Board and the applicants bid to take over HOF completely, relations between Lonrho and the applicants deteriorated. Lonrho proceeded to launch an acrimonious campaign against the applicants. In opposing the applicants' bid for HOF, Lonrho had made submissions to Ministers concerning unfair competition and the undesirability of HOF falling into foreign hands. It was alleged that the applicants were fraudulently claiming that the funds for the acquisition were theirs personally. Lonrho asserted that the brothers were lying about their money and themselves and that they should not be permitted to acquire HOF without a thorough inquiry. However, the applicants' bid was cleared by the Department of Trade and Industry ("DTI") and accepted by the HOF Board. In March 1985 the Secretary of State decided, on the recommendation of the Director General of Fair Trading, not to refer the applicants' proposed acquisition to the Monopolies and Mergers Commission, as had been done in the case of the earlier bid by Lonrho. The decision of Government clearance was expressly described at the time by the DTI as having been influenced by the statements made and assurances given by and on behalf of the Fayed brothers about their bid. Lonrho nevertheless campaigned on through the

media and other publications, and in particular through The Observer, a newspaper it owned.

11. The applicants instructed their solicitors to threaten and, if necessary, institute libel proceedings if anything were published putting in doubt their claim to be the beneficial owners of the funds used to acquire HOF. This policy affected several publications, including The Observer. In almost every instance the threat of action led to the publication of a retraction. The applicants instituted three libel actions against The Observer in 1985 and 1986 for articles written about them. One central issue in these actions was the truth or not of The Observer's allegation that the funds used by the applicants in their takeover of HOF were not their own.

12. In March 1987 Lonrho commenced legal proceedings against the applicants and their bankers alleging wrongful interference with Lonrho's business, and conspiracy and negligence in connection with HOFH's acquisition of HOF. In particular, it was alleged that the applicants, by false statements about their financial capacity to acquire the share capital and develop HOF's business, had persuaded HOF's Board of Directors to accept their bid and had convinced the Secretary of State not to refer their bid to the Monopolies and Mergers Commission. It was claimed that the applicants had thereby tortiously interfered with Lonrho's right to bid for the shares or, alternatively, they had conspired against Lonrho.

Lonrho unsuccessfully sought leave to apply for judicial review of the Secretary of State's refusal to refer the applicants' acquisition of HOF to the Monopolies and Mergers Commission.

C. Appointment of the Inspectors and their investigation

13. On 9 April 1987, after two years of unrelenting pressure by Lonrho upon the Government, the Secretary of State appointed two Inspectors to investigate the affairs of HOFH and, in particular, the circumstances surrounding the acquisition of shares in HOF in 1984 and 1985. The appointment of the Inspectors was made by the Secretary of State under section 432 (2) of the Companies Act 1985 (see paragraph 36 below). They were told at the time of their appointment, and they so informed the applicants, that an area of particular concern to the Secretary of State was the validity of the assurances given by the applicants and their advisers in March 1985 (Inspectors' report, paragraphs 1.10, 23.1.9 and 26.19).

14. In their subsequent report the Inspectors described the applicants' takeover bid as being unusual, not least because it was a bid involving huge sums of money by three individuals and, since the offerers were individuals, the corporate balance sheets and other financial statements which are customary on such occasions were totally absent (Inspectors' report, paragraph 21.1.1). In order to establish what had occurred during the

takeover, they had been obliged to make findings on vigorously contested issues of fact (Inspectors' report, paragraph 1.7).

The principal questions they addressed when investigating the affairs of HOFH were listed in their report as follows:

> "(i) Were the Fayeds who they said they were, and if not who were they?
>
> (ii) Did they acquire HOF with their own unencumbered funds?
>
> (iii) Did they deliberately mislead, whether directly or indirectly, those who represented them to the authorities and the public?
>
> (iv) If so, did they seek to frustrate those who tried to establish the true facts, and if so how?
>
> (v) What steps did the Board of HOF and its advisers take before they gave the comfort that they appeared to give to those who relied on their words or actions?
>
> (vi) Were the authorities - the officials of the [Office of Fair Trading] and the DTI and, eventually, Ministers - or the public misled about the Fayeds? If so, how and why?"

(The Inspectors' report, paragraph 1.11)

The Inspectors also stated that, throughout their investigation, they were not concerned solely with simple questions relating to the direct control of the purchase money which was used to buy HOF. They were also concerned about the veracity of the statements which the applicants made, or which they allowed others to make on their behalf, which had the effect of influencing people to act favourably towards them (Inspectors' report, paragraph 1.12; and also chapter 9).

15. During the course of the investigation, the Inspectors identified matters upon which they wished to receive evidence. If any uncertainty or issue arose in relation to the provision of such evidence, these were discussed in the course of meetings or through correspondence between the Inspectors' staff and the applicants' solicitors. Thereafter, information was provided to the Inspectors by way of memoranda, together with copy documentation. In addition, the Inspectors received oral evidence by interviewing witnesses on oath. Mr Mohamed Al Fayed and Mr Ali Fayed were interviewed, in the presence of their lawyers, on 14 October 1987 and again on 8 and 9 March 1988. All proceedings were conducted in private. There was no opportunity for the applicants to confront or cross-examine witnesses, it being well-established as a matter of English law that the Inspectors were not obliged to afford such an opportunity to anyone.

16. It was agreed between the Inspectors and the applicants that, having assimilated the factual information supplied, the Inspectors would notify the applicants of the provisional conclusions they had reached and the material upon which they had relied in reaching such conclusions. The Inspectors

would then consider such submissions as the applicants might make in respect of these conclusions.

17. Respect for personal privacy was known to be a matter of especial concern to the applicants. The Inspectors' approach to matters of privacy and confidentiality is summed up in their report (at paragraphs 26.44 - 45) as follows:

> "[I]f private people incorporate a company, in which they become directors, and which makes public representations about their affairs, Inspectors who are appointed to investigate the truth of those representations must balance their concern to preserve the directors' privacy as far as practicable ... against their duty to do the job which they were appointed to perform.
>
> If the Fayeds had chosen to say nothing this might have created evidential difficulties for us. But because they wished us to make findings in their favour they brought witnesses to see us ... and gave us evidence about their private affairs which it was then our duty to test."

18. At the start of the investigation the applicants expressly accepted that the Inspectors were entitled to inquire into the accuracy of statements which had been made by them or on their behalf in late 1984 and early 1985. These were the statements at the heart of the investigation. Only at the very end of the investigation, when they were confronted by the Inspectors with "overwhelming evidence" that they had been telling lies, did they resile from that stance and challenge the Inspectors' entitlement to look into certain aspects of their private life (Inspectors' report, paragraph 26.28).

The Inspectors rejected the challenge and gave their reasons for so doing (see generally chapter 16 of the Inspectors' report). The Inspectors were entitled to seek confidential information from third parties, but before doing so they gave the applicants an opportunity to satisfy them as to the accuracy of the statements "in whatever manner was least obtrusive to their privacy" (Inspectors' report, paragraphs 16.2.5 and 16.6.2). The law did not permit them to compel the applicants to produce personal bank statements (which would have gone far to confirm or refute the accuracy of the statements) nor, save to a very limited extent, did the applicants consent to such production. The Inspectors considered that the applicants were in breach of their duty to give all the assistance which they were reasonably required to give. By virtue of section 436 of the 1985 Act the Inspectors could have certified this to a court, which could then have taken steps to sanction the applicants if, after hearing evidence, it was satisfied that they were in breach of their duty (see paragraph 38 below). The Inspectors were, however, of the opinion that they could complete their task without the need to resort to such a serious measure and chose to pursue the matter without making such a certificate. They made clear that if the applicants chose not to give evidence, they, the Inspectors, would be entitled to draw inferences from such failure.

19. In October 1987 and thereafter Lonrho publicly criticised the conduct of the investigation by the Inspectors and sought an additional two-month period in which to assemble and submit evidence to them. Through its lawyers, Lonrho argued that the rules of natural justice required the Inspectors to allow Lonrho access to the information the Inspectors had received from the applicants because Lonrho's commercial reputation would suffer if the Inspectors dismissed the complaints which it had made so publicly. The Inspectors dismissed Lonrho's application for access to the applicants' evidence, but permitted Lonrho to have a longer period in which to adduce evidence to them, relating primarily to the personal background of the applicants and their family. The applicants' solicitors in turn protested to the Inspectors vigorously about this latter decision. The written material provided to the Inspectors by Lonrho ran to thousands of pages. The Inspectors accepted that Lonrho and its directors had pursued their ends in a remarkably single-minded manner, and they described the applicants and Lonrho as "bitterly antagonistic parties" (Inspectors' report, paragraph 26.71).

D. The Inspectors' report and its follow-up, including consideration of criminal and civil proceedings

20. The Inspectors' provisional conclusions, which exceeded 500 pages of text and were, in large part, unfavourable to the applicants, were made available to the applicants on 12 April 1988. The Inspectors had previously made known to the applicants the gist of the adverse evidence received and the conclusions that they, the Inspectors, might be disposed to draw from that evidence.

Between 12 April and 17 June there was no significant response from the applicants. On the latter date the applicants' solicitors informed the Inspectors that they were not even in a position to discuss the procedural situation of the inquiry. The Inspectors told the applicants' solicitors on 20 June that by 15 July the Inspectors would consider that they had had ample time to respond to the provisional conclusions. On that date the applicants lodged detailed submissions running to 571 pages and containing a mixture of factual analysis and legal argument and, quite often, new evidence. The argument sought to limit the scope of the inquiry very drastically. The applicants' solicitors requested the Inspectors, as "the basic minimum which fairness required", to deal with certain questions raised and, if rejecting any of their principal submissions, to state reasons before issuing any report (Inspectors' report , paragraph 1.23 and chapter 17).

21. On 23 July 1988 the Inspectors delivered their report to the Secretary of State, in broadly the same terms as their provisional conclusions. They explained that they had not acceded to the applicants'

ultimate procedural request because they were of the view that otherwise the completion of their report might be indefinitely delayed:

> "It appeared to us that the appropriate course for us to take would be to consider the written submissions we had received and to express our views on them when we submitted our report to the Secretary of State. Our findings would not be dispositive of anything, we had given HOFH, HOF, the Fayeds and their advisers ample time to make their submissions, which they had chosen to make in this way at this extremely late stage and we considered that it was in the public interest that we should now complete our work and submit our report."

22. The Inspectors concluded that the applicants had dishonestly misrepresented their origins, their wealth, their business interests and their resources to the Secretary of State, the Office of Fair Trading, the press, the HOF Board and HOF shareholders and their own advisers; that during the course of their investigations, the Inspectors had received evidence from the applicants, under solemn affirmation and in written memoranda, which was false and which the applicants knew to be false; in addition, that the applicants had produced a set of documents they knew to be false; that this evidence related mainly, but not exclusively, to their background, their past business activities and the way in which they came to be in control of enormous funds in the autumn of 1984 and the spring of 1985 (see especially Inspectors' report, chapter 2). The Inspectors were satisfied that the main thrust of Lonrho's attack on the applicants was well founded on a sound basis of substantiated fact (Inspectors' report, paragraph 1.20).

However, the Inspectors did not reject the entirety of the applicants' evidence and praised part of their work. Thus the report included, for example, findings that "the departure of the Lonrho directors and their replacement by the Fayeds brought harmony to a board where previously discord had existed" (Inspectors' report, paragraph 6.6.9); and that "the Fayeds' considerable ability to identify assets with a potential for capital appreciation has undoubtedly been an important element in their business success" (Inspectors' report, paragraph 12.6.10). In the final chapter of the report the Inspectors made complimentary findings of fact and expressed favourable opinions about HOFH. They regarded the management of HOF since its acquisition as, subject to certain reservations, "law-abiding, proper and regular".

23. The Secretary of State passed the report to the Director of Public Prosecutions and the Director of the Serious Fraud Office. On 29 September 1988 the DTI announced that publication of the report would be delayed until the Serious Fraud Office had completed its investigations. In the summer of 1988 the Secretary of State also sent copies of the report to the Bank of England, the City Panel on Takeovers and Mergers (which is an integral part of the system of regulation of business in the United Kingdom), the Inland Revenue, the Office of Fair Trading and the Monopolies and Mergers Commission.

24. On 9 November 1988 the Secretary of State announced that, consistent with the advice of the Director General of Fair Trading, he had decided against the referral of HOFH's acquisition of HOF to the Monopolies and Mergers Commission, even though the Inspectors' report did disclose new material facts.

Also in November 1988 Lonrho made an application for judicial review of the Secretary of State's decisions (i) not to publish the report immediately and (ii) not to refer the acquisition to the Monopolies and Mergers Commission in the light of the report. In the context of these proceedings the Director of the Serious Fraud Office and the Director of Public Prosecutions submitted affidavits in December 1988 stating their opinion that publication of the report would prejudice the criminal investigation and run the risk of preventing a fair trial in the event of criminal proceedings subsequently being brought against the applicants. Lonrho's application was ultimately rejected by the House of Lords in May 1989.

25. On 30 March 1989 The Observer newspaper published a sixteen-page special midweek edition devoted solely to extracts from and comments on a leaked copy of the Inspectors' report. On the same day, Lonrho posted between 2,000 and 3,000 copies of the special edition to persons named on a mailing list to whom Lonrho had been regularly sending literature hostile to the applicants. The High Court immediately granted injunctions, on the applications of the Secretary of State and HOFH, restraining any further disclosure of the report or its contents.

26. During the course of a radio interview broadcast on 4 April 1989, the Secretary of State stated, prior to its publication, that the Inspectors' report "clearly disclosed wrongdoing". This gave rise to substantial press coverage.

27. On 1 March 1990 the Director of the Serious Fraud Office and the Director of Public Prosecutions announced that their inquiries into the matter were complete (see paragraph 23 above) and that they would not be taking further action. In a joint statement issued on that date they said:

> "The directors are now satisfied that all lines of inquiry have been pursued and that the evidence available is insufficient to afford a realistic prospect of conviction for any criminal offence relating to any matter of substance raised in the report."

The Attorney General expressed himself satisfied that the conclusion reached by the two directors was the correct one on the basis of the admissible and available evidence. On 12 March 1990 he stated to the House of Commons, in reply to a question (Hansard, House of Commons, 12 March 1990, column 14):

> "Whereas it was open to the Inspectors to take account of hearsay evidence if they thought that it was reliable - and of course it was open to them to reach the conclusion that they did - it would not have been open to a jury in a criminal case to convict upon evidence of the same character. The Inspectors are entitled to take account of evidence

covering a wider scope than that available in criminal proceedings in an English court ... Inquiries were pursued in every part of the world indicated by the Inspectors' report, but the [Director of the Serious Fraud Office and the Director of Public Prosecutions] had to conclude, as they said in their joint statement issued on 1 March, that there was insufficient evidence available for use in an English court in English criminal proceedings on any matter of substance raised in the Inspectors' report to warrant the bringing of criminal proceedings."

E. Publication of the Inspectors' report

28. On 1 March 1990 the Secretary of State had announced his intention to publish the report on 7 March 1990. It is general policy to publish reports on public companies, of which HOFH was one (see paragraph 41 below). In addition the Government considered that in the particular case there were specific grounds of general public interest justifying publication. In their pleadings before the Commission they described these grounds as follows:

"There had been a complex and lengthy investigation, and the public were entitled to learn the result of that investigation unless there were compelling reasons why they should not. There were important lessons to be learnt by those involved in takeovers from studying the report. ... The report contained a recommendation that certain features of part XIV of the 1985 Act (which deals with the investigation of companies and their affairs) deserved to be reconsidered in the light of difficulties encountered by the Inspectors ... It was appropriate to acknowledge that the Secretary of State, the [Office of Fair Trading], the DTI, certain journalists and sections of the press, the Board of HOF, the regulatory authorities, and the applicants' professional advisers had been misled by the applicants. Lonrho considered that its interests and reputation had been seriously and adversely affected by the preparedness of the Secretary of State to allow the HOFH bid to go forward in March 1985 without a reference to the [Monopolies and Mergers Commission]. Lonrho would have had a legitimate grievance if the explanation for this was suppressed without compelling reasons. There was a need to dispel continuing speculation as to the events which had given rise to the investigation. Rumours and speculation were rife. Publication of the report would provide employees and creditors with information concerning the way in which HOF and Harrods had been run and might be expected to be run in future. (The Inspectors were largely prepared to accept the sincerity of the brothers' assurances for the future.) The brothers had been prepared before the Inspectors to attempt to discredit Lonrho, Mr Rowland, The Observer, its editor and others. It was deemed to be in the public interest to publicise both the fact that these attempts had been made and the conclusion of the Inspectors that they were ill-founded."

29. On 2 March 1990, the applicants were provided with pre-publication copies of the report in confidence, in order to enable them to consider their position.

Throughout the period between submission of the report to the Secretary of State in July 1988 and its publication on 7 March 1990 the applicants' solicitors had adopted, in extensive correspondence with the DTI and the Treasury Solicitor, the position that judicial review or other court proceedings were likely to be taken, on the basis, inter alia, that the Inspectors' report did not constitute a valid report under the Companies Act

1985 because of the scope of the investigation and alleged procedural unfairness (including departures from what the applicants alleged was an agreed procedure). By letter dated 1 March 1990 the DTI undertook that if the applicants were to apply for judicial review to challenge the validity of the report, publication would be held up pending the final determination by the courts of their application. In the event no such proceedings were commenced. According to the applicants, the possibility of applying for judicial review to prevent publication was kept under consideration by them and their advisers, but the unanimous view at all stages was that such proceedings were almost inevitably bound to fail.

30. On 7 March 1990, the day the report was published, the Secretary of State stated to the House of Commons (Hansard, House of Commons, 7 March 1990, column 873):

> "I should explain to the House that in this matter I have three main responsibilities as Secretary of State: first, to decide whether to publish the report. This I have now done as soon as possible after I was informed by the prosecution authorities that they had withdrawn their objection to publication. Second, I had to consider whether to apply to the court to disqualify any director under section 8 of the Company Directors Disqualification Act 1986. I have concluded that it would not be in the public interest to do so. Anyone who reads the report can decide for themselves what they think of the conduct of those involved. Third, I also have responsibility for decisions on whether to refer mergers to the Monopolies and Mergers Commission. That responsibility was fully discharged by my predecessor. He had six months from July 1988 in which to consider the findings of the Inspectors' report and to decide whether to refer the matter. He concluded in November 1988 that a reference to the Monopolies and Mergers Commission would not be appropriate ...
>
> No other matters require action from me. I have passed the report to all those authorities concerned with enforcement and regulation so that they may consider whether to take action under their various powers."

The Secretary of State considered that the publication of the report and the ensuing publicity would enable people who might have dealings with the applicants in their capacity as directors to judge whether their interests were likely to be at risk from the type of conduct described in the report (ibid., column 878).

31. The Secretary of State also publicly expressed his own view as to the correctness of the Inspectors' findings. On 28 March 1990 he told a Parliamentary Select Committee (House of Commons Trade and Industry Committee report on company investigations, 2 May 1990, HC 36, Annex 6, p. 183, paras. 938, 940A):

> "... the allegations in the report have not been substantiated in a court of law. We can all take our view about them and I think that the balance of probability is extremely strong that they are accurate, but there is no proof of this.
>
> ...

I am not required to say that every fact and opinion in the report is true. These were outside Inspectors who were appointed to look into these matters, and they published their report. I have no means of checking it word for word. I myself and I think most people are inclined to believe that the events revealed are correct, but we have no proof - that is all I am saying.

...

[Question:] It appears that [the applicants] even told a succession of lies to the Inspectors themselves, who were then investigating the lies they had already told. Is that right?

[Secretary of State:] It so appears."

The Select Committee accepted the Inspectors' findings as authoritative, referring in its subsequent report to the "misinformation concerning the financial status of the Fayed brothers" recounted in the Inspectors' report (Trade and Industry Committee report, loc. cit., p. xxvi, para. 126).

32. On the day of the publication of the report the applicants issued a press communiqué through HOFH commenting on, inter alia, the contents of the report and the conduct of the Inspectors. Part of this press release read as follows:

"It is appalling to discover that two people in such a position could have gone so badly off the rails in the conduct of this investigation.

...

The Inspectors misled us.

They misled our lawyers. Indeed they were not even honest with them.

They demonstrated prejudice towards us and they did not treat us even-handedly.

They reneged on their agreements with us.

They have employed language which has no place in such a document.

They have reached conclusions which they do not support with facts.

They have dishonoured themselves and the whole procedure of Department of Trade inquiries.

These Inspectors went far beyond their legal powers, enquiring into matters that were no legitimate concern to them.

They completely disregarded the principles of natural justice. In simple terms they did not give us a fair hearing. They reversed the burden of proof in a denial of the basic tenet of British justice. They have held us to be guilty, unless proven innocent."

33. On 28 March 1990, in the course of a debate in the House of Lords, the Minister of State for Trade and Industry stated (Hansard, House of Lords, 28 March 1990, columns 946-47):

> "Although the Inspectors concluded that the Fayeds lied to the competition authorities at the time of the merger - I have no reason to believe that they were wrong, but it is for individuals to make up their own minds once they have read the report - the Inspectors did not criticise the Fayeds for the way they were running the House of Fraser which they already owned and which cannot be taken away from them. In these circumstances, [the Secretary of State] considered that publication of the report, which would allow people to judge for themselves whether they wished to do business with the Fayeds, would be a severe blow to their reputation, as indeed I think it has proved."

F. Aftermath of publication

34. The report and its findings were widely reported on television, radio and in the national press. The applicants claimed that it very seriously damaged their personal and commercial reputations as the Minister had predicted.

In August 1990 they abandoned their libel actions against The Observer newspaper and paid the latter's £500,000 legal costs. At the time the Court of Appeal was about to hear an appeal brought by the applicants on a preliminary procedural question. Failure in this appeal would have had the consequence of obliging the applicants to disclose a number of crucial documents bearing on the issue of the possible financing of the acquisition of HOF by third-party funds. According to the applicants, they discontinued the libel actions as a result of legal advice that publication of the Inspectors' report had deprived them of any effective remedy (see paragraph 11 above).

One month after the publication of the report the Bank of England served notice of restrictions on Harrods Bank Ltd in relation to the applicants' positions within that company. The Parliamentary Select Committee considered that the Secretary of State had not taken sufficient action against the applicants (Trade and Industry Committee report on company investigations, loc. cit., pp. xxv-xxvii, paras. 118-40). The City Takeover Panel subsequently disciplined the applicants, in reliance on the report. As the Takeover Panel made clear, it did not seek to conduct its own investigation into the facts, but relied on the Inspectors' report. The penalty imposed was public censure.

35. Lonrho persisted with its attacks. In May 1990 it applied for judicial review of the Secretary of State's refusal to apply to the High Court for an order disqualifying the three applicants as directors. This application was dismissed on 21 October 1991.

In October 1993 it was announced that a settlement had been negotiated between the applicant brothers and Lonrho, the terms of which included the discontinuance of all proceedings between the two parties.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Basis and scope of a section 432 (2) investigation

36. The investigation of HOFH was conducted under section 432 (2) of the Companies Act 1985 in relation to the circumstances surrounding the acquisition of shares in HOF in 1984 and 1985. Section 432 (2) empowers the Secretary of State to appoint Inspectors to investigate the affairs of a company and to report on them in such manner as he directs if it appears to him that there are circumstances suggesting wrongdoing, within the categories of wrongdoing defined as follows:

> "(a) that the company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or otherwise for a fraudulent or unlawful purpose, or in a manner which is unfairly prejudicial to some part of its members, or
>
> (b) that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that the company was formed for any fraudulent or unlawful purpose, or
>
> (c) that persons concerned with the company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members, or
>
> (d) that the company's members have not been given all the information with respect to its affairs which they might reasonably expect."

37. The Secretary of State is under no statutory obligation to disclose to the company concerned the reasons for the appointment of Inspectors to investigate its affairs (Norwest Holst Limited v. Secretary of State [1978] 3 Weekly Law Reports 73 (Court of Appeal)); nor does he generally do so. In the present case, when requested by the House of Lords to do so in the course of Lonrho's judicial review applications, counsel for the Government stated that the Secretary of State had acted under section 432 (2) (a) in appointing the Inspectors.

B. Inspectors' powers to obtain information

38. Section 434 confers wide powers upon the Inspectors to obtain information, if necessary by compulsion, from officers and agents of the company whose affairs are being investigated. An answer given by a person

to a question put to him in exercise of powers conferred by section 434 may be used in evidence against him (section 434 (5)). Under section 436 obstruction of the Inspectors may be certified by them to a court, which may, after enquiry, treat it as a contempt of court punishable by imprisonment or fine.

C. Inspectors' duty to act fairly

39. The Inspectors are bound by the rules of natural justice; they have a duty to act fairly and to give anyone whom they propose to criticise in their report a fair opportunity to answer what is alleged against them (In re Pergamon Press Ltd [1971] 1 Chancery 388 (Court of Appeal)). The Inspectors in the present case accepted as applicable to them the principle of natural justice whereby a person exercising an investigatory jurisdiction must base his or her findings on material having probative value (Inspectors' report, paragraphs 26.23 and 26.25 - citing Mahon v. Air New Zealand [1985] Appeal Cases 808 (Privy Council), at pp. 820-21).

However, proceedings before the Inspectors are administrative in form, not judicial; the Inspectors are not a court of law and they are masters of their own procedure (In re Pergamon Press Ltd, loc. cit., pp. 399-400, per Lord Denning MR; pp. 406-07, per Buckley LJ). Except for the duty to act fairly, Inspectors are not subject to any set rules or procedures and are free to act at their own discretion. There is no right for a person who is at risk of being criticised by the Inspectors to cross-examine witnesses (ibid., p. 400B, per Lord Denning MR). It is not necessary for the Inspectors to put their tentative conclusions to the witnesses in order to give them a chance to refute them. It is sufficient in law for the Inspectors to put to the witnesses what has been said against them by other persons or in documents to enable them to deal with those criticisms in the course of the investigation (Maxwell v. Department of Trade and Industry [1974] 1 Queen's Bench 523 (Court of Appeal)).

D. Publication of the report of an investigation

40. The Secretary of State is empowered by section 437 (3) (c) to decide whether or not to print and publish the Inspectors' report. Although he has a very wide discretion in deciding whether or not to publish the whole report, he is precluded by section 437 (3) (c) from deciding to publish only parts or a synopsis of it.

Publication may be deferred if there is a possibility that criminal proceedings may be taken, in order to avoid the possibility of prejudice to such proceedings.

41. The question whether an Inspector's report should be published is considered in each case on its merits. The DTI's general policy is to publish

reports on public companies wherever possible, as being matters of public interest.

Members of a limited company are in a privileged legal position because their liability is limited. In view of this privilege, where the Secretary of State has decided that the affairs of a large public company should be investigated under the provisions of section 432 of the 1985 Act, because he is satisfied that the circumstances are of sufficient concern to warrant the substantial cost of an inspection, it is important that the Inspectors' report explaining the underlying facts and the conclusions that they draw from them should be made public unless there are overriding reasons to the contrary.

E. Inspectors' liability in defamation

42. The defence of privilege or immunity in defamation cases rests upon the idea that conduct which would otherwise be actionable escapes liability because the defendant is acting in furtherance of some interest of social importance which is entitled to protection, even at the expense of uncompensated harm to the plaintiff's reputation. If the interest is one of paramount importance, considerations of policy may require that the defendant's immunity for false statements be absolute, without regard to his purpose or motive or the reasonableness of his conduct. Such is the nature of the absolute protection afforded to judicial and parliamentary proceedings. Also on grounds of public policy, a defence of qualified privilege may lie when the publication is made by a person in good faith and in the discharge of some public or private duty. The condition attached to qualified privilege is that it must be exercised in a reasonable manner and for a proper purpose. A publisher with malicious intent would lose the defence of qualified privilege.

43. In re Pergamon Press Ltd (loc. cit., at p. 400G) Lord Denning MR stated:

> "Inspectors should make their report with courage and frankness, keeping nothing back. The public interest demands it. They need have no fear because their report, so far as I can judge, is protected by an absolute privilege ..."

Even if, contrary to Lord Denning's observation, the Inspectors' report is subject to a qualified rather than an absolute privilege, neither the Inspectors nor the Secretary of State could be successfully sued for defamation in publishing the report, except upon proof of express malice (that is, the desire to injure as the dominant motive for the defamatory publication: see Horrocks v. Lowe [1975] Appeal Cases 135 (House of Lords), at p. 149, per Lord Diplock).

F. Judicial review

44. The grounds on which administrative action (such as the Secretary of State's decision to publish the report) is subject to judicial control are the three traditional grounds of judicial review described by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service ([1985] Appeal Cases 375 (House of Lords), at pp. 410-11). These grounds are illegality, irrationality and procedural impropriety.

"Illegality" means that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

"Irrationality", or what is often also referred to as "Wednesbury unreasonableness" (see Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1947] 1 King's Bench 223 (Court of Appeal)), applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. "'Irrationality' or 'Wednesbury unreasonableness' is a narrowly restricted ground of judicial review of an administrative decision. Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely" (per Lord Brightman, in R. v. Hillingdon LBC, ex parte Puhlhofer [1986] Appeal Cases 484 (House of Lords), p. 528).

"Procedural impropriety" covers failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision, as well as failure to observe procedural rules that are expressly laid down even where such failure does not involve any denial of natural justice.

45. Judicial review would, for example, provide a remedy if Inspectors under the Companies Act were prejudiced or biased against the subjects of their report (Franklin v. Minister of Town and County Planning [1948] Appeal Cases 87 (House of Lords)); or if the Inspectors reached conclusions which there were no facts to support, or took into account irrelevant considerations, or failed to take account of relevant considerations, or reached conclusions which no reasonable person in their position could have reached (the Wednesbury case, loc. cit.); or if their findings have not been properly based on material which has probative value (Mahon v. Air New Zealand, loc. cit.); or if the Inspectors were dishonest or acted in bad faith (the Wednesbury case, loc. cit.); or if the Inspectors acted ultra vires or beyond their legal powers (the Wednesbury case, loc. cit.); or if the Inspectors acted against the legitimate expectations of those concerned

(Council of Civil Service Unions v. Minister for the Civil Service, loc. cit.); or if the Inspectors acted contrary to the rules of natural justice (Wiseman v. Borneman [1971] Appeal Cases 297 (House of Lords)); or if the Inspectors acted unfairly (In re Pergamon Press, loc. cit.; Maxwell v. Department of Trade, loc. cit.; R. v. Panel on Takeovers and Mergers, ex parte Guinness PLC [1990] 1 Queen's Bench 146 (Court of Appeal)).

However, a mistake of fact could not form the basis of a challenge to an administrative decision by the Inspectors or the Secretary of State unless the fact was a condition precedent to an exercise of jurisdiction, or the fact was the only evidential basis for a decision, or the fact was as to a matter which expressly or impliedly had to be taken into account (R. v. London Residuary Body, ex parte Inner London Education Authority, Times Law Reports, 24 July 1987 (Divisional Court)).

PROCEEDINGS BEFORE THE COMMISSION

46. The three applicant brothers and the company HOFH lodged an application (no. 17101/90) with the Commission on 30 August 1990.

The applicants contended that, in violation of Article 6 para. 1 (art. 6-1) of the Convention, the Inspectors' report had determined their civil right to honour and reputation and denied them effective access to a court in determination of this civil right. They further alleged a denial of effective domestic remedies to challenge the findings of the Inspectors, contrary to both Article 6 para. 1 and Article 13 (art. 6-1, art. 13) of the Convention.

In addition, they claimed that the making and publication of the Inspectors' report had determined criminal charges against them and violated the presumption of innocence, in breach of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2); and had unjustifiably interfered with their honour and reputation, protected as part of their right to respect for private life under Article 8 (art. 8) of the Convention, and with the peaceful enjoyment of their possessions as guaranteed under Article 1 of Protocol No. 1 (P1-1).

47. On 15 May 1992 the Commission declared admissible the complaint of the three applicant brothers under the "civil" branch of Article 6 para. 1 (art. 6-1) of the Convention, both on its own and in relation to Article 13 (art. 13) of the Convention. The remainder of the application, including the grievance of the fourth applicant company, was declared inadmissible.

48. In its report of 7 April 1993 (Article 31) (art. 31) the Commission expressed the opinion that there had been no violation of Article 6 para. 1 (art. 6-1), either as regards the making and publication of the Inspectors' report (twelve votes to one) or as regards the applicant brothers' access to court whether for proceeding against the Inspectors and the Secretary of State (ten votes to three) or for proceeding against others (twelve votes to

one). The Commission further concluded (unanimously) that no separate issue arose under Article 13 (art. 13).

The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

49. At the public hearing on 23 March 1994 the Government maintained in substance the concluding submission set out in their memorial, whereby they invited the Court to hold

> "(1) that the application is inadmissible because of failure by the applicants to exhaust domestic remedies;
>
> (2) alternatively, (a) that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention and (b) that there has been no violation of Article 13 (art. 13) of the Convention or that no separate issue arises for examination under Article 13 (art. 13)".

50. On the same occasion the applicants likewise maintained in substance the conclusions formulated at the close of their memorial, whereby they requested the Court

> "to decide and declare that they are the victims of breaches of Article 6 (art. 6), and to afford just satisfaction to them under Article 50 (art. 50) of the Convention".

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

51. The Government submitted that the applicants had failed to exhaust their domestic remedies in a number of respects. The Delegate of the Commission explained at the hearing that this plea, although not adverted to in the admissibility decision of 15 May 1992 because the Commission assumed that it had not been maintained, had been raised before the Commission at the appropriate time. The Court therefore has jurisdiction to entertain it (see the Artico v. Italy judgment of 13 May 1980, Series A no. 37, pp. 12-13, paras. 24 and 27).

52. According to the Government, the applicants failed to exhaust their domestic remedies (a) by not having applied for judicial review either of the

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* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 294-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

Inspectors' conduct of the inquiry or of their decision to submit their report to the Secretary of State; (b) by not having applied for judicial review of the Secretary of State's decision to publish the Inspectors' report; and (c) by not having pursued the libel proceedings commenced against The Observer newspaper.

53. The grounds on which judicial review may be sought (see paragraphs 44 and 45 above) are such that it would not have ensured access to a court for determination of the truth of statements made about the applicants in the Inspectors' report, the absence of such access being the essence of their complaints under the Convention. Nor would the libel actions against The Observer, although to some extent concerned with the same subject-matter (see paragraph 11 above), have provided a remedy against the Inspectors or the Secretary of State as regards the publication of the damaging statements contained in the Inspectors' report.

The Court therefore agrees with the Delegate of the Commission and the applicants that the plea of non-exhaustion of domestic remedies has not been made out by the Government.

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

54. The applicants contended that the Inspectors' investigation and, above all, the publication of the Inspectors' report gave rise to a violation of Article 6 para. 1 (art. 6-1), which, in so far as relevant, provides:

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

In their submission, the making and the subsequent publication of the Inspectors' report in its entirety seriously damaged their reputations, thereby determining their civil right to honour and reputation, and the state of English law was such that they were denied effective access to the courts to challenge the resultant interference with that civil right.

This contention was accepted neither by the Government nor by the majority of the Commission.

A. Investigation by the Inspectors

55. The first stage of the applicants' argument, which was disputed by the Government and not accepted by the Commission, was that Article 6 para. 1 (art. 6-1) was applicable to the investigation by the Inspectors.

56. In order for an individual to be entitled to a hearing before a tribunal, there must exist a "dispute" ("contestation") over one of his or her civil rights or obligations. It follows, so the Court's case-law has explained, that the result of the proceedings in question must be directly decisive for

such a right or obligation, mere tenuous connections or remote consequences not being sufficient to bring Article 6 para. 1 (art. 6-1) into play (see, inter alia, the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, pp. 20-22, paras. 44-50).

57. The applicants claimed to identify three different disputes (contestations) arising in and during the investigation by the Inspectors: firstly, the dispute between the applicants and Lonrho, which the applicants described as giving rise to and forming the subject-matter of the proceedings conducted by the Inspectors; secondly, a dispute between the applicants and the Inspectors, in that the applicants had contested the Inspectors' actions in investigating their honesty and then arriving at conclusions in this regard; and, thirdly, a dispute between the applicants and the Secretary of State, in that, notwithstanding their opposition, the Secretary of State had initially considered there to be circumstances suggesting dishonest conduct by them, and had thereafter adopted the contents of the Inspectors' report, so they asserted, and decided to publish it.

In the applicants' submission, one of the objects of the inquiry by the Inspectors was to make findings as to whether the applicants were guilty of misconduct and the central conclusion of the report was that the applicants had dishonestly misled the authorities. Even though the Inspectors' role may in theory have been investigative, the manner in which they performed their functions in the present case was in fact determinative. The Inspectors' report, published to the world at large, had the force of a judgment convicting the applicants of dishonesty. The result of the inquiry was thus directly decisive for the applicants' civil right to a good reputation. In short, so they argued, the Inspectors' report effectively "determined" their civil right to reputation without any of the procedural guarantees of Article 6 para. 1 (art. 6-1) being respected.

58. Having regard to the cases of Golder v. the United Kingdom (judgment of 21 February 1975, Series A no. 18, p. 13, para. 27) and Helmers v. Sweden (judgment of 29 October 1991, Series A no. 212-A, p. 14, para. 27), the respondent Government did not dispute the existence and "civil" character of the right under English law to a good reputation.

However, they submitted that neither the investigation by the Inspectors nor the publication of the report "determined" the applicants' civil right to a good reputation or, indeed, any right at all. The principal purpose of the investigation and report of the Inspectors, they maintained, was to acquire, marshal and set down factual information which would enable the various competent authorities - such as the Director General of Fair Trading, the prosecuting authorities, the Bank of England, the Takeover Panel and the Secretary of State (see paragraphs 23, 27, 30 and 34 above) - to decide what action, if any, to take. Four further purposes also existed, none of which, however, included ascertaining whether the applicants merited their good reputation. These additional purposes were dispelling public speculation

about the events surrounding the takeover, enabling those concerned in takeovers to learn lessons, laying the foundations for reform of company law and practice, and providing information to HOF's employees, shareholders and creditors.

59. The Commission, after analysing the purposes served by the preparation and publication of the Inspectors' report, came to the conclusion that the Inspectors had an "investigative rather than determinative" role (paragraph 64 of the Commission's report). The Commission was therefore of the opinion that Article 6 para. 1 (art. 6-1) was not applicable to the proceedings conducted by Inspectors because those proceedings did not determine any civil right or obligation of the applicants.

60. The Court notes that under the terms of section 432 (2) of the Companies Act 1985 Inspectors can only be appointed if it appears to the Secretary of State that there are circumstances suggesting one or more types of specified wrongdoing or unlawful action in the conduct of a company's affairs (see paragraph 36 above). The Act confers on the Inspectors wide powers to obtain information and obstruction of the Inspectors may, upon reference by them to a court, be treated by it as a contempt of court and punished accordingly (sections 434 and 436 of the Act - see paragraph 38 above). The principal question addressed by the Inspectors in the instant case can be reduced to whether the Fayed brothers had dishonestly misled the authorities and the public in order to obtain Government clearance and acceptance by the HOF Board of their bid (see paragraphs 13 and 14 above). The Inspectors' published findings - that the applicants had indeed made dishonest representations concerning their origins, their wealth, their business interests and their resources and had thereafter knowingly submitted false evidence to the Inspectors (see paragraph 22 above) - undoubtedly damaged the applicants' reputations. The competent Ministers and a Parliamentary Select Committee - quite apart, it can be supposed, from a substantial section of public opinion - showed a disposition to accept as correct these findings, publication of which was seen as a kind of sanction (see paragraphs 26, 30, 31, 33 and 34 above).

Such elements or consequences are, it is true, not infrequently found in the context of adjudicatory proceedings.

61. However, the Court is satisfied that the functions performed by the Inspectors were, in practice as well as in theory, essentially investigative (see the similar analysis by the Supreme Court of the United States of America of the function of the Federal Civil Rights Commission in the case of Hannah v. Larche (363 US 420 (1960)). The Inspectors did not adjudicate, either in form or in substance. They themselves said in their report that their findings would not be dispositive of anything (see paragraph 21 above). They did not make a legal determination as to criminal or civil liability concerning the Fayed brothers, and in particular concerning the latter's civil right to honour and reputation. The purpose of their inquiry

was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities - prosecuting, regulatory, disciplinary or even legislative.

Lonrho admittedly exhibited a clear interest in the inquiry and its outcome, by being instrumental in bringing about the appointment of the Inspectors, by submitting evidence and by seeking to prompt action by the Secretary of State (see paragraphs 12 in fine, 13, 19, 24, 25 and 35 above). The Inspectors described Lonrho and the Fayed brothers as "bitterly antagonistic parties" (see paragraph 19 in fine above). Nonetheless, whilst there was a close connection between Lonrho's grievance against the Fayed brothers and the matters investigated by the Inspectors (see, inter alia, paragraphs 10-13 and 22 above), the object of the proceedings before the Inspectors was not to resolve any dispute (contestation) between Lonrho and the applicants. Those disputes, and in particular the applicants' libel claims that Lonrho, through The Observer, had wrongfully damaged their reputations, were being adjudicated by the ordinary courts (see paragraphs 11 and 12 above). Likewise, no dispute (contestation) between the Secretary of State or the Inspectors and the applicants as to the lawfulness of any alleged interference with the applicants' right to reputation arose merely because the applicants contested the grounds on which the Minister decided to appoint the Inspectors and on which the Inspectors conducted their lines of inquiry.

In short, it cannot be said that the Inspectors' inquiry "determined" the applicants' civil right to a good reputation, for the purposes of Article 6 para. 1 (art. 6-1), or that its result was directly decisive for that right.

62. Acceptance of the applicants' argument would entail that a body carrying out preparatory investigations at the instance of regulatory or other authorities should always be subject to the guarantees of a judicial procedure set forth in Article 6 para. 1 (art. 6-1) by reason of the fact that publication of its findings is liable to damage the reputation of the individuals whose conduct is being investigated. Such an interpretation of Article 6 para. 1 (art. 6-1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities. In the Court's view, investigative proceedings of the kind in issue in the present case fall outside the ambit and intendment of Article 6 para. 1 (art. 6-1).

63. The Court accordingly concludes that the investigation by the Inspectors was not such as to attract the application of Article 6 para. 1 (art. 6-1).

B. Proceedings to contest the Inspectors' findings

64. The Inspectors' report, published to the world at large, contained statements damaging to the applicants' reputations.

The applicants argued that English law denied them their entitlement under Article 6 para. 1 (art. 6-1) to access to a court to have determined whether there was any justification for this attack on their reputations. In particular, they stated, there was no opportunity under English law, whether by way of defamation proceedings or by way of judicial review, to challenge the Inspectors' condemnatory findings of fact or conclusions before a tribunal satisfying the requirements of Article 6 para. 1 (art. 6-1).

1. Relevant principles

65. In the words of the Court's Golder judgment, "... Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article (art. 6-1) embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only" (loc. cit., p. 18, para. 36). This right to a court "extends only to 'contestations' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law; [Article 6 para. 1] (art. 6-1) does not in itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States" (see, inter alia, the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, pp. 46-47, para. 81; and the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p.16, para. 36).

Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6 para. 1 (art. 6-1) may have a degree of applicability. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6 para. 1 (art. 6-1) a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 para. 1 (art. 6-1) - namely that civil claims must be capable of being submitted to a judge for adjudication - if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (see the Commission's admissibility decision of 9 October 1984 on application no. 10475/83, Dyer v. the United Kingdom, Decisions and Reports 39, pp. 246-66 at pp. 251-52).

The relevant principles have been stated by the Court as follows:

> "(a) The right of access to the courts secured by Article 6 para. 1 (art. 6-1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access 'by its very nature calls for regulation by the State, regulation which

may vary in time and in place according to the needs and resources of the community and of individuals'.

(b) In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

(c) Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

(Lithgow and Others v. the United Kingdom judgment of 8 July 1986, Series A no. 102, p. 71, para. 194, citing the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, pp. 24-25, para. 57)

These principles reflect the process, inherent in the Court's task under the Convention, of striking a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, inter alia, the Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, p. 26, para. 69).

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

66. In the Government's submission, the defence of privilege delimited the very content of the applicants' right to a good reputation as protected under English law. They maintained that, unlike procedural barriers to access to court, such an exercise by the State of the power to fix the content of a particular civil right did not bring into play Article 6 para. 1 (art. 6-1), although it might on occasions raise an issue in relation to one or other of the substantive rights protected by the Convention (such as the right to respect for private life under Article 8) (art. 8). In the circumstances, they concluded, the applicants had no actionable claim to a civil right under English law so as to attract the application of Article 6 para. 1 (art. 6-1).

The Commission and the applicants, on the other hand, considered that the defence amounted to a limitation on the right to bring defamation proceedings and, as such, a restriction on effective access to court.

67. It is not always an easy matter to trace the dividing line between procedural and substantive limitations of a given entitlement under domestic law. It may sometimes be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy.

In the present case the Court does not consider it necessary to settle the question of the precise nature of the defence of privilege for the purposes of Article 6 para. 1 (art. 6-1), since it is devoid of significance in the particular circumstances. If the Court were to treat the facts underlying the complaints declared admissible by the Commission as raising a substantive, rather than

a procedural, complaint going to the right to respect for private life under Article 8 (art. 8) of the Convention - as it has jurisdiction to do (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, pp. 19-20, para. 41) -, the same central issues of legitimate aim and proportionality as under Article 6 para. 1 (art. 6-1) would be posed.

The Court therefore proposes to proceed on the basis that Article 6 para. 1 (art. 6-1) is applicable to the facts of the case, the argument before the Court having been directed solely to this Article.

68. On this approach, it has to be ascertained whether the contested limitation on the applicants' ability to take legal proceedings to challenge the findings and conclusions in the Inspectors' report which were damaging to their reputations satisfied the conditions stated in the Court's case-law.

3. Legitimacy of the aims pursued by the contested limitation

69. The legitimacy of the limitation complained of cannot be divorced from its context, namely the system of investigation and reporting under the Companies Act 1985.

The underlying aim of this system is clearly the furtherance of the public interest in the proper conduct of the affairs of public companies whose owners benefit from limited liability. Considerations of public interest dictate both the appointment of Inspectors and the publication or not of their report (see paragraphs 36, 40 and 41 above). The system contributes to safeguarding the interests of the various parties concerned in the affairs of public companies such as investors, shareholders, especially small shareholders, creditors, customers, trading partners and employees, as well as ensuring the overall soundness and credibility of the country's company law structures. In the words of the Commission's report (at paragraph 64), "it is ... necessary in a democratic society that governments exercise supervisory controls over large commercial activities in order to ensure good management practices and the transparency of honest dealings".

As regards the particular facts complained of by the applicant brothers, the Court accepts as accurate the Government's analysis of the purposes served by the making and publication of the Inspectors' report (see paragraphs 28 and 58 above - see also paragraphs 13, 14 and 30 above as regards the particular facts).

The investigation into the affairs of HOFH and the publication of the resultant report in themselves therefore pursued legitimate aims.

70. As to the contested limitation on the ability to take legal proceedings, it was common ground that any defamation action brought by the applicants against the Inspectors or the Secretary of State would have been successfully met with a defence of privilege, be it absolute or qualified (see paragraphs 42 and 43 above). The rationale of this defence is that statements which harm an individual's reputation and which would otherwise give rise to liability should benefit from total or partial immunity

because their author or publisher is acting in furtherance of some overriding interest of social importance (see paragraph 42 above). As regards more specifically investigations under the Companies Act, the British courts have explained that "the public interest demands" that "Inspectors should make their report with courage and frankness" (per Lord Denning in re Pergamon Press Ltd - see paragraph 43 above).

Like the Commission, the Court has no difficulty in accepting that the underlying objective in according Inspectors freedom to report in this manner is likewise legitimate.

4. Proportionality of the means employed

71. It remains to be determined whether in the circumstances of the particular case there was a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the contested limitation.

72. Before the Court the applicants appeared to shift the emphasis of their argument as compared with their submissions to the Commission. Whilst continuing to maintain that the means employed were disproportionate to the aim pursued, they stressed that their complaint was not directed against the defence of privilege as such. They were not asserting a right to hold the Inspectors or the Secretary of State personally liable for damages in a suit for defamation; nor were they arguing that such independent reports into the affairs of public companies should never be prepared or published. Rather their claim was that where a report by organs of the State has branded an individual as being guilty of wrongdoing such as dishonesty after a procedure not attended by the procedural guarantees of a fair trial, Article 6 para. 1 (art. 6-1) grants the individual whose reputation is at stake the right to challenge the findings against him or her in a court of law before publication of the report. Accepting that a cause of action based on libel was barred and that judicial review did not provide the desired remedy, some other form of effective access to the courts should have been available to them for this purpose by virtue of Article 6 para. 1 (art. 6-1).

The English legal system, in their view, lacked adequate safeguards to protect their civil right to honour and reputation against misuse of their powers by the Inspectors and the Secretary of State. They submitted that means which involved denying them any effective remedy at all for the attack on their reputations caused disproportionate harm to them. They suggested that the requisite fair balance between the competing interests would be secured by the Government adopting a system which satisfied the aim pursued in a manner less harmful to their human rights, such as publication of the report only following full judicial scrutiny of the Inspectors' findings of fact.

73. In its report, the Commission expressed the opinion that the principle of proportionality had not been transgressed in the applicants'

case. In its view, judicial review, whilst not affording complete protection against possibly erroneous conclusions by the Inspectors, did "provide sufficient guarantees for persons affected by the report, which [were] proportionate to the general public interest in inquiries of the present kind" (paragraph 75 of the report).

74. In so far as the defence of privilege was taken to be a procedural bar on access, the Government agreed with the Commission's analysis. As they perceived it, the applicants' claim was really based on the impracticable proposition that a person aggrieved at any conclusion of fact reached by Inspectors acting under section 432 (2) of the Companies Act 1985 because of some detrimental effect on his or her reputation ought, by virtue of Article 6 para. 1 (art. 6-1), to have a right of appeal to a court to challenge that conclusion.

75. The Court recognises that limitations on access to court may be more extensive when regulation of activities in the public sphere is at stake than in relation to litigation over the conduct of persons acting in their private capacity. As to enforcement of the right to a good reputation under domestic law, the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals, to paraphrase a principle enunciated by the Court in the context of the State's power to restrict freedom of expression in accordance with Article 10 para. 2 (art. 10-2) of the Convention (see the Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 26, para. 59). Persons, such as the applicants, who fall into the former category of businessmen inevitably and knowingly lay themselves open to close scrutiny of their acts, not only by the press but also and above all by bodies representing the public interest (ibid.).

76. An additional point to note as concerns the particular circumstances of the present case is that the findings in the Inspectors' report to which the applicants took exception related to matters which the applicants themselves had made great efforts to bring into the public domain, namely their family background, their personal wealth and their business activities (see paragraphs 9 and 22 above). The beneficial public reputation which the applicants enjoyed in late 1984 and early 1985 was largely the result of an active public relations campaign which they undertook with the assistance of their advisers, and it played a crucial role in facilitating clearance of their bid for HOF. Thereafter the applicants were at pains to stifle any publicity adverse to this favourable reputation which they had themselves largely created, as is shown by their threatened or actual libel actions against various newspapers, notably The Observer (see paragraph 11 above). The contested limitation was thus concerned with an investigation of circumstances offered to public scrutiny by persons who had themselves sought a public profile through their bid to take over a large public company.

77. Like the Commission, the Court does not find it decisive whether the Inspectors' report benefited from absolute or merely qualified privilege (see paragraphs 42 and 43 above). In any event, in their argument to the Court the applicants did not suggest that either the Inspectors or the successive Secretaries of State had acted with malicious intent, which would have destroyed a defence of qualified privilege.

78. In arriving at their findings of fact or conclusions, the Inspectors were under a duty to act fairly and to give anyone whom they proposed to criticise in their report a fair opportunity to answer the allegations against them. Although the investigation was administrative and not judicial in nature, the Inspectors were bound by what are known under English law as "the rules of natural justice" (see paragraph 39 above). The remedy of judicial review was available to the applicants against the Inspectors or the Secretary of State to challenge the appointment of the Inspectors, the making of the report, its content or its publication if it could be claimed that there had been unfairness or breach of the rules of natural justice or that the findings or conclusions were unreliable on a number of other grounds (see paragraphs 44 and 45 above). In the latter connection, judicial review would have provided relief if it could have been established that the Inspectors had made findings of fact not properly based on material with probative value, or reached conclusions which there were no facts to support, or taken into account irrelevant considerations or failed to take account of relevant considerations, or reached conclusions which no reasonable person in their position could have reached (ibid.).

Judicial review would not, it is true, have provided the applicants with "the effective remedy" to which they were claiming to be entitled under Article 6 para. 1 (art. 6-1), namely a remedy enabling them to argue before a court that the Inspectors' findings of fact were simply erroneous. Nonetheless, the manner in which findings detrimental to a person's reputation are arrived at in an administrative investigation, as well as the objectives pursued by the investigation, is relevant for assessing the permissibility under Article 6 para. 1 (art. 6-1) of a limitation on the person's opportunities to go to court to enforce his or her civil right to reputation.

Whilst Inspectors are accorded broad freedom in reporting on the affairs of public companies, the performance of their investigative functions is attended by not inconsiderable safeguards intended to ensure a fair procedure and the reliability of findings of fact.

79. Extremely serious accusations were levelled against the Inspectors by the applicants in the press release issued by them on the day of the publication of the Inspectors' report, including accusations of dishonesty, prejudice, non-respect of agreed procedures, unfairness and total disregard of the principles of natural justice (see paragraph 32 above). In correspondence with the authorities the applicants had previously been

consistently threatening to take legal action to contest the report and its publication; yet in the event they did not do so, despite a formal undertaking on behalf of the Secretary of State to hold up publication if proceedings were brought (see paragraph 29 above). As the Government pointed out, a reading of the Inspectors' report shows that the applicants were made aware of the information required of them and were given every reasonable opportunity to respond to the allegations made against them and to furnish evidence, notwithstanding their last-minute procedural request to the Inspectors (see paragraphs 20 and 21 above). Safeguards afforded to the applicants throughout the investigation included constant consultation by the Inspectors as regards the structure, procedure and lines of inquiry of the investigation, the professional representation of the applicants, at interviews as well as in the submission of evidence and argument, and the Inspectors' concern to respect the applicants' personal privacy as much as possible (see paragraphs 15 to 18 and 20 above).

80. The applicants pointed out that the Inspectors' report containing findings of dishonesty was published, with the benefit of protection from liability in defamation, even though the authorities decided that there was no cause for instituting either criminal or civil proceedings (see paragraphs 23, 27, 28 and 30 above). The Court has also taken note of the evidence submitted by the applicants showing that there is a body of informed opinion in the United Kingdom which believes that these consequences of the system enacted by Parliament in the Companies Act 1985 are not desirable.

81. It is not, however, for the Court to substitute its own view for that of the national legislature as to what would be the most appropriate policy in this regard. The risk of some uncompensated damage to reputation is inevitable if independent investigators in circumstances such as those of the present case are to have the necessary freedom to report without fear, not only to the authorities but also in the final resort to the public. It is in the first place for the national authorities to determine the extent to which the individual's interest in full protection of his or her reputation should yield to the requirements of the community's interest in independent investigation of the affairs of large public companies. The applicants' argument would amount to reading into Article 6 para. 1 (art. 6-1) an entitlement to have a report such as the one in the present case not published until after a full judicial hearing repeating, doubtless over a longer time-scale, the same fact-finding exercise as that already carried out by the Inspectors. Such an entitlement could effectively destroy the utility of informing the public of the results of the administrative investigations provided for under section 432 (2) of the Companies Act 1985. Having found the aim of not only making but also publishing Inspectors' reports to be legitimate, the Court cannot apply the test of proportionality in such a way as to render publication impracticable.

82. In the light of the foregoing considerations, the Court cannot find that, in the exercise of their responsibility of regulating the conduct of the affairs of public companies, the national authorities exceeded their margin of appreciation to limit the applicant brothers' access to the courts under Article 6 para. 1 (art. 6-1), either as regards the state of the applicable law or as regards the effects of the application of that law to the brothers. Having regard in particular to the safeguards that did exist in relation to the impugned investigation, the Court concludes that a reasonable relationship of proportionality can be said to have existed between the freedom of reporting accorded to the Inspectors and the legitimate aim pursued in the public interest.

5. Conclusion

83. In the Court's view, the limitation on the applicants' opportunity, before and after publication of the Inspectors' report, to take legal proceedings to challenge the Inspectors' findings damaging to their reputations did not involve an unjustified denial of their "right to a court" under Article 6 para. 1 (art. 6-1).

C. Proceedings against others

84. A further issue addressed in the Commission's report was whether the publication of the Inspectors' report rendered impossible a fair and unbiased trial of the libel actions brought by the applicants against The Observer newspaper (see paragraphs 13 and 34 above), such that they were thereby denied effective access to court for the determination of a dispute over their civil right to honour and reputation.

This complaint was not pursued by the applicants in their pleadings before the Court, and the Court sees no cause, in law or on the facts, to examine it of its own motion.

D. Recapitulation

85. The Court finds no violation of Article 6 para. 1 (art. 6-1) in the present case under any of the heads of complaint.

III. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

86. Before the Commission the applicants alleged that, contrary to Article 13 (art. 13) of the Convention, no effective remedy was available under English law in respect of their complaint of a violation of Article 6 para. 1 (art. 6-1) of the Convention. Article 13 (art. 13) provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

87. The Commission concluded in its report that no separate issue arose under Article 13 (art. 13). In their memorial to the Court, the applicants announced that they would not be seeking to contest the Commission's conclusion.

88. In view of the applicants' effective withdrawal of this complaint, the Court does not find it necessary also to examine the case under Article 13 (art. 13).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Dismisses the Government's preliminary objection;

2. Holds that there has been no breach of Article 6 para. 1 (art. 6-1) of the Convention;

3. Holds that it is not necessary also to examine the case under Article 13 (art. 13) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 September 1994.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting Registrar

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

R. R.
H. P.

CONCURRING OPINION OF JUDGE MARTENS

1. The applicants submitted that Article 6 para. 1 (art. 6-1) was violated because the defence of privilege amounted to a restriction on their right of access to court with respect to the statements in the Inspectors' report which were damaging to their reputation (paragraph 64 of the Court's judgment).

2. The Government denied the applicability of Article 6 para. 1 (art. 6-1) since in their opinion the applicants had no actionable claim to a civil right under English law (paragraph 66).

3. The outcome of the Court's reasoning in paragraphs 65-67 of its judgment is that the Court "proposes to proceed on the basis that Article 6 para. 1 (art. 6-1) is applicable to the facts of the case". I support that modus procedendi, although I find it difficult to subscribe to the reasoning which led to it.

4. The starting-point for the Court's reasoning is its doctrine that Article 6 (art. 6) "extends only to 'contestations' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law" (paragraph 65).

5. In my concurring opinion in the case of Salerno v. Italy (judgment of 12 October 1992, Series A no. 245-D, pp. 57 et seq.), I examined the genesis of this doctrine. In paragraph 3.4 of that opinion I recalled that the doctrine had been fundamentally criticised on repeated occasions by several judges[1], but I left open whether I too subscribed to that criticism. I came to the conclusion that in any event there was no room for the "arguable claim" test where the applicant has in fact had access to a court which has decided on the merits of his claim: a decision on a non-arguable claim should also meet the requirements of Article 6 para. 1 (art. 6-1).

6. The present case demonstrates that also within the context of an access-to-court issue the "arguable claim" test is an unfortunate feature of the Court's case-law[2]. It has obliged the Court to adopt a reasoning whose subtleness, to my mind, seems hardly convincing. Nor clear, for what does it mean to say that "Article 6 para. 1 (art. 6-1) may have a degree of applicability" and in what cases will this extraordinary phenomenon occur? When does the answer to the question whether a person has an actionable domestic claim depend not only on the substantive content of the relevant right as defined under national law but also on the existence of procedural bars?

7. In my opinion the Court's reasoning would have been simpler and more persuasive without all this meandering necessitated by its maintaining

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[1] See, inter alios, the separate opinion of Judge De Meyer in the case of H. v. Belgium (judgment of 30 November 1987, Series A no. 127-B, pp. 48 et seq.).

[2] I note incidentally that I also share Judge De Meyer's opinion as to the role of the requirement that there must be a "dispute" ("contestation"); from which it follows that I am not happy with paragraphs 56 et seq. either.

the "arguable claim" test: there could be no doubt as to the applicants' right to reputation having been damaged. Whether or not a right to reputation is enshrined in Article 8 (art. 8) of the Convention is immaterial, since such a right does exist, at least in principle, under all our national laws and it has not been contended that in this respect English law makes an exception by clearly and fully excluding such a right. Neither can there be doubt as to the right to reputation being a "civil" right within the autonomous meaning of that notion under Article 6 para. 1 (art. 6-1). It follows that under this provision, whenever a person's reputation has been interfered with, he or she is in principle entitled to access to a court meeting its requirements. Consequently, the question whether under English law the defence of privilege constitutes a substantive limitation on the content of the right to reputation or a procedural barrier to access to court is immaterial. On this approach the Court could have gone into the essential question whether the contested limitation was justified under the conditions stated in its case-law (paragraph 68) almost immediately.