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EGMR Nr. 73797/01 - Urteil vom 27. Januar 2004 (Kyprianou vs. Zypern)

Recht auf ein faires Verfahren (Anwendbarkeit: Begriff der strafrechtlichen Anklage bei gerichtlichen Ordnungsstrafen, Ordnungsmitteln und contempt of court): Unabhängigkeit und Unparteilichkeit des Gerichts (Befangenheit und Besorgnis der Befangenheit: objektiver und subjektiver Test; nemo judex in causa sua; praktische und nicht theoretische Betrachtung des Gerichts und seiner Richter; Bedingungen einer möglichen Heilung), Unschuldsvermutung (Gewährung voller Verteidigungsrechte), unverzügliche Information über Art und Grund der strafrechtlichen Anklage; Meinungsfreiheit des Rechtsanwaltes (Verteidigers; Einwirkung des fairen Verfahrens; chilling effect).

Art. 6 Abs. 1, Abs. 2, Abs. 3 lit. a EMRK; Art. 10 EMRK; Art. 2 Abs. 1 GG; Art. 20 Abs. 3 GG; Art. 5 Abs. 1 GG

Leitsätze des Bearbeiters

1. Ein Gericht muss unparteiisch sein. Unparteilichkeit bedeutet grundsätzlich, dass das Gericht nicht voreingenommen oder befangen sein darf. Die Unparteilichkeit des Gerichts kann nach Art. 6 I EMRK auf verschiedene Art und Weise geprüft werden. Erstens muss das Gericht von persönlicher Voreingenommenheit oder Befangenheit frei sein. Die Unparteilichkeit eines Richters wird dabei vermutet, soweit nicht Belege für das Gegenteil vorliegen. Zweitens muss das Gericht auch objektiv unparteiisch sein: Es müssen hinreichende Garantien vorliegen, die berechtigte Zweifel an der Unparteilichkeit ausschließen.

2. In Situationen, in denen ein Gericht mit dem Fehlverhalten einer Person im Gerichtssaal konfrontiert wird, das eine gegen die Autorität des Gerichts gerichtete Straftat ("contempt of court") erfüllen könnte, muss infolge der Unparteilichkeit des Art. 6 Abs. 1 EMRK die Frage einer möglichen Bestrafung den zuständigen Strafverfolgungsbehörden überwiesen werden und eine mögliche Anklage wegen des Fehlverhaltens von anderen Richtern entschieden werden. Dies gilt nicht, soweit eine reine Disziplinarstrafe vorliegt, auf die Art. 6 EMRK keine Anwendung findet.

3. Die Unschuldsvermutung ist ein Bestandteil des fairen Verfahrens im Sinne des Art. 6 Abs. 1 EMRK. Sie ist verletzt, wenn das verhandelnde Gericht zu Beginn der Verhandlung seine Überzeugung von der Schuld des Angeklagten erklärt und ihm nur die Gelegenheit gibt, mildernde Umstände vorzutragen anstatt ihm eine volle Verteidigung gegen den Tatvorwurf zu gewähren.

4. Art. 6 Abs. 3 lit. a EMRK gewährt dem Angeklagten das Recht, nicht nur über den Grund der Anklage und damit über die ihm vorgeworfenen Handlungen informiert zu werden, sondern auch über die rechtliche Einstufung dieser Handlungen. Die hiernach erforderliche Information muss detailliert sein und sie muss erfolgen, bevor das Gericht eine Grundentscheidung über die Schuld des Angeklagten getroffen hat. Die Anwendung des Art. 6 Abs. 3 lit. a EMRK muss im Lichte des generelleren Rechts auf ein faires Verfahren erfolgen, das von Art. 6 Abs. 1 EMRK garantiert wird.

THE FACTS

put a question to the witness, he states that the court interrupted him. Whereupon, he maintains that he felt aggrieved and sought permission to withdraw from the case. In this connection, the Government submit that the court made a routine intervention with a simple and polite remark regarding the manner in which the applicant was conducting the cross-examination of the relevant witness. The applicant immediately interrupted, without allowing the court to complete its remark and refusing to proceed with his cross-examination.

12. The verbatim record of the proceedings discloses the following exchange (translation): 5

"Court: We consider that your cross-examination goes into detail beyond the extent to which it could go at this stage of the main trial regarding questions...

Applicant: I stop my cross-examination....

Court: Mr Kyprianou...

Applicant: Since the Court considers that I am not doing my job properly in defending this man, I ask for your leave to withdraw from this case.

Court: Whether an advocate is to be granted leave to withdraw or not, is a matter within the discretionary power of the Court and, in the light of what we have heard, no such leave is granted. We rely on the case of Kafkaros and Others v. the Republic and we do not grant leave.

Applicant: Since you prevent me from continuing my cross-examination on significant points of the case, then my role here does not serve any purpose.

Court: We consider your persistence...

Applicant: And I am sorry when I was cross-examining, the members of the Court were talking to each other, sending "ravasakia" to each other, which are not compatible with allowing me to continue the cross-examination with the required vigor, when my cross-examination is under the scrutiny of the Court in a secret manner.

Court: What has just been said by Mr Kyprianou, and in particular the manner with which he speaks to the Court, is considered by us as a contempt of court and Mr Kyprianou has two choices: either to insist on what he said and to give reasons why no sentence should be imposed on him, or it is a matter for him to decide whether he should not insist. We give him this opportunity exceptionally. Article 44.1 (a) of the Courts of Justice Law applies fully.

Applicant: You can try me.

Court: Would you like to say anything?

Applicant: I saw with my own eyes the small pieces of paper going from one judge to the other when I was cross-examining, in a way not very flattering to the defence. How can I find the stamina to defend a man who is accused of murder?

Court (Mr Photiou): It happens that the document, to which Mr Kyprianou refers, is still in the hands of brother Judge Mr Economou and Mr Kyprianou may inspect it.

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

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

Court: We examined the matter during the adjournment and continue to believe that what Mr Kyprianou said, the content, the manner and the tone of his voice, constitute a contempt of court as provided for in Article 44. 1 (a) of the Courts of Justice Law 14/60, that is disrespect of the court by way of words and conduct. We have asked Mr Kyprianou if he has anything to add before we pass sentence on him. If he has something to add, let's hear him, otherwise the Court should proceed.

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

Court: We shall adjourn for ten minutes and shall continue with the pronouncement of a sentence."

13. After a short break the Assize Court, by a majority, sentenced the applicant to five days' imprisonment. The court referred to the above exchange between the applicant and its members and held as follows: 6

"...It is not easy, through words, to convey the atmosphere which Mr Kyprianou had created since, beside the unacceptable content of his statements, the intensity of his voice as well as his manner of expression and gestures to the Court, not only created an unacceptable image for any civilised place, and a court room in particular, but were apparently aimed at creating a feeling of intimidation and terror within the Court. We are not exaggerating at all in saying that Mr Kyprianou was yelling at and gesturing to the Court.

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

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

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

It is impossible for us to imagine another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate.

The persons of the judges, whom Mr Kyprianou has insulted gravely, are the least of our concern. What really concerns us is the authority and integrity of justice. If the Court's reaction is not immediate and drastic, we feel that the blow to justice will be disastrous. An insufficient reaction on the part of the lawful and civilised order, as expressed by the courts, would result in the acceptance of the humiliation of the authority of justice.

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

We deeply comprehend the repercussions of this decision since the person concerned is an advocate of long practice, but it is Mr Kyprianou himself who, through his conduct, brought matters to this end.

In the light of the above we impose a sentence of imprisonment of 5 days".

14. The president of the Court also decided to impose a fine of CYP 75 (128.45 euros). 7

15. The applicant served the sentence of imprisonment. 8

16. On 15 February 2001 the applicant filed an appeal with the Supreme Court, which was dismissed on 2 April 2001. At ground 8 of his appeal, he asserted that a sanction for contempt of court should not be used to suppress offensive 9

methods of advocacy, so that the advocate has sufficient freedom to enable him to conduct his client's case as he sees fit.

17. The Supreme Court stated that the relevant constitutional provisions of Cypriot law on contempt of court reflected the principles of English law. It relied on Article 162 of the Constitution which enables the enactment of legislation giving jurisdiction to any court to order the imprisonment for up to 12 months of any person who does not comply with a judgment or order of that court, and to punish contempt of court. It held that Article 44.2 of the Courts of Justice Law is lawfully authorised by Article 162. Finally, it concluded that it was the applicant who had created a tense atmosphere by his disdainful attitude and by undermining his role. 10

18. The Supreme Court held *inter alia*: 11

"It is not accidental that the successive objectives of the constitutional legislator, which are embodied in Article 30 and Article 162 of the Constitution, exist side by side. The power to sanction contempt of court is aimed at the protection of judicial institutions, which is essential in order to safeguard a fair trial. ...The role of the judge is nothing more than that of the defender of judicial proceedings and of the court's authority, the very existence of which are necessary to secure a fair trial. The lawyer, a servant of justice, is not a party to the case. By abusing the right to be heard and being in contempt of court, the lawyer intervenes in the procedure, as any third person, and intercepts its course, to the detriment of justice. The judicial sanctioning of contempt, where this becomes necessary, is a judicial duty exercised for the sake of the unhindered holding of a fair trial".

19. The Supreme Court concluded as follows: 12

"It is our finding that Mr Kyprianou, by words and conduct, showed disrespect to the court and committed the offence of contempt in the face of the court contrary to Article 44.2 of the Law".

20. As regards the sentence imposed on the applicant, the Supreme Court stated *inter alia* the following: 13

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

II. RELEVANT DOMESTIC LAW AND OTHER RELEVANT MATERIAL 14

… 15

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION 16

24. The applicant contended that he had not been heard by an independent and impartial tribunal. The same court before which the alleged contempt had been committed had found him guilty and had sentenced him. In this respect he stated that the Assize Court had prosecuted and tried the offence, being the sole witness in that procedure and had pronounced the sentence. Thus, the applicant complained of a violation of Article 6 § 1 which, insofar as relevant, reads as follows: 17

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

A. Submissions of the parties 18

1. The Government 19

25. The Government submitted that the applicant's allegations were based on the assumption that the judges had been involved in the matter as complainants and therefore had a personal interest in the proceedings that followed. They stated that this approach betrayed a fundamental misunderstanding of the nature and function of proceedings for contempt in the face of the court in common law jurisdictions. These were not proceedings brought by a party or complainant. They constituted a *sui generis* procedure aimed at securing the unimpeded functioning of the courts and safeguarding the authority of the judiciary. These proceedings were not adversarial in the sense that one person was opposed to another; they concerned the integrity of the judicial system. No single judge had any interest in them. The long-established power granted to common law courts to sanction improper conduct committed in their face was a necessary and indispensable element of a fair trial itself. The Assize Court's own duty to ensure a fair trial of the persons accused of murder in the present case, required that it had the summary power to deal with any contempt before it. The applicant had not insulted the judges in their individual capacity but had sought to undermine the authority of the judicial system itself. 20

26. The Government further maintained that, in order to be effective, the judicial power to sanction attempts by any person in the courtroom to dominate the court, and determine the course of the trial, had to be exercised immediately. Otherwise, the contemnor, in effect, would have succeeded in his purpose. Moreover, if contempt proceedings had commenced before a different bench, there would have been certain undesirable consequences that could not have 21

been overlooked: The members of the bench would have had to testify about the events which had taken place before their eyes. Their credibility in connection with the facts, of which they had become aware while performing their functions, would have had to have been scrutinised by other judges and, thus, the very integrity of the judiciary would have been unnecessarily questioned.

27. According to the Government, the applicant could have alleged a breach of the impartiality rule only if one had assumed (wrongly) that the Assize Court had been acting in a personal capacity in trying him. There was no basis for a finding of objective bias when one appreciated the context and the fact that there was no complainant. Furthermore, the fact that the applicant had been able to appeal to the Supreme Court, a judicial body with full jurisdiction to review facts and law, cured any possible breach of the impartiality requirement. The requirements of Article 6 had been satisfied, if not by the Assize Court, then by the Supreme Court. The Supreme Court, independently, had found that the applicant had been guilty of the offence of contempt, and upheld the sentence imposed by the Assize Court. The Government stressed that the Judges of the Assize Court itself were not protagonists or parties to a dispute with the applicant, and the proceedings taken against the latter were not taken for the purpose of vindicating any personal rights of the three insulted Judges, but in order to protect the courts as a whole, within a democratic society governed by the rule of law. The Assize Court's decision to act immediately was in the circumstances both necessary and justified. 22

28. The Government averred that the tribunal had to be presumed impartial until the contrary was proved. No evidence existed that the Assize Court had been biased against the applicant. The sentence of 5 days' imprisonment had been upheld on appeal by the Supreme Court, and it was thus impossible to argue that this sentence revealed bias on the part of the Assize Court. The power of the court to ensure the proper functioning of its proceedings, and to protect the integrity of the judicial system, was necessary to allow the court to provide a fair hearing to those who came before it. A power to take such measures as were necessary to protect the authority of the court constituted implied limitations upon the requirements of Article 6 of the Convention. 23

2. The applicant 24

29. The applicant maintained that the sentence of five days' imprisonment, imposed on an experienced lawyer of exemplary reputation for what (on the court's findings) had been a minor transgression, in itself suggested the existence of bias. He submitted that, in proceedings for contempt, a judge should refer the matter to another judge or to the Attorney General, especially if the former had prematurely expressed a view as to guilt. The conduct of the bench in the present case suggested bias, both on the subjective test (due to their words and the intemperate sentence imposed on the applicant) and on the objective test (due to their position as judges in their own cause). The members of the bench in question were both "complainants" and witnesses to the conduct which was alleged to have constituted contempt. The applicant maintained that it was particularly important that the issue should have been determined by an independent tribunal given that (a) there had been a dispute as to the applicant's intended meaning in using the word "ravasakia" which was a matter of inference; (b) there had been a dispute as to whether he was justified in complaining about the conduct of the court in the first place; (c) there had been a dispute as to whether his demeanour was intended to be, or was perceived to be intimidating; and (d) the court had been contemplating the imposition of a prison sentence on a lawyer for his conduct in court. 25

30. The applicant contended that the review by the Supreme Court in the present case had not rectified the alleged partiality. That court had not conducted a rehearing of the case. It had confined itself to points of law. Moreover, it had upheld the manifestly disproportionate sentence imposed on the applicant. The case could have been dealt with by a simple adjournment of proceedings and/or referral of the matter to the Attorney General to decide whether to initiate proceedings or to refer the matter to another bench for trial. The court could have also referred the matter to the Attorney General for disciplinary action as, under the law, the latter is the Chairman of the Disciplinary Committee. This was the normal practice in Cyprus. So is a referral by a court to the Attorney General when, in the course of a hearing, the judge thinks that a criminal offence might have been committed. 26

B. The Court's assessment 27

1. Applicability of Article 6 28

31. The Court notes that the Government did not dispute the submission of the applicant that Article 6 of the Convention applies in this case and, more particularly, that the applicant's conviction for contempt of court was a conviction for a criminal offence. In any event, the Court finds that the criminal nature of the offence of contempt of court in this case cannot be disputed. Applying the criteria established by the case-law of the Court (*Engel and others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, §§ 82-83; *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, §§ 48-50), namely a) the domestic classification of the offence, b) the nature of the offence, and c) the degree of 29

severity of the penalty that the person concerned risks incurring, it is clear that the offence in question was criminal. The offence was classified in domestic law as criminal, it was not confined to the applicant's status as a lawyer, the maximum possible sentence was one month's imprisonment and the sentence actually imposed on the applicant was 5 days' imprisonment (*Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, §§ 82-86, ECHR 2003-X). Therefore, the requirements of Article 6 of the Convention in respect of the determination of any criminal charge, and the defence rights of everyone charged with a criminal offence, apply fully in the present case.

2. Compliance with Article 6 30

32. The Court reiterates that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and, above all, as far as criminal proceedings are concerned, in the accused. To that end it has constantly stressed that a tribunal must be impartial. Whilst impartiality normally denotes the absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 of the Convention, be tested in various ways. It is well established in the case-law of the Court that there are two aspects to the requirement of impartiality. First, the tribunal must be subjectively free of personal prejudice or bias. Personal impartiality is to be presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubts (see *Sander v. the United Kingdom*, no. 34129/96, § 22, ECHR 2000-V, and *Piersack v. Belgium*, judgment of 1 October 1982, Series A no. 53, § 30). 31

33. In the present case the applicant alleged that there was evidence of both objective and actual or subjective bias on the part of the Assize Court. 32

(a) Objective test 33

34. The Court considers that the decisive feature of the case is that the judges on the court which convicted the applicant were the same judges before whom the contempt was allegedly committed. This in itself is enough to raise legitimate doubts, which are objectively justified, as to the impartiality of the court - *nemo judex in causa sua*. 34

35. For the Government to aver that the judges who convicted the applicant cannot be considered complainants in the proceedings and had no personal interest in the relevant offence, but were simply defending the authority and standing of the court, is, in the opinion of the Court, theoretical. The reality is that the courts are not impersonal institutions but function through the judges who compose them. It is the judges who interpret a certain act or type of conduct as contempt of court. Whether this is so has to be assessed on the basis of the particular judges' own personal understanding, feelings, sense of dignity and standards of behaviour. Justice is offended if the judges feel this to be so. Their personal feelings are brought to bear in the process of judging whether there has been a contempt of court. Their own perception and evaluation of the facts and their own judgment are engaged in this process. For that reason, they cannot be considered to be sufficiently detached, in order to satisfy the conditions of impartiality, to determine the issues pertaining to the question of contempt of their own court. The Court adopts in this respect the statement of the Supreme Court of the United States in the case of *Offutt v. USA* (348 U.S. 11. 75 S.Ct.11): 35

"But judges also are human, and may, in a human way, quite unwittingly identify offence to self with obstruction to law. Accordingly, this Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feeling against the lawyer".

36. In this connection, the Court notes that, in their decision, the judges of the Assize Court acknowledged that their "*persons"* were "*insulted gravely"* by the applicant, even though they went on to say that this was the least of their concerns, and emphasised the importance for them to uphold the authority and integrity of justice. 36

37. The Court considers that in situations where a court is faced with misbehaviour on the part of any person in the court room, which may amount to the criminal offence of contempt, the correct course dictated by the requirement of impartiality under Article 6 § 1 of the Convention is to refer the question to the competent prosecuting authorities for investigation and, if warranted, prosecution, and to have the matter determined by a different bench from the one before which the problem arose. In fact, with the exception of Cyprus, this is the practice in the High Contracting Parties to the Convention as regards behaviour which amounts to the criminal offence of contempt of court. The situation regarding sanctions of a disciplinary nature, in the form of fines, in connection with behaviour which cannot be considered as amounting to a criminal charge, is different (*Ravnsborg v. Sweden*, judgment of 23 March 1994, Series A no. 283-B). 37

(b) Subjective test 38

38. As regards the applicant's contention concerning the subjective bias of the judges of the Assize Court, the Court notes that the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long established 39

in the case-law of the Court (see, for example, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, Series A no. 43, p. 25, § 58). The personal impartiality of each judge must be presumed until there is proof to the contrary (*ibid.*).

39. The Court accepts that the facts, as disclosed by the minutes of the relevant proceedings and the final decision of the Assize Court, reveal that a certain personal partiality did indeed develop on the part of the judges during the discussion they had with the applicant. This was triggered, to some extent, by the court's interpretation of the word "ravasakia" as "love letters" instead of "notes" in spite of the two possible different meanings of that word (see § 23 above), the particular context in which it was used and the applicant's statement that he saw:
"with [his] own eyes the small pieces of paper going from one judge to the other when [he] was cross-examining ...". 40

40. In this respect, the Court notes that, in their decision, the judges of the Assize Court stated that the applicant *"did not hesitate to suggest that the exchange of views between the members of the bench amounted to an exchange of "ravasakia", that is, "love letters""* and acknowledged that their "*persons*" were "*insulted gravely*" by the applicant, even though they went on to say that this was the least of their concerns. 41

41. The lack of impartiality is evidenced by the intemperate reaction of the judges to the conduct of the applicant, given their haste to try him summarily for the criminal offence of contempt of court without availing themselves of other alternative, less drastic, measures such as an admonition, reporting the applicant to his professional body, refusing to hear the applicant unless he withdrew his statements, or asking him to leave the court room. In this respect an additional important factor is the severe punishment - immediate imprisonment - which they imposed on the applicant while stating, for example: 42
i) "It is impossible for us to imagine another occasion of such a manifest and unacceptable contempt of court by any person..."
ii) "If the Court's reaction is not immediate and drastic, we feel that the blow to justice will be disastrous (êáôáóôñïöéêü)".

42. The Court also finds relevant in this connection its observations and conclusions below regarding the complaints of a breach of the presumption of innocence and insufficient information as to the nature and cause of the accusation against the applicant (paragraphs 52-58 and 65-68). 43

(c) The review by the Supreme Court 44

43. The Court notes that the decision of the Assize Court was subjected to a subsequent control by the Supreme Court. According to the Court's case-law, it is possible for a higher tribunal, in certain circumstances, to make reparation for an initial violation of the Convention (see the *De Cubber v. Belgium* judgment of 26 October 1984, Series A no. 86, p. 19, § 33). 45

44. However, in the instant case, the Court observes that the Supreme Court agreed with the approach of the first instance court, i.e. that the latter could itself try a case of criminal contempt committed in its face, and rejected the applicant's complaints which are now before this Court. There was no retrial of the case by the Supreme Court. As a court of appeal, the Supreme Court did not have full competence to deal *de novo* with the case, but could only review the first instance judgment for possible legal or manifest factual errors. It did not carry out an *ab initio,* independent determination of the criminal charge against the applicant for contempt of the Assize Court. Furthermore, the Supreme Court found that it could not interfere with the judgment of the Assize Court, accepting that that court had a margin of appreciation in imposing a sentence on the applicant. Indeed, although the Supreme Court had the power to quash the impugned decision, on the ground that the composition of the Assize Court had not been such as to guarantee its impartiality, it declined to do so. 46

45. The Court also notes that the appeal did not have a suspensive effect on the judgment of the Assize Court. In this connection, it observes that the applicant's conviction and sentence became effective under domestic criminal procedure on the same day as the judgment's pronouncement by the Assize Court, i.e. on 14 February 2001. The applicant filed his appeal the next day, on 15 February 2001 whilst he was serving the five-day sentence of imprisonment. The decision on appeal was delivered on 2 April 2001, long after the execution of the sentence. 47

46. In these circumstances, the Court is not convinced by the Government's argument that any defect in the proceedings of the Assize Court was rectified on appeal by the Supreme Court. 48

47. In conclusion, the Court considers that there has been a breach of the principle of impartiality, on the basis of both the objective and subjective tests. Accordingly, there has been a violation of Article 6 § 1 of the Convention. 49

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION 50

48. The applicant complained that he had been presumed guilty as soon as he had objected to the Assize Court's conduct. He argued that, in essence, he had only been expected to provide mitigation on his own behalf before the delivery of the court's final ruling. He alleged a violation of Article 6 § 2 of the Convention, which provides as follows: 51

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

A. The parties' submissions 52

1. The Government 53

49. The Government referred to their arguments on the question of impartiality. Further, they emphasised that this was a case where there was no dispute over the underlying facts as to what had happened. Therefore the ordinary procedure, where the facts constituting the offence were to be proved through witnesses, would have been absurd in this situation. Finally, there was no indication that the presumption of innocence had not been upheld. In the instant case the judges had applied the presumption automatically in their decision-making process, but the facts before them had been such as to rebut that presumption. All judges are imbued with the necessity of upholding the presumption of innocence, and automatically apply it without having to state expressly in every case that they have done so. The fact that the court stated that what had been said *prima facie* constituted contempt, and invited representations on the matter, could not be considered a violation of Article 6 § 2 of the Convention. If the applicant had produced a good explanation for what he said, he would not have been found to have been in contempt. It was totally unrealistic to suggest that the court had closed its mind to this possibility. 54

2. The applicant 55

50. The applicant submitted that his appearance and that of the members of the bench, before a different, independent tribunal, in a hearing to assess whether the applicant's words and actions amounted to contempt, would have been entirely practicable and fair to both sides. The presumption of innocence required the court to refrain from taking any decision as to the applicant's guilt until all parties had had an opportunity to make representations. It is clear that the court made up its mind as to his guilt immediately, and all he had been offered was an opportunity to provide mitigation as to sentence. This transpired from the Assize Court's judgment, where it was stated *"Later, after a long break, Mr Kyprianou was given a second chance to say something to the Court, in the hope that he would express his apologies and would mitigate the damage caused by his behaviour"*. 56

B. The Court's assessment 57

51. Although there is authority to the effect that, if a violation of the principle of impartiality is found, it is not necessary to examine other complaints under Article 6 of the Convention (*Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, § 80), the Court considers that, in the circumstances of the present case, it is justified to examine the other complaints of the applicant under this provision (*mutatis mutandis*, *Göç v. Turkey* [GC], no. 36590/97, § 46, ECHR 2002-V). 58

52. The Court recalls that the presumption of innocence enshrined in Article 6 § 2 of the Convention is one of the elements of a fair criminal trial guaranteed by Article 6 § 1. 59

53. In the present case the Court notes, on the basis of the minutes of the relevant proceedings, that the Assize Court formed and expressed an opinion during its discussion with the applicant amounting to a conclusion that it considered him guilty of the criminal offence of contempt of court. In particular, following the court's refusal to grant him leave to withdraw and his statement regarding the exchange of "ravasakia" between the judges, the court stated the following: 60

"What has just been said by Mr Kyprianou and in particular the manner with which he speaks to the Court is considered by us as a contempt of court and Mr Kyprianou has two choices: either to insist on what he said and to give reasons why no sentence should be imposed on him or it is a matter for him to decide whether he should not insist. We give him this opportunity exceptionally. Article 44.1 (a) of the Courts of Justice Law applies fully".

54. In this connection, the Court observes that the applicant was given little opportunity to react to the possibility of such a finding or put forward his own explanations and representations in this respect. 61

55. Furthermore, following the applicant's persistence and a second short break, the court reaffirmed its view by stating that: 62

"We continue to believe that what Mr Kyprianou said, the content, the manner and the tone of his voice, constitute a contempt of Court as provided in Article 44.1 (a) of the Courts of Justice Law 14/60".

56. The final decision of the Assize Court imposing the sentence of imprisonment was based on the above conclusions 63

formed by the court during its discussions with the applicant. The Court agrees with the applicant that, in sum, he was asked to mitigate his situation rather than being given a full opportunity to defend himself against a charge which was to have grave consequences for his liberty. In these circumstances, the Court finds that the Assize Court violated the principle of the presumption of innocence.

57. The Court reiterates its findings as regards the role of the Supreme Court (see §§ 43-46 above) and the non-rectification of the defects in the proceedings of the Assize Court on appeal. 64

58. It therefore finds that there has been a violation of Article 6 § 2 of the Convention. 65

III. ALLEGED VIOLATION OF ARTICLE 6 § 3 a) OF THE CONVENTION 66

59. The applicant contended that the Assize Court failed to inform him in detail of the accusations against him. In its decision on sentence, the Assize Court held that the gestures of the applicant were intended to create a feeling of *"intimidation and terror within the court"*. The applicant claimed that he could not have known of the court's fears and that this accusation should have been specifically put to him. He alleged a violation of Article 6 § 3 a) of the Convention, which provides as follows: 67

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

A. Submissions of the parties 68

1. The Government 69

60. The Government stated that Article 6 § 3 a) did not require that the accused be informed of all the evidence on which a charge was founded. It was sufficient that he was informed of the offences with which he was charged, together with the date and place of their alleged commission. 70

61. The Government further submitted that it transpired from the transcript of the proceedings before the Assize Court that the court expressly referred both to the facts that constituted the offence as well as to the relevant statutory provisions. The Supreme Court concluded that the applicant had been sufficiently informed of the matters constituting the contempt. 71

62. The Government stressed that the events that had constituted the offence had been brief and simple and had just taken place in the courtroom; there had been no dispute as to what had occurred. The court had expressly told the applicant that what had amounted to contempt had been the content of his specific statement and the tone in which it was made. The transcript of the proceedings could neither catch nor convey the tone in which the applicant spoke, but he himself had been well aware of it. 72

63. It was highly formalistic to suggest that the allegation that "the intensity of his voice as well as his tone and gestures to the Assize Court" had been "apparently aimed at creating a feeling of intimidation and terror within the Court" constituted a separate allegation which had to be put to the applicant. The Assize Court specifically mentioned the "tone in which he speaks to the Court". The Government submitted that the Court is simply not in a position to assess how a Cypriot court (consisting of native speakers of the Greek language) should have interpreted the Greek word "ravasakia", which can mean "love letters", derived from the Slavic word "ravas". In any case, the applicant would have been well aware of the possible connotations of that word. He must have known that such a comment was inappropriate and capable of misinterpretation. 73

2. The applicant 74

64. The applicant submitted that the information as to the charge that had been put to him by the members of the bench had been lacking in detail and had not enabled him to prepare his defence. Contrary to the conclusion of the Supreme Court, neither the allegation of creating an atmosphere of "intimidation and terror", nor the suggestion that the court had interpreted the word "ravasakia" to mean "love letters", had been put to him. 75

B. The Court's assessment 76

65. The Court recalls that the fairness of proceedings must be assessed with regard to the case as a whole (see, for example, *Miailhe v. France (no. 2)*, judgment of 26 September 1996, *Reports* 1996-IV, p. 1338, § 43, and *Imbrioscia v.* 77

Switzerland, judgment of 24 November 1993, Series A no. 275, pp. 13-14, § 38). Article 6 § 3 a) of the Convention underlines the need for special attention to be paid to the notification of the "accusation" to the defendant. It affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should be detailed (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 51, ECHR 1999-II). The scope of this provision must be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention.

66. In the present case, the Court observes that the applicant was informed about the nature and cause of the accusation against him by the Assize Court after this court had already formed its opinion that the applicant was guilty of the criminal offence of contempt of court (see §§ 53-56 above). Furthermore, the material facts which influenced the court's decision, as expressed in the decision of the majority to impose on him the sentence of imprisonment, were not disclosed before that decision. These facts were, first, that the Assize Court interpreted the word "ravasakia" to mean "love letters" rather than "notes"; secondly, the court's objections regarding the intensity of the applicant's voice and his gestures to the court which had created *"a feeling of intimidation and terror within the Court"* ; and thirdly, the Assize Court's view that the applicant had accused the court of restricting him and of *"making secret justice"*. 78

67. The Court repeats it findings concerning the review by the Supreme Court (§§ 43-46 above) and the non-rectification of the defects in the proceedings of the Assize Court on appeal. 79

68. In the light of the above, the Court finds that there has been a violation of Article 6 § 3 a) of the Convention. 80

IV. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION 81

69. Finally, the applicant complained of an interference with his right to freedom of expression that was not prescribed by law, and that the imposition of a fine and a term of imprisonment were disproportionate to the legitimate aim pursued. He alleged a violation of Article 10 which provides insofar as relevant as follows: 82

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for maintaining the authority and impartiality of the judiciary."

70. The Government submitted that the applicant's allegations in relation to Article 10 of the Convention were based on the misconception that participants in judicial proceedings are enabled, as of right, to say whatever they wish in a personal capacity. However, they submitted that an advocate appearing before a court was a servant of justice and the alleged limitations on an advocate's freedom of expression were not imposed by the impugned domestic law but derived from the very nature of his or her mission and function in the courtroom. The Government maintained that, even if an advocate had personal free speech rights in a courtroom, these may be limited for the purpose of maintaining the authority of the judiciary, as in the present case. In view of the degree of insult and the seriousness of the applicant's contemptuous behaviour, the sanction that had been imposed on him had been justified and fell within the margin of appreciation afforded to the Assize Court, the determination of the "weight" of the contempt in a given case being a function entrusted to the domestic courts. 83

71. The applicant submitted that Article 10 of the Convention applied to all forms of expression, including the expression of an advocate in court. The expression in question had been used by the applicant as a professional advocate while attempting to protect the interests of his client. At worst, he had been guilty of an error of judgment. To sentence a respected advocate, with an exemplary professional record, to five days' imprisonment for what was no more than a momentary intemperate outburst, was plainly disproportionate. There was a range of potential responses such as adjournment of the hearing allowing tempers to cool, admonition, reporting the applicant to his professional body, or warning him about his future conduct. In this connection he stated that the imposition of such a plainly disproportionate penalty would have a general "chilling effect" on the conduct of advocates in court, to the potential detriment of their clients' cases. The applicant contented that it was essential to recall that the power of a court to deal with contempt was designed to prevent a real threat to the administration of justice, and was not a tool to protect the personal dignity of the judge or a means of exacting personal retribution where an advocate has caused offence. 84

72. The Court considers that the essential issues raised by the applicant were considered above under Article 6 of the Convention. Thus, it does not deem it necessary to examine separately whether Article 10 was also violated. 85

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION 86

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FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention; 88

2. *Holds* that there has been a violation of Article 6 § 2 of the Convention; 89

3. *Holds* that there has been a violation of Article 6 § 3 a) of the Convention; 90

4. *Holds* that it is not necessary to examine separately the applicant's complaint under Article 10 of the Convention; 91

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