CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

## THIRD SECTION

## DECISION

## AS TO THE ADMISSIBILITY OF

Application no. 62902/00
by Maurice and Stephane ZOLLMANN
against the United Kingdom

The European Court of Human Rights (Third Section), sitting on 27 November 2003 as a Chamber composed of

Mr I. CABRAL BARRETO, *President*,
Sir Nicolas BRATZA,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs H.S. GREVE, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 16 August 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

# THE FACTS

The applicants, Stéphane David and Maurice Zollmann, are Belgian nationals, who were born in 1959 and 1963 respectively and have given addresses in Belgium and South Africa. They are represented before the Court by Mr N. Angelet, a lawyer practising in Brussels, Belgium.

## A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicants, who are brothers, run an international diamond business, which involved, *inter alia*, importing diamonds to the family business in Antwerp, Belgium. They state that in autumn 1997 the family business took the decision not to import diamonds from African countries which were undergoing civil war or political instability.

By resolution 1173 (1998) of 12 June 1998, the United Nations Security Council imposed an embargo on the export of diamonds by UNITA due to that organisation's role in the continuing war in Angola. In paragraph 21, it requested States to take measures against persons or bodies which violated the sanctions and to impose appropriate penalties. On 8 July 1998, the European Union formally adopted sanctions, binding on its member states. By August 1998, the United Kingdom and Belgium had adopted legislation to give effect to resolution 1173. The legislation as amended in the United Kingdom prohibited the importation into the United Kingdom of diamonds from Angola unless certified by the Angola Government.

On 20 September 1999, in answer to a parliamentary question, Mr Peter Hain, the Minister of State at the Foreign and Commonwealth Office responsible for Africa, gave a written response stating *inter alia*;

> "We fully support UN sanctions against UNITA... We have also called for stricter enforcement of sanctions by all UN member states. ... The UK fully implements UN sanctions decided upon by the Security Council... Information concerning potential breaches of sanctions by UK nationals or companies is passed immediately to the appropriate UK enforcement authorities."

On 18 January 2000, in answer to further questions about Government measures to enforce UN sanctions, Mr Hain stated:

> "It is vital that private individuals and companies engaged in breaking the law by deliberately breaching the UN sanctions on UNITA are stopped. I can inform the House that we are referring to the UN sanctions committee and its expert panels the details of three such individuals which we hope that they will be able to follow up..."

On 17 February 2000, Mr Hain stated in the House:

> "We are ready to name, shame and take action where we can on those who break sanctions. For example, we would take action in respect of the illegal provision of UNITA with supplies, without which it could not keep on fighting in Angola. I have

> named in the House several people included in breaking UN sanctions by supplying UNITA and I shall now name more. David Zollmann is involved in exporting diamonds to Antwerp for UNITA. Based in Rundu, Namibia, Zollmann paid a monthly fee to Namibian officials to enable him to operate without interference. We estimate that in 1999 Zollmann was moving $4 million worth of diamonds per month. His brother, Maurice Zollmann, is carrying out similar activity for UNITA in South Africa. Hennie Steyn, a South African pilot, flies diamonds for Maurice Zollmann from Angola, via Congo Brazzaville... Those individuals are making money out of misery. It is vital that all the Governments, agencies and companies where they operate take urgent action to stop their illegal activities... We have passed these names to the UN and in particular to ambassador Robert Fowler, for his work on the Sanctions Committee responsible for tackling UNITA and Angola generally."

This declaration was published in the House of Commons Hansard Debates and was available on the parliamentary website. The press reported on the matter, repeating the names of the persons included in the declaration – this included a report from Reuters on 17 February 2000 repeated by CNN, an article in the *Guardian* on 18 February 2000 and an article in the Namibian newspaper *Windhoek Observer* on 11 March 2000. Mr Hain's declaration was repeated in the South African Parliament by the deputy minister for foreign affairs on 15 March 2000.

The applicants stated that an investigation was opened into the allegations by the *parquet* in Antwerp in February 2000. No proceedings have since ensued. The applicants provided a letter dated 8 November 2000 from the Antwerp *procureur* stating that the investigation had been closed with a decision not to prosecute or issue charges. A letter (undated but apparently sent in June) from the Belgian Foreign Minister to a Belgian Member of Parliament stated that the British secret service had provided information to the Belgian secret service but that it had not been established on the basis of that information that David Zollmann was guilty of the acts that Mr Peter Hain had accused him of.

By letter dated 28 February 2000, the first applicant wrote to Mr Peter Hain denying the facts imputed by the Minister and requesting a meeting with himself and his brother. On 8 March 2000, Mr Peter Hain replied that he stood by the statement which he had made, that the matter was in the hands of the UN Sanctions Committee and that he saw no need for a meeting.

On 28 February 2000, the Panel of Experts assisting the UN Angola Sanctions Committee stated in a report that it has received information from several sources that David Zollmann had been involved in importing diamonds to Antwerp for UNITA and that similar allegations had been made publicly. It considered that further investigation was warranted and passed on the information to the Chairman of the Committee.

On 12 July 2000, following disclosure of the letter by the Belgian Minister for Foreign Affairs, the first applicant's counsel wrote to Mr Peter Hain requesting that he retract his allegations publicly and meet with the first applicant on his visit to Antwerp in July 2000, or alternatively, to waive

the parliamentary privilege attaching to his statements in order to permit the first applicant to take proceedings in the courts. No response was received to this letter.

In the report of the Monitoring Mechanism on Angola Sanctions dated 21 December 2000, a detailed analysis of the status of the sanctions on diamond trading in the region was made. David Zollmann was named as the junior partner in the Antwerp firm of Glasol which had created the Cuango Mining Corporation that had been the largest mining operation in the Cuango valley before the imposition of sanctions. In the additional report dated 16 April 2001 reporting on the enforcement of sanctions, no mention was made of either applicant.

Since then the applicants have alleged that the stigma attaching to their reputation has led to other businesses refusing to trade with them *e.g.* providing two letters referring to the appearance of the name of one of the applicants in UN documents concerning diamond smuggling.

## B. Relevant domestic law and practice

### *1. Privilege*

Words spoken by MPs in the course of debates in the House of Commons are protected by absolute privilege. This is provided by Article 9 of the Bill of Rights 1689, which states:

> "... the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in a court or place out of Parlyament."

The effect of this privilege was described by Lord Chief Justice Cockburn in the case of *Ex parte Watson* (1869) QB 573 at 576:

> "It is clear that statements made by Members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third party."

Statements made by MPs outside the Houses of Parliament are subject to the ordinary laws of defamation and breach of confidence, save where they are protected by qualified privilege.

The question whether or not qualified privilege applies to statements made in any given political context turns upon the public interest. In the case of *Reynolds v. Times Newspapers Ltd.* [2001] 2 AC 127, which concerned allegations made in the British press about an Irish political crisis in 1994, Lord Nicholls of Birkenhead stated in the House of Lords, at page 204:

> "The common law should not develop 'political information' as a new 'subject matter' category of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever the circumstances. That would not provide adequate protection for reputation. Moreover, it would be unsound in principle to

distinguish political discussion from discussion of other matters of serious political concern. The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegations may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing."

Press coverage, to the extent that it fairly and accurately reports parliamentary debates, is generally protected by a form of qualified privilege which is lost only if the publisher has acted "maliciously". "Malice", for this purpose, is established where the report concerned is published for improper motives or with "reckless indifference" to the truth. A failure to make proper enquiries is not sufficient in itself to establish malice, but it may be evidence from which malice (in the sense of reckless indifference to the truth) can reasonably be inferred.

MPs can waive the absolute immunity which they enjoy in Parliament as a result of section 13 of the Defamation Act 1996, which provides:

"(1) Where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he may waive for the purposes of those proceedings, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament.

(2) Where a person waives that protection –

(a) any such enactment or rule of law shall not apply to prevent evidence being given, questions being asked or statements, submissions, comments or findings being made about his conduct, and

(b) none of those things shall be regarded as infringing the privilege of either House of Parliament.

(3) The waiver by one person of that protection does not affect its operation in relation to another person who has not waived it.

(4) Nothing in this section affects any enactment or rule of law so far as it protects a person (including a person who has waived the protection referred to above) from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament."

General control is exercised over debates by the Speaker of each House of Parliament. Each House has its own mechanisms for disciplining Members who deliberately make false statements in the course of debates. Deliberately misleading statements may be punishable by Parliament as a contempt. Alternatively, as the parliamentary Select Committee on Procedure (1988-89) has observed:

> "... there already exists a wide range of avenues which can be pursued by an aggrieved person who wishes to correct or rebut remarks made about him in the House. He can approach his Member of Parliament with a view to his tabling an Early Day Motion, or an amendment where appropriate; there may be cases which can be raised through Questions if some ministerial responsibility can be established; he can petition the House, through a Member; and he can approach directly the Member who made the allegations in the hope of persuading him that they are unfounded and that a retraction would be justified. We believe that in these circumstances, the House would not expect a rigid adherence to the convention that one Member does not take up a case brought by the constituent of another, particularly if the latter was the source of the statement complained of, and so long as the courtesies of proper notification were observed."

### *2. Report of the Joint Committee on Parliamentary Privilege*

A Joint Committee of both Houses of Parliament was set up in July 1997 and tasked with reviewing the law of parliamentary privilege. The Committee received written and oral evidence from a wide variety of sources from within the United Kingdom and abroad and held fourteen sessions of evidence in public. Its report was published in March 1999. Chapter 2 sets out its conclusions on parliamentary immunity:

> "38. The immunity is wide. Statements made in Parliament may not even be used to support a cause of action arising out of Parliament, as where a plaintiff suing a member for an alleged libel on television was not permitted to rely on statements made by the member in the House of Commons as proof of malice. The immunity is also absolute: it is not excluded by the presence of malice or fraudulent purpose. Article 9 protects the member who knows what he is saying is untrue as much as the member who acts honestly and responsibly. ... In more precise legal language, it protects a person from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament.
>
> 39. A comparable principle exists in court proceedings. Statements made by a judge or advocate or witness in the course of court proceedings enjoy absolute privilege at common law against claims for defamation. The rationale in the two cases is the same. The public interest in the freedom of speech in the proceedings, whether parliamentary or judicial, is of a high order. It is not to be imperilled by the prospect of subsequent inquiry into the state of mind of those who participate in the proceedings even though the price is that a person may be defamed unjustly and left without a remedy.
>
> 40. It follows that we do not agree with those who have suggested that members of Parliament do not need any greater protection against civil actions than the qualified privilege enjoyed by members of elected bodies in local government. Unlike members of Parliament, local councillors are liable in defamation if they speak maliciously. We consider it of utmost importance that there should be a national public forum where all manner of persons, irrespective of their power or wealth, can be criticised. Members

should not be exposed to the risk of being brought before the courts to defend what they said in Parliament. Abuse of parliamentary freedom of speech is a matter for internal self-regulation by Parliament, not a matter for investigation and regulation by the courts. The legal immunity principle is as important today as ever. The courts have a duty not to erode this essential constitutional principle."

## C. The Council of Europe and the European Union

Article 40 of the Statute of the Council of Europe provides:

"a. The Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions. These immunities shall include immunity for all representatives to the Consultative Assembly from arrest and all legal proceedings in the territories of all members, in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions.

b. The members undertake as soon as possible to enter into agreement for the purpose of fulfilling the provisions of paragraph a above. For this purpose the Committee of Ministers shall recommend to the governments of members the acceptance of an agreement defining the privileges and immunities to be granted in the territories of all members. In addition, a special agreement shall be concluded with the Government of the French Republic defining the privileges and immunities which the Council shall enjoy at its seat."

In pursuance of paragraph b above, the member States, on 2 September 1949, entered into the General Agreement on Privileges and Immunities of the Council of Europe. This provides, as relevant, as follows:

**Article 14**

"Representatives to the Parliamentary Assembly and their substitutes shall be immune from all official interrogation and from arrest and from all legal proceedings in respect of words spoken or votes cast by them in the exercise of their functions."

**Article 15**

"During the sessions of the Parliamentary Assembly, the Representatives to the Assembly and their substitutes, whether they be members of Parliament or not, shall enjoy:

a. on their national territory, the immunities accorded in those countries to members of Parliament;

b. on the territory of all other member States, exemption from arrest and prosecution. ..."

Article 5 of the Protocol to the General Agreement on Privileges and Immunities of the Council of Europe provides:

"Privileges, immunities and facilities are accorded to the representatives of members not for the personal benefit of the individuals concerned, but in order to safeguard the independent exercise of their functions in connection with the Council of Europe. Consequently, a member has not only the right but the duty to waive the immunity of its representative in any case where, in the opinion of the member, the

> immunity would impede the course of justice and it can be waived without prejudice to the purpose for which the immunity is accorded."

Article 9 of the Protocol on the Privileges and Immunities of the European Communities, adopted in accordance with Article 28 of the Treaty establishing a Single Council and a Single Commission of the European Communities, provides:

> "Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties."

## COMPLAINTS

The applicants complained under Article 6 § 2 of the Convention that Mr Peter Hain declared before the House of Commons that they were guilty of breaching the UN embargo on diamond trading with UNITA and of having bribed Namibian officials.

The applicants complained under Article 6 § 1 of the Convention that they were unable to sue Mr Peter Hain in court for defamation. There was no other recourse open to them to refute the allegations made by him.

The applicants complained under Article 8 of the Convention that the declaration in the House of Commons attacked their reputation and was defamatory, without any basis of legally established fact. The publication of information relating to them was also a breach of their right to respect for private life. They complained that Mr Peter Hain made no response to their requests to meet with them or gave them no opportunity to rebut his allegations.

The applicants complained under Article 14 of the Convention, in conjunction with Articles 6 § 2 and 8 of the Convention, that they were subject to "naming and shaming" as they were not United Kingdom nationals, Mr Peter Hain having stated that the policy in respect of United Kingdom individuals and companies was for any information about alleged breaches of the UN embargo to be passed onto the appropriate United Kingdom enforcement body.

Finally, they invoked Article 13 of the Convention, complaining that they have no effective remedy available to them in respect of the breaches of Articles 6 § 2 and 8 mentioned above.

## THE LAW

1. The applicants complained that the statements by Mr Peter Hain in the House of Commons breached Article 6 § 2 which provides:

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

**(a) The parties' submissions**

The Government submitted that the criminal guarantees of Article 6, in particular the presumption of innocence, were inapplicable at the time of the Minister's speech as there were no criminal proceedings on foot or intended. Nor was there any realistic possibility of such proceedings ever taking place in the United Kingdom, as the allegation was that the applicants had been engaged in the importation of UNITA diamonds into Antwerp, which was not an offence in the United Kingdom where the criminal law only applied to importation into the United Kingdom. The presumption existed to protect the fairness of actual or contemplated proceedings and for Article 6 § 1 to be applicable the person affected must be "charged" with a criminal offence within the extended Convention meaning of that expression. At least some steps must have been taken towards the initiation of a prosecution. In this case, the applicants were not "substantially affected" by a criminal allegation against them within the meaning of Article 6. Even if the provision was applicable, it had to be interpreted in a manner taking into account the principle of Parliamentary privilege, the importance of which has been acknowledged in *A. v. the United Kingdom*, no. 35373/97, ECHR 2002-X) and which would otherwise be undermined or defeated.

The applicants submitted that Article 6 § 2 applied even where no criminal proceedings were in existence or possible in the United Kingdom, citing *Allenet de Ribemont v. France* (judgment of 10 February 1995, Series A no. 308) as indicating that the provision applied even outside criminal proceedings to protect the alleged suspect from hostile public opinion and prevent substitution of non-judicial statements for penal decisions. Even if proceedings were not possible in the criminal courts of the United Kingdom, Mr Peter Hain had accused the applicants of an international infraction and, contrary to the principle of separation of powers, had made himself effectively the tribunal declaring their guilt and imposing a punitive sanction intended to have repercussions on the applicants' business and reputation. Further, the accusations contributed to the institution of criminal investigations against the applicants in Namibia, Belgium and South Africa. The Government could not rely on the principle of parliamentary immunity as necessarily bringing the matter outside the scope of Article 6 § 2, as this was not an absolute justification in Convention terms but could be outweighed by other fundamental interests, as in this case where the applicants were seriously prejudiced and had no means of obtaining redress and the exposure did not pursue any proper legislative purpose.

**(b) The Court's assessment**

*(i) General principles*

The presumption of innocence enshrined in paragraph 2 of the Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1 (see *Allenet de Ribemont*, cited above, § 35). It prohibits the premature expression by the tribunal itself of the opinion that the person charged with the criminal offence is guilty before he has been so proved according to law (see *Minelli v. Switzerland*, judgment of 25 March 1983, Series A no. 62, where the Assize Court hearing the criminal case found the prosecution time-barred but continued nonetheless to decide whether, if it had continued, the applicant would probably have been found guilty for the purposes of costs orders). It also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (*Allenet de Ribemont*, § 41, where remarks were made by a Minister and police superintendent to the press naming without qualification the applicant, arrested that day, as an accomplice in murder).

Article 6 § 2 may also be applicable where the criminal proceedings proper have terminated in an acquittal and other courts issue decisions voicing the continued existence of suspicion regarding the accused's innocence or otherwise casting doubt on the correctness of the acquittal (see, for example, *Sekanina v. Austria*, judgment of 25 August 1993, Series A no. 266-A, § 30; *Hammern v. Norway*, no. 30287/96, ECHR 2003-..., § 48, and *O. v. Norway*, no. 29327/95, ECHR 2003-..., § 40 (concerning the acquitted accused's application for costs and compensation for pecuniary damage respectively); *Y. v. Norway*, no. 56568/00, ECHR 2003-..., § 46 (concerning proceedings brought by the alleged victim of the crime for compensation from the acquitted accused).

The subsequent procedure must however be linked with the issue of criminal responsibility in such a manner as to bring the proceedings within the scope of Article 6 § 2. In *Sekanina* (cited above, § 22) the Court noted that Austrian legislation and practice linked the two questions - the criminal responsibility of the accused and the right to compensation - to such a degree that the decision on the latter issue could be regarded as a consequence and, to some extent, the concomitant of the decision on the former (see also *Hammern*, cited above, § 46, where the compensation claim not only followed the criminal proceedings in time but were tied to those proceedings in legislation and practice). Similarly, in *Y. v. Norway* (cited above, §§ 43-46) the reasoning and language used by the civil court created a clear link between the criminal case and the compensation proceedings (see, *mutatis mutandis*, *Ringvold v. Norway*, no. 34964/97, ECHR 2003-..., where Article 6 § 2 was not applicable as the compensation proceedings could not be regarded as a consequence, or concomitant of the criminal proceedings).

*(ii) Application in the present case*

The Court has accordingly examined whether the applicants may be regarded in the circumstances of this case as "charged with a criminal offence" for the purposes of Article 6 § 2 when Mr Peter Hain declared in Parliament that they were involved in exporting diamonds from Angola in breach of UN sanctions.

The applicants were not charged with any criminal offence within the United Kingdom. As the Government have pointed out, their alleged activities did not fall within the jurisdiction of the United Kingdom courts, the legislation imposing criminal sanctions covering only importation of diamonds into the United Kingdom. At the time that Mr Peter Hain made his statement in the House of Commons, it is not apparent therefore that there was any pending or intended criminal investigation about a prosecutable offence within the United Kingdom, of which his statements might be regarded as prejudging the outcome.

The applicants argued that this was not decisive as by making the statement Mr Peter Hain was setting himself up as a *de facto* tribunal to determine their guilt and issue a punishment of "naming and shaming" in respect of what was in essence an international offence. The Court recalls that the United Nations Security Council had issued a resolution imposing an embargo on the export of diamonds by UNITA in which it requested States to take measures against infringing persons or organisations. The European Union subsequently adopted measures, which required its members to enforce the prohibition. It is not however apparent to the Court that a resolution of the Security Council is sufficient in itself to create an "international offence" that is prosecutable. There is no international tribunal which appears to have competence to prosecute sanction infringements (the UN Sanctions Committee is a monitoring and investigative but not judicial body) and it would appear that the United Nations relies on member states to act within the confines of their own criminal law jurisdictions. The Court is accordingly not persuaded that Mr Peter Hain's reference to the breaching of UN sanctions has effect on some plane of international criminal jurisdiction. Nor, however damning his statement might have been, could he be regarded as acting as a judicial body or determining criminal charges himself.

The applicants have also claimed that the statement in the United Kingdom Parliament should be regarded as linked to the criminal investigations which were as a result, they alleged, instigated into the allegations in Belgium, Namibia and South Africa. Sparse information is provided about these procedures although it is apparent that no prosecuting authority in these countries considered it appropriate to bring any charges against the applicants or to commence a prosecution. It seems that there was an investigation by the police which was closed by the Antwerp *procureur* with a decision not to prosecute or bring charges. It is not apparent that

either of the applicants was contacted or questioned nor that any steps were taken to obtain evidence from business premises or any other person connected with them. The letter provided by the applicants from the Belgian Foreign Minister refers to information passed between the United Kingdom and Belgian secret services and not to any substantive criminal investigation by prosecutorial authorities. The Court does not consider therefore that there is any close link, in legislation, practice or fact, established between the statement made in the House of Parliament and any significant criminal procedural steps taken overseas which might be regarded as sufficient to render the applicants "charged with a criminal offence" for the purposes of Article 6 § 2 of the Convention.

The Court observes from the applicants' submissions that they have no objection as such to the United Kingdom transmitting information to Belgian authorities or to the UN Sanctions Committee about purported breaches of UN sanctions. The essence of their complaint is that Mr Peter Hain announced incorrect facts about their involvement in such breaches in a forum attracting considerable publicity harmful to their business and reputation and where he enjoyed immunity against suit. Article 6 § 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. Where no such proceedings are, or have been in existence, statements attributing criminal or other reprehensible conduct are relevant rather to considerations of protection against defamation and adequate access to court to determine civil rights and raising potential issues under Articles 8 and 6 of the Convention.

The Court concludes therefore that Article 6 § 2 of the Convention was not applicable. This part of the application is therefore incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 § 3, and therefore inadmissible in application of Article 35 § 4.

2. The applicants complained under Article 6 § 1 of the Convention that they had been unable to bring proceedings for defamation against Mr Peter Hain. Article 6 § 1 provides as relevant:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

**(a) The parties' submissions**

The Government accepted that Article 6 § 1 was applicable to the applicants' complaints that they were unable to take proceedings against the minister for defamation. However, the rule of absolute privilege fully satisfied the tests for determining compatibility with Article 6 § 1 as it pursued very important aims, including the protection of free speech in Parliament, in a manner proportionate to the constitutional significance of the public interests at stake. As found by the Court in *A. v. the United*

*Kingdom* (cited above), the creation of exceptions to the rule would seriously undermine the legitimate aims that the privilege exists to protect.

The applicants submitted that the restriction on access to court was disproportionate and impaired the essence of the right. It could not be said, as in *A. v. the United Kingdom,* that any alternative means of redress was available. As they were not British citizens, there was no possibility of their constituency MP or likelihood of any other MP taking up their complaint in Parliament internally. While deliberately misleading statements could be punished as contempt, this would require the applicants in effect to prove their innocence, which would defeat the purpose of the Convention. Also Article 6 § 1 was breached by the way in which Mr Peter Hain set himself up to act as a effective criminal tribunal, judging and punishing them, contrary to the principle of separation of powers.

**(b) The Court's assessment**

The present case raises similar, though not identical, complaints and issues under Article 6 § 1 as *A. v. United Kingdom*. The Court adopts its reasoning in that case that, as the central issues of legitimate aim and proportionality which arise under the applicants' procedural complaint under Article 6 § 1 of the Convention are the same as those arising in relation to the applicants' substantive complaint going to the right to respect for private life under Article 8, it may proceed on the basis that Article 6 § 1 is applicable to the facts of this case.

As regards compliance with the requirements of Article 6 § 1, in particular whether the applicants have been denied access to court by the operation of Parliamentary immunity, the Court recalls that right of access to court 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. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the 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. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other cases, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I).

In *A. v. the United Kingdom,* the Court was satisfied that the immunity given to statements made by members of Parliament within the House of Commons pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary.

As regards the proportionality of the immunity enjoyed by the MP, the Court found that, notwithstanding the absolute nature of the immunity, it was compatible with the Convention. It had regard to the special importance of safeguarding the freedom of expression of the elected representatives of the people, stating that in a democracy, Parliament or such comparable bodies are the essential *fora* for political debate and that very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein (see, for example, *Jerusalem v. Austria*, no. 26958/95, §§ 36 and 40, ECHR 2001-II). It also noted that most, if not all, Contracting States to the Convention had in place some form of immunity for members of their national legislatures and the existence of measures granting privileges and immunities to, *inter alios*, Representatives to the Parliamentary Assembly of the Council of Europe and Members of the European Parliament. It concluded that a rule of parliamentary immunity, which was consistent with and reflects generally recognised rules within signatory States, the Council of Europe and the European Union, could not in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1 (see, *mutatis mutandis*, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, § 56). Just as the right of access to court was an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by signatory States as part of the doctrine of parliamentary immunity (*ibid*).

The applicants argued that their case could be distinguished from *A. v. United Kingdom* as the Court in its judgment had regard to the fact that the applicant was not deprived of all possible redress, since a MP could have taken up her complaints and petitioned in Parliament for a retraction. It was hardly likely that this would be possible in their case as foreigners accused of serious wrongdoing. The Court is not persuaded however that this possibility was decisive for its reasoning in *A. v. United Kingdom*, particularly since on the facts of the case no such petition was made. The Court finds no reason to depart from its assessment as to the proportionality of the immunity. More importantly in that context it may be observed that the immunity afforded to MPs in the United Kingdom appears to be narrower than that afforded to members of national legislatures in certain other signatory States and those afforded to Representatives to the Parliamentary Assembly of the Council of Europe and Members of the European Parliament. In particular, the immunity attaches only to statements made in the course of parliamentary debates on the floor of the House of Commons or House of Lords. No immunity attaches to statements made outside Parliament or to an MP's press statements published prior to parliamentary debates, even if their contents are repeated subsequently in the debate itself. This indicates that the immunity is kept within well-

defined limits, apt to achieve the purposes for which it is required without erring into unnecessarily blanket protection (see *Cordova v. Italy* (no. 1) no. 40877/98, ECHR 2003-..., §§ 62-63). That members of Parliament cannot act with impunity even within the House is shown by the fact that in extreme cases, deliberately misleading statements may be punishable by Parliament as a contempt, while general control is exercised over debates by the Speaker of each House. It is true that neither of these aspects served to prevent, or sanction, the statement being made concerning the applicants. However, they remain relevant to the overall proportionality of the system and the balance between the competing interests.

It follows that, in all the circumstances of this case, the application of a rule of absolute Parliamentary immunity cannot be said to exceed the margin of appreciation allowed to States in limiting an individual's right of access to court.

The Court notes the applicants' submissions concerning the seriousness of the allegations made about them, although the statements, unlike those made about the applicant in *A. v. United Kingdom*, were at least arguably relevant to the subject-matter of the debate in the House. It also notes the applicants' claims that the statements had financially damaging repercussions on their business, although it may be observed that the letters from other diamond enterprises submitted by the applicants refer not to the statement in the House of Commons but to the documents of the UN Sanctions Committee. However, these factors could not, in any event, alter the Court's conclusion as to the proportionality of the parliamentary immunity at issue, since the creation of exceptions to that immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued.

The Court concludes that the complaints under Article 6 § 1 are manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

3. The applicants complained that the defamatory statement of Mr Peter Hain violated Article 8 of the Convention, which provides as relevant:

> "1. Everyone has the right to respect for his private ... life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government considered that, insofar as this complaint related to the absence of a civil remedy in the national courts, the issues were indistinguishable from those arising under Article 6 § 1 and rejected in *A. v. the United Kingdom* (cited above).

The applicants submitted that their right to honour and reputation had been violated by the statement and also their private life infringed by the

release to the public of inaccurate information. The interference with their rights was disproportionate, in particular since no means of protecting their rights was available. It was not required that a court action be possible against MPs however, as an effective avenue of redress within Parliament could provide protection.

As in *A v. the United Kingdom*, the Court finds that the central issues of legitimate aim and proportionality that arise in relation to the applicants' complaints under Article 8 are the same as those arising in relation to their Article 6 § 1 complaint about the parliamentary immunity enjoyed by the Mr Peter Hain. No point of distinction or separate issue arises on the submissions before it.

This part of the application must also be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

4. The applicants complain that the "naming and shaming" in Parliament was discriminatory, invoking Article 14 of the Convention in conjunction with Articles 6 § 2 and 8, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Government submitted that the applicants, as dealers based in Antwerp, were not in a relevantly similar position to United Kingdom nationals or companies in respect of whom there was reliable information suggesting a breach of the sanctions regime within the United Kingdom. The United Kingdom was not in a position to take enforcement action through prosecution of those involved in importation into a country other than the United Kingdom and thus there was no possibility of reporting them to domestic enforcement bodies, which would take action regardless of nationality if the importation was within their jurisdiction. The applicants were however reported to the UN Sanctions Committee.

The applicants submitted that it was discrimination to "name and shame" them as this treated them differently from those whom the United Kingdom authorities could pursue with criminal investigations within its jurisdiction and that this was a ground of distinction also covered by Article 14. The difference in treatment had no objective or reasonable justification, as it should be for the national authorities in the countries where the crimes were allegedly committed to take the necessary measures.

The Court notes that the applicants' complaints concerning Article 6 § 2 fell outside the scope of that provision. Accordingly, Article 14 is, in that regard, not applicable, restricted as it is to complaints falling within the scope of the rights guaranteed under the Convention.

As regards the applicants' allegations that they have been discriminated against in the enjoyment of their right to respect for private life, the Court

recalls that for the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (for example, *Pretty v. United Kingdom*, no. 2346/02, ECHR 2002-III, § 88). Moreover, the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Camp and Bourimi v. the Netherlands*, no. 28369/95, ECHR 2000-X, § 37).

The Court notes that the applicants seek to compare themselves with suspected persons against whom action could be brought before United Kingdom courts, apparently on the basis that if they had been in that position they would have been subject to criminal investigation and prosecution instead of "naming and shaming". Observing that in any case there is no right to be investigated or prosecuted under the Convention, the Court is not persuaded that the applicants can claim to be in an analogous situation to suspected sanction infringers hypothetically subject to the jurisdiction of the United Kingdom courts, where the provisions of domestic law would apply in full force.

It follows that this part of the application must be rejected as, respectively, incompatible *ratione materiae* and manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

5. Finally, the applicants complained of a lack of effective remedy for their complaints, invoking Article 13 of the Convention which 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."

The Government submitted that the applicants did not have an arguable claim of a violation of their rights for the purposes of their provision and that in any event Article 13 could not be relied upon to challenge the content of domestic law.

The applicants argued that their claims were at the least arguable and that they were not seeking to denounce the Bill of Rights as such but to seek a remedy in the very exceptional circumstances of their case where immunity served to protect a statement equivalent to a criminal condemnation for which no other redress was possible.

The Court has found above that there has been no violation of Articles 6 § 1, 8 or 14 of the Convention in this case. Even assuming however that the applicants had an "arguable claim" that those Articles had been violated, the Court recalls that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's primary legislation to be challenged before a national authority on grounds that it is contrary to the Convention (see

*James and others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, § 85; *A. v. United Kingdom*, cited above, § 112). The applicants' complaints related to the immunity conferred by Article 9 of the Bill of Rights 1689 and it is irrelevant that they only sought to establish an exception to its provisions rather than a general repeal (*mutatis mutandis*, *A. v. United Kingdom*, cited above, § 112).

This part of the applicant must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

*Declares* the application inadmissible.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President