CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 29746/05
by THE CONDE NAST PUBLICATIONS LTD and CARTER
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 8 January 2008 as a Chamber composed of:

Josep Casadevall, *President*,
Nicolas Bratza,
Giovanni Bonello,
Kristaq Traja,
Stanislav Pavlovschi,
Ján Šikuta,
Päivi Hirvelä, *judges*,
and Lawrence Early, *Section Registrar*,

Having regard to the above application lodged on 10 August 2005,

Having deliberated, decides as follows:

THE FACTS

The first applicant, Condé Nast Publications Ltd, is a company incorporated in England and Wales which is the publisher of *Vanity Fair*, a magazine published monthly in New York and the United Kingdom. The second applicant, Mr G. Carter, is a Canadian national who is the editor-in-chief of *Vanity Fair* and lives in New York. They were represented before the Court by Mr M. Stephens, a lawyer practising in London.

A. The circumstances of the case

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

Roman Polanski ("RP"), a well-known film director who held dual Polish and French nationality, had pleaded guilty in 1977 in the United States ("US") to unlawful sexual intercourse with a 13-year-old girl. He fled from the US before sentencing. Thereafter he lived in France from where, being a French citizen, he could not be extradited to the US.

In 2002 the applicants published in the July issue of *Vanity Fair* an article concerning RP which described how he had allegedly tried to seduce a Swedish model at a fashionable New York nightspot shortly after his pregnant wife's murder in 1969. He brought an action in the United Kingdom for libel against *Vanity Fair* and, fearing possible arrest and extradition to the US, applied to give his evidence by video conference link ("VCF").

On 9 October 2003 the High Court ordered that RP be permitted to give his evidence in the libel trial by VCF from a Paris hotel. It was noted that the technology to be used would be of a high standard and that in VCF evidence there was generally very little delay, very little room for confusion and cross-examination could take place at the same pace as if a witness were present at court. On 11 November 2003 the Court of Appeal allowed the appeal of the applicants. It was considered that it was "clearly an indulgence" to permit RP to give his evidence by VCF and the real question was whether, as a matter of policy in the particular circumstances of this case, that indulgence should be granted. It was considered that the court's general policy should be to discourage litigants from escaping the normal processes of the law, rather than to facilitate it, so that, accordingly, the judge had erred in making the VCF order which should be set aside.

On 10 February 2005 the House of Lords allowed an appeal by RP by a majority of 3-2.

Lord Nicholls of Birkenhead, delivering the leading majority speech, with whom Lord Hope of Craighead and Baroness Hale of Richmond agreed, found that there was no doubt that, as between RP and Condé Nast, the judge's order was rightly made. The test of the relevant Practice

Direction for the use of VCF, namely that it could be allowed to save costs and where it would be beneficial to the efficient, fair and economic disposal of the litigation, was satisfied in the circumstances.

RP was entitled to bring his action in the United Kingdom where the offending article had been published. His flight from the US in 1978 and the steps he had taken ever since to remain beyond the reach of the US court, did not preclude him from bringing proceedings in England in respect of damage to his reputation flowing from publication of defamatory material in the United Kingdom. Hence, the libel proceedings did not constitute an abuse of the process of the court. A direction that RP's evidence might be given by means of VCF, an entirely satisfactory means of giving evidence, would not prejudice Condé Nast to any significant extent; indeed, any prejudice would more likely be suffered by RP by reason of the lessened impact of his evidence and celebrity status on the jury. Improvements in technology enabled RP's evidence to be tested as adequately if given by VCF as it would be if given in court. If a VCF order were refused, RP would be gravely handicapped in the conduct of the proceedings. In practice he would either abandon his action or, possibly, continue but under the serious disadvantage that his oral evidence on the crucial dispute of fact, concerning what took place at the restaurant, would not be placed before the jury. Either way, in its conduct of the litigation Condé Nast would receive an unjustified windfall at the expense of RP. Condé Nast would find itself in the fortunate position of not being called to account for having published what might be a serious libel.

Whether the use of the court's procedures in a particular way would bring the administration of justice into disrepute or would be an affront to the public conscience, called for an overall balanced view. A fugitive from justice was not as such precluded from enforcing his rights through the courts of the United Kingdom. RP's status as a fugitive offender did not deprive him of any rights he would otherwise possess in respect of the subject matter of his action. The contrary approach, adopted in the name of the public interest, would lead to wholly unacceptable results in practice. It would mean that for so long as a fugitive remained on the run from the criminal law, his property and other rights could be breached with impunity. That could not be right. Such harshness had no place in the law that knew no principle of fugitive disentitlement.

Although a direction that a fugitive such as RP may give his evidence by use of VCF was a departure from the normal way a claimant gives evidence in libel proceedings, the extent of this departure should not be exaggerated; it was expressly sanctioned by the Civil Procedure Rules and was not an indulgence. Despite his status, a fugitive from justice was entitled to invoke the assistance of the court and its procedures in protection of his civil rights. He could bring or defend proceedings even though he was, and remained, a fugitive. If he was entitled to lodge such proceedings there could be little

rhyme or reason in withholding from him a procedural facility flowing from a modern technological development which was now readily available to all litigants. To withhold that facility would be to penalise him because of his status. The appeal was to be allowed and the judge's order restored.

Lord Slynn of Hadley dissented. He noted that there were at least two policy considerations arising in the present case which were in conflict. The first was that the court should not frustrate the claimant's accepted right to sue in the civil courts by refusing a procedural step provided for by the Rules when there was no valid reason to do so. The second was that the civil courts should not take steps the effect of which was to frustrate or impede the due execution of the criminal procedure of another State with which the United Kingdom had an extradition treaty and under which, if the appellant were in England, the United Kingdom would be required to respond to a request for his extradition so that he could be sentenced and obliged to comply with any sentence imposed.

Although it was recognised that the fact that RP was a fugitive offender did not bar him from starting proceedings, there was only one reason for the request of the order which was to avoid the risk or likelihood of arrest and extradition and to escape sentence and punishment in the US for an admitted offence. To accede to his request in the absence of other overriding considerations compelling the grant of the application, would be contrary to public or judicial policy.

Where a person convicted on his own admission fled the jurisdiction, in the absence of special factors compelling a different result, a VCF order may and should be refused where the sole reason for asking for it was that he wished to escape conviction or sentence in the country where he had commenced proceedings or to avoid extradition to another country for the same reason.

Lord Carswell also dissented, finding that although it was not necessary to import into the United Kingdom legal system the full rigour of the fugitive offender doctrine as it applied in the US, permitting a fugitive to give his evidence by VCF so that he could stay out of the jurisdiction and avoid arrest affronted the public conscience and brought the administration of justice into disrepute. Moreover, it was noted that excluding the claimant from presenting his case in court by VCF would not constitute a breach of Article 6 of the European Convention of Human Rights as the right of access to court is not absolute.

The trial took place in July 2005. RP gave evidence by VCF from a Paris hotel suite and the editor and eyewitnesses came to the UK and gave evidence in person. The applicants claim that RP's cross-examination by VCF was made difficult for defence counsel given delays and inaudibility. On 22 July 2005 the jury found for RP and awarded him 50,000 pounds sterling (GBP) in damages. The applicants did not lodge an appeal.

B. Relevant domestic law and practice

The Civil Evidence Act 1995 provides, in so far as relevant, that:

> **"**1.—(1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay.
>
> (...)
>
> 3. Rules of court may provide that where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness, any other party to the proceedings may, with the leave of the court, call that person as a witness and cross-examine him on the statement as if he had been called by the first-mentioned party and as if the hearsay statement were his evidence in chief."

R. 32 of the Civil Procedure Rules ("CPR") provides:

> "(I) The Court may control the evidence by giving directions as to ...
>
> (c) the way in which the evidence is to be placed before the court."

Annex 3 to the Practice Direction to the CPR, Pt 32 sets out video conferencing guidance. Paragraph 2 of that guidance states:

> "VCF may be a convenient way of dealing with any part of proceedings: it can involve considerable savings in time and cost. Its use for the taking of evidence from overseas witnesses will, in particular, be likely to achieve material saving of costs, and such savings may also be achieved by its use for taking domestic evidence. It is, however, inevitably not as ideal as having the witness physically present in court. Its convenience should not therefore be allowed to dictate its use. A judgment must be made in every case in which the use of VCF is being considered not only as to whether it will achieve an overall cost saving but as to whether its use will be likely to be beneficial to the efficient, fair and economic disposal of the litigation. In particular, it needs to be recognised that the degree of control a court can exercise over a witness at the remote site is or may be more limited than it can exercise over a witness physically before it."

COMPLAINTS

1. The applicants complained under Article 6 of the Convention that the granting of the VCF order, and its application in respect of their cross-examination of RP, had hindered the principle of equality of arms and rendered the proceedings unfair.

2. They further complained that the libel proceedings had violated their rights under Article 10 of the Convention.

3. They lastly contended that the House of Lords' judgment was a violation of Article 10 taken in conjunction with Article 18, in that the restriction of their free speech rights had been pursued with the purpose of assisting a convicted child rapist to evade justice.

THE LAW

A. Article 6 of the Convention

The applicants complained about the alleged unfairness of the proceedings caused by the granting and application of the VCF order. Article 6 provides, in so far as relevant, that:

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

(a) The applicants' submissions

The applicants maintained that allowing RP, a fugitive from justice, to submit his evidence by VCF imposed a disproportionate burden on the conduct of their defence. It further violated the principle of equality of arms since their eyewitnesses had been cross-examined in person while RP was permitted to testify by VCF and was assisted by the time delays and the breakdown in sound which required counsel to repeat questions and ask them in a non-confrontational way, thus preventing the necessary pace and probing of cross-examination which tests for truth. His evidence was crucial to the verdict as he alone was in a position to refute the eyewitness testimony. RP should have been taken to have waived his right to be present at the hearing because of his status as a fugitive from justice.

(b) General principles

The Court reiterates that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, for example, *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 238, § 53).

Article 6 of the Convention is intended to provide procedural guarantees relating to the proceedings as a whole and the admissibility of evidence is primarily a matter for regulation by national law and, as a general rule, it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether evidence was properly admitted but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, *inter alia*, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, § 50).

As to the use of VCF for the submission of evidence, the Court has stated in *Marcello Viola v. Italy* (no. 45106/04, §67, 5 October 2006) that:

> "Although the participation of the defendant in his trial by videoconference is not, as such, contrary to the Convention, it is incumbent on the Court to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the submission of evidence are compatible with the requirements of due process as laid down in Article 6 of the Convention."

(c) The Court's assessment

The Court notes at the outset that the applicants' complaint under this provision is two-fold:

(i) In the first place, they contested the granting of the VCF order to a fugitive from justice. The Court observes that such means of submission of evidence is not contrary to the principles of the Convention (see *mutatis mutandis Marcello Viola v. Italy* (cited above)). In the present proceedings, the legitimate aim pursued was the proper administration of justice, by granting RP access to the same procedural facilities as other litigants and enabling him to continue the proceedings which were aimed at the vindication of his right to reputation guaranteed under Article 8 of the Convention (see *White v. Sweden*, no. 42435/02, § 19, 19 September 2006; *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI; *Abeberry v. France* (dec.) no. 58729/00, 21 September 2004). In the view of the Court a fugitive from justice does not lose his entitlement to protection of his right to reputation merely because of his status as a fugitive. The applicant's fugitive status was, in any event, irrelevant to the libel proceedings which had been brought by RP to vindicate his right to reputation allegedly damaged by accusations that were unconnected with the criminal proceedings in the US. The Court also considers that the State cannot be condemned under Article 6 of the Convention for providing a particular litigant with facilities that were available to other litigants simply because of his status as a fugitive from justice. The deprivation of such facilities would run counter to the Convention guarantee of equal treatment that is inherent in the principle of equality of arms. For the Court, there is no scope for a rule on fugitive disentitlement in the Convention legal system (see, *mutatis mutandis*, *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, p. 15, § 38; *Omar v. France*, judgment of 29 July 1998, *Reports of Judgments and Decisions* 1998-V, § 40; *Krombach v. France*, no. 29731/96, § 87, ECHR 2001-II). Further, it considers that the applicants had suffered little, if any, disadvantage as a result of the submission of RP's evidence by VCF whereas, in the event of a refusal of the relevant order, RP would, in practice, have been requested to abandon his action in denial of his right of access to court. In these circumstances, the Court does not consider that the order enabling RP to submit his evidence by VCF hindered the principle of equality of arms or rendered the proceedings unfair in any other way.

It follows that this head of the complaint must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

(ii) In so far as the applicants complained about the alleged deficiencies in the proceedings caused by the submission of RP's evidence by VCF, the Court considers that the complaint is inadmissible on grounds of non-exhaustion of domestic remedies. In the first place, there is no indication that the applicants sought to bring their alleged difficulties in cross-examination caused by the VCF transmission of RP's evidence to the attention of the trial judge. Secondly, the applicants had the opportunity to raise any particular shortcomings in the fairness of the proceedings on appeal, but they failed to do so.

It follows that this head of the complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Article 10 of the Convention

The applicants complained that the libel proceedings brought by RP constituted a disproportionate interference with their right to free speech contrary to Article 10 of the Convention. Article 10 provides, insofar as relevant:

> "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...
>
> 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 the protection of the reputation or rights of others..."

The Court considers that, to the extent that the applicants' complaint under this provision has not been addressed by the Court's examination of their complaint under Article 6, the complaint is inadmissible on grounds of non-exhaustion of domestic remedies.

The applicants raised three issues in their complaint under this provision. In the first place, they suggested that the VCF order rendered the proceedings unfair. However, the Court considers that, while procedural unfairness may render an impugned interference disproportionate (see *Kyprianou v. Cyprus*, [GC], no. 73797/01, § 171, ECHR 2005-...), in the present case the proceedings were not unfair for the reasons set out in its analysis of the Article 6 complaint.

Secondly, the applicants contended that the impugned publication fell within the margin of public debate accorded to the press given that the subject of the publication was a public figure. However, the applicants did not lodge an appeal to contest the High Court judgment.

Lastly, the applicants argued that the legal costs of the proceedings and the damages award had been excessive. However, it appears that the

applicants did not raise this complaint before the domestic authorities and, as noted above, did not appeal against the High Court judgment.

Hence, the Court considers that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

C. Article 18 of the Convention

The applicants maintained, invoking Article 18 of the Convention in conjunction with Article 10, that the VCF order constituted an interference with their Convention rights which was imposed for a purpose incompatible with the Convention's guarantees, namely the protection of a fugitive so that he could successfully evade justice. Article 18 provides:

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

The Court recalls that Article 18 of the Convention, like Article 14, does not have an autonomous role. It can only be applied in conjunction with another Article of the Convention (*Gusinskiy v. Russia*, no. 70276/01, ECHR 2004-IV, § 73).

The Court finds the applicants' argument misconceived. The purpose of the impugned VCF order was to ensure the proper administration of justice by not restricting a procedural facility and ultimately access to court of a particular litigant on the basis of his status. The Court reiterates, in this connection, that the granting of the impugned order was unconnected with RP's conviction in the US. Its refusal would have deprived him of the opportunity to obtain a remedy for an attack on his reputation.

It follows that the complaint must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early Registrar	Josep Casadevall President