

European Court of Human Rights Cases/2005/Steel and another v United Kingdom (App no 68416/01) - [2005] ECHR 68416/01

## **Steel and another v United Kingdom (App no 68416/01)**

[2005] ECHR 68416/01

### **EUROPEAN COURT OF HUMAN RIGHTS**

**JUDGE PELLONPAA (PRESIDENT), JUDGES BRATZA, STRAZNICKA, CASADEVALL, MARUSTE, PAVLOVSKI AND GARLICKI, AND MR M O'BOYLE (SECTION REGISTRAR)**

**7 SEPTEMBER 2004, 25 JANUARY 2005**

**15 FEBRUARY 2005**

*Human rights – Fair trial – Civil right – Access to court – Availability of legal aid – Defamation proceedings – Freedom of expression – Applicants defending themselves in long and complex libel proceedings – Damages awarded against applicants – Whether violation of applicants' rights to fair trial and freedom of expression – Whether applicants entitled to just satisfaction for non-pecuniary loss – European Convention on Human Rights, arts 6, 10, 41.*

At all material times, the applicants were associated with a small group which campaigned principally on environmental and social issues. In the mid-1980s, that group began a campaign, which included the distribution of leaflets, against a large multi-national corporation which ran a substantial number of fast-food outlets. That corporation brought proceedings in libel against the applicants and a number of others who had allegedly published the leaflets. Proceedings against the other defendants were withdrawn in exchange for an apology. The applicants defended the action on a number of grounds. The applicants had low incomes and were unable to afford legal representation. Their application for legal aid was refused because under the relevant legislation in force at the time, legal aid was not available for defamation proceedings. The applicants therefore represented themselves throughout the trial and subsequent appeal. Some money was raised by way of donation to assist them and they received some pro bono legal assistance both with drafting and, on a small number of occasions, representation. The corporation was represented by specialist leading and junior counsel and solicitors. The hearing was very lengthy, and lasted for 313 court days. The applicants were found to have libelled the corporation, and damages at a total of £60,000 were awarded. That award was reduced on appeal to £40,000. The applicants applied to the European Court of Human Rights. The applicants complained, inter alia: (i) that they had been denied a fair trial in breach of art 6(1) of the European Convention on Human Rights by virtue of the lack of legal aid; and (ii) that there had been a breach of their right to freedom of expression contrary to art 10 of the Convention. In respect of the latter argument, it was not disputed that the domestic proceedings amounted to an interference with the applicants' right to freedom of expression, and the central issue for the court was whether that interference was necessary in a democratic society. The applicants also sought just satisfaction for non-pecuniary loss pursuant to art 41 of the Convention.

Held: (1) It was central to the concept of a fair trial that a litigant was not denied the opportunity to present his case effectively before the court, and that he was able to enjoy equality of arms with the opposing side. Article 6(1) left to contracting states a free choice of the means to be used in guaranteeing those rights. The institution of a legal aid scheme constituted just one of those means. The question whether the provision of legal aid was necessary for a fair hearing had to be determined on the basis of the particular facts and cir-

cumstances of each case, and would depend, inter alia, on the importance of what was at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity effectively to represent himself. The right of access to a court was not, however, absolute and could be subject to restrictions, provided that those pursued a legitimate aim and were proportionate. It could, therefore, be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the applicant or his prospects of success in the action. Moreover, it was not incumbent on the state to seek through the use of public funds to ensure total equality of arms between the assisted party and the opposing party, so long as each party was afforded a reasonable opportunity to present his case under conditions which did not place him at a substantial disadvantage vis-à-vis his adversary. Applying those criteria to the instant case, the case was factually highly complex, and involved extensive legal and procedural issues. In an action of such complexity, neither the sporadic help given to the applicants on a pro bono basis, nor judicial assistance and latitude of the sort afforded to litigants in person was any substitute for competent and sustained representation by an experienced lawyer. Moreover, the disparity between the respective levels of legal assistance enjoyed by the applicants and the corporation was of such a degree that it could not have failed to give rise to unfairness. It followed that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms. There had, accordingly, been a violation of art 6(1) of the Convention; *McVicar v UK* (2002) 12 BHRC 567 considered.

(2) The inequality of arms and the difficulties under which the applicants laboured were significant in assessing the proportionality of the interference under art 10. The applicants had been faced with the choice either to withdraw the leaflet and apologise to the corporation or to bear the burden of proving, without the benefit of legal aid, the truth of the allegations contained within it. Given the enormity and complexity of that undertaking, it could not be said that the correct balance had been struck between the need to protect the applicants' right to freedom of expression and the need to protect the corporation's rights and reputation. The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible 'chilling' effect on others were also important factors to be taken into consideration. Moreover, the award of damages made against the applicants could also have failed to strike the right balance. There had, accordingly, been a violation of art 10 of the Convention; *Hertel v Switzerland* (1998) 5 BHRC 260 considered.

(3) In the circumstances of the case, the applicants had suffered non-pecuniary damage and would be awarded just satisfaction pursuant to art 41 of the Convention. The first applicant would be awarded 20,000 euros and the second applicant 15,000 euros.

## PROCEDURE

1. The case originated in an application (no 68416/01) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under art 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two United Kingdom nationals, Helen Steel and David Morris ("the applicants"), on 20 September 2000.
2. The applicants, who had been granted legal aid, were represented by Mr M Stephens, a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D Walton, Foreign and Commonwealth Office.
3. The applicants alleged, in particular, that defamation proceedings brought against them had given rise to violations of their rights to a fair trial under art 6(1) of the Convention and to freedom of expression under art 10.

4. The application was allocated to the Fourth Section of the Court (r 52(1) of the Rules of Court). Within that Section, the Chamber that would consider the case (art 27(1) of the Convention) was constituted as provided in r 26(1).

5. By a decision of 6 April 2004, the Court declared the application partly admissible.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 September 2004 (r 59(3)).

There appeared before the Court: (a) *for the Government* Mr D Walton, Foreign and Commonwealth Office, *Agent*, Mr P Sales, *Counsel*, Mr A Brown, Mr D Willink, Mr R Wright, *Advisers*; (b) *for the applicants* Mr K Starmer, *Counsel*, Mr M Stephens, *Solicitor*, Mr A Hudson, *Junior Counsel*, Ms P Wright, *Adviser*.

The Court heard addresses by Mr Starmer and Mr Sales.

7. Following the hearing, both parties submitted information which had been requested by Judge Bratza at the hearing.

## THE FACTS

### *I. The circumstances of the case*

#### A. The leaflet

8. The applicants, Helen Steel and David Morris, were born in 1965 and 1954 respectively and live in London.

9. During the period with which this application is concerned, Ms Steel was at times employed as a part-time bar worker, earning approximately £65 per week, and was at other times unwaged and dependent on income support. Mr Morris, a former postal worker, was unwaged and in receipt of income support. He was a single parent, responsible for the day to day care of his son, aged four when the trial began. At all material times the applicants were associated with London Greenpeace, a small group, unconnected with Greenpeace International, which campaigned principally on environmental and social issues.

10. In the mid-1980s London Greenpeace began an anti-McDonald's campaign. In 1986 a six-page leaflet entitled "What's wrong with McDonald's?" ("the leaflet") was produced and distributed as part of that campaign. It was last reprinted in early 1987.

11. The first page of the leaflet showed a grotesque cartoon image of a man, wearing a Stetson and with dollar signs in his eyes, hiding behind a "Ronald McDonald" clown mask. Running along the top of pages 2-5 was a header comprised of the McDonald's "golden arches" symbol, with the words "McDollars, McGreedy, McCancer, McMurder, McDisease ..." and so forth superimposed on it.

12. The text of page 2 of the leaflet read as follows (extract):

† "What's the connection between McDonald's and starvation in the 'Third World'?"

† THERE's no point feeling *guilty* about eating while watching starving African children on TV. If you do send money to Band Aid, or shop at Oxfam, etc., that's morally good but politically useless. It shifts the blame from governments and does nothing to challenge the power of multinational corporations.

† HUNGRY FOR DOLLARS

† McDonald's is one of several giant corporations with investments in vast tracts of land in poor countries, sold to them by the dollar-hungry rulers (often military) and privileged elites, evicting the small farmers that live there growing food for their own people. The power of the US dollar means that in order to buy technology and manufactured goods, poor countries are trapped into producing more and more food for export to the States. *Out of 40 of the world's poorest countries, 36 export food to the USA—the wealthiest.*

† ECONOMIC IMPERIALISM

† Some 'Third World' countries, where most children are undernourished, are actually exporting their staple crops as animal feed—ie to fatten cattle for turning into burgers in the 'First World'. Millions of acres of the best farmland in poor countries are being used for *our* benefit—for tea, coffee, tobacco, etc—while people there are *starving*. McDonald's is directly involved in this economic imperialism, which keeps most black people poor and hungry while many whites grow fat.

† GROSS MISUSE OF RESOURCES

† GRAIN is fed to cattle in South American countries to produce the meat in McDonald's hamburgers. Cattle consume 10 times the amount of grain and soy that humans do: one calorie of beef demands ten calories of grain. Of the 145 million tons of grain and soy fed to livestock, only 21 million tons of meat and by-products are used. *The waste is 124 million tons a year at a value of 20 billion US dollars.* It has been calculated that this sum would feed, clothe and house the world's entire population for one year.”

The first page of the leaflet also included a photograph of a woman and child, with the caption:

† “A typical image of 'Third World' poverty—the kind often used by charities to get 'compassion money'. This diverts attention from one cause: exploitation by multinationals like McDonald's.”

The second and third pages of the leaflet contained a cartoon image of a burger, with a cow's head sticking out of one side and saying “If the slaughterhouse doesn't get you” and a man's head sticking out of the other, saying “The junk food will!” Pages 3-5 read as follows:

† “FIFTY ACRES EVERY MINUTE

† EVERY year an area of rainforest the size of Britain is cut down or defoliated, and burnt. Globally, one billion people depend on water flowing from these forests, which soak up rain and release it gradually. The disaster in Ethiopia and Sudan is at least partly due to uncontrolled deforestation. In Amazonia—where there are now about 100,000 beef ranches—torrential rains sweep down through the treeless valleys, eroding the land and washing away the soil. The bare earth, baked by the tropical sun, becomes useless for agriculture. *It has been estimated that this destruction causes at least one species of animal, plant or insect to become extinct every few hours.*

† Why is it wrong for McDonald's to destroy rainforests?

- † AROUND the Equator there is a lush green belt of incredibly beautiful tropical forest, untouched by human development for one hundred million years, supporting about half of the Earth's life-forms, including some 30,000 plant species, and producing a major part of the planet's crucial supply of oxygen.
- † PET FOOD AND LITTER
- † McDonald's and Burger King are two of the many US corporations using lethal poisons to destroy vast areas of Central American rainforest to create grazing pastures for cattle to be sent back to the States as burgers and pet food, and to provide fast-food packaging materials. (Don't be fooled by McDonald's saying they use recycled paper: only a tiny per cent of it is. The truth is it takes *800 square miles* of forest just to keep them supplied with paper for one year. Tons of this end up littering the cities of 'developed' countries.)
- † COLONIAL INVASION
- † Not only are McDonald's and many other corporations contributing to a major ecological catastrophe, they are forcing the tribal peoples in the rainforests off their ancestral territories where they have lived peacefully, without damaging their environment, for thousands of years. This is a typical example of the arrogance and viciousness of multinational companies in their endless search for more and more profit. It's no exaggeration to say that when you bite into a Big Mac, you're helping McDonald's empire to wreck this planet.
- † What's so unhealthy about McDonald's food?
- † McDONALD's try to show in their 'Nutrition Guide' (which is full of impressive-looking but really quite irrelevant facts & figures) that mass-produced hamburgers, chips, colas & milkshakes, etc., are a useful and nutritious part of any diet.  
What they don't make clear is that a diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals—which describes an average McDonald's meal—is linked with cancers of the breast and bowel, and heart disease. This is accepted medical fact, not a cranky theory. Every year in Britain, heart disease alone causes about 18,000 deaths.
- † FAST = JUNK
- † Even if they like eating them, most people recognise that processed burgers and synthetic chips, served up in paper and plastic containers, is junk-food. McDonald's prefer the name 'fast-food'. This is not just because it is manufactured and served up as quickly as possible—it has to be *eaten* quickly too. It's a sign of the junk-quality of Big Macs that people actually hold competitions to see who can eat one in the shortest time.
- † PAYING FOR THE HABIT
- † Chewing is essential for good health, as it promotes the flow of digestive juices which break down the food and send nutrients into the blood. McDonald's food is so lacking in bulk it is hardly possible to chew it. Even their own figures show that a 'quarter-pounder' is 48% water. This sort of fake food encourages over-eating, and the high sugar and sodium content can make people develop a kind of addiction—a 'craving'. That means more profit for McDonald's, but constipation, clogged arteries and heart attacks for many customers.
- † GETTING THE CHEMISTRY RIGHT
- † McDONALD's stripy staff uniforms, flashy lighting, bright plastic décor, 'Happy Hats' and muzak, are all part of the gimmicky dressing-up of low-quality food which has been designed down to the last detail to look and feel and taste *exactly* the same in any outlet anywhere in the world.

To achieve this artificial conformity, McDonald's require that their 'fresh lettuce leaf', for example, is treated with *two*/*ve* different chemicals just to keep it the right colour at the right crispness for the right length of time. It might as well be a bit of plastic.

† How do McDonald's deliberately exploit children?

† NEARLY all McDonald's advertising is aimed at children. Although the Ronald McDonald 'personality' is not as popular as their market researchers expected (probably because it is totally unoriginal), thousands of young children now think of burgers and chips every time they see a clown with orange hair.

† THE NORMALITY TRAP

† No parent needs to be told how difficult it is to distract a child from insisting on a certain type of food or treat. Advertisements portraying McDonald's as a happy, circus-like place where burgers and chips are provided for everybody at any hour of the day (and late at night), traps children into thinking they aren't 'normal' if they don't go there too. Appetite, necessity and—above all—money, never enter into the 'innocent' world of Ronald McDonald. Few children are slow to spot the gaudy red and yellow standardised frontages in shopping centres and high streets throughout the country. McDonald's know exactly what kind of pressure this puts on people looking after children. It's hard not to give in to this 'convenient' way of keeping children 'happy', even if you haven't got much money and you try to avoid junk-food.

† TOY FOOD

† As if to compensate for the inadequacy of their products, McDonald's promote the consumption of meals as a 'fun event'. This turns the act of eating into a performance, with the 'glamour' of being in a McDonald's ('Just like it is in the ads!') reducing the food itself to the status of a prop.

† Not a lot of children are interested in nutrition, and even if they were, all the gimmicks and routines with paper hats and straws and balloons hide the fact that the food they're seduced into eating is at best mediocre, at worst poisonous—and their parents know it's not even cheap.

† RONALD'S DIRTY SECRET

† ONCE told the grim story about how hamburgers are made, children are far less ready to join in Ronald McDonald's perverse antics. With the right prompting, a child's imagination can easily turn a clown into a bogeyman (a lot of children are very suspicious of clowns anyway). Children love a secret, and Ronald's is especially disgusting.

† In what way are McDonald's responsible for torture and murder?

† THE menu at McDonald's is based on meat. They sell millions of burgers every day in 35 countries throughout the world. This means the constant slaughter, day by day, of animals born and bred solely to be turned into McDonald's products. Some of them—especially chickens and pigs—spend their lives in the entirely artificial conditions of huge factory farms, with no access to air or sunshine and no freedom of movement. Their deaths are bloody and barbaric.

† MURDERING A BIG MAC

† In the slaughterhouse, animals often struggle to escape. Cattle become frantic as they watch the animal before them in the killing-line being prodded, beaten, electrocuted and knifed.

A recent British government report criticised inefficient stunning methods which frequently result in animals having their throats cut while still fully conscious. McDonald's are responsible for the deaths of countless animals by this supposedly humane method. We have the choice to eat

meat or not. The *450 million* animals killed for food in Britain every year have no choice at all. It is often said that after visiting an abattoir, people become nauseous at the thought of eating flesh. How many of us would be prepared to work in a slaughterhouse and kill the animals we eat?

† WHAT'S YOUR POISON?

† MEAT is responsible for 70% of all food-poisoning incidents, with chicken and minced meat (as used in burgers) being the worst offenders. When animals are slaughtered, meat can be contaminated with gut contents, faeces and urine, leading to bacterial infection. In an attempt to counteract infection in their animals, farmers routinely inject them with doses of antibiotics. These, in addition to growth-promoting hormone drugs and pesticide residues in their feed, build up in the animals' tissues and can further damage the health of people on a meat-based diet.

† What's it like working for McDonald's?

† THERE must be a serious problem: even though 80% of McDonald's workers are part-time, the annual staff turnover is 60% (in the USA it's 300%). It's not unusual for their restaurant-workers to quit after just four or five weeks. The reasons are not hard to find.

† NO UNIONS ALLOWED

† Workers in catering do badly in terms of pay and conditions. They are at work in the evenings and at weekends, doing long shifts in hot, smelly, noisy environments. Wages are low and chances of promotion minimal. To improve this through Trade Union negotiation is very difficult: there is no union specifically for these workers, and the ones they could join show little interest in the problems of part-timers (mostly women). A recent survey of workers in burger-restaurants found that 80% said they needed union help over pay and conditions. Another difficulty is that the 'kitchen trade' has a high proportion of workers from ethnic minority groups who, with little chance of getting work elsewhere, are wary of being sacked—as many have been—for attempting union organisation. McDonald's have a policy of preventing unionisation by getting rid of pro-union workers. So far this has succeeded everywhere in the world except Sweden, and in Dublin after a long struggle.

† TRAINED TO SWEAT

† It's obvious that all large chain-stores and junk-food giants depend for their fat profits on the labour of young people. McDonald's is no exception: three-quarters of its workers are under 21. The production-line system deskills the work itself: anybody can grill a hamburger, and cleaning toilets or smiling at customers needs no training. So there is no need to employ chefs or qualified staff—just anybody prepared to work for low wages.

As there is no legally-enforced minimum wage in Britain, McDonald's can pay what they like, helping to depress wage levels in the catering trade still further. They say they are providing jobs for school-leavers and take them on regardless of sex or race. The truth is McDonald's are only interested in recruiting cheap labour—which always means that disadvantaged groups, women and black people especially, are even more exploited by industry than they are already.”

The leaflet continued, on pages 5-6, with a number of proposals and suggestions for change, campaigning and activity, and information about London Greenpeace.

B. Proceedings in the High Court

13. Because London Greenpeace was not an incorporated body, no legal action could be taken directly against it. Between October 1989 and January or May 1991, UK McDonald's hired seven private investigators from two different firms to infiltrate the group with the aim of finding out who was responsible for writing, printing and distributing the leaflet and organising the anti-McDonald's campaign. The inquiry agents attended over 40 meetings of London Greenpeace, which were open to any member of the public who wished to attend, and other events such as "fayres" and public, fund-raising occasions. McDonald's subsequently relied on the evidence of some of these agents at trial to establish that the applicants had attended meetings and events and been closely involved with the organisation during the period when the leaflet was being produced and distributed.

14. On 20 September 1990 McDonald's Corporation ("US McDonald's") and McDonald's Restaurants Limited ("UK McDonald's"; together referred to herein as "McDonald's") issued a writ against the applicants and three others, claiming damages of up to £100,000 for libel allegedly caused by the alleged publication by the defendants of the leaflet. McDonald's withdrew proceedings against the three other defendants, in exchange for their apology for the contents of the leaflet.

15. The applicants denied publication, denied that the words complained of had the meanings attributed to them by McDonald's and denied that all or some of the meanings were capable of being defamatory. Further, they contended, in the alternative, that the words were substantially true or else were fair comment on matters of fact.

16. The applicants applied for legal aid but were refused on 3 June 1992, because legal aid was not available for defamation proceedings in the United Kingdom. They therefore represented themselves throughout the trial and appeal. Approximately £40,000 was raised by donation to assist them (for example, to pay for transcripts: see para 20 below), and they received some help from barristers and solicitors acting *pro bono*: thus, their initial pleadings were drafted by lawyers, they were given some advice on an *ad hoc* basis, and they were represented during five of the pre-trial hearings and on three occasions during the trial, including the appeal to the Court of Appeal against the trial judge's grant of leave to McDonald's to amend the Statement of Claim (see para 24 below). They submitted, however, that they were severely hampered by lack of resources, not just in the way of legal advice and representation, but also when it came to administration, photocopying, note-taking, and the tracing, preparation and payment of the costs and expenses of expert and factual witnesses. Throughout the proceedings McDonald's were represented by leading and junior counsel, experienced in defamation law, and by one or two solicitors and other assistants.

17. In March 1994 UK McDonald's produced a press release and leaflet for distribution to their customers about the case, entitled "Why McDonald's is going to Court". In May 1994 they produced a document called "Libel Action—Background Briefing" for distribution to the media and others. These documents included, *inter alia*, the allegation that the applicants had published a leaflet which they knew to be untrue, and the applicants counter-claimed for damages for libel from UK McDonald's.

18. Before the start of the trial there were approximately 28 interim applications, involving various issues of law and fact, some lasting as long as five days. For example, on 21 December 1993 the trial judge, Mr Justice Bell ("Bell J"), ruled that the action should be tried by a judge alone rather than a judge and jury, because it would involve the prolonged examination of documents and expert witnesses, on complicated scientific matters. This ruling was upheld by the Court of Appeal on 25 March 1994, after a hearing at which the applicants were represented *pro bono*.

19. The trial took place before Bell J between 28 June 1994 and 13 December 1996. It lasted for 313 court days, of which forty were taken up with legal argument, and was the longest trial (either civil or criminal) in English legal history. Transcripts of the trial ran to approximately 20,000 pages; there were about 40,000 pages of documentary evidence; and, in addition to many written witness statements, 130 witnesses gave



oral evidence: 59 for the applicants, 71 for McDonald's. Ms Steel gave evidence in person but Mr Morris chose not to.

20. The applicants were unable to pay for daily transcripts of the proceedings, which cost approximately £750 per day, or £375 if split between the two parties. McDonald's paid the fee, and initially provided the applicants with free copies of the transcripts. However, McDonald's stopped doing this on 3 July 1995, because the applicants refused to undertake to use the transcripts only for the purposes of the trial, and not to publicise what had been said in court. The trial judge refused to order McDonald's to supply the transcripts in the absence of the applicants' undertaking, and this ruling was upheld by the Court of Appeal. Thereafter, the applicants, using donations from the public, purchased transcripts at reduced cost (£25 per day), 21 days after the evidence had been given. They submit that, as a result, and without sufficient helpers to take notes in court, they were severely hampered in their ability effectively to examine and cross-examine witnesses.

21. During the trial, Mr Morris faced an unconnected action brought against him by the London Borough of Haringey relating to possession of a property. Mr Morris signed an affidavit ("the Haringey affidavit") in support of his application to have those proceedings stayed until the libel trial was over, in which he stated that the libel action had arisen "from leaflets we had produced concerning, *inter alia*, nutrition of McDonald's food ...". McDonald's applied for this affidavit to be adduced as evidence in the libel trial as an admission against interest on publication by Mr Morris, and Bell J agreed to this request. Mr Morris objected that the affidavit should have read "allegedly produced" but that there had been a mistake on the part of his solicitor. The solicitor confirmed in writing to the court that the second applicant had instructed her to correct the affidavit, but that she had not done so because the error had not been material to the Haringey proceedings. The applicants submitted that they assumed that the solicitor's letter would be admitted in evidence, and that Bell J did not warn them that it was inadmissible until the closure of evidence, so that they did not realise they needed to adduce further evidence to explain the mistake. The applicants' appeal to the Court of Appeal against Bell J's admission of the affidavit was refused on 25 March 1996.

22. On 20 November 1995, Bell J ruled on the meaning of the paragraph in the leaflet entitled "What's so unhealthy about McDonald's food?", finding that this part of the leaflet bore the meaning:

† " ... that McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt (Sodium), and low in fibre, vitamins and mineral, and because eating it may well make your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, with the very real risk that you will suffer cancer of the breast or bowel or heart disease as a result; that McDonald's know this but they do not make it clear; that they still sell the food, and they deceive customers by claiming that their food is a useful and nutritious part of any diet."

23. The applicants appealed to the Court of Appeal against this ruling, initially relying on seven grounds of appeal. However, the day before the hearing on 2 April 1996 before the Court of Appeal, Ms Steel gave notice on behalf of both applicants that they were withdrawing six of the seven grounds, and now wished solely to raise the issue whether the trial judge had been wrong in determining a meaning which was more serious than that pleaded by McDonald's in their Statement of Claim. The applicants submitted that they withdrew the other grounds of appeal relating to the meaning of this part of the leaflet because lack of time and legal advice prevented them from fully pursuing them. They mistakenly believed that it would remain open to them to raise these matters again at a full appeal after the conclusion of the trial. The Court of Appeal decided against the applicants on the remaining single ground, holding that the meaning given to this paragraph by the judge was less severe than that pleaded by McDonald's.

24. In the light of the Haringey affidavit, McDonald's sought permission from the court to amend their Statement of Claim to allege that the applicants had been involved in the production of the leaflet and to allege publication dating back to September 1987. The applicants objected that such an amendment so late in the

trial would be unduly prejudicial. However, on 26 April 1996 Bell J gave permission to McDonald's for the amendments; the applicants were allowed to amend their Defence accordingly.

25. Before the trial, the applicants had sought an order that McDonald's disclose the notes made by their enquiry agents; McDonald's had responded that there were no notes. During the course of the trial, however, it emerged that the notes did exist. The applicants applied for disclosure, which was opposed by McDonald's on the ground that the notes were protected by legal professional privilege. On 17 June 1996 Bell J ruled that the notes should be disclosed, but with those parts which did not relate to matters contained in the witness statements or oral evidence of the enquiry agents deleted.

26. When all the evidence had been adduced, Bell J deliberated for six months before delivering his substantive 762 page judgment on 19 June 1997.

On the basis, principally, of the Haringey affidavit and the evidence of McDonald's enquiry agents, he found that the second applicant had participated in the production of the leaflet in 1986, at the start of London Greenpeace's anti-McDonald's campaign, although the precise part which he played could not be identified. Mr Morris had also taken part in its distribution. Having assessed the evidence of a number of witnesses, including Ms Steel herself, he found that her involvement had begun in early 1988 and took the form of participation in London Greenpeace's activities, sharing its anti-McDonald's aims, including distribution of the leaflet. The judge found that the applicants were responsible for the publication of "several thousand" copies of the leaflet. It was not found that this publication had any impact on the sale of McDonald's products. He also found that the London Greenpeace leaflet had been reprinted word for word in a leaflet produced in 1987 and 1988 by an organisation based in Nottingham called Veggies Ltd. McDonald's had threatened libel proceedings against Veggies Ltd, but had agreed a settlement after Veggies rewrote the section in the leaflet about the destruction of the rainforest and changed the heading "In what way are McDonald's responsible for torture and murder?" to read "In what way are McDonald's responsible for the slaughtering and butchering of animals?"

27. Bell J summarised his findings as to the truth or otherwise of the allegations in the leaflet as follows:

- † "In summary, comparing my findings with the defamatory messages in the leaflet, of which the Plaintiffs actually complained, it was and is untrue to say that either Plaintiff has been to blame for starvation in the Third World. It was and is untrue to say that they have bought vast tracts of land or any farming land in the Third World, or that they have caused the eviction of small farmers or anyone else from their land.
- † It was and is untrue to say that either Plaintiff has been guilty of destruction of rainforest, thereby causing wanton damage to the environment.
- † It was and is untrue to say that either of the Plaintiffs have used lethal poisons to destroy vast areas or any areas of Central American rainforest, or that they have forced tribal people in the rainforest off their ancestral territories.
- † It was and is untrue to say that either Plaintiff has lied when it has claimed to have used recycled paper.
- † The charge that McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, and because eating it more than just occasionally may well make your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, with the very real, that is to say serious or substantial risk that you will suffer cancer of the breast or bowel or heart disease as a result, and that McDonald's know this but they do not make it clear, is untrue. However, various of the First and Second Plaintiffs' advertisements, promotions and booklets have pretended to a positive

nutritional benefit which McDonald's food, high in fat and saturated fat and animal products and sodium, and at one time low in fibre, did not match.

- † It was true to say that the Plaintiffs exploit children by using them as more susceptible subjects of advertising, to pressurise their parents into going into McDonald's. Although it was true to say that they use gimmicks and promote the consumption of meals at McDonald's as a fun event, it was not true to say that they use the gimmicks to cover up the true quality of their food or that they promote them as a fun event when they know that the contents of their meals could poison the children who eat them.
- † Although some of the particular allegations made about the rearing and slaughter of animals are not true, it was true to say, overall, that the Plaintiffs are culpably responsible for cruel practices in the rearing and slaughter of some of the animals which are used to produce their food.
- † It was and is untrue that the Plaintiffs sell meat products which, as they must know, expose their customers to a serious risk of food poisoning.
- † The charge that the Plaintiffs provide bad working conditions has not been justified, although some of the Plaintiffs' working conditions are unsatisfactory. The charge that the Plaintiffs are only interested in recruiting cheap labour and that they exploit disadvantaged groups, women and black people especially as a result, has not been justified. It was true to say that the Second Plaintiff [UK McDonald's] pays its workers low wages and thereby helps to depress wages for workers in the catering trade in Britain, but it has not been proved that the First Plaintiff [US McDonald's] pays its workers low wages. The overall sting of low wages for bad working conditions has not been justified.
- † It was and is untrue that the Plaintiffs have a policy of preventing unionisation by getting rid of pro-union workers.”

28. As regards the applicants' counter-claim, Bell J found that McDonald's allegation that the applicants had lied in the leaflet had been unjustified, although they had been justified in alleging that the applicants had wrongly sought to deny responsibility for it. He held that the unjustified remarks had not been motivated by malice, but had been made in a situation of qualified privilege because McDonald's had been responding to vigorous attacks made on them in the leaflet, and he therefore entered judgment for McDonald's on the counter-claim also.

29. The judge awarded US McDonald's £30,000 damages and UK McDonald's a further £30,000. Mr Morris was severally liable for the whole £60,000, and Mr Morris and Ms Steel were to be jointly and severally liable for a total of £55,000 (£27,500 in respect of each plaintiff). McDonald's did not ask for an order that the applicants pay their costs.

### C. The substantive appeal

30. The applicants appealed to the Court of Appeal on 3 September 1997. The hearing (before Lord Justices Pill and May and Mr Justice Keene) began on 12 January 1999 and lasted 23 days, and on 31 March 1999 the court delivered its 301 page judgment.

31. The applicants challenged a number of Bell J's decisions on general grounds of law, and contended as follows:

- † “(a) [McDonald's] had no right to maintain an action for defamation because:

- † [US McDonald's] is a 'multinational' and [US and UK McDonald's] are each a public corporation which has (or should have) no right at common law to bring an action for defamation on the public policy ground that in a free and democratic society such corporations must always be open to unfettered scrutiny and criticism, particularly on issues of public interest.
- † the right of corporations such as [McDonald's] to maintain an action for defamation is not 'clear and certain' as the judge held ... The law is on the contrary uncertain, developing or incomplete ... Accordingly the judge should have considered and applied art 10 of the European Convention on Human Rights ...
- † (b) the judge was wrong to hold that [McDonald's] need [not] prove any particular financial loss or special damage provided that damage to its good will was likely.
- † (c) the judge should have held that the burden was on [McDonald's] to prove that the matters complained of by them were false.
- † (d) the judge was wrong to hold that, to establish a defence of justification, the [applicants] had to prove that the defamatory statements were true. The rule should be disapplied in the light of art 10 of the ECHR.
- † (e) it should be a defence in English law to defamation proceedings that the defendant reasonably believed that the words complained of were true.
- † (f) there should be a defence in English law of qualified privilege for a publication concerning issues of public importance and interest relating to public corporations such as [McDonald's].
- † (g) the judge should have held that the publication of the leaflet was on occasions of qualified privilege because it was a reasonable and legitimate response to an actual or perceived attack on the rights of others, in particular vulnerable sections of society who generally lack the means to defend themselves adequately (eg. children, young workers, animals and the environment) which the [applicants] had a duty to make and the public an interest to hear."

32. The Court of Appeal rejected these submissions.

On point (a), it held that commercial corporations had a clear right under English law to sue for defamation, and that there was no principled basis upon which a line might be drawn between strong corporations which should, according to the applicants, be deprived of this right, and weaker corporations which might require protection from unjustified criticism.

In dismissing ground (b), it held that, as with an individual plaintiff, there was no obligation on a company to show that it had suffered actual damage, since damage to a trading reputation might be as difficult to prove as damage to the reputation of an individual, and might not necessarily cause immediate or quantifiable loss. A corporate plaintiff which showed that it had a reputation within the jurisdiction and that the defamatory publication was apt to damage its goodwill thus had a complete cause of action capable of leading to a substantial award of damages.

On grounds (c) and (d), the applicants' submissions were contrary to clearly established English law, which stated that a publication shown by a plaintiff to be defamatory was presumed to be false until proven otherwise, and that it was for the defendants to prove the truth of statements presented as assertions of fact. Moreover, the court found some general force in McDonald's submission that in the instant case they had in fact largely accepted the burden of proving the falsity of the parts of the leaflet on which they had succeeded.

Dismissing grounds (e)-(g), the court observed that a defence of qualified privilege did exist under English law, but only where (i) the publisher acted under a legal, moral or social duty to communicate the information; (ii) the recipient of the information had an interest in receiving it; and (iii) the nature, status and source of the material, and the circumstances of the publication, were such that the publication should be protected in the public interest in the absence of proof of malice. The court accepted that there was a public interest in receiving information about the activities of companies and that the duty to publish was not confined to the mainstream media but could also apply to members of campaign groups, such as London Greenpeace. However, to satisfy the test, the duty to publish had to override the requirement to verify the facts. Privilege was more likely to be extended to a publication that was balanced, properly researched, in measured tones and based on reputable sources. In the instant case, the leaflet “did not demonstrate that care in preparation and research, or reference to sources of high authority or status, as would entitle its publishers to the protection of qualified privilege”.

English law provided a proper balance between freedom of expression and the protection of reputation and was not inconsistent with art 10 of the Convention. Campaign groups could perform a valuable role in public life, but they should be able to moderate their publications so as to attract a defence of fair comment without detracting from any stimulus to public discussion which the publication might give. The relaxation of the law contended for would open the way for “partisan publication of unrestrained and highly damaging untruths”, and there was a pressing social need “to protect particular corporate business reputations, upon which the well-being of numerous individuals may depend, from such publications”.

33. The Court of Appeal further rejected the applicants' contention that the appeal should be allowed on the basis that the action was an abuse of process or that the trial was conducted unfairly, observing as follows:

- † “Litigants in person who bring or contest a High Court action are inevitably undertaking a strenuous and burdensome task. This action was complex and the legal advice available to the [applicants] was, because of lack of funds, small in extent. We accept that the work required of the [applicants] at trial was very considerable and had to be done in an environment which, at least initially, was unfamiliar to them.
- † As a starting point, we cannot however hold it to be an abuse of process in itself for plaintiffs with great resources to bring a complicated case against unrepresented defendants of slender means. Large corporations are entitled to bring court proceedings to assert or defend their legal rights just as individuals have the right to bring actions and defend them...
- † Moreover the proposition that the complexity of the case may be such that a judge ought to stop the trial on that ground cannot be accepted. The rule of law requires that rights and duties under the law are determined...
- † As to the conduct of the trial, we note that the 313 hearing days were spread over a period of two and a half years. The timetable had proper regard to the fact that the [applicants] were unrepresented and to their other difficulties. They were given considerable time to prepare their final submissions to which they understandably attached considerable importance and which were of great length. For the purpose of preparing closing submissions, the [applicants] had possession of a full transcript of the evidence given at the trial. The fact that, for a part of the trial, the [applicants] did not receive transcripts of evidence as soon as they were made does not render the trial unfair. Quite apart from the absence of an obligation to provide a transcript, there is no substantial evidence that the [applicants] were in the event prejudiced by delay in receipt of daily transcripts during a part of the trial.
- † On the hearing of the appeal, we have been referred to many parts of the transcripts of evidence and submissions and have looked at other parts on our own initiative. On such references, we have invariably been impressed by the care, patience and fairness shown by the judge. He was well aware of the difficulties faced by the [applicants] as litigants in person and

had full regard to them in his conduct of the trial. The [applicants] conducted their case forcefully and with persistence as they have in this Court. Of course the judge listened to submissions from the very experienced leading counsel appearing for [McDonald's] but the judge applied his mind robustly and fairly to the issues raised. This emerges from the transcripts and from the judgment he subsequently handed down. The judge was not slow to criticise [McDonald's] in forthright terms when he thought their conduct deserved it. Moreover, it appears to us that the [applicants] were shown considerable latitude in the manner in which they presented their case and in particular in the extent to which they were often permitted to cross-examine witnesses as great length.

- † ... [We] are quite unpersuaded that the appeal, or any part of it, should be allowed on the basis that the action was an abuse of the process of the Court or that the trial was conducted unfairly.”

34. The applicants also challenged a number of Bell J's findings about the content of the leaflet, and the Court of Appeal found in their favour on several points, summarised as follows:

- † “On the topic of nutrition, the allegation that eating McDonald's food would lead to a very real risk of cancer of the breast and of the bowel was not proved. On pay and conditions we have found that the defamatory allegations in the leaflet were comment.
- † In addition to the charges found to be true by the judge—the exploiting of children by advertising, the pretence by the respondents that their food had a positive nutritional benefit, and McDonald's responsibility for cruel practices in the rearing and slaughtering of some of the animals used for their products—the further allegation that, if one eats enough McDonald's food, one's diet may well become high in fat etc., with the very real risk of heart disease, was justified ... ”

35. The appeal court therefore reduced the damages payable to McDonald's, so that Ms Steel was now liable for a total of £36,000 and Mr Morris for a total of £40,000. It refused the applicants leave to appeal to the House of Lords.

36. On 21 March 2000 the Appeal Committee of the House of Lords also refused the applicants leave to appeal.

## ***II. Relevant domestic law and practice***

### **A. Defamation**

37. Under English law the object of a libel action is to vindicate the plaintiff's reputation and to make reparation for the injury done by the wrongful publication of defamatory statements concerning him or her.

38. The plaintiff carries the burden of proving “publication”. As a matter of law, (*per* Bell J at p. 5 of the judgment in the applicants' case):

- † “any person who causes or procures or authorises or concurs in or approves the publication of a libel is as liable for its publication as a person who physically hands it or sends it off to another. It is not necessary to have written or printed the defamatory material. All those jointly concerned in the commission of a tort (civil wrong) are jointly and severally liable for it, and this applies to libel as it does to any other tort.”

39. A defence of justification applies where the defamatory statement is substantially true. The burden is on the defendant to prove the truth of the statement on the balance of probabilities. It is no defence to a libel action to prove that the defendant acted in good faith, believing the statement to be true. English law does, however, recognise the defence of “fair comment”, if it can be established that the defamatory statement is comment, and not an assertion of fact, and is based on a substratum of facts, the truth of which the defendant must prove.

40. As a general principle, a trading or non-trading corporation is entitled to sue in libel to protect as much of its corporate reputation as is capable of being damaged by a defamatory statement. There are certain exceptions to this rule: local authorities, government-owned corporations and political parties, none of which can sue in defamation, because of the public interest that a democratically-elected organisation, or a body controlled by such an organisation, should be open to uninhibited public criticism (see *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; *British Coal Corp v NUM (Yorkshire Area) and Capstick*, unreported, 28 June 1996; and *Goldsmith and another v Bhoynul* [1997] 4 All ER 268).

#### B. Legal aid for defamation proceedings

41. Throughout the relevant time, the allocation of civil legal aid in the United Kingdom was governed by the Legal Aid Act 1988. Under Sch 2, Pt II, para 1 of that Act, “[p]roceedings wholly or partly in respect of defamation” were excepted from the scope of the civil legal aid scheme.

42. The Access to Justice Act 1999 (“AJA 1999”) came into force on 1 April 2000, after the proceedings in the present case had concluded. It sets out the current statutory framework for legal aid in England and Wales, administered by the Legal Services Commission (“the Commission”), and made a number of reforms; for example, introducing the possibility for conditional fee agreements. Under the AJA 1999 the presumption remains that civil legal aid should not be granted in respect of claims in defamation (para 1(a)(f) of Schedule). However, the Act contains a provision (section 6(8)) to enable discretionary “exceptional funding” of cases which otherwise fall outside the scope of legal aid, allowing the Lord Chancellor *inter alia*, to authorise the Commission to grant legal aid to an individual defamation litigant, following a request from the Commission.

The Lord Chancellor has issued guidance to the Commission as to the types of case he is likely to consider favourably, stressing that such cases are likely to be extremely unusual given that Parliament has already decided in the AJA 1999 that the types of case excepted from the legal aid scheme are of low priority. As well as financial eligibility for legal aid, the Commission must be satisfied either that “there is a significant wider public interest ... in the resolution of the case and funded representation will contribute to it”, or that the case “is of overwhelming importance to the client”, or that “there is convincing evidence that there are other exceptional circumstances such that without public funding for representation it would be practically impossible for the client to bring or defend the proceedings, or the lack of public funding would lead to obvious unfairness in the proceedings”.

43. The normal rule in civil proceedings in England and Wales, including defamation proceedings, is that the loser pays the reasonable costs of the winner. This rule applies whether either party is legally aided or not. An unsuccessful privately paying party would usually be ordered to pay the legal costs of a successful legally aided opponent. However, an unsuccessful legally aided party is usually protected from paying the costs of a successful privately paying party, because the costs order made against the loser will not usually be enforceable without further order of the court, which is likely to be granted only in the event of a major improvement in the financial circumstances of the legally aided party.

#### C. Mode of trial

44. The Supreme Court Act 1981 provides in section 69:

- † “(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue -
- † a claim in respect of libel, slander ...
- † the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.”

#### D. Damages

45. The measure of damages for defamation is the amount that would put the plaintiff in the position he or she would have been in had the wrong-doing not been committed. The plaintiff does not have to prove that he has suffered any actual pecuniary loss: it is for the jury (or judge, if sitting alone) to award a sum of damages sufficient to vindicate the plaintiff's reputation and to compensate for injury to feelings.

46. The Civil Procedure Rules (RSC, Ord 46, r 2(1)(a)) provide that leave of the court is required in order to enforce a judgment after a delay of six years or more. Leave to issue execution is usually refused after the expiration of six years from the date on which the judgment became enforceable (see *National Westminster Bank plc v Powney* [1991] Ch 339, [1990] 2 All ER 416, CA, and *WT Lamb & Sons v Rider* [1948] 2 KB 331, [1948] 2 All ER 402, CA).

### COMPLAINTS

47. The Court declared a number of the applicants' complaints inadmissible in its partial decision of 22 October 2002. The remaining complaints are, under art 6(1) of the Convention, that the proceedings were unfair, principally because of the denial of legal aid, and, under art 10, that the proceedings and their outcome constituted a disproportionate interference with the applicants' right to freedom of expression.

### THE LAW

#### *1. Alleged violation of art 6(1) of the convention*

48. The applicants raised a number of issues under art 6(1), which provides:

- † “In the determination of his civil rights and obligations ... , everyone is entitled to a fair ... hearing ... by [a] ... tribunal ... ”

The applicants' principal complaint under this provision was that they were denied a fair trial because of the lack of legal aid. They also alleged that unfairness was caused as a result of the trial judge's ruling to admit as evidence an affidavit sworn by the second applicant, his refusal to allow adjournments on a number of occasions and his grant of permission to McDonald's to amend their pleadings at a late stage in the proceedings.

#### A. Legal Aid

##### *1. The parties' submissions*

###### *(a) The applicants*



49. The applicants pointed out that this was the longest trial, either civil or criminal, in English legal history. The entire length of the proceedings, from the issue of the writ on 20 September 1990 to the refusal by the House of Lords of leave to appeal on 21 March 2000 was nine years and six months. Before the trial started there were 28 pre-trial hearings, some of which lasted up to five days. The hearing before the High Court lasted from 28 June 1994 until 13 December 1996, a period of two years and six months, of which 313 days were spent in court, together with additional days in the Court of Appeal to contest rulings made in the course of the trial. The High Court proceedings involved about 40,000 pages of documentary evidence and 130 oral witnesses. The appeal hearing lasted 23 days. Overall, the case included over 100 days of legal argument. The transcripts of the hearings exceeded 20,000 pages.

50. The adversarial system in the United Kingdom is based on the idea that justice can be achieved if the parties to a legal dispute are able to adduce their evidence and test their opponent's evidence in circumstances of reasonable equality. At the time of the proceedings in question, McDonald's economic power outstripped that of many small countries (they enjoyed worldwide sales amounting to approximately \$30b in 1995), whereas the first applicant was a part-time bar-worker earning a maximum of £65 a week and the second applicant was an unwaged single parent. The inequality of arms could not have been greater. McDonald's were represented throughout by Queen's Counsel and junior counsel specialising in libel law, supported by a team of solicitors and administrative staff from one of the largest firms in England. The applicants were assisted by lawyers working *pro bono*, who drafted their defence and represented them, during the 28 pre-trial hearings and appeals which took place over 37 court days, on eight days and in connection with five applications. During the main trial, submissions were made by lawyers on their behalf on only three occasions. It was difficult for sympathetic lawyers to volunteer help, because the case was too complicated for someone else just to "dip into", and moreover the offers of help usually came from inexperienced, junior solicitors and barristers, without the time and resources to be effective.

51. The applicants bore the burden of proving the truth of a large number of allegations covering a wide range of difficult issues. In addition to the more obvious disadvantages of being without experienced counsel to argue points of law and to conduct the examination and cross-examination of witnesses in court, they had lacked sufficient funds for photocopying, purchasing the transcripts of each day's proceedings, tracing and proofing expert witnesses, paying the witnesses' costs and travelling expenses and note-taking in court. All they could hope to do was keep going: on several occasions during the trial they had to seek adjournments because of physical exhaustion.

52. They claimed that, had they been provided with legal aid with which to trace, prepare and pay the expenses of witnesses, they would have been able to prove the truth of one or more of the charges found to have been unjustified, for example, the allegations on diet and degenerative disease, food safety, hostility to trade unionism and/or that some of McDonald's international beef supplies came from recently deforested areas. Moreover, the applicants' inexperience and lack of legal training led them to make a number of procedural mistakes. Had they been represented, it is unlikely that they would have withdrawn all but one of their grounds on the interim appeal (see para 23 above) or that the Haringey affidavit would have been admitted in evidence (see para 21 above), and it was mainly on the basis of the mistake contained in that affidavit that the second applicant was found to have been involved in the publication of the leaflet.

**(b) the Government**

53. The Government submitted that the Court should be slow to impose a duty to provide legal aid in civil cases, in view of the deliberate omission of any such obligation from the Convention. In contrast to the position in criminal proceedings (art 6(3)(c)), the Convention left Contracting States with a free choice of the means of ensuring effective civil access to court (the Government relied on *Airey v Ireland* [1979] ECHR 6289/73 at para 26). States did not have unlimited resources to fund legal aid systems, and it was therefore legitimate to impose restrictions on eligibility for legal aid in certain types of low priority civil cases, provided such restrictions were not arbitrary (*Winer v UK*, no 10871/84, Commission decision of 10 July 1986, 48 *Decisions and Reports* 154 at 171).

54. The Convention organs had considered the non-availability of legal aid in defamation cases under English law in six cases, and had never found it to be in breach of art 6(1) (see *Winer v UK*, no 10871/84, Commission decision of 10 July 1986, 48 *Decisions and Reports* 154; *Munro v UK*, no 10594/83, Commission decision of 14 July 1987, 52 *Decisions and Reports* 158; *HS and DM v UK*, no 21325/93, Commission decision of 5 May 1993; *Stewart-Brady v UK*, nos 27436/95 and 28406/95, Commission decision of 2 July 1997; *McVicar v UK* (2002) 12 BHRC 567; and *A v UK* [2002] ECHR 35373/97).

55. The Court should not depart from this consistent jurisprudence in the present case, which, in the Government's submission, fell far short of the kind of exceptional circumstances where the provision of legal aid was "indispensable for effective access to court" (see *Airey v Ireland* [1979] ECHR 6289/73 at para 26).

56. First, the Government argued that the law and facts at issue in the litigation were not so difficult as to make legal aid essential. The applicants' conduct of their defence and counter-claim, and their success in proving many of the allegations made in the leaflet, demonstrated that they were capable of mastering any complexities of the law of defamation as it applied to them.

57. Furthermore, the Government contended that it was relevant that the applicants received advice and representation *pro bono* on a number of occasions, particularly for some of their appearances in the Court of Appeal and in drafting their pleadings. It appeared that the applicants also raised at least £40,000 to fund their defence and that they received help with note-taking and other administrative tasks from volunteers sympathetic to their cause. Both Bell J and the Court of Appeal took into account the applicants' lack of legal training: Bell J, for example, assisted the applicants by reformulating questions for witnesses and did not insist on the usual procedural formalities, such as limiting the case to that pleaded; the Court of Appeal took note in its judgment of the need to safeguard the applicants from their lack of legal skill, conducted its own research to supplement the submissions made by the applicants and allowed them to introduce the defence of fair comment at the appeal stage, even though it had not been raised at first instance. The applicants intended the case to achieve maximum publicity, which it did. The hearings before the High Court and Court of Appeal took so long because the applicants were afforded every possible latitude in the presentation of their case; their evidence and submissions took up the great bulk of the time.

58. In the Government's submission it could not be assumed, in any event, that had legal aid generally been available for the defence of defamation actions, the applicants would have been granted it. The Legal Aid Board (as it then was, now the Legal Services Commission) would have had to make a decision, as it does in civil cases where legal aid is available, based on factors such as the merits of the case and whether the costs of litigation would be justified by the likely benefit to the aided party. The applicants published defamatory material without prior justification, and the tax payer should not have been required to pay for the research the applicants should have carried out before publishing the leaflet, or to bear the burden of placing the applicants in a position of equality with McDonald's, which was estimated to have spent in excess of £10 million on legal expenses.

## **2. The Court's assessment**

59. The Court recalls that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial (see *Airey v Ireland* [1979] ECHR 6289/73 at para 24). It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court (*ibid.*) and that he or she is able to enjoy equality of arms with the opposing side (see, among many other examples, *De Haes and Gijssels v Belgium* [1997] ECHR 19983/92 at para 53).

60. Article 6(1) leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means but there are others, such as for

example simplifying the applicable procedure (see *Airey v Ireland* [1979] ECHR 6289/73 at para 26 and *McVicar v UK* (2002) 12 BHRC 567 at para 50).

61. The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend *inter alia* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively (*Airey v Ireland* [1979] ECHR 6289/73 at para 26; *McVicar v UK* (2002) 12 BHRC 567 at paras 48 and 50; *P, C and S v UK* [2002] ECHR 56547/00 at para 91; and also *Munro v UK*, no 10594/83, Commission decision of 14 July 1987, 52 Decisions and Reports 158).

62. The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate (see *Ashingdane v UK* [1985] ECHR 8225/78 at para 57). It may therefore be acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or his or her prospects of success in the proceedings (see *Munro v UK*, no 10594/83, Commission decision of 14 July 1987, 52 Decisions and Reports 158). Moreover, it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-a-vis the adversary (see *De Haes and Gijssels v Belgium* [1997] ECHR 19983/92 at para 53, and also *McVicar v UK* (2002) 12 BHRC 567 at paras 51 and 62).

63. The Court must examine the facts of the present case with reference to the above criteria.

First, as regards what was at stake for the applicants, it is true that, in contrast to certain earlier cases where the Court has found legal assistance to have been necessary for a fair trial (for example, *Airey v Ireland* [1979] ECHR 6289/73 and *P, C and S v UK* [2002] ECHR 56547/00), the proceedings at issue here were not determinative of important family rights and relationships. The Convention organs have observed in the past that the general nature of a defamation action, brought to protect an individual's reputation, is to be distinguished, for example, from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family (see *McVicar v UK* (2002) 12 BHRC 567 at para 61 and *Munro v UK*, no 10594/83, Commission decision of 14 July 1987, 52 Decisions and Reports 158).

However, it must be recalled that the applicants did not choose to commence defamation proceedings, but acted as defendants to protect their right to freedom of expression, a right accorded considerable importance under the Convention (see para 87 below). Moreover, the financial consequences for the applicants of failing to verify each defamatory statement complained of were significant. McDonald's claimed damages up to £100,000 and the awards actually made, even after reduction by the Court of Appeal, were high when compared to the applicants' low incomes: £36,000 for the first applicant, who was, at the time of the trial, a bar-worker earning approximately £60 a week, and £40,000 for the second applicant, an unwaged single parent (see paras 9, 14 and 35 above). McDonald's have not, to date, attempted to enforce payment of the awards, but this was not an outcome which the applicants could have foreseen or relied upon.

64. As for the complexity of the proceedings, the Court recalls its finding in *McVicar v UK* (2002) 12 BHRC 567 at para 55 that the English law of defamation and rules of civil procedure applicable in that case were not sufficiently complex as to necessitate the grant of legal aid. The proceedings defended by Mr McVicar required him to prove the truth of a single, principal allegation, on the basis of witness and expert evidence, some of which was excluded as a result of his failure to comply with the rules of court. He had also to scrutinise evidence submitted on behalf of the plaintiff and to cross-examine the plaintiff's witnesses and experts, in the course of a trial which lasted just over two weeks.

65. The proceedings defended by the present applicants were of a quite different scale. The trial at first instance lasted 313 court days, preceded by 28 interlocutory applications. The appeal hearing lasted 23 days. The factual case which the applicants had to prove was highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses, including a number of experts dealing with a range of scientific questions, such as nutrition, diet, degenerative disease and food safety. Certain of the issues were held by the domestic courts to be too complicated for a jury properly to understand and assess. The detailed nature and complexity of the factual issues are further illustrated by the length of the judgments of the trial court and the Court of Appeal, which ran in total to over 1,100 pages (see, *inter alia*, paras 18, 19, 30 and 49 above).

66. Nor was the case straightforward legally. Extensive legal and procedural issues had to be resolved before the trial judge was in a position to decide the main issue, including the meanings to be attributed to the words of the leaflet, the question whether the applicants were responsible for its publication, the distinction between fact and comment, the admissibility of evidence and the amendment of the Statement of Claim. Overall, some 100 days were devoted to legal argument, resulting in 38 separate written judgments (*ibid.*).

67. Against this background, the Court must assess the extent to which the applicants were able to bring an effective defence despite the absence of legal aid. In *McVicar v UK* ([2002](#)) 12 BHRC 567 at paras 53 and 60, it placed weight on the facts that Mr McVicar was a well-educated and experienced journalist, and that he was represented during the pre-trial and appeal stages by a solicitor specialising in defamation law, from whom he could have sought advice on any aspects of the law or procedure of which he was unsure.

68. The present applicants appear to have been articulate and resourceful; in the words of the Court of Appeal, they conducted their case “forcefully and with persistence” (see para 33 above), and they succeeded in proving the truth of a number of the statements complained of. It is not in dispute that they could not afford to pay for legal representation themselves, and that they would have fulfilled the financial criteria for the grant of legal aid. They received some help on the legal and procedural aspects of the case from barristers and solicitors acting *pro bono*: their initial pleadings were drafted by lawyers, they were given some advice on an *ad hoc* basis, and they were represented during five of the pre-trial hearings and on three occasions during the trial, including the appeal to the Court of Appeal against the trial judge's grant of leave to McDonald's to amend the Statement of Claim (see para 16 above). In addition, they were able to raise a certain amount of money by donation, which enabled them, for example, to buy transcripts of each day's evidence 25 days later (*ibid.*). For the bulk of the proceedings, however, including all the hearings to determine the truth of the statements in the leaflet, they acted alone.

69. The Government have laid emphasis on the considerable latitude afforded to the applicants by the judges of the domestic courts, both at first instance and on appeal, in recognition of the handicaps under which the applicants laboured. However, the Court considers that, in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel (compare *P, C and S v UK* [2002] ECHR 56547/00 at paras 93-95 and 99). The very length of the proceedings is, to a certain extent, a testament to the applicants' lack of skill and experience. It is, moreover, possible that had the applicants been represented they would have been successful in one or more of the interlocutory matters of which they specifically complain, such as the admission in evidence of the Haringey affidavit (see para 21 above). Finally, the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald's (see para 16 above) was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness, despite the best efforts of the judges at first instance and on appeal.

70. It is true that the Commission declared inadmissible an earlier application under, *inter alia*, art 6(1) by these same applicants (*HS and DM v UK*, no 21325/93, Commission decision of 5 May 1993, unreported), observing that “they seem to be making a tenacious defence against McDonald's, despite the absence of legal aid ...”. That decision was, however, adopted over a year before the start of the trial, at a time when the length, scale and complexity of the proceedings could not reasonably have been anticipated.

71. The Government argued that, even if legal aid had been in principle available for the defence of defamation actions, it might well not have been granted in a case of this kind, or the amount awarded might have been capped or the award made subject to other conditions. The Court is not, however, persuaded by this argument. It is, in the first place, a matter of pure speculation whether, if legal aid had been available, it would have been granted in the applicants' case. More importantly, if legal aid had been refused or made subject to stringent financial or other conditions, substantially the same Convention issue would have confronted the Court, namely whether the refusal of legal aid or the conditions attached to its grant were such as to impose an unfair restriction on the applicants' ability to present an effective defence.

72. In conclusion, therefore, the Court finds that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's. There has, therefore, been a violation of art 6(1).

#### B. Other complaints under art 6(1)

73. The applicants also alleged that a number of specific rulings made by the judges in the proceedings caused unfairness in breach of art 6(1). Thus, they complained that the circumstances surrounding the admission in evidence of the Haringey affidavit (see para 21 above) had been unfairly prejudicial, as had Bell J's refusal to grant adjournments on a number of occasions and his decision to allow McDonald's to amend their Statement of Claim (see para 24 above).

74. The Government denied that any unfairness had been caused by these rulings, which had instead struck a fair balance between the opposing litigants.

75. To the extent that these particular complaints have merit, the Court considers that they are subsumed within the principal complaint about lack of legal aid, since, even if it had not led to a different result, legal representation might have mitigated the effect on the applicants of the rulings in question.

76. In view of the above finding of a violation of art 6(1) based on the lack of legal aid, the Court does not consider it necessary to examine separately the additional complaints.

### ***II. Alleged violation of art 10 of the convention***

77. The applicants also complained of a breach of art 10 of the Convention, which provides:

- † “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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

#### A. The parties' submissions

##### **1. The applicants**

78. The applicants emphasised the inter-relationship between arts 6 and 10 and claimed that the domestic proceedings and their outcome were disproportionate given, *inter alia*, that, without legal aid, they bore the burden of proving the truth of the matters set out in the leaflet.

79. This burden was contrary to art 10. The issues raised in the leaflet were matters of public interest and it was essential in a democracy that such matters be freely and openly discussed. To require strict proof of every allegation in the leaflet was contrary to the interests of democracy and plurality because it would compel those without the means to undertake court proceedings to withdraw from public debate. The reasons under English law for permitting wider criticism of government bodies applied equally to criticism of large multinationals, particularly given that their vast economic power was coupled with a lack of accountability. In this regard, the applicants prayed in aid the principle in English law that local authorities, government-owned corporations and political parties could not sue in defamation (see para 40 above).

80. Moreover, it was significant that the applicants were not the authors of the leaflet. It was almost impossible for campaigners to prove the truth of the contents of a campaigning leaflet dealing with global issues that they were merely involved in distributing. In any event, the matters contained in the leaflet were already in the public domain and had, with only minor amendments, been set out in a leaflet printed and distributed by Veggies, to which McDonald's did not object (see para 26 above). The applicants bore no malice against McDonald's and genuinely believed that the statements in the leaflet were true.

81. Finally, the applicants submitted that the damages awarded were excessive and quite beyond their means of paying. It was contrary to the freedom of expression for the law to presume damage without the need for McDonald's to show any loss of sales as a result of the publication.

## **2. The Government**

82. The Government contended that the applicants in the present case were not responsible journalists, but participants in a campaign group carrying out a vigorous attack on McDonald's. There had been no attempt on their part to present a balanced picture, for example by giving McDonald's an opportunity to defend itself, and there was no suggestion that the applicants had carried out any research before publication. Domestic law was not arbitrary in allocating the burden of proving justification on the defendant. On the contrary, it reflected the ordinary principle that the party who asserts a particular fact should have to prove it. In many cases it would be unreasonable to expect a plaintiff to have to prove a negative, that a given allegation was untrue. Having taken it upon him or herself to publish a statement, it was not unreasonable to expect that the defendant should bear the limited burden of having to adduce evidence which showed, on the balance of probabilities, that the statement was true.

83. The Government rejected the applicants' argument that the ability of multinational corporations, such as McDonald's, to defend their reputations by bringing defamation claims amounted to a disproportionate restriction on the ability of individuals to exercise their right to freedom of expression. They denied that there was a parallel to be drawn with the position under domestic law whereby government bodies and political parties are unable to sue for defamation: this bar was justified for the protection of the democratic process, which required free, critical expression. The reputation of a large company might be vital for its commercial success; and the commercial success of companies of all sizes was important to society for a variety of reasons, such as fostering wealth creation, expanding the tax base and creating employment. Furthermore, the applicants' proposal that "multinational companies" should have no legal protection for their reputations was unworkably vague and it would be difficult to draft and operate legislation to that effect. Their alternative suggestion, that multinationals should have to prove loss, was also misconceived. The vindication of a plaintiff's reputation was a legitimate aim in itself and it would place enormous evidential burdens on both sides if economic loss were to become a material issue.

84. It was irrelevant that certain of the defamatory statements had already been published, for example in the Veggies' leaflet. A statement did not become true simply through repetition, and, even where a statement was in wide circulation and had been published by a number of authors, the defamed party must be free to take proceedings against whomever he, she or it chose.

#### B. The Court's assessment

85. It was not disputed between the parties that the defamation proceedings and their outcome amounted to an interference, for which the State had responsibility, with the applicants' rights to freedom of expression.

86. It is further not disputed, and the Court finds, that the interference was "prescribed by law". The Court further finds that the English law of defamation, and its application in this particular case, pursued the legitimate aim of "the protection of the reputation or rights of others".

87. The central issue which falls to be determined is whether the interference was "necessary in a democratic society". The fundamental principles relating to this question are well established in the case-law and have been summarised as follows (see, for example, *Hertel v Switzerland* (1998) 5 BHRC 260 at para 46):

- † "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to para 2 of art 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in art 10, this freedom is subject to exceptions, which—as the Court has already said above—must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
- † (ii) The adjective 'necessary', within the meaning of art 10(2), implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by art 10.
- † (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under art 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in art 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement amounts to a value judgment the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see, for example, *Feldek v Slovakia* [2001] ECHR 29032/95 at paras 75-76).

88. The Court must weigh a number of factors in the balance when reviewing the proportionality of the measure complained of. First, it notes that the leaflet in question contained very serious allegations on topics of general concern, such as abusive and immoral farming and employment practices, deforestation, the exploitation of children and their parents through aggressive advertising and the sale of unhealthy food. The Court has long held that “political expression”, including expression on matters of public interest and concern, requires a high level of protection under art 10 (see, for example, *Thorgeir Thorgeirson v Iceland* [1992] ECHR 13778/88, and also *Hertel v Switzerland* (1998) 5 BHRC 260 at para 47).

89. The Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under art 10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment (see, *mutatis mutandis*, *Bowman v UK* (1998) 4 BHRC 25 and *Appleby v UK* [2003] ECHR 44306/98).

90. Nonetheless, the Court has held on many occasions that even the press “must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, ...” (see, for example, *Bladet Tromso and Stensaas v Norway* [1999] ECHR 21980/03 at para 59). The safeguard afforded by art 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (*Bladet Tromso and Stensaas v Norway* [1999] ECHR 21980/03 at para 65), and the same principle must apply to others who engage in public debate. It is true that the Court has held that journalists are allowed “recourse to a degree of exaggeration, or even provocation” (see for example *Bladet Tromso and Stensaas v Norway* [1999] ECHR 21980/03 at para 59 or *Prager and Oberschlick v Austria*, [1995] ECHR 15974/90 at para 38), and it considers that in a campaigning leaflet a certain degree of hyperbole and exaggeration is to be tolerated, and even expected. In the present case, however, the allegations were of a very serious nature and were presented as statements of fact rather than value judgments.

91. The applicants deny that either was involved in the production of the leaflet (despite the High Court's finding to the contrary: see para 26 above) and stress that they genuinely believed the leaflet's content to be true (see the High Court's finding in para 28 above). They claim that it places an intolerable burden on campaigners such as themselves, and thus stifles public debate, to require those who merely distribute a leaflet to bear the burden of establishing the truth of every statement contained in it. They also argue that large multinational companies should not be entitled to sue in defamation, at least without proof of actual financial damage. Complaint is further made of the fact that under the law McDonald's were able to bring and succeed in a claim for defamation when much of the material included in the leaflet was already in the public domain.

92. As to this last argument, the Court notes that a similar contention was examined and rejected by the Court of Appeal on the ground either that the material relied on did not support the allegations in the leaflet or that the other material was itself lacking in justification. The Court finds no reason to reach a different conclusion.

93. As to the complaint about the burden of proof, the Court recalls that in *McVicar v UK* (2002) 12 BHRC 567 it held that it was not in principle incompatible with art 10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements (see *McVicar v UK* (2002) 12 BHRC 567 at para 87). The Court there recalled *Bladet Tromso and Stensaas v Norway* [1999] ECHR 21980/03 at para 84, in which it commented that special grounds were required before a newspaper could be dispensed from its ordinary obligation to verify factual statements.



94. The Court further does not consider that the fact that the plaintiff in the present case was a large multinational company should in principle deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made. It is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies (see *Fayed v UK* [1994] ECHR 17101/90 at para 75). However, in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The State therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation (see *Markt Intern Verlag GmbH and Beerman v Germany* [1989] ECHR 10572/83 at paras 33-38).

95. If, however, a State decides to provide such a remedy to a corporate body, it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for. The Court has already found that the lack of legal aid rendered the defamation proceedings unfair, in breach of art 6(1). The inequality of arms and the difficulties under which the applicants laboured are also significant in assessing the proportionality of the interference under art 10. As a result of the law as it stood in England and Wales, the applicants had the choice either to withdraw the leaflet and apologise to McDonald's, or bear the burden of proving, without legal aid, the truth of the allegations contained in it. Given the enormity and complexity of that undertaking, the Court does not consider that the correct balance was struck between the need to protect the applicants' rights to freedom of expression and the need to protect McDonald's rights and reputation. The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible "chilling" effect on others are also important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion (see, for example, *Lingens v Austria* [1986] ECHR 9815/82 at para 44, *Bladet Tromsø and Stensaas v Norway* [1999] ECHR 21980/03 at para 64, *Thorgeir Thorgeirson v Iceland* [1992] ECHR 13778/88 at para 68). The lack of procedural fairness and equality therefore gave rise to a breach of art 10 in the present case.

96. Moreover, the Court considers that the size of the award of damages made against the two applicants may also have failed to strike the right balance. Under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered (see *Tolstoy Miloslavsky v UK* [1995] ECHR 18139/91 at para 49). The Court notes on the one hand that the sums eventually awarded in the present case (£36,000 in the case of the first applicant and £40,000 in the case of the second applicant) although relatively moderate by contemporary standards in defamation cases in England and Wales, were very substantial when compared to the modest incomes and resources of the two applicants. While accepting, on the other hand, that the statements in the leaflet which were found to be untrue contained serious allegations, the Court observes that not only were the plaintiffs large and powerful corporate entities but that, in accordance with the principles of English law, they were not required to, and did not, establish that they had in fact suffered any financial loss as a result of the publication of the "several thousand" copies of the leaflets found to have been distributed by the trial judge (see para 45 above and compare, for example, *Hertel v Switzerland* (1998) 5 BHRC 260 at para 49).

97. While it is true that no steps have to date been taken to enforce the damages award against either applicant, the fact remains that the substantial sums awarded against them have remained enforceable since the decision of the Court of Appeal. In these circumstances, the Court finds that the award of damages in the present case was disproportionate to the legitimate aim served.

98. In conclusion, given the lack of procedural fairness and the disproportionate award of damages, the Court finds that there has been a violation of art 10.

### **III. Application of art 41 of the convention**

99. Article 41 of the Convention provides:

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

#### A. Pecuniary damage

100. The applicants claimed that, had their rights under arts 6 and 10 been adequately protected by the Government, they would not have had to defend themselves throughout the entire defamation proceedings, which continued over nine years. They claimed payment for the legal work they had to carry out, at the rate applicable for litigants in person under the Civil Procedure Rules, namely £9.25 per hour, plus reasonable travelling expenses. Using this rate, they calculated that they should each be reimbursed £21,478.50 in respect of the 387 days each spent in court, together with £100,233.00 each for preparation. Their total, joint claim for domestic legal costs therefore came to £243,423.00, to which had to be added £31,194.84 for expenses and disbursements such as photocopying, transcripts, telephone calls and travelling.

101. The applicants also asked the Court to ensure in its judgment that if McDonald's were ever successful in enforcing the £40,000 award of damages against them, the Government should be required to reimburse the sum paid.

102. The Government commented that the amounts claimed by the applicants in respect of their court appearances and preparatory work did not reflect costs actually incurred by them or money actually lost as a result of the alleged violations of arts 6(1) and 10. Had the applicants been awarded legal aid for their defence, the legal aid monies would have been paid to their legal representatives; on no view would legal aid have constituted financial remuneration for the applicants themselves. As for the expenses claimed by the applicants, it was a matter of pure speculation whether and to what extent, if legal aid had been available, these expenses would have been covered by public funds.

103. As for the applicants' request for a “rider” to cover their liability should McDonald's decide to enforce the claim for damages, the Government submitted that this was not a concept known to international law and that such an order would be contrary to the parties' legitimate interest in the finality of litigation.

104. The Court notes that the applicants have not presented any evidence to suggest that the time they spent preparing and presenting their defence to the defamation proceedings caused them any actual pecuniary loss; it has not been suggested, for example, that either applicant lost earnings as a result of the lack of legal aid. They have filed an itemised claim in respect of expenses and disbursements, but they do not allege that their expenses exceeded the amount which they were able to raise by voluntary donation (see para 16 above). The Court is not, therefore, satisfied that the sums claimed represented losses or expenses actually incurred.

105. It further notes that, because of the period of time that has elapsed since the order for damages was made against the applicants, McDonald's would need the leave of the court before it could proceed to enforce the award (see para 46 above). In these circumstances, despite its finding that the award of damages was disproportionate and in breach of art 10, the Court does not consider it necessary to make any provision in respect of it under art 41 at the present time.

106. In conclusion, therefore, the Court makes no award in respect of compensation for pecuniary damage.

## B. Non-pecuniary damage

107. The applicants claimed that during the period of over nine years they were defending the defamation action against such a powerful adversary they suffered considerable stress and anxiety. They felt a responsibility to defend the case to the utmost because of the importance of the issues raised and the necessity of public debate. In consequence, they were forced to sacrifice their health, personal and family lives. Ms Steel provided the Court with doctors' letters from March 1995 and March 1996 stating that she was suffering from stress-related illness aggravated by the proceedings. Mr Morris, a single parent, was unable to spend as much time as he would have wished with his young son. Ms Steel claimed £15,000 under this head and Mr Morris claimed £10,000.

108. The Government submitted that, in accordance with the Court's practice in the great majority of cases involving breaches of art 10 and procedural breaches of art 6, it was not necessary to make an award of compensation for non-pecuniary damage. There was no evidence that the applicants had suffered more stress than any individual, represented or not, involved in litigation and it was a matter of pure speculation whether and by how much the stress would have been reduced if the violations of arts 6 and 10 had not taken place. In any event, the amounts claimed were excessive when compared with other past awards for serious violations of the Convention.

109. The Court has found violations of arts 6(1) and 10 based, principally, on the fact that the applicants had themselves to carry out the bulk of the legal work in these exceptionally long and difficult proceedings to defend their rights to freedom of expression. In these circumstances the applicants must have suffered anxiety and disruption to their lives far in excess of that experienced by a represented litigant, and the Court also notes in this connection the medical evidence submitted by Ms Steel. It awards compensation for non-pecuniary damage of EUR 20,000 to the first applicant and EUR 15,000 to the second applicant.

## C. Strasbourg costs and expenses

110. The applicants were represented before the Court by leading and junior counsel and a senior and assistant solicitor.

Both counsel claimed to have spent several hundred hours on the case, but, in order to keep costs within a reasonable limit, decided to halve their hourly rates (to £125 and £87.50 respectively) and to claim for only 115 hours' work for leading counsel and 75 hours' work for junior counsel. In addition, leading counsel claimed £5,000 for preparing for and representing the applicants at the hearing on 7 September 2004, and junior counsel claimed £2,500 for the hearing. The total fees for leading counsel were £19,375 plus value added tax ("VAT"), and those of junior counsel were £9,062.50 plus VAT.

Despite having invested approximately 45 hours in the case, the senior solicitor claimed for only 25 hours and halved his hourly rate to £175. He also claimed £2,000 in respect of the hearing. The assistant solicitor claimed to have spent over 145 hours on the case, but claimed for 58 hours' work, at £75 per hour, half her usual rate. She claimed £1,500 for the hearing. The senior solicitor's total costs came to £6,375 plus VAT, and those of the assistant solicitor came to £5,850 plus VAT.

In addition, the applicants made a claim under this head for some of the work they had carried out in connection with the proceedings before the Court, namely 150 hours each at £9.25 per hour: a total of £2,775.

Finally, they claimed a total of £3,330 travelling and accommodation expenses for the hearing in respect of the four lawyers and two applicants.

The total claim for costs and expenses under this heading came to £46,767.50, plus VAT.

111. The Government considered the use of four lawyers to have been unreasonable and excessive. They submitted that the costs and travelling expenses of senior counsel and one of the solicitors should be disallowed. The applicants were not entitled to claim any costs in respect of the work they had carried out, since this part of the claim did not represent pecuniary loss actually incurred.

112. The Court recalls that only such costs and expenses as were actually and necessarily incurred in connection with the violation or violations found, and reasonable as to quantum, are recoverable under art 41 (see, for example, *Sahin v Germany* [2003] ECHR 30943/96 at para 105). It follows that it cannot make an award under this head in respect of the hours the applicants themselves spent working on the case, as this time does not represent costs actually incurred by them (see *Dudgeon v UK (Art 50)* [1983] ECHR 7525/76 at para 22 and *Robins v UK* [1997] ECHR 22410/93 at para 44). It is clear from the length and detail of the pleadings submitted by the applicants that a great deal of work was carried out on their behalf, but in view of the relatively limited number of relevant issues, it is questionable whether the entire sum claimed for costs was necessarily incurred. In all the circumstances, the Court awards EUR 50,000 under this head, less the EUR 2,688.83 already paid in legal aid by the Council of Europe, together with any tax that may be payable.

#### D. Default interest

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

#### **FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Holds* that there has been a violation of art 6(1) of the Convention;
2. *Holds* that there has been a violation of art 10 of the Convention;
3. *Holds* (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to art 44(2) of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the time of settlement: (i) EUR 20,000 (twenty thousand euros) to the first applicant and EUR 15,000 (fifteen thousand euros) to the second applicant in respect of non-pecuniary damage; (ii) EUR 47,311.17 (forty-seven thousand, three hundred and eleven euros and seventeen cents) in respect of costs and expenses; (iii) any tax that may be chargeable on the above amounts; (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' claim for just satisfaction.