Circuit Court for _____
Case # _____

IN THE COURT OF APPEALS OF MARYLAND

Misc. No. 3

September Term, 1996

VLADIMIR IVANOVICH TELNIKOFF

v.

VLADIMIR MATUSEVITCH

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*Murphy, C.J.
Eldridge
Rodowsky
Chasanow
*Karwacki
Raker
Bell

JJ.

Dissenting Opinion by Chasanow, J.

Filed: November 12, 1997

*Murphy, C.J., and Karwacki, J., now retired, participated in the hearing and conference of this case while active members of this Court; after being recalled pursuant to the Constitution, Article IV, § 3A, they also participated in the decision and the adoption of this opinion.

The question certified to us by the United States Court of Appeals for the District of Columbia Circuit may have been the result of a misunderstanding during arguments before that court. The certification order states: "Both parties agreed at oral argument that whether recognition and enforcement of the foreign judgment would be repugnant is determined by reference to Maryland law." In their arguments before this Court, however, both counsel indicated that they did not desire certification of any Maryland public policy issue and that the primary issue in the instant case was whether the First Amendment to the United States Constitution and the public policy underlying the United States Constitution precluded enforcement of the foreign judgment. Neither party contended, nor even suggested, that the Maryland Constitution and Maryland public policy should not be read in *pari materia* with the United States Constitution and its underlying public policy. There are both statutory and policy reasons why the issue of Maryland public policy is not relevant and why this Court should respectfully decline to answer the certified question.

On December 10, 1993, Vladimir Telnikoff filed an action in Maryland seeking to have his English libel judgment against Vladimir Matusevitch recognized and enforced.[1] Telnikoff also filed to enforce the judgment in the Superior Court for the District of

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[1]Telnikoff's attorney filed a "Declaration of Counsel Registering Foreign Judgment" stating that the declaration was "pursuant to Maryland Code §§ 11-801 et seq., the Maryland Uniform Enforcement of [Foreign] Judgments Act." Had Telnikoff's libel judgment been rendered in a state or federal court, the filing under Maryland Code (1974, 1995 Repl. Vol.), Courts and Judicial Proceedings Article, §§ 11-801 et seq. would have been proper. Since the judgment was from a foreign country, however, Maryland law requires that the judgment be recognized under the Maryland Uniform Foreign Money-Judgments Recognition Act, Md. Code (1974, 1995 Repl. Vol.), Courts and Judicial Proceedings Art., §§ 10-701 et seq. Because Telnikoff failed to get recognized first under §§ 10-701 et seq., filing under §§ 11-801 et seq. was improper.

Columbia, perhaps because Vladimir Matusevitch worked in the District of Columbia, and his wages might be garnished there. Matusevitch then filed a declaratory judgment action in the United States District Court for the District of Maryland, reciting that Telnikoff was seeking recognition and enforcement of his libel judgment in Maryland and the District of Columbia, and Matusevitch asked for a declaration that recognition and enforcement of the English libel judgment would violate the Constitution and public policy of the United States and the Constitution and public policy of the State of Maryland. A stipulation was filed in the Superior Court case that "Mr. Matusevitch and Mr. Telnikoff will take all necessary steps to transfer the action styled *Matusevitch v. Telnikoff*, Civil Action No. L-94-1037 (D. Md.), from the United States District Court for the District of Maryland to the United States District Court for the District of Columbia." This was soon thereafter accomplished by a joint request for a transfer.

Following a hearing in the United States District Court for the District of Columbia, a scholarly opinion was rendered by Judge Ricardo M. Urbina. That opinion was reported as *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D. D.C. 1995). Judge Urbina made several findings, the first was that the Maryland entry of judgment based on the English libel judgment was invalid for procedural reasons. *Matusevitch*, 877 F. Supp. at 3. Judge Urbina reasoned that pursuant to the Maryland Uniform Foreign Money-Judgments Recognition Act, Maryland Code (1974, 1995 Repl.Vol.), Courts and Judicial Proceedings Article, § 10-703, "before a party can enforce a foreign-country judgment, the Recognition Act requires a proceeding to determine preliminarily whether the court should recognize the foreign-country

judgment." *Matusevitch*, 877 F. Supp. at 2. The judge held that, since this procedure was not complied with, the Maryland judgment was unenforceable. He stated: "[Telnikoff] never attempted to get [the English libel] judgment recognized before filing, as required by statute. Consequently, the court determines that the defendant currently holds an unrecognized foreign-country judgment from the State of Maryland. The defendant must obtain recognition of this judgment in order to enforce it." *Matusevitch*, 877 F. Supp. at 3. The District Court judge further concluded that the English libel judgment violated the public policy of the United States and the State of Maryland. It is abundantly clear that this holding was based solely on the United States Constitution and its underlying policy which Maryland would be obligated to follow. Judge Urbina extensively analyzed Article I and federal case law, but did not cite or rely on a single Maryland case. He read Maryland's public policy as embracing U.S. libel standards and wrote: "libel standards that are contrary to U.S. libel standards would be repugnant to the public policies of the State of Maryland and the United States." *Matusevitch*, 877 F. Supp. at 4. (emphasis added). Telnikoff appealed Judge Urbina's decision to the United States Court of Appeals for the District of Columbia Circuit. The sole basis for the appeal was the United States Constitution and federal public policy issue. Telnikoff did not cite or rely on a single Maryland case.

THE STATUTORY REASON WHY THE CERTIFIED QUESTION SHOULD NOT BE ANSWERED

Both parties obviously agreed with Judge Urbina's finding that the Maryland

judgment was invalid for procedural reasons; they took steps to expunge the Maryland judgment and with it any issue involving Maryland public policy. As a result of Judge Urbina's decision and before appellate briefs were filed, the parties jointly secured an order from the Circuit Court for Montgomery County dismissing the Maryland judgment. That order not only recites that Telnikoff voluntarily dismisses the Maryland proceeding but further, by agreement of the parties, orders that neither party will cite nor rely on the expunged Maryland judgment. The Circuit Court for Montgomery County order further provides:

> "Mr. Telnikoff shall not assert in any pending or future action or proceeding in any forum or otherwise base any claim or defense in any forum on the premise that he now holds or at any time has held a judgment of the State of Maryland in his favor and against Mr. Matusevitch or that such judgment now exists or at any time has existed."

The circuit court's dismissal order as well as the pleadings in the pending Superior Court proceedings were filed as part of the record in the federal appellate court. It is beyond question that the Maryland judgment was expunged and along with it any issue of Maryland public policy. The only pending action for recognition of the English libel judgment is the District of Columbia Superior Court action, and since there is no Maryland judgment or proceedings pending, Maryland public policy has no more relevancy than the public policy of Tennessee, Oregon, or any other state where the English judgment might later be filed.

Maryland Code (1974, 1995 Repl. Vol., 1997 Supp.), Courts and Judicial Proceedings Art., § 12-603 provides:

> "The Court of Appeals of this State may answer a question of law certified to it by a court of the United States or by an appellate court of another state or of a tribe, if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State."

As a result of the expungement of the Maryland judgment, there is no Maryland public policy issue. Since there is currently no Maryland judgment based on the English judgment, Maryland public policy cannot be "determinative" of any issue still pending in the federal litigation and is no more relevant than the public policy of any of the fifty states where the judgment might be filed. Thus, our statute would seem to preclude us from answering this certified question.

OTHER REASONS FOR NOT ANSWERING THE CERTIFIED QUESTION

This Court cannot "decide questions of federal constitutional law in a certified question case." ___ Md. ___, ___ n.15, ___ A.2d ___, ___ n.15 (1997)(Majority Op. at 18 n. 15). We also have discretion to refuse to answer a certified question, and we should exercise that discretion in the instant case. Maryland Code (1974, 1995 Repl. Vol., 1997 Supp.), Courts and Judicial Proceedings Art., § 12-607 provides: "The Court of Appeals of this State, acting as a receiving court, shall notify the certifying court of acceptance or rejection of the question and, in accordance with notions of comity and fairness, respond to an accepted certified question as soon as practicable." In accordance with notions of comity, fairness, and uniformity, the issues, in the instant case, should be resolved pursuant to the

First Amendment and national public policy, not based on Maryland public policy.

Both sides agreed in oral argument that they view this case as being controlled by the First Amendment and its public policy. In addition, this Court's view of Maryland public policy seems to be more restrictive than the First Amendment and its public policy and, if so, Maryland public policy should yield to federal public policy. The majority states that "[i]n a series of opinions after *New York Times Co. [v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)] and *Gertz [v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S.Ct. 2997, 3010, 41 L.Ed.2d 789 (1974)], this Court substantially changed the Maryland common law regarding defamation actions even in areas where the changes were not mandated by the First Amendment...." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 35)(citations omitted). If Maryland public policy protects defamation "in areas where the changes were not mandated by the First Amendment," it should be subordinated to the First Amendment policy in this federal declaratory judgment case.

National public policy regarding foreign money-judgments is manifested in the Uniform Foreign Money-Judgments Recognition Act (the Act). The Act contains two important provisions that indicate why we should not answer this certified question. First, the Act indicates that uniformity of interpretation among the states is a primary consideration; and second, the Act permits a state to recognize a foreign judgment even if the judgment is contrary to the state's public policy. In other words, the Act gives a state discretion to subordinate its own public policy in favor of uniformity and the importance of comity among nations. The majority ignores these two important provisions of the Act.

Section 10-708 of the Act, Uniformity of Interpretation, provides: "This subtitle shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it." Md. Code (1974, 1995 Repl. Vol.), Courts and Judicial Proceedings Art., § 10-708. The importance of uniformity in recognition of foreign judgments under the Act was commented on in *Wolff v. Wolff*, 40 Md. App. 168, 389 A.2d 413 (1978), *aff'd*, 285 Md. 185, 401 A.2d 479 (1979):

> "Thus the Uniform Foreign Money-Judgments Recognition Act was intended to promote principles of international comity by assuring foreign nations that their judgments would, under certain well-defined circumstances, be given recognition by courts in states which have adopted the Uniform Act. As reciprocity is generally an important consideration in determining whether the courts of one country will recognize the judgments of the courts of another, the certainty of recognition of those judgments provided for by the Act will hopefully facilitate recognition of similar United States' judgments abroad." (Citations omitted).

40 Md. App. at 175, 389 A.2d at 417. When Maryland's public policy differs from that of other states and from national public policy, then Maryland's public policy should yield to the uniform national public policy. This is further provided for in the Act by authorizing a state to enforce a foreign money judgment, even if the judgment was rendered contrary to the public policy of the enforcing state. The pertinent provision is Md. Code (1974, 1995 Repl. Vol.), Courts and Judicial Proceedings Art., § 10-704, which provides:

> "(a) A foreign judgment is not conclusive if:
>
> (1) The judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

> (2) The foreign court did not have personal jurisdiction over the defendant;
>
> (3) The foreign court did not have jurisdiction over the subject matter; or
>
> (4) The judgment was obtained by fraud.
>
> (b) A foreign judgment need not be recognized if:
>
> (1) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
>
> (2) The cause of action on which the judgment is based is repugnant to the public policy of the State;
>
> (3) The judgment conflicts with another final and conclusive judgment;
>
> (4) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute was to be settled out of court; or
>
> (5) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action." (Emphasis added.)

Md. Code (1974, 1995 Repl. Vol.), Courts and Judicial Proceedings Art., § 10-704.

Thus, the Act provides four mandatory reasons why a judgment cannot be recognized and five discretionary reasons why a state may refuse to recognize a foreign judgment. See *Ingersoll Mill. Mach. Co. v. Granger*, 833 F.2d 680, 688 (7th Cir. 1987) stating:

> "The language of subparagraph (b) [of the Uniform Foreign-Money Judgments Act] is not mandatory, but rather optional. In other words, even if Ingersoll's arguments with respect to the [public policy] provisions of subparagraph (b) were valid, the statute does not require the district court to deny

> recognition of the judgment; it simply provides that it 'may' deny recognition of the judgment."

See also Jeremy Maltby, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978, 1987 (1994)(the Uniform Recognition of Foreign Money-Judgments Act gives a court discretion whether to deny enforcement of a foreign judgment where "enforcement ... would contravene the public policy of the enforcing state"). Under the Act, we may say that, even if the libel cause of action is repugnant to Maryland public policy, we will in the interest of uniform national comity subordinate Maryland's public policy to First Amendment public policy or a uniform national public policy. We should do so in the instant case. The majority suggests that Maryland case law and public policy is more protective of defamation than the First Amendment; if so, in order to have a uniform national policy regarding enforcement of English libel judgments, we should exercise our discretion not to apply Maryland's unique public policy.

Recognition of foreign judgments, and especially English judgments, has been the subject of treaty negotiations. A convention between the United Kingdom and the United States for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters was held in 1976, but no treaty has yet been ratified. The Supreme Court has not indicated whether federal or state law should govern the recognition of foreign-nation judgments. *See* R. Doak Bishop and Susan Burnette, *United States Practice Concerning Recognition of Foreign Judgments*, 16 INT'L LAW. 425, 429 (1982). Although there is currently no treaty

or federal statute preempting the area and most states have assumed enforcement of foreign judgments is a matter that currently can be regulated by the states, we must be cognizant of the foreign affairs implication of comity. The majority acknowledges: "The recognition of foreign judgments is governed by principles of comity." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 11). The Supreme Court has given us a definition of comity:

> "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."

Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S.Ct. 139, 143, 40 L.Ed 95, 108 (1895). It is clear comity in enforcement of foreign judgments requires two considerations. First, the interest of the individual defendant; and second, the international relations between sovereign states. The definition of comity recognizes its obvious international foreign affairs implications. This Court ignores any foreign affairs considerations in its decision, as well as the importance of the attempt to base comity on a uniform national standard. I believe we should answer the certified question by explaining that, even if the English libel judgment might be repugnant to some atypical public policy of Maryland, we would exercise our discretion to subordinate our unique public policy and enforce the English judgment unless to do so violates the United States Constitution, federal public policy, or the uniform public policy of all states.

Since in answering this certified question we are precluded from interpreting the

United States Constitution or federal public policy, we should respectfully decline to answer the question. Had this same issue reached this Court by an appeal of the filing of the English libel judgment in Maryland instead of as a certified question, the case would be in a different posture and we could then construe the United States Constitution and what national public policy should be pursuant to the First Amendment. The limitations imposed on us by a certified question proceeding should preclude us from answering the question, and the only issue we can answer, *i.e.*, Maryland's possibly unique public policy, is irrelevant to this litigation.

MARYLAND PUBLIC POLICY SHOULD NOT PREVENT ENFORCEMENT OF THIS ENGLISH LIBEL JUDGMENT

If this Court had to reach the issue, I believe Maryland public policy should not prevent enforcement of this English libel judgment. Any resolution of whether enforcement of this English libel judgment would violate Maryland public policy should begin with the definition of public policy with regard to enforcement of foreign judgments. A good definition of public policy in the context of recognition of foreign judgments is found in *Milhoux v. Linder*, 902 P.2d. 856 (Colo. Ct. App. 1995):

> "[C]ourts in the United States normally will not deny recognition merely because the law or practice of the foreign country differs, even if markedly from that of the recognition forum. See Hunt v. BP Exploration Co. (Libya) Ltd., supra; Uniform Foreign Money-Judgments Recognition Act S 4 (comment), 13 Uniform Laws Annot. 268 (1986) (A mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved.).

> As Judge Cardozo observed: 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.'
>
> As have numerous other courts, we conclude that an appropriate standard is that set forth in the Restatement (Second) of Conflicts § 117 comment c (1971). Under this standard, the public policy exception is limited to 'situations where the original claim is repugnant to fundamental notions of what is decent and just' in the recognition forum." (Citations omitted).

902 P.2d at 861. See also *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986):

> "A judgment is unenforceable as against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.' The standard is high, and infrequently met. As one court wrote, '[o]nly in clear-cut cases ought it to avail defendant.' In the classic formulation, a judgment that 'tends clearly' to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property is against public policy." (Citations omitted).

788 F.2d at 841. This libel judgment obtained by one British resident against another British resident was not a "serious injustice"; it does not violate fundamental notions of what is decent and just; and it does not undermine public confidence in the administration of law. Fundamental notions of what is decent and just should also consider that Telnikoff might deserve compensation for Matusevitch's false statements that Telnikoff was a racist and anti-semite who advocated racial superiority or racial purity, especially since those statements were sent to a newspaper and did substantial damage to Telnikoff's reputation and career. Assessing damages against a private individual, regardless of intent or malice, who wrote a

false and defamatory letter that almost ruined another person's reputation should not undermine public confidence in the administration of justice.

For hundreds of years, up until 1964 when the Supreme Court decided *New York Times Co.*, *supra*, the Maryland common law of libel was the same as the current English libel law under which the instant English libel case was decided. *See, e.g.*, *Negley v. Farrow*, 60 Md. 158, 175 (1883). "The fact that one is the proprietor of a newspaper, entitles him to no privilege in this respect, not possessed by the community in general. The law recognizes no duty, imposed on him, arising from his relations to the public, to defame and libel the character of any one, and if he does, it is no answer to say, he did so in good faith, and without malice, honestly believing it to be true." *Negley*, 60 Md. at 177; *Domchick v. Greenbelt Services*, 200 Md. 36, 46, 87 A.2d 831, 836 (1952) (In libel suits, defense of truth must be made by special plea of justification and such plea of justification, if not sustained, "furnishes proof on record of continued malice."). Prior to 1964, there was no public outcry or legislative reaction in Maryland to the same common law applied in the English judgment against Matusevitch. Prior to *New York Times Co.*, this Court saw nothing in the Maryland Declaration of Rights or Maryland public policy that would have led to a decision any different from the English judgment. The *New York Times Co.* decision changed common-law defamation based on the Supreme Court's interpretation of the First Amendment. As one writer noted, "it is sure that *[New York Times Co.]* found defamation a creature of the common law and left it a monument of the First Amendment." Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L.

REV. 999, 1011 (1994).

It was only after *New York Times Co.* and its progeny that this Court abandoned hundreds of years of common-law defamation precedent. *See* ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 35) and cases cited therein. It was not the Maryland Constitution, the Maryland Legislature, public outcry, or Maryland public policy that caused Maryland to abandon its adherence to the English common law of libel in 1964. It was the Supreme Court construing the First Amendment to the United States Constitution that made us jettison the same English common law of libel that we now find so offensive. The change in the Maryland common law was the result of the First Amendment, not the Maryland Constitution, and since we are precluded from interpreting the First Amendment in this action, we should not answer the certified question.

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article 40 of the Maryland Declaration of Rights differs significantly from its federal counterpart and contains a safeguard against defamation not found in the United States Constitution. It provides:

> "That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, <u>being responsible for the abuse of that privilege</u>." (Emphasis added).

MD. CONST., Declaration of Rights, Art. 40. This provision seems to indicate the drafters of the Maryland Constitution provided for more protection against libel or slander than the First Amendment. Article 40 also established a clear difference between the "liberty of the press," which is inviolably preserved, and the right of every citizen to speak, write, and publish, which leaves the individual responsible for abuse of the privilege. The instant case does not involve "liberty of the press." It is perhaps noteworthy that our freedom of speech is expressly granted to citizens of this state not to non-citizen residents of England. The majority makes no attempt to explain the differences in the language of the two constitutional provisions and, indeed, somehow concludes that Art. 40 may even give more freedom to defame another person than the First Amendment. There is nothing in the words of Art. 40 that justifies such a conclusion.

If we had to decide the certified question, I believe Maryland's public policy should not preclude enforcement of this judgment. The majority opinion devotes page after page to a stirring tribute to freedom of the press, but this case does not involve freedom of the press. This is a libel judgment obtained by one resident of England against another resident of England. The libel was contained in a letter written by the defendant. Although the letter was published by a newspaper as a letter to the editor, that only increased the damages, the libel was the letter prepared and dispatched by a private person. The letter was libelous regardless of whether the newspaper chose to reprint it. Freedom of the press is not implicated, nor was any United States interest implicated. I trust the majority is not somehow suggesting that it is freedom of speech that protects speaking, but it is freedom of

the press that protects printing or writing; that simply is wrong. *See, e.g.*, Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999, 1002 (1994). Article 40 of the Maryland Declaration of Rights also clearly differentiates between the "liberty of the press" and a citizen's right to speak, write, or publish.

Matusevitch's letter was determined to be libelous by a jury; the proceedings were fair and carefully reviewed by the House of Lords, the highest court in England. There is no grave injustice in this internal English litigation. The majority apparently holds that no English libel judgment will ever be recognized and enforced in Maryland; it says, "recognition of English defamation judgments could well lead to wholesale circumvention of fundamental public policy in Maryland and the rest of the country." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 46). The Court uses an oversimplified analysis to reach an overbroad result.

There is another public policy that should also be considered by this Court. That public policy, recognized by our legislature when it adopted the Uniform Foreign Money-Judgment Recognition Act, is to give broad and uniform recognition to foreign judgments. The Act gives our courts discretion to subordinate our State's public policy. Our interest in international good will, comity, and res judicata fostered by recognition of foreign judgments must be weighed against our minimal interest in giving the benefits of our local libel public policy to residents of another country who defame foreign public figures in foreign publications and who have no reasonable expectation that they will be protected by the

Maryland Constitution. Unless there is some United States interest that should be protected, there is no good reason to offend a friendly nation like England by refusing to recognize a purely local libel judgment for a purely local defamation. In the instant case, there is no United States interest that might necessitate non-recognition or non-enforcement of the English defamation judgment. As one author noted: "Few cases can be found denying recognition solely on grounds of public policy; when the exception is used, the case almost always involves a choice-of-law concern flowing from the recognizing jurisdiction's interest in the parties or the underlying transaction." Arthur T. von Mehren and Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1670 (1968).

Here, Plaintiff and Defendant were both Russian emigres living in England.[2] If England wishes to protect its public figures from even non-negligent libel by private citizens, it should be able to do so. There should be no need for Maryland public policy to give protection to an English resident who libels an English public figure in England. The newspaper article by Telnikoff that provoked Matusevitch's libelous personal attack was a criticism of the British Broadcasting Corporation's (B.B.C.) Russian Service hiring practices. It ended with a statement that: "The author [Telnikoff] was on the staff of the B.B.C.

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[2]Matusevitch was a Russian citizen and had a Russian passport. He may have also had U.S. citizenship because he was born in New York while his father, a Soviet citizen, was assigned to the Soviet Trade Representation in New York. In 1940, Matusevitch's father was recalled back to the Soviet Union, and Matusevitch accompanied his family back to the Soviet Union when he was four years old. He remained in Russia until he defected in 1968.

External Services."[3] Matusevitch's defamatory letter referred only to the B.B.C.'s Russian Service recruitment policies and ended with the statement that "[o]ne could expect that the spreading of racialist views would be unacceptable in a British newspaper." There is no United States or Maryland interest implicated by this judgment.

The majority makes the finding of fact that "Telnikoff ... was undisputably a public official or public figure," ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 42), but fails to take into account that Telnikoff was not an American public official or public figure. Our Constitution extracts a price for notoriety. American public officials and public figures must realize that if they are defamed there is no redress under our laws unless the defamation is done with malice. This may keep some people from becoming public officials and induce others to shun notoriety, but they generally have that choice. British public officials and public figures, however, expect their law to give them protection from even non-malicious false defamatory statements. We should respect this difference between British public figures and their American counterparts in cases of purely internal English defamation by private persons. I doubt the public would find this as repugnant as does the majority of this Court. Matusevitch, at the time he falsely accused Telnikoff of being a racist hate monger, had no right to, or expectation that he would, be protected by the United States Constitution, and I doubt that the public would be outraged if we do not retroactively bestow our constitutional right to non-maliciously defame a public official on Matusevitch merely

[3]The certification order recites that Telnikoff was "an employee of the B.B.C. Russian Service" at the time he wrote the article.

because he later moves to our country.

The majority cites with approval *Desai v. Hersh*, 719 F. Supp. 670 (N.D. Ill. 1989), *aff'd*, 954 F.2d 1408 (7th Cir. 1992). In *Desai* the plaintiff was not seeking to enforce a foreign judgment in the United States; he was asking a United States district court to apply foreign libel law to a claim brought in the United States. 719 F. Supp. at 672. The court's analysis was, however, relevant to the instant case when it said:

> "The court concludes that, for purposes of suits brought in United States courts, first amendment protections do not apply to all extraterritorial publications by persons under the protections of the Constitution. Had defendant written a book and published it solely in India concerning plaintiff's activities as a public official in the government of India, but minimally related to a matter of public concern in this country, the need for protection of first amendment interests would be greatly lessened, if not entirely absent. In such an instance, foreign law could be applied here without offending the Constitution.... The first amendment shields the actions of speakers for the benefit of their audience.... To allow the protections of the first amendment to be invoked where the interests it seeks to promote are absent would be to transform the first amendment from a shield into a sword." (Citations omitted).

Desai, 719 F. Supp. at 676. The court went on to make a very important distinction, even in cases involving a public figure, between a U.S. publisher or U.S. publication that is distributed in a foreign country which should be given First Amendment protection and a publication directly and intentionally published and distributed solely in another country. In the latter instance there is an abandonment of any First Amendment protection. The court stated:

> "[I]n instances where the plaintiff is a public official or figure

> and thus heightened first amendment protections, including the 'actual malice' standard, apply to domestic publication, these same protections will apply to extraterritorial publication of the same speech where the speech is of a matter of public concern and the publisher has not intentionally and directly published the speech in the foreign country in a manner consistent with the intention to abandon first amendment protections. This principle, being based on conduct within the control of the potential defamation defendant, minimizes any 'chilling effect' resulting from the potential application of foreign defamation law. An author or publisher who does not directly publish in a foreign country can rely on the protections in *New York Times [Co.]*."

Desai, 719 F. Supp. at 680-81.

The implication from the majority opinion is that Article 40 of the Maryland Declaration of Rights, as well as the First Amendment, extend to England and protect all English residents who defame other English residents. We should not imply that all English libel judgments violate our public policy as the majority seems to be saying. Instead, the Court should look carefully at the libel judgment at issue and make an individualized determination as to whether enforcement of the foreign judgment would have a chilling effect on First Amendment protection. This is illustrated in *Bachchan v. India Abroad Publications,* 585 N.Y.S. 2d 661 (1992), a New York trial court case that the majority calls "the only American case ... directly on point." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 44). *Bachchan* is not at all on point, but it is a sound decision. The defendant in *Bachchan* was a New York operator of a news wire service that transmits reports to a news service in India. 585 N.Y.S.2d at 661. The defamatory story was written by a reporter in London, wired by the defendant news service to a news service in India where it was picked

up by two Indian newspapers who published it and distributed it in England. *Id*. The defamatory story was also published in defendant's publication "India Abroad," which was published and distributed by the defendant in New York, as well as in England. *Id*. The United States wire service was sued in England and a libel judgment was obtained. *Bachchan*, 585 N.Y.S.2d at 661-62. The *Bachchan* case was decided solely on First Amendment principles and was clearly a correct decision. With border crossing media publications, the United States has a strong interest in seeing that our media will be protected from foreign libel judgments that fail to recognize the American media's freedom of the press. The rationale for the *Bachchan* decision was explained by one commentator as follows:

> "[I]t is not the repugnance of the English law of defamation, but the repugnance of applying it in such a way as to chill speech in New York that is the grounds of non-recognition. The court adumbrates this approach early in its opinion when it substitutes repugnance of the 'judgment' for repugnance of the 'cause of action.'"

Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking,* 60 BROOK. L. REV. 999, 1031 (1994). Another writer, while praising the result in *Bachchan*, was concerned that its failure to fully explain its rationale would lead other courts into the same error made by the majority in the instant case. His concern was that, instead of recognizing that United States interests were at risk and needed protection in *Bachchan*, other courts might interpret the case too simplistically and use it as authority to refuse recognition of any English libel judgment. He wrote:

> "Despite the 'welcome relief' it provides, *Bachchan* has serious flaws. It does not clearly explain the grounds upon which it is based or the interests it seeks to protect. This lack of concrete reasoning provides unclear precedent for the future and raises concerns that its rule may be applied too broadly, so as to deny enforcement of any foreign libel judgment that does not conform exactly to the requirements of *[New York Times Co.]* and its progeny. *Bachchan* forbids the enforcement of foreign libel judgments that conflict with the values of the First Amendment, but does not spell out what these values are. To follow its command properly, one must identify the interests at stake and determine what will threaten them." (Emphasis added).

Jeremy Maltby, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts,* 94 COLUM. L. REV. 1978, 1982 (1994).

There should be no question about the need for First Amendment protection for a United States news wire service and that enforcement of the judgment in *Bachchan* would chill the free press rights of the New York newspaper wire service. There is a huge difference between giving First Amendment protection to a United States news wire service and giving First Amendment protection (or Article 40 protection) to all English libel defendants. It is unwarranted to simply refuse, on the basis of freedom of the press and Maryland public policy, to enforce all English libel judgments. England has an interest in protecting its residents, including its own public officials and public figures, from even unintentionally false and defamatory statements damaging to their reputation. It should not violate our public policy to recognize that interest as long as it does not endanger our interest in the free dissemination of information by our media and those people shielded by our Constitution. Our national interest might necessitate non-recognition of an English libel

judgment if it was a judgment against a United States publication that was circulated abroad, or even perhaps a defamation judgment obtained in a foreign country by a United States public figure who cannot sue for merely negligent or unintended defamation under our Constitutions and public policy. Each case should be examined on its own facts to see if the United States freedom of the press is implicated or if the free speech rights of people entitled to the protection of our First Amendment are implicated.

Public policy should not require us to give First Amendment protection or Article 40 protection to English residents who defame other English residents in publications distributed only in England. Failure to make our constitutional provisions relating to defamation applicable to wholly internal English defamation would not seem to violate fundamental notions of what is decent and just and should not undermine public confidence in the administration of law. The Court does little or no analysis of the global public policy considerations and seems inclined to make Maryland libel law applicable to the rest of the world by providing a safe haven for foreign libel judgment debtors.