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

SECOND SECTION

CASES OF TEŠIĆ v. SERBIA
(app. nos. 4678/07 and 50591/12)

JUDGMENT

STRASBOURG

11 February 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the cases of Tešić v. Serbia,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Işıl Karakaş,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Helen Keller,
Egidijus Kūris, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 21 January 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 4678/07 and 50591/12) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Ms Sofija Tešić ("the applicant"), on 29 December 2006 and 28 May 2012 respectively.

2. The applicant was represented by Mr M. Dodig, a lawyer practising in Temerin. The Serbian Government ("the Government") were initially represented by their former Agent, Mr S. Carić, and subsequently by their current Agent, Ms Vanja Rodić.

3. Applications nos. 4678/07 and 50591/12 concern the criminal and civil defamation proceedings, respectively, brought against the applicant by her former lawyer and the applicant's various complaints in this connection.

4. On 11 December 2012 the applications were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1934 and lives in Ledinac. In December 2006 her pension was 6,568.30 Serbian Dinars ("RSD"), i.e. approximately 80 Euros ("EUR").

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

A. The criminal case and other related proceedings

7. On 8 April 2005 the Novi Sad Municipal Court, acting on the basis of a private criminal action (*privatna krivična tužba*) filed on 10 March 2003, found the applicant guilty of criminal defamation (*kleveta*) and sentenced her to six months' imprisonment, suspended for a period of two years (*uslovna osuda*; see paragraph 35 below). Ms SN, a journalist, was also found guilty of the same offence and sentenced identically.

8. The Municipal Court noted, *inter alia*, that on 12 December 2002 *Dnevnik*, a Novi Sad daily newspaper, had published an article, prepared by Ms SN and based on the information provided by the applicant, to the effect that the latter's lawyer, Mr NB, had deliberately failed to represent her properly in a pending civil case. The article maintained that this was subsequently confirmed by the Novi Sad Police Department. The Municipal Court described the applicant's and article's assertions as lacking any factual basis and being aimed solely at harming the honour and reputation of Mr NB, a highly respected member of the Novi Sad legal community and a former judge.

9. On 11 January 2006 the Novi Sad District Court upheld this judgment on appeal and endorsed its reasoning. The applicant received the District Court's decision on 19 July 2006.

10. On 16 August 2006 the applicant filed a request for the reopening of these proceedings.

11. Following two remittals, on 29 July 2009 the Municipal Court accepted the applicant's motion and reopened the case. The applicant personally and a number of witnesses were reheard and numerous documents/files were re-examined, but ultimately, on 25 March 2011, both the original conviction and the sentence imposed were reaffirmed in their entirety. The Municipal Court's reasoning likewise remained the same. It clarified, however, that, whilst the police had indeed filed a criminal complaint against Mr NB on 15 May 2002, by 5 July 2002 the Novi Sad Municipal Public Prosecutor's Office had informed the applicant of its formal rejection based on the applicable statute of limitation. The applicant had thereafter attempted to take over the prosecution of the case in the capacity of a subsidiary prosecutor, but this had ultimately been rejected by the courts by 30 September 2004.

12. On 29 November 2011 the Novi Sad Appeals Court upheld the Municipal Court's judgment of 25 March 2011. The applicant was served with the Appeals Court's decision on 21 December 2011.

13. On 19 January 2012 the applicant filed a further appeal with the Constitutional Court, complaining, *inter alia*, about the outcome, fairness and length of the criminal proceedings, as well as the alleged breach of her freedom of expression. This appeal is still pending.

B. The civil suit and other related proceedings

14. On 19 December 2006 Mr NB filed a separate civil claim for damages with the Novi Sad Municipal Court, alleging that he had suffered mental anguish due to the publication of the impugned article.

15. On 31 January 2007 the Municipal Court ruled partly in favour of Mr NB and ordered the applicant to pay RSD 300,000 in compensation, together with default interest, plus costs in the amount of RSD 94,120, i.e. approximately EUR 4,900 Euros in all.

16. In its reasoning the Municipal Court found that: (a) the applicant had already been convicted of defamation within the criminal proceedings (see paragraph 40 below); (b) having examined Mr NB's professional conduct, her allegations had clearly lacked any factual basis; and (c) this had offended the honour, reputation and dignity of Mr NB and had caused him profound mental anguish (see paragraph 38 below).

17. On 16 April 2009 the District Court in Novi Sad rejected the applicant's appeal, and in so doing endorsed the reasons given at first instance. The applicant received the District Court's decision on 30 April 2009.

18. The applicant could not file an appeal on points of law, *revizija*, with the Supreme Court in view of the amount of damages awarded.

19. On 29 May 2009 the applicant thus filed an appeal with the Constitutional Court. This appeal was, effectively, supplemented by memorials of 21 November 2009, 27 June 2011 and 25 November 2011. The applicant complained about the breach of her right to freedom of expression, as well as the procedural fairness. Concerning the former she specifically referred to the disproportionate nature of the damages awarded, and cited the relevant Strasbourg case-law (such as, for example, *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Series A no. 316-B; and *Filipović v. Serbia*, no. 27935/05, 20 November 2007). The applicant, lastly, complained about the consequent danger to her life and her health, as described at paragraphs 30 and 31 below.

20. On 6 August 2009 the applicant requested that the Constitutional Court order the suspension of the civil enforcement proceedings brought against her (see paragraphs 25-29 below).

21. On 9 December 2009 the Municipal Court rejected the applicant's motion for the reopening of the civil proceedings, and on 7 May 2010 the Novi Sad High Court upheld this decision on appeal.

22. On 27 April 2011 the applicant again requested that the Constitutional Court order the suspension of the said enforcement proceedings.

23. On 15 December 2011 the Constitutional Court rejected the constitutional appeal on its merits, stating, inter alia, that the impugned decisions had been adopted in accordance with the law, that they had been

well-reasoned, and that it was not its function to assess whether the amount of compensation which had been awarded was disproportionate. The Constitutional Court made no mention of the applicant's complaint concerning her medical situation.

24. The applicant was apparently informed of this decision in the Constitutional Court's letter of 21 December 2011, and received it by 23 April 2012 at the latest.

C. The enforcement proceedings

25. On 13 July 2009 Mr NB filed a motion with the Novi Sad Municipal Court, seeking enforcement of its judgment dated 31 January 2007.

26. On 14 July 2009 the Municipal Court issued an enforcement order whereby two thirds of the applicant's pension were to be transferred to the creditor's bank account each month, until the sums awarded to the latter have been paid in full (see paragraphs 41-43 below).

27. The said deductions to the applicant's monthly income began as of 8 August 2009.

28. In May 2012 the applicant's monthly pension was RSD 19,707, approximately EUR 170. After deductions, the applicant was left with approximately EUR 60 on which to live.

29. By 30 June 2013 the applicant had paid a total of RSD 496,471.10, i.e. approximately EUR 4,350. However, given the accrued and future interest, she would have to continue with the payments for approximately another two years (see paragraphs 44-50 below).

D. The applicant's medical condition

30. The applicant suffered from a number of diseases including cataracts, progressive ocular hypertension, which had allegedly caused a total loss of vision in her left eye, angina pectoris, and clinical depression. She had also had a pacemaker installed several years ago, had suffered a stroke and was in need of hip surgery.

31. The applicant maintained that she needed a minimum of RSD 5,000 monthly for her medication, i.e. approximately EUR 44, but that she could no longer afford to buy it.

E. Other relevant facts

32. On 21 September 2006, concerning the same article published on 12 December 2002, the Novi Sad Municipal Court ruled in favour of Mr NB and ordered Ms SN, *Dnevnik*, and the Autonomous Province of Vojvodina (as the said newspaper's founder) jointly to pay RSD 300,000 in compensation for the non-pecuniary damage suffered, together with default

interest, plus costs in the amount of RSD 55,600, i.e. approximately EUR 4,120 in all. On 13 December 2006 this judgment was upheld by the Novi Sad District Court on appeal.

33. The applicant maintained that on 13 April 2013 her gas supply had been disconnected in view of her continuing inability to pay her utilities.

II. RELEVANT DOMESTIC LAW, COMMENTARY AND PRACTICE

A. The Criminal Code of the Republic of Serbia 1977 (*Krivični zakon Republike Srbije*; published in the Official Gazette of the Socialist Republic of Serbia – OG SRS – nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89 and 42/89, as well as in the Official Gazette of the Republic of Serbia – OG RS – nos. 21/90, 16/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02 and 80/02)

34. The relevant provisions of this Code read as follows:

Article 92

"Whoever, in relation to another, asserts or disseminates a falsehood which can damage his [or her] honour or reputation shall be fined or punished by imprisonment not exceeding six months.

If an act described in [the above] paragraph has been committed through the press, via radio or television ... [or otherwise through the mass media] ... or at a public meeting, the perpetrator shall be punished by imprisonment not exceeding one year. ...

If the defendant proves his [or her] claims to be true or if he [or she] proves that there were reasonable grounds to believe in the veracity of the claims which he [or she] had made or disseminated, he [or she] shall not be punished for defamation, but may be punished for the offence of insult ... or the offence of reproaching someone for the commission of a criminal offence...

Whoever, in relation to another, falsely claims or disseminates claims to the effect that he [or she] has committed a crime prosecuted ex officio, shall be punished for defamation even if there were reasonable grounds to believe in their veracity, unless such claims have been made or disseminated pursuant to Article 96 § 2 of this Code. The veracity of the claim that someone has committed a crime prosecuted ex officio may be proved only by means of a final court judgment and through other means of proof only if criminal prosecution or a trial are not possible or are legally precluded."

Article 96 §§ 1 and 2

"... [No one] ... shall ... be punished for insulting another person if he [or she] so does in a scientific, literary or artistic work, a serious critique, in the performance of his [or her] official duties, his [or her] journalistic profession, as part of a political or other social activity or in defence of a right or of a justified interest, if from the manner of his [or her] expression or other circumstances it transpires that there was no [underlying] intent to disparage.

In situations referred to above, ... [the defendant] ... shall not be punished for claiming or disseminating claims that another person has committed a criminal offence prosecuted ex officio, even though there is no final judgment to that effect ... , if he [or she] proves that there were reasonable grounds to believe in the veracity of ... [those claims] ..."

B. The Criminal Code of the Federal Republic of Yugoslavia (*Krivični zakon Savezne Republike Jugoslavije*; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia – OG SFRY – nos. 44/76, 46/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 and 54/90, as well as in the Official Gazette of the Federal Republic of Yugoslavia – OG FRY – nos. 35/92, 16/93, 31/93, 37/93, 24/94 and 61/01)

35. The relevant provisions of this Code read as follows:

Article 4

"It is the criminal legislation which was in force at the time of commission of the crime in question that shall be applied to the perpetrator thereof.

If the criminal legislation has been amended once or on several occasions thereafter, the legislation which is more favourable for the perpetrator shall be applied."

Article 51

"... [T]he purpose of a suspended sentence ... is that punishment ... for socially less dangerous acts not be imposed ... when ... it can be expected that an admonition with a threat of punishment (suspended sentence) ... will ... [be sufficient to deter the offender] ... from committing any [other] criminal acts."

Article 52 § 1

"In handing down a suspended sentence, the court shall impose punishment on the person who had committed a criminal act and at the same time order that this punishment shall not be enforced if the convicted person does not commit another criminal act for a ... [specified] ... period of time which cannot be less than one or more than five years in all (period of suspension) ..."

Article 53 § 4

"In deciding whether to impose a suspended sentence, the court shall take into account the purpose of [this] sentence, the personality of the offender, his [or her] conduct prior to and following the commission of the criminal act, the degree of his [or her] criminal liability, as well as other circumstances under which the act has been committed."

Article 54 §§ 1 and 2

"The court shall revoke the suspended sentence if, during the period of suspension, the convicted person commits one or more criminal acts for which he or she is sentenced to imprisonment for a term of or exceeding two years.

If, during the period of suspension, the convicted person commits one or more criminal acts and is sentenced to imprisonment for a term of less than two years or to a fine, the court shall, upon consideration of all the circumstances ... including the similarity of the crimes committed ... decide whether to revoke the suspended sentence ..."

Article 93 § 2

"A suspended sentence shall be expunged one year following the date of expiry of the period of suspension, if the convicted person does not commit another criminal act during this time."

Article 94 § 3

"When a conviction has been expunged, information about the conviction may ... be given ... [only] ... to the courts, the public prosecution service and the police in connection with an ongoing criminal case against the person ... [concerned] ... "

C. Subsequent criminal legislation

36. In 2005 the Serbian Parliament enacted a new Criminal Code (*Krivični zakonik*). It was published in OG RS no. 85/05 and entered into force on 1 January 2006, thus repealing the above-mentioned criminal legislation. The new Code provided for the offence of criminal defamation, in Article 171, but envisaged that only a fine, not a prison term, could be imposed on the perpetrators thereof.

37. The Criminal Code 2005 was amended on four occasions thereafter. Ultimately, the amendments adopted in 2012, which were published in OG RS no. 121/12 and entered into force on 1 January 2013, repealed Article 171 of the Criminal Code 2005. Criminal defamation thereby ceased to be a criminal offence in the Serbian legal system.

D. The Obligations Act (*Zakon o obligacionim odnosima*; published in OG SFRY nos. 29/78, 39/85, 45/89 and 57/89, as well as in OG FRY no. 31/93)

38. Under Articles 199 and 200*, inter alia*, anyone who has suffered mental anguish as a consequence of a breach of his or her honour or reputation may, depending on its duration and intensity, sue for financial compensation before the civil courts and, in addition, request other forms of redress "which may be capable" of affording adequate non-pecuniary satisfaction.

39. Article 200 § 2 provides, *inter alia*, that when deciding on the exact amount of compensation to be awarded, the courts must take into account all of the relevant circumstances. There is also long-standing domestic case-law to the effect that the courts must be vigilant not to give in to any lucrative animus when it comes to compensation claims filed in respect of

alleged breaches of one's reputation (see, for example, the decision of the Supreme Court of Yugoslavia, Rev. 277/66).

E. The Civil Procedure Act 2004 (*Zakon o parničnom postupku*; published in OG RS nos. 125/04 and 111/09)

40. Article 13 provides that a civil court is bound by a final decision of a criminal court in respect of whether a crime was committed, as well as concerning the criminal liability of the person convicted. An acquittal, however, does not rule out a civil suit for damages since the conditions for criminal and civil liability are different (see *Komentar Zakona o parničnom postupku*, Mr Svetislav R. Vuković, Poslovni biro, Belgrade, 2004, p. 18).

F. The Enforcement Procedure Act 2004 *(Zakon o izvršnom postupku*; published in OG RS no. 125/04)

41. Article 156 § 1 provides, *inter alia*, that, as part of the enforcement procedure, up to two thirds of a debtor's pension may be withheld.

G. The Enforcement Procedure Act 2011 (*Zakon o izvršenju i obezbeđenju*, published in OG RS nos. 31/11 and 99/11)

42. Article 148 § 1 of this Act, in its relevant part, corresponds to the substance of Article 156 § 1 of the Enforcement Procedure Act 2004.

43. According to Article 363, the Enforcement Procedure Act 2011 entered into force on 18 September 2011, while pursuant to Article 358 § 1 all pending enforcement proceedings shall be completed on the basis of this new Act.

H. The Statutory Interest Act 2001 (*Zakon o visini stope zatezne kamate*; published in OG FRY no. 9/01 and OG RS no. 31/11)

44. Article 1 provides that statutory interest shall be paid as of the date of maturity of a recognised monetary claim until the date of its settlement.

45. Article 2 states that such interest shall be calculated on the basis of the official consumer price index plus another 0.5% monthly.

46. Article 3 § 1 sets out the exact method of calculating the interest in question.

I. The Constitutional Court's decision IUz-82/09 of 12 July 2012 published in OG RS no. 73/12

47. Based on this decision and as of 27 July 2012, the Constitutional Court repealed the method of calculating interest as set out in Article 3 § 1 of the Statutory Interest Act 2001.

J. The Statutory Interest Act 2012 (*Zakon o zateznoj kamati*; published in OG RS no. 119/12)

48. Article 2 provides that statutory interest shall be paid as of the date of maturity of a recognised monetary claim until the date of its settlement.

49. Article 3 states that such interest shall be calculated annually based on the Serbian National Bank's reference interest rate and increased by eight percentage points.

50. This act entered into force on 25 December 2012 and thereby repealed the Statutory Interest Act 2001.

THE LAW

I. JOINDER OF THE APPLICATIONS

51. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

52. The applicant complained, under Article 10 of the Convention, about the breach of her freedom of expression suffered due to her criminal conviction, the subsequent civil defamation judgment rendered against her, and, also, the way in which the latter was enforced domestically, causing her, as it did, extreme financial hardship, numerous health problems and even endangering her very life. The applicant additionally referred to Articles 3 and 8 of the Convention in this context, as well as to Article 1 of Protocol No. 1.

53. It being the "master of the characterisation" to be given in law to the facts of any case before it (see, for example, *Akdeniz v. Turkey*, no. 25165/94, § 88, 31 May 2005), the Court considers that this complaint primarily falls be examined under Article 10 of the Convention, which, insofar as relevant, reads as follows:

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

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

A. Admissibility

1. As regards the criminal proceedings

54. The Government maintained, *inter alia*, that since the proceedings before the Constitutional Court were still pending in this respect (see paragraphs 13 above), the applicant's complaint regarding the criminal case brought against her had to be rejected on the grounds of non-exhaustion.

55. The applicant recalled that she had lodged her application (no. 4678/07) with the Court on 29 December 2006, at which time the constitutional appeal had still not been considered effective.

56. The Court recalls that it has consistently held that a constitutional appeal should, in principle, be deemed effective within the meaning of Article 35 § 1 of the Convention in respect of applications introduced against Serbia as of 7 August 2008 (see *Vinčić and Others v. Serbia*, no. 44698/06 and others, § 51, 1 December 2009; see also *Rakić and Others v. Serbia*, no. 47460/07 and others, § 39, 5 October 2010, and *Hajnal v. Serbia*, no. 36937/06, §§ 122 and 123, 19 June 2012). It is understood, however, that any complaints concerning subsequent facts, including proceedings and/or decisions, shall have their own, "new", introduction date. The mere fact that the applicant has relied on the same Article of the Convention in his or her application is not sufficient to validly raise all subsequent complaints made under that provision (see, for example, *Allan v. United Kingdom* (dec.), no. 48539/99, 28 August 2001; and *Zervakis v. Greece* (dec.), no. 64321/01, 17 October 2002).

57. In view of the above, the Court notes that the original criminal proceedings brought against the applicant had ceased to be of relevance as of 29 July 2009, which was when the Municipal Court accepted the applicant's motion for their reopening (see paragraph 11 above). The subsequent criminal proceedings were concluded by 29 November 2011, hence post 7 August 2008, and the case before the Constitutional Court has been pending since 19 January 2012 (see paragraphs 12 and 13 above). In these circumstances, the applicant's remaining complaint relating to the criminal proceedings following their reopening is premature and must, as such, be rejected under Article 35 §§ 1 and 4 of the Convention on the grounds of non-exhaustion.

2. As regards the civil and enforcement proceedings

58. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits (as regards the civil and the enforcement proceedings)

1. The parties' submissions

59. The Government admitted that the applicant's freedom of expression had been restricted. This restriction, however, had been in accordance with the applicable domestic law and had pursued the legitimate aim of protecting the reputation of others. The competent civil courts had also properly assessed the facts and adequately applied the relevant domestic legislation. The applicant's allegation to the effect that her lawyer, Mr NB, had deliberately failed to represent her properly in a pending civil case, had been a statement of fact in support of which no credible evidence had ever been offered. This statement had likewise not been given in any constructive social context, but merely as an expression of the applicant's personal dissatisfaction. Further, Mr NB, being a practising lawyer, could not have remained passive in the face of such serious allegations undermining his very livelihood. Finally, the Government argued that neither the sum which had been awarded to Mr NB by the civil courts, consistent with damages awarded in other similar cases, nor the manner of its subsequent enforcement could be deemed disproportionate. While, admittedly, the applicant's pension had been low this could not have absolved her from paying for the profound damage caused to Mr NB. In any event, approximately one third of the total principal sum due to be paid by the applicant consisted of the costs incurred by Mr NB in the course of the civil and enforcement proceedings.

60. The applicant reaffirmed her complaint. She added that the newspaper article was the journalist's responsibility and that she had provided Ms SN with the relevant information but had never seen the piece before its publication. In any event, the fact remained that Mr NB had failed to adequately represent the applicant throughout the proceedings in question. The civil judgments rendered against the applicant amounted therefore to, at best, a disproportionate interference with her freedom of expression, particularly bearing in mind the pension-related deductions imposed in the course of the enforcement proceedings and considering her dire financial and medical situation.

2. The Court's assessment

61. The 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 paragraph 2 of Article 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 Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among many other authorities, *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012 (extracts)). Moreover, Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see, for example, *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204).

62. The Court has repeatedly upheld the right to impart, in good faith, information on matters of public interest, even where this involved damaging statements about private individuals (see, *mutatis mutandis*, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III). However, account must be taken of the distinction between factual statements on the one hand and value judgments on the other, since the existence of facts can be demonstrated whereas the truth of value judgments is not susceptible to proof (see, for example, *Lingens v. Austria*, judgment of 8 July 1986, § 46, Series A no. 103; and *McVicar v. the United Kingdom*, no. 46311/99, § 83, ECHR 2002-III).

63. The nature and severity of the sanction imposed, as well as the "relevance" and "sufficiency" of the national courts' reasoning, are matters of particular importance in assessing the proportionality of the interference under Article 10 § 2 (see *Filipović*, cited above, § 55). The amount of any compensation awarded must likewise "bear a reasonable relationship of proportionality to the ... [moral] ... injury ... suffered" by the plaintiff in question (see *Tolstoy Miloslavsky*, cited above, § 49; see also *Steel and Morris v. the United Kingdom*, no. 68416/01, § 96, ECHR 2005, where the Court held that the damages "awarded ... although relatively moderate by contemporary standards ... [had been] ... very substantial when compared to the modest incomes and resources of the ... applicants ... " and, as such, in breach of the Convention).

64. Turning to the present case, the Court notes that both the final civil court judgment rendered against the applicant and the subsequent enforcement order undoubtedly constituted an interference with the applicant's right to freedom of expression. Since they were based on the Obligations Act and the applicable enforcement procedure legislation, however, they were also clearly "prescribed by law" within the meaning of

Article 10 § 2 of the Convention (see paragraphs 38 and 41-43 above). Lastly, the judgment in question, as well as the enforcement order, were adopted in pursuit of a legitimate aim, namely "for the protection of the reputation" of another. What remains to be resolved, therefore, is whether the interference was "necessary in a democratic society".

65. In this respect the Court notes that the damages plus costs awarded against the applicant amounted to approximately EUR 4,900 and were, as such, equal to a total of more than sixty of the applicant's monthly pensions calculated on the basis of the available information as of December 2006 (see paragraphs 15 and 5 above, in that order; see also, *mutatis mutandis*, *Koprivica v. Montenegro*, no. 41158/09, §§ 73-75, 22 November 2011). This sum was also very similar to the amount awarded in a separate civil suit concerning the same issue brought against, *inter alios*, *Dnevnik* and the Autonomous Province of Vojvodina, as two certainly more financially viable legal entities (see paragraph 32 above).

66. Furthermore, while it is true that the criminal complaint filed by the police against Mr NB had been rejected by the Novi Sad Municipal Public Prosecutor's Office, and that the applicant had been informed of this rejection on the grounds of prescription by 5 July 2002 (see paragraph 11 above), it cannot be said that her statement in respect of her former counsel had been merely a gratuitous personal attack. After all, the police had clearly seen some merit in these allegations and the applicant's subsidiary prosecution was not rejected by the courts until 30 September 2004 (*ibid*.), well after the publication of the impugned article on 12 December 2002 (see, *mutatis mutandis*, *Koprivica*, cited above, § 67, *in fine*). Moreover, the Government's proposition that a discussion of a practising lawyer's professional conduct is clearly a matter of no public interest is in itself a dubious one, particularly bearing in mind the role of lawyers in the proper administration of justice.

67. Finally but most strikingly, on 14 July 2009 the Novi Sad Municipal Court issued an enforcement order whereby two thirds of the applicant's pension were to be transferred to Mr NB's bank account each month, until the sums awarded to him have been paid in full (see paragraph 26 above), all this notwithstanding that Article 156 § 1 of the Enforcement Procedure Act 2004 had provided that *up to* two thirds of a debtor's pension might be withheld, thus clearly leaving room for a more nuanced approach (see paragraph 41 above). The said deductions began as of 8 August 2009, and by 30 June 2013 the applicant had paid a total of approximately EUR 4,350 (see paragraphs 27 and 29 above). Nevertheless given the accrued and future interest, she will have to continue with the payments for approximately another two years (see paragraph 29 above). In May 2012 the applicant's monthly pension was some EUR 170. After deductions, she was hence left with approximately EUR 60 on which to live and buy her monthly medication (see paragraph 28 above). Since the latter would cost

her approximately EUR 44, she maintained, and the Government never contested this assertion, that she can no longer afford to buy it (see paragraph 31 above). This is in the Court's opinion a particularly precarious situation for an elderly person suffering from a number of serious diseases (see paragraph 30 above).

68. In view of the above, the Court finds that the interference in question was not necessary in a democratic society. Accordingly, there has been a violation of Article 10 of the Convention.

69. Having regard to this finding, the Court further considers that it is also not necessary to examine separately the admissibility or the merits of the applicant's essentially identical complaints made under Articles 3 and 8 of the Convention and Article 1 of Protocol No. 1.

III. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

70. Under Article 6 § 1 of the Convention, the applicant complained about the fairness and the length of the criminal proceedings prior to and after their reopening, the fairness and the length of the civil defamation proceedings, and the length of the proceedings before the Constitutional Court instituted on 29 May 2009.

71. Article 6 § 1, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal established by law ..."

72. The Government contested the admissibility, including on the grounds of non-exhaustion, and the merits of the above-alleged violations.

A. The Court's assessment as regards the criminal proceedings (i.e. the complaints made in app. no. 4678/07 lodged on 29 December 2006)

73. As already noted above, the Court is of the opinion that the original criminal proceedings brought against the applicant had ceased to be of relevance as of 29 July 2009, which was when the Municipal Court had ordered their reopening (see paragraphs 57 and 11 above, in that order). The applicant's complaints as regards their fairness are therefore manifestly ill-founded and must, as such, be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

74. Concerning the length of the criminal proceedings prior to their reopening, the Court notes that the Convention had entered into force in respect of Serbia on 3 March 2004 and that by 19 July 2006 these proceedings had been terminated (see paragraph 9 above; see also *Eckle*

v. *Germany*, 15 July 1982, § 84, Series A no. 51). The case in question had therefore lasted for a period of approximately two years and four months within the Court's competence *rarione temporis*, during which time the charges brought against the applicant had been examined at two instances. It follows that this complaint is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

75. Turning, lastly, to the issue of fairness and length of the criminal proceedings following their reopening, and for the reasons already explained at paragraphs 56 and 57 above, the Court considers that this part of the application is premature (see paragraph 13 above). It must therefore be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. The Court's assessment as regards the civil and constitutional proceedings (i.e. the complaints made in app. no. 50591/12 lodged on 28 May 2012)

76. The Court notes that applicant has never specifically complained before the Constitutional Court about the length of the civil defamation suit (see paragraph 19 above). This complaint must therefore, bearing particularly in mind the date of its introduction, be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies (see *Vinčić*, cited above, § 51; see also paragraph 56 above).

77. Concerning the length of the proceedings before the Constitutional Court, it is recalled that the reasonableness of these proceedings must be assessed in the light of the specific circumstances of the case, regard being had in particular to its complexity, the parties' conduct, and the importance of the issues at stake for the applicant (see, for example, *Šikić v. Croatia*, no. 9143/08, § 35, 15 July 2010). It is further understood that its role of guardian of the Constitution makes it particularly necessary for a Constitutional Court sometimes to take into account considerations other than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms (see *Šikić v. Croatia*, no. 9143/08, § 37, 15 July 2010). Turning to the matter at hand, the Court notes that the impugned proceedings had been instituted on 29 May 2009 (see paragraph 19 above). Some two and a half years later, on 21 December 2011, the applicant was informed of the adoption of the decision in her case, although the decision itself would seem to have been served by 23 April 2012 (see paragraph 24 above). Finally, the applicant's constitutional complaint was of some complexity, and the applicant herself had repeatedly supplemented the original constitutional appeal with additional submissions (see paragraphs 19, 20 and 22 above). In such circumstances, the underlying civil defamation proceeding having themselves lasted for approximately two years and four months

(see paragraphs 14-17 above) and despite the applicant's advanced age and the seriousness of the issues at stake for her, the Court cannot but reject this complaint as manifestly ill-founded in accordance with Article 35 §§ 3 (a) and 4 of the Convention (compare and contrast to, for example, *Nikolac v. Croatia*, no. 17117/06, § 17, 10 July 2008, *Butković v. Croatia*, no. 32264/03, § 27, 24 May 2007, and *Šikić*, cited above, § 37, where the Court found violations of the reasonable time requirement contained in Article 6 § 1 of the Convention in urgent cases involving labour-related and housing issues; the constitutional proceedings therein had lasted for approximately three years and four months, three years and six months, and three years and nine months, respectively, and considered together with the prior civil proceedings had lasted globally for approximately seven years, six and a half years, and five years within the Court's competence *ratione temporis* respectively).

IV. OBLIGATIONS UNDER ARTICLE 34 OF THE CONVENTION

78. The applicant noted that her former lawyer, who had represented her before the Court prior to Mr Dodig, had twice failed to receive the Court's correspondence addressed to his office. The applicant maintained that the respondent State had every reason to engage in this interference, hoping that the Court would conclude that she had lost interest in her Strasbourg application.

79. The Government made no comment in this regard.

80. Article 34 of the Convention provides as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

81. According to the Court's case-law, a complaint under Article 34 of the Convention does not give rise to any issue of admissibility under the Convention (see *Cooke v. Austria*, no. 25878/94, § 46, 8 February 2000; and *Ergi v. Turkey*, judgment of 28 July 1998, § 105, *Reports* 1998-IV).

82. The Court notes that Article 34 of the Convention imposes an obligation on a Contracting State not to hinder the right of the individual effectively to present and pursue a complaint with the Court. While the obligation imposed is of a procedural nature distinguishable from the substantive rights set out in the Convention and Protocols, it flows from the very essence of this procedural right that it is open to individuals to complain of alleged infringements of it in Convention proceedings (see *Manoussos v. the Czech Republic and Germany* (dec.), no. 46468/99, 9 July 2002).

83. It is of the utmost importance for the effective operation of the system of individual application instituted by Article 34 that applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from using a Convention remedy. The issue of whether or not contacts between the authorities and an applicant amount to unacceptable practices from the standpoint of Article 34 must be determined in the light of the particular circumstances (*ibid*.).

84. Turning to the present case, the Court finds that there is an insufficient factual basis for it to conclude that the authorities of the respondent State have interfered in any way with the applicant's exercise of her right of individual petition, it being noted that the Court cannot speculate as to who may have interfered with the correspondence addressed to the applicant's former counsel and in which context (see, *mutatis mutandis*, *Juhas Đurić v. Serbia*, no. 48155/06, § 75, 7 June 2011).

85. In view of the foregoing, the Court finds that the respondent State has not failed to comply with its obligations under Article 34 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

86. 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. Damage

87. The applicant claimed EUR 77,000 and EUR 7,000 in respect of pecuniary and non-pecuniary damage, respectively.

88. The Government contested these claims.

89. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 6,000 in respect of the non-pecuniary damage suffered as a consequence of the violation of her rights guaranteed under Article 10 of the Convention.

90. As regards the pecuniary damage, the Court notes that in May 2012 the applicant's monthly pension was approximately EUR 170. After deductions, the applicant was left with some EUR 60 on which to live. Further, by 30 June 2013 the applicant had paid a total of approximately EUR 4,350 through the enforcement proceedings. However, given the

accrued and future interest, she will have to continue with the payments for approximately another two years, and pay an additional EUR 2,000. In these circumstances, having already found the said interference to be disproportionate within the meaning of Article 10 of the Convention and without speculating on the exact amount of damages and costs, plus interest, which might have been adequate, the Court considers it reasonable to award the applicant the additional sum of EUR 5,500 for the pecuniary damage suffered.

B. Costs and expenses

91. The applicants also claimed a total of EUR 2,736 for the costs and expenses incurred domestically, as well as those incurred before the Court.

92. The Government contested this claim.

93. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are also reasonable as to their quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,200 covering costs under all heads.

C. Default interest

94. The Court considers it appropriate that the default interest rate 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

1. *Decides*, unanimously, to join the applications;

2. *Declares*, unanimously, the complaint under Article 10 of the Convention, as regards the civil and enforcement proceedings, admissible;

3. *Declares*, unanimously, the complaints under Article 10, regarding the criminal proceedings, and Article 6 § 1 of the Convention inadmissible;

4. *Holds*, by 6 votes to 1, that there has been a violation of Article 10 of the Convention as regards the civil and enforcement proceedings;

5. *Holds*, unanimously, that it is not necessary to examine separately the complaints under Articles 3 and 8 of the Convention and Article 1 of Protocol No. 1;

6. *Holds*, unanimously, that the respondent State has not failed to comply with its obligations under Article 34 of the Convention;

7. *Holds*, by 6 votes to 1,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 5,500 (five thousand five hundred euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 2,200 (two thousand two hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(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;

8. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 February 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sajó is annexed to this judgment.

G.R.A.
S.H.N.

DISSENTING OPINION OF JUDGE SAJÓ

I regret that I am unable to agree with the majority that there has been a violation of Article 10 of the Convention in this case. My reasons are the following.

In the present case the domestic courts found the applicant guilty of criminal defamation and sentenced her to six months' imprisonment, suspended for a period of two years. Her appeal against the conviction is still pending before the Constitutional Court. Whatever her allegations about her lawyers were, and whatever one thinks about prison sentences in a defamation case (a solution abandoned by Serbia in the meantime), the punishment indicates that the offence must have been a serious one. The present case concerns the applicant's loss of her case in civil proceedings on the same factual grounds.

Specifically, the case involves an interference with the applicant's freedom of expression. The limitation of her freedom of expression was found by the domestic courts to serve the legitimate goal of protecting reputation, in accordance with Article 10 § 2 of the Convention. I personally agree with the methodology which the Court applied in this case, namely that the limitation of freedom of expression is a matter to be considered within the four corners of Article 10 only, and an interference with freedom of expression is a matter of proportionality under that Article (see *Karakó v. Hungary*, no. 39311/05, 28 April 2009). However, more recently the Grand Chamber, in determining a conflict between the rights to reputation (private life) and free speech, found that

> "the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher who has published the offending article or under Article 8 of the Convention by the person who was the subject of that article. Indeed, as a matter of principle these rights deserve equal respect." (*Axel Springer AG v. Germany* [GC], no. 39954/08, § 87, 7 February 2012)

In the present case the conflict of the applicant's freedom-of-expression rights and the private-life rights of the defamed lawyer triggers a balancing exercise:

> "Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts." (ibid., § 88)

Irrespective of the methodology chosen, there are certain elements in the circumstances surrounding the statements at issue that influence the balancing exercise or determine the level of scrutiny for the purposes of the analysis of proportionality. These are, among other factors, the position of the allegedly defamed person (public figure), the function of the speaker (social watchdog function), the nature of the discourse (speech on matters of

public interest), the veracity of the statements made, and whether they were made in good faith (see, among other authorities, *Axel Springer AG*, cited above). None of these elements is present in this case: here, the applicant willingly and actively brought to the knowledge of the general public a factually untrue, defamatory statement which was likely to have severe consequences for the defamed person (that is, debarment). The Court's reference to the existence of an investigation following the complaints made by the applicant against the lawyer cannot be regarded as an indication that there was any truth in the allegations: where a matter is reported to the authorities they have to handle the matter seriously. The result of the investigation is what matters: in this case, given the interests of the defamed lawyer in protection of his reputation, the award was neither irrational nor disproportionate. The private interest in expressing personal discontent by disclosing false factual allegations to the general public is not a matter protected by the Convention. It is probable that the application should have been rejected as an abuse of the right of individual application.

Nor does the Court claim that an interest in free speech is really affected here. The Court brings a novel consideration into the analysis of proportionality, namely exclusive reliance on the alleged severity of the civil sanction imposed. In other words, Article 10 is applied in the total absence of an interest in freedom of expression. It is true that the Court asserts that the statement at issue cannot be held to be merely a gratuitous personal attack, seeing that the applicant's request to take over as a subsidiary prosecutor was not rejected for some time (see paragraph 66 of the judgment). Suffice it to say, however, that the complaint did not concern the disputed statement and was barred by the statute of limitations, and the delay cannot be held in any way to be an indication of the factual correctness of the allegation. Likewise, I have difficulties in following the second argument put forward by the Court, namely that there is a public-interest element present, given the role of lawyers in the proper administration of justice. This uncontroversial truth cannot be seen to be relevant here, as the statement related to a personal grievance. In the present case the activities of the lawyer cannot be attributed to the State; the lawyer acted within the traditional client-lawyer relationship without any impact on the public interest in the administration of justice.

I do not think that compensation in the law of tort (as long as the compensation is not unreasonably connected to the injury caused) should be calibrated by taking into consideration the alleged financial difficulties of the party causing injury. Freedom of expression entails responsibilities, and these responsibilities cannot be different on the grounds of existential difficulties affecting the speaker. Poverty cannot be an excuse for irresponsible private injury. Moreover, the State cannot be held responsible for compensating for the financial losses of indigent people when they cause injury, especially where the values of freedom of expression are not at stake.

Furthermore, the approach applied in this case seems to tip the balance between the rights in question to the detriment of reputation and private life. An individual will receive fair compensation only if there is a deep pocket to compensate that individual. This logic is hard to reconcile with the fundamentals of modern tort law, which is based on the assumption that the damage caused has to be undone, irrespective of the status of the parties involved. People are entitled on an equal footing to the protection of their reputation. The national law did allow for compensation in instalments, and therefore an element of "clemency" or flexibility reflecting the applicant's personal difficulties is present here. The domestic courts applied the discretion granted by law. It is not for an international court of human rights to review the equity of these lawful discretionary powers.

The Court relies on *Tolstoy Miloslavsky v. the United Kingdom* (13 July 1995, Series A no. 316-B). In that case the applicant and the Commission were of the view that the amount of damages awarded – 1.5 million pounds sterling (GBP) – was disproportionate to the legitimate aim of protecting Lord Aldington's reputation or rights (ibid., § 46). The Court found in that case that under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered (ibid., § 49). This principle was not contested in the present judgment; considerations regarding the injury to reputation suffered are different from the alleged financial difficulties an award imposes on a person who defames someone else.

It is true that reasoning similar to that in the present case was adopted in *Koprivica v. Montenegro* (no. 41158/09, 22 November 2011), cited in the judgment. That case concerned factually incorrect journalistic information on a matter of the utmost public interest, and it was left undecided to what extent the applicant was able to prove his allegations in the domestic court. It would not be appropriate to speculate in this dissent as to the existence of additional reasons for the finding of a violation in that case. Suffice it to say that the excessive sanctions imposed on a journalist had a clear chilling effect on news-gathering, and it was not the mere existential difficulty caused by the award made by the domestic courts that justified the finding of a violation.

I would like to mention one more authority which was relied upon in the Court's reasoning. *Steel and Morris v. the United Kingdom* (no. 68416/01, § 96, ECHR 2005-II) contains the following passage:

> "... 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. the United Kingdom*, [cited above,] § 49). The Court notes on the one hand that the sums eventually awarded in the present case (GBP 36,000 in the case of the first applicant and GBP 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 by the trial judge to have been distributed."

I mentioned above that *Tolstoy Miloslavsky* was concerned with the proportionality of the award to the injury suffered, and that in this regard the consideration of the defendants' position is a *non sequitur*. The *Tolstoy Miloslavsky* argument as applied in *Steel and Morris* may seem to stop short of a *non sequitur,* but it is not a statement of principle: what matters for the Court is that the corporate plaintiffs did not establish that they had suffered any financial loss. It is of more interest that the leaflets distributed in that case concerned a matter of public interest, and that there was a violation of Article 6 that had an impact on the protection of the freedom of expression.

I understand that the applicant in the present case might be in a very difficult situation as a consequence of the debt she has incurred, and that she has a serious medical condition. In substance, her claim amounts to an allegation of deprivation of possessions (namely a pension) resulting in her health being endangered. This might exceptionally fall within the ambit of Article 1 of Protocol No. 1. However, it seems to me that the deprivation of possessions was legitimate, that it served the public interest (enforcing civil liability for damage caused) and that it was not disproportionate to that goal. Equitable considerations do not seem to play a role in the case-law of this Court, beyond the concept of "individual and excessive burden", even assuming that this case involved an issue of possessions.