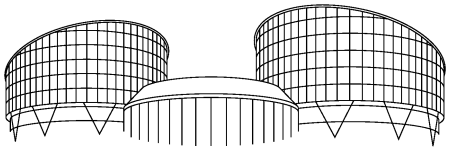

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MAKRADULI v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Applications nos. 64659/11 and 24133/13)

JUDGMENT

STRASBOURG

19 July 2018

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 case of Makraduli v. the former Yugoslav Republic of Macedonia,

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

Linos-Alexandre Sicilianos, *President,*
Kristina Pardalos,
Aleš Pejchal,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 23 January and 19 June 2018,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 64659/11 and 24133/13) against the former Yugoslav Republic of Macedonia, lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Macedonian national, Mr Jani Makraduli ("the applicant"), on 30 September 2011 and 1 April 2013 respectively.

2. The applicant was represented by Ms S. Joshevska, a lawyer practising in Skopje. The Macedonian Government ("the Government") were represented by their former Agent Mr K. Bogdanov, succeeded by the current Agent Ms D. Djonova.

3. Jovan Ilievski, the judge elected in respect of the former Yugoslav Republic of Macedonia, was unable to sit in the case (Rule 28 of the Rules of Court). On 10 October 2017 the President of the Chamber decided to appoint Tim Eicke to sit as an *ad hoc* judge (Rule 29).

4. The applicant alleged that his criminal conviction for defamation had breached his right to freedom of expression.

5. The complaint was communicated to the Government on 12 May 2015.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

6. The applicant was born in 1965 and lives in Skopje. At the time of the events he was vice-president of the SDSM opposition party and a member of parliament. The present applications concern criminal libel proceedings brought against the applicant by Mr S.M., who at the time was a senior member of the then ruling political party and at the same time head of the Security and Counter Intelligence Agency ("the Agency"). According to the Internal Affairs Act (sections 24 and 25), the head of the Agency is appointed by the Government and is accountable to it and the competent Minister. The impugned proceedings concerned statements made by the applicant at press conferences held at his political party's headquarters.

B. Application no. 64659/11

1. SDSM press conference and the applicant's statement

7. On 14 December 2007 the applicant held a press conference that was broadcast by the main news programme of the A1 television channel, which had national coverage and was the most popular channel at the time. The relevant part of the applicant's statement at the press conference reads as follows:

> "In the year and a half he has formally been head of the Security and Counter Intelligence Agency and practically the head of the police, has M. (the plaintiff's surname), abused his powers in order to influence the Macedonian Stock Exchange and have timely information to enable him to obtain a profit? Is there any truth in the rumours (*гласини*), which have become stronger, that police wiretapping equipment is being misused for trading on the Stock Exchange? ..."

8. The applicant submitted a transcript of the broadcast, which was also viewed at the trial (see paragraph 11 below). Besides the information described above, the transcript included a journalist suggesting that the applicant's political party had asked the head of the Public Revenue Office whether Mr S.M. had paid taxes on his property, which had been assessed as being worth several million euros (EUR). The same programme also gave Mr S.M.'s reply, denying the allegations and stating that the money in question had been transferred to the respondent State from a foreign bank account. The transcript of the broadcast was published on the channel's website on the same day under the headline: "SDSM: M. has wrongfully used wiretapping equipment".

9. The applicant submitted articles published over the following days on the channel's website, which described the subsequent exchange of comments and replies between the applicant and his political party, on the one hand, and various State institutions on the other. The articles stated that the applicant's political party had asked the relevant institutions to investigate the origin of Mr S.M.'s assets and that the Ministry of the Interior had requested that it submit any evidence in support of its allegations.

2. Criminal proceedings against the applicant

10. On 1 February 2008 Mr S.M. brought private criminal proceedings accusing the applicant for libel, which was punishable at the time under Article 172 § 1 of the Criminal Code. He claimed that the applicant's statement at the press conference (see paragraph 7 above) had contained defamatory allegations about him. The applicant did not submit any comments in reply.

11. The Skopje Court of First Instance ("the trial court") scheduled twelve hearings. The applicant, who was legally represented, did not personally attend any of the scheduled hearings. Several hearings were adjourned owing to the applicant's work in Parliament. At the trial, the court heard Mr S.M. and was provided with audio-and video-recordings of the programme on A1. The relevant part of the transcript of the hearing of 24 March 2009, when the court examined that material, reads as follows:

> "... The court views ... the video and audio-recording of the news programme broadcast on A1 television on 14 December 2007 on which ... there is a photo of the plaintiff S.M. and the voice of a journalist who states the following:
>
> 'The (SDSM) ask(s) whether the head of the (Agency), S.M., earned hundreds of thousands of euros by misusing police wiretapping equipment for trading on the Stock Exchange. Their suspicions are based on a declaration of assets (*анкетен лист*), which S.M. submitted half a year ago, in which he specified that he possessed shares valued at EUR 300,000. SDSM ask(s) whether M. obtained any of that property during the nine months he has been in office, without submitting a declaration, and whether that was the reason for his failing to submit the declaration within the first nine months of his mandate'
>
> The recording continues with a photograph of [the applicant] at a stand in front of the SDMS logo and states that [statement described in paragraph 7 above] ...
>
> The video material continues with a commentary by the journalist stating that:
>
> 'S.M. replied to the allegations by SDSM by saying that the money in question was linked to a lawful business which he had abroad' and the tape continues with the plaintiff's statement ..."

12. The defence did not submit any evidence (including the evidence described in paragraphs 8 and 9 above). In the concluding remarks, the applicant's lawyer stated that the applicant had made the impugned statement in an interrogatory form and as the vice-president of an opposition

political party, which had the role of expressing concerns about and assessing the work of State officials.

13. On 3 November 2009 the trial court, sitting as a single-judge (Judge V.M.), found the applicant guilty of defamation and fined him EUR 1,500 with seventy-five days' imprisonment in default. It also ordered him to pay court fees of EUR 30 and a further EUR 230 to cover Mr S.M.'s costs. The court further ruled that the operative part of the judgment should be published at the applicant's expense via A1 television's news programme. The relevant parts of the judgment read as follows:

> "... The accused is the vice-president of SDSM ...
>
> ... [the applicant] said [the words described in paragraph 7 above] from a podium which had the SDMS logo behind it ...
>
> ... a statement ... must contain certain facts and ... be false ... The fact of that which ... is expressed or disseminated being false constitutes the core of the criminal offence of libel. Consequently, a victim is not required to prove that a defamatory statement is false, rather the accused is obliged to prove (the veracity of) what was said ...
>
> ... based on the audio and video material to hand the court finds that [the applicant] made statements about [Mr S.M.] in a form capable of persuading an ordinary viewer ... that they are truthful ...
>
> ... the court does not deny that questions can be put to and answers sought from State officials ... It is true that every person, including a member of a political party, as is [the applicant], has the right to put questions of public interest, to criticise the work of the Government and to express concerns about someone who holds the highest office in the executive. This makes the victim a 'legitimate target' of constructive criticism and public debate, but not of statements and assertions that had no factual basis, as in the present case.
>
> ... the court cannot accept, as contrary to the evidence, [the applicant's] defence that the allegations were made in an interrogatory form (in an attempt) to obtain an answer from the victim as a State official. (Given) the manner in which the applicant expressed his allegations and other circumstances, the court has found that the [applicant's] allegations are false and (represent) an assertion made in an interrogatory form, which have had a considerable effect on the claimant's reputation and dignity. The defence cannot rely on Article 176 of the Criminal Code and (claim) that the (impugned) expression should have been examined in the context of the position he held, namely vice-president of an opposition political party. Such a status does not entitle him to express or disseminate untruthful allegations which are detrimental to the reputation and dignity of a third party.
>
> ... the court considers that the fact that [the applicant] has already been convicted by a final judgment of the same offence is an aggravating factor ..."

14. On 11 May 2010 the Skopje Court of Appeal, sitting as a three-judge panel composed of Judges M.S., L.I.Sh. and S.K., upheld the trial court's judgment, finding no grounds to depart from the established facts and the reasoning.

15. Based on legislative amendments of November 2012, on 12 February 2013 (see paragraph 36 below) the trial court stayed the

execution (*се запира постапката за извршување на санкција*) of the sanction (a fine) imposed on the applicant.

16. The applicant paid Mr S.M.'s costs for the criminal proceedings. He did not pay the court fees and did not publish the trial court's judgment via A1, which ceased to exist in 2011.

3. Decision of the Constitutional Court

17. The applicant lodged a constitutional appeal with the Constitutional Court in which he complained that his conviction had violated his right to freedom of expression. He reiterated his arguments that he had been punished for a question that he had raised at a press conference that had been held on behalf of his political party. The question had been addressed to the public and had been based on information submitted to his political party about suspected irregularities in the work of a State official. The aim had been to stimulate public debate on whether the official had been diligent in performing his official duty.

18. By a decision of 23 February 2011 (served on the applicant on 30 March 2011), the Constitutional Court by a majority dismissed the applicant's appeal. It noted that he had not attended any of the scheduled hearings and held that freedom of expression was not absolute and could be restricted in accordance with the law. In that connection, it referred to Article 172 of the Criminal Code, which punished the dissemination of untrue information that could affect the reputation and dignity of a third party. The court further held that:

> "The way in which [the applicant] expressed his opinion (*мислење*) in public concerning the performance of public duties by a public official (in an interrogatory form, as a member of an opposition political party, from a political party's podium (*говорница*), the consequences of his public action ...), without trying to prove the veracity of his question or statement, taken as a whole, represents an action which only appears to fall within the ambit of the freedom of conviction, conscience, thought and public expression of thought, but in substance it affects the reputation and dignity of the citizen who holds that public office at the time and violates those values. Accordingly, the statement lost the attributes of the freedom (of thought and public expression of thought) and (represents) an abuse of (that freedom)."

4. Other information

19. In comments submitted in reply to the Government's observations (November 2015), the applicant informed the Court that Mr S.M. had brought civil proceedings against him after his conviction, seeking compensation for non-pecuniary damage. The claim was examined at three levels of jurisdiction. By a final judgment of 9 April 2014 the applicant was ordered to pay 550,000 Macedonian denars (MKD) plus interest in respect of non-pecuniary damage and MKD 46,180 for the trial costs incurred by Mr S.M. in the compensation proceedings.

C. Application no. 24133/13

1. Press conference by SDSM and the applicant's statement

20. On 9 September 2007 the applicant held a press conference at SDSM's offices regarding the public sale of State-owned building land in the central area of Skopje, where the construction of a hotel was planned. It was broadcast on local television news. According to a transcript of the entire press conference (evidence not submitted to the criminal courts), the applicant presented the events involved and information obtained from the State authorities regarding the sale in question. He further detailed the conclusions of research done by his political party, showing that the company that had been selected was incorporated in the respondent State at the same address as O. Holding (a local company) and was partly owned by a company which had business ties with O. Holding. In that connection, he alleged that a deal had been done so that "the land would be given to people who had close family or party ties" with the Prime Minister. As described in the trial court's judgment (see below), the applicant stated that:

> "The attractive location behind the 'Ramstor' shopping mall planned for the construction of a hotel was granted to a company supported (*зад која стоу*) by O. Holding ... After the revelation of this megascandal, the biggest dilemma is whether the Academy Award for the most corrupt politician should be given to the Prime Minister or his cousins? To those who created or to those who carried out the deal?"

21. By a press release of the same date (9 September 2007) sent "in relation to the press conference held by the political party SDSM and with a view to provide the public with objective and correct information" the Ministry of Transport and Communication informed the media about the procedure and the selected company.

22. In reply to a request for information, SDSM notified the public prosecutor on 1 October 2007 about the company that had been selected (it was registered at the same address as O. Holding and its manager was a former O. Holding employee), alleging that it had not met the requirements of the sale. It further requested that the public prosecutor investigate whether the transaction had been in conformity with the Anti-Corruption Act.

2. Criminal proceedings for libel against the applicant

23. On 19 September 2007 Mr S.M. brought private criminal charges, accusing the applicant of making (see paragraph 20 above) defamatory allegations about him. He denied ever having had any connection, private or professional, with the public sale of the land. He had also not signed the sale contract with the company that had been chosen. The applicant did not submit any comments in reply.

24. The trial court scheduled seventeen hearings. The applicant was represented by a lawyer, but did not attend any of the scheduled hearings in person. Some of the scheduled hearings were adjourned because the court bailiff was unable to serve summonses on the applicant. At the trial, the court heard Mr S.M. and viewed audio and video material of television coverage of the applicant's statement. The defence did not submit any evidence, not even the information submitted to the public prosecutor (see paragraph 22 above).

25. On 23 February 2011, after one remittal, the trial court, sitting as a single-judge (Judge D.G.I.), convicted the applicant of defamation. It fined him EUR 1,000 with one hundred days' imprisonment in default, ordered him to pay a court fee of EUR 30 and a further EUR 375 to cover Mr S.M.'s trial costs. Relying on the latter's testimony, the court held that the applicant's allegations had concerned Mr S.M., regardless of the fact that he had not been identified by name. That was because the applicant had previously given false statements about Mr S.M. and had often referred to him as "the Prime Minister's cousin". Mr S.M. admitted that he had had contact with the managers of O. Holding, although that had been as friends. He had had no cooperation with them in business terms or been involved in any way in the construction of the hotel.

26. The relevant parts of the trial court's judgment read as follows:

> "... the court considers ... that [the applicant's] [statement described in paragraph 20 above] could have a considerable effect on the complainant's reputation and dignity ... since he is the holder of a public office and (such) statements are disseminated quickly and aggressively in public.
>
> That the complainant was not identified by his full name by the [applicant] is irrelevant since the relevant circumstances clearly and unequivocally suggest that the matter concerned [Mr S.M.]. Furthermore, the news presenter identified the complainant by his surname.
>
> ... The [applicant's] assertion, (which he made) as vice-president of a political party, contained untrue allegations about the complainant susceptible of violating his honour and reputation ... [The statement in question] was not substantiated with any evidence because the private complainant, as head of the Agency, does not have the competence to participate in the public sale of State-owned land and the accused did not present any evidence that [Mr S.M.] was privately involved in the sale transaction in question ..."

27. On 18 May 2011 a three-judge panel (Judges Z.N., L.I.Sh. and G.S.) of the Skopje Court of Appeal dismissed an appeal by the applicant in which he had complained, *inter alia*, that the complainant had not been identified in his statement, which had been made in an interrogatory form and in a political context and, accordingly, not punishable, as specified in Article 176 of the Criminal Code (see paragraph 34 below). The court upheld the trial court's judgment, finding that the applicant had made a false assertion (*тврдење со невистина содржина)* about the complainant. It continued:

"It is a statutory presumption that a statement of fact harmful to the honour and reputation of a third party is untrue. The burden of proof therefore rests with the accused to prove that the assertion is true. Accordingly, [the applicant] was required to prove that his statement was true, which is not the case ... The contents of the statement, the time, place and way in which it was given imply that it was serious and that it could objectively create a perception in the minds of third parties about certain facts. This court finds [the statement] defamatory since the factual assertion contained therein was able objectively to affect the reputation and dignity of the private complainant."

28. On 12 February 2013 the trial court stayed the execution of the fine it had imposed (see paragraph 36 below). The applicant paid the court fees and the trial costs incurred by Mr S.M., who did not claim compensation for damage in respect of this criminal conviction for defamation.

3. Proceedings before the Constitutional Court

29. The applicant lodged a constitutional appeal with the Constitutional Court in which he claimed that as a representative of a political party he had been required to bring to light information that had been brought to his attention. He had not made a factual statement but had raised a question regarding allegations of corruption.

30. By a decision of 12 September 2012 (served on the applicant on 1 October 2012) the Constitutional Court unanimously dismissed the applicant's constitutional appeal for protection of the right to freedom of expression. The court held that:

"In the concrete case, the court ... punished [the applicant] ... as a necessary measure for the protection of the reputation, dignity and authority of another person. That was because [the applicant], by relying on freedom of public expression, interfered with the protected right of another person, namely Mr S.M ...

[The applicant] is a member of parliament and vice-President of the SDSM and he made the statement in SDSM's headquarters (if the statement had been given in Parliament, he would have enjoyed immunity and private charges would not have been possible). Although freedom of expression is important for all, it is particularly important for representatives of the people ... Therefore, interference with a Member of Parliament's freedom of expression calls for the closest scrutiny by the court.

Analysis must be made ... of whether (the applicant's) conviction and sanction represent a justified restriction of his rights and freedoms ... namely whether the courts struck a fair balance between the need to protect the reputation and dignity of the victim and [the applicant's] freedom of public expression. The freedom of political debate is not of an absolute nature ... the court notes that the impugned statement concerns the public sale of State-owned building land ... and should be considered in the context of a debate concerning an issue of public interest, which in particular was of prime political interest ...

The court considers that the veracity of the statement ... was of primary importance for the courts. Those courts ... established that [the applicant's] statement was not true or that there was no evidence to prove the contrary.

> ... the court has the right and duty to assess whether the courts enabled [the applicant] to prove the veracity of (his) statement. In this connection the court finds that [the applicant] was able, during the entire proceedings, to present evidence as to the veracity of his statement. In the absence of proof to confirm the veracity (of the statement) or the existence of a strong basis for it to be regarded as truthful, the court must accept the courts' findings that the statement was false.
>
> Despite the fact that the statement is part of a public debate, the question is whether (it) ... had any impact or was relevant for the public as a contribution to a better understanding of the issue subject to public debate ...
>
> The way in which the (applicant) expressed his opinion (*мислење*) in public concerning the performance of a public office by a public official (in an interrogatory form, as a member of an opposition party, from the podium (*говорница*) of the political party, the consequences of his public action ...) without trying to prove the veracity of his question or statement, taken as a whole, represents an action which only appears to fall within the ambit of the freedom of conviction, conscience, thought and public expression of thought, but in substance it affects the reputation and dignity of the citizen who holds the public office at the time and violates those values. Accordingly, the statement lost the attributes of the freedom (of thought and public expression of thought) and (represents) an abuse of (that freedom)."

D. Other information

31. By a judgment of 20 May 2008 the trial court, sitting as a single-judge (Judge D.G.I.), had found the applicant guilty of making defamatory allegations about the then Minister for Transportation and Communications regarding the public sale of the same State-owned land subject to application no. 24133/13 above. The applicant was convicted and fined EUR 1,000 for the following statement, which was made at a press conference on 12 September 2007 at the offices of his political party:

> "... by selling land to a company that does not fulfil the (statutory) conditions, Minister J. obviously committed a criminal offence-abuse of office. We therefore expect that the public prosecutor will immediately lodge an indictment".

32. As explained in the judgment, the court established that when the applicant had made the statement, the procedure for the public sale of the land was still ongoing, namely the relevant standing committee within the Ministry had not yet submitted its proposal to the Minister about the best bidder. The Minister had then granted the land to the best bidder in December 2007. Furthermore, several institutions, which had reviewed the work of the committee, had not found any irregularities. The court did not accept the applicant's defence (he did not attend any of the scheduled hearings) that his statement had been an expression of a reasonable suspicion about the public sale of the land. The court refused the following defence applications: to examine a member of the standing committee; to admit committee minutes in evidence regarding the public sale; and to hear information from the public prosecutor about the committee's work. It held that the proposed evidence concerned the committee's work which was not

the subject of the proceedings. A three-judge panel of the Skopje Court of Appeal (Judges M.S., L.I.Sh. and V.Dz.) upheld the lower court's judgment. Both courts considered that the applicant had made the statement in his own name and not on behalf of his political party.

II. RELEVANT DOMESTIC LAW

A. Criminal Code

33. Under Article 172 §§ 1, 2 and 4 of the Criminal Code, any person who disseminated false allegations about another person could be subjected to a fine or six months' imprisonment. Acts of defamation committed in public or through the media were punishable by a fine and by up to one year's imprisonment. The accused would not be held liable for defamation if he or she proved the veracity of his or her statement or the existence of reasonable grounds to believe in the truthfulness of what had been stated or disseminated.

34. Article 176 § 1 provided that a person who had made defamatory allegations about another person in the performance, *inter alia*, of a political activity would not be held liable if the manner of expression or other circumstances implied no intent on the part of the accused.

35. Under Article 184 § 1, defamation as set out in Article 172 was subject to private prosecution.

36. In anticipation of the entry into force of the Law on civil responsibility for insults and defamation (see paragraph 37 below), Articles 172, 176 and 184 of the Criminal Code have not been in force since 21 November 2012 (Official Gazette no. 142/2012, 13 November 2012).

B. Law on civil responsibility for insults and defamation (Official Gazette no. 143/2012, 14 November 2012, entered into force on 22 November 2012)

37. The Law concerns civil liability for violation of the honour and reputation of physical and legal persons through insults or defamation. The law provides for freedom of expression and states that any restrictions thereon must be in conformity with the European Convention on Human Rights and the Court's case-law. It further regulates the procedure regarding claims for compensation for pecuniary and non-pecuniary loss sustained as a result of an insult or defamation, as well injunctions the courts can order if parties so request. The Law also provides that the execution of final sanctions and damages awarded with respect to offences against honour and reputation would be stayed after it would enter into force (section 25).

THE LAW

I. JOINDER OF THE APPLICATIONS

38. 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

39. The applicant complained that his criminal convictions for defamation had violated his rights under Article 10 of the Convention. The Court will confine its examination to the complaints as submitted by the applicant in the application forms, which were communicated to the respondent Government and did not include the compensation proceedings brought against him (paragraph 19 above). Article 10 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

40. The Court will examine both convictions together, given the fact that they raise similar issues, except in so far as separate examination may be necessary.

A. Admissibility

1. The parties' submissions

41. The Government raised the objection that the applicant had abused his right of petition because he had failed to inform the Court about the trial court's decisions staying the execution of the sanction issued in the impugned proceedings (see paragraphs 15 and 28 above). The trial court had rendered those decisions of its own motion on the basis of the statutory changes of November 2012. The applicant must have known about those legislative developments. He had also failed to inform the Court that he had not paid the fine. The applicant, who had had legal representation in the proceedings before the domestic courts and the Court, must have been

aware of those facts and could have had no doubts about their relevance. In this latter context they submitted that the information in question concerned the core of the applications.

42. The applicant denied any intention to provide the Court with incomplete or misleading information. In his opinion, the crucial question in his case was his criminal convictions for defamation for questions he had raised regarding the work of a high-ranking State official. Whether the fine had been paid or not was only relevant to the issue of compensation when it came to the issue of pecuniary damage.

2. The Court's assessment

43. The Court reiterates that an application may be rejected as an abuse of the right of individual application within the meaning of Article 35 § 3 (a) of the Convention if, among other reasons, it was knowingly based on false information (see *Kerechashvili v. Georgia* (dec.), no. 5667/02, 2 May 2006; *Bagheri and Maliki v. the Netherlands* (dec.), no. 30164/06, 15 May 2007; *Poznanski and Others v. Germany* (dec.), no. 25101/05, 3 July 2007; and *Simitzi-Papachristou and Others v. Greece* (dec.), no. 50634/11, § 36, 5 November 2013), or if significant information and documents were deliberately omitted, either where they were known from the outset (see *Kerechashvili*, cited above) or where new, significant developments occurred during the procedure (see *Predescu v. Romania*, no. 21447/03, §§ 25-27, 2 December 2008). Incomplete and therefore misleading information may amount to an abuse of the right of individual application, especially if the information in question concerns the very core of the case and no sufficient explanation is given for the failure to disclose that information (see *Hüttner v. Germany* (dec.), no. 23130/04, 9 June 2006; *Poznanski and Others*, cited above; *Predescu*, cited above, §§ 25-26; and *Komatinović v. Serbia* (dec.), no. 75381/10, 29 January 2013).

44. Turning to the present case, the Court notes that the trial court's decisions staying the execution of the fine imposed on the applicant were rendered on 12 February 2013 (see paragraphs 15 and 28 above). Accordingly, these decisions came before and after applications nos. 24133/13 and 64659/11, respectively (see paragraph 1 above). It is not disputed between the parties that those decisions were based on the statutory changes of November 2012, under which defamation was no longer subject to criminal prosecution (see paragraphs 36 and 37 above). Those amendments were published in the respondent State's Official Gazette and therefore the applicant could not have been unaware of them. He did not argue otherwise (see paragraph 42 above).

45. The fact that the fine imposed in the impugned proceedings could not be executed by virtue of the law was revealed in the respondent Government's observations after the applications had been communicated.

The applicant did not inform the Court about the courts' decisions staying the execution of the fine imposed on him.

46. In order to determine whether that failure amounts to abuse of the applicant's right to individual application, the Court needs to examine whether the information concerned, as argued by the Government, was at the core of the applications. The applicant's position was that the non-execution of the fine was only relevant for the award of pecuniary damages if the Court found a violation of the Convention (see paragraph 42 above).

47. The Court notes that the gist of the present applications concerns the applicant's criminal conviction for defamation and its potential chilling effect on the exercise of his right to freedom of expression under Article 10 of the Convention. The nature and severity of a criminal-law sanction, in principle, are factors to be taken into account for the assessment of that effect (see *Kasabova v. Bulgaria*, no. 22385/03, § 69, 19 April 2011). In such circumstances, the fact that the criminal-law sanction was not to be executed is certainly a relevant issue of fact, which the applicant was required, under Rule 47 § 6 of the Rules of Court, to bring to the attention of the Court. However, in order to assess whether the impugned conviction was justified in the circumstances of the case, the Court will examine a range of other relevant factors, as described below. In such circumstances, the Court considers that the information which the applicant failed to disclose, albeit relevant, did not concern the very core of the case at hand (see, conversely, *Metalex DOO v. Serbia* (dec.), no. 34176/10, § 14, 3 May 2016). Accordingly, it finds that the applicant's conduct was not contrary to the purpose of the right of individual petition, as provided for in Article 34 of the Convention.

48. The Government's objection therefore must be rejected.

3. Conclusion

49. The Government did not raise any other objection as regards the admissibility of this complaint.

50. The Court concludes that the complaint under this head is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

51. The applicant submitted that the domestic courts had failed to strike a fair balance between the right to freedom of expression and the protection of the reputation of others. They had wrongly regarded the allegations, which he had made on behalf of and as spokesperson of his political party, as statements of fact and had required that he prove their veracity to the criminal standard. However, he had neither possessed nor been able to obtain any evidence to prove his allegations (*сомневање*). Given his prior experience in a similar case, in which the same trial judge had refused to admit proposed evidence (see paragraphs 31 and 32 above), the applicant had had no reasonable grounds to believe that the court would take a different approach in the impugned proceedings. In any event, the factual basis for his allegations which were the subject of application no. 64659/11 had been the fact that Mr S.M. had belatedly submitted his declaration of assets, failing to specify the origin of shares worth EUR 300,000 (see paragraph 8 above). He further referred to public rumours, which have been shown to be true in 2015, that wiretapping equipment had, in fact, been misused. His questions had been based on allegations that had been brought to his attention and had fallen within the limits of acceptable criticism in the context of the political debate, which, as was commonly known, the political opposition had launched at the time regarding the issues in dispute. The submitted material (see paragraphs 9 and 22 above) sought to assist the Court to obtain a clearer picture about that debate. In any event, the domestic courts had not been bound by the parties' proposals and had been entitled to establish all the facts and adduce the relevant evidence of their own motion. However, they had based their findings about the falsity of the applicant's allegations only on Mr S.M.'s statement. If the opposition could only hold press conferences if there was irrefutable evidence about irregularities by State officials, it would be deprived of its crucial role of informing and alerting the public about allegations of irregular conduct by officials.

52. The applicant further maintained that there had not been any negative consequences for Mr S.M. as a result of his questions. He had remained in office until May 2015, when he had resigned, and his political party had won parliamentary elections in 2008. As regards application no. 64659/11, the applicant accepted that the sanction and the order to pay the trial costs had not been disproportionate. However, the award of civil-law damages (see paragraph 19 above) had violated his rights.

(b) The Government

53. The Government asked the Court not to take the evidence submitted by the applicant (see paragraphs 9, 20 and 22 above) into consideration since it had not been submitted to any domestic authority and no inferences could be drawn about what their decisions would have been if it had been brought to their attention. In any event, the evidence referred to (in paragraph 9 above) was irrelevant because it was not related to the substance of the applicant's statement that Mr S.M. had misused the wiretapping equipment in order to have timely access to relevant information for trading on the stock exchange. Furthermore, they argued that the video and audio material admitted in evidence (see paragraph 11 above) had not concerned the entire press conference and the court had therefore not been provided with the wider context. In addition, the applicant's defamatory allegations about Mr S.M.'s conduct had not been indispensable for any public debate that the applicant might have intended to encourage about the origin of his assets. Notwithstanding the wide limits of the freedom of political speech, the applicant had not been exempted from the obligation to respect the rights and freedoms of others, in particular their reputation. The incriminating statements had not been given during an electoral campaign.

54. They agreed that the applicant's conviction had constituted an interference with his right to freedom of expression. However, they argued that it had been "in accordance with the law" (Article 172 of the Criminal Code) and had pursued a legitimate aim, namely that of the protection of Mr S.M.'s reputation, the principle of the presumption of innocence and the public's right to obtain truthful information. There was no doubt that the statement in application no. 24133/13 had concerned Mr S.M. Indeed, it had referred to "[the Prime Minister's] cousins" and "politician" and it had been generally known that Mr S.M. was indeed the Prime Minister's first cousin (*прв братучед*) and had been recognised and often referred to in public as such; the friendship (*пријателство*) between Mr S.M. and the owner of O. Holding had been widely known and had frequently been the subject of public and media interest; close relationships between the owner of O. Holding and "people close to the Prime Minister" were regularly assumed by the public to concern Mr S.M.

55. They also maintained that the interference had been justified and in conformity with Convention standards. In that connection, the domestic courts had examined the form and manner in which the applicant had made the statements and had accepted that they had been given in a political context and had regarded issues of public interest. Whether his allegations were to be regarded as statements of fact or value judgments was irrelevant given the fact that the applicant had not tried to prove that they had a minimum factual basis.

56. Finally, given on the one hand, the fact that the fine could no longer be executed and, on the other, the low amount of court fees and trial costs which the applicant had been required to pay, the Government maintained that the sanction imposed on him could not be regarded as disproportionate.

57. In those circumstances, they concluded that the disputed interference had been supported by relevant and sufficient reasons and that the domestic courts had struck a fair balance between the conflicting interests at stake, acting within the permissible limits of the State's margin of appreciation under Article 10 of the Convention.

2. The Court's consideration

(a) Existence of an interference, whether it was "prescribed by law", and whether it pursued a legitimate aim

58. It was common ground between the parties that the applicant's criminal convictions for defamation constituted an interference with his right to freedom of expression. It is further not contested that the interference was prescribed by law, namely Article 172 of the Criminal Code, and that it pursued the aim of the protection of Mr S.M.'s reputation, as the only "legitimate aim" advanced by the domestic courts. The Court sees no reason to hold otherwise.

(b) "Necessary in a democratic society"

59. It remains to be determined whether the interference complained of was "necessary in a democratic society", which is the central issue in this case. In doing so, the Court has to examine whether the national courts struck a fair balance between the applicant's right to freedom of expression guaranteed under Article 10 of the Convention and Mr S.M.'s interest in the protection of his reputation.

(i) General principles

60. The general principles concerning the necessity of an interference with freedom of expression emerging from the Court's case-law (see *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no 17224/11, § 75, ECHR 2017 and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 91, ECHR 2004-XI) have been summarised as follows:

> "... (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...

... The Court must also ascertain whether the domestic authorities struck a fair balance between, on the one hand, the protection of freedom of expression as enshrined in Article 10, and, on the other hand, the protection of the reputation of those against whom allegations have been made, a right which, as an aspect of private life, is protected by Article 8 of the Convention"

61. As regards the level of protection, the Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest. Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest. A degree of hostility and the potential seriousness of certain remarks do not obviate the right to a high level of protection, given the existence of a matter of public interest.

62. Furthermore, the Court reiterates that it has always distinguished between statements of facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. However, where a statement amounts to a value judgment, the proportionality of interference may depend on whether there exists a sufficient "factual basis" for the impugned statement: if there is not, that value judgment may prove excessive. In order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks, bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact. However, it is to be noted that that distinction is of less significance in cases where the impugned statement has been made in the course of a lively political debate and where elected officials should enjoy a wide freedom to criticise Government actions, even if the statements made may lack a clear basis in fact (see, *mutatis mutandis*, *Lombardo and Others v. Malta*, no. 7333/06, § 60, 24 April 2007).

63. Lastly, the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of the interference. As the Court has previously pointed out, interference with

freedom of expression may have a chilling effect on the exercise of that freedom. The relatively moderate nature of the fines does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression. Generally speaking, while it is legitimate for the institutions of the State, as guarantors of the institutional public order, to be protected by the competent authorities, the dominant position occupied by those institutions requires the authorities to display restraint in resorting to criminal proceedings (see *Morice v. France* [GC], no. 29369/10, §§ 125-127, ECHR 2015 and the authorities referred to therein).

(ii) Application of these principles to the present case

64. The Court must weigh a number of factors in the balance when determining the existence of a "pressing social need" and ascertaining whether the applicant's conviction for the impugned statements was "necessary in a democratic society" for protecting Mr S.M.'s reputation. In examining the particular circumstances of the case, the Court will take the following elements into account: the position of the applicant and the plaintiff in the defamation proceedings, the subject matter of the applicant's statements, their qualification by the domestic courts and the latter's approach to justifying the interference in question (see *Lombardo and Others v. Malta*, no. 7333/06, § 52, 24 April 2007).

65. As regards the applicant's status, the Court observes that at that time he was vice-president of an opposition political party. He made the impugned statements at press conferences held in the headquarters of his political party (see paragraph 30 above). In such circumstances, the Court accepts that he made those remarks on behalf of the party and accordingly, in a political context. The latter was implicitly acknowledged by the Government which at the time of the events confirmed that the applicant's statement was given "at the press conference held by the political party SDSM" (see paragraph 21 above). There is nothing to suggest that the public could have perceived his actions any differently.

66. The Court considers noteworthy that the applicant was also a member of parliament. The high level of protection of political speech discussed in paragraph 61 above applies in particular to elected representatives given the fact that they represent the electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with their freedom of expression call for the closest scrutiny on the part of the Court. That is the case because freedom of expression for members of parliament is political speech *par excellence* (see *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 137, ECHR 2016 (extracts)). It has been the Court's constant approach to require very strong reasons for justifying restrictions on political speech, since broad restrictions imposed in individual cases would undoubtedly affect respect for freedom of expression in general in the State concerned (see

Fatullayev v. Azerbaijan, no. 40984/07, § 117, 22 April 2010, and the authorities cited therein).

67. While the domestic courts acknowledged that the applicant made the incriminating statements as the vice-president of an opposition political party (see paragraphs 13, 18, 26 and 30 above), only the Constitutional Court, in its decision of November 2012, recognised him also as being a member of parliament (see paragraph 30 above). That was also the only court decision to accept that political speech, in particular when employed by MPs, enjoyed an elevated level of protection.

68. The plaintiff in the impugned proceedings, Mr S.M., was at the time both the head of the Agency and, accordingly, a public official, as well as a senior politician (see paragraph 6 above). The Court will, therefore, consider whether the applicant's impugned statements went beyond the limits of acceptable criticism of someone who combines these two positions.

69. In this context, the Court reiterates that, according to its established case law, the limits of acceptable criticism are wider for State officials than for private individuals. In a democratic system the actions or omissions of the government must be subject to close scrutiny, not only by the legislative and judicial authorities, but also by public opinion (see *Dmitriyevskiy v. Russia*, no. 42168/06, § 96, 3 October 2017, and *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV).

70. Furthermore, Mr S.M. was not an ordinary civil servant, but a high-ranking State official responsible to the Government, who held, as described by the trial court, "the highest office in the executive" (see paragraph 12 above). The limits of acceptable criticism must in such cases accordingly be wider than in the case of an ordinary civil servant (see, *mutatis mutandis*, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, cited above, § 98).

71. In relation to Mr S.M.'s position as a politician (see paragraph 6 above), the Court notes that this would have been a fact of general knowledge at the time and is one which the Government implicitly conceded in their observations (see paragraph 54 above). In that context, the Court reiterates that a politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance (see *Brosa v. Germany*, no. 5709/09, § 41, 17 April 2014; *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 30, ECHR 2000-X; and *Oberschlick v. Austria (no. 2)*, 1 July 1997, § 29, *Reports of Judgments and Decisions* 1997-IV). While, as a politician, he was certainly entitled to have his reputation protected, even when he was not acting in a private capacity, the requirements of that protection have to be weighed against the interests of the open discussion of political issues (see *Dichand and Others v. Austria*, no. 29271/95, § 39, 26 February 2002).

72. In light of the above, the unusual situation of the plaintiff simultaneously combining the political and the public official elements in one person required, in the Court's opinion, a high degree of tolerance to public criticism and restraint in resorting to criminal proceedings, particularly if other means were available for replying to unjustified attacks and criticisms of his adversaries (see *Sürek v. Turkey (no. 4)* [GC], no. 24762/94, § 57, 8 July 1999).

73. In both sets of proceedings against the applicant the domestic courts treated the impugned statements concerning Mr S.M. as relating solely to a State official (see paragraphs 13, 18 and 26 above). Although the applicant's statement in the second set of proceedings was rather elusive in that it did not identify the plaintiff by name (see paragraph 20 above), the Court accepts that the reasons given by the domestic courts to establish that the statement in question concerned Mr S.M. are convincing. The Government's arguments further add to that finding (see paragraph 54 above). However, although the courts acknowledged his status as a State official, they did not accept that freedom of expression was subject to wider limits of acceptable criticism as far as views on, or criticism of, such officials were concerned nor did they consider the fact that he was also a senior politician. The mere statement that Mr S.M. was a "legitimate target of constructive criticism" (see paragraph 13 above) is not sufficient in that respect.

74. As to the subject matter of the impugned statements, the Court observes that they concerned allegations of irregular conduct regarding the use of police wiretapping equipment and corrupt practices in the public sale of State-owned land (see paragraphs 7 and 20 above). As regards the former, the Court is ready to accept that the domestic courts, on the whole, conceded that those were issues of public interest. In the second set of proceedings, they explicitly accepted that the statement "concerned an issue of public interest, which in particular was of prime political interest" (see paragraph 30 above). The Government also agreed that the applicant's statements had concerned issues of public interest (see paragraph 55 above). The Court finds no reasons to hold otherwise.

75. As regards the qualification of the applicant's impugned remarks, the Court observes that the criminal courts in both proceedings held that they were factual statements rather than value judgments. On that basis, they required that the applicant demonstrate the truth of his assertions, as specified under Article 172 § 4 of the Criminal Code (see paragraph 32 above). In the absence of any proof by the applicant, they concluded that his statements were untrue and accordingly defamatory. The Constitutional Court was less categorical on this issue: despite holding that the impugned statements had reflected the applicant's "opinion", it nevertheless followed the approach of the criminal courts and accepted "(their) findings that the (applicant's) statements (were) untrue". It added that the applicant had made

no effort "to prove the veracity of his question or statement", notwithstanding the fact that he had been "able during the entire proceedings to present evidence as to the veracity of his statement" (see paragraphs 18 and 30 above). Accordingly, the domestic courts applied the so-called "presumption of falsity" (sometimes referred to as the "defence of justification" or the "defence of truth"), under which defendants are required to prove to a reasonable standard that factual allegations are true. The Court has held that such an approach does not, as such, contravene the Convention (see *Rumyana Ivanova v. Bulgaria*, no. 36207/03, §§ 39 and 68, 14 February 2008; *Makarenko v. Russia*, no. 5962/03, § 156, 22 December 2009; and *Rukaj v. Greece* (dec.), no. 2179/08, 21 January 2010)), and has held a lack of effort to make out that defence against applicants (see *Mahmudov and Agazade v. Azerbaijan*, no. 35877/04, § 44, 18 December 2008). However, it has also held that if an applicant is clearly involved in a public debate on an important issue he should not be required to fulfil a more demanding standard than that of due diligence. In such circumstances, the obligation to prove the factual statements may deprive the applicant of the protection afforded by Article 10 (see *Kurski v. Poland*, no. 26115/10, § 56, 5 July 2016 and *Braun v. Poland*, no. 30162/10, § 50, 4 November 2014).

76. In light of the above, the Court cannot but note that the applicant did not attend any of the scheduled hearings in both sets of proceedings. However, it cannot be said that he displayed a clear lack of interest in his trial (see, conversely, *Cumpănă and Mazăre*, cited above, § 104). The defence presented by his lawyer before both the criminal courts and the Constitutional Court rested on his belief that the impugned statements had been made in an interrogatory form and in a political context (see paragraphs 11, 17, 27 and 29). Accordingly, he argued that he should have been exempted from criminal liability under Article 176 of the Criminal Code (see paragraph 34 above). The courts dismissed such arguments, finding that his statements had concerned, as stated in paragraph 75 above, false accusations of a factual nature about Mr S.M., presented in such a way that "ordinary" viewers had been given the impression that they had concerned "truthful" matters and "facts" (see paragraphs 13 and 27 above).

77. In order to determine whether the above description of the applicant's statements and the manner in which the domestic courts dealt with the present case were in conformity with Convention standards, the Court will examine the expressions themselves, including the form in which the impugned remarks were conveyed and their context (see *Stankiewicz and Others v. Poland*, no. 48723/07, § 61, 14 October 2014, and *Nikula v. Finland*, no. 31611/96, §§ 44 and 46, ECHR 2002-II).

78. Turning to the expressions themselves, the Court observes that in the first set of proceedings the applicant asked whether Mr S.M. had abused his office in order to obtain timely information for trading on the stock

exchange in order to achieve personal financial gain. That question, as described in the media coverage, was related to Mr S.M.'s belated declaration of his assets, in which he had reported his possession of shares worth EUR 300,000. The latter constituted, in the Court's view, sufficient factual ground for the applicant's statement. Here, the Court disagrees with the Government (see paragraph 53 above) and notes that the criminal courts were able to examine the applicant's statement in the context of the coverage of the events as a whole (see paragraphs 8 and 11 above). In the second part of his statement, the applicant further asked whether "police wiretapping equipment (is being) misused for trading on the Stock Exchange". Although the applicant did not directly and explicitly accuse Mr S.M. of misusing police wiretapping equipment, the Court accepts that the factual elements contained in that part of the statement concerned allegations of a particular type of misconduct by Mr S.M. as the head of the Agency. In that connection, it reiterates that accusations against a third person, although made indirectly and by way of a question, may be regarded as an allegation of fact susceptible of proof (see *Pedersen and Baadsgaard*, cited above, §§ 74-76). However, the Court places significant importance on the wording used and the manner in which the applicant presented matters. In that connection, it is noteworthy that the impugned questions were related to and consisted of "public rumours which have become stronger". The applicant essentially raised a question about something that had already been subject to public discussion (see, *mutatis mutandis*, *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 65, Series A no. 239). Accordingly, his remarks were neither novel nor did he present them so as to be perceived as his own assertion. He merely put the matters that were of general interest for public debate, which, in the Court's view, is the role of politicians and members of parliament, as representatives of the electorate. In the ensuing proceedings against the applicant he was convicted because of his failure to prove what the domestic courts considered to be his own allegations. To the extent the applicant was required to establish the truth of his statement, he was, in the Court's opinion, faced with an unreasonable, if not impossible, task.

79. The statement in the second set of proceedings concerned the public sale of State-owned land. It followed the research carried out by the applicant's political party, which had revealed alleged relations between the selected company and a local company, O. Holding, which was perceived by the public, as confirmed by the Government (see paragraph 54 above), as being close to Mr S.M. Accordingly, it cannot be said that the impugned statement was given frivolously without any prior efforts by the applicant being made in order to shed light on the circumstances surrounding the public sale in question. The applicant further asked who was to be held responsible for that "megascandal". While some of the expressions used by the applicant may have lacked a certain degree of moderation and may have

been sarcastic, they did not contain manifestly insulting language. In the Court's opinion, the impugned remarks remained within the limits of admissible exaggeration or provocation (see *Mamère v. France*, no. 12697/03, § 25, ECHR 2006-XIII).

80. The Court cannot ascertain whether the results of the above-mentioned research, presented by the applicant at the press conference, were part of the case file reviewed by the domestic courts. Whereas the applicant did not submit the full transcript of the press conference as evidence (see paragraphs 20 and 53 above), the trial court referred to the commentary of a "news presenter" (see paragraph 26 above). In any event, the Court considers that the impugned remarks must be placed in context. In that connection, it notes the public debate that was going on at the time about the public sale in question (press conferences held by the applicant's political party, paragraphs 20 and 31 above). The trial judge could not have been unaware of that debate given the fact that this judge had already convicted the applicant of defamation for statements that he had made about the same public sale (see paragraphs 25 and 31 above). The courts remained silent on that issue and concluded that the statement in question contained factual allegations that the applicant had failed to prove. Given the on-going lively political debate about the issue at stake, the Court is unable to accept the domestic courts' view that he was required to prove the veracity of his allegations. It was not justified, in the light of the Court's case-law and in the circumstances of the case, to require him to fulfil a more demanding standard than that of due diligence (see paragraphs 62 and 75 *in fine* above).

81. In any event, and in view of the circumstances of the case, both of the applicant's statements were, in the Court's opinion, fair comment on issues of legitimate public interest, such as compliance with the asset disclosure requirements and conflict of interests by Mr S.M., who was a well-known high-ranking State official as well as a politician of a certain importance. Transparency and prevention of abuse of power by public servants are matters of public concern in a democratic society which aim is to strengthen public integrity and maintain public confidence in public institutions. The fact that such a figure is in a situation where his business, political and official activities overlap can give rise to a public discussion, even where, strictly speaking, no problem of incompatibility of office arises under domestic law (see *Dichand and others*, cited above, § 51).

82. The Court further takes account of the fact that the remarks were made orally during a press conference, meaning the applicant had no possibility of reformulating, refining or retracting them before they were made public (see *Otegi Mondragon v. Spain*, no. 2034/07, § 54, ECHR 2011). The applicant made the statements in the offices of his political party and not in Parliament. The Court attaches weight to the fact that he chose not to take advantage of the elevated level of protection that

parliamentary immunity would have conferred on him. The Constitutional Court did not go beyond noting that fact (see paragraph 30 above).

83. Lastly, the Court considers that the applicant's criminal conviction, notwithstanding the fact that the fine imposed could no longer be executed, could be seen to have a chilling effect on the political debate on matters of importance, which is essential for the proper functioning of democracy. The Court was not presented with any argument why the means employed (see paragraph 8 above) for replying to the applicant's remarks were not sufficient in the present case. The Court also takes note of the fact that the respondent State has since decriminalised defamation (see paragraphs 36 and 37 above).

84. In light of the foregoing, it considers that the standards applied in the impugned proceedings were not compatible with the principles embodied in Article 10 and that the domestic courts failed to strike a fair balance between the competing interests at stake.

85. It must therefore be concluded that the interference was disproportionate to the aim pursued and not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

III. 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. In respect of pecuniary damage, the applicant claimed reimbursement of the amount he had been charged in the compensation proceedings (see paragraph 19 above). He also claimed 10,000 euros (EUR) in respect of non-pecuniary damage for the emotional pain and stress he had suffered as a result of his conviction in the two sets of proceedings.

88. The Government contested those claims as excessive and unsubstantiated. They also submitted that there was no causal link between the alleged violation and the pecuniary damage claimed. Furthermore, there was no evidence that the applicant had paid the amount specified in the compensation proceedings. In their view, the finding of a violation was sufficient compensation for any damage suffered by the applicant.

89. The Court reiterates that any award of damages must be related to the violation found. Given the fact that the compensation proceedings were not within the scope of the case (see paragraph 39 above), it finds no

grounds to make an award of the pecuniary damage claimed; it therefore rejects this claim.

90. On the other hand, it finds that an award of compensation in respect of non-pecuniary damage is justified. Making its assessment on an equitable basis, as required under Article 41, the Court awards the applicant EUR 1,500 under this head, plus any tax that may be chargeable.

B. Costs and expenses

91. The applicant also claimed the equivalent of EUR 1,020 for the costs and expenses incurred in the proceedings before the Court. In support he submitted an invoice from 2015 where that figure represented the lawyer's fees for preparation of the applications and for the comments submitted in reply to the Government's observations. He asked that the amount claimed be paid directly to his representative's bank account.

92. The Government contested the sum claimed as excessive, unsubstantiated and not actually incurred. They submitted that the applicant had failed to submit a time-sheet or any other supporting document, such as evidence attesting to the payment of the amount claimed.

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 reasonable as to quantum (see *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). That is to say, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the violation found or to obtain redress (see *Belchev v. Bulgaria*, no. 39270/98, § 113, 8 April 2004, and *Hajnal v. Serbia*, no.36937/06, § 154, 19 June 2012). In the present case, having regard to the available material and the above criteria, the Court considers it reasonable to award the applicant the sum claimed under this head. There being no evidence to show any payment has been made, the amount is to be paid into the bank account of the applicant's representative, plus any tax that may be chargeable to the applicant.

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, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been a violation of Article 10 of the Convention;

4. *Holds*
   (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 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,020 (one thousand and twenty euros), in respect of costs and expenses, to be paid into the bank account of the applicant's representative, plus any tax that may be chargeable to the applicant;
   (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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 July 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Linos-Alexandre Sicilianos
Registrar	President

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

L.A.S.
A.C.

CONCURRING OPINION OF JUDGE WOJTYCZEK

1. I fully agree with my colleagues that Article 10 of the Convention has been violated in the instant case but at the same time I have serious reservations concerning certain parts of the reasoning.

2. The judgment reiterates the distinction between statements of fact and value judgments (see paragraph 62). Statements of fact can be verified and proven, whereas value judgments can be justified by rational arguments. The distinction in question is, however, of much lesser relevance than it may prima facie appear.

Firstly, the distinction in question is not a logical partition but a typology. In the natural language, there are logical propositions describing facts, and there are value judgments, but very often utterances simultaneously describe facts and express value judgments. The phrase "he is a malicious cop" simultaneously: (i) indicates that the person referred to is a member of the police, and (ii) shows that the speaker has negative feelings concerning this person, and (iii) expresses a negative assessment of his work in the police. The factual layer of an utterance may be proven or not, whereas the assessment layer of the same utterance may be justified or not by relevant argument. Also the instant case shows that statements of fact and value judgments mix.

Secondly, as explained below, under the case-law of the Court a person taking part in a public debate is usually not required to prove the veracity of his statements. A sufficient factual basis for the fact statement suffices, as in the case of value judgments.

In this context, the traditional dichotomy of statements of fact and value judgments should be revisited.

3. The judgment contains the following statement in paragraph 75 *in fine*:

> "Accordingly, the domestic courts applied the so called 'presumption of falsity' (sometimes referred to as the 'defence of justification' or the 'defence of truth'), under which defendants are required to prove to a reasonable standard that factual allegations are true. The Court has held that such an approach does not, as such, contravene the Convention ... However, it has also held that if an applicant is clearly involved in a public debate on an important issue he should not be required to fulfil a more demanding standard than that of due diligence. In such circumstances, the obligation to prove the factual statements may deprive the applicant of the protection afforded by Article 10 ..."

All these propositions (propositions in the meaning of logic) are true. It would, however, be more precise to say that whereas in the Court's older case-law the requirement to prove to a reasonable standard that factual allegations were true was declared compatible with the Convention, more recent case-law (see for instance the cases cited in the reasoning paragraphs 62 *in fine* and 75 *in fine* together with the judgments in the cases

of *Kasabova v. Bulgaria*, no. 22385/03, §§ 63 and 64, 19 April 2011, and *Tavares de Almeida Fernandes and Almeida Fernandes v. Portugal* no. 31566/13, § 56, 17 January 2017) has departed gradually from this approach in respect of allegations made in a public debate by applying the "sufficient factual basis" test and the requirement of due diligence, which is closely connected with this test. Initially, this new approach was applied to politicians participating in a lively debate and to journalists and, subsequently, it was extended to other persons. As a result, in the context of public speech, the truth requirement has been replaced by the sufficient factual basis test.

The instant case enhances this approach and further illustrates the inadequacy of the truth standard in certain contexts. I agree with the *sufficient factual basis* and *due diligence* standards adopted in the reasoning. There are situations in which it is legitimate to draw the attention of the public to certain pathologies, if there are strong indications that they exist even if the full proof of the truth is impossible. However, this approach is not without danger to the necessary protection of reputation. It may be accepted only if domestic legislation provides for sufficient instruments to protect the reputation of the persons concerned when the allegations are ultimately found untrue. I would like to add that criminalisation of defamation and insult belongs to such instruments but cannot be seen as sufficient to protect the victims of statements that have a sufficient factual basis but are later proved to be untrue.

4. The judgment contains the following assertion in paragraph 83 *in fine*:

> "The Court also takes note of the fact that the respondent State has since decriminalised defamation (see paragraphs 36 and 37 above)."

I would like to add in this respect that the issue of the criminal-law approach to insults and defamation has to be placed in the context of the intensity of freedom of speech protection. There are grounds to oppose such criminalisation in the context of the "proof of truth" requirement and strong protection of personality rights. There are even more serious reasons to oppose decriminalisation when the Court ensures very strong protection of freedom of speech by replacing the requirement to prove the truth by the "sufficient factual basis" test.

More generally, strong protection of freedom of expression is not without social cost, such as the real danger of public debate being brutalised. I share the concerns expressed by Judge Kuris in his numerous separate opinions about the excesses of free speech (see for instance his remarkably eloquent separate opinions in the cases of *Selahattin Demirtaş v. Turkey*, no. 15028/09, 23 June 2015, and *Szanyi v. Hungary*, no. 35493/13, 8 November 2016).

5. The judgment explains that the fact/value distinction loses relevance in the following terms (see paragraph 62 *in fine*):

> "However, it is to be noted that that distinction is of less significance in cases where the impugned statement has been made in the course of a lively political debate and where elected officials should enjoy a wide freedom to criticise Government actions, even if the statements made may lack a clear basis in fact (see, *mutatis mutandis*, *Lombardo and Others v. Malta*, no. 7333/06, § 60, 24 April 2007)."

I agree with the assertion that where the impugned statement has been made in the course of a lively political debate it may lack a clear basis in fact. I disagree with the suggestion that this applies only to elected officials, for reasons explained below. It applies to anyone taking part in a public debate. Not only elected officials but everyone should enjoy a wide freedom to criticise government actions and not only in the course of a lively political debate but in the course of any public debate.

I note in this context that the judgment expresses the following view in paragraph 80:

> "Given the on-going lively political debate about the issue at stake, the Court is unable to accept the domestic courts' view that he was required to prove the veracity of his allegations."

In my view, the existence of an *on-going lively political debate* has not been sufficiently established in the instant case. No evidence was provided to the Court to this effect. In any event, the existence of a lively political debate is irrelevant. Even assuming that there was no such lively debate, it was not justified to require the applicant to fulfil a more demanding standard than that of due diligence.

6. Utterances have to be placed in their context. There are situations in which the context is of crucial importance to understand the content and impact of an utterance. However, this is not always the case.

The judgment emphasises, in paragraph 65, that the applicant *made those remarks on behalf of the party and accordingly, in a political context.* In the instant case the fact that the applicant made his remarks on behalf of a political party is irrelevant from the viewpoint of the proportionality analysis. In particular, it affects neither the meaning of his message nor its impact upon the audience. Had he made the same remarks on his own behalf, his remarks would also belong to political speech. They belong to political speech because of their content and because they were made publicly. The scope of his freedom of speech should remain the same, whether the applicant's utterances were expressed in the name of his party or not. On the other hand, not all remarks made on behalf of a political party are necessarily political speech. The analysis of context has not been carried out correctly in the instant case.

7. The judgment stresses the following factual elements (see paragraph 78):

> "... it is noteworthy that the impugned questions were related to and consisted of 'public rumours which have become stronger'. The applicant essentially raised a question about something that had already been subject to public discussion ... Accordingly, his remarks were neither novel nor did he present them so as to be perceived as his own assertion."

I strongly disagree with this approach. Firstly, reference to rumours is a frequent technique used in order to minimalise legal risks when disseminating false information. The rumours may have been invented by the speaker and it is impossible to verify whether they were really being spread beforehand. The general public usually consider that "there is no smoke without fire" and that rumours referred to by a speaker reflect, at least partly, the truth.

Secondly, the fact that a speaker refers to a rumour is not evidence that a matter has already been the subject of public discussion. Whether the applicant raised a question about something that had already been publicly discussed remains to be verified.

Thirdly, even if references to rumours are not presented so as to be perceived as one's own assertions, such a reference gives the rumours more weight and tends to corroborate them in the eyes of the audience. In the instant case, it is the applicant who speaks and gives rumours much more credibility and a much broader audience.

The argument used is therefore not devoid of naivety.

8. The part of the reasoning assessing the proportionality of the interference strongly emphasises that the applicant is a politician and a member of parliament (see paragraphs 65, 66, 67, 78 and 82). It suggests that this fact has to be taken into account in the examination of the proportionality of the interference and that it is a factor of primary relevance which weighs in favour of an applicant. It therefore also implicitly suggests that, had an applicant been neither a politician nor a member of parliament, an important factor for finding a violation would be missing and that this might have tipped the balance in favour of the respondent State. In other words, the same speech *content* may be permissible or not depending upon whether the applicant is a politician (parliamentarian) or not.

The reasoning appears therefore to be based upon the underlying assumption that the freedom of speech of politicians in general and parliamentarians in particular has to be broader than the freedom of speech of "commoners". The implicit message that can be gleaned from the judgment is that the political elites have a special role to play in society and therefore may enjoy broader rights.

I strongly disagree with the approach adopted in this respect. The fact that the applicant is a politician and a member of the national Parliament is completely irrelevant in the instant case. Had the applicant been a person

who was neither active in politics nor a member of an elected body, the outcome of the case should have been exactly the same. Can certain unpleasant things be said only by some but not by everyone?

On the other hand, I agree that, in some States, opposition politicians and parliamentarians may be particularly targeted by the authorities. Stronger threats may justify specific protection tools. There may be special legal tools in domestic law, such as parliamentary immunity, in order to protect parliamentarians against arbitrary interference by the public authorities. These instruments protect first and foremost the constitutional democracy and the legislative body, not the personal interests of the persons protected. They are particularly necessary to protect speech which forms part of the official duties in an elected body and which may remain unprotected by constitutional rights and international human rights instruments. They stop the action of the authorities, but they should not widen the scope of the speech content protected *under the Convention*.

Stronger threats are not a reason – under the Convention – to allow politicians a broader scope of permissible utterances than non-politicians. It suffices that the same scope of freedom is – in the case of parliamentarians – protected by certain special legal tools introduced at the domestic level and adapted to the potential threats.

9. The judgment contains, *inter alia*, the following statement (paragraph 78):

> "He merely put the matters that were of general interest for public debate, which, in the Court's view, is the role of politicians and members of parliament, as representatives of the electorate."

I strongly disagree with the view expressed in the second part of this sentence. On this point, I agree with the domestic court which expressed the following view (see the judgment of 3 November 2009, quoted in paragraph 13, emphasis added):

> "... **every person**, including a member of a political party, as is [the applicant], has the right to put questions of public interest, to criticise the work of the Government and to express concerns about someone who holds the highest office in the executive."

In a constitutional democracy, everyone can raise matters of general interest for public debate. In particular, to raise matters of general interest for public debate is the role of each citizen. It belongs to the essence of citizenship.