CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF FLUX v. MOLDOVA (No. 6)

(Application no. 22824/04)

JUDGMENT

STRASBOURG

29 July 2008

FINAL

29/10/2008

This judgment may be subject to editorial revision.

In the case of Flux v. Moldova (No. 6),

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

Lech Garlicki, *President,*
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges,*

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 8 July 2008,

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

PROCEDURE

1. The case originated in an application (no. 22824/04) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by *Flux* ("the applicant newspaper"), a newspaper based in Chişinău, on 13 May 2004.

2. The applicant newspaper was represented by Mr V. Gribincea, a lawyer practising in Chişinău and a member of the non-governmental organisation Lawyers for Human Rights. The Moldovan Government ("the Government") were represented by their Agent, Mr V. Grosu.

3. The applicant newspaper alleged, in particular, a breach of its right to freedom of expression after it was held liable in civil proceedings for the defamation of a high school principal.

4. On 14 September 2006 the President of the Fourth Section of the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. On 4 February 2003 the applicant newspaper published an article about the Spiru Haret High School. The article was not based on investigations by the newspaper's reporters but merely quoted an

anonymous letter it had allegedly received from a group of students' parents. The letter criticised the situation in the school, in particular, overcrowding and a lack of proper facilities for children. It alleged that the school's principal used the school's funds for inappropriate purposes, spending money on decorating his office and building a separate bathroom for himself, launching a school newspaper which only published articles related to relationships and sex. It also alleged he had received bribes of 200-500 US dollars for enrolling children in the school and that the authors of the letter had been afraid to sign for fear of reprisal against their children.

6. On an unspecified date the principal and the editorial staff of the school newspaper asked *Flux* to publish a reply to the article of 4 February 2003; however, their request was rejected. They finally managed to have their reply published in another newspaper called the *Jurnal de Chisinău*.

7. In their reply they expressed dissatisfaction with the fact that *Flux* had failed to seek their side of the story before publishing an anonymous letter, and said that the manner in which *Flux* had acted had been contrary to journalistic ethics. In their view, the fact that *Flux* had published an anonymous letter without even visiting the school or conducting any form of investigation showed that its aim was purely sensationalism. It was true that the school was overcrowded, but that was a result of its popularity. Had the journalist from *Flux* visited the school, she would have noted that it was not only the principal's office that had been renovated, but many other parts of the school. As to the issue of bribes, it was far too serious an accusation to be published without any supporting evidence. The editorial staff of the school newspaper stressed that the anonymous letter had misinformed the readers by only citing certain articles and overlooking many others concerning such matters as sport, cultural events and school events.

8. On 14 February 2003 the applicant newspaper reacted to the reply published in the *Jurnal de Chisinău* by publishing a new article which stated, *inter alia*:

> "The first people to visit us, were, to our surprise, not the [principal], but the 'creation team' of the school newspaper... headed by the teacher M.C. They had prepared a so called 'reply' to the article [of 4 February 2003]. In reality a scrap of paper attacking our editorial staff, full of ironic comments such as 'Flux, the newspaper which pretends to write the truth'. We have nothing against this school newspaper, which started to give us marks for behaviour. We tried to explain to our as yet too young colleagues, in a friendly way, of course, that since Flux had pledged to publish the [anonymous] letter in full, it could not change its content. We were merely reproducing a point of view which had the right to exist. We simply did not care about other details, such as the quality of the school newspaper or the IQ of its editors.
>
> Maybe the 'reply' from the editors of the Spiru Haret newspaper, would have been published by Flux if its tone had been measured and shown at least a little respect for a newspaper [Flux] from which their school newspaper still has a lot to learn. Not to mention that the 'editors' who came to our office were arrogant and spoke down to us from a great height. We had the impression that these 'editors' were from the New

York Times or at least from Le Monde. Incidentally, we later found out that the chief of the 'editors', M.C. is the partner of the school principal, but we readily overlooked this delicate detail.

...

When we agreed to publish the letter from the group of parents, we were not intent on sensationalism, as was insinuated by the principal in his reply. Everybody knows that the situation in our schools is far from satisfactory. Nobody is surprised by this anymore. Spiru Haret is not the first school we have written about, nor will it be the last....

We published the letter in the hope that the principal would descend from his lofty perch and understand that there also are dissatisfied parents. Many people complained to us that the principal was a spiteful person. Just to prove the point, after the publication of our article, he convened a meeting of the parents' association at which he demanded the names of the persons who had written the letter. He also demanded that the association write a letter critical of our newspaper....

Obviously, the most serious problem is that of the bribes, which, according to the cynics among us, are not causing the principal any loss of sleep. We have been accused of libelling him without any proof. However, it was not we who accused him, but the parents. And we are sure that we will be able to bring witnesses to the court. We will find people willing to overcome their fear...

We will now refer to a person who called us [after the publication of the article of 4 February 2003]. His name is V.L. and he is a former university colleague of the principal of Spiru Haret. Before moving to Chişinău, he lived in Ungheni. After coming to Chişinău, he had to find a school for his daughter. He approached his former colleague, who hinted that he had to pay not only with fond memories of their student years but also with cash. V.L. refused and told the principal that he had no money. After a lengthy period in which he was fobbed off with promises, V.L. gave up the idea of enrolling his daughter in Spiru Haret.

'The official reason given by the principal was that we lived in another part of the city. I was surprised to learn that a friend of my daughter, who lived in the same neighbourhood, had told my daughter that her father had paid the principal three hundred dollars. Now she is a student at Spiru Haret while my daughter is at another school, where no money is required', said V.L...."

9. On an unspecified date the principal brought civil proceedings for defamation against the applicant newspaper, arguing that many statements in the above article were defamatory of him.

10. During the proceedings the applicant newspaper called three witnesses, including V.L., who testified that bribes were taken for the enrolment of children in Spiru Haret.

11. On 18 September 2003 the Buiucani District Court gave judgment for the principal, after finding the allegations of bribery to be untrue and defamatory. It concluded that the statements of the three witnesses called by the applicant newspaper were not sufficient to overturn the presumption of innocence enjoyed by the principal. It ordered the newspaper to issue an

apology within fifteen days and to pay the principal 1,350 Moldovan Lei (MDL) (the equivalent of 88 euros (EUR) at the time). As to the witnesses called by the newspaper, it stated:

> "The court has no reason not to believe the witnesses V.L., C.G. and M.N. However, in order to be able to declare publicly that someone is accepting bribes, there is a need for a criminal-court decision finding that person guilty of bribery. Since there is no such finding against [the principal], he cannot be accused of bribery."

12. Both the applicant newspaper and the principal appealed against this judgment. The applicant newspaper contested the finding that the statement concerning bribery was defamatory, arguing that it had not directly accused the principal of bribe-taking, but had brought to the attention of the public the well-known phenomenon of bribe-taking in schools. The principal claimed that the statement concerning bribery was not the only defamatory statement in the article. On 23 December 2003 both appeals were dismissed by the Chişinău Court of Appeal, which found the applicant newspaper's submissions ill-founded. As to the principal's appeal, it stated that being a public figure, he had to be more tolerant to criticism.

13. The applicant newspaper lodged an appeal on points of law with the Supreme Court of Justice, arguing again, *inter alia*, that the purpose of the article was not to accuse the principal of taking bribes but simply to make public the rumours to that effect. It submitted that the circulation of such rumours had been confirmed by witnesses. Penalising the newspaper for the lack of a criminal court judgment against the principal was disproportionate and unnecessary in a democratic society. Moreover, the newspaper had simply disseminated statements made by third parties.

14. On 31 March 2004 the Supreme Court of Justice dismissed its appeal.

II. RELEVANT DOMESTIC LAW

15. The relevant provisions of the Civil Code in force at the material time read:

Article 7. Protection of honour and dignity

> "(1) Any natural or legal person shall be entitled to apply to the courts to seek the withdrawal of statements which are damaging to his or her honour and dignity if the person who made such statements cannot prove that they are true.
>
> (2) Where such information was made public by a media body, the court shall compel the publishing office of the media body to publish, not later than 15 days after the entry into force of the judicial decision, a withdrawal of the statements in the same column, on the same page or in the same programme or series of broadcasts."

Article 7/1. Compensation for non-pecuniary damage

"(1) Damage caused to a person as a result of the dissemination of statements which do not correspond to the truth and are damaging to his or her honour or dignity shall be compensated by the natural of legal person responsible.

(2) The amount of the award shall be determined by the court in each case as an amount equal to between 75 and 200 months' minimum wages if the information was disseminated by a legal person and between 10 and 100 months' minimum wages if it was disseminated by a natural person."

THE LAW

16. The applicant newspaper complained under Article 10 of the Convention that the domestic courts' decisions had entailed interference with its right to freedom of expression that could not be regarded as necessary in a democratic society. Article 10 reads:

"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."

I. ADMISSIBILITY

17. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider the merits of these complaints.

II. MERITS

18. The applicant newspaper argued that it had abided by the rules of ethical journalism and that the domestic courts had not found otherwise. It

had conducted a reasonable investigation before publishing the article. The journalist concerned had verified the authenticity of the anonymous letter and followed the events in Spiru Haret High School after its publication. The journalist knew the identities of the authors of the letter, but had not disclosed them in order to protect their children. The journalist had met V.L. and other persons to collect additional information concerning the allegations of corruption contained in the anonymous letter.

19. The applicant newspaper added that the article of 14 February 2003 had to be treated as a continuation of that of 4 February 2003, which had raised issues of clear public interest, namely the conditions of study at a famous Chişinău high school and alleged corruption in that institution.

20. The refusal by the applicant newspaper to publish the principal's reply to the first article did not indicate bad faith. It was based on the offensive nature of the reply. It had asked the principal to modify the reply but in view of his refusal to do so, the reply was not published.

21. The article of 14 February 2003 was a response to the article that had appeared in the *Jurnal de Chişinău* and was aimed at protecting the newspaper's reputation. Moreover, the principal was a public figure, a fact confirmed by the domestic courts, and the applicant newspaper was performing its duty to act as a "public watchdog".

22. The Government argued that the applicant newspaper had failed to perform the duties and assume the responsibilities inherent in the exercise of freedom of expression. In particular, it had failed to verify the information before publication and the manner in which the article was written was incompatible with the public watchdog role of the press.

23. They further pointed to the national authorities' margin of appreciation in assessing the need for interference and submitted that where the Convention referred to domestic law it was primarily the task of the national authorities to apply and interpret that domestic law. They contended that in the present case the domestic authorities had not overstepped their margin of appreciation and had made use of it in good faith, carefully and reasonably.

24. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. Not only does the press have the task of imparting information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see, among other authorities, the Observer and Guardian *v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, pp. 29-30, § 59).

25. Article 10 of the Convention does not, however, guarantee wholly unrestricted freedom of expression even in respect of coverage by the press of matters of serious public concern. Where, as in the present case, there is question of attacking the reputation of individuals and thus undermining

their rights as guaranteed in Article 8 of the Convention (see, *inter alia*, *Pfeifer v. Austria*, no. 12556/03, § 35, ECHR 2007-...), regard must be had to the fair balance which has to be struck between the competing interests at stake. Also of relevance to the balancing exercise which the Court must carry out in the present case is that, under Article 6 § 2 of the Convention, everyone has the right to be presumed innocent of any criminal offence until proved guilty.

26. Under the terms of paragraph 2 of Article 10, the exercise of freedom of expression carries with it "duties and responsibilities" which also apply to the press. By reason of these "duties and responsibilities", which are inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III). The Court will examine whether the journalist who wrote the impugned article acted in good faith and in accordance with the ethics of the profession of journalist. In the Court's view, this depends in particular on the nature and degree of the defamation at hand, the manner in which the impugned article was written and the extent to which the applicant newspaper could reasonably regard its sources as reliable with respect to the allegations in question. The latter issue must be determined in light of the situation as it presented itself to the journalist at the material time, rather than with the benefit of hindsight (see Bladet Tromsø *and Stensaas*, cited above, § 66).

27. The Court notes that the applicant newspaper made attempts during the domestic proceedings to present the impugned statements not as a direct accusation of bribe-taking by the principal of Spiru Haret, but as an attempt to bring to the attention of the public the phenomenon of bribe-taking in schools (see paragraph 12 above). The Court finds this argument unconvincing and considers that in both the first and second articles the allegations were sufficiently explicit to suggest to readers that the principal was guilty of the criminal offence of bribe-taking.

28. The Court agrees with the applicant's representative that the articles of 4 and 14 February 2003 cannot be dissociated from one another (see paragraph 19 above) and therefore considers it important to examine the professional conduct of the applicant newspaper in the context of both articles.

29. It notes that despite the seriousness of the accusations made against the principal contained in the anonymous letter published on 4 February 2003, the journalist made no attempt to contact him and ask his opinion on the matter. Nor does it appear from the text of the article that the journalist conducted any form of investigation into the matters mentioned in the anonymous letter. Moreover, when the principal and the editorial staff of the

school newspaper requested the right to publish a reply, this was refused on the ground that their reply was considered offensive. Having regard to the terms of the reply published in the *Jurnal de Chişinău*, the Court does not find the language used offensive. The principal did accuse the applicant newspaper of unprofessional conduct but such reaction was only normal and proportionate to the content of the first article.

30. In response to the principal's reply, the applicant newspaper published a further article on 14 February 2003. It argued before the Court that the purpose of that article was to discuss issues of public interest (see paragraph 19 above); however, in view of the repetition of some of the accusations made against the principal taken from the article of 4 February 2003 and of the language used, the Court regards this article more as a form of reprisal against the persons who had questioned the newspaper's professionalism. Indeed, the tone of the article indicates a degree of mockery and the article contains innuendo about an alleged personal relationship between the principal and a teacher, without any evidence of such or regard to the reputation and authority which school teachers must have in the eyes of their pupils.

31. The applicant newspaper endeavoured to repair an omission it had made in the first article by citing hearsay evidence to back up its accusation of bribe-taking. It was only when faced with the threat of civil proceedings that it called two additional witnesses in an attempt to lend substance to its allegations of bribe-taking. In the course of adversarial proceedings, the Buiucani District Court did not accept the applicant newspaper's arguments and evidence and found the allegations to be untrue and defamatory. The Court would underline that it does not accept the reasoning of the first-instance court, namely that the allegations of serious misconduct levelled against the claimant should have first been proved in criminal proceedings. Nevertheless, it should be stressed that the right to freedom of expression cannot be taken to confer on newspapers an absolute right to act in an irresponsible manner by charging individuals with criminal acts in the absence of a basis in fact at the material time (see Bladet Tromsø *and Stensaas*, cited above, § 66) and without offering them the possibility to counter the accusations. There are limits to their right to impart information to the public, and a balance must be struck between that right and the rights of those injured.

32. The Court has, in addition, had regard to the unprofessional behaviour of the applicant newspaper and the relatively modest award of damages which it was required to pay in the context of a civil action.

33. In the overall circumstances of the instant case, the Court finds that the solution of the domestic courts struck a fair balance between the competing interests of the claimant and those of the applicant newspaper.

34. In view of the above and of the fact that the applicant newspaper acted in flagrant disregard of the duties of responsible journalism and thus

undermined the Convention rights of others, the interference with the exercise of its right to freedom of expression was justified. Accordingly, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by four votes to three that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 29 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Lech Garlicki President

In accordance with Article 45 § 2 of the Convention and Rules 74 § 2 of the Rules of Court, the following dissenting opinion of Judge Bonello, joined by Judges David Thór Björgvinsson and Šikuta, is annexed to this judgment.

L.G.
T.L.E.

DISSENTING OPINION OF JUDGE BONELLO, JOINED BY JUDGES DAVÍD THÓR BJÖRGVINSSON AND ŠIKUTA

1. The domestic courts' order to the applicant newspaper to pay damages and publish an apology constituted, in my view, a violation of freedom of expression enshrined in Article 10 of the Convention, and I voted without hesitation in favour of a finding to that effect.

2. The judgment lays out the salient facts of the case in paragraphs 5 to 14. I would highlight the following as particularly material. The applicant newspaper, in the two impugned articles, levelled a number of accusations against the principal of the government-owned Spiru Haret High School. Some charges hang at the lower end of the scale of gravity. One, of bribery and corruption by the principal of the school, at the highest end.

3. Of the four less severe allegations, the first two appear to be uncontested: that the school suffered from overcrowding and lacked facilities. The third, that the principal had spent money on decorating his own office, also responds to fact. As is true of the circumstance that the principal had also employed public funds to improve some other parts of the school. There is absolutely nothing improper, in my view, in inferring that, where insufficient funds exist to cover all the needs of the school, spending public money on embellishing the principal's office should not have been a priority. This surely constitutes a value judgment, acceptable, arguable or disagreeable, protected by Article 10.

4. The fourth allegation that the school magazine "only related to relationships and sex", is not, in itself, defamatory at all; relationship skills and sex education are significant aims of any self-respecting educational system. Whether the implied criticism is satisfactory or open to controversy, it still remains a value judgment, welcome or unwelcome, but protected.

5. The fifth accusation levelled by the newspaper at the principal – that he received bribes of 200 – 500 US dollars for enrolling children in the school, fits another bracket altogether and will be dealt with in accordance with the criteria long established by the Court's case-law, primarily concerning freedom of democratic discussion on issues of serious public interest – and that should include, in my view, investigations into the pervasiveness of corruption or otherwise in the public educational system. Another question is whether, to attract the protection of Article 10, allegations published by newspapers in the course of open debate on topics of serious public concern must be proved "true" or whether it is sufficient for them to be grounded on adequate verifiable substantiation (the 'supporting factual basis' doctrine).

6. In the domestic proceedings, the newspaper produced three independent witnesses who all confirmed that money had to be paid to the principal to secure the enrolment of children in his school. The domestic

court which examined these witnesses "has no reason not to believe the witnesses LV, CG and MN". But that court then proceeded to dismiss their - believable – evidence all the same, with a reasoning that I find endearingly bizarre. Although the court established the credibility of the three witnesses it added that "in order to declare publicly that someone is accepting bribes, there is a need for a criminal court decision finding that person guilty of bribery. Since there is no such finding against [the principal], he cannot be accused of bribery". Fine. Now we know that it is the august function of a 'watchdog' free press to give publicity to copies of judgments of the criminal courts.

7. This also implies that, in the domestic court's view, had a thousand credible witnesses sworn that the principal had received bribes, the court would all the same have found the newspaper guilty of libel – because the newspaper failed to throw at its readers a judgment of the criminal court proclaiming the criminal guilt of the principal. What perturbs me is not so much that there is no judgment of a criminal court against the principal, but that, notwithstanding such grave accusations confirmed by witnesses certified as reliable, no criminal charges were laid against him. Since no one has ever bothered to charge the principal, the newspaper will have to wait a rather long time, more or less an eternity, for a judgment confirming or rebutting his culpability. Cutting-edge democracy requires that the one to be prosecuted is the one who makes credible charges, not the one against whom credible charges are made. And the public watchdog would do well not to bark at all, even if it has trustworthy evidence in its possession. Before this pronouncement, I had failed to appreciate that it is the business of the free press to respect eternal silence, waiting deferentially for a judgment of the criminal court that can never ever come.

8. The Strasbourg Court has distanced itself – rightly – from the rather quaint theorem of the domestic court, but, that notwithstanding, all the same found against the newspaper for making public charges of impropriety by government officials substantiated by witnesses, accepted as believable by the domestic courts.

9. Freedom of expression would be at a very low ebb were newspapers to be punished, with this Court's approval, for contributing to a public debate on issues of serious civic concern with the release of trustworthy information – certified as trustworthy by the domestic courts. My view of the responsibilities of healthy, vigorous media – 'essential public watchdog' someone called them when not fully recovered from an overdose of optimism - goes some way beyond publishing sanitised press releases issued by the authorities. I've now been told I am misguided.

10. Differently from the Court, I would not have belaboured unduly the argument of 'unprofessional behaviour' of the applicants, or that journalism has to be exercised responsibly in accordance with the ethics of the profession. Personally I do not find the behaviour of the applicant

newspaper particularly negative, but, for the purposes of this opinion I am prepared to go along with the majority and grant that it was. Where does that lead to? I too would have good governance and good professional behaviour go hand in hand, but, if the latter should fail, I would still opt to privilege good governance over good media professionalism. The truth is that in this case the Court attached more value to professional behaviour than to the unveiling of corruption.

11. The facts show that the newspaper made enquiries about persistent rumours, found three witnesses whose integrity has not been put in doubt and who supported the allegations of corruption on oath, assuming the harsh responsibilities of perjury and the harsher ones of victimisation. The Court has penalised the newspaper not for publishing untruths (had that been the case, I would have rushed to join in with emphatic fervour) but for 'unprofessional behaviour' which was, in any case, quite uninfluential. I will explain later how this distorts completely the proportionality exercise.

12. The so-called 'unprofessional behaviour' punished by the Court would seem to consist in the fact that the newspaper traced its first – credible – witness before its publication of the articles, but the second and third – credible – witnesses after the publication. This censure seems to give more importance to timing than to truth, more to the calendar than to the disclosure of corruption.

13. Another fault of the newspaper, according to the Court, was its omission to ask the principal for his opinion. And where, pray, does this lead? Assuming the newspaper, suffering a fit of daft journalistic finesse, had asked the principal before publication: is it true you take bribes? The reply would have been a yes or a no, and, with some effort I rather guess which of the two would have been the more likely. Had he (how surprising) denied corruption, was the newspaper forever muzzled or would it have published its – credible – findings all the same? The domestic court and the Strasbourg Court reply differently to this question. The domestic court answers that the newspaper could not publish anything at all since there is no res judicata conviction of the principal by a criminal court. A vigorous prop to democratic debate and freedom of expression.

14. Sadly, the Strasbourg Court goes one better: the newspaper falls foul for not having asked a question to which the answer was totally predictable and, in any event, uninfluential. Newspapers (and their readers) forfeit their freedom of expression if the journalist omits to ask a person considered, on credible evidence, associated with the commission of a crime, whether he is public-spirited enough to own up, or whether he prefers denying. Don't ask a stupid question, and you're in trouble in Strasbourg. At this point the Court loses me.

15. The Court has also faulted the newspaper for failing to publish a fraught reply from the principal of the school. Surely this is confusing two totally separate issues. If the paper unreasonably failed to publish a reply, it

should have been penalised – and rightly so - by the competent domestic overseer of communication ethics for defaulting in journalistic ethical duties. But a breach of an ethical duty, subsequent in time to the publication of alleged defamation, fails to render a newspaper retroactively guilty of defamation – the editor can be censured for failure to perform an ethical duty, but no way for libel. The Court did not see that these are wholly distinct issues which needed to be resolved separately. Instead it endorsed a finding of defamation when all it established was a deficit of professional correctness.

16. To find the domestic courts respectful of freedom of expression, the Court has also factored into the proportionality equation "the relatively modest award of damages". On my part, I do not believe the respondent Government earn points by having gone far, but not quite as far as they could have.

17. I fear this judgment has thrown the protection of freedom of expression as far back as it possibly could. Journalists have been told what to expect if they publish anything disturbing to the authorities, however pressing the social need and sufficient the factual basis are, if their professional behaviour leaves anything to be desired. Even if alarming facts are sufficiently borne out by evidence, in the balancing exercise to establish proportionality, disregard for professional norms is deemed by Strasbourg to be more serious than the suppression of democratic debate on public corruption. To put it differently, in the Court's view the social need to fight poor journalism is more pressing than that of fighting rich corruption. The 'chilling effect' of sanctions against press freedom dreaded by the Court's old case-law has materialised through the Court's new one.

18. Salman Rushdie, the victim of a fatwa, remarked: what is freedom of expression? Without freedom to offend it ceases to exist. Maybe freedom of expression should cease to exist when it offends, and that would not distress me unduly. The serious inference of this judgment is that freedom of expression also ceases to exist when it is punished for pushing forward for public debate allegations of public criminality made by witnesses certified as credible but in a manner considered unprofessional. When subservience to professional good practice becomes more overriding than the search for truth itself it is a sad day for freedom of expression.