



Up-366/16  
18 December 2019

**Concurring Opinion of Judge Dr Rok Čeferin regarding Decision No. Up-366/16, dated 5 December 2019**

To begin with, let me stress that I concur with both the operative provisions and the majority part of the reasoning of Decision No. Up-366/16. I opine that in the case at issue the regular courts appropriately carried out the balancing between two human rights in collision, i.e. the right of a journalist to freedom of expression, on the one hand, and the right of a political party to protection of its reputation, on the other.

There are multiple circumstances that speak in favour of the idea that the balance be tilted towards freedom of expression. First of all, the disputed statement of the journalist was made in the framework of a topic of distinct public interest. A topic concerning alleged corrupt conduct of a parliamentary party is certainly a topic in the public interest *par excellence*. In the framework of such a topic, in accordance with the established case law of the European Court of Human Rights (hereinafter referred to as the ECtHR), broad limits to freedom of expression must be allowed.<sup>[1]</sup> Furthermore, with his harsh words, the journalist targeted a political party, which is an absolute public entity and must as such tolerate intensive interference with its right to the protection of its reputation.<sup>[2]</sup> And finally, the case at issue concerned the exercise of a journalist's freedom of expression in the performance of his work. As the Constitutional Court has stated a number of times in its decisions, freedom of the press is one of key institutional conditions for the effectiveness of the democratic process;<sup>[3]</sup> therefore, in the framework of the right to freedom of expression, its limits must be particularly broad.

However, there are three circumstances that despite the weighty arguments in favour of the right to freedom of expression mentioned above tilted the scales to the other side, i.e. to the side of the right of a political party to protection of its reputation. In his article, the journalist made (1) a defamatory and (2) untrue accusation against a political party, aware that – which in the case at issue is essential – (3) the accusation was false.

In this context, it must be stressed that in accordance with the established case law, journalists do not necessarily act unlawfully even if they impart untrue information to the public. Also in such instances, they remain within the admissible limits of freedom of

expression if they act in good faith, i.e. if they have reasonable grounds to believe that the imparted information was true.<sup>[4]</sup> Journalists are not obliged to verify the veracity of the information they obtain from official sources.<sup>[5]</sup> In some of its judgments, the ECtHR deemed that a journalist remained within the limits of exercising freedom of expression even if on the basis of unverified hearsay he or she made defamatory and untrue statements addressing allegedly unlawful conduct of state authorities.<sup>[6]</sup> When performing their work, journalists may summarise the statements of other persons and reports in other media, and they are not obliged to expressly distance themselves from the summarised content.<sup>[7]</sup>

However, summarising statements must be distinguished from changing them. If a journalist seemingly summarises someone's statement, but in reality modifies it such that it no longer corresponds to the state of the facts and becomes defamatory, it must be deemed that he or she overstepped the admissible limits to freedom of expression and thus acted unlawfully.<sup>[8]</sup> <sup>[9]</sup> Despite the above-described broad limits to freedom of expression and in particular of freedom of the press in the European legal area, these limits are certainly overstepped at the latest when a journalist knowingly states untrue facts in his or her report.

In view of the above, I concur with the position of the majority of my fellow judges that [in the case at issue] the regular courts correctly balanced the journalist's right to freedom of expression, on the one hand, against the right of a political party to protection of its reputation, on the other, and that, following the balancing, they justifiably gave priority to the latter right.

However, what seems important to me in these proceedings, but was not expressly mentioned in the Decision, is that sanctioning an abuse of freedom of expression in the case at issue is necessary not only in order to protect the reputation of the plaintiff in the lawsuit, but also in order to protect the right of the public to be informed.

The Constitutional Court has stressed a number of times that the Constitution protects freedom of expression not only in the interest of an individual, but also "in the interest of ensuring comprehensive informedness and the search for truth in the continuous democratic processes involving the ascertainment and formation of public opinion."<sup>[10]</sup> However, *the right* of the public to "comprehensive informedness and the search for the truth" imposes on journalists the *duty* to report comprehensively and truthfully on developments in society, and in particular on topics in the public interest. Journalists, as public watchdogs, must supervise the actions of the authorities and immediately alert the public in the event of any irregularities. In such manner, they play a decisive role in ensuring a democratic social process. Conversely, those journalists who mislead the public with sensationalistic and untrue information with a view to boosting the circulation and profits of a media outlet jeopardise such democratic process. Or, as the Constitutional Court has correspondingly concluded in its decisions, in a biased and imperfectly informed society, both the effective functioning of the political opposition to those in power and supervision over the exercise of power are rendered impossible.<sup>[11]</sup>

In this respect, I stress that these days, when it is characteristic that the standards of professional journalism are declining<sup>[12]</sup> and that the influence of economic centres of power on independent and impartial media reporting is growing,<sup>[13]</sup> the right of the public to be informed is particularly threatened. In such circumstances, it is in my opinion correct that a court sanction the most obvious and grave instances of abuse of freedom of expression, which also includes the reporting of the journalist in the case at issue, and that it award persons whose personality rights were thereby affected just compensation. This is correct not only in order to protect the rights of injured parties, but also to draw the attention of the media to the content of the second paragraph of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR), which determines that the exercise of freedom of expression also carries with it duties and responsibilities.

Therefore, it is also due to the above-stated reasons that I concur with the position of the majority of judges that finding liability and awarding damages in the case at issue within the meaning of the second paragraph of Article 10 of the ECHR is necessary in a democratic society.

Dr Rok Čeferin  
Judge

<sup>[1]</sup> Decisions of the Constitutional Court No. U-I-172/94, dated 6 October 1994, and No. Up-2940/07, dated 5 February 2009, and the ECtHR Judgments in *Giniewski v. France*, dated 31 January 2006, and in *Editions Plon v. France*, dated 18 May 2004.

<sup>[2]</sup> The ECtHR Judgment in *Magyar Zeti Jrt v. Hungary*, dated 4 December 2018.

<sup>[3]</sup> Decision of the Constitutional Court No. U-I-106/01, dated 5 February 2004.

<sup>[4]</sup> Decision of the Constitutional Court No. Up-2940/07, dated 5 February 2009.

<sup>[5]</sup> The ECtHR Judgment in *Bladet Tromsø and Stensaas v. Norway*, dated 20 May 1999.

<sup>[6]</sup> The ECtHR Judgment in *Thorgeirson v. Iceland*, dated 25 June 1992.

<sup>[7]</sup> The ECtHR Judgment in *Thoma v. Luxembourg*, dated 29 March 2001.

<sup>[8]</sup> In *Radio France [and others] v. France*, dated 30 March 2004, the ECtHR answered the question of whether in their reports journalists may modify the statements of others. In that case, a journalist of Radio France summarised the report of a newspaper on the conduct of a politician during the Second World War in occupied France. He added thereto that during the Second World War that politician supervised the mass deportation of Jews, although this was not stated in the article he summarised. Hence, the journalist modified, not only summarised, the content of an article, and was thus convicted of the public defamation of a politician. Although the disputed radio show concerned a topic in the public interest and the action of a representative of the authorities, the ECtHR unanimously dismissed the application of Radio France against the judgments of conviction issued by the French courts.

<sup>[9]</sup> An exception to this rule is satirical content created by media in which journalists in a humorous and ironic manner modify social reality. See, e.g., the ECtHR Judgment in *Nikowitz and Verlagsgruppe News GMBH v. Austria*, dated 22 February 2007.

[10] See, e.g., Decision of the Constitutional Court No. Up-345/01, dated 5 February 2004.

[11] See, e.g., Decision of the Constitutional Court No. U-I-106/01, dated 5 February 2004.

[12] M. Poler Kovačič, *Kriza novinarske odgovornosti* [The Crisis of Journalistic Liability], Knjižna zbirka Media, Faculty of Social Sciences of the University of Ljubljana, Ljubljana 2005, p. 30.

[13] S. Splichal, *Javno mnenje* [Public Opinion], Zbirka Javnost, Faculty of Social Sciences of the University of Ljubljana, Ljubljana 2005, p. 353.

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