



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

THIRD SECTION

**CASE OF RINGIER AXEL SPRINGER SLOVAKIA, A. S.
v. SLOVAKIA**

(Application no. 41262/05)

JUDGMENT

STRASBOURG

26 July 2011

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 Ringier Axel Springer Slovakia, a. s. v. Slovakia,

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

Josep Casadevall, *President*,

Corneliu Bîrsan,

Egbert Myjer,

Ján Šikuta,

Ineta Ziemele,

Nona Tsotsoria,

Kristina Pardalos, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 5 July 2011,

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

PROCEDURE

1. The case originated in an application (no. 41262/05) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) on 27 October 2005 by a joint-stock company established under the laws of Slovakia, the name of which is now Ringier Axel Springer Slovakia, a. s. (“the applicant company”), and which was then called RINGIER SLOVAKIA a.s.

2. The applicant company was represented by Mr J. Havlát, a lawyer practising in Bratislava. The Government of the Slovak Republic (“the Government”) were represented by their Agent, Ms M. Pirošíková.

3. The applicant company alleged, in particular, that the outcome of a libel action taken against its legal predecessor at the domestic level was arbitrary both in terms of substance and procedure and that, as such, it was contrary to the applicant company’s rights under Article 10 of the Convention

4. On 17 May 2010 the Court decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company was established in 1990 and has its seat in Bratislava. It is a multimedia publishing house.

A. Background

6. The applicant company's legal predecessor, A., was the publisher of a popular national daily newspaper.

7. A. employed, among others, reporters B. and C.

8. On 14 June 1999 B. received an anonymous phone call informing him of an incident taking place at that very moment involving individuals D. and E. The incident was said to be taking place in a public restaurant and is described below.

9. At that time, D. was a Member of Parliament, a municipal mayor and the president of a political party. E., for his part, was vice-president of the Police Corps of the Slovak Republic.

10. In the days that followed, A. and another publisher printed a series of articles about the incident. The details are described in paragraphs 21 to 25 below.

11. The behaviour of E. in the context of the incident was subsequently investigated by the Police Inspection Service, in particular as regards the allegations that he had wet his pants and threatened to organise civic disturbances (see below).

On the basis of a report issued on 6 July 1999, E., the personnel of the restaurant and a number of witnesses having been interviewed, no impropriety on the part of E. was established.

12. At a later point E. left the police force on his own initiative.

13. Both D. and E. subsequently successfully sued A. for libel. The proceedings concerned by the present application are those instituted by E. They are described in paragraphs 26 to 44 below.

14. Following the proceedings, in 2004, A. was merged with the applicant company.

B. Incident on 14 June 1999

15. In the anonymous phone call mentioned in paragraph 8 above, the caller informed B. that D. and E. were sitting in a public restaurant and that D. had previously urinated on the terrace of that restaurant.

16. In a matter of minutes, B. arrived at the restaurant, where he saw D. and E. as they were about to leave. He ordered a drink and observed them. Judging by the way they were walking and holding each other up, B. had the impression that they were under the influence. In total, B. had spent up to ten minutes in the restaurant before D. and E. left.

17. B. then interviewed the waitress and some of the diners, following which he left and wrote the first of the articles described below.

18. The following morning B. revisited the restaurant, re-interviewed the waitress and photographed the location of the incident.

19. In the subsequent days contact and a meeting were arranged between F., an eyewitness to the incident, and B., who was assisted by C. and another colleague.

20. Contact and a meeting between E. and B. were also arranged with a view to obtaining E.'s position. In that meeting, E. admitted having been at the restaurant with D. but denied any impropriety. He requested that his name not be disclosed, as that would ruin his career in the police force.

C. Coverage of the incident

21. On 16 June 1999 the paper in question printed an article entitled "[D.] 'introduced himself' in [the restaurant] on Monday". The article included the following text:

"'[D.] is sitting in [the restaurant] rollicking drunk', one of our readers reported to the editorial office [of the newspaper] on Monday evening. As we checked with our own eyes, it really was true. The president [of the political party] was really sitting in the restaurant named and his appearance revealed that our reader had not done him an injustice. [D.] was accompanied by an individual who claimed to be a high-ranking police official. 'Gentlemen brothers' (*páni bratia*) [D.] boomed as he staggered from the terrace to the bar. Then, as if he wanted to take flight with his arms outstretched, [he] gave an order for departure and headed for the stairs. His friend even offered to help him out, but [D.] refused. 'Come with me' [he] called out to the forty or so diners present. Where, he did not say. But none of the diners stood up. As alleged by several eyewitnesses, only shortly before our arrival [D.] had urinated off the terrace of the restaurant onto the pavement. According to our findings the president [of the members of the party] arrived at the restaurant [...] already in an inebriated state: 'when he arrived he already looked a state; he only had a few cognacs here', we were told by one of those present, who does not wish to be named. Contented, [D.] was finally driven off [in his car] by his driver, who had been hanging about outside nervously the entire time waiting for the president to have his fill of fun ..."

22. On 22 June 1999 the paper printed an article entitled "Have the leader and high-ranking police officer planned a coup? An eyewitness to [D.]'s running wild has spoken out". The article included the following text:

"[The paper] was the first to report that last week the president of [the political party] [D.], while intoxicated, urinated off the terrace of a Bratislava restaurant [...] onto the pavement. For publishing this information, [D.] wants to sue our paper and claim 1,000,000 [Slovakian korunas]. We bring you now the account of an eyewitness

to [D.'s] running wild on Monday: 'I was sitting with my friends at the bar. [D.] arrived with a man who claimed to be a high-ranking police officer. [D.] came up to the bar, obviously under the influence, ordered two beers and [the two] went to sit on the terrace. [...] On the terrace, they were served by a waitress. They were drinking cognac. After a while one man who had been sitting with them left and said that the policemen had wet [himself] on the chair. The policeman himself then walked from the terrace to the interior of the restaurant and we really saw that he was completely wasted. He came back a moment later and fell asleep in his chair'. The witness added, 'the policeman also told [D.]: 'I will ensure that there are civic disturbances within two weeks, don't worry about anything, but you have to provide me with support'. [D.] rejoined: 'Don't worry, you are under my protection.' We laughed at that because [D.] must have misunderstood the meaning of support, since he started urinating off the terrace. [He] and the policeman were holding each other up. The concrete railing is relatively high, so he had difficulty, he was standing on tip toes, he was doing what he could', the [witness] recalls as [D.] answered the call of nature. [...] [The witness] also recalls that the policeman's head had dropped and had had to be supported by a plastic chair [...]. [The paper] has found out that [D.] was in fact in the company of a high-ranking police officer. His identity is known to our paper."

23. On 23 June 1999 the paper printed an article entitled "[The Minister of the Interior] has entrusted the investigation of the scandal to the Police Inspection Service. [D.] went on the rampage with the police vice-president". The article included the following text:

"[The paper] has established the identity of the high-ranking police officer who accompanied the leader of [the political party] [D.] to the restaurant last week [...]. [D.] went on the rampage in this establishment with the vice-president of the police [corps], colonel [E.]. Shortly after the incident the president of the [political party] declined to disclose the identity of the man, identifying him in the media as a friend. The Minister of the Interior [...] has already charged the Police Inspection Service with investigating the scandal. 'I cannot believe things went that far. If they did, then I will act according to the findings of the investigation. Everyone is the master of their own fate' the Minister stated for the paper. He did so in reply to our question as to whether the vice-president would be removed from office should the information that we had been published in our daily be confirmed. Let us be reminded that, according to an eyewitness to the incident, the president of [the political party] and the vice-president of the police [corps] were drinking cognac on a terrace. 'After a while one man who had been sitting with them left and said that the policeman had wet [himself] on a chair. The policeman himself then walked from the terrace to the interior of the restaurant and we really saw that he was completely wasted', the witness recalled. According to him, the vice-president [E.] also held [D.] up when the latter, standing on tip toes, urinated off the terrace onto the pavement. The witness likewise heard [E.] suggest to [D.] that within two weeks he would ensure that there were civic disturbances. [He] asked the president of [the political party] for 'support'. [E.] confirmed to the paper yesterday that he had been drinking in [the restaurant] with [D.]. However, he refutes the claim that he had wet [himself]. He also claims that he has never planned any civic disturbances with [D.]. The president of the police stated for the paper that: 'If it were proven that what you have written is true, I, as president [of the police corps], would be very sorry. That's all I have to say.'"

24. The articles mentioned above were also published in the on-line version of the newspaper on 16, 22 and 23 June 1999.

25. Some of the information from the articles mentioned above was used in an article published on 24 June 1999 in a newspaper in the Czech Republic entitled: “[D.] did not urinate onto the people alone, he was assisted by the vice-president of the police force”.

D. Libel action

1. The action

26. On 21 March 2001 E. sued A. in civil courts for libel, demanding publication of a correction and an apology and claiming the equivalent of some 23,000 euros (EUR) in compensation for damage to his reputation.

27. E. admitted having been at the restaurant and having consumed alcoholic beverages in a moderate quantity with D. at the given time but contested the truthfulness of all the other facts alleged in the articles. He argued that his personal integrity had been interfered with and that he had been falsely discredited, in particular in the sphere of his service ranking, his civic dignity and his family life.

2. First instance

28. On 18 October 2001, 16 September 2002, 31 October 2002, 16 December 2002 and 12 June 2003 the Žilina District Court (*Okresný súd*) held hearings. At the latter hearing, the District Court invited the parties to adduce further evidence and instructed them that once the evidence-taking was closed, they would have only a limited possibility to adduce further evidence in the event of an appeal. The parties declared that they had no further evidence to adduce, following which the evidence-taking was closed and a judgment was given.

29. In the judgment of 12 June 2003 the District Court found for the claimant. It ordered A. to publish in the above-mentioned newspaper an article correcting the inaccurate information, accepting that such information was false and apologising to E.

A. was also ordered to pay the amount claimed (see paragraph 26 above) together with the claimant’s legal costs.

30. The District Court had examined testimonies by D., his driver G., the claimant’s wife, B., C., F., another diner at the restaurant, H., and two other witnesses.

31. The District Court had also examined the contents of the court file concerning the libel action by D. on the basis of the same facts and the case file concerning disciplinary proceedings against E.

Reports by the National Institute of Meteorology and a sworn expert on toxicology had also been taken into account.

32. The District Court considered untrustworthy the submissions of B. and C., the authors of the articles, one of whom had witnessed a part of the reported incident, and F., on whose statements B. and C. had mostly relied.

33. The District Court considered that D., E. and the remaining witnesses either did not confirm or actually contested the reported facts as to the behaviour of D. and E.

34. In conclusion, A. had failed to establish the truthfulness of the facts and the articles could not be considered a justified critique.

35. The District Court observed that there were opposing interests at stake, in particular, the freedom of expression under Article 10 of the Convention and the right to respect for private life under Article 8 of the Convention.

36. Weighing the right of E. to have his personal integrity protected against the right of A. to freedom of expression, the District Court found that the articles had significantly, and without acceptable justification, damaged E.'s position in his employment, family and society in general.

3. Appeal

37. A. appealed, arguing that the District Court had erred in the assessment of the facts and in the application of the law. In particular, the District Court had failed to explain why it considered untrustworthy the evidence of B., C. and F. It also contended that the District Court had arbitrarily considered H., who had had no clear recollection of the relevant events, to be the key witness for the defence, while the key witness had in fact been F., who confirmed that E. had been intoxicated, that he had spoken of receiving protection [from D.], that E.'s head had dropped and had to be supported by a plastic chair and that E. had had a damp patch on his trousers, giving the impression that he had urinated in them.

A. requested that the discrepancy in the testimonies be explained by means of a face-to-face witness meeting.

38. The Žilina Regional Court (*Krajský súd*) called a hearing of the appeal for 3 February 2004. A. was summoned through the intermediary of its lawyer but excused itself and agreed to the hearing's taking place in its absence.

39. On 3 February 2004 the Regional Court held a hearing at which it questioned the claimant (see paragraph 44 below). Neither A. nor its lawyer was present.

40. Following the hearing, on the same day, the Regional Court upheld the first-instance judgment but reduced the amount of damages to the equivalent of some EUR 12,250.

41. The Court of Appeal found that neither B. nor C. nor F. had seen or directly testified that E. had urinated in his trousers, that he had incited civic disturbances and that he had held D. up while the latter had urinated from the terrace of the restaurant.

42. The Court of Appeal relied on the principle of “truthfulness of information”, consisting of the following elements. Information intended for publication was to be verified by at least two but ideally more credible and mutually independent sources with care adequate to the circumstances. The law could only protect the journalists if they could establish the truthfulness of the impugned material as well as their *bona fides* in publishing it and the presence of a public interest in the matter.

43. Under the applicable procedural rules it was not permissible at the appellate stage to take new evidence, at the request of the parties, which had not been adduced at the first-instance level. The Court of Appeal found that it therefore could not call a face-to-face witness meeting as requested by A. It followed that, in the given evidentiary situation, the conclusions of the first-instance court as to the essence of the claim were justified.

44. However, the Court of Appeal considered the existing evidence insufficient to justify the award of damages made by the first-instance court. It was therefore necessary to take new evidence of the court’s own motion by hearing the claimant and, eventually, to reduce the amount of the award. It held it established that the greatest loss that the claimant had suffered had been in the area of his employment.

E. Constitutional complaint

45. On 7 October 2004 the applicant company lodged a complaint under Article 127 of the Constitution with the Constitutional Court (*Ústavný súd*), directed against the decision of the Court of Appeal.

46. The applicant company pointed out that the Court of Appeal had considered as decisive whether or not the defendant could establish the truthfulness of the reported facts. This was, however, not compatible with the principle of freedom of expression, which also extended to untrue information.

47. The applicant company submitted that B. had verified the facts by witnessing the incident in person and that B. and C. had verified the facts by interviewing witness F. and the claimant. They had thereby acted *bona fides* and in accordance with journalistic ethics. What also was of relevance was that the claimant had been a public figure. The ordinary courts, however, had completely omitted to carry out an assessment of these essential components of the concept of freedom of expression.

48. The applicant company considered the amount of the damages awarded to be excessive, referring to the judgment of the Court in the case of *Marônek v. Slovakia* (no. 32686/96, ECHR 2001-III), where the equivalent of some 5,850 European Currency Units worth of damages in a libel case had been considered excessive.

49. The applicant company contended that it had been incompatible with the guarantees of a fair trial and, in particular, the equality of arms principle

for the Court of Appeal to base its ruling on damages solely on the additional evidence provided by the claimant, as this evidence had not been adduced by the parties, it had served only one of the parties and – as it had been taken at the appellate level – the defendant had had no opportunity to contest it. Moreover, this evidence was not impartial by definition and the Court of Appeal had failed to corroborate it by other evidence, which was contrary to the established judicial practice.

50. As regards the finding that the claimant's greatest loss had been in the sphere of his employment, the Court of Appeal had failed to take into account that the disciplinary proceedings against the claimant had in fact ended in his favour.

51. According to the applicant company, the ordinary courts had erred in the assessment of the witness evidence, in particular that provided by F., by arbitrarily selecting elements benefiting the claimant. In so far as the testimony of F. was concerned, in addition, the ordinary courts had failed to support their findings with adequate reasoning.

52. On 16 March 2005 the Constitutional Court declared the complaint inadmissible. Observing that it was not a court of a third or fourth instance, the Constitutional Court found no indication of any unlawfulness or constitutionally relevant arbitrariness in the proceedings and decisions of the Court of Appeal. As to the complainant's specific argument that the Court of Appeal had taken new evidence (see paragraph 44 above) without informing the complainant and giving it an opportunity to comment, the Constitutional Court found that the complainant had failed to exhaust ordinary remedies by raising this argument by way of an appeal on points of law under Article 237 (f) of the Code of Civil Procedure (Law no. 99/1963 Coll., as amended – "the CCP").

The decision of the Constitutional Court was served on the applicant company on 28 April 2005.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution (Constitutional Law no. 460/1992 Coll., as amended)

53. The status of international human rights treaties in Slovakia is defined in Article 7 § 5, the relevant part of which reads as follows:

"International treaties on human rights and fundamental freedoms which have been ratified and promulgated in the manner required by statute take precedence over statute."

54. Article 144 § 1 provides that:

“In the discharge of their function, judges are independent and, in decision-making, they are only bound by the Constitution, constitutional law, international treaties under Article 7 § 5 [of the Constitution] and statute.”

B. Civil Code (Law no. 40/1964 Coll., as amended)

55. The protection of personal integrity is governed by the provisions of Articles 11 et seq. In so far as relevant, these provide:

“Article 11

Every natural person shall have the right to protection of his or her personal integrity, in particular his or her ... civil honour and human dignity, as well as privacy, name ...

...

Article 13

1. Every natural person shall have the right, inter alia, to request an order restraining any unjustified interference with his or her personal integrity, an order cancelling out the effects of such interference and an award of appropriate compensation.

2. If the satisfaction afforded under paragraph 1 of this Article is insufficient, in particular because the injured party's dignity or social standing has been considerably diminished, the injured party shall also be entitled to financial compensation for non-pecuniary damage.

3. When determining the amount of compensation payable under paragraph 2 of this Article, the court shall take into account the seriousness of the harm suffered by the injured party and the circumstances in which the violation of his or her rights occurred.”

C. Code of Civil Procedure (Law no. 99/1963 Coll., as amended)

56. The Code regulates the conduct of the court and parties in civil proceedings so as to ensure the just protection of the rights and legally recognised interests of the parties as well as promoting the observance of laws, honest fulfilment of duties and respect for the rights of other persons (Article 1).

57. Article 18 it provides that parties to civil proceedings have equal standing. The court is duty-bound to ensure they have equal opportunity to assert their rights.

58. Parties to the proceedings have the right to comment on any evidence adduced and taken (Article 123).

59. Under Article 228 § 1 (d), civil proceedings can be reopened where the Court has found a violation of the requesting party's Convention rights and where serious consequences of the violation have not been adequately redressed by the award of just satisfaction.

60. A Court of Appeal can in principle reassess evidence or take further evidence provided that it can be done without delay (Article 213 § 2, as in force at the relevant time).

61. Under Article 236 an appeal on points of law (*dovolanie*) lies against final and binding decisions of appellate courts if certain statutory admissibility criteria are met.

62. The general admissibility criteria, that is, those applicable to both judgments (*rozsudok*) and resolutions (*uznesenie*), are set out in Article 237.

These comprise situations where: (a) the courts decided in a matter outside their jurisdiction; (b) a person who acted as a party to the proceedings lacked the legal capacity to be a party to court proceedings; (c) a party to the proceedings lacked the capacity to act in court proceedings and was not duly represented; (d) the courts decided on a matter which had been *res iudicata* or which had already been pending in other proceedings (*lis pendens*); (e) the proceedings could only commence by way of an action and no such action was actually filed; (f) the courts prevented a party to the proceedings from acting before them; and (g) where the case was decided upon by an excluded judge or where the composition of the court was incorrect.

63. In addition to the above-mentioned general admissibility criteria, special admissibility criteria apply if the Court of Appeal decided in the form of a judgment. These are defined in Article 238.

64. Under paragraph 1 of Article 238 an appeal on points of law is admissible where the appellate court overturned the judgment of a first-instance court.

65. In accordance with paragraph 2 of Article 238, an appeal on points of law also lies against a judgment of the appellate court in which the latter did not follow the binding legal view previously expressed in the same matter by the court of cassation.

66. Under Article 238 § 3 (a), an appeal on points of law is also admissible against a judgment of an appellate court in which it upholds a judgment of a first-instance court and, at the same time, rules that such an appeal is admissible as the case concerns a matter of particular legal importance.

67. Finally, under Article 238 § 3 (b), an appeal on points of law is also admissible against a second judgment of an appellate court in which it upholds a second judgment of a first-instance court if, in the second round, the first-instance court decided differently than in its first judgment (which had been quashed by the first decision of the Court of Appeal) because it was bound by the legal view expressed by the Court of Appeal in its first

judgment. This rule also applies to the third and, as the case may be, subsequent judgments of the Court of Appeal.

68. As to the merits, an appeal on points of law can only be based on the grounds defined in Article 241 § 2, that is to say that the proceedings have been vitiated by an error envisaged in Article 237 (letter (a)), that the proceedings have been vitiated by another error that resulted in an incorrect decision on the merits (letter (b)) and that the decision rests on an error of law (letter (c)).

69. In a decision of 23 July 2003 in an unrelated case no. IV. ÚS 130/03, the Constitutional Court observed that, in relation to evidence-taking, the right to a fair hearing under Article 6 § 1 of the Convention was to be understood so that a party to the proceedings must be provided with the opportunity to take part in the evidence-taking in a manner defined by statute, which means to adduce evidence, to be present when the evidence is being taken, including the right to interview witnesses and parties, and to take a position in respect of evidence adduced and taken. For that reason a party to the proceedings must always have the opportunity to be present at the evidence-taking. Should that not have been the case, the error can be qualified as “judicial conduct that has prevented the party from acting before a court”, thereby constituting a ground for admissibility of an appeal on points of law under Article 237 (f) of the CCP.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

70. The applicant company complained under Article 10 of the Convention that the ordinary courts had (i) incorrectly required its legal predecessor to prove the absolute truthfulness of the published information, (ii) failed to assess the situation under the established criteria, (iii) found arbitrarily against the applicant’s legal predecessor, and (iv) awarded an excessive amount of damages. Article 10 of the Convention 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.”

A. Admissibility

71. The Government objected, arguing that, in so far as the applicant company had contested the amount of adjudicated damages, it had failed to fulfil the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention. In particular, the Government pointed out that, by reducing, in its judgment of 3 February 2004, the amount of the adjudicated damages, the Regional Court had in fact overturned the first-instance judgment, which constituted grounds for appealing against that judgment on points of law under Article 238 § 1 of the CCP. The applicant company had not, however, made use of that remedy.

72. In reply, the applicant company disagreed and submitted that, in fact, the decision of the Court of Appeal did not amount to a substantive overturning of the first-instance order for payment of damages. The substance of the order had been upheld and what had been modified was merely the scope of the order. To the extent that the claim for damages had been allowed by the Court of Appeal, that court’s decision in fact amounted to upholding the first-instance judgment and could not be appealed against on points of law. In so far as the Court of Appeal disallowed the claim for damages, its decision had in fact been favourable to the applicant company and, by the nature of things, the applicant company had no standing to appeal against such decisions on points of law.

73. The applicant company also submitted that the judgment of 3 February 2004 could not be appealed against on points of law on the basis of Article 237 (f) of the CCP either since only procedural errors that were in violation of a specific statutory procedural rule could be appealed against on points of law. The applicant company considered that no specific statutory procedural rule had been breached in the case of its legal predecessor.

74. The Court notes that in the first-instance judgment of 16 September 2002 A. was ordered to pay damages worth the equivalent of some EUR 23,000 (see paragraphs 26 and 29 above) and that in the judgment of the Court of Appeal of 3 February 2004 the amount of damages was reduced to the equivalent of some EUR 12,250 (see paragraph 40 above).

75. The Court observes that, as regards the allowed part of the claimant’s action for damages, the Court of Appeal found that the existing evidence was insufficient to justify the award of damages made by the first-instance court (see paragraph 44 above). The Court of Appeal therefore took new evidence on which – in its absence - A. had had no opportunity

to comment (see paragraph 39 above). Nevertheless, the Court of Appeal went on to adjudicate on the damages (see paragraph 40 above).

76. At the same time, the Court takes notice that in its decision of 16 March 2005 the Constitutional Court found that it could not examine the matter on account of the applicant company's failure to raise it first by way of an appeal on points of law under Article 237 (f) of the CCP (see paragraph 52 above).

77. In this context, the Court observes that under Article 237 (f) of the CCP a decision of a Court of Appeal can be appealed against on points of law where the courts prevented the party concerned from acting before them.

78. The Court also notes that under Articles 1 and 18 of the CCP, it is part of the purpose of the proceedings and is indeed the statutory duty of the courts to ensure just protection of the rights and legally recognised interests of the parties and equal opportunity to assert their rights.

More specifically, under Article 123 of the CCP, parties to the proceedings have the right to comment on any evidence taken.

79. The Court further observes that under Article 144 § 1 in conjunction with Article 7 § 5 of the Constitution, in the discharge of their function, judges are bound not only by national legislation, but also by international human rights treaties, which take precedence over statute, if ratified and promulgated in the manner required by statute.

80. In view of this constitutional and statutory framework and the fact that it only has a limited power to review questions of compliance with national law (see, *mutatis mutandis*, *Beyeler v. Italy* [GC], no. 33202/96, § 108, ECHR 2000-I)), the Court accepts the conclusion of the Constitutional Court in its decision of 16 March 2005 that the applicant company could have arguably challenged the judgment of 3 February 2004 by way of an appeal on points of law under Article 237 (f) of the CCP as regards the allowed part of the claim for damages.

81. It follows that, irrespective of availability of an appeal on points of law under Article 238 § 1 of the Convention, the specific complaint concerning the amount of damages must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

82. The Court further notes that the applicant company's remaining Article 10 complaints, in particular those alleging that the domestic courts had incorrectly required its legal predecessor to prove the absolute truthfulness of the published information; that they had failed to assess the situation under the criteria stemming from the Convention case-law; and that they had arbitrarily found against the applicant's legal predecessor, concern the merits of the case and, as such, can be severed from and examined independently of the question of damages.

83. The Court considers that these remaining Article 10 complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' arguments

84. The applicant company complained that the domestic courts had examined the libel action against its legal predecessor by applying an incorrect test and had arbitrarily found for the claimant.

85. The Government did not contest that the impugned judgments constituted an interference with the applicant company's rights under Article 10 of the Convention and submitted that it had been prescribed by law, in particular by the relevant provisions of the Civil Code, that it had followed the legitimate aim of protecting the reputation or rights of others and that it had been necessary in a democratic society.

86. As to the latter criterion, in the Government's view, the articles in question had amounted to statements of fact and the domestic courts had duly examined whether the facts contained therein had been true and capable of interfering with the claimant's personal integrity. They rightly assessed the available evidence and concluded that the claimant's right had outbalanced that of A.

87. The Government also considered that A. had had ample opportunity to adduce further evidence to support its case.

88. Lastly, the Government submitted that the present case was to be distinguished from that of *Bladet Tromsø and Stensaas v. Norway* ([GC], no. 21980/93, ECHR 1999-III) in that A. itself was the author of the contested articles and in that the articles did not concern a current issue of public debate but were aimed at stirring up a scandal.

89. In reply, the applicant company did not contest that the interference complained of had been prescribed by law and had followed a legitimate aim. However, it contended that the interference had not been necessary in a democratic society.

90. For that matter, accepting that the articles in question contained predominantly statements of fact, the applicant company relied on the *Bladet Tromsø and Stensaas* judgment (cited above) and argued that truthfulness of published information was not a precondition for journalists to enjoy the protection of Article 10 of the Convention. The availability of that protection depended on criteria established by the Court's case-law, none of which had, however, been examined by the domestic courts, their analysis having been reduced to the simple test of truthfulness.

91. In conclusion, the applicant company argued that the articles in question concerned a topic of legitimate public concern and contributed to the public debate. The journalists involved had spared no effort that could legitimately have been expected of them to verify the information published and had acted in good faith with a view to providing the public with accurate and credible information. Last, but not least, the claimant had been given opportunity to express his position shortly after the events.

2. *The Court's assessment*

(a) **Interference, legality and legitimate aim**

92. The Court finds, and it has not been disputed between the parties, that the judgments of the District Court and the Regional Court in the action brought by E. for protection of his personal integrity constituted an interference with the right of the applicant company's legal predecessor to freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

93. Furthermore, the Court finds, and it has likewise not been disputed by the parties, that the interference complained of was prescribed by law, namely, Articles 11 *et seq.* of the Civil Code, and that it pursued the legitimate aim of protecting the reputation and rights of others.

Thus the only point in issue is whether the interference was "necessary" in a "democratic society".

(b) **Necessity**

94. In that respect, at the outset, the Court reiterates that the freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, *inter alia*, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such 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, for instance, *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216).

95. The right to freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any section of the community. In addition, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *De Haes and Gijssels v. Belgium*, 24 February 1997, § 47, *Reports of Judgments and Decisions* 1997-I).

96. The Court also reiterates the distinction between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof (see, for instance, *Feldek v. Slovakia*, no. 29032/95, §§ 75-76, ECHR 2001-VIII; *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II; *De Haes and Gijssels*, cited above, § 47; and *Oberschlick v. Austria (no. 2)*, 1 July 1997, § 33, *Reports* 1997-IV).

97. However, Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it “duties and responsibilities”, which also apply to the press. By reason of the “duties and responsibilities” 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. Furthermore, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (see, for example, *Standard Verlagsgesellschaft mbH v. Austria (no. 2)*, no.37464/02, § 38, 22 February 2007).

98. As to the test of “necessity in a democratic society”, the Court reiterates that it requires the Court to determine whether the interference complained of corresponded to a “pressing social need”. In assessing whether such a “need” exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see, for example, *Bezmyanny v. Russia*, no. 10941/03, § 36, 8 April 2010 and *Radio Twist, A.S. v. Slovakia*, no. 62202/00, § 49, ECHR 2006-XV).

99. The Court’s task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I and *Feldek v. Slovakia*, no. 29032/95, § 73, ECHR 2001-VIII).

100. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or 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. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were relevant and sufficient and whether the measure taken was proportionate to the legitimate aims pursued. In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10. The Court must also ascertain whether the domestic authorities struck a fair balance between the protection of freedom of expression as enshrined in Article 10 and 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 (for a recapitulation of the relevant principles, see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 89 – 91, ECHR 2004-XI and also *Marónek*, cited above, § 53).

(c) Application of the general principles in the present case

101. The Court observes that in the present case the applicant company's legal predecessor was sued for libel by E., an individual directly concerned by the articles published. The domestic courts determined his action under a doctrine of "truthfulness of information" which essentially consisted of determining whether, as a matter of fact, the information contained in those articles was true (see paragraph 42 above). It was with reference to this criterion that evidence was taken and assessed and legal conclusions were drawn.

102. The Court also observes that in so far as the Regional Court, in its judgment of 3 February 2004, referred to other constituting elements of the doctrine applied, such as the good faith of the journalists and the presence of a public interest in the matters they had reported on, it does not appear that any relevant analysis was conducted or any specific judicial conclusions drawn on the basis of such elements.

103. More specifically, the Court notes that the domestic courts do not appear to have examined, either in form, or in substance, whether the "duties and responsibilities" within the meaning of Article 10 § 2 of the Convention were observed on the part of the applicant company's legal predecessor. In particular, in fact, the domestic courts have in no way examined on the facts or in the law whether the articles were published in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.

104. In so far as the Government sought to distinguish the present case from that of *Bladet Tromsø and Stensås* (cited above), the Court observes that the defamation proceedings in that case concerned a newspaper article containing factual statements not emanating from the newspaper itself but from a report commissioned by the authorities, while the newspaper had

taken no independent steps to verify its contents. The Court examined whether, in that case, there were any special grounds for dispensing the newspaper from its ordinary obligation to do so. In the Court's view, that depended on, in particular, the nature and degree of the defamation at hand and the extent to which the newspaper could reasonably regard the report as reliable with respect to the allegations in question. The latter issue had to be determined in the light of the situation as it presented itself to the newspaper at the material time, rather than with the benefit of hindsight, on the basis of the findings of fact made by a commission of inquiry a long time thereafter (see *Bladet Tromsø and Stensaas*, cited above, § 66).

105. The Court acknowledges that the present case differs from *Bladet Tromsø and Stensaas*, in particular in that the information published by the applicant company's legal predecessor did not emanate from an external source but was, rather, established by its own reporters. However, unlike in that case, the applicant company's legal predecessor in the present case did take independent steps to verify the facts through its reporters, B. and C., who visited the location of the incident and interviewed its witnesses and the claimant. It therefore remained to be established whether these steps were in accordance with its "duties and responsibilities" within the meaning of Article 10 § 2 of the Convention.

106. The Court observes that, according to its case-law, an examination of the case under the latter criteria would involve individual and contextual assessment, with reference to the situation at the time when the impugned articles were published, of such complex matters as, for example, the importance of the public interest at stake in correlation with the status of E., as contrasted to the status of D., the extent to which E. was involved in preparing the articles, the necessity of disclosing the identity of E., the *bona fides* of the applicant company's legal predecessor, the genuine aim it had followed in publishing the articles and the adequacy of the efforts on the part of the applicant company's legal predecessor to verify the veracity of the information published from the perspective of the ethics of journalism.

107. In this connection, the Court reiterates that, in view of the subsidiary nature of its role, it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. It is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and as a general rule it is for those courts to assess the evidence before them (see *Europapress Holding d.o.o. v. Croatia*, no. 25333/06, § 62, 22 October 2009).

108. The Court acknowledges that the behaviour in public, while off duty, of officials and civil servants vested with public authority may arguably attract public interest.

109. However, the Court considers that it was crucial that the domestic courts make a careful assessment of the presence and level of public interest

in the publishing of the impugned information in the present case as well as strike a balance between any such public interest and the individual interests of those concerned since, as a matter of principle, domestic courts are better equipped to establish the facts relevant to the ensuing legal analysis. This also applies to the issue of the *bona fides* of the applicant company's legal predecessor and other aspects of the case that are necessary for establishing whether the applicant company's legal predecessor had acted in accordance with the "duties and responsibilities" inherent in Article 10 § 2 of the Convention.

The Court considers that by failing to examine these elements of the case, the domestic courts cannot be said to have "applied standards which were in conformity with the principles embodied in Article 10" and to have "based themselves on an acceptable assessment of the relevant facts" (see *Kommersant Moldovy v. Moldova*, no. 41827/02, § 38, 9 January 2007).

110. The foregoing considerations are sufficient to enable the Court to conclude that the legal protection received by the applicant company's legal predecessor at the domestic level was not compatible with the requirements of Article 10 of the Convention. There has accordingly been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

111. The applicant company complained that the proceedings had been unfair in that the judgments were one-sided in favour of the claimant, in that the judgments were supported by reasons which were contradictory and as such inadequate and in that the principle of equality of arms had not been respected in the proceedings in as much as new evidence (the claimant's additional submission) had been taken without being proposed by the parties, benefiting solely the claimant and depriving the applicant's legal predecessor of the possibility to reply (see paragraph 44 above).

The applicant company relied on Article 6 § 1 of the Convention, the relevant part of which provides:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Parties' arguments

112. The Government objected, arguing that the applicant company had failed to satisfy the requirement of Article 35 § 1 of the Convention to exhaust domestic remedies in that it had failed to assert its rights at the domestic level by way of an appeal on points of law under Article 237 (f) of the CCP.

113. In respect of the additional evidence taken by the Court of Appeal at the hearing of the appeal of the applicant company's legal predecessor, the Government pointed out that the applicant company's legal predecessor had been duly summoned to that hearing, that it had excused itself and that it had agreed to the hearing's taking place in its absence (see paragraph 39 above). Moreover, as the Government submitted, the Court of Appeal had acted in compliance with the applicable law, in particular Article 213 § 2 of the CCP (see paragraph 60 above), which allowed for that court to reassess and take new evidence.

114. In reply, the applicant company disagreed and raised similar arguments as in connection with the complaint under Article 10 of the Convention (see paragraphs 72 and 73 above).

B. The Court's assessment

115. The Court reiterates that, in accordance with Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references).

116. The Court considers that, similarly as in respect of the Article 10 complaint (see paragraphs 81 and 82 above), in the specific circumstances of the present case a distinction is to be made between the part of the proceedings leading up to the substantive outcome of the action and the part leading up to the domestic court's ruling concerning damages.

1. Substantive outcome of the action

117. As to the substantive outcome of the action, Court observes that it was determined by the domestic court's ruling ordering the applicant company's legal predecessor to publish an article correcting the inaccurate information, accepting that such information was false and apologising to E. (see paragraphs 29 and 40 above).

The Court also notes, specifically, that the substantive outcome of the action was not affected by the taking of additional evidence at the appellate stage, which solely concerned the ruling on damages.

118. In connection with the substantive outcome of the action, the Court finds that the facts of the case do not disclose any appearance of a violation of Article 6 § 1 of the Convention.

It follows that the relevant part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. *The ruling on damages*

119. As to the fairness of the proceedings in so far as the ruling on damages is concerned, the Court observes that it has found above (see paragraph 81) that a complaint under Article 10 of the Convention of the outcome of these proceedings was inadmissible for non-exhaustion of domestic remedies.

For the same reasons, the reminder of the application must likewise be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

120. 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.”

121. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 10 of the Convention concerning the substantive outcome of the action against the applicant company’s legal predecessor admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 10 of the Convention.

Done in English, and notified in writing on 26 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President