



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

THIRD SECTION

CASE OF FRĂSILĂ AND CIOCÎRLAN v. ROMANIA

(Application no. 25329/03)

JUDGMENT
(Extracts)

STRASBOURG

10 May 2012

This judgment is final but it may be subject to editorial revision.

In the case of Frăsilă and Ciocîrlan v. Romania,

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

Josep Casadevall, *President*,

Alvina Gyulumyan,

Egbert Myjer,

Ineta Ziemele,

Luis López Guerra,

Mihai Poalelungi,

Kristina Pardalos, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 10 April 2012,

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

PROCEDURE

1. The case originated in an application (no. 25329/03) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Romanian nationals, Mr Petru Frăsilă and Ms Lucica Ciocîrlan (“the applicants”), on 1 July 2003.

2. The applicants were represented by Mr D. Tomaşeschi, a lawyer practising in Iaşi, and subsequently by Mr D. Bogdan and Mr M. Selegan, lawyers practising in Bucharest. The Romanian Government (“the Government”) were represented by their Agent, Ms I. Cambrea, of the Ministry of Foreign Affairs.

3. Corneliu Bîrsan, the judge elected in respect of Romania, withdrew from sitting in the case (Rule 28 of the Rules of Court). The President of the Chamber accordingly appointed Mihai Poalelungi to sit as *ad hoc* judge in his place (Article 26 § 4 of the Convention and Rule 29 § 1).

4. The applicants alleged, in particular, that their freedom of expression had been breached on account of the fact that they had not been assisted by the national authorities in enforcing a final decision of 6 December 2002 which ordered third parties to allow them access to the premises of a local radio station, and that they had thus been prevented from working as journalists.

5. On 11 February 2008 the application was communicated 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

6. The first applicant was born in 1957 and lives in Piatra-Neamț (Romania); the second was born in 1972 and lives in Jakobstad (Finland). They are both journalists.

A. Background to the case

7. In 1995 the first applicant set up the limited corporation Tele M, whose registered purpose was the production and broadcasting of radio and television programmes. The first applicant was the majority shareholder and manager. The company obtained broadcasting licence no. 246/1997 and was granted television operation rights for the Neamț region.

8. In 1999 the first applicant set up the private limited liability company Radio M Plus, whose main registered purpose was the production of audiovisual programmes. The first applicant was its sole shareholder and manager. A change in share capital in 2000 reduced his interest to 20%.

9. The first applicant's intention was to separate the television activities from those of radio broadcasting, with Radio M Plus dealing solely with the latter. Pending the change in audiovisual legislation which would enable the assignment of the radio-broadcasting licence (amendment finally adopted on 8 August 2002), the relevant activities were divided between Radio M Plus, which produced the radio programmes, and Tele M, which was responsible for broadcasting. The equipment necessary for the radio activity (including broadcasting) belonged to the company Radio M Plus.

10. In January 2002 the television station Tele M broadcast two documentaries; one concerned a protégé of I.T. who was wanted by the police, and the other was about one of I.T.'s business ventures, namely a hotel where traces of mercury had been found in food. In the first applicant's submission, after those two documentaries I.T. threatened to make his companies insolvent as a result of inspections by the financial authorities. According to the information provided by the first applicant, I.T. was at the time a member of parliament affiliated to the party in power, and was referred to in the press as a "local baron".

11. On 25 January 2002 the local financial authorities of Piatra-Neamț attempted to carry out an unannounced inspection at the head offices of Tele M. In view of the first applicant's opposition, he was fined by the financial authorities. The fine was, however, subsequently annulled, because it had been imposed, according to the applicant, in breach of the statutory provisions which required giving 15 days' notice to the company concerned before an inspection could be carried out. An inspection was subsequently

carried out, however, and the authorities found that the company owed significant amounts to the State budget. An agreement for the staggered repayment of the sums due was entered into with the first applicant. In his submission, the inspection had followed a request made by I.T. to V.M., who was head of the local public finance directorate and who, at the time, was an associate of I.T. in a number of commercial companies.

12. The first applicant explained that, having regard to the high amount of the aggregate debt and the fact that it was repayable immediately, and in order to avoid insolvency, he had been persuaded to sell his majority interest in the company Tele M. to I.T. and to the company I., which belonged to the wife and son of V.M. He thus ceased to be a shareholder on 1 August 2002. On the same day the applicant was dismissed from his duties as manager of the company.

13. On the same day, the company Radio M Plus, of which the first applicant was still the manager, and the company Tele M, set up a partnership for the production and broadcasting of radio programmes. Under the partnership agreement, Tele M was to provide movable and immovable property, programmes, licences and contracts, whilst Radio M Plus was to provide specialised equipment, financial resources and programmes, and was to take charge of the management. In accordance with the technical broadcasting permit of 16 September 1998, issued by the Communications Ministry, the radio station Radio M Plus was to broadcast from its head office at 80, Stefan cel Mare, Piatra-Neamţ.

14. In a decision of 2 August 2002, the company Radio M Plus appointed the first applicant as manager of the partnership. The radio activities were located on the second floor of the building at 80, Stefan cel Mare, Piatra-Neamţ, which housed studios for production and for radio broadcasting, and one for guests.

15. The second applicant was the radio station's editor and, from 1 October 2002, its programme director.

B. The applicants' urgent proceedings concerning their access to premises used for radio services

16. From 2 October 2002, following certain disagreements between the representatives of the two above-mentioned companies, the applicants were denied access to the radio station's newsroom by representatives of Tele M.

17. On 16 October 2002 the applicants brought urgent proceedings seeking a right of access to the radio station's newsroom.

18. In a decision of 6 December 2002 the Neamţ County Court upheld the applicants' claim and ordered Tele M to give them access to the newsroom of Radio M Plus, at 80, Stefan cel Mare, Piatra-Neamţ. This decision was upheld at last instance by the Bacău Court of Appeal, on 11 March 2003. The courts noted, in particular, that the head offices of

Radio M Plus and Tele M were located in the same building and that the companies were therefore entitled to make use of it for their activities. They concluded that the barring of the applicants from the radio's newsroom by Tele M. constituted an unlawful action that was likely to cause prejudice to the activities of the radio station, in which the applicants held the posts of manager and editor, respectively.

C. Steps taken by the applicants to enforce the Neamț County Court's final decision of 6 December 2002

19. On 7 January 2003, on the applicants' request, the Piatra-Neamț Court of First Instance ordered the enforcement of the Neamț County Court's decision of 6 December 2002.

20. On 14 January 2003 a bailiff accompanied the applicants to the radio station's head office. The representative of the company Tele M denied the applicants access to the second floor of the building, explaining that the newsroom had been transferred to the ground-floor of the building, to a room where they were received. Only the bailiff was able to visit the rooms on the second floor where the special equipment was located.

21. On 18 March 2003 the applicants reiterated their request for the enforcement of the final decision of 6 December 2002, as in the meantime an appeal by the defendant against that decision had been dismissed.

22. A fresh attempt at enforcement took place on 12 May 2003, but was unsuccessful. On that occasion, the bailiff noted that the decision to be enforced was clear and that it was not necessary to initiate court proceedings in order to clarify the meaning and scope of its operative provisions.

23. On 24 January 2003, on account of their inability to exercise their profession as journalists, following the refusal by Tele M to allow them access to the radio's newsroom, the applicants filed a criminal complaint with the public prosecutor for opposition to the enforcement of a final decision. On 8 July 2003 the public prosecutor at the Piatra-Neamț Court of First Instance gave a decision discontinuing the proceedings, finding that the dispute actually concerned the implementation of the partnership agreement signed on 1 August 2002. On 30 January 2004 the Principal Public Prosecutor confirmed the discontinuance.

24. On 23 February 2004 the applicants lodged an urgent application requesting the courts to order Tele M to comply with the partnership agreement of 1 August 2002 and, for that purpose, to hand over to them any radio production and broadcasting equipment that was necessary for the implementation of that agreement. They further sought an order that the company be fined 2 million Romanian lei (ROL) per day of non-compliance.

25. In a final decision of 12 October 2004 the Sibiu County Court dismissed the application, finding that it concerned the merits of the

question of the performance of the agreement rather than a temporary or urgent situation justifying an immediate injunction.

26. On 25 October 2004 the company Tele M returned to the company Radio M Plus the equipment of which the latter was the owner.

27. On 25 March 2005 the first applicant filed a criminal complaint with the Piatra-Neamț Court of First Instance against the shareholders and managers of Tele M for refusing to allow him access to the newsroom and to the equipment necessary for radio programmes, thus preventing him from exercising his profession as journalist. On 27 June 2007 the first applicant was informed that his criminal complaint had been referred to the public prosecutor at the Piatra-Neamț Court of First Instance, which had opened criminal proceedings against three managers of the company Tele M for embezzlement. He was not kept informed of subsequent developments in the proceedings.

28. The Court has not been informed whether the applicants have brought civil-law proceedings for the performance of the partnership agreement of 1 August 2002 between the companies Radio M Plus and Tele M.

29. In their written observations of 9 June 2008 the Government informed the Court as follows:

“According to the information notified by the bailiff N.T., he was unable to pursue the enforcement procedure, in view of the subject-matter of the claim – enforcement of an obligation ‘to perform’ – and the legal nature of the premises, and, moreover, having regard to the fact that the writ of execution did not precisely stipulate the location of the newsroom of Radio M Plus SRL or describe its composition. In those conditions, the bailiff stated that he was not competent to go beyond the above-mentioned legal framework.”

D. Operation of the radio station Radio M Plus

30. On 30 January 2003 the National Audiovisual Council (the “NAC”) ordered the company Tele M to terminate the assignment of audiovisual licence no. 246/1997 as provided for under the partnership agreement of 1 August 2002 and to ensure that its situation became lawful within thirty days, in view of the fact that the said agreement was in breach of the new Audiovisual Act (law no. 504/2002), which prohibited the exploitation of an audiovisual licence by anyone other than its legal beneficiary. There is no evidence in the file to show whether the order was followed by a decision by the NAC to withdraw the licence in accordance with the above-mentioned law.

31. However, on 9 June 2003, the company Tele M once again assigned the rights to audiovisual licence no. 246/1997 to a third company. In a decision of 14 November 2003 that company obtained a broadcasting permit, for the purpose of which it was to use a transmitter belonging to the

company Radio M Plus. Nevertheless, it can be seen from the case file that, in a decision of 20 November 2003, the NAC temporarily suspended the licence assignment until the finalising of the dispute that had in the meantime arisen between the two companies. It was only on 9 November 2004 that the third company secured the right to use a new transmitter.

32. According to an NAC certificate of 4 June 2008, issued at the request of the Romanian Government's Agent, the company Radio M Plus held audiovisual licence no. 524, dated 17 May 2004, for the city of Târgu-Neamţ in respect of the radio station of the same name, and a broadcasting licence of 5 May 2005 issued by the National Regulatory Authority for Communications. The company also held two audiovisual licences obtained in 2004 for two television stations, which were authorised to broadcast in the cities of Piatra-Neamţ and Roman, respectively. Audiovisual licence no. 246/1997 issued for the radio station Radio M Plus belonged to the company Tele M Invest. The NAC concluded that the radio station Radio M Plus had not carried on any radio broadcasting activity in 2002-2004.

E. Information about the applicants' activity after October 2002

33. In October 2002 the second applicant published an article in the national newspaper *România liberă* about the various businesses run by I.T.

34. From November 2003 onwards the first applicant became the director of the regional weekly newspaper *Lumea Nemţeanului*. The second applicant was appointed as its editor-in-chief. According to the information provided by the applicants, the weekly had to close after five issues because of pressure exerted on the companies that distributed the newspaper and those with which it had signed advertising agreements.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. National legislation on audiovisual matters

35. The Audiovisual Act (Law no. 504) was enacted on 11 July 2002 and entered into force on 22 July 2002. This law set up the National Audiovisual Council, an autonomous public authority in the public interest, under parliamentary supervision, with the responsibility, under section 17(c) of that law, for granting audiovisual licences. Under section 57(b), the Council withdraws an audiovisual licence if its holder stops broadcasting programmes for 45 days, for technical reasons, and for 96 hours, for any other reason. Under section 59(1) of the law, in cases where the broadcasting of programmes requires the use of a terrestrial radio frequency, the audiovisual licence must be accompanied by a broadcasting permit issued by the National Regulatory Authority for Communications.

B. Relevant provisions of domestic law on enforcement

1. Code of Civil Procedure

36. The relevant articles of the Code of Civil Procedure read as follows:

...

Article 399 § 1

“In respect of enforcement proceedings or any act of enforcement, any person who has an interest therein or is aggrieved as a result thereof is entitled to lodge an objection. Similarly, ... an objection may be lodged when it is necessary to clarify the meaning, scope or terms of implementation of the writ of execution, or where the authority responsible for enforcement refuses to perform an act of enforcement as provided for by law.”

...

Article 580²

“Should the obligor refuse the enforcement of the obligation to act provided for in the writ of execution within ten days after receiving the order, the court, by a final interlocutory decision, after summoning the parties, may authorise the obligee to enforce the obligation himself or to have it enforced by third parties at the obligor’s expense.”

Article 580³

“Should the obligation ‘to act’ require the obligor’s personal intervention, he may be coerced into performing the obligation by means of a civil-law coercive. The court, on an application by the obligee, may order the obligor, in a final interlocutory decision, after summoning the parties, to pay the State a fine of between 200,000 and 500,000 Romanian lei for each day until the obligation provided for in the writ of execution has been performed.

The obligee may request the court to award him damages against the obligor in order to make good the loss incurred by the failure to perform the obligation ... Article 574 shall be applicable in such matters.”

...

C. National and international reports on freedom of the press in Romania between 2002 and 2004

39. A number of national and international non-governmental organisations, together with the European Commission, have drawn up reports on the freedom of the press in Romania in the period 2002 to 2004.

...

43. In its “2004 Regular Report on Romania’s progress towards accession” the European Commission added as follows:

“Despite this progress, certain structural problems may affect the practical realisation of the freedom of expression. Many media organisations are not economically viable and their continued existence can depend on the support of political or business interests. External studies have concluded that journalists’ reporting can often be influenced by financial inducements leading to self-censorship. Against this background, the state has tolerated the accumulation of significant arrears by a number of the largest media companies, including most major private TV stations. Such a situation may compromise editorial independence and media monitoring studies have observed that the TV news is notably less critical of the government than the written press. There are also credible reports of locally elected officials using public office to influence the editorial policy of local newspapers, radio and TV stations, e.g. through the selective award of public advertising contracts.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

44. The applicants complained that the competent authorities had not assisted them effectively in their endeavours to enforce the Neamţ County Court’s final decision of 6 December 2002 and that the non-enforcement had prevented them from working as journalists, thus breaching their right

to freedom of expression. They relied on Article 10 of the Convention, which 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.”

...

B. Merits

1. The parties' submissions

(a) The applicants

49. The applicants began by arguing that Article 10 of the Convention was applicable in the present case. They observed that in spite of their numerous endeavours they could not gain access to the radio station's studios and equipment, thus finding it impossible to secure the enforcement of the decision of 6 December 2002 and, consequently, being unable to exercise their profession of radio journalist. They mentioned that before and after the partnership agreement they had run the newsroom of Radio M Plus. In their submission, and contrary to what the Government had claimed, the radio station had continued to broadcast even after October 2002 when they were first refused access to the newsroom, the work of which had then been taken over by other journalists from the company Tele M. The applicants asserted that this situation was the result of a conflict between the first applicant and the local representatives of a major political party, who were annoyed by the first applicant's independent journalism. In this connection, the applicants referred to the Court's case-law to the effect that dismissal from employment following “a course of action made up of an indeterminate number of acts of communication or expression that [the applicants] had committed over a period of several months, in the particular context of a labour dispute between them and their employer” represented a breach of their right to freedom of expression (*Cârstea and Grecu v. Romania* (dec.), no. 56326/00, 21 September 2004).

In their opinion, even though the present case did not concern a dismissal, in several aspects their situation was tantamount to a *de facto* dismissal, with similar effects: the inability for the applicants to exercise their profession as radio journalists. Moreover, they observed that the Court had previously examined, under Article 10 of the Convention, the impact of unlawful actions by third parties which were perceived as *de facto* obstacles to freedom of expression.

Even though they had had the possibility of writing articles in newspapers, the applicants observed that the situation at issue had prevented them from freely choosing their form of expression, which was guaranteed by Article 10 de la Convention. They emphasised that it was not for the public authorities or third parties, instead of the journalists themselves, to choose the manner in which the latter carried out their work of imparting information and ideas. In addition, following the failure to enforce the decision of 6 December 2002, the applicants had not had access to the technical facilities for the transmission of radio programmes, whereas the Convention also protected the means used for the imparting of information and ideas (they referred to *Autronic AG v. Switzerland*, 22 May 1990, § 47, Series A no. 178).

50. The applicants then observed that the present case did not require an examination of any interference by the State with the exercise of their freedom of expression, but rather an analysis of its positive obligation under the Convention. They took the view that the national authorities, in the present case, had a positive obligation to provide them with a system that enabled them to obtain the performance of an undertaking from an individual and that the authorities had a duty to act with the requisite diligence to assist them in enforcing the judicial decision given in their favour on 6 December 2002, as a result of which they would have been able to exercise their profession as radio journalists. They pointed out that the Court had already noted the existence of such an obligation, under Article 6 § 1 of the Convention, in cases concerning individuals' obligations to act. In their view, the transposition of such an obligation to the subject-matter of Article 10 of the Convention would be consistent with the principle of proportionality between the general interest and the interest of individuals and would not represent an impossible or disproportionate burden for the State, given that no new obligations would be imposed on it. Lastly, the applicants took the view that, in determining the positive obligation in the present case, it had to be taken into account that freedom of expression was exercised by professional journalists and that the *de facto* obstacles complained of affected the diversity and plurality of means of expression. In addition, it was also necessary to take into account the situation of the press in Romania in the relevant period (2002-2004), as described in a number of reports by various national and international organisations.

51. The applicants went on to complain of the failure to fulfil the above-mentioned positive obligation. In this connection, they first referred to the ineffectiveness of the enforcement procedure that they had initiated. They pointed out that the bailiff responsible for the enforcement had not been sufficiently diligent, even though he had considered the applicants to have a clear writ of execution, especially as it had been obtained in urgent proceedings and had thus, by definition, required urgent intervention. They further argued that the bailiff, under the provisions of the Code of Civil Procedure, could have sought police assistance. In actual fact the bailiff had merely paid a visit, on his own, to see the radio equipment on the second floor of the building. Moreover, the bailiff had not closed the enforcement procedure, leaving them in a state of uncertainty. Lastly, the applicants disputed the arguments that the bailiff had apparently transmitted to the Government in 2008, eight years after the events, and which had never been notified to them beforehand.

Secondly, the applicants complained of the refusal by the criminal authorities to impose a sanction on the representatives of the company Tele M and the fact that no other effective mechanisms were available to them to obtain the enforcement of the “obligation to act” which would have enabled them to gain access to the radio station.

Thirdly, the applicants emphasised the consequences of the non-enforcement of the decision of 6 December 2002 for the exercise of their profession. They argued that, unlike the situation in *Vérités Santé Pratique SARL v. France* (no. 74766/01, 1 December 2005), where the applicant company had been able to transmit information by other means, such as via the Internet, and had continued the publication of that information in a different magazine, in the present case the applicants had not been able to transmit information by equivalent means – and indeed had not done so. For the applicants, journalists specialising in radio and television, the occasional writing of articles in newspapers was not a real alternative because that was a different style of journalism. As the Court had already noted in other cases, the potential impact of the means of transmission of opinions was of particular importance for freedom of expression, because it was commonly acknowledged that the audiovisual media had a much more immediate and powerful effect than the print media (the applicants referred to *Purcell and Others v. Ireland*, no. 15404/89, Commission decision of 16 April 1991, Decisions and reports 70, p. 262). Lastly, the applicants observed that they had been editors in a local radio station which broadcast information and programmes of local interest; they were thus addressing a local audience which had a good knowledge of the subjects covered. As a result, the possibility offered to the second applicant of publishing a few articles in a national daily newspaper, which by definition was aimed at a nationwide readership, was not an equivalent means and could not be construed as “exercising her profession”. Moreover, the first applicant had not exercised

his profession (not even by writing a few articles) for several years after the events at issue. In any event, the possibility of exercising their profession – and thus their freedom of expression – by other means (writing in a gazette, taking part in a television programme) was purely speculative and theoretical because such activities did not depend only on the good will of the applicants, but rather on that of third parties. In addition, that type of argument could have stifled all applications in which the dismissal of journalists was at issue, because in all such cases the applicants could have found another job in the media. Moreover, to have the opportunity to write an article from time to time for a newspaper, or to be invited to take part in a radio or television programme, did not constitute the exercise of their profession and did not represent an equivalent means to that of an editor in a radio station.

(b) The Government

52. The Government were of the view that there had been no interference with the exercise by the applicants of their freedom of expression. They thus pointed out that Radio M Plus had not engaged in any activity in the period 2002-2004, in view of the unlawful assignments of the rights to licence no. 246/1997 (see paragraph 32 above). They further observed that the material in the file showed that the second applicant had worked as a journalist for the national daily *România liberă* in October 2002. Similarly, there had been nothing to prevent the first applicant from writing in a newspaper or preparing television programmes.

53. In the alternative, the Government argued that any interference with the applicants' freedom of expression in the present case was prescribed by law, namely by the legislation concerning the enforcement of a final decision. It also pursued a legitimate aim, that of the protection of the rights of others. Lastly, the Government were of the opinion that the margin of appreciation afforded to the national authorities as to the existence of a pressing social need corresponding to the impugned interference had not been overstepped and that the interference had been both necessary in a democratic society, to ensure respect for the rights of third parties and to uphold the law, and proportionate. In that connection, they pointed out that the applicants could have exercised their freedom of expression by means other than radio journalism.

2. The Court's assessment

(a) General principles

54. The Court reiterates the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to

interfere, but may require positive measures of protection, even in the sphere of relations between individuals. Thus, in the case of *Appleby and Others v. the United Kingdom* (no. 44306/98, § 47, ECHR 2003-VI), the Court had to examine the United Kingdom's obligations in relation to the refusal by a private company which owned a shopping centre to allow the applicants to set up a stand there and distribute leaflets in which they sought to draw the attention of their fellow citizens to their opposition to the local authority's plans to develop a playing field and thus to deprive their children of green areas to play in. The Court decided that, where the bar on access to property had the effect of preventing any effective exercise of freedom of expression or it could be said that the essence of the right had been destroyed, it would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights.

55. The Court further reiterates that, in determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, among other authorities, *Özgür Gündem v. Turkey*, no. 23144/93, § 43, ECHR 2000-III). Lastly, in determining whether there is a positive obligation under Article 10 of the Convention, the Court takes into account the nature of the freedom of expression in question, its capacity to contribute to a debate on a topic of public interest, the nature and scope of the restrictions imposed on that freedom, the existence of alternatives and the weight of any competing rights of third parties or of the public in general (see *Appleby*, cited above, §§ 42-43 and 47-49).

56. The Court would lastly refer to its finding that the non-enforcement of a judicial decision in favour of a historian constituted a violation of Article 10 of the Convention, in view of the fact that the decision was an essential element of the exercise of the applicant's right to freedom of expression (see *Kenedi v. Hungary*, no. 31475/05, §§ 43-45, 26 May 2009).

(b) Application to the present case of the above-mentioned principles

57. In the present case, the applicant obtained a final court decision ordering the representatives of the company Tele M to give them access to the newsroom of Radio M Plus. However, that decision remained unenforced, even after the applicants had initiated the enforcement procedure through a bailiff.

58. The Court notes that the parties expressed different opinions as to the approach that it should adopt in examining the present case. Whilst the Government were of the view that it should analyse the justification for a possible interference with the applicants' rights, the applicants alleged that there had been a breach of a positive obligation imposed on the State by Article 10 of the Convention. The Court, for its part, would note at the outset that the authorities bear no direct responsibility for the restriction of the applicants' freedom of expression. It is not persuaded that any element of State responsibility can be derived from the fact that a private company prevented the applicants from gaining access to the radio station's newsroom (compare *Appleby*, cited above, § 41). The issue to be determined, however, is whether the respondent State has failed to fulfil any positive obligation to protect the exercise of the applicants' Article 10 rights from interference by others – in this case, by the representatives of Tele M.

59. The Court will first examine the question whether the State had a positive obligation *vis-à-vis* the applicants, having regard to the specific circumstances of the case. It is noteworthy in this connection that the Court has already found fault with failures on the part of national authorities to act upon other types of unlawful conduct by third parties which had impaired journalists' freedom of expression (see *Appleby*, cited above; *Özgür Gündem*, cited above; and *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, §§ 106-108 and 137-138, 14 September 2010).

60. On that point, the Court would refer to its case-law under Article 6 of the Convention to the effect that the right to the enforcement of final judicial decisions is an integral part of the right of access to a court (see *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II). The question to be determined in the present case is whether, in addition to a party's personal interest in the enforcement of a decision in its favour, and the general interest of society in the proper administration of justice, as established by the Court in cases concerning the non-enforcement of final court decisions (see *Hornsby*, cited above, § 41), there is also an interest on the part of the applicants to have their right to freedom of expression upheld, through the enforcement of a final judicial decision.

61. The Court notes that the Government did not dispute that, by seeking access to the newsroom and facilities of the radio station Radio M Plus, the applicants were seeking to exercise their profession as radio journalists, and that this clearly concerned an essential element of their right to freedom of expression (see *Kenedi*, cited above, § 43, and, *mutatis mutandis*, *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 27, 14 April 2009). The Government denied, however, producing a certificate from the NAC to such effect, that the radio station had carried on any broadcasting activity in the period 2002-2004 (see paragraph 52 above), and argued that the applicants could not therefore have worked as journalists in that company.

62. The Court would point out that it is not called upon to rule on the lawfulness of the activities of a local radio station. It notes that the NAC certificate refers to the granting and assignment of audiovisual licences held by the companies at issue, namely Radio M Plus and Tele M, and concludes that the radio station Radio M Plus had no broadcasting activity in the period 2002-2004. However, the Court notes that the orders addressed by the NAC following the various unlawful assignments were never followed up by a decision to withdraw audiovisual licence no. 246/1997, exploited by Radio M Plus, in accordance with the Audiovisual Act (Law no. 504/2002). Neither was any withdrawal decided under Article 57 of that Act, which allows the NAC to withdraw an audiovisual licence in cases where its holder stops broadcasting programmes for 45 days, for technical reasons, and for 96 hours, for any other reason (see paragraph 35 above). Having regard to the foregoing, the Court cannot accept the Government's argument that the failure to enforce the final decision of 6 December 2002 did not breach the applicants' freedom of expression on the ground that Radio M Plus had no broadcasting activity in the period 2002-2004.

63. The Court further observes that the present case does not concern an inability to impart certain information or certain ideas to third parties, but the form of exercise of a profession that the Court recognises as having an essential role in a democratic society, that of "public watchdog" (see, as a recent authority, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 102, 7 February 2012). In conclusion, an essential element of freedom of expression, namely the form of its exercise, was at stake for the applicants. Moreover, it was not merely an aspiration to exercise such a right, as the applicants had the technical facilities to transmit radio programmes. The Court notes that, as can be seen from documents in the file, the applicants were able to publish a few articles in the national and local press in 2002 and 2003 (see paragraphs 33-34 above). However, it accepts that the possibility of writing articles in newspapers cannot compensate for the freedom of journalists to choose their form of expression. In accordance with the Court's case law, Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298; *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, §§ 39-40, ECHR 2000-I; and *Vérités Santé Pratique SARL*, cited above). It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists (see *Jersild*, cited above, § 31). It is also necessary to take into account the potential impact of the medium concerned, which is an important factor in relation to freedom of expression, it being commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media (see *Purcell and Others*, cited above). Consequently, the Court is unable to

accept the Government's argument that the applicants had other alternatives by which to manifest their freedom of expression.

64. In addition, the Court would reiterate that the State is the ultimate guarantor of pluralism, especially in relation to audio-visual media, whose programmes are often broadcast very widely (see *Informationsverein Lentia and Others v. Austria*, 24 November 1993, § 38, Series A no. 276). That role becomes all the more indispensable where the independence of the press is subjected to external pressure by politicians and economic decision-makers. Consequently, particular weight should be given to the Romanian context as regards the freedom of the press at the relevant time. According to reports published by various national and international organisations, the situation of the press in Romania during the period 2002-2004 does not appear to have been satisfactory ... One of the main findings of those reports was that the local press was directly or indirectly under the control of political or economic figures in the region. The Court cannot disregard the first applicant's claim that he was subjected to political and economic pressure, leading to the sale of part of his stake in a television company (see paragraphs 10-12 above). In those circumstances, the measures that the State was required to take, in view of its role as guarantor of the pluralism and independence of the press, are of genuine importance.

65. Having regard to the foregoing, the Court is of the opinion that the national authorities were required to take effective measures in order to assist the applicants in the enforcement of the final and enforceable judicial decision of 6 December 2002 delivered by the Neamţ County Court. In spite of their endeavours, the applicants were refused access to the radio station's newsroom. Only the equipment belonging to the company Radio M Plus was returned to the first applicant on 25 October 2004.

66. The Court reiterates that the exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised (see *Wos v. Poland* (dec.), no. 22860/02, ECHR 2005-IV, and *Vodopyanov v. Ukraine*, no. 22214/02, § 33, 17 January 2006). In addition, the decision by a respondent State to delegate some of its powers to a particular body cannot relieve it of the responsibilities it would have incurred had it chosen to exercise them itself (see, *mutatis mutandis*, *Wos*, cited above). Consequently, the State, as holder of public authority, was required to act diligently and to assist the applicants in the enforcement of the decision in their favour, more specifically through the intermediary of the bailiffs.

67. The Court notes that, in the present case, the applicants rapidly sought the enforcement of the decision of 6 December 2002. As a result, a bailiff accompanied them on two occasions to the head office of the radio station, but the applicants were received in an empty room on the ground floor of the building, and only the bailiff was able to visit the studios containing special equipment on the second floor of the building (see

paragraphs 19-22 above). Even though the bailiff noted that the enforceable decision was clear and that there was no need to apply to a court in order to clarify the meaning and scope of its operative provisions, he did not seek the police support or assistance that was necessary in view of the uncooperative attitude of the other party, and took no other steps to obtain the enforcement of the decision in the applicants' favour. Given what was at stake in these proceedings for the applicants, who were seeking to exercise their profession as radio journalists, and in view of the fact that the decision in question had been obtained through an urgent application, the enforcement procedure called for urgent measures. The Court cannot accept the reasons given by the bailiff to the Government in 2008 in order to justify the non-enforcement of the decision of 6 December 2002 (see paragraph 29 above). It does not appear from the evidence in the file that those reasons were notified to the applicants, being raised for the first time in the proceedings before the Court (see, *mutatis mutandis*, *Svipsta v. Latvia*, no. 66820/01, § 110, 9 March 2006).

68. In so far as the Government argued that the applicants could have lodged an objection to the enforcement procedure under Article 399 of the Code of Civil Procedure, or initiate disciplinary proceedings against the bailiff under Law no. 188/2000 to complain about his refusal to perform an act of enforcement ..., the Court would observe, as it found in a previous judgment, that the Government have not demonstrated the effectiveness of the remedies in question (see *Constantin Oprea v. Romania*, no. 24724/03, § 41 *in fine*, 8 November 2007, and *Elena Negulescu v. Romania*, no. 25111/02, § 43, 1 July 2008), and notes that they have not submitted any evidence that could lead the Court to reach a different conclusion in the present case. In particular, the Government did not provide any examples of domestic case-law to prove that the applicants could have held the bailiff liable for failing to notify them of his refusal to continue the enforcement and of the official discontinuance of the procedure. Neither did the Government indicate how the disciplinary action could have been a remedy directly accessible to the applicants and capable of securing the enforcement of the final decision, bearing in mind that such action could be brought only by the governing board of the Bailiffs' Association or by the Minister of Justice and could only lead to the bailiff's suspension from his duties (see *Topcirov v. Romania* (dec.), no. 17369/02, 15 June 2006).

69. As regards, moreover, the Government's argument that the applicants could also have obtained enforcement under Article 580² of the Code of Civil Procedure or could have brought proceedings under Article 580³ of that Code to obtain a coercive fine or an award of damages against the other party ..., the Court first notes that the Government did not show how the applicants could have secured the application of Article 580², whether by enforcing the obligation themselves or through the intermediary of a third party.

70. As regards the possibility of bringing proceedings to obtain a coercive fine or an award of damages against the other party under Article 580³ of the Code of Civil Procedure, the Court notes that these remedies suggested by the Government are indirect means of enforcing a final decision and are not therefore capable of providing direct redress for the alleged violation. Even supposing that, having regard to its special nature, the obligation to enforce required the obligor's personal intervention, and that such means of coercing the obligor could, in principle, have proved to constitute effective and accessible remedies, the Court observes that, in the present case, the applicants had already used other indirect means, namely the two criminal complaints, without securing the enforcement of the final decision. According to the Court's case-law, an applicant must have made normal use of domestic remedies which are likely to be effective and sufficient and, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Ghibusi v. Romania*, no. 7893/02, § 28, 23 June 2005).

71. In view of the foregoing, the Court finds that the applicants initiated sufficient acts of enforcement and took the necessary steps to obtain the enforcement of the final decision of 6 December 2002. However, the main legal resource available to the applicants to obtain the enforcement of a decision in their favour, namely the use of a bailiff, proved to be inappropriate and ineffective. In addition, by failing to take effective and necessary measures to assist the applicants in the enforcement of the above-mentioned final and enforceable judicial decision, the national authorities deprived the provisions of Article 10 of the Convention of any useful effect and compromised the exercise by the applicants of the profession of radio journalist.

72. Accordingly, the Court must dismiss the Government's objection that domestic remedies have not been exhausted and finds that there has been a violation of Article 10 of the Convention.

...

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

...

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

...

Done in French, and notified in writing on 10 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President