



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

FIRST SECTION

CASE OF SALLUSTI v. ITALY

(Application no. 22350/13)

JUDGMENT

STRASBOURG

7 March 2019

FINAL

07/06/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sallusti v. Italy,

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

Linós-Alexandre Sicilianos, *President*,

Guido Raimondi,

Aleš Pejchal,

Krzysztof Wojtyczek,

Armen Harutyunyan,

Tim Eicke,

Jovan Ilievski, *judges*,

and Abel Campos, *Section Registrar*,

Having deliberated in private on 12 February 2019,

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

PROCEDURE

1. The case originated in an application (no. 22350/13) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Mr Alessandro Sallusti (“the applicant”), on 18 March 2013.

2. The applicant was represented by Mrs V. Ramella, a lawyer practising in Milan. The Italian Government (“the Government”) were represented by their former Agent, Ms E. Spatafora, and their former co-Agent, Ms P. Accardo.

3. The applicant alleged that his conviction for defamation through the press and for failure to exercise control over the content of articles published in a newspaper headed by him had breached his right to freedom of expression, as guaranteed by Article 10 of the Convention.

4. On 12 September 2016 the above complaint was communicated to the Government.

THE FACTS

5. The applicant was born in 1957 and lives in Carate Uriò (Como).

6. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE CIRCUMSTANCES OF THE CASE

A. Publication of the articles

7. The applicant is a well-known Italian journalist. At the material time, specifically from January 2007 until 15 July 2008, he was the editor-in-chief of *Liberio*, a national daily newspaper that sold around 125,000 copies per day.

8. On 17 February 2007 one of the main Italian newspapers, *La Stampa*, published an article covering the story of a thirteen-year old girl who had undergone an abortion. The article suggested that the girl had been forced to undergo the abortion by her parents and G.C., the guardianship judge (*giudice tutelare*) who had authorised the procedure. Later that day it was reported that there had been no pressure placed on the teenager, and that she had decided alone to terminate the pregnancy. This clarification was widely disseminated by different sources: in particular, the National Press Agency (ANSA) issued a number of press releases on 17 February 2007 clarifying the events; the television news bulletins broadcast by Rai2 and Rai3 (Italy's public national television channels) reported that the news concerning the alleged pressure on the teenager was false; the newspapers *Corriere della Sera* and *La Repubblica* reported the facts of the case in the same vein.

9. On 18 February 2007 two articles were published in *Liberio* concerning the events involving the teenager. Despite the clarification disseminated the previous day by other media, both articles reported that the girl had been forced to undergo an abortion by her parents and G.C.

10. The first article, written by an unknown person under the pseudonym "Dreyfus", was entitled "Judge orders abortion. The law is stronger than life" (*Il giudice ordina l'aborto. La legge più forte della vita*).

11. It was worded as follows:

"A teenager from Turin has been forced by her parents to [have an abortion] ... the magistrate has heard the parties and has applied the law – the law! – ordering the compulsory abortion ... she did not want. She struggled ... [N]ow the young mother (you are still considered as a mother even if your son died) is hospitalised as mentally ill. She had screamed in vain 'if you kill my son, I will commit suicide' ... if there were the death penalty, and if [it were ever] applicable, this would have been the case, [f]or the parents, the gynaecologist and [G.C.] ... the medicine and the judiciary are accomplices in the [coercive abortion]".

12. The second article, written by the journalist A.M., was entitled "Forced to abort by her parents and the judge" (*Costretta ad abortire dai genitori e dal giudice*). The relevant parts read as follows:

"Pregnant [girl] at the early age of thirteen undergoes abortion and is hospitalised in a psychiatric centre ...) After the abortion [the thirteen-year old girl] accused her family of forcing her to [have an abortion]..."

B. Defamation proceedings brought against the applicant

1. First-instance proceedings

13. On 27 April 2007 G.C. filed a criminal complaint against the applicant and A.M. with the Milan District Court. The applicant was charged with defamation, aggravated by the fact that the offence consisted of imputing a specific fact (Article 595 §§ 1 and 2 of the Criminal Code), and failure of newspaper's editor-in-chief to control what had been published – *omesso controllo* (Article 57 of the Criminal Code).

14. In a judgment of 26 January 2009, filed in the relevant registry on 20 March 2009, the District Court found the applicant guilty of *omesso controllo*, as far as the article drafted by A. M. was concerned, and of aggravated defamation since, as head of the newspaper, he was responsible for the article published under the pseudonym "Dreyfus". The applicant was ordered to pay a fine of 5,000 euros (EUR), damages in the sum of EUR 10,000 and costs in the sum of EUR 2,500 (to be paid jointly with A.M.), with publication of the judgment in *Libero*.

15. It concluded: (i) that both articles contained false information, and (ii) that the content of both articles had severely damaged the reputation of the victim, clearly overstepping the boundaries of the applicant's right to freely impart information.

2. Appeal proceedings

16. The applicant lodged an appeal.

17. In its judgment of 17 June 2011, filed in the relevant registry on 24 June 2011, the Milan Court of Appeal quashed the first-instance judgment in part. It pointed out that the articles at issue had reported false information, since the thirteen-year old girl had decided alone to terminate the pregnancy. Accordingly, the Court of Appeal found that the penalty imposed was too lenient, particularly in the light of the seriousness of the offence committed, and a finding that the applicant was a recidivist. The Court of Appeal thus increased the penalty to one year and two months' imprisonment, and upheld the fine of EUR 5,000. The Court of Appeal did not suspend the enforcement of the penalty and decided to record the conviction on the applicant's criminal record. In addition, the damages were also increased from EUR 10,000 to EUR 30,000.

3. Appeal on points of law

18. The applicant appealed on points of law.

19. In a judgment of 26 September 2012, deposited in the relevant registry on 23 October 2012, the Court of Cassation upheld the Court of Appeal's findings, assessing, *inter alia*, the compatibility of the conviction and the sentence imposed in the light of the case-law of the Court. In

particular, the Court of Cassation sought to justify the imposition of a custodial sentence by arguing that there were exceptional circumstances in the case. In particular, the imposition of the detention measure had been justified by a set of concurrent factors, such as the existence of the aggravating circumstance of “imputing a specific fact”; the applicant’s personality, his criminal record (the applicant being a recidivist) and the fact that the publication of false information had undermined the reputation of G.C., a member of the judiciary.

20. By a decision of 30 November 2012, filed in the relevant registry on the same date, the Milan Court responsible for the execution of sentences (*Tribunale di Sorveglianza di Milano*) ordered the applicant to serve his sentence under house arrest (*pericolo di fuga*), on the grounds that there was no risk that he might abscond.

21. On an unspecified date, relying on Article 87 § 11 of the Constitution, the applicant filed a request with the President of the Italian Republic to convert the remainder of the detention period into a fine.

22. By a decree of 21 December 2012 the applicant’s request was granted and his sentence was commuted into the payment of a EUR 15,532 fine.

23. In his decision to commute the applicant’s penalty, the President relied on the criticism expressed by the European Court of Human Rights with respect to the imposition of custodial sentences on journalists. He also expressed his concerns about the ongoing review of the legislation on defamation, which was on hold owing to difficulties in striking a balance between the need to set out more lenient sanctions while at the same time ensuring more effective redress measures.

24. The applicant spent twenty-one days under house arrest, starting 30 November 2012 until 21 December 2012, when he was released (see paragraphs 20-22).

II. RELEVANT DOMESTIC LAW

25. Article 87 of the Constitution sets out the powers of the President of the Italian Republic. In particular, paragraph 11 provides:

“The President may grant pardons and commute punishments.”

26. Article 174 of the Criminal Code provides:

“The pardon or grace condones, in whole or in part, the penalty imposed, or commutes it into another penalty established by law. It does not extinguish the accessory penalties nor, unless the decree states otherwise, the other penal effects of the sentence”.

27. Article 57 of the Criminal Code, entitled “Offences committed by means of the press”, provides:

“Without prejudice to the liability of the author of the publication and unless complicity is involved, any editor-in-chief or deputy editor who fails to exercise, *vis-à-vis* the content of his periodical, the control required to prevent offences being committed by means of the publication shall be punished for negligence if an offence is committed, with the penalty for this offence reduced by a maximum of one-third.”

28. Article 595 of the Criminal Code defines the offence of defamation. The relevant parts of that Article read as follows:

“(1) Anyone who ..., in communicating with more than one person, damages the reputation of another, shall be punished by one year’s imprisonment or by a fine of up to EUR 1,032.

(2) Defamation which consists in imputing a specific fact shall be punishable by up to two years’ imprisonment or by a fine of up to EUR 2,065.

(3) Defamation which is disseminated by the press or any other form of publicity, or in a public document, shall be punishable by imprisonment of between six months and three years or by a fine of at least EUR 516.

(4) In the event of defamation against a member of a political, administrative or judicial authority, or one of its representations ... the sentences shall be increased.”

29. Section 13 of Law no. 47 of 8 February 1948 (hereinafter “the Press Act”), published in Law Gazette no. 43 of 20 February 1948, as far as relevant, reads as follows:

“If the offence of defamation is committed through the press and consists in attributing a specific fact, the author shall be liable to imprisonment of [between] one and ... six years and a fine ...”

30. In their observations the Government pointed out that a defamation reform bill (Draft Bill no. 925) was currently under revision for a second reading before the Senate Standing Committee on Justice. Among other things, the draft proposes the removal of imprisonment as a sanction for defamation, and its replacement by a fine.

III. COUNCIL OF EUROPE DOCUMENTS

31. On 24 January 2013 the Parliamentary Assembly of the Council of Europe adopted Resolution 1920 (2013) entitled “The state of media freedom in Europe”. In this document, referring to the fourteen-month prison sentence imposed on the applicant, the Assembly asked the European Commission for Democracy through Law (hereinafter “the Venice Commission”) to prepare an opinion on whether the Italian laws on defamation were in line with Article 10 of the Convention.

32. On 9 November 2013 the Venice Commission, in Opinion no. 715/2013 (“Opinion on the Legislation on Defamation of Italy”) observed that a reform of the legislation on defamation was ongoing (see paragraph 30 above): the amendments proposed envisaged, *inter alia*, limitation of the use of criminal provisions, abolition of imprisonment as a

possible penalty and an upper limit for fines, lacking in Article 595 §§ 3 and 4 of the Criminal Code (repealed by the Bill). The Venice Commission was of the opinion that [high fines posed “a threat with almost as much chilling effect as imprisonment”] but also recalled that this was to be regarded as “a remarkable improvement, in accordance with the Council of Europe calls for lighter sanctions for defamation”.

33. The Venice Commission, however, albeit satisfied with the amendments proposed, observed that the Bill, presented in 2013, was still pending before the Senate Standing Committee on Justice.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

34. The applicant argued that his conviction for defamation through the press (*diffamazione a mezzo stampa*) and for failure to exercise control over the content of the publication (*omesso controllo sul contenuto dell'articolo diffamatorio*) had breached 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.

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

35. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

36. The applicant challenged his conviction for defamation. He submitted that he had only been convicted because of the Public Prosecutor's failure to conduct an appropriate investigation in order to find the writer of the anonymous article. In the applicant's view, the conviction of the editor-in-chief of a newspaper had had the negative effect of impeding the publication of news in the public interest. The applicant further submitted that "[on] the day the article was published [he] was absent and didn't know anything about the article contested".

37. Turning to the proportionality between the offence committed and the sanction imposed, the applicant observed the following.

38. At the outset, he submitted that the domestic courts had not adopted a homogeneous approach with respect to the type of sanction to be imposed: in particular, the first-instance court had not found the detention "necessary", finding the imposition of a financial sanction appropriate and sufficient; secondly, the applicant argued that the lack of subjective responsibility, the offence having been committed by another person, could not justify the "cruelty" of the sanction.

39. The applicant further submitted that the sanction imposed had seriously damaged his career. The proceedings instituted against him had led to him being suspended from his profession as a journalist for three months. Furthermore, he had been forced to resign from the position of editor-in-chief of another newspaper, *Il Giornale*, and, overall, his professional capacity had inevitably been affected.

40. The applicant also claimed he had suffered health problems as a result of his conviction.

41. Lastly, the applicant reiterated the reasons put forward by the President of the Italian Republic, who had taken the decision to commute his penalty into a fine (see paragraphs 21-23 above).

(b) The Government

42. The Government argued that the articles at issue were clearly defamatory since, in addition to reporting false information, they had been mainly intended to "obscure and undermine the reputation of those involved in the facts of the case".

43. The Government further argued that the right to freedom of expression and to impart information invoked by the applicant had violated the right to protection of one's reputation in that the applicant had not only undermined G.C.'s reputation but first and foremost had violated the right to privacy of a thirteen-year old girl who "in a dramatic time in her

adolescence had sought the [intervention of a] judge”, as well as of all those involved.

44. Turning to the applicant’s liability, the Government, after pointing out that as editor-in-chief he bore full responsibility for the content of the article published under the pseudonym, reiterated the reasons put forward by the domestic courts, in particular the Court of Cassation, in imposing the custodial sentence on the applicant (see paragraph 19 above).

45. In conclusion, the Government, relying on what the Court had previously stated in *Fatullayev v. Azerbaijan*, (no. 40984/07, § 95, 22 April 2010), affirmed that the applicant could not invoke the safeguards afforded by Article 10 to journalists since he had not acted in good faith and, even worse, had provided unreliable and false information. In the light of the foregoing observations, in the Government’s view, the imposition of detention had been proportionate.

2. The Court’s assessment

(a) Whether there has been an interference

46. It is not in dispute between the parties that the applicant’s conviction constituted an interference with his right to freedom of expression under Article 10 § 1 of the Convention.

47. It should therefore be determined whether it was “prescribed by law”, whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was “necessary in a democratic society” in order to achieve the relevant aim or aims (see *Peruzzi v. Italy*, no. 39294/09, § 42, 30 June 2015, and the authorities cited therein).

(b) Whether the interference was justified: “prescribed by law” and “legitimate aim”

48. The parties likewise agree that the interference was prescribed by law, namely by Articles 57 and 595 of the Criminal Code and section 13 of the Press Act (see paragraphs 26-28 above).

49. Turning to the legitimacy of the aim pursued, it is not for the Court to assess whether the applicant’s conviction pursued the legitimate aim of protecting the judiciary, as the Court can accept that the interference in any case pursued the legitimate aim of protecting the reputation and rights of others, namely the thirteen-year old girl and her parents as well as those of G.C. (see *Belpietro v. Italy*, no. 43612/10, §§ 45, 24 September 2013).

50. The parties differed as to whether the interference in question had been “necessary in a democratic society” and proportionate to the sanction imposed. The Court must therefore determine whether this requirement, as set forth in the second paragraph of Article 10, was satisfied in the instant case.

(c) “Necessary in a democratic society”

(i) General principles

51. The general principles concerning the necessity of an interference with freedom of expression are summarised in the cases of *Morice v. France* [GC], no. 29369/10, §§ 124-139, ECHR 2015 and *Belpietro* (cited above, §§ 47-54).

52. In particular, the Court points out that the test of “necessity in a democratic society” requires it to determine whether the interference complained of corresponded to a “pressing social need”, whether the reasons adduced by the national authorities to justify the interference were “relevant and sufficient” and whether the sanction imposed was “proportionate to the legitimate aim pursued” (see *Belpietro*, cited above, §§ 49-50).

(ii) Application of the above principles to the present case

53. In the instant case the national courts found that the content of the articles had led to misinformation of the public, having given false information despite the clarifications disseminated the day prior to their publication. In addition, in the courts’ view, the applicant had seriously tarnished G.C.’s honour and his right to privacy, as well as that of all those involved.

54. The Court sees no reason to depart from the above findings.

55. In particular, it cannot consider arbitrary or manifestly erroneous the assessment carried out by the national authorities, according to which the articles published by the applicant had attributed behaviour to G.C. involving a misuse of his official powers. Moreover, the Court observes that the case involved a minor and also contained defamatory statements against the parents and the doctors.

56. In addition, the Court agrees with the Government that the applicant failed to observe the ethics of journalism by reporting information without first checking its veracity.

57. Furthermore, the Court points out, as it has previously held (see *Belpietro*, cited above, §§ 58-59), that the head of a newspaper cannot be exempted from his duty to exercise control over the articles published therein and bears responsibility for their content.

58. In the light of the foregoing considerations, and having regard to the margin of appreciation left to the Contracting States in such matters, the Court finds that the domestic authorities were entitled to consider it necessary to restrict the exercise of the applicant’s right to freedom of expression and that his conviction for defamation and *omesso controllo* accordingly met a “pressing social need”. What remains to be determined is whether the interference at issue was proportionate to the legitimate aim pursued, in view of the sanctions imposed.

59. Although sentencing is in principle a matter for the national courts, the Court considers the imposition of a custodial sentence for a media-related offence, albeit suspended, compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention can only be in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence (see, *Cumpănă and Mazăre v. Romania*, [GC], no. 33348/96, § 115, ECHR 2004-XI). In this connection, the Court notes the recent legislative initiatives by the Italian authorities aimed, in line with the recent rulings of the Court against Italy, at limiting the use of criminal sanctions for defamation, and introducing, as a notable positive step, the removal of imprisonment as a sanction for defamation (see paragraph 29).

60. In the present case, unlike in *Belpietro* and *Ricci* (*Ricci v. Italy*, no. 30210/06, §§ 59-61, 8 October 2013), the applicant, in addition to being ordered to pay compensation to the magistrate concerned, actually spent twenty-one days under house arrest before the intervention of the President of the Italian Republic (see paragraphs 21-24 above).

61. In this connection, it may be relevant to note that in two similar cases (see *Belpietro*, cited above, §§ 61-63, and *Ricci*, cited above, §§ 59-61) the imposition of a custodial sentence (although suspended) led the Court to find a violation of Article 10. In particular, in *Belpietro*, the applicant, the then editor-in-chief of the newspaper *Il Giornale*, had been accused of defamation for omitting to exercise the necessary control over an article published by another person in the newspaper. On that occasion the Court held that a prison sentence could only be justified if there were exceptional circumstances, that not being the case since it concerned a lack of control in connection with defamation.

62. The Court considers that, in the circumstances of the instant case, there was no justification for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect (see, *mutatis mutandis*, *Kapsis and Danikas v. Greece*, no. 52137/12, § 40, 19 January 2017). The fact that the applicant's prison sentence was suspended does not alter that conclusion, considering that the individual commutation of a prison sentence into a fine is a measure subject to the discretionary power of the President of the Italian Republic. Furthermore, while such an act of clemency dispenses convicted persons from having to serve their sentence, it does not expunge their conviction (see paragraph 26 above; see also *Cumpănă and Mazăre v. Romania*, cited above, § 116, and *Marchenko v. Ukraine*, no. 4063/04, § 52, 19 February 2009).

63. The foregoing considerations are sufficient to enable the Court to conclude that the criminal sanction imposed on the applicant was manifestly disproportionate in its nature and severity to the legitimate aim invoked.

64. The Court concludes that the domestic courts in the instant case went beyond what would have amounted to a "necessary" restriction on the

applicant's freedom of expression. The interference was thus not "necessary in a democratic society".

65. Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

67. The applicant claimed EUR 100,000 in respect of pecuniary and non-pecuniary damage.

68. The Government disputed this claim. They reiterated that there was "no room" for the applicant's request since he had seriously infringed the fundamental rights of a minor, her parents and G.C.

69. The Court rejects the applicant's claim for pecuniary damage as unsubstantiated since he has failed to produce any relevant information. On the other hand, having regard to the fact that the applicant must have suffered anguish and distress on account of the facts leading to the finding of a violation of Article 10 of the Convention, the Court awards him EUR 12,000 in respect of non-pecuniary damage.

B. Costs and expenses

70. The applicant also claimed EUR 14,591.20 for the costs and expenses incurred before the Court.

71. The Government did not comment on the applicant's claim.

72. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,000 for the proceedings before the Court.

C. Default interest

73. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds*,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 March 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President