



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF FLUX v. MOLDOVA (no. 7)

(Application no. 25367/05)

JUDGMENT

STRASBOURG

24 November 2009

FINAL

24/02/2010

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 Flux v. Moldova (no. 7),

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

Ján Šikuta,

Mihai Poalelungi,

Nebojša Vučinić, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 3 November 2009,

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

PROCEDURE

1. The case originated in an application (no. 25367/05) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Flux, a newspaper registered in Moldova (“the applicant newspaper”), on 28 June 2005.

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

3. The applicant newspaper alleged, in particular, that its right to freedom of expression had been breached as a result of a sanction imposed on it by the domestic courts following the publication of an article.

4. The application was allocated to the Fourth Section of the Court. On 7 February 2007 the President of the Section decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention it was decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The facts of the case, as submitted by the applicant newspaper, may be summarised as follows.

6. In early March 2004 a warehouse belonging to the Parliament in Chişinău was converted into four apartments. On 18 March 2004 Mr Vlad Cubreacov, Member of Parliament, asked the Parliament leadership to allow him access to information on whether the manner in which deputies from the four parliaments elected since the date of Moldova's independence had been provided with accommodation from public money had been correct. He did not obtain access to that information.

7. On 9 April 2004 the applicant newspaper published an article entitled "Four more communists have obtained housing on our money". The article informed readers about the four apartments built in the former Parliament warehouse. The journalists visited the apartments and saw workers carrying out final repairs in them. They were almost ready since the pipes and water meters had already been installed. The author added that:

"According to certain sources in Parliament, who have asked to remain anonymous, the future owners of the relevant apartments include V.S., the president of the communist faction in Parliament, C.G., head of the Parliament apparatus, and M.R., the president of Floreşti county."

8. The article went on to state that the newspaper had tried to verify this information by telephoning V.S. on his mobile phone and at work but could not find him, his secretary answering that he was busy. Attempts to contact the Speaker of Parliament or her adviser, as well as the Deputy Speaker of Parliament, had also been unsuccessful. Mr Ş. Secăreanu, Member of Parliament, informed the newspaper that he had been told by C.G. and M.C., another deputy speaker in Parliament, that Parliament had paid for the apartments.

9. The article went on to recount further efforts to discover information about the source of the funding for the four new apartments from other State officials, including C.G., none of whom could be contacted. The newspaper concluded that none of the State officials had given it the opportunity to verify the information regarding the future owners of the apartments. It also mentioned that three years earlier E.O., a speaker of parliament and member of the then ruling party had obtained, in a similar manner, an apartment measuring 200 square metres in the same former warehouse. The article then described Mr Secăreanu's efforts to obtain information on the expenditure of Parliament and the Presidency from the President of the Court of Accounts, information which had been made secret by the latter, as well as his efforts to obtain that information from the Parliament leadership.

The article concluded by referring to Mr Cubreacov's request of 18 March 2004 (see paragraph 6 above) and his attempt in 2002 to obtain similar information. Two photographs of the exterior and the interior of the apartments were inserted into the text of the article.

10. On 5 May 2004 V.S. initiated court proceedings against the applicant newspaper, claiming that he had been defamed by the article and notably by the phrase cited above (see paragraph 7 above).

11. The applicant newspaper submitted to the first-instance court that it had published the opinions of third parties on an issue of major public interest, opinions to which it had not subscribed. It also referred to the journalist's unsuccessful attempts to verify the information by telephoning V.S. and other officials, and the refusal of the Parliament leadership to make public information as to who owned the apartments. In addition, the plaintiff had proved his bad faith by failing, at least once, to appear before the court or delegate a representative, and by failing to ask the applicant newspaper to publish a correction or reply before initiating court proceedings. The applicant newspaper finally submitted that V.S. had initiated 15 defamation suits against it, showing little tolerance of criticism despite his role as a prominent politician.

12. On 7 June 2004 the Buiucani District Court accepted V.S.'s claims in full, awarding him 30,000 Moldovan lei (MDL) (2,046 euros (EUR) at the time), and ordered the applicant newspaper to publish an apology. The court found that the relevant phrase (see paragraph 7 above) was defamatory of V.S. and that the applicant newspaper had not submitted any evidence to prove that the information published about V.S. was true.

13. The applicant newspaper appealed, relying on arguments similar to those formulated earlier. It added that the first-instance court had rejected its arguments without giving any specific reason, which had deprived the applicant newspaper of the right to lodge an effective appeal against the judgment. It also argued that the court had awarded a significant amount of compensation despite V.S.'s failure to prove the nature and extent of the damage caused to him, the court not having heard V.S. or his representative.

14. At the same time as it lodged its appeal, the applicant newspaper also challenged Judge C., who was in charge of the case at the Chişinău Court of Appeal. The grounds for the challenge were that Judge C. had already decided three cases between the same parties and had found in favour of V.S. each time, without giving any relevant reasons. He had also examined other defamation cases brought by politicians or public figures against the applicant newspaper, with the same outcome. Moreover, several of those judgments had subsequently been quashed or amended by the Supreme Court of Justice. Finally, it claimed that Judge C. was a relative of a member of the Communist faction in Parliament and that he had been appointed to his position by the President of Moldova, who was also the leader of the Communist Party of Moldova.

15. Referring to the lack of proof that Judge C. was a relative of a Member of Parliament, as claimed by the applicant newspaper, a judge of the Chişinău Court of Appeal rejected the applicant newspaper's challenge to Judge C.

16. On 16 September 2004 the Chişinău Court of Appeal, presided by Judge C., quashed the first-instance court's judgment in the part concerning the award made, reducing it to MDL 15,000 to reflect the real level of harm caused to V.S. The court found that the applicant newspaper had published information which it could not prove to be true and which was defamatory of V.S.

17. In an appeal in cassation against both the decision rejecting its challenge to Judge C. and the judgment on the merits, the applicant newspaper repeated the arguments it had raised before the two lower courts. It added that when its challenge to Judge C. had been rejected, only one of three grounds invoked had been examined by the Judge at the Chişinău Court of Appeal. The applicant newspaper asked for the decision rejecting its challenge to Judge C. to be quashed since it had proved that its doubts about his impartiality were reasonably entertained.

18. On 9 March 2005 the Supreme Court of Justice found that the lower courts had correctly determined the defamatory and untrue nature of the statements made about V.S. but reduced the award of compensation to MDL 5,000 (EUR 300).

19. The applicant newspaper submitted to the Court a record of the domestic court hearings at the first two levels of jurisdiction, which allegedly showed that the courts had not asked any questions bearing on the substance of the case, had limited themselves to taking the mandatory procedural steps and had not attempted to clarify or verify any of the arguments or evidence submitted by the applicant newspaper.

20. According to the applicant newspaper, C.G., one of the persons mentioned in the paragraph cited above, is currently living in one of the apartments discussed in the article. The Government did not comment.

II. RELEVANT DOMESTIC LAW

21. The relevant part of Article 16 of the Civil Code reads as follows:

“(1) Every person has the right to the respect for his or her honour, dignity and professional reputation.

(2) Every person has the right to request the disclaiming of information which affects his or her honour, dignity and professional reputation if the person circulating such information cannot prove that it corresponds to reality.

.. (4) Where information which affects a person's honour, dignity and professional reputation is circulated in a mass medium, the court shall order it to publish a

disclaimer in the same column, page, programme or series of programmes, within a maximum of 15 days of the date of entry into force of the court judgment.

... (7) A person whose rights and lawful interests have been violated by a publication in a mass medium has the right to publish a reply in the medium in question, at the latter's expense.

(8) Every person about whom information has been published violating his or her honour, dignity and professional reputation has the right to request compensation for pecuniary and non-pecuniary damage in addition to the publication of a disclaimer.”

22. Article 18 of the Enforcement Code of 3 March 2005 reads as follows:

“Article 18. Period of submission of enforcement warrants.

1. A court judgment can be submitted for enforcement within three years from the date when the judgment became final, if the law does not provide otherwise. ...”

THE LAW

23. The applicant newspaper complained under Article 6 § 1 of the Convention that Judge C's examination of its appeal lacked impartiality and that the courts had given insufficient reasons for their judgments. The relevant part of Article 6 reads as follows:

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

24. The applicant newspaper also complained under Article 10 of the Convention that its right to freedom of expression had been violated.

Article 10 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.”

I. ADMISSIBILITY

25. The Court notes that in its initial application the applicant newspaper had submitted a complaint under Article 6 § 1 of the Convention. However, in its observations on the admissibility and merits it asked the Court not to proceed with the examination of that complaint. In a letter dated 3 March 2008 the applicant company asked the Court to examine that complaint. That submission, which was made after the parties had exchanged their observations on the case, was not accepted to the file as having been unsolicited. The Court therefore will not examine that complaint.

26. The Court considers that the applicant newspaper's complaint under Article 10 of the Convention raises questions of fact and law which are sufficiently serious that their determination should depend on an examination of the merits, and that no grounds for declaring it inadmissible have been established. The Court therefore declares this part of the application admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider the merits of this complaint.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

A. The arguments of the parties

1. The applicant newspaper

27. The applicant newspaper complained of a violation of its right to freedom of expression. It considered that there had been an interference with its right, but conceded that it had been in accordance with the law and pursued the legitimate aim of protecting the rights of others.

28. The applicant newspaper relied on the Court's case-law concerning the special protection to be afforded to the press, and the wider limits of acceptable criticism to which politicians knowingly submit themselves. It also noted the public-interest nature of the matter discussed in the impugned article, justifying a higher level of Article 10 protection. The applicant newspaper had acted in accordance with the rules governing journalists' ethics since it had published the material in good faith and had not focused on V.S. in order to victimise him specifically. Moreover, the applicant newspaper's source was credible, as evidenced by the fact that one of the four persons mentioned in the article (C.G.) still lives in one of the four apartments. A reasonable investigation into the matter had been carried out before the publication of the article, and this was not denied by anyone during the court proceedings. The applicant newspaper's own attempts to verify the information, as well as those of two different Members of

Parliament, had been unsuccessful. This meant that using other avenues, such as lodging a request under the Law on access to information, was unlikely to succeed. Such a measure would in any event take too long, in view of the perishable nature of the information concerned.

29. The applicant newspaper also considered that the wording of its article had been accurate and moderate. No information about the private life of V.S. had been discussed, and the information about allegations of his use of public funds had not been presented to the reader as an established fact. Moreover, the press was allowed a certain degree of exaggeration. The domestic courts had not analysed any of the above-mentioned elements in their judgments. They apparently simply insisted on the strict application of Article 16 § 2 of the Civil Code (see paragraph 21 above): that the applicant newspaper had to prove the truth of what they had published. The law was thus so inflexible as to leave the courts no choice but to adopt judgments contrary to Article 10 of the Convention.

2. The Government

30. The Government conceded that there had been interference with the applicant newspaper's freedom of expression but submitted that it had been provided for by law (Article 16 of the Civil Code), had pursued the legitimate aim of protecting the reputation of others and had been "necessary in a democratic society".

31. The authorities enjoyed a certain margin of appreciation in adopting their decisions and the courts had adopted reasoned decisions in which they had taken account of the two competing values - freedom of expression and protection of reputation - and had found that there had been a "pressing social need" to impose the fine on the applicant newspaper. The interference had thus been proportionate to the legitimate aim pursued. In addition, while the applicant newspaper claimed that it had unsuccessfully tried to contact V.S., it had failed to lodge a request under the Law on access to information.

32. Finally, considering the applicant newspaper's financial status and the fact that it was a national publication, the fine which it had to pay was not excessive.

B. The Court's assessment

33. It is common ground between the parties, and the Court agrees, that the decisions of the domestic courts and the award of damages made against the applicant newspaper amounted to "interference by [a] public authority" with the applicant newspaper's right to freedom of expression under the first paragraph of Article 10. Such interference will entail a violation of Article 10 unless it is "prescribed by law", has an aim or aims that are

legitimate under paragraph 2 of the Article and is “necessary in a democratic society” to achieve such aim or aims.

1. “*Prescribed by law*”

34. The Court notes that the interference complained of had a legal basis, namely Article 16 of the Civil Code (see paragraph 21 above). The Court considers that this provision is both accessible and foreseeable in its application. Accordingly, the Court concludes that in this case the interference was “prescribed by law” within the meaning of Article 10 § 2.

2. “*Legitimate aim*”

35. It is not disputed by the parties, and the Court agrees, that the interference served the legitimate aim of protecting V.S.'s reputation. It therefore remains to be examined whether the interference was “necessary in a democratic society”.

3. “*Necessary in a democratic society*”

36. The relevant general principles have been summarised in *Busuioc v. Moldova* (no. 61513/00, §§ 56-62, 21 December 2004); *Timpul Info-Magazin and Anghel v. Moldova*, no. 42864/05, §§ 29-30, 27 November 2007; and *Flux v. Moldova* (no. 6), no. 22824/04, § 24-26, 29 July 2008).

37. The Court notes that in the present case the article was written by a journalist and stresses the pre-eminent role of the press in a democratic society in imparting ideas and expressing opinions on political matters and other matters of public interest (see *Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, § 65, Series A no. 30). Particularly strong reasons must be provided for any measure affecting this role of the press and limiting access to information which the public has the right to receive (see, amongst many authorities, *Oberschlick v. Austria* (no. 1), 23 May 1991, § 58, Series A no. 204).

38. The plaintiff in the domestic proceedings was a politician and president of the Communist faction in Parliament at the time of the events. As such, he “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance” (see *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103). The domestic courts would have had to find a particularly “pressing social need” to sanction the newspaper in such circumstances. The Court observes that the article in question was aimed at criticising Parliament for alleged lack of transparency, rather than at disparaging V.S. specifically. The latter's name appeared twice in the entire article. While not focusing on any particular person, the article mentioned the names of all the alleged beneficiaries of

the four apartments and described the attempts to verify the information with some of them, including V.S.

39. The Court also notes that the article published by the applicant newspaper dealt with the issue of whether the Parliament leadership had spent public money in a non-transparent manner. This was therefore a matter of genuine public interest, which is also to be given additional protection under Article 10 of the Convention.

40. The Court considers that the expression relied on by the domestic courts in sanctioning the applicant newspaper (see paragraph 7 above) could be considered a statement of fact, or at least as implying that four members of the Communist party, including V.S., were to obtain the four apartments in question. It reiterates that, in accordance with its case-law, the existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof (see *Jerusalem v. Austria*, no. 26958/95, § 42, ECHR 2001-II). However, it also reiterates that, as part of their role of “public watchdog”, the media's reporting on “‘stories’ or ‘rumours’ – emanating from persons other than the applicant – or ‘public opinion’” is to be protected where they are not completely without foundation (see *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 65, Series A no. 239, and *Timpul Info-Magazin and Anghel*, cited above, § 36).

41. In situations such as this, where on the one hand a statement of fact is made and insufficient evidence is adduced to prove it, and on the other the journalist is discussing an issue of genuine public interest, verifying whether the journalist acted professionally and in good faith becomes paramount (see *Flux v. Moldova (no. 6)*, cited above, § 26 et seq.).

42. The Court notes that the article included a number of factual statements, none of which was challenged as untrue in court. These included the fact that four apartments had been built and were in their final phase of renovation in a former Parliament warehouse, that the Speaker of Parliament had already obtained an apartment there, and that information about the allocation of the apartments to Members of Parliament, together with other information concerning the financial accountability of Parliament, had been withheld by the Court of Accounts and the Parliament leadership. Even Members of Parliament could not obtain that information (see paragraphs 6-9 above). These uncontested facts gave a certain degree of credibility to the source in Parliament who had contacted the journalist.

43. Moreover, the applicant newspaper did not just publish what the source had told it, but verified some of the facts above by actually visiting the apartments in question and establishing that they were indeed being prepared for allocation. Furthermore, it attempted to obtain the opinion of some of those involved. It attempted to contact two of the four persons to whom the apartments had allegedly been allocated, as well as a number of Parliament officials, in order to verify the facts.

44. The Court considers that the applicant newspaper acted in a professional manner and attempted in good faith to verify its facts as far as was reasonably possible. The fact that news is a perishable commodity (see *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 60, Series A no. 216) made unsuitable any request for access to information, as suggested by the Government, since it would have taken too long to obtain an answer. Moreover, it is difficult to see how a request from a newspaper could have succeeded where requests made by Members of Parliament had failed (see paragraph 9 above). In addition, the lack of any official information on the matter at issue, despite the applicant newspaper's attempts to obtain such details, plus the other uncontested facts raising legitimate doubts as to the legitimacy of the distribution of the apartments (see paragraphs 6-9 and 42 above), could reasonably have prompted the journalist to report on anything that was available, including unconfirmed rumours (see *Timpul Info-Magazin and Anghel*, cited above, § 36). Significantly, the applicant newspaper clearly informed its readers in the article itself that it had been unable to verify the truth of the information received, and thus avoided presenting the rumours on which it was reporting as established facts.

The present case must therefore be distinguished from *Flux v. Moldova* (no. 6), cited above, in which the same newspaper, while unable to prove the facts on which it had reported, had not even attempted to verify them or to give those concerned an opportunity to comment or reply (see also *Rumyana Ivanova v. Bulgaria*, no. 36207/03, §§ 55-71, 14 February 2008).

45. In view of the above and taking into account the applicant newspaper's good faith in reporting on an issue of genuine public interest, the relevant factual background and the lack of any details on how public money was spent by Parliament, and despite the applicant newspaper's inability to prove some of the facts which it had reported, the Court considers that the interference with the applicant newspaper's right to freedom of expression was not "necessary in a democratic society".

46. There has, accordingly, been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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. Pecuniary damage

48. The applicant claimed EUR 312.25 for pecuniary damage, consisting of the amount of damages it had to pay V.S. in accordance with the domestic courts' judgments, and the court fees paid.

49. The Government submitted that no compensation was due since the applicant newspaper's Convention rights had not been breached. In any event, no evidence was submitted to the Court that the sum awarded to V.S. had actually been paid.

50. The Court considers that the sum claimed by the applicant newspaper is a direct causal effect of the violation of Article 10 which it has established. However, it also notes that the applicant newspaper would only have had to pay that amount if V.S. had submitted the warrant for enforcement. Since the Court has no information to that effect, it agrees with the Government that the evidence submitted is an insufficient ground for an award. It is also noted that if an enforcement warrant is not submitted within three years from the date of the award, it can only be enforced thereafter if the debtor wishes to pay (see paragraph 22 above). It follows that if the enforcement warrant has still not been submitted, the 2005 warrant can no longer be submitted for enforcement. Therefore, the applicant newspaper's claim for EUR 300 to cover the damages awarded to V.S. must be rejected.

51. At the same time, the court fees (EUR 12.25) had presumably been paid, since the courts would not have proceeded with the examination of the case had that not been so. The Court thus awards EUR 12.25 in this respect.

B. Non-pecuniary damage

52. The applicant newspaper claimed EUR 5,000 in compensation for non-pecuniary damage caused. It referred to the lack of any justification for the award made in V.S.'s favour and the damage to its reputation as a result of the judgment.

53. The Government considered that the applicant newspaper's claims were unsubstantiated and in any event excessive.

54. Making an overall assessment on an equitable basis and taking into account its case-law in similar cases, the Court awards the applicant EUR 3,000 (see *Savitchi v. Moldova*, no. 11039/02, § 64, 11 October 2005, and *Flux v. Moldova (no. 3)*, no. 32558/03, § 32, 12 June 2007).

C. Costs and expenses

55. The applicant newspaper claimed EUR 2,199.75 for costs and expenses incurred before the Court. He submitted a detailed time-sheet and a contract according to which the lawyer had worked 29.33 hours at an

hourly rate of EUR 75. The fee charged was in any event half the maximum recommended by the Moldovan Bar Association for representation before international courts.

56. The Government disagreed with the amount claimed and argued that the case was not very complex in comparison with similar cases, such as previous applications lodged by the same applicant newspaper.

57. In the present case, regard being had to the itemised list submitted and the complexity of the case, the Court awards the applicant EUR 1,800 for costs and expenses.

D. Default interest

58. The Court considers it appropriate that the default interest 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, to be converted into Moldovan lei at the rate applicable at the date of settlement:
 - (i) EUR 12.25 (twelve euros and twenty-five cents), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iii) EUR 1,800 (one thousand eight hundred 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 amounts 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 24 November 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President