CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF PERNA v. ITALY

(Application no. 48898/99)

JUDGMENT

STRASBOURG

(25 July 2001)

THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
6 May 2003

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 Perna v. Italy,

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

Mr C.L. ROZAKIS, *President*,
Mr B. CONFORTI,
Mr G. BONELLO,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr E. LEVITS, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 14 December 2000 and on 10 July 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 48898/99) against Italy 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 Giancarlo Perna ("the applicant"), on 22 March 1999.

2. The applicant was represented before the Court by Mr G.D. Caiazza, a lawyer practising in Rome. The Italian Government ("the Government") were represented by their Agent, Mr U. Leanza, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs, assisted by Mr V. Esposito, Co-Agent.

3. The applicant alleged a violation of Article 6 §§ 1 and 3 (d) of the Convention on account of the Italian courts' refusal to admit the evidence he wished to adduce, and an infringement of his right to freedom of expression contrary, in his submission, to Article 10 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

5. By a decision of 14 December 2000, the Chamber declared the application admissible.

THE FACTS

6. On 21 November 1993 the applicant, who is a journalist, published in the Italian daily newspaper *Il Giornale*, in the "Lion's mouth" column (*La*

bocca del leone), an article about Mr G. Caselli, who was at that time the Public Prosecutor in Palermo. The article purported to be a "portrait" of Mr Caselli. It was entitled "Caselli, the judge with the white tuft" and bore the sub-title "Catholic schooling, communist militancy – like his friend Violante...".

7. In the article the applicant, after referring to the proceedings instituted by Mr Caselli against Mr G. Andreotti, a very well known Italian statesman accused of aiding and abetting a mafia-type organisation (*appoggio esterno alla mafia*), who had in the meantime been acquitted at first instance, expressed himself as follows:

> "... At university, [Caselli] moved towards the PCI [the Italian Communist Party], the party which exalts the frustrated. When he entered the State Legal Service he swore a threefold oath of obedience – to God, to the Law and to via Botteghe Oscure [formerly the headquarters of the PCI, now those of the PDS – the Democratic Party of the Left]. And [Caselli] became the judge he has remained for the last thirty years – pious, stern and partisan.
>
> But he cannot really be understood without a mention here of his *alter ego* Violante, his twin brother. Both from Turin; the same age – fifty-two; both raised by the Catholic teaching orders; both Communist militants; both judicial officers; and a deep understanding between them: when Violante, the head, calls, Caselli, the arm, responds.
>
> Luciano [Violante] has always been one step ahead of Giancarlo [Caselli]. In the mid-1970s he indicted for an attempted *coup d'état* Edgardo Sogno, a former member of the Resistance, but also an anticommunist. It was a typical political trial which led nowhere. Instead of facing a judicial inquiry, Violante found that his career began to take off. In 1979 he was elected as a Communist MP. And ever since then he has been the via Botteghe Oscure's shadow Minister of Justice...
>
> ... [Caselli] is a judge in the public eye. He is in the first line of the fight against terrorism. It was he who obtained the confession of Patrizio Peci, whose evidence as a witness for the prosecution was a disaster for the BR [the red Brigades].
>
> In the meantime, the PCI set in motion its strategy for gaining control of the public prosecutors' offices in various cities. That campaign is still going on, as the PDS has picked up the baton. ... The first idea was that if the Communists did not manage to gain power through the ballot box, they could do so by forcing the lock in the courts. There was no shortage of material. The Christian Democrats and the Socialists were nothing but thieves and it would be easy to catch them out. The second idea was more brilliant than the first: the opening of a judicial investigation was sufficient to shatter people's careers; there was no need to go to the trouble of a trial, it was sufficient to put someone in the pillory. And to do that it was necessary to control all the public prosecutors' offices.
>
> And that was the start of Tangentopoli. The Craxis, De Lorenzos and others were immediately caught with their hands in the till and destroyed. But Andreoti was needed to complete the picture...

> It was at that precise moment that Giancarlo [Caselli] was getting ready to leave the rain of Turin for the sun of Palermo...
>
> Once in Palermo his fate and Andreotti's became intertwined, whereas the two men had remained apart for years. Less than two years later the senator for life was suddenly accused of belonging to the mafia. The file was an implausible rag-bag...
>
> In April Caselli flew off to the United States, where he met Buscetta. He offered the informer eleven million lire a month to continue to co-operate. [Buscetta] could still be useful to him during the investigation, even if the outcome was no longer of much importance. The result sought had already been achieved.
>
> What will happen next is already predictable. In six to eight months' time the investigation will be closed. But Andreotti will not be able to resurrect his political career. What a stroke of luck. Caselli, on the other hand, will be portrayed as an objective judge. ..."

8. On 10 March 1994, acting on a complaint by Mr Caselli, the judge responsible for preliminary investigations committed the applicant and the manager of *Il Giornale* for trial in the Monza District Court. The applicant was accused of defamation through the medium of the press (*diffamazione a mezzo stampa*), aggravated by the fact that the offence had been committed in respect of a civil servant in the performance of his official duties.

9. During the first-instance proceedings the defence asked to take evidence from Mr Caselli as the complainant and civil party. It also asked for two press articles concerning the professional relations between Caselli and the criminal-turned-informer (*pentito*) Buscetta to be added to the file. The District Court refused both the above applications on the grounds that there was no point taking evidence from Caselli in view of the content of the article written by the applicant and that the documents in question would not have had any influence over the decision.

10. On 10 January 1996 the District Court found the accused guilty of defamation within the meaning of Articles 595 §§ 1 and 2 and 61 § 10 of the Criminal Code and section 13 of the Press Act (Law no. 47 of 8 February 1948). It sentenced the applicant to a fine of 1,500,000 Italian lire (ITL), payment of damages and costs in the sum of ITL 60,000,000 and publication of the judgment in *Il Giornale*. It held that the defamatory nature of the article was evidenced by the fact that it denied that Caselli performed his duties conscientiously, attributing to him a lack of impartiality, independence and objectivity which had allegedly led him to use his judicial activity for political ends. The applicant was not entitled to assert the right to report current events (*diritto di cronaca*) and comment on them (*diritto di critica*) as he had not adduced any evidence in corroboration of such serious accusations.

11. The applicant appealed. Relying on the freedom of the press and in particular the right to comment on current events, he submitted, among other arguments, that the reference to Caselli's political tendencies reflected

the truth and that the District Court could have tested whether this was so by agreeing to take evidence from the complainant himself, that Caselli and Violante actually were friends and that in the proceedings against Andreotti Caselli actually had made use of the assistance of the *pentito* Buscetta and had paid him sums of money as the representative of the State, since all the *pentiti* were in receipt of money from the Italian State. He further described himself as a commentator (*opinionista*), arguing that his intention had not been to present a biography of Caselli but to express his critical opinions, in a figurative and effective way, on the basis of true and uncontested facts. Lastly, he insisted that the complainant, together with journalists and other well-known personalities on the Italian political stage who, like Caselli, had been militant Communists, should be required to give evidence. In particular, he asked for evidence to be taken from Mr S. Vertone and Mr G. Ferrara, both political comrades of the complainant during the 1970s in Turin and demanded that the Court of Appeal add to the file press articles relating interviews in which they had confirmed the complainant's active political militancy. In particular, in an interview published in the daily newpaper *Corriere della Sera* on 11 December 1994, extracts from which were quoted in the applicant's appeal, Mr Vertone had declared, among other statements, that the complainant was a courageous man of great integrity but that he was influenced by the Communist cultural and political model, that his links with the former Communist Party were very close and that Caselli had subsequently become all but a member of it. In an interview published by another daily newspaper, *La Stampa*, on 9 December 1994, also quoted in extract form in the applicant's appeal, Mr Ferrara had stated that in the 1970s he had participated in dozens of political meetings attended by Caselli and Violante, among others, held by the Turin federation of the former Communist Party. He had gone on to say that although Caselli, a man of integrity, had done good work in fighting terrorism and as a judicial officer, he was highly politicised and should therefore avoid making speeches like a tribune.

12. In a judgment of 28 October 1997 the Milan Court of Appeal gave judgment against the applicant. It held that he had attributed acts and conduct to Caselli in a clearly defamatory way.

13. The Court of Appeal gave separate rulings on the various key parts of the article.

14. It first examined the phrase concerning the "oath of obedience" (*giuramento di obbedienza*):

> "When he entered the State Legal Service he swore a threefold oath of obedience – to God, to the Law and to via Botteghe Oscure [formerly the headquarters of the PCI, now those of the PDS – the Democratic Party of the Left]. And [Caselli] became the judge he has remained for the last thirty years – pious, stern and partisan.

15. The Court of Appeal held that this sentence was defamatory because, while it had a symbolic value, it indicated dependence on the instructions of

a political party, which was inconceivable for persons who, on being admitted to judicial office, had to swear an oath of obedience (not a symbolic one but a real one) to the law and nothing but the law.

16. The Court of Appeal next examined the remainder of the article, particularly the allegations that

- Caselli, with the support of Violante, also a judicial officer (the relations between the two being described as relations between "the arm and the head"), had played a crucial role in the former Italian Communist Party's plan to gain control of the public prosecutors' offices in each Italian city in order to annihilate their political opponents;
- Caselli had accused Andreotti and used the *pentito* Buscetta in the full knowledge that he would eventually have to discontinue the proceedings for lack of evidence, which confirmed that the sole purpose of his actions had been to destroy Andreotti's political career.

17. The Court of Appeal ruled that these allegations were very serious and highly defamatory in that they were not backed up by any evidence.

18. As to the request for cross-examination of the complainant and other notable figures of Italian political life and for certain articles to be added to the file, the Court of Appeal held that this was unnecessary since the applicant's remarks about Caselli's political leanings, the friendship between Caselli and Violante and the use of Buscetta, a *pentito* paid by the State, in the proceedings against Andreotti, were not defamatory and therefore did not have to be proved.

19. In a judgment of 9 October 1998, deposited with the registry on 3 December 1998, the Court of Cassation upheld the Court of Appeal's decision. It held that it was a correct decision both in procedural terms and as regards the merits of the case. On the merits, it held that the offensive nature of the article for Caselli, both as an individual and as a judicial officer, could not be doubted, as the applicant had accused him of deeds which implied a lack of personality, dignity, autonomy of thought, coherence and moral integrity.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

20. The applicant complained above all of an infringement of his right to defend himself, as the Italian courts had refused throughout the proceedings to admit the evidence he had sought to adduce, including cross-examination of the complainant. He relied in that connection on Article 6 §§ 1 and 3 (d) of the Convention.

21. Paragraphs 1 and 3 (d) of Article 6 of the Convention provide:

> ""1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"

A. Arguments of the parties

1. The applicant

22. The applicant contested the Government's assertion that the courts which had tried him had based their decisions on the evidence considered at trial. In fact, it could be seen that the decisions in question had been based solely on the offending article, and therefore on Mr Caselli's complaint, since his own requests concerning the taking of evidence had all been refused.

23. According to the applicant, his judges had refused to admit the crucial evidence in any defamation trial, namely the complainant's witness evidence. As a result, he, the accused, had been denied the most elementary right of a defendant, namely the right to ask the complainant to say under oath whether or not the facts underlying the criticisms he had made were true. In other words, by finding him guilty on the basis of the offending article alone, the relevant Italian courts had in substance considered the trial itself to be superfluous.

24. The applicant contended that a journalist accused of defamation could defend himself only by proving his credibility, but he had been denied the opportunity to do so. Moreover, in the present case, he had not been allowed to adduce any evidence, this being symptomatic, in his submission, of the abnormal nature of the proceedings against him. In particular, he found it difficult to understand how witness statements about the complainant's political militancy at a time when he was already a judicial officer – which formed the basis of the criticisms the applicant had made concerning that officer's independence – could be deemed to have no bearing on the case.

2. The Government

25. The respondent Government emphasised above all that the admissibility of evidence was a matter for the domestic courts and that the applicant's criminal responsibility had been found to be established by courts at three levels of jurisdiction which had conducted an adversarial examination of the evidence adduced before them. They had held that the evidence the applicant had sought to adduce was not pertinent and there was nothing to indicate that the refusal to admit that evidence had breached Article 6. Moreover, according to the established case-law of the Convention institutions, the accused did not have an unlimited right to have witnesses summoned. He had to show that the evidence of the witnesses he wished to call was necessary to establish the facts, and the applicant, in the Government's submission, had not done so. In fact, none of the witness statements which the applicant had sought to have admitted in evidence would have had any bearing on the statements held to be defamatory.

B. The Court's assessment

26. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among many other authorities, the Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, Reports of Judgments and Decisions 1997-III, § 50). In particular, "as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce... More specifically, Article 6 para. 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses" (see the Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, § 33). Consequently, it is not sufficient for an accused to complain that he was not permitted to examine certain witnesses; he must also support his request to call witnesses by explaining the importance of doing so and it must be necessary for the court to take evidence from the witnesses concerned in order to be able to establish the true facts (see Engel and others v. the Netherlands, 8 June 1976, Series A no. 22, § 91, and Bricmont v. Belgium, 7 July 1989, Series A no. 158, § 89, and Eur. Comm. HR, no. 29420/95, Dec. 13.1.1997, DR 88-B, p. 148 at pp. 158 and 159). That principle also applies to the complainant in a defamation case where, as in the present case, it is requested that he be called as a witness of the facts asserted in the allegedly defamatory statements.

27. In the present case the applicant complained that the Italian courts had refused to take evidence either from the witnesses he had asked them to call or from the complainant, and had not allowed certain press articles to be added to the file.

28. The Court notes that the applicant requested in particular that evidence be taken from Mr Vertone and Mr Ferrara, both political comrades of the complainant during the 1970s in Turin, concerning Mr Caselli's political militancy. But throughout the proceedings the Italian courts consistently held that his militancy had been established, and the same is true of the friendship between Caselli and Violante, Buscetta's co-operation with the judicial authorities and the fact that the latter, as a *pentito*, was paid by the State. In that connection, the Court attaches special importance to the fact that, in his appeal, the applicant mentioned above all the complainant's political militancy as a fact which could be corroborated by the witnesses he wished to call, whereas he did not name any other witness capable of giving evidence about the crucial facts alleged in his article, namely that there was a strategy of gaining control of the public prosecutors' offices in various cities and that Buscetta was being used to destroy Andreotti's political career. The Court therefore considers that the applicant has not explained how evidence from the witnesses he wished to call could have contributed any new information whatsoever to the proceedings. The same is true of the press articles which the applicant had asked to be added to the file and which also essentially referred to the complainant's political militancy.

29. As regards examination of the complainant, repeatedly requested by the applicant, the Court does not underestimate the relevance such an examination might have had in the context of a defamation trial. However, the relevance thus presumed *a priori* must be verified in the light of the actual circumstances of the case concerned. The applicant's article raised in substance two separate issues. Firstly, he questioned the complainant's independence and impartiality in general on account of his political militancy. Secondly, he accused him of the specific conduct mentioned above, that is the strategy of gaining control of the public prosecutors' offices and the use of the *pentito* Buscetta against Andreotti. The complainant's political militancy and his relations with Mr Buscetta, a *pentito* paid by the State, had been held by the Italian courts to have been established. A witness statement by the complainant would therefore have concerned mainly the allegations that he had participated in a plan to gain control of the public prosecutors' offices in various cities and that he had an ulterior motive for his use of Buscetta. These, however, were accusations which the complainant had contested in his complaint alleging defamation. Consequently, it is hard to see what evidence capable of helping the courts to establish the truth could have been provided by examination of the complainant, other than a repetition of his rejection of the allegations against him *en bloc*.

30. It would have been a different matter if the applicant had adduced witness statements or other evidence in support of these contested allegations because the complainant would then have been obliged to reply, not – or not only – to the applicant's allegations as such, but also and above all to the supporting evidence.

31. In conclusion, the Court considers that the applicant has not established the relevance of taking evidence from Mr Vertone, Mr Ferrara and the complainant or of adding certain press articles to the file. Accordingly, there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. Relying on Article 10 of the Convention, the applicant further complained of an infringement of his right to freedom of expression resulting both from the decision of the Italian courts on the merits and from their decisions on procedural matters, the latter having prevented him from proving that the offending article was covered by the right to report and comment on current events in the context of the freedom of the press.

33. Article 10 of the Convention provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The complaint under Article 10 prompted by the Italian courts' refusal to admit the evidence the applicant sought to adduce

34. The Court observes at the outset that in so far as it concerns the Italian courts' refusal to admit the evidence the applicant sought to adduce, the complaint under Article 10 in substance raises no issue distinct from the one it has already determined in relation to Article 6 §§ 1 and 3 (d) of the Convention. Consequently, the Court will examine this part of the

application purely from the standpoint of the substantive guarantees afforded by Article 10 as regards the applicant's conviction as such.

B. Arguments of the parties

1. The applicant

35. The applicant asserted that a judicial officer's political experience inevitably influenced him in the performance of his duties. One might disagree with that opinion, but it was not acceptable for it to be described as a very serious accusation and punished under the criminal law.

2. The Government

36. The Government submitted that the decisions complained of by the applicant were aimed at protecting the reputation of others, and specifically that of the Palermo Public Prosecutor and maintaining the authority of the judiciary; they therefore pursued legitimate aims for the purposes of the second paragraph of Article 10. The applicant's statements, far from concerning a debate of general interest, in fact contained personal insults against the judicial officer he named. Referring to the Court's case-law on the question, the Government emphasised that, regard being had to the specific position of the judiciary within society, it might become necessary to protect it against attacks devoid of all foundation, especially where the duty of discretion prevented the judicial officers criticised from replying.

37. In accusing the judicial officer concerned of breaking the law, or at least of failing to discharge his professional duties, the applicant had not only damaged Mr Caselli's reputation but had also undermined public confidence in the State Legal Service. As the Court of Appeal had found, the applicant had not expressed opinions but had attributed conduct to the judicial officer accused without making any attempt to check the facts and without producing any firm supporting evidence.

C. The Court's assessment

1. General principles

38. The Court reiterates the fundamental principles which emerge from its judgments relating to Article 10:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend,

shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among others, the following judgments: Jersild v. Denmark, 23 September 1994, Series A no. 298, § 31; *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I; and *Nilsen and Johnsen v. Norway*, no. 23118/93, § 43, to be published in the official reports of the Court's judgments and decisions).

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see *Janowski v. Poland*, cited above, § 30).

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see *Janowski v. Poland*, cited above, § 30, and the Barfod v. Denmark judgment of 22 February 1989, Series A no. 149, § 28). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see the above-mentioned Jersild v. Denmark judgment, § 31).

(iv) The truth of an opinion, by definition, is not susceptible of proof. It may, however, be excessive, in particular in the absence of any factual basis (see the De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, § 47).

(v) The matters of public interest on which the press has the right to impart information and ideas, in a way consistent with its duties and responsibilities, include questions concerning the functioning of the judiciary. However, the work of the courts, which are the guarantors of justice and which have a fundamental role in a State governed by the rule of law, needs to enjoy public confidence. It should therefore be protected against unfounded attacks, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying (see the Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, § 34).

2. Application of the above principles in the present case

39. The Court notes in the first place that in convicting the applicant the Court of Appeal gave separate rulings on each of the crucial parts of the article complained of. In following that approach it first ruled on the sentence "When he entered the State Legal Service he swore a threefold oath of obedience..." (see paragraphs 14 and 15 above) and then on the content of the remainder of the article, concerning among other matters the alleged strategy of gaining control of the public prosecutors' offices in various cities in which the complainant was said to have taken part and the abusive and manipulative nature of the investigation of Mr Andreotti (see paragraphs 16 and 17 above). Consequently, the Court will examine separately, in the light of the requirements of Article 10 of the Convention, these two branches of the applicant's conviction.

(a) The sentence relating to the "oath of obedience"

40. The Court observes that a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof (see the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, § 46). The Court takes the view that the sentence in question was essentially symbolic in content and amounted to the expression of a critical opinion about Caselli's political militancy as a member of the former Communist Party. Moreover, the Court of Appeal itself accepted, in its judgment of 28 October 1997, that it was a sentence with a symbolic meaning. Admittedly, to repeat the terms used by the Court of Appeal, such an expression indicated dependence on the instructions of a political party. However, this was precisely the tenor of the criticism directed at the complainant. Consequently, the Court must verify whether such criticism, conveyed in a strongly-worded, symbolic form, was consistent with respect for the rules of the journalist's profession, to which exercise of the freedom of expression guaranteed by Article 10 is subject.

41. The Court notes that the criticism directed at the complainant had a factual basis which was not disputed, namely Caselli's political militancy as a member of the Communist Party. The Italian courts themselves consistently held that fact to have been established (see paragraph 28 above). While it is true that judicial officers must be protected against unfounded attacks, especially in view of the fact that they are subject to a duty of discretion that precludes them from replying (see the Prager and Oberschlick v. Austria judgment, cited above, § 34), the press nevertheless is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them (ibid.). By acting as a militant member of a political party, of whatever

tendency, a judicial officer imperils the image of impartiality and independence that justice must always show at all times (see, *mutatis mutandis*, *Buscemi v. Italy*, no. 29569/95, § 67, to be published in the official reports of the Court's judgments and decisions). Where a judicial officer is an active political militant, his unconditional protection against attacks in the press is scarcely justified by the need to maintain the public confidence which the judiciary needs in order to be able to function properly, seeing that it is precisely such political militancy which is likely to undermine that confidence. By such conduct, a judicial officer inevitably exposes himself to criticism in the press, which may rightly see the independence and impartiality of the State legal service as a major concern of public interest.

42. As to the terms chosen by the applicant, use of the symbolic image of the "oath of obedience" was admittedly hard-hitting, but the Court observes in that connection that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see the Prager and Oberschlick v. Austria judgment, cited above, § 38). Moreover, while the Court does not have to approve the polemical and even aggressive tone used by journalists, Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see the Jersild v. Denmark judgment, cited above, § 31). Regard should also be had to the open and even ostentatious nature of the complainant's political militancy (see paragraphs 11 and 18 above and, *mutatis mutandis*, *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 35, to be published in the official reports of the Court's judgments and decisions).

43. That being so, the applicant's critical comment on Mr Caselli's political militancy, which had a solid and uncontested factual basis, could not be considered excessive (see the De Haes and Gijsels v. Belgium judgment, cited above, § 47).

(b) The factual allegations made against the complainant

44. The Court considers that the applicant's assertions about the alleged strategy of gaining control of the public prosecutors' offices in a number of cities and the use of the *pentito* Buscetta in order to prosecute Mr Andreotti quite obviously amounted to the attribution of specific acts to the complainant. They are therefore not covered by the protection of Article 10 unless they have a factual basis, especially considering the seriousness of such accusations, since they were allegations of fact susceptible of proof (see *Nilsen and Johnsen v. Norway*, cited above, § 49).

45. The article in question did not mention any evidence or cite any source of information capable of corroborating these allegations. Furthermore, during the trial the applicant did not adduce any precise evidence in support of these assertions of fact and, as the Court found above, the evidence of the witnesses he wished to call concerned only the

complainant's political activism (see paragraph 28 above). Regard being had to the context, those assertions, which carried extremely serious accusations against a judicial officer, overstepped the limits of acceptable criticism in that they had no factual basis.

3. Conclusion

46. The Court has always emphasised the fundamental importance of freedom of expression in a democratic society, of which it is one of the essential foundations. Consequently, in reviewing the decisions given by domestic courts by virtue of their power of appreciation, it must ensure that sanctions against the press were strictly proportionate and prompted by assertions which did indeed overstep the limits of acceptable criticism, while safeguarding assertions which may and therefore must enjoy the protection of Article 10. Exercise of the freedom of expression is a complex and delicate matter and a sanction imposed on a journalist is justified only in so far as it penalises those parts of his writings which have overstepped the limits referred to above. The Court reiterates in that connection that exceptions to freedom of expression must be interpreted narrowly (see the Oberschlick v. Austria (no. 2) judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, pp. 1274-75, § 29, and, most recently, *Lopes Gomes da Silva v. Portugal*, cited above, § 30 (ii)).

47. Consequently, the applicant's conviction appears to have been founded on relevant and sufficient reasons with regard to the allegations concerning the complainant's participation in a plan to gain control of the public prosecutors' offices of several cities and the real reasons for using the *pentito* Buscetta, given that these were allegations of fact which had not been backed up and could not be founded on the complainant's political militancy alone (see, *mutatis mutandis*, *Nilsen and Johnsen v. Norway*, cited above, § 49). On the other hand, it does not appear to have been justified with regard to the sentence concerning the "oath of obedience", because that sentence constituted a critical opinion which, though couched in hard-hitting, provocative language, was nevertheless based on a solid factual basis, incontestably related to a matter of public interest, on account of the concern that a judicial officer's political militancy may prompt, and should therefore have enjoyed the protection of Article 10 with regard to the form of words used also.

48. There has accordingly been a violation of Article 10 in so far as the applicant was convicted partly on account of the sentence relating to the "oath of obedience".

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. In respect of pecuniary damage, the applicant referred to part of the sums he had been ordered to pay the complainant, namely 60,000,000 Italian lire (ITL) in reparation for non-pecuniary damage and ITL 11,000,000 in reimbursement of the complainant's costs. He acknowledged, however, that he had not paid these sums personally, as the company which owned the newspaper had borne the full cost.

51. That being so, the Court considers that the applicant did not sustain any damage which affected his financial position, and accordingly that no sum should be awarded to him under that head.

52. In respect of non-pecuniary damage, the applicant in substance left the matter to the Court's discretion, while making the following submissions. His conviction had caused him serious prejudice to his professional reputation, regard being had to the fact that at the material time he was a very famous journalist whose articles were published on the first and third pages, that is in the most prestigious positions in a daily newspaper. That prejudice had been aggravated by the celebrity of the complainant and by the delicate nature of the issues covered in the article. In addition, the applicant's conviction had considerably limited his subsequent activity on account of his fear of being prosecuted again for the content of his articles.

53. The respondent Government submitted that a finding of a violation would constitute sufficient reparation.

54. The Court considers, like the Government, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant (see *Nilsen and Johnsen v. Norway*, cited above, § 56), especially as the Court has found that the applicant's conviction for his allegations about the alleged strategy of gaining control of the public prosecutors' offices and the real reasons for using the *pentito* Buscetta was founded on relevant and sufficient reasons.

B. Costs and expenses

55. The applicant acknowledges that the costs incurred in the domestic courts were likewise borne by the company which owned the newspaper. The Court therefore considers that no award should be made to him under that head.

56. As to his costs before the Court, the applicant claimed the overall sum of ITL 27,754,689, which also included the sums chargeable in value-added tax and a contribution to the lawyers' insurance fund (the "CAP"). In that connection he produced a detailed bill of costs and disbursements.

57. The Government left the matter to the Court's discretion, while emphasising the simplicity of the case.

58. The Court considers that the case presented undeniable difficulties, but that account should also be taken of the fact that the finding of a violation concerns Article 10 only, and only in so far as the applicant's conviction was also based on his assertions about the "oath of obedience". Consequently, the Court considers it equitable to award one third (rounded down) of the sum claimed, namely ITL 9,000,000, plus any amount of value-added tax and CAP which may be chargeable.

C. Default interest

59. According to the information available to the Court, the statutory rate of interest applicable in Italy at the date of adoption of the present judgment is 3.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention;

2. *Holds* that there has been a violation of Article 10 of the Convention on account of the applicant's conviction for alleging, in the form of a symbolic expression, that the complainant had taken an oath of obedience to the former Italian Communist Party, and that there has been no violation of Article 10 arising from the applicant's conviction on account of his allegations concerning participation by the complainant in an alleged plan to gain control of the public prosecutors' offices in a number of cities and the real reasons for using the criminal-turned-informer Buscetta;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, 9,000,000 (nine million) Italian lire for costs and expenses, together with any sum that may be chargeable in value-added tax and a contribution to the lawyers' insurance fund (the "CAP")

(b) that simple interest at an annual rate of 3.5% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 25 July 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Conforti, joined by Mr Levits, is annexed to this judgment.

C.L.R.
E.F.

CONCURRING OPINION OF JUDGE CONFORTI, JOINED BY JUDGE LEVITS

(*Translation*)

I agree with the finding of a violation of Article 10 of the Convention, but for different reasons than those given in the judgment.

The majority clearly separated the applicant's complaint concerning the procedure before the Italian courts, which it considered exclusively under Article 6, from his complaint concerning the substantive guarantees of freedom of expression, which it examined from the standpoint of Article 10.

In my opinion, on the contrary, the issues raised in cases of this type are still Article 10 issues even where the procedure followed is concerned; and what can normally be tolerated from the point of view of due process according to the fair-trial rules laid down in Article 6 may not be acceptable when it is a matter of verifying whether an interference with freedom of expression is "necessary in a democratic society". In the present case the courts refused to hear evidence from the complainant, who could have been cross-examined by the applicant's counsel, and rejected all requests to adduce written evidence. In a trial for defamation by a journalist of a judicial officer in the public prosecution service, such conduct, whether intentional or not, gives the clear impression of intimidation, which cannot be tolerated in the light of the Court's case-law on restrictions of the freedom of the press. The Italian courts did indeed act very speedily in determining the charges against the applicant in less than four years, at three levels of jurisdiction. However, that circumstance too, although praiseworthy from the point of view of the reasonable length of judicial proceedings, cannot fail to reinforce – in a country condemned many times for the length of its proceedings – the impression I mentioned above.

That is why I accept the applicant's arguments, in which he insisted on the need to assess the procedure from the standpoint of Article 10, and I consider that there has been a violation of that provision.