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

FIRST SECTION

DECISION

Application no. 76795/13
X
against San Marino

The European Court of Human Rights (First Section), sitting on 19 April 2016 as a Chamber composed of:

Mirjana Lazarova Trajkovska, *President,*
Ledi Bianku,
Kristina Pardalos,
Linos-Alexandre Sicilianos,
Paul Mahoney,
Aleš Pejchal,
Robert Spano, *judges,*

and Abel Campos, *Section Registrar,*

Having regard to the above application lodged on 25 November 2013,

Having regard to the Court's decision of 19 April 2016 not to hold an oral hearing and to grant anonymity to the applicant of its own motion under Rule 47 § 4 of the Rules of Court,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr X is a San Marinese national, who was born in 1963 and lives in Fiorentino. He was represented before the Court by Mr F. Cocco, a lawyer practising in Rimini, Italy.

A. The circumstances of the case

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

1. Background to the case

3. On an unspecified date the applicant, a police superintendent, lodged a criminal complaint for defamation against a newspaper and a journalist, as well as GF the elected chief of the administrative district of Fiorentino (*Capitano di Castello*) (who had given an interview to the newspaper), in connection with press articles which were published on 20, 23 and 25 February 2012. The articles claimed that, *inter alia,* a policeman (a title presumably traceable to the applicant) was fraudulently obtaining benefits from the State, including the use of a State apartment, despite it being needed by other persons.

4. Subsequent to the articles, the administrative body in question removed the apartment from the applicant's possession. According to the applicant, the articles questioned his morality – they cast doubts over whether rent and service charges had been paid, hypothesised as to whether other benefits were also being enjoyed by the applicant, and posed questions regarding the possibility of the applicant's involvement in other minor fraud infractions, even though, according to the applicant, such infractions were common in lease contracts. The last article also focused on the applicant's profession and, in his view, was written in a manner intended to bring him into disrepute. Moreover, it was not based on the truth in so far as no substantiation was given to the allegations that the applicant was not wanted for the post of commander of the police brigade; or that that there had been friction between him and the citizens of Fiorentino; or that some persons had in fact complained about the applicant, as had been claimed by GF in the interview.

5. Prior to this last article and following the first two articles the applicant had written to various media outlets with a statement in his defence clarifying his situation. He also clarified the situation regarding the apartment that was the subject of the articles, which was in his possession by title of lease. The entirety of the applicant's statement was published, together with comments by the journalist who authored the press articles, in the third above-mentioned article.

2. Criminal proceedings

6. Criminal proceedings no.175/2012 were instituted against the above-mentioned persons and testimony was heard from the applicant, the journalist and other witnesses.

7. On 31 January 2013 the investigating judge (*Commissario della Legge*, hereinafter "the Commissario") requested that criminal proceedings no.175/2012 be archived. The Commissario recalled the importance of freedom of expression, noting that this was not however unlimited and could be curtailed in view of the dignity, honour and reputation of other persons. Having regard to the principles derived from the right to freedom

of expression, the articles complained of were not offensive, and thus could not be subject to criminal liability.

8. The Commissario considered that neither the title ("*A Fiorentino abita l'ultimo giapponese*" – "The last Japanese living in Fiorentino") nor the content of the first article contained any criminally relevant statement. The applicant had confirmed that, as mentioned in the beginning of the article, he had lived in an apartment provided by the State situated in the cultural centre (*centro sociale*) of Fiorentino. The Fiorentino authorities (through GF) had also confirmed that an application had been lodged to regain possession of the property (as mentioned in the central part of the article). As to the questions posed in the last part of the article (namely, concerning the rent of the apartment and the fact that a family was living in a cultural centre built for other purposes, and so forth), the subject matter was one of public interest and the formulation of the questions appeared to be correct and did not exceed the limits of the exercise of journalistic functions. The same was valid for the second article (called "*Appartamenti dello Stato, per i cittadini bisogna vederci chiaro*" – "Clarification needed for the citizens on State-owned apartments") which reconstructed the historical context in the eighties, explaining the existence of an anti-drug unit and an anti-drug squad, and reiterated the content of the previous article. Nor was the third article, which contained an interview with GF, as well as the applicant's letter and a comment by the journalist and a third person, subject to any criminal liability. The article had not related to "eviction" as mentioned by the applicant, but correctly to the authorities' decision to have the apartment reassigned to someone else, a procedure which did not require the intervention of the applicant. Similarly the applicant's confused challenge to a reference to an anti-drug dog could not be upheld since the comment – to the effect that it had made sense for the applicant to benefit from the use of the apartment at the time when a canine squad existed, but no longer now that the squad had been disbanded – reflected reality and was a reserved statement. Lastly, the adjective *sbroccato* (a person who lost it), which was today a term of general use (*sdoganato*) could not be considered defamatory, as the term was not offensive or intimidating. Any other considerations put forward by the applicant appeared to refer to disagreements within the police department, which even if they were true do not appear to be relevant to the present case.

9. The Commissario considered that as the information was true and in the general interest, the articles fell within the legitimate exercise of the right to information. Moreover, the applicant had been given a right of reply, and a faithful reproduction of his statement had been published in its entirety.

10. The Commissario considered that a balance had to be reached between both constitutionally guaranteed rights, specifically, on the one hand that of the honour, reputation and dignity of the individual, and on the

other that of freedom of expression and of the press to impart information and for persons to receive information. "Justification" was the crux of the right to report news, thus abstract "defamatory" statements made within the requisite limits were licit and part and parcel of freedom of expression as long as they did not exceed the requisite limits and thus amount to abuse. The balance between the right to respect for the dignity, honour and privacy of the individual and that of freedom of expression was not subject to precise definition, even more so given that that freedom of expression may take various forms – including rapidly developing trends or changes in language – which remain in any event subjective. Indeed, according to domestic case-law, it was *a priori* impossible to dictate the general limits between what was licit and what was not.

11. In the light of such principles, the Commissario considered that in the present case the articles had been justified in order to impart information on a matter of public interest, specifically in reference to a policeman, the use of public property and the involvement of the authorities. They had not been intended to offend anyone's honour. The content of the articles did not overstep the limits of free speech, and the sole fact that the articles may have inconvenienced the applicant did not suffice to make them amount to a criminal act of defamation (the sole matter subject to the court's jurisdiction).

12. The Attorney General agreed and on 14 February 2013 the Commissario ordered that criminal proceedings no.175/2012 be archived on the basis of the above-mentioned reasoning, noting that there were no elements to issue a bill of indictment.

13. The applicant challenged that decision (*opposizione*) on 21 March 2013.

14. By a decision of 3 May 2013 notified on 27 May 2013 the judge of criminal appeals ordered that criminal proceedings no.175/2012 be archived, and rejected the applicant's objection as manifestly ill-founded. The judge noted that the applicant had reiterated his arguments without referring to the reasons given by the first-instance court, and ignoring the fact that the allegations made by the accused had been substantiated by documentary evidence. Further, the judge stated that the three impugned articles had not offended the applicant's reputation. They questioned the use of State apartments without attributing to the applicant any particular untoward behaviour. They contained whole truths and, although the articles were written as a form of criticism, the applicant had had a right – which he made use of – to defend himself in the press. Lastly, GF had provided a copy of his correspondence with the authorities which related to the use of the apartment in question and in respect of which he had given an interview which had then been published. Thus, his actions had not been a gratuitous accusation but a supply of correct information concerning the applicant's activity and functions.

COMPLAINTS

15. The applicant complained under Article 6 § 1 about the assessment of the Commissario. The applicant further complained, under Article 8 of the Convention, that he (and his family) had been subject to a defamatory campaign which had effected the enjoyment of his property (namely his home) and his reputation.

THE LAW

A. Article 6

16. The applicant complained under Article 6 § 1 about the assessment of the Commissario which had led to the proceedings being archived, in so far as the Commissario had failed to assess the veracity or otherwise of the statements at issue.

17. The Court reiterates that the Convention does not confer any right, as such, to "private revenge" or to an *actio popularis*. To fall within the scope of the Convention the right to have third parties prosecuted or sentenced for a criminal offence must be indissociable from the victim's exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a "good reputation" (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I, and *Gorou v. Greece (no. 2)* [GC], no. 12686/03, § 24, 20 March 2009). The import of this case-law is that Article 6 § 1 of the Convention applies to proceedings involving civil-party complaints from the moment the complainant is joined as a civil party, unless he or she has waived the right to reparation in an unequivocal manner (see *Perez*, cited above, § 66, and *Gorou*, cited above, § 25).

18. In the present case the applicant did not have civil-party status in the criminal proceedings concerning charges of defamation against third persons. Thus, the remedy chosen by the applicant to seek redress against the alleged false accusations against him, namely by way of criminal proceedings, in the present case, does not fall within the scope of Article 6 § 1 of the Convention (see *Rekasi v Hungary* no. 31506/96, Commission decision of 25 November 1996, *Decisions and Reports* 87-A, p.164). Unlike a civil action for defamation, the purpose of the criminal proceedings at issue in the present case was to punish the accused persons concerned for having committed a criminal offence. However, the right of access to the courts which Article 6 § 1 grants to anyone who seeks the determination of his civil rights does not include any right to bring criminal proceedings against a third person (ibid.).

19. It follows that the applicant's complaint is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 § 3, and must be rejected in accordance with Article 35 § 4.

B. Article 8

20. The applicant further complained, under Article 8 of the Convention, that he (and his family) had been subject to a defamatory campaign, which effected the enjoyment of his property (namely his home) and his reputation.

21. Firstly, the Court notes that the relatives of the applicant have not lodged any complaints with the Court. It follows that any complaint lodged by the applicant on behalf of his family – who have not themselves applied to be parties to the proceedings – must be rejected as incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3, and must be rejected in accordance with Article 35 § 4 (see *Brincat and Others v. Malta*, nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, § 142, 24 July 2014).

22. Further, the Court notes that no detail has been provided by the applicant concerning his home and it considers that the complaint is to be examined solely in respect of the applicant's reputation under Article 8 of the Convention. In this connection the Court also notes that the applicant failed to institute civil proceedings concerning the alleged defamatory statements; it follows that the examination of the complaint can solely be made in the light of the decisions in the criminal proceedings.

23. Starting from the premise that the present case requires an examination of the fair balance that has to be struck between the applicant's right to the protection of his private life under Article 8 of the Convention and the journalist's right to freedom of expression as guaranteed by Article 10, the Court finds it relevant to reiterate some general principles relating to the application of both Articles.

1. General principles

24. The Court reiterates that the notion of private life is a broad concept, not susceptible to exhaustive definition. It extends to aspects relating to personal identity, such as a person's name, photograph, or physical and moral integrity. This concept also includes the right to live privately, away from unwanted attention (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 83, 10 November 2015) and extends to aspects relating to personal identity and reputation (see *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007; *Petrina v. Romania*, no. 78060/01, §§ 27-29 and 34-36, 14 October 2008; and *Ion Cârstea v. Romania*, no. 20531/06, § 29, 28 October 2014). It covers personal information which individuals can legitimately expect should not be published without their

consent (see *Flinkkilä and Others v. Finland*, no. 25576/04, § 75, 6 April 2010, and *Saaristo and Others v. Finland*, no. 184/06, § 61, 12 October 2010). In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and be carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012, § 83 and *Bédat v. Switzerland* [GC], no. 56925/08, § 72, 29 March 2016).

25. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private and family life, even in the sphere of the relations of individuals between themselves (see *Odièvre v. France* [GC], no. 42326/98, § 40, 13 February 2003 and *Dickson v. the United Kingdom* [GC], no. 44362/04, § 70, 4 December 2007).

26. The choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation, whether the obligations on the State are positive or negative (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 104, ECHR 2012). Likewise, under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression protected by this provision is necessary (ibid.). However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (ibid., § 105, with further references).

27. In cases which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the news report, or under Article 10 by the publisher. Indeed, as a matter of principle these rights deserve equal respect (ibid. § 106). Accordingly, the margin of appreciation should in theory be the same in both cases.

28. Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (ibid., § 107). The Court has already had occasion to lay down the relevant principles which must guide its assessment in this area. It has thus identified a number of criteria in the context of balancing the competing rights (ibid. §§ 109-13, and see *Axel Springer* AG, cited above). The relevant criteria thus defined are: contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; and the content, form and consequences of the publication. Where it examines an application lodged under Article 10, the Court will also examine the way in which the information was obtained and its veracity, and the severity of the penalty imposed on the journalists or publishers (ibid, and see *Couderc and Hachette Filipacchi Associés*, cited above, § 93).

29. The Court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, particularly regarding protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Axel Springer AG*, cited above, § 79).

30. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. Subject to paragraph 2 of Article 10, freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society" (see *Tammer v. Estonia*, no. 41205/98, § 59, ECHR 2001-I).

2. Application to the present case

31. Even assuming that in the present case the attacks on the applicant's reputation attained that certain level of seriousness in order for Article 8 to come into play, the complaint is in any event inadmissible for the following reasons.

32. The main question in the present case is whether the State has, in the context of its positive obligations under Article 8, achieved a fair balance between the applicant's right to protection of his reputation, which is an element of his "private life", and the other party's right to freedom of expression guaranteed by Article 10 of the Convention (see *Von Hannover*, cited above, § 57, with further references, and *Pfeifer*, cited above, § 38).

33. The Court firstly notes the domestic courts' conclusion that the articles in question concerned matters of public interest, in so far as they dealt with the use of public property and the involvement of a policeman and the public authorities. The Court considers this to be surely a matter of interest to the local community and that journalists were entitled to bring it to the public's attention through the press (see, *mutatis mutandis*, *Lombardo and Others v. Malta*, no. 7333/06, § 55, 24 April 2007).

34. The Court observes that while holding that the content of the articles had been true, and thus had had a sufficient factual basis – indeed the applicant had admitted to living in the apartment in question and the attempt to recover the property had been confirmed by the authorities; furthermore, no doubt existed as to the historical context of the situation – the domestic courts did not explicitly classify the alleged defamatory expressions as statements of fact or value judgments. However, in deciding to archive the case, the same courts referred in detail to the factual basis of the allegations.

35. The domestic courts also implied that the articles had not been written in bad faith, and explicitly considered that they had not been "intended to offend anyone's honour". Moreover, the applicant had also been given a right of reply, and his reply had been faithfully reproduced (see *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 50, 21 September 2010).

36. The Court agrees with that assessment. Indeed, even assuming that some statements in the article were potentially provocative, the Court reiterates that journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 56, ECHR 2007-IV), and, as held by the domestic courts, the articles were not offensive, nor was the formulation of the questions inappropriate. The Court would add that it does not appear that there was any manifestly insulting language in the articles at issue (see also *Mamère v. France*, no. 12697/03, § 25, ECHR 2006-XIII).

37. Furthermore, the Court notes that the domestic courts took great care in balancing the two rights at issue on the basis of relevant principles and gave sufficient reasons for reaching their decision. While it is true that the first-instance court failed to go into detail about certain statements made by GF (as they considered them to be internal disputes), the judge of criminal appeals looked into the matter and found that GF had produced correspondence in connection with the subject of his interview, and had thus imparted correct information to the public.

38. In conclusion, the Court is satisfied that the domestic decisions were in conformity with Convention standards, and it finds no reasons to substitute its view for that of the domestic courts.

39. It thus considers that the potential negative consequences that the applicant might have suffered after the publication of this article do not

attain the level of seriousness to justify a restriction on the right to freedom of expression guaranteed by Article 10 (see, *mutatis mutandis, Karakó v. Hungary*, no. 39311/05, § 28, 28 April 2009).

40. The foregoing considerations are sufficient to enable the Court to conclude that the domestic courts struck a fair balance between freedom of expression under Article 10 and the applicant's right to have his reputation respected under Article 8.

41. It follows that the applicant's complaint is manifestly ill-founded and must be rejected in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Done in English and notified in writing on 12 May 2016.

Abel Campos
Registrar

Mirjana Lazarova Trajkovska
President