



## No violation of right to freedom of expression in civil proceedings for defamation against four organisations for untrue allegations made in private correspondence

In today's **Grand Chamber** judgment<sup>1</sup> in the case of **Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina** (application no. 17224/11) the European Court of Human Rights held, by 11 votes to six, that there had been:

**no violation of Article 10 (freedom of expression)** of the European Convention on Human Rights.

The case concerned a finding of defamation in civil proceedings against four organisations following the publication of a letter they had written to the highest authorities of their district complaining about a person's application for the post of director of Brčko District's multi-ethnic radio and television station. Relying on their right to freedom of expression, the applicants complained about the order to pay damages imposed on them in the context of civil proceedings for defamation.

The Court found that four statements in the letter contained allegations portraying the candidate in question (Ms M.S.) as a person who was disrespectful and contemptuous in her opinions and sentiments about Muslims and ethnic Bosniacs. The nature of the accusations had been such as to seriously call into question Ms M.S.'s suitability for the post of director of the radio and her role as editor of the entertainment programme of a multi-ethnic public radio station. However, the applicants had not established before the domestic courts the "truthfulness of these statements which they knew or ought to have known were false" despite being bound by the requirement to verify the veracity of their allegations even if these had been disclosed to the authorities by means of private correspondence.

The Court therefore held that the applicants had not had a sufficient factual basis to support their allegations and that the interference with their freedom of expression had been supported by relevant and sufficient reasons and had been proportionate to the legitimate aim pursued (protection of Ms M.S.'s reputation). The Court also held that the domestic authorities had struck a fair balance between the applicants' freedom of expression and Ms M.S.'s interest in the protection of her reputation, thus acting within their margin of appreciation.

### Principal facts

The applicants are four organisations, the Brčko Branch of the Islamic Community of Bosnia and Herzegovina (*Medžlis Islamske Zajednice Brčko*), the Bosniac Cultural Society "*Preporod*" (*Bošnjačka zajednica kulture "Preporod"*), the Bosniac Charity Association "*Merhamet*" (*"Merhamet" Humanitarno udruženje građana Bošnjaka Brčko Distrikta*) and the Council of Bosniac Intellectuals (*Vijeće Kongresa Bošnjačkih intelektualaca Brčko Distrikta*).

In May 2003 the applicants wrote a letter to the highest authorities of the Brčko District complaining about Ms M.S.'s application for the post of director of their district's multi-ethnic radio and television station and about her alleged misconduct with regard to Muslims and ethnic Bosniacs. They asked the authorities to reject Ms M.S.'s application on the grounds that she did not have the

1. Grand Chamber judgments are final (Article 44 of the Convention).

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requisite professional or moral qualities to hold that sort of post. A short time later the letter was published in a number of daily newspapers.

As a result, Ms M.S. brought civil defamation proceedings against the applicants. Her action was dismissed at first instance on the grounds that it was not the applicants who had published the letter in the media. However, in July 2007 the Court of Appeal found the applicants liable for defamation on grounds of the inaccuracy of factual statements they had made about Ms M.S. in their letter, which had been untrue and damaging to Ms M.S.'s reputation. The applicants were ordered to retract those statements, failing which they would have to pay 1,280 euros (EUR) for non-pecuniary damage. The court also ordered them to give the judgment to the Brčko District radio and television and to two newspapers for publication at their own expense. As the applicants failed to comply with that judgment, Ms M.S. applied for enforcement and, in December 2007, the applicants had to pay about EUR 1,445 for enforcement of the judgment of July 2007. In May 2010 the Constitutional Court upheld the Court of Appeal's judgment.

## Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) of the European Convention on Human Rights, the applicants complained about the order to pay damages imposed on them in civil proceedings for defamation.

The application was lodged with the European Court of Human Rights on 21 January 2011.

In its Chamber judgment of 13 October 2015, the Court held, by four votes to three, that there had been no violation of Article 10 (freedom of expression) of the Convention. The Chamber held, in particular, that the domestic courts had made a distinction between statements of facts and value judgments and that, relying on the available evidence, they had correctly concluded that the applicants had acted negligently by simply reporting Ms M.S.'s alleged misconduct without making a reasonable effort to verify the accuracy of those allegations. It also found that the award of damages made against the applicants had not been disproportionate. It concluded therefore that the domestic courts had struck a fair balance between Ms M.S.'s right to protection of her reputation and the applicants' right to report irregularities about the conduct of a public servant to the body competent to deal with such complaints and that the reasons given to justify their decisions had been "relevant and sufficient" and met a "pressing social need".

On 8 January 2016 the applicants requested that the case be referred to the Grand Chamber under Article 43 of the Convention (referral to the Grand Chamber). On 14 March 2016 the panel of the Grand Chamber accepted that request. A hearing was held on 31 August 2016.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

András Sajó (Hungary), *President*,  
İşıl Karakaş (Turkey),  
Angelika Nußberger (Germany),  
Khanlar Hajiyev (Azerbaijan),  
Luis López Guerra (Spain),  
Mirjana Lazarova Trajkovska ("The former Yugoslav Republic of Macedonia"),  
Nebojša Vučinić (Montenegro),  
Vincent A. De Gaetano (Malta),  
André Potocki (France),  
Paul Mahoney (the United Kingdom),  
Faris Vehabović (Bosnia and Herzegovina),  
Egidijus Kūris (Lithuania),  
Iulia Motoc (Romania),  
Jon Fridrik Kjølbro (Denmark),

Mārtiņš Mits (Latvia),  
Stéphanie Mourou-Vikström (Monaco),  
Gabriele Kucsko-Stadlmayer (Austria),

and also Søren Prebensen, *Deputy Grand Chamber Registrar*.

## Decision of the Court

### Article 10 (freedom of expression)

The Court considered that the decision of the Brčko District Court of Appeal holding the applicants liable for defamation constituted an interference with their right to freedom of expression, that the interference was prescribed by section 6 of the Defamation Act of 2003 and that it had pursued a legitimate aim (protection of the reputation or rights of others). In order to determine whether the interference was justified and proportionate to the aim pursued, the Court examined various factors and the following in particular.

In ruling on the applicants' liability for defamation, the domestic courts had relied on the applicants' letter alone, without having regard to its publication in the local press. Four statements in that letter had contained allegations of wrongdoing on the part of Ms M.S. in the workplace and a comment in a newspaper, of which she was allegedly the author, showing contempt for different ethnic and religious segments of Bosnian society. The allegations had been liable to portray Ms M.S. as a person who was disrespectful and contemptuous in her opinions and sentiments about Muslims and ethnic Bosniacs and the nature of the accusations had been such as to seriously call into question her suitability for the post of director of the Brčko District radio for which she had applied and for her role as editor of the Brčko District's entertainment programme in a multi-ethnic public radio station. That these allegations had been submitted to a limited number of State officials by way of private correspondence had not eliminated their potential harmful effect on the career prospects of Ms M.S. as a civil servant and her professional reputation as a journalist. The applicants' accusations about M.S. had also been leaked to the press and it was conceivable that their publication had opened a possibility for public debate and aggravated the harm to Ms M.S.'s dignity and professional reputation.

With regard to the authenticity of the information disclosed to the authorities, the applicants, like the press, were bound by the requirement to verify the veracity of their allegations, that requirement being inherent in the Code of Ethics and Conduct for NGOs and in the context of the "responsibilities" in the operation of NGOs. That the impugned allegations had been communicated to the State authorities by means of private correspondence, albeit an important consideration, had not conferred wholly unrestricted freedom on the applicants to submit unverified aspersions. Accordingly, the Court of Appeal held that the applicants had not "proved the truthfulness of these statements which they knew or ought to have known were false", and the Constitutional Court found that those statements had concerned "manifestly untrue facts" and that the applicants "[had] not [made] reasonable efforts to verify the truthfulness of those statements of fact before reporting, but [had] merely made those statements".

The Court therefore concluded that the applicants had not had a sufficient factual basis for their allegations in their letter. It also observed that the order awarding damages against the applicants did not raise an issue under the Convention. Accordingly, **the Court held that there had been no violation of Article 10 of the Convention**, as it was satisfied that the interference had been supported by relevant and sufficient reasons and had been proportionate to the legitimate aim pursued. It found that the domestic authorities had struck a fair balance between the applicants' freedom of expression (Article 10 of the Convention), on the one hand, and Ms M.S.'s interest in

protection of her reputation on the other hand (Article 8 of the Convention), thus acting within their margin of appreciation.

### Separate opinion

Judges Sajó, Karakaş, Motoc and Mits expressed a joint dissenting opinion. Judges Vehabović and Kūris each expressed a dissenting opinion. These separate opinions are annexed to the judgment.

*The judgment is available in English and French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.