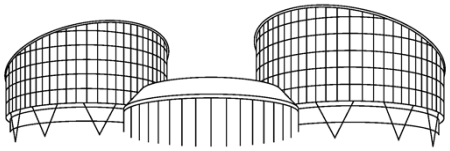

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF GELEVSKI v. NORTH MACEDONIA

(Application no. 28032/12)

JUDGMENT

Art 10 • Freedom of expression • Criminal conviction for defamation of a member of the press after criticising a journalist in an opinion piece • Plaintiff well-known to the public • Professional actions and opinions of the plaintiff as a journalist and media editor-in-chief subject to close scrutiny by public and other journalists • Applicant's disagreement with Government policies as such contributing to an ongoing political debate on a matter of public interest • Limits of critical and investigative journalism a matter of legitimate public interest • Domestic courts limiting their analysis to the general impact of the article on the plaintiff • Language used not exceeding the acceptable limits of criticism • Criminal conviction capable of having chilling effect on political debate between members of the media on matters of importance • Interference disproportionate

STRASBOURG

8 October 2020

FINAL

08/01/2021

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

In the case of Gelevski v. North Macedonia,

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

Ksenija Turković, *President,*
Linos-Alexandre Sicilianos,
Aleš Pejchal,
Armen Harutyunyan,
Pere Pastor Vilanova,
Tim Eicke,
Jovan Ilievski, *judges,*

and Abel Campos, *Section Registrar,*

Having regard to:

the application against the Republic of North Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Macedonian/citizen of the Republic of North Macedonia, Mr Nikola Gelevski ("the applicant"), on 21 November 2012;

the decision to give notice of the application to the Government of North Macedonia ("the Government");

the parties' observations;

Having deliberated in private on 1 September 2020,

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

INTRODUCTION

1. The applicant, a columnist, was criminally convicted for defamation for having criticised a journalist in an opinion piece. He complains that the conviction, which included imposition of a fine and a prison sentence in the event he defaulted on the payment, violated his freedom of expression protected under Article 10 of the Convention.

THE FACTS

2. The applicant was born in 1964 and lives in Skopje. He is represented by Mr F. Medarski, a lawyer practising in Skopje. The Government of North Macedonia ("the Government") were represented by their former Agent, Mr K. Bogdanov, succeeded by their current Agent, Ms D. Djonova.

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

I. BACKGROUND TO THE CASE

4. Mr D.P.L. ("the plaintiff") was the editor-in-chief of the newspaper *Večer* and the news segment of the television channel Sitel. Between December 2008 and March 2009 he published weekly opinion columns on current political events in the above newspaper. The relevant parts of some of his columns, published on 2 and 16 February and 23 March 2009 respectively, read as follows:

> "The [construction of the] the Mother Theresa memorial house is important because it sets the stage for a whole array of buildings ... If someone left the country before the coming to power of Gruevski [the then Prime Minister Nikola Gruevski] and came back several years later, they would see ... a new football stadium, over a hundred new sports halls [*спортски сали*], a completely different main square [in the capital], a new concert hall [*Универзала Сала*], a new national theatre, new motorways ...
>
> [B., a journalist,] was caught taking money from SDSM [*Социјалдемократски сојуз на Македонија* – an opposition political party at the time] to create news more favourable for them. [B. was] a journalist who ... has tried out with every television station in the city. He has been everywhere, and he has been kicked out of everywhere. Together with seven or eight more, they are attached to SDSM ...
>
> If I had any doubts as to the investigation into the criminal liability of Zoran Zaev [the President of SDSM], I have none any more. The man is a liar [*тешка лажовчина*] rare even by Macedonian standards."

5. On 28 March 2009 a group of students from the School of Architecture [*Архитектонски факултет*] gathered for a peaceful protest, which had been duly declared to the authorities, on the main square in Skopje to express their disagreement with the construction of a church on the square, as had been announced by the Government. Another group, protesting in opposition, gathered at the same time on the square to disrupt the students' protest. In the 2009 Progress Report regarding the respondent State, the EU Commission stated the following:

> "With regard to freedom of assembly and association**,** the overall situation is satisfactory. However, there were two occasions when peaceful and legal public events were violently disrupted. One was a student protest in Skopje against the government's plan to build a church on the main square ..."

6. On 31 March 2009 in an article published in the daily newspaper *Utrinski Vesnik* under the title "Megaphones from the Fuhrer's alley" (*Мегафоните од фиреровиот сокак*), the applicant, a regular columnist and contributor, commented on the above events. The relevant parts of the article, which was also published on the website of the newspaper, read as follows:

> "[The plaintiff and several other journalists] are not problematic in view of their clear political agenda: to transform the country into a totalitarian underdeveloped village [*касаба*] of little black 'Grujo' [referring to the then Prime Minister, Nikola Gruevski], his bums and vagrants [*гуланфери, гилиптери*] and bus-driven bandits [*башибозук*] that are transported all around as part of the project called 'Fraternity of

cities (bastards)' [*Братимења на г(р)адови*][1]. [In order] to discipline those who think otherwise (attackers come from Gostivar to beat fifty students gathered on their own city square in order to publicly express their opinion). ... When the battering buses of VMRO [*Внатрешна македонска револуционерна организација - Демократска партија за македонско национално единство* – the political party in power at that time] arrive next time, the people of Skopje will be better organised, at least to protect their children; and the bear of violence will dance in front of the doors of the inciters, such as D.P.L. [and two other journalists].

[One of the journalists above] and others like him, I say, are not problematic only because they have transformed journalism and working for the public into a spin service of a political and mafia-type partnership with the aim of the dissolution of the Republic of Macedonia, but they are problematic because in the most direct and blatant way they violate the highest, and still valid, legal document of this State: the Constitution [the applicant here cites the constitutional provisions which regulate freedom of expression and peaceful assembly and association] ... All this speaks to the fascist nature of the government of Nikola Gruevski and his threatening phalanxes ..."

II. PROCEEDINGS AGAINST THE APPLICANT

7. On an unspecified date D.P.L. lodged a criminal complaint against the applicant accusing him of defamation and insult regarding the above article published in *Utrinski Vesnik*. Both crimes were punishable under the Criminal Code applicable at the time.

8. On 10 June 2010 the Skopje Court of First Instance ("the trial court") found the applicant guilty on both accounts, imposed on him a fine of 600 euros (EUR), with thirty days' imprisonment in the event of default, and ordered him to pay the court fee and a further EUR 150 to cover the plaintiff's trial costs. The court found that the applicant had intentionally put forward untruths and unsubstantiated assertions in his article (see paragraph 6 above), thereby interfering with the plaintiff's reputation and dignity. By doing this the applicant had presented the public with an image of the plaintiff as dishonest and incompetent. The court dismissed the applicant's arguments that he had discussed the political views and behaviour of the journalists mentioned, including the plaintiff, which in no way could have been understood as an attack of their reputation and dignity. In this context, according to the applicant, the plaintiff's public statements had contained hate speech (see paragraph 4 above) and the applicant's article had been aimed at protecting people from that political "lynching". His aim had also been to safeguard the constitutional values, including the freedom of assembly and the free association of students.

9. The applicant appealed arguing, *inter alia*, that his columns had contained his own opinions, which had been value judgments and not statements of fact. According to him, defamation was supposed to be

[1] "*Градови*" means "cities", while "*гадови*" means "bastards", suggesting a play on words.

measured against objective criteria and the simple fact that the plaintiff had felt insulted by his column was insufficient for a finding of guilt.

10. On 22 September 2011 the Skopje Court of Appeal (*Апелационен суд Скопје*) ruled partly in favour of the applicant and upheld his conviction only in respect of defamation (it found that the applicant could not be held guilty on both accounts for the same article). It reduced the fine to EUR 320, with sixteen days' imprisonment to be imposed in the event of the applicant defaulted on payment. The court dismissed the applicant's argument that the article had contained a value judgment. In this connection the court stated:

> "In order for a statement to be regarded as a value judgment, it should not be related to a specific event or happening, and it should be made *in abstracto*. In the present case, the published text concerns a specific event ... and it contains a factual assertion that is subject to substantiation, proof and determination. The burden of proof is on the ... accused."

11. By a decision of 2 May 2012, served on the applicant on 21 May 2012, the Constitutional Court (*Уставен суд*) dismissed a constitutional appeal by the applicant, in which he complained of a violation of his freedom of conscience, thought and public expression of thought. The court reproduced the judgments of the courts of general competence and found, *inter alia*, the following:

> "In the present case, through their judgments, the courts punished a publicly expressed opinion of [the applicant], as a necessary measure for the protection of the reputation, dignity and authority of another citizen. That was because [the applicant], relying on his freedom of public expression, had violated the protected right of another citizen, namely [D.P.L.]
>
> ...
>
> It is clear that the article articulates the author's personal opinion about the policies of the ... political party [in power] in the Republic of Macedonia, with which he obviously disagrees. In the impugned parts ... [the applicant] describes [the plaintiff], a journalist and an editor-in-chief, as a spokesperson, affiliate and a 'megaphone' of those policies, which, according to the author of the article, are of a fascist nature.
>
> ... the court finds that the reasons given by the trial and appeal courts are acceptable and that the State's interference is proportionate to the legitimate aim of protecting the reputation of the victim ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

12. The applicant complained that his conviction had violated his right to freedom of expression as provided in Article 10 of the Convention, which reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 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. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicant

14. The applicant submitted that the only statement of fact contained in the article had pertained to the anti-demonstration protesters who had arrived at the main square in Skopje from Gostivar to disrupt the students' protest. In the remaining parts of the article he had articulated his opinion, reflecting his dissatisfaction with the policies of the political party in power at the time. The aim of the article had been to stir public debate on the issues of public assembly and freedom of expression in the respondent State, which was evident from him citing the relevant Articles of the Constitution. He claimed that the plaintiff had never argued that he had not been a supporter of the government's policies, which was sufficient proof that his value judgments had had a sufficient factual basis.

15. The applicant did not deny that he had used provocative language in his article, but taken in the context of a lively public debate, as had been the case in the instant case, this had not been sufficient reason for his conviction. As to the Government's argument that he had called for violence in the article, he stated that he had simply expressed his disgust at the violence that had occurred, stating that violence could lead to more violence.

(b) The Government

16. The Government conceded that there had been an interference with the applicant's freedom of expression. However, the interference had been lawful and had served a legitimate aim, namely the protection of reputation of others.

17. In the particular circumstances of the case, the interference had been necessary in a democratic society. This was so since the applicant's article, which had contained both factual statements and value judgments, had been written in bad faith, and had not been factually supported. They invited the Court not to accept as evidence the columns written by the plaintiff (see paragraph 4 above) as they had neither been submitted in evidence nor taken into consideration by the domestic courts. The applicant's article had not contributed to a public debate, and there had been no risk of imprisonment since the applicant had paid the fine imposed. Lastly, they stated that the article had contained statements that could be interpreted as a call to violence, making reference here to the passage "the bear of violence will dance in front of the doors of the inciters, such as D.P.L. ..."

2. The Court's assessment

18. The general principles regarding freedom of expression have been reaffirmed by the Court in the case of *Bédat v. Switzerland* ([GC], no. 56925/08, § 48, 29 March 2016) and more recently in the case of *Makraduli v. the former Yugoslav Republic of Macedonia* (nos. 64659/11 and 24133/13, §§ 60 and 62, 19 July 2018).

19. The Court notes that it was not disputed between the parties that there had been an interference with the applicant's right to freedom of expression and that it had been prescribed by law. The Court sees no reason to hold otherwise.

20. The Court is satisfied that the interference in question was aimed at protecting the reputation of others, as established by the domestic courts (see paragraphs 8 and 10 above). It therefore remains to be established whether the interference was "necessary in a democratic society".

21. The Court considers the following elements to be relevant for the examination of the particular circumstances of the present case: the position of the applicant, the position of the plaintiff, the subject-matter of the publication, the language used by the applicant and the penalty imposed (see, for example, *Novaya Gazeta and Milashina v. Russia*, no. 45083/06, § 58, 3 October 2017).

22. The Court observes that the applicant was a regular opinion writer in a daily newspaper. The interference must therefore be examined in the context of the essential role of a free press in ensuring the proper functioning of a democratic society (see *Falzon v. Malta*, no. 45791/13, § 57, 20 March 2018).

23. The Court reiterates that the role or function of the person concerned and the nature of the activities that are the subject of the report constitute another important criterion, related to the subject-matter of the article. The extent to which an individual has a public profile or is well-known influences the protection that may be afforded to his or her private life (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 110, ECHR 2012 and *Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece*, no. 72562/10, § 53, 22 February 2018).

24. In the present case, the plaintiff was well-known to the public. As a known journalist and editor-in-chief of a television channel and a daily newspaper, he knowingly exposed himself to a close scrutiny of his professional actions and opinions by both journalists and the general public and must therefore show a greater degree of tolerance (see *Katamadze v. Georgia* (dec.), no. 69857/01, 14 February 2006 and, *mutatis mutandis*, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 98, 27 June 2017). This is so in particular regarding a discussion whether he complied with the "duties and responsibilities" of a journalist and media editor-in-chief (see *Orban and Others v. France*, no. 20985/05, § 47, 15 January 2009 regarding the enhanced responsibility of an editor-in-chief) and whether he acted in accordance with the tenets of responsible journalism (see *Bédat v. Switzerland* [GC], no. 56925/08, § 50, 29 March 2016 and *Pentikäinen v. Finland* [GC], no. 11882/10, § 90, ECHR 2015) and the ethics of journalism (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 93, 7 February 2012; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III; and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 78, ECHR 2004-XI). These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance (see *Stoll v. Switzerland* [GC], no. 69698/01, § 104, ECHR 2007-V).

25. As regards the subject matter of the publication, the Court notes that the article written by the applicant was not directed at the plaintiff's private activities. The Court observes, as held by the domestic courts (see paragraph 10 above), that it was a statement of his disagreement with the policies of the Government and that as such, contrary to the Government's argument (see paragraph 17 above), it contributed to an ongoing political debate which in itself was a matter of public interest. As part of that debate, the impugned article contained allegations and pointed to different journalists, including the plaintiff, as supporters of Government policies (see paragraph

6 above). In this context the Court reiterates that the limits of critical and investigative journalism are also a matter of legitimate public interest (see *Niskasaari and Otavamedia Oy v. Finland*, no. 32297/10, § 53, 23 June 2015).

26. The Court observes that the criminal courts established that the applicant's article contained statements of fact (see paragraph 8 above). However, they did not go beyond that conclusion and failed to identify the specific facts allegedly raised by the applicant. On the other hand, the Constitutional Court qualified the applicant's statements as opinions, and therefore, value judgments (see paragraph 11 above). Any statements of fact (such as the applicant's claim regarding the anti-demonstration protesters who had come from another city to Skopje on 28 March 2009, see paragraphs 4 and 13 above) did not directly relate to the plaintiff, but rather to the students' protest and related events. Furthermore, even assuming that the article contained some statements of fact (such as that the plaintiff was a supporter of the government's policies, see paragraph 13 above), their veracity was neither disputed by the plaintiff domestically nor were they examined by the criminal courts (see *Falzon*, cited above, § 63). Instead, the courts limited their analysis to the general impact of the article on the plaintiff (see paragraphs 8 and 10 above).

27. Under this head, the Court finds it important to make a distinction between the applicant's disagreement with the policies of the Government, which in his opinion, were "fascist", and his opinion of the plaintiff as a supporter of those policies.

28. The Court notes that the qualification of Government policies as "fascist" carries a clear element of value judgment which is not fully susceptible to proof (see, *mutatis mutandis, Brosa v. Germany*, no. 5709/09, § 45, 17 April 2014), and has no relevance on its own in the instant case, given that the plaintiff was not a member of the Government. The Court notes that the applicant never stated directly that the plaintiff had been a fascist. The defamatory character of this statement was therefore attributed to the allegation that the plaintiff had been a supporter of those policies.

29. As to the language used by the applicant, the Court reiterates that individuals, and in particular journalists, who take part in a public debate on a matter of general interest are allowed to have recourse to a degree of exaggeration or provocation (see, among many other authorities, *Do Carmo de Portugal e Castro Câmara v. Portugal*, no. 53139/11, § 43, 4 October 2016 and *Katamadze*, cited above). Considering that the plaintiff was a well-known journalist and a public and political debate concerning plans for rearrangement of and construction on the Skopje main square and the students' protest were ongoing, the Court finds that the applicant's statements did not exceed the acceptable limits of criticism (see, *mutatis mutandis*, *Brosa*, cited above, § 51). As to the Government's argument that the article in question contained hate speech, the Court observes that the

domestic courts did not find any elements of hate speech or incitement to violence. Indeed, the relevant passage of the applicant's article to which the Government referred (see paragraph 17 above) was neither analysed nor relied on by the courts in support of their findings (see paragraph 8, 10 and 11 above).

30. Lastly, the Court considers that the applicant's criminal conviction could undoubtedly have a chilling effect on the political debate between members of the media on matters of importance (see, *mutatis mutandis*, *Makraduli*, cited above, § 83).

31. The foregoing considerations are sufficient to enable the Court to conclude that the interference in question was disproportionate to the aim pursued and was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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

33. The applicant claimed 320 euros (EUR) in respect of pecuniary damage – the amount that he was fined in the criminal proceedings – and EUR 3,180 in respect of non-pecuniary damage.

34. The Government contested those amounts as excessive and unsubstantiated.

35. The Court finds that the applicant's claim in respect of pecuniary damage is a direct consequence of his criminal conviction, which the Court has found violated his right to freedom of expression. It therefore considers that he should be awarded the full amount claimed under this head, plus any tax that may be chargeable.

36. The Court also considers the applicant's claim under the head of non-pecuniary damage justified. It therefore awards the applicant EUR 3,180, which is the full amount that he claimed under this head, plus any tax that may be chargeable.

B. Costs and expenses

37. The applicant also claimed EUR 1,500 for the costs and expenses incurred before the Court, without submitting any documents in support of his claim.

38. The Government contested these claims as excessive and unsubstantiated.

39. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). The Court points out that under Rule 60 §§ 2 and 3 of the Rules of Court, "the applicant must submit itemised particulars of all claims, together with any relevant supporting documents", failing which "the Chamber may reject the claim in whole or in part" (see *Lazoroski v. the former Yugoslav Republic of Macedonia*, no. 4922/04, § 88, 8 October 2009).

40. In the present case, the Court notes that the applicant has failed to substantiate his claim with an itemised list of costs or supporting documents. In such circumstances, the Court makes no award.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 320 (three hundred and twenty euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 3,180 (three thousand one hundred and eighty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(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 applicant's claim for costs and expenses.

Done in English, and notified in writing on 8 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Ksenija Turković
President