CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF LEŠNÍK v. SLOVAKIA

(Application no. 35640/97)

JUDGMENT

STRASBOURG

11 March 2003

FINAL

11/06/2003

In the case of Lešník v. Slovakia,

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

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 17 December 2002 and 4 February 2003,

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

PROCEDURE

1. The case originated in an application (no. 35640/97) against the Slovak Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovakian national, Mr Alexej Lešník ("the applicant"), on 10 March 1997.

2. The applicant, who had been granted legal aid, was represented by Mr J. Hrubala, a lawyer practising in Banská Bystrica. The Slovakian Government ("the Government") were represented by their Agent, Mr P. Vršanský.

3. The applicant alleged, in particular, that his right to freedom of expression had been violated as a result of his conviction for statements in respect of a public prosecutor.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. 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.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section.

7. By a decision of 8 January 2002 the Chamber declared the application partly admissible.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1940 and lives in Košice. He is a businessman.

10. On 2 December 1991 the applicant requested the Košice City Prosecutor's Office to bring criminal proceedings against H., a businessman from the Czech Republic whom he suspected of having committed fraud. The request was examined by various authorities but no criminal proceedings were brought.

11. On 4 December 1992 the applicant complained to the police that two unknown men had left a message at the entrance to his flat saying that they would break his hands if he did not "abstain from writing". On 13 April 1993 the applicant complained to the police that a shot had been fired through a window in his flat. He claimed that he was being harassed because he had written articles about several former members of the Communist Party. Subsequently the applicant was informed that the police could not identify the perpetrators.

12. On 5 April 1993 the applicant complained to the head of the Košice Telecommunications Authority that, following a change of the central switchboard, telephone conversations at his agency were frequently interrupted. The applicant stated that there was a noise on the telephone prior to the interruption of a call which was similar to that which had formerly occurred when telephone calls were tapped by the communist secret police. He requested that the fault be remedied.

13. On 10 June 1993 a police investigator brought criminal proceedings against the applicant on the ground that he was suspected of having stolen goods from H. The decision was based on a written communication by the district prosecutor in Semily (Czech Republic).

14. On 1 November 1993 the applicant asked the Košice Regional Prosecutor to discontinue the criminal proceedings against him. In his letter the applicant complained, without providing further details, that the police investigator dealing with his case had obtained information on him by

unlawfully tapping his telephone. He requested that criminal proceedings be brought against a person or persons unknown for illegal telephone tapping.

15. On 6 December 1993 the applicant addressed a letter to P., the Košice I district prosecutor. The letter contained, *inter alia*, the following statements:

> "Since you have not succeeded, comrade prosecutor, in attaining your aims in one area, you continue energetically, in accordance with the practice of the [former] State Security agents, to fabricate another case [against the applicant] as you have learned to do under the so-called infallible socialist law. On this occasion I can assure you, however, that I have not bowed to the high representatives of the former political system and, in particular, the [former] State Security agents who paid at least as much attention to my person as you do now. I do not intend today to let myself be intimidated, especially not by individuals such as yourself, a person with a dubious past, not to speak of [your] other qualities ...
>
> It is not only my earlier experience of managing a detective agency which makes it difficult for me to associate you with objectivity, professionalism and respect for the law. I would therefore like to remind you on this occasion that you are also bound by the law despite the fact that you probably consider yourself ... to be an almighty lord of the Tatra [Mountains] and the Váh [River] and, as such, beyond anyone's reach as you are, for the time being, under the protective hand of comrade [M.]. Abuse of the law may have very unpleasant consequences for you. For the time being, I will only mention some of the abuses which do not call for any comments."

16. In the letter the applicant further stated that the addressee was responsible for the dismissal of his criminal complaint against H. and the institution of criminal proceedings against him in 1993, and that he had unlawfully ordered the tapping of his telephone.

17. P. submitted the letter to his hierarchical superior, the Košice Regional Prosecutor. In a letter of 17 March 1994 the latter informed the applicant that it had not been established that P. had given an order to tap his telephone or that he had otherwise acted unlawfully.

18. In the meantime, on 7 March 1994, the applicant complained to the General Prosecutor that P. had committed an offence in that he had misused his authority. The letter read, *inter alia*, as follows:

> "[P.] accepted the request of [H.'s lawyer] ... that no criminal proceedings would be brought against [H.] in Slovakia notwithstanding that sufficient evidence existed to do so ... Of course, money paid by [H.] with a view to covering up his fraudulent activity also played a role in the matter. It would therefore be worth examining in this context whether [an offence of bribery was not committed] ...
>
> Following a ... threat ... by ... an investigator from the Košice I Investigation Office in the context of the case of [H.] ... I went to the aforesaid office on 10 June 1993. After I had rejected an 'agreement' which was proposed to me, [the investigator], a former State Security agent, accused me of having stolen [goods from H.] in 1991. Thus [P.] has been unwilling to bring proceedings against [H.] since 1991, and has arranged, through a police investigator who can easily be blackmailed, for proceedings to be brought against me in revenge for the justified complaints I had lodged against him. [P.] did so contrary to [the relevant provisions of the Code of Criminal

> Procedure] because so far ... there is no evidence before [the relevant authorities] from which to conclude with sufficient certainty that I stole anything from [H.] Subsequently I realised that my telephone, which was also used by my detective agency, had been tapped contrary to Article 88 of the Code of Criminal Procedure."

19. On a petition by P., the General Prosecutor's Office agreed that criminal proceedings be brought against the applicant for insulting a public prosecutor. The case was transferred to a public prosecutor in Liptovský Mikuláš. On 2 June 1994 the applicant was charged with insulting a public official in his letters of 6 December 1993 and 7 March 1994 mentioned above.

20. In a letter of 5 September 1994 addressed to the Košice Regional Prosecutor's Office, the applicant expressed the view that the purpose of the harassment to which he was subjected in 1992 and 1993 had been to make him withdraw his criminal complaint against H. He requested that an investigation be opened.

21. In September 1994 the newspaper *Necenzurované noviny* published an article by a third person describing the applicant's case in detail. It was entitled "How the Red Plague operates in Eastern Slovakia" and contained quotations from the applicant's letters. The relevant parts read as follows:

> "... It is on this basis that the district prosecutor's office in Liptovský Mikuláš started a prosecution against [the applicant] on 2 June 1994. In order to give the reader an idea of what is possible in [Slovakia], I will quote the text which, according to public prosecutor [L.], constitutes a criminal offence.
>
> In his message of 7 March 1994 addressed to the General Prosecutor in Bratislava, [the applicant] stated in respect of [public prosecutor P.] that in the criminal case of [H.] he had deliberately acted wrongly so that 'he could satisfy his friend [M.] from Košice, the former President of the Košice City Court whom the City Committee of the Communist Party of Slovakia had identified as a key official and who is now [H.]'s lawyer, that no criminal proceedings would be brought against [H.] in Slovakia notwithstanding that sufficient evidence existed to do so ... Of course, money paid by [H.] with a view to covering up his fraudulent activity also played a role in the matter. It would therefore be worth examining in this context whether the facts do not fall under Articles 161 and 162 of the Criminal Code [which govern the offence of bribery]'.
>
> In the same document [the applicant] stated: 'Subsequently I realised that my telephone, which was also used by my detective agency, had been tapped contrary to Article 88 of the Code of Criminal Procedure.'
>
> In a letter dated 6 December 1993 and addressed to public prosecutor [P.], [the applicant] stated among other things: 'Since you have not succeeded, comrade prosecutor, in attaining your aims in one area, you continue energetically, in accordance with the practice of the [former] State Security agents, to fabricate another case as you have learned to do under the so-called infallible socialist law. On this occasion I can assure you, however, that I have not bowed to the high representatives of the former political system and, in particular, the [former] State Security agents who paid at least as much attention to my person as you do now. I do not intend today

to let myself be intimidated, especially not by individuals such as yourself, a person with a dubious past, not to speak of [your] other qualities ...'

In the same letter [the applicant] went on: 'It is not only my earlier experience of managing a detective agency which makes it difficult for me to associate you with objectivity, professionalism and respect for the law. I would therefore like to remind you on this occasion that you are also bound by the law despite the fact that you probably consider yourself to be an almighty lord of the Tatra [Mountains] and the Váh [River] and, as such, beyond anyone's reach since you are, for the time being, under the protective hand of comrade [M.]. Abuse of the law may have very unpleasant consequences for you. For the time being, I will only mention some of the abuses which do not call for any comments.'

Thus, on the basis of these statements, prosecutor [L.], on the instructions of [the General Prosecutor], started a prosecution against [the applicant]. Every decent person must be astonished to learn of such stupid behaviour."

22. On 7 November 1994 the applicant stated before the prosecutor in Liptovský Mikuláš that he had intended to criticise P. for his wrongful actions but not to insult him. He further informed the public prosecutor dealing with the case that he had not written any newspaper article on the issue, but had merely provided the author with the relevant documents.

23. On 8 November 1994 the Košice Regional Prosecutor submitted a document to the district prosecutor's office in Liptovský Mikuláš indicating, with reference to the relevant register, that the Košice I district prosecutor had not ordered the tapping of the applicant's telephone between 1992 and 1994.

24. On 23 November 1994 the Liptovský Mikuláš district prosecutor indicted the applicant before the Liptovský Mikuláš District Court on the charge of insulting a public official. On 25 November 1994 the Liptovský Mikuláš District Court transferred the case to the Košice I District Court for reasons of jurisdiction. As the public prosecutor affected by the applicant's statements was responsible for the same district, the Košice Regional Court, on 9 March 1995, transferred the case to the Trebišov District Court.

25. On 25 April 1995 the Trebišov District Court issued a penal order in which it convicted the applicant of attacking a public official, on the ground that, in his letters of 6 December 1993 and 7 March 1994, he had insulted a public prosecutor. The court sentenced the applicant to four months' imprisonment suspended for a probationary period of one year.

26. The applicant appealed against the order. The case was assigned to another judge. On 25 June 1996 the Trebišov District Court convicted the applicant under Article 156 § 3 of the Criminal Code of insulting a public official and sentenced him to four months' imprisonment suspended for a probationary period of one year. The judgment stated, in particular, that in his letters the applicant had alleged that the public prosecutor had deliberately acted improperly as regards the applicant's request of 1991 for criminal proceedings to be brought against H.; that the public prosecutor

had done so at the request of the lawyer representing H.; and that H. had paid a sum of money for this purpose. The District Court also noted that the applicant had accused P. of having been unwilling to uphold his criminal complaint, of having ordered criminal proceedings to be brought against him and of having his telephone illegally tapped.

27. The judgment further stated that the applicant had not shown that the public prosecutor in question had failed to act in accordance with the law. The court therefore concluded that the applicant's statements were defamatory and grossly offensive.

28. The District Court did not accept the applicant's defence that the sole purpose of his letters had been to have his request for criminal proceedings to be brought against H. dealt with appropriately. The court noted that, besides the two letters in question, the applicant had sent a considerable number of other complaints concerning the same issue which, however, had contained no defamatory or offensive remarks. Both the Košice Regional Prosecutor's Office and the General Prosecutor's Office had dealt with the applicant's complaints and had dismissed them as being unsubstantiated.

29. The applicant appealed, both personally and through his lawyer. He alleged that the purpose of his remarks had been to prevent further delays in the proceedings concerning his criminal complaint of 1991, and not to offend P. He further claimed that the statements in question were not offensive and did not constitute an offence.

30. On 24 September 1996 the Košice Regional Court dismissed the appeal after hearing evidence from the applicant and asking him to substantiate his allegations.

31. The Regional Court found that in the statements made in his letters of 6 December 1993 and 7 March 1994 the applicant had grossly insulted a public prosecutor without justification. In particular, it stated that the applicant had failed to substantiate his allegation that H. had paid a sum of money in order to prevent criminal proceedings being brought against him and reiterated that the General Prosecutor's Office had not established that P. had acted unlawfully in this or any other respect.

32. The Regional Court further considered defamatory and grossly offensive the applicant's statements that the public prosecutor had acted in accordance with the practice of the former State Security agents, had a dubious past, not to speak of his other qualities, and possibly considered himself to be an almighty lord of the Tatra Mountains and the Váh River who was "beyond anyone's reach".

33. In the Regional Court's view, the applicant had failed to show that he had a justified reason to make such statements. The court did not accept the applicant's argument that he had doubts about the past and qualities of the public prosecutor because the latter had studied socialist law, had failed

to take appropriate action on the applicant's criminal complaint of 1991, and initiated criminal proceedings against him.

34. In its judgment the Regional Court pointed out that the applicant had not been hindered in seeking redress before the appropriate authorities for the actions of P. which he considered inappropriate or unlawful. It held, however, that by making defamatory and offensive remarks the applicant had committed an attack against a public official within the meaning of Article 156 § 3 of the Criminal Code. The Regional Court upheld the sentence which the District Court had imposed on the applicant.

35. On 28 October 1996 the Košice IV District Office revoked the trading licence under which the applicant had been authorised, *inter alia*, to run a detective agency, on the ground that he had been convicted of an offence. On 12 December 1996 the Košice Regional Office dismissed the applicant's appeal against this decision.

36. On 4 June 1997 the Košice Regional Court quashed the administrative decisions concerning the revocation of the applicant's trading licence and remitted the case to the Košice Regional Office. In its judgment the Regional Court noted that both administrative authorities, deciding at lower instances, had failed to establish any relevant legal grounds for their decisions.

37. On 18 November 1997 the Trebišov District Court issued a decision noting that the applicant had not committed any offence during the probationary period and stating that he was to be considered as not having been convicted.

38. As from 1 January 1998 the relevant law was amended in that persons wishing to run private security agencies were required to obtain the approval of the police headquarters. The applicant did not ask for such approval and returned his trading licence of 7 January 1993, under which he had been allowed to run a detective agency, to the Košice IV District Office on 3 June 1998. In the meantime, on 18 February 1998, he registered with the relevant authorities as running a different business. He attached a certificate indicating that his criminal record was clean and received a new trading licence on 6 April 1998.

II. RELEVANT DOMESTIC LAW

39. Article 156 § 3 of the Criminal Code provides that a person who utters grossly offensive or defamatory remarks in respect of a public official relating to that official's exercise of his or her powers shall be punished by up to one year's imprisonment or a fine.

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

40. The applicant complained that his right to freedom of expression had been breached in that he had been convicted for having criticised the actions of a public prosecutor which he considered unlawful. He alleged a violation of Article 10 of the Convention, the relevant parts of which provide:

> "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 ...
>
> 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 ... for the protection of the reputation or rights of others ... or for maintaining the authority and impartiality of the judiciary."

A. Existence of an interference

41. It was common ground that the applicant's conviction for insulting a public official and the suspended prison sentence imposed on him constituted an interference with his freedom of expression guaranteed by paragraph 1 of Article 10. The Court sees no reason to hold otherwise.

B. Justification of the interference

42. This interference would contravene Article 10 of the Convention unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2 of Article 10 and was "necessary in a democratic society" for achieving such aim or aims.

1. "Prescribed by law"

43. The applicant contended that the Criminal Code and the Code of Criminal Procedure had been enacted in 1961 and that, despite several amendments, their respective provisions were intended to harass citizens. For this reason, his conviction could not be regarded as lawful.

44. The Government maintained that the interference had been in accordance with Article 156 § 3 of the Criminal Code as in force at the relevant time. They considered irrelevant, when determining whether or not it was "prescribed by law", the date and circumstances of its enactment.

45. The Court notes that the interference in question had a legal basis, namely Article 156 § 3 of the Criminal Code, and is satisfied that the

application of the legal provisions contained therein to the applicant's case did not go beyond what could be reasonably foreseen in the circumstances. Accordingly, the interference was prescribed by law within the meaning of Article 10 § 2 of the Convention. As to the applicant's argument concerning the nature of the criminal law in Slovakia, it relates, in substance, to the question whether the interference resulting from the application of the relevant law in the present case was "necessary in a democratic society", which the Court will address below.

2. Legitimate aim

46. The applicant maintained that the interference in question had not pursued any legitimate aim as its main purpose had been to justify the failure by the public prosecutor concerned to proceed with the applicant's criminal complaint against another person.

47. In the Government's view, the interference pursued the legitimate aim of protecting the reputation and rights of the public prosecutor concerned and also the aim of protecting the authority and impartiality of the judiciary.

48. The Court notes that the criminal proceedings instituted against the applicant on account of his critical statements in respect of P. pursued the legitimate aim of protecting the latter's reputation and rights with a view to permitting him to exercise his duties as a public prosecutor without undue disturbance.

3. "Necessary in a democratic society"

(a) Arguments before the Court

49. The applicant submitted that the interference had not been necessary in a democratic society. He pointed out, in particular, that his statements were value judgments which were not susceptible of proof; that their aim had not been to offend the public official concerned but to criticise the latter's actions which he considered unlawful; and that he had neither published his letters nor disseminated them to a wider audience. Lastly, the applicant argued that the interference had been disproportionate as a prison sentence had been imposed on him and his trading licence had been revoked following his conviction.

50. The Government contended that in his letters the applicant had alleged that the public prosecutor had misused his authority and acted unlawfully. However, those allegations, which had not been made in the context of a debate on matters of public interest, had turned out to be unsubstantiated. The interference complained of had therefore been justified by a pressing social need, namely to protect a public official against insults capable of affecting his rights and reputation. Lastly, the Government maintained that the reasons

relied on by the domestic courts were relevant and sufficient, and that the interference had been proportionate to the legitimate aim pursued.

(b) The Court's assessment

(i) The relevant principles

51. According to the Court's case-law (see the recapitulation in *Janowski v. Poland* [GC], no. 25716/94, §§ 30 and 33, ECHR 1999-I, and *Nikula v. Finland*, no. 31611/96, §§ 44 and 48, ECHR 2002-II, with further references), 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.

52. In exercising its supervisory jurisdiction, the Court must look at the impugned 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". 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.

53. The limits of acceptable criticism in respect of civil servants exercising their powers may admittedly in some circumstances be wider than in relation to private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions. Moreover, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty.

(ii) Application of the aforementioned principles to the instant case

54. Public prosecutors are civil servants whose task it is to contribute to the proper administration of justice. In this respect they form part of the judicial machinery in the broader sense of this term. It is in the general interest that they, like judicial officers, should enjoy public confidence. It

may therefore be necessary for the State to protect them from accusations that are unfounded.

55. There is no doubt that in a democratic society individuals are entitled to comment on and criticise the administration of justice and the officials involved in it. However, such criticism must not overstep certain limits. The Court has held that the national authorities are in principle better placed to ensure, within the margin of appreciation reserved to them, a fair balance between the various interests at stake in similar cases.

56. In the present case the interference with the applicant's freedom of expression resulted from the domestic courts' finding that his statements in two letters of 6 December 1993 and 7 March 1994 had grossly insulted a public prosecutor without justification. The Court's task is to examine whether a fair balance was struck between the competing rights and interests: the applicant's right to freedom of expression on the one hand and the public prosecutor's right to have his personal rights protected on the other hand. In particular, when assessing the necessity of the impugned measure, the Court must determine whether or not the domestic courts overstepped their margin of appreciation when convicting the applicant.

57. While the applicant's statements in respect of the professional and personal qualities of the public prosecutor concerned could be considered as value judgments which are not susceptible of proof, the Court notes that the above-mentioned letters also contained accusations of unlawful and abusive conduct by the latter. Thus the applicant alleged, in particular, that the public prosecutor had unlawfully refused to uphold his criminal complaint, had abused his powers and had in that context been involved in bribery and unlawful tapping of the applicant's telephone. Those allegations are, in the Court's view, statements of fact which the domestic courts rightly requested the applicant to support by relevant evidence.

58. However, the domestic courts found, after examining all the available evidence, that the applicant's above statements of fact were unsubstantiated. There is no information before the Court which would indicate that this finding was contrary to the facts of the case or otherwise arbitrary. The courts dealing with the case duly examined the circumstances in which the insulting statements were made and whether they could be justified, for example by the conduct of the public prosecutor in question. The Court is satisfied that the reasons given by the domestic courts in respect of the applicant's statements accusing P. of misconduct and breaches of the law are sufficient and relevant.

59. Those accusations were of a serious nature and were made repeatedly. They were capable of insulting the public prosecutor, of affecting him in the performance of his duties and also, in the case of the letter sent to the General Prosecutor's Office, of damaging his reputation.

60. Admittedly, the applicant's statements were aimed at seeking redress before the relevant authorities for the actions of P. which he considered

wrong or unlawful. In this connection the Court notes, however, that the applicant was not prevented from using appropriate means to seek such redress (see paragraphs 28 and 34 above, and also *Tammer v. Estonia*, no. 41205/98, § 67, ECHR 2001-I, with further reference).

61. Since the relevant parts of the letters were also published in a newspaper, it is conceivable that they opened a possibility of a public debate. In this context the Court must take into consideration that the newspaper article in question was written by a third person and that the domestic courts did not rely on that article when convicting the applicant. However, the harm caused to the public prosecutor concerned by the statements of fact, which the applicant could not prove to have been true, must have been aggravated to a certain extent by the publication of the letters, to which the applicant had after all contributed by providing the author with the relevant documents (see paragraph 22 above).

62. As to the applicant's argument that the interference in question was disproportionate in that, in particular, his trading licence was withdrawn following his conviction, the Court notes that on 4 June 1997 the Košice Regional Court quashed the relevant administrative decisions as having no legal grounds. Furthermore, in its decision of 8 January 2002 on the admissibility of the present application the Court dismissed the applicant's complaint under Article 8 of the Convention in this respect, noting that the applicant had not shown that he had suffered any damage as a result of the decisions to revoke his trading licence and that, in any event, it had been open to him to claim compensation in this respect under the State Liability Act of 1969.

63. Although the sanction imposed on the applicant – four months' imprisonment suspended for a probationary period of one year – is not insignificant in itself, the Court notes that it is situated at the lower end of the applicable scale.

64. In view of the above considerations and bearing in mind that a certain margin of appreciation is left to the national authorities in such matters, the Court finds that the interference complained of was not disproportionate to the legitimate aim pursued and can be regarded as "necessary" within the meaning of Article 10 § 2 of the Convention.

65. There has consequently been no breach of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

Holds by five votes to two that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 11 March 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Sir Nicolas Bratza and Mr Maruste is annexed to this judgment.

N.B.
M.O'B.

JOINT DISSENTING OPINION OF JUDGES Sir NICOLAS BRATZA AND MARUSTE

We are unable to share the view of the majority of the Chamber that the applicant's rights under Article 10 of the Convention were not violated in the present case. In our view, the prosecution of the applicant and the imposition on him of a suspended sentence of imprisonment for insulting a public prosecutor, P., was neither a response to a pressing social need nor proportionate to any legitimate aim pursued.

Like the majority of the Chamber, we accept that the impugned statements were of a serious nature, accusing P., as they did, of an abuse of his powers as a prosecutor and going as far as to impute to P. the acceptance of a bribe. We accept, too, the finding of the domestic courts that the accusations had not been proved by the applicant to be true and that they were insulting of P.

However, unlike the majority of the Chamber, we attach central, if not decisive, importance to the fact that the impugned statements which were the subject of the prosecution were not made to the media or otherwise published by the applicant to the outside world but were contained in two letters, the first addressed personally to P. himself and the second to the General Prosecutor, in his capacity as P.'s ultimate hierarchical superior.

The Court has in several cases observed (see, in particular, *Janowski v. Poland* [GC], no. 25716/94, ECHR 1999-I, and *Nikula v. Finland*, no. 31611/96, ECHR 2002-II) that it may be necessary to protect public servants, including prosecutors, from offensive, abusive and defamatory attacks which are calculated to affect them in the performance of their duties and to damage public confidence in them and the office they hold. However, these cases have all concerned written or verbal attacks made in public and not, as in the present case, those made in private correspondence to the public servant concerned, where the same considerations do not appear to us to apply. Not only are the limits of acceptable criticism of a public servant wider than in relation to private individuals, but public servants must be prepared to tolerate such criticism, where it is personally addressed to them in private correspondence, even where such criticism is expressed in abusive, strong or intemperate terms and even where it consists of serious and unfounded allegations. Where as here the allegations are contained in a personal letter addressed to the public servant in question, it is only in the most exceptional circumstances that resort to criminal proceedings can be justified in terms of Article 10 of the Convention. We can find no such special circumstances in the present case.

The same is true of the statements contained in the letter to the General Prosecutor. As the hierarchical superior of P., the General Prosecutor was in our view the appropriate authority to receive complaints about the manner in which P. had carried out his public functions and in particular to investigate, as the applicant had requested him to do, whether the offence of bribery had been committed. Private citizens must remain in principle free to make complaints against public officials to their hierarchical superiors without the risk of facing prosecution for defamation or insult, even where such complaints amount to allegations of a criminal offence and even where such allegations prove on examination to be groundless.

It is true that in the present case the contents of the two letters reached the public domain when they were substantially reproduced in an article written by a third person relating details of the applicant's case. It is true, too, that the applicant admitted that he had provided the author of the article with the relevant documents. However, this is in our view of no significance in the particular circumstances of the present case. The charge of insulting P. was lodged against the applicant in June 1994, prior to the publication of the article, and related exclusively to the applicant's letters of 6 December 1993 and 7 March 1994. Moreover, at no stage during the criminal proceedings against the applicant in the district or regional court was any reliance placed on the fact that the allegations had been given wider publicity through the article nor was any reference made to the publication of the allegations in the judgments of either court, the applicant's conviction and the sentence imposed on him being based solely on the two letters which he had written.

In our view, there was in these circumstances an unjustified interference with the applicant's freedom of expression.