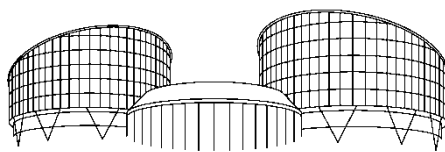


## **Libertà di espressione e tutela della reputazione della persona giuridica (CEDU, sez. IV, sent. 11 gennaio 2022, ric. n. 78873/13)**

Nel caso in esame il ricorrente ha lamentato la violazione dell'art. 10 CEDU per essere stato condannato per i reati di oltraggio e diffamazione a danno di persona giuridica all'esito di dichiarazioni da lui rese in un'audizione davanti alla Commissione parlamentare per l'etica, la società e la cultura. Il ricorrente, un noto giornalista, era stato audito sul tema della libertà di espressione e dei media ed aveva rilasciato opinioni personali. All'esito infatti delle suddette dichiarazioni veniva avviato un procedimento penale di primo grado a suo carico con conseguente condanna. Nella sua decisione, il Tribunale penale di Lisbona aveva ritenuto la condotta dell'imputato dolosa (*dolo generico*). E la Corte d'Appello, confermando tale verdetto, riteneva necessario un *test* di proporzionalità tra diritto all'onore e libertà di espressione.

La Corte EDU, dopo aver ritenuto ammissibile il ricorso, ha chiarito che la protezione della reputazione della persona giuridica non ha la stessa forza della protezione della reputazione delle persone fisiche, stante la differenza tra la reputazione di una persona giuridica e la reputazione di un individuo. E mentre quest'ultima può avere ripercussioni sulla dignità dell'individuo, la prima invece è priva di quella dimensione morale. Tuttavia, nel caso di specie, le dichiarazioni del ricorrente avevano esercitato notevole influenza sull'etica giudiziaria e, dunque, l'ingerenza da parte delle autorità appariva strumentale a proteggere la fiducia del pubblico nella magistratura. In ragione di ciò, la Corte EDU si è riservata di verificare se l'ingerenza denunciata fosse "necessaria in una società democratica". In proposito, essa ha ricordato che per valutare la necessità di un'ingerenza nell'esercizio della libertà di espressione va considerato il contesto in cui tale libertà si esercita, e la tutela sarà normalmente accordata quando le osservazioni riguardano una questione di interesse pubblico. Inoltre, si legge ancora nella sentenza, occorre distinguere tra dichiarazioni di fatto e giudizi di valore. L'esistenza dei fatti può essere dimostrata, mentre la verità dei giudizi di valore non è suscettibile di prova. L'obbligo di provare la veridicità di un giudizio di valore è impossibile e viola la stessa libertà di opinione, che costituisce una parte fondamentale del diritto sancito dall'art. 10 CEDU. Nella specie, la Corte ha rilevato che la maggior parte delle affermazioni del ricorrente consistevano in sue opinioni personali, la cui veridicità non è suscettibile di prova e che nonostante il ricorrente non fosse un rappresentante eletto avrebbe dovuto beneficiare di un elevato livello di protezione. In conclusione, i giudici di Strasburgo hanno ritenuto che i tribunali nazionali non abbiano fornito ragioni pertinenti e sufficienti per giustificare l'ingerenza con il diritto del ricorrente alla libertà di espressione e che non vi sia un ragionevole rapporto di proporzionalità tra la restrizione al diritto del ricorrente alla libertà di espressione e lo scopo legittimo perseguito con conseguente violazione dell'art. 10 della Convenzione.

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

FOURTH SECTION

**CASE OF XXX v. PORTUGAL**

*(Application no. 78873/13)*

JUDGMENT

STRASBOURG

11 January 2022

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of XXX v. Portugal,**

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

Yonko Grozev, *President,*

Tim Eicke,

Faris Vehabović,

Gabriele Kucsko-Stadlmayer,

Pere Pastor Vilanova,

Jolien Schukking,

Ana Maria Guerra Martins, *judges,*

and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 78873/13) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Portuguese national, Mr XXX (“the applicant”), on 5 December 2013;

the decision to give notice to the Portuguese Government (“the Government”) of the complaint under Article 10 of the Convention and to declare the remainder of the application inadmissible;

the information about the applicant’s death on 13 August 2014 and the wish of his daughters, Ms XXX and Ms XXX, to continue the proceedings before the Court in his stead;

the parties’ observations;

Having deliberated in private on 23 November and on 7 December 2021,

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

**INTRODUCTION**

1. The present application concerns the applicant's complaint that his conviction for insulting a legal entity (*ofensa a pessoa colectiva*) on account of statements he made about the Professional Association of Judges (*Associação Sindical de Juizes Portugueses* – "the ASJP") and the Professional Association of Public Prosecutors (*Sindicato dos Magistrados do Ministério Público* – "the SMMP") at a hearing before the Parliamentary Commission on Ethics, Society and Culture was in breach of his right to freedom of expression as provided for by Article 10 of the Convention.

## THE FACTS

2. The applicant, Mr XXX, was a Portuguese national who was born in XXX and lived in XXX. He was represented before the Court by Mr R. Correia Afonso, a lawyer practising in Lisbon. By a letter of 9 September 2015, the applicant's representative informed the Court that Mr XXX had died on 13 August 2014 and that his daughters, Ms XXX and Ms XXX, had expressed their wish to pursue the application in his stead.

3. The Government were represented by their Agent, Ms M.F. da Graça Carvalho, Deputy Attorney General.

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

### I. BACKGROUND TO THE CASE

5. The applicant was a renowned journalist in Portugal.

6. In February 2010 he was invited by the Socialist Party to give testimony at a hearing before the Parliamentary Commission on Ethics, Society and Culture (*Comissão Parlamentar de Ética, Sociedade e Cultura*) on the topic of freedom of expression and the media in Portugal. More than seventy personalities and entities were invited to give their views on this topic at the hearing, which was open to the public and the media. The discussion specifically concerned the following issues:

(a) the conditions for the exercise of freedom of expression in Portugal;

(b) the transparency of the ownership of the media and the influence of economic and political power on media outlets;

(c) the precariousness of employment contracts in the journalism sector in Portugal and the consequent implications for the performance of that activity;

(d) the conditions for the exercise of journalists' right to participate in shaping the editorial stance of the media, in particular through their editorial boards; and

(e) the influence of public entities on the media and the methods through which the media financed themselves.

7. On 6 April 2010 the applicant gave his testimony before the Parliamentary Commission on Ethics, Society and Culture. During his presentation, he blamed certain journalists for lowering the standards of journalism in the country, and he drew attention to the fact that the political and judicial classes were utilising journalism to pursue political goals. Before answering questions from members of parliament, he stated, *inter alia*, as follows:

"... It is urgent that something is done. 90% of young journalists have not read the code of ethics. No one has ever been punished for bad journalistic practice. No one has been praised for good practice. Journalism is essential to democracy. There is no democracy without quality journalism. However, the situation has got worse. This circle has recently seen the entry – and this is the trend

[*modismo*] of modern times – of the professional associations of judges and public prosecutors. These are two hubs managing information relating to judicial cases [*duas centrais de gestão de informação processual*], which is achieved through close ties with journalists. They obtain documents concerning judicial cases for journalists to publish, exchange these documents at coffee shops, in the open; if they can help to breach the duty of judicial confidentiality [*segredo de justiça*], they really will share the documents. This is not going to end well, Mr President, honourable members of parliament, if we do not return to a time with rules preventing the judiciary from engaging in politics.”

8. As he was leaving the parliamentary session, the applicant made the following statements to a journalist from the newspaper *Público* who had been present at the hearing:

“Where does the material covered by judicial confidentiality come from? Can it only come from the justice system itself? ... If they were resolving issues to do with a professional association, but no, what I have seen is an extensive and broad political intervention with negative consequences ... They try to limit the decisions of the Attorney-General [*Procurador Geral da República*] and [to influence] public opinion, and they have privileged relationships with journalists to whom, from time to time, they pass on documents dealing with various topics.”

9. On the same day that the applicant addressed the parliamentary session, the National Board of the ASJP issued a public statement, which read as follows:

“At the hearing that took place today before the Parliamentary Commission on Ethics, Society and Culture, the journalist XXX asserted ... that the ASJP was connected to violations of judicial confidentiality by ‘obtaining documents concerning judicial cases for journalists to publish’ and exchanging these documents ‘at coffee shops, in the open’.

This allegation is false and defamatory, insulting ... the good name of the ASJP with its thirty-five years of dedication to strengthening the prestige and the dignity of the judiciary, as well as the honour of the more than 2,050 judges who are members of the organisation.

The journalist XXX did not identify a single member of the governing bodies of the ASJP who might have shared a case file, a document, information, or anything else in violation of judicial confidentiality or the rules on professional conduct and ethics by which Portuguese judges are governed, for the simple reason that it never happened ...”

10. The applicant’s statements before Parliament and to the journalist from *Público* were widely covered in the media and reported on by at least ten different news organisations on 6, 7 and 9 April 2010.

11. On 7 April 2010, in an interview with the news agency Lusa, the applicant stated:

“I stand by everything I said. The judiciary must be prudent and exercise its functions with modesty ...”

## II. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

### A. First-instance proceedings

12. On 23 April 2010 and on 5 May 2010 respectively the ASJP and the SMMP lodged criminal complaints against the applicant for insulting a legal entity (*ofensa a pessoa colectiva*) on account of the statements he had made before the Parliamentary Commission on Ethics, Society and Culture.

13. After those complaints were lodged, criminal proceedings were initiated against the applicant by the Lisbon public prosecutor’s office.

14. On an unknown date the ASJP and the SMMP were granted leave to intervene in the proceedings as assistants to the prosecuting authority (*assistentes*). They also brought civil claims.

15. On an unknown date the ASJP and the SMMP filed their private prosecution submissions against the applicant in relation to two counts of defamation. The Lisbon public prosecutor's office supported their submissions.

16. The applicant challenged the prosecution submissions by applying for the opening of a judicial investigation (*requerimento de abertura de instrução*). On an unknown date the Lisbon Criminal Investigation Court dismissed his application and sent the case for trial in the Lisbon Criminal Court.

17. During the trial, the applicant defended the impugned statements. He claimed that he had personally witnessed a journalist, E.D., exchanging files at a café with a member of the SMMP. E.D. denied those allegations during the hearing.

18. On 7 May 2012 the Lisbon Criminal Court convicted the applicant on two counts of insulting a legal entity, pursuant to Article 187 §§ 1 and 2 and Article 183 §§ 1 (a) and (b) and 2 of the Criminal Code ("the CC" – see paragraph 34 below). The court held that the applicant had made statements of fact which were unsubstantiated, and that there was no reason not to believe E.D.'s testimony. The applicant was convicted and ordered to pay a fine of 6,000 euros (EUR), or alternatively, sentenced to 200 days' imprisonment. As compensation for non-pecuniary damage, he was also ordered to pay the SMMP and the ASJP EUR 50,000 each, plus interest, calculated from the date of the judgment.

19. In its decision, the Lisbon Criminal Court took the view that for Article 183 of the CC to apply, it was sufficient for the perpetrator to have acted with general criminal intent (*dolo genérico*); thus, it would suffice for the perpetrator to realise that he had attributed false facts, or even offensive value judgments, to the legal entities in question. The court held as follows:

"The [applicant's] desire to directly strike at and diminish the credibility and prestige of the *assistentes* in front of the members of parliament sitting on the Ethics Commission and before the whole country is well known.

The offence directed against the *assistentes* took place in a solemn venue – Parliament – where the [applicant] read out a text written by him, in a context where media access to the hearing ... was unrestricted, which heightened the potential for the dissemination of the words spoken by the [applicant], as well as for the perpetuation of the offence to the *assistentes*. The statements made by the [applicant] were knowingly designed to endure in time ... considering that the applicant is a figure of reference in journalism in Portugal, and that his opinions are widely listened to.

The immediate reporting ... by various media entities of the statements he made to the Ethics Commission, as a result of the 'bandwagon effect' [*efeito propulsor*] that they instantaneously acquired, carried the 'viral load' of the words and allowed them to persist in time. As they still persist.

...

It is hard for us to accept that, in any circumstances, such statements may be considered harmless. It is hard for us to accept that, in any circumstances, they may be interpreted as not being offensive to, or unable to offend, the *assistentes*.

And that the [applicant] did not seek to 'back up' [his statements] with any facts.

He merely referred to a vague incident at a café ... involving the journalist E.D. and a judge belonging to the SMMP, whom he refused to identify.

This is manifestly insufficient.

...

Freedom of expression was, in this instance, dishonoured [*desvirtuada*].”

#### B. Appeal proceedings

20. On an unknown date the applicant appealed against the Lisbon Criminal Court’s decision to the Lisbon Court of Appeal.

21. On 22 November 2012 the Lisbon Court of Appeal upheld the criminal conviction of the applicant. However, it held that the applicant had committed two counts of the offence of insulting a public entity under Article 187 §§ 1 and 2 and Article 183 § 2 of the CC, excluding the application of Article 183 § 1 (a) and (b) (see paragraph 34 below). The Lisbon Court of Appeal considered that the applicant was only to be convicted under Article 183 § 2 because the offence under that Article was more severe than the one under Article 183 § 1 (a) and (b) and therefore included the offences committed under those two sub-paragraphs as well. However, this would not have any impact on the total amount of the penalty.

22. In its judgment, the Lisbon Court of Appeal noted that it was necessary to make a proportionality assessment between the right to honour and freedom of expression, holding as follows:

“... Given that the [Convention], like all treaty law to which Portugal is a contracting party, has infra-constitutional but supra-legal value, in determining whether certain conduct constitutes a crime against honour, account should be taken of the provisions of that Convention, as interpreted by the case-law of the [Court], specifically in respect of Article 10 (freedom of expression).

According to the case-law of that court ‘... the exceptions to freedom of expression, notably to protect the honour of others, must be interpreted restrictively and the necessity for the restrictions must be convincingly established’. Thus, when public figures are involved, the limits of permissible criticism are wider, accepting, in the context of political and public controversies, the use of strong, exaggerated and scathing language.

...

In the present case, the [applicant] claimed that the members of the *assistentes* had shared information on topics that were protected by judicial confidentiality [*segredo de justiça*] with journalists.

Considering that the *assistentes* are associations whose members are exclusively members of the State legal service who must abide by special duties in respect of their legal obligations, such an act would be extremely serious, both criminally and in terms of professional conduct; therefore, the attribution of such acts [to the *assistentes*] seriously damages the right of the *assistentes* to a reputation.

[The present case] is not about opinions on the existence or handling of the *assistentes*, but rather the false attribution of serious acts, without the [applicant] having even proven that he had any grounds, in good faith, to believe in their veracity ... for this reason the limit of freedom of expression has been surpassed and the objective elements of the offence under Article 187 of the Criminal Code are met.”

23. As to civil liability, the Lisbon Court of Appeal lowered the amount to be paid in damages to the *assistentes* to EUR 10,000 each. The relevant parts of the judgment in this regard read as follows: “The [applicant] is an individual and the *assistentes* are legal entities (where the offender is a media company, the compensation must be increased, so that the revenue gained from the news which offends a person’s honour does not offset the respective consequences); on the other hand ..., the honour of legal entities stems from social dignity and not from ‘human dignity’, and, as a consequence, there is no suffering, as there is in the case of a human being, [and this] diminishes the duty to compensate.

...

The [applicant] has a monthly income of about EUR 5,000 ... and no facts connected to the economic circumstances of the *assistentes* have been established ...

[H]owever, the [applicant] did not have any basis to consider, in good faith, that the facts he attributed to the *assistentes* were true, and therefore the compensation should not be reduced for the purposes of Article 494 of the Civil Code.

...

The statements were made before third parties (which necessarily leads to a higher award of compensation than in the case of statements made only in front of the victim), [and] read from a written text ... therefore, the words were well considered [*ponderado*] (which increases the duty to compensate), and reiterated several times ..., triggering a large amount of media attention ... which also leads to the duty to compensate ... The facts referred to [by the applicant] constitute an offence, which heightens the duty to compensate.”

24. On 21 February 2013 the applicant filed a plea of nullity in respect of the judgment of the Court of Appeal, but his plea was dismissed.

25. As far as the criminal conviction of the applicant was concerned, the judgment of the Lisbon Court of Appeal was not amenable to further appeal pursuant to Article 400 § 1 (e) of the Code of Criminal Procedure (see paragraph 35 below).

#### C. Proceedings before the Supreme Court

26. On an unknown date the ASJP and the SMMP lodged an application with the Supreme Court for judicial review, arguing that the amount that the applicant had been ordered to pay them in damages was too low.

27. On 5 June 2013 the Supreme Court held partly in their favour, increasing to EUR 25,000 the amount of compensation for non-pecuniary damage to be paid by the applicant to each of the ASJP and the SMMP.

28. The relevant part of the Supreme Court’s judgment reads as follows:

“The right to a good name and reputation is a fundamental right based on Article 26 § 1 of the Constitution .... With regard to legal entities, the right to a good name is specifically enshrined, from a civil point of view, in Article 484 of the Civil Code, and, at the same time, the violation of this legal interest [*bem juridico*] is also an offence under the Criminal Code ...

... with regard to legal entities, the insult to their credibility and good name may entail serious damage that affects not only the self-image and the prestige that they enjoy, but also the trust that the public may place in them ...

In the [present] case, it is undeniable that the insults to the good name (credibility, prestige and trust) of the claimants were severe, both because of the extent of their unlawfulness (the seriousness of the insults, the knowledge of their falsehood, the form in which they were produced, the outlet that they had), and because of the established guilt, with a particularly severe level of intent ...

Now, the facts are particularly serious owing to the offensive nature of the statements and the coverage that they had; with regard to negligence [*culpa*], as we have already seen, the [applicant] acted with gross negligence [*culpa grave*] – the most serious form of negligence, and the level of unlawfulness is also high within this type of offence.

Both the Professional Association of Judges and the Professional Association of Public Prosecutors demonstrated, through their executive bodies, that they were profoundly affected by the statements made, especially considering that these associations are representatives of prosecutors and judges in their socio-professional field, striving for the protection of the values connected to professional and ethical conduct, such as independence, immunity and objectivity, which are characteristics of the exercise of their respective roles that are enshrined in the Constitution and in their statutes. The allegations made by the applicant imply a total disrespect for the principles by which judges and prosecutors ... must be governed ...

... This was combined with the aggravating fact that the [applicant] acted freely, voluntarily and consciously and with the intention of offending the legal entities in question ... while knowing the falsehood of his statements ...

... The determination of compensation, in contrast to what the [applicant] suggests, must have, in the present case, the nature of a sanction, with a preventive purpose ...

The value of the compensation for non-pecuniary damage and as a civil sanction is established on the basis of the degree of fault [*culpabilidade*], the unlawfulness [of the act], the economic situation of both the perpetrator [*lesante*] and the victim, and the overall circumstances of the case.

Considering that the negligence [*culpa*] in this case fell into the most serious category ... in the form of intent [*dolo*], and was especially severe within that category, on account of its high degree of unlawfulness; considering the damaging consequences, the [applicant's] manner of operating and the universe of people making up the collective entities; and bearing in mind the economic situation of the claimants and the [applicant], the amount of EUR 10,000 determined by the Court of Appeal is too low."

#### D. Enforcement proceedings

29. On 5 December 2014 the Lisbon Criminal Court declared the sentence completed after the applicant had finished paying the fine of EUR 6,000.

30. The ASJP initiated enforcement proceedings against the applicant in respect of the sum of EUR 25,000 in compensation which he had been ordered to pay. This amount was seized from the applicant and transferred to the ASJP. On 18 November 2014 the enforcement proceedings instituted by the ASJP were terminated.

31. On an unknown date, the applicant agreed to the payment of the sum of EUR 25,000 to the SMMP in instalments. On 1 July 2014 he paid the first instalment in the amount of EUR 500.

32. The applicant died on 13 August 2014 (see paragraph 2 above). On 3 September 2015 the debt which remained to be paid to the SMMP was transferred to the applicant's estate within the



inventory proceedings, which, as of 30 July 2018, the date of the latest information available to the Court, were still pending before a notary.

## RELEVANT LEGAL FRAMEWORK AND PRACTICE

### I. THE CIVIL CODE

33. The relevant provisions of the Civil Code read as follows:

#### Article 70

“The law shall protect individuals against any unlawful interference or threat of harm to their person or character.”

#### Article 484

“Anyone who states or spreads [knowledge of] a fact that is capable of harming the reputation of another natural or legal person shall be liable to pay damages.”

#### Article 494

“When liability results from negligence, the compensation may be set at a lower value than that which corresponds to the damage caused, as long as the degree of fault [*grau de culpabilidade*] of the perpetrator, the economic situation of the victim and the remaining circumstances justify this.”

### II. THE CRIMINAL CODE

34. The relevant provisions of the CC read as follows:

#### Article 11 § 1

##### Liability of individual people and legal entities

“Except as provided in the following paragraph and in cases specifically provided for by law, only individuals may incur criminal responsibility.”

#### Article 180

##### Defamation

“1. Anyone who, when addressing a third party, accuses another, even if the accusation takes the form of a suspicion, or makes a statement that casts aspersions on the honour of another, even when repeating an accusation or statement, shall be liable on conviction to a maximum of six months’ imprisonment or 240 day-fines.

...”

#### Article 183

##### Public disclosure and slander

“1. If in the case of the offences provided for in Articles 180, 181 and 182:

(a) the offence is committed by means or in circumstances that facilitate its disclosure; or

(b) in the case of imputation of facts, if it is ascertained that the offender knew that the imputation was false, the minimum and maximum penalties for defamation or insult shall be increased by one-third.

2. If the offence is committed through the media, the offender shall be punished with a prison sentence of up to two years or not less than 120 day-fines.”

#### Article 187

##### Insulting a public body or service or a legal entity

“1. Anyone who, without having grounds to do so in good faith, regards as truthful, affirms or propagates false facts capable of offending the reputation, prestige or trust that are owed to a body

or a service that exercises public authority, a legal entity, an institution or a corporation, shall be liable on conviction to a maximum of six months' imprisonment or 240 day-fines.

2. The following shall consequently apply:

(a) Article 183;

..."

Article 371 § 1

Violation of judicial confidentiality

"Anyone who, regardless of having had direct contact with the proceedings, unlawfully shares, in its entirety or in part, the contents of an act relating to criminal proceedings which is protected by judicial confidentiality, or which is not open to the general public, shall be punishable by a prison sentence of up to two years or by the payment of up to 240 day-fines ..."

### III. THE CODE OF CRIMINAL PROCEDURE

35. At the material time, the relevant provisions of the Code of Criminal Procedure read as follows:

Article 400 § 1 (e)

Decisions that are not amenable to appeal

"1. The following decisions are not amenable to appeal:

...

(e) Judgments given on appeal by courts of appeal which impose a penalty not entailing deprivation of liberty [*pena não privativa de liberdade*].

..."

### IV. OTHER RELEVANT MATERIAL

36. The relevant provisions of the statutes of the ASJP and the SMMP read as follows:

Section 3 of the ASJP statutes

(Objects)

"1. The ASJP shall have as its objects: ... (d) making proposals to the competent authorities on reforms to improve the judicial system and asking to be consulted on all reforms in such matters; ... (g) communicating the views of judges externally on all aspects relevant to the defence of the image, prestige and dignity of the judiciary; ..."

Section 6 of the SMMP statutes

(Objectives)

"The professional association shall pursue the following objectives:

...

2. to defend the interests of public prosecutors, specifically with regard to their socio-professional status;

3. to fight for the dignity of the public prosecutor's office and for the improvement and democratisation of the judicial system;

...

6. to be consulted on the drafting of laws within the judicial system and to make proposals to the competent authorities on the necessary reforms for the improvement of the judicial system and the delivery of justice."

### V. DOMESTIC PRACTICE

37. Domestic case-law has clarified that Article 187 of the CC (see paragraph 34 above) is only applicable to the dissemination of false facts and not to value judgments (see the domestic judgments cited in *Pinto Pinheiro Marques v. Portugal*, no. 26671/09, § 22, 22 January 2015).

## THE LAW

### I. LOCUS STANDI

38. The Court notes that Ms XXX and Ms XXX expressed the intention to pursue the application on behalf of the applicant, who had died in the course of the proceedings (see paragraph 2 above). The Government did not comment on this matter. Having regard to the close family ties and the heirs' legitimate interest in pursuing the application, the Court accepts that the deceased applicant's heirs may pursue the application in his stead (see, amongst many other authorities, *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII, and *Pais Pires de Lima v. Portugal*, no. 70465/12, § 39, 12 February 2019). It will therefore continue to deal with the application at the heirs' request. However, for practical reasons, Mr XXX will continue to be referred as "the applicant" in this judgment (see *Dalban v. Romania* [GC], no. 28114/95, § 1, ECHR 1999-V).

### II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

39. The applicant complained that his conviction and punishment were in breach of his right to freedom of expression as provided for in Article 10 of the Convention, which, in so far as relevant, 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. ...

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

40. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

#### B. Merits

##### 1. The parties' submissions

##### (a) The applicant

41. The applicant asserted that his statements had been of public interest. He argued that he had expressed value judgments and generic statements, but had not mentioned any specific names. Furthermore, a violation of judicial confidentiality under Article 11 § 1 of the CC (see paragraph 34 above) could only be committed by private individuals and not by legal entities.

42. He further submitted that his statements ought to be interpreted in the light of the cultural, social and historic context, and within the scope of the debate in Parliament (see paragraphs 6 and

7 above). Furthermore, he emphasised the extensively political role that both the ASJP and the SMMP held in Portuguese society.

43. Lastly, the applicant alleged that the penalty to which he had been sentenced and the amount he had been ordered to pay in damages (see paragraphs 18, 21 and 27 above) was excessively high, having an undue chilling effect on freedom of expression.

(b) The Government

44. The Government argued that the applicant had known that the impugned statements were false. The interference with the applicant's right to freedom of expression was enshrined in the law and had pursued the legitimate aim of protecting the right to honour and reputation of others. They contended that the applicant had made very offensive statements against the two associations concerned in a location which was of particular relevance to them, considering that they were often called on to express their views before Parliament on legal proposals, specifically on matters connected to the functioning of the justice system. In view of the seriousness of the accusations, the applicant had had the duty to support his allegations with evidence, which he had failed to do. Referring to the Court's judgment in *Morice v. France* (no. 29369/10, § 128, ECHR 2015), the Government contended that the applicant's conviction had been necessary in a democratic society to maintain the authority of the judiciary.

45. As regards the amounts of compensation in respect of non-pecuniary damage which the applicant had been ordered to pay, the Government submitted that they were proportionate to the damage caused.

2. *The Court's assessment*

(a) Existence of an interference

46. The Court notes at the outset that the parties did not dispute that the applicant's conviction on two counts of insulting a legal entity following his speech before Parliament had amounted to an "interference", within the meaning of Article 10 § 2 of the Convention, with the exercise of his right to freedom of expression (see paragraphs 41 and 44 above). The Court sees no reason to hold otherwise.

(b) Whether the interference was prescribed by law and pursued a legitimate aim

47. The Court notes that the criminal conviction of the applicant was based on Article 187 §§ 1 and 2 (a) and Article 183 § 2 of the CC (see paragraphs 18, 21, 34 and 37 above) and that his civil liability was based on Article 484 of the Civil Code (see paragraph 33 above). It therefore concludes that the interference at issue was "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

48. The Government argued that the interference in question had pursued the legitimate aim of "the protection of the reputation or rights of others" (see paragraph 44 above). The Court points out in this connection that the issue of whether a legal entity can enjoy the right to reputation (including the scope of such right) is debatable. However, in this case, it is prepared to assume that this aim can be relied on (see, *mutatis mutandis*, *Margulev v. Russia*, no. 15449/09, § 45, 8 October 2019, and the references therein). It notes that the Supreme Court found that the allegations made by the applicant had also affected the judicial ethics by which judges and prosecutors were bound (see paragraph 28 above). The Court accepts that the interference also served the legitimate aim of protecting public confidence in the judiciary and thus maintaining the authority of the judiciary

within the meaning of Article 10 § 2 of the Convention. However, it remains to be established whether the interference complained of was “necessary in a democratic society”.

(c) Whether the interference was necessary in a democratic society

(i) *General principles*

49. The Court refers to the general principles for assessing the necessity of an interference with the exercise of freedom of expression as set out in *Morice* (cited above, § 124); *Bédat v. Switzerland* ([GC], no. 56925/08, § 48, 29 March 2016); and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* ([GC], no. 17224/11, § 75, 27 June 2017).

50. Under Article 10 § 2 of the Convention, there is little scope for restrictions on political speech or on debate on matters of public interest. Accordingly, a high level of protection of freedom of expression, with the authorities thus having a narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, in particular for remarks on the functioning of the judiciary (see *Baka v. Hungary* [GC], no. 20261/12, § 159, 23 June 2016, with further references).

51. A distinction must be made between statements of fact and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. However, where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient “factual basis” for the impugned statement: if there is not, that value judgment may prove excessive. In order to distinguish between a factual allegation and a value judgment, it is necessary to take account of the circumstances of the case and the general tone of the remarks, bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact (see *Morice*, cited above, § 126, with further references, and *Miljević v. Croatia*, no. 68317/13, § 56, 25 June 2020).

52. Furthermore, the Court has found that the most careful scrutiny on its part is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III).

53. The Court also notes that the protection of the reputation of a legal entity does not have the same strength as the protection of the reputation or rights of individuals (compare *Uj v. Hungary*, no. 23954/10, § 22, 19 July 2011, and *Kharlamov v. Russia*, no. 27447/07, § 29, 8 October 2015). The Court has previously emphasised that there is a difference between the reputation of a legal entity and the reputation of an individual as a member of society. Whereas the latter may have repercussions on the individual’s dignity, the former is devoid of that moral dimension. This difference is even more salient when it is a public authority that invokes its right to a reputation (see *Margulev*, cited above, § 45).

(ii) *Application of the above principles to the present case*

54. Turning to the circumstances of the present case, the Court notes at the outset that the applicant, who is a well-known journalist (see paragraph 5 above) and had been invited by a political party to speak before the Parliamentary Commission on Ethics, Society and Culture (see paragraph 6 above), made the impugned statements while giving his opinion on freedom of

expression and the media and how these were influenced by the political and economic classes. During his speech, he alleged that the ASJP and the SMMP, both of which played a role in policy-making decisions concerning judicial matters (see paragraphs 36 and 44 above), had shared confidential information with journalists to advance their political objectives (see paragraph 7 above). The Court finds that those issues were a matter of general interest to the community and that discussing them before Parliament formed part of a political debate, a field where a high level of protection of freedom of expression will normally be accorded, with the authorities thus having a narrow margin of appreciation (see the case-law cited in paragraph 50 above).

55. The Court further observes that the parliamentary session was open to the public and that journalists were present when the applicant spoke (see paragraph 6 above). It therefore finds it unsurprising that the impugned statements were widely disseminated in the media in the days following his speech (see paragraph 10 above). In addition, the applicant was interviewed immediately after the parliamentary session by a journalist from the newspaper *Público* who was present during his speech before Parliament (see paragraph 8 above). The applicant also gave a follow-up interview in which he reiterated his position, arguing that the ASJP and the SMMP should act with prudence and modesty (see paragraph 11 above).

56. With regard to the ASJP and the SMMP, the Court observes that they are reputable and well-known professional associations which are frequently invited to present their views before Parliament on legal proposals in matters connected to the functioning of justice (see paragraphs 36 and 44 above).

57. The domestic courts, in the criminal proceedings brought by the ASJP and the SMMP against the applicant (see paragraphs 12 and 15 above), assumed that the applicant had made only statements of fact which he knew were false and defamatory towards those associations (see paragraphs 23 and 28 above). The Court, for its part, notes that most of the applicant's statements consisted of his personal opinions, the truthfulness of which is not susceptible of proof (see the case-law quoted in paragraph 51 above). The only statement of fact at issue is the applicant's claim concerning the sharing, by the ASJP and the SMMP, of confidential information with journalists. During his trial, the applicant defended that statement, claiming that he had personally witnessed the exchange of a case file between a journalist and a member of the SMMP (see paragraph 17 above). The Court finds that the statements made by the applicant must be understood within the specific context in which they were made. Even if the journalist in issue had denied the applicant's allegations about the exchange of the case file, thus leaving those allegations unsubstantiated, the applicant's statement of fact can be considered to have gone beyond this specific allegation and to speak in a more general way about the information sharing by the two organisations. While this may be seen as an exaggerated and thus unfortunate formulation, the applicant's comments may well be interpreted as an illustration of a broader societal critique regarding the inappropriate intervention of the judiciary as a whole in politics and the media, which was a subject of public interest and which he believed to be true (see paragraphs 7, 8 and 11 above).

58. The Court reiterates that the protection of the reputation of a legal entity does not have the same strength as the protection of the reputation or rights of individuals (see paragraphs 48 and 53 above). Furthermore, in the present case, it is imperative to take into account the context in which the applicant made his remarks, namely before a parliamentary commission dealing with the

precise issue of freedom of expression and how the political and economic classes influenced the media and freedom of expression in the country (see paragraphs 5, 6 and 7 above).

59. The Court emphasizes that, according to its case-law, political speech is afforded special protection (see paragraph 50 above). Despite the fact that the applicant was not an elected representative, as an invited expert presenting his views before a parliamentary commission, he should have been afforded an elevated level of protection, as is the case for parliamentary and political speech (see, *mutatis mutandis*, *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, §§ 242-45, 22 December 2020, and the sources cited therein, and compare *Mladina d.d. Ljubljana v. Slovenia*, no. 20981/10, § 43, 17 April 2014).

60. Furthermore, the Court notes that, although the Lisbon Court of Appeal referred to the right to freedom of expression and the need for a proportionality assessment in passing (see paragraph 22 above), it based its decision solely on the right to the good name and reputation of the ASJP and the SMMP, without duly taking into account or examining in detail the criteria mentioned in paragraphs 50-53 above.

61. Lastly, turning to the nature and severity of the sanctions imposed (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 113-115, 10 June 2003), the Court observes not only that a fine of EUR 6,000 was imposed on the applicant as a criminal sanction, but also that he was ordered to pay EUR 25,000 to each of the associations in respect of non-pecuniary damage (see paragraphs 18, 21 and 27 above). Besides the deterrent effect of the criminal fine imposed, which was not modest (contrast *Stoll v. Switzerland* [GC], no. 69698/01, § 160, ECHR 2007-V), in the Court's view the amounts in question were disproportionate to any potential damage caused to the reputation of the associations, which, as noted by both the applicant and the Government, are renowned entities often involved in legal decision-making (see paragraphs 42 and 44 above). The Court also considers that sanctions of this severity may have a chilling effect on the exercise of freedom of expression of persons called upon to participate in discussions of matters of general public interest and concerning institutions (compare *Público - Comunicação Social, S.A. and Others v. Portugal*, no. 39324/07, § 55, 7 December 2010; *Bozhkov v. Bulgaria*, no. 3316/04, § 55, 19 April 2011; *Pinto Pinheiro Marques v. Portugal*, no. 26671/09, § 46, 22 January 2015; *Medipress-Sociedade Jornalística, Lda v. Portugal*, no. 55442/12, § 45, 30 August 2016; and *Pais Pires de Lima*, cited above, §§ 66-67).

#### Conclusion

62. The above elements lead the Court to conclude that the domestic courts failed to provide relevant and sufficient reasons to justify the interference with the applicant's right to freedom of expression. The Court further considers that the domestic courts have exceeded the margin of appreciation afforded to them regarding limitations on debates of public interest and that there is no reasonable relationship of proportionality between, on the one hand, the restriction on the applicant's right to freedom of expression and, on the other, the legitimate aim pursued. The Court concludes that the interference with the applicant's right to freedom of expression was not necessary in a democratic society.

63. Accordingly, there has been a violation of Article 10 of the Convention.

#### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. 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

65. The applicant claimed 56,000 euros (EUR) in respect of pecuniary damage, corresponding to the fine of EUR 6,000 inflicted to him and the sum of EUR 50,000 in damages he had been ordered to pay to the ASJP and the SMMP. He did not claim any amount in respect of non-pecuniary damage.

66. The Government noted that the applicant had not paid the full amount of the compensation owed to the ASJP and the SMMP, but had only paid EUR 31,500.

67. The Court considers that an applicant is, in principle, entitled to recover any sums that he or she has paid in fines and costs, by reason of their direct link with the national court judgments which the Court found to be in breach of his or her right to freedom of expression (see *Tavares de Almeida Fernandes and Almeida Fernandes v. Portugal*, no. 31566/13, § 86, 17 January 2017). In the present case, in view of the documents submitted, the Court notes that the applicant paid the fine of EUR 6,000 which he was ordered to pay, as well as the sums of EUR 25,000 to the ASJP and EUR 500 to the SMMP, totalling EUR 31,500. The Court further observes that, following the death of the applicant, the debt which remained to be paid to the SMMP was inherited by his heirs. Although it appears that they are liable for it (see paragraphs 29-32 above), they have provided no evidence that they paid it. There is therefore no reason to award anything in respect of the remaining debt. In view of the documents submitted, the Court awards the applicant EUR 31,500.

68. As the applicant made no claim in respect of non-pecuniary damage, the Court is not called upon to make any award under that head.

#### B. Costs and expenses

69. The applicant claimed EUR 14,320 in respect of legal fees and EUR 1,419.82 in respect of other costs and expenses related to the proceedings before the domestic courts. He also claimed EUR 2,783.85 in respect of legal fees and EUR 1,350.56 in respect of other costs and expenses related to the proceedings before the Court.

70. The Government contested the amounts claimed in respect of legal fees, finding them excessive

71. 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 were actually and necessarily incurred and are reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). In the present case, regard being had to the documents in its possession and the above criteria, the Court awards EUR 19,874.23 covering costs under all heads, plus any tax that may be chargeable to the applicant's heirs.

#### C. Default interest

72. 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. *Holds* that the applicant's daughters, Ms XXX and Ms XXX, have standing to pursue the proceedings in place of the late applicant;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 10 of the Convention;
4. *Holds*
  - (a) that the respondent State is to pay jointly to the applicant's heirs, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
    - (i) EUR 31,500 (thirty-one thousand five hundred euros), plus any tax that may be chargeable, in respect of pecuniary damage;
    - (ii) EUR 19,874.23 (nineteen thousand eight hundred and seventy-four euros and twenty-three cents), plus any tax that may be chargeable to the applicant's heirs, in respect of costs and expenses;
  - (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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 January 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti Registrar  
Yonko Grozev President

