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La Corte EDU su obblighi positivi dello Stato e libertà di espressione dei giornalisti (CEDU, sez. II, sent. 6 settembre 2022, ric. n. 24738/19)

La Corte EDU si è pronunciata sul ricorso presentato da quattro cittadini serbi, i quali hanno lamentato la presunta violazione dell'articolo 10 della Convenzione per il mancato adempimento da parte delle autorità nazionali del loro obbligo positivo di proteggerli dalle minacce e da una campagna mediatica contro di loro, che li ha intimiditi e dissuasi dal continuare ad esprimere la loro opinione su questioni pubbliche. Stando ai fatti della causa, i ricorrenti, giornalisti e attivisti, hanno partecipato alle proteste relative alla demolizione di alcune case ed installazioni, e denunciato pubblicamente la mancanza di trasparenza di un progetto di costruzione su larga scala.
La Corte dopo aver ribadito l'importanza fondamentale della libertà di espressione come una delle precondizioni per una democrazia funzionante, si è soffermata a definire la portata degli obblighi positivi a carico dello Stato, la cui consistenza deve tenere conto del giusto equilibrio che deve essere raggiunto tra l'interesse generale della collettività e gli interessi del singolo, senza mai tradursi in un onere impossibile o sproporzionato per gli Stati stessi. In particolare, gli obblighi positivi di cui all'articolo 10 della Convenzione impongono agli Stati di creare, attraverso un sistema efficace per la protezione dei giornalisti, un ambiente favorevole alla partecipazione al dibattito pubblico che consenta loro di esprimere le loro opinioni e idee, anche se contrastanti con quelle difese dalle autorità ufficiali o da una parte significativa dell'opinione pubblica.
Sulla base di questa più generale premessa, i giudici di Strasburgo hanno verificato se lo Stato sia venuto meno agli obblighi positivi imposti dalla norma convenzionale. In particolare, essa ha osservato come dalle suddette azioni poste in essere contro i ricorrenti non ne è derivata nessuna effettiva violenza e che la decisione dell'autorità giudiziaria nazionale di rigettare la denuncia penale non fosse né arbitraria né irragionevole. Anzi, la Corte ha rilevato come lo Stato convenuto abbia offerto una serie di mezzi efficaci per la protezione dei ricorrenti, dei quali gli stessi non si sono avvalsi. E, per conseguenza, ha ritenuto non vi sia stata violazione dell'articolo 10 CEDU.

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

SECOND SECTION

CASE OF XXX v. SERBIA

(Application no. 24738/19)

JUDGMENT

STRASBOURG

6 September 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. Serbia,

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

Jon Fridrik Kjølbro, *President,*

Carlo Ranzoni,

Branko Lubarda,

Pauliine Koskelo,

Jovan Ilievski,

Gilberto Felici,

Diana Sârcu, *judges,*

and Hasan Bakırcı, *Section Registrar,*

Having regard to:

the application (no. 24738/19) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Serbian nationals, Mr XXX (the first applicant), Mr XXX (the second applicant), Ms XXX (the third applicant), and Ms XXX (the fourth applicant), on 30 April 2019;

the decision to give notice to the Serbian Government ("the Government") of the complaint concerning an alleged breach of the applicants' freedom of expression, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 28 June 2022,

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

INTRODUCTION

1. The present case concerns the applicants' complaint under Article 10 about an alleged breach of their freedom of expression on account of the national authorities' failure to discharge their positive obligation and to protect the applicants from the threats and media campaign against them.

THE FACTS

2. The applicants were born in XXX, respectively, and live in XXX. The applicants were represented by Mr M. Stojković, a lawyer practising in Novi Beograd.

3. The Government were represented by their Agent, Mrs Z. Jadrijević Mladar.

4. The facts of the case may be summarised as follows.

I. THE CIRCUMSTANCES OF THE CASE

A. Background information

5. The applicants are journalists and civil-sector activists who often criticised the government and the authorities. In early 2016 they participated in the protests relating to the demolition of certain houses and installations (*objekti*) in Belgrade, the lack of transparency of a large-scale construction project in Belgrade, and the changes in the management of Radio-Television Vojvodina.

6. On 27 May 2016 the website of the right-wing movement published an article titled "Don't let Serbia d(r)own" ("*Ne da(vi)mo Srbiju*") about the protests, written by S.S., the then president of the movement. The article stated, *inter alia*:

"... there is ... a whole system of NGOs and political subjects hiding behind the brand 'Don't let Belgrade d(r)own'. ... there is [the first applicant], the executive director of the 'Slavko Ćuruvija' foundation, whose main donors are the Rockefeller Brothers Fund, the Balkan Trust for Democracy, a project of the German Marshall Fund of the United States, NED [the National Endowment for Democracy], the embassy of the Kingdom of Denmark, and the embassy of Australia in Belgrade. ... Behind a well-tuned system of media and NGOs, political parties and individuals there is an intention of western centres of power to influence the formation of the new government of Serbia through pressure, ... by imposing topics, and by a range of other techniques, as well as to create, in perspective, conditions for further destabilisation of the State and ... to turn Serbs against Serbs. While the process of establishing Kosovo statehood is being finalised, further destabilisation of the State encouraged, and the separatist tendencies are growing, the focus of the public is being directed towards the demolition of a few houses and installations. ... The situation in which entire western agencies manipulate people's dissatisfaction caused by injustice done, confirms ... the influence of the foreign-financed non-governmental sector on political events in Serbia. That is why the only and urgent measure of supressing such subversive actions is the adoption of an NGO Act, which would treat as foreign agents NGOs financed from abroad and interfering with internal political issues, and which would provide for their criminal prosecution."

7. The same text, with a different title, was published the next day on another website, whose editor-in-chief is I.M.

8. On 9 June 2016 the daily media platform, Informer (both the printed and online versions), published an article titled "The assassination of [the Prime Minister] begins! The EU and the USA are paying extremists to create chaos in Serbia!". The article stated that the EU and US ambassadors in Serbia had conceived a plan for the radicalisation of the "Don't let Belgrade d(r)own" protests, through which they would try to overthrow the Prime Minister before he managed to form the new government. They were coordinating and organising the financing of the protests, which were supposed to develop into violent demonstrations and a "colour revolution" (anti-regime protests aimed at overthrowing governments). The ultimate aim was the violent occupation of institutions, even the incitement of conflict with the police and the ruling party supporters, which would lead to an "extraordinary political state". The atmosphere at protests should be combative in character, as the protests up to that point had not been a threat. The article also stated that the reports obtained by Informer indicated that a number of persons were actively participating in this project, and published photos of several of them, including the applicants.

9. The online article was followed by 118 readers' comments. Some of them (about fifteen in total) referred to domestic traitors and mercenaries, failed journalists, the easily corrupted, "sold souls", western pets (*zapadnjačke šlihtare*), extremists and trash, suggested that "domestic traitors should be marked as such for the rest of their lives", that "the yellow scum should be arrested", and stated "don't make us use shitty poles".

10. On 9 June 2016 the Informer's editor-in-chief, D.V., was interviewed on TV Pink, whose editor-in-chief was Ž.M. He repeated the allegations in the previous articles, and in doing so referred to a number of individuals including the first and third applicants. In particular, he said that the ambassadors had been exchanging written documentation relating to the protests with the first applicant, and that the third applicant was also part of the "project".

11. On 10 June 2016 the Informer, both the printed and online versions, published another article suggesting that there were "new details of a big western conspiracy against the authorities in Serbia". The article mainly repeated the allegations from the article of the day before, including mentioning the applicants.

12. On 13 June 2016 a television show, "Balkan Spring in the Making", was broadcast on TV Pink, discussing the alleged planning of the destabilisation and disintegration of the State. The applicants were not mentioned.

B. The applicants' criminal complaint

13. On 4 August 2016 the applicants lodged a criminal complaint with the High Public Prosecutor's Office (*Više javno tužilaštvo*) in Belgrade for racial and other discrimination (*rasna i druga diskriminacija*) and a breach of the right to equality (*povreda ravnopravnosti*), against S.S., I.M., D.V., and Ž.M. They submitted that in the articles and television shows in question S.S., I.M., D.V., and Ž.M. had persecuted organisations and individuals because of their advocating for equality, and in doing that and in other ways had spread ideas and theories which promoted and incited hatred, discrimination and violence against a group of people based on their religion, nationality and other personal characteristics, notably having different political opinions.

14. On an unspecified date before 23 August 2016, the high public prosecutor requested the police to investigate these allegations. Between 23 and 30 August 2016 the police interviewed the applicants, S.S., and I.M.

15. In substance, the applicants denied the allegations made in the articles and television shows and stated that they had harmed their honour, personal and professional reputation, and made them feel threatened. They submitted that they had not received any direct threats, but they had been commented on in a negative context or in a discriminatory and insulting manner on social media. The third applicant submitted that such allegations put her in danger, and could have dramatic consequences, of which there had been dramatic examples in recent history. The first applicant submitted that certain media had added significance to his ethnicity (*nacionalnoj pripadnosti*), which he considered had been done in order to incite ethnic intolerance and public persecution.

16. S.S. stated that his text was an analysis through which he had intended to warn of the working methods of the people mentioned in the article and their financing, which information he had found in publicly available sources, primarily on the websites of the organisations in question.

Given that the applicants were themselves engaged in public work, they should have been aware that they were susceptible to criticism.

17. I.M. stated that his website had merely reproduced (*prenela*) the same text. He considered the applicants' criminal complaint a result of the political campaign that they were running against the authorities and media connected to the authorities, and their misconception that the Prime Minister had something to do with I.M.'s website, which was not the case.

18. On 19 July 2017, on the basis of the above, the high public prosecutor rejected (*odbacili*) the applicants' complaint. He found that there was no ground to believe (*ne postoje osnovi sumnje*) that the persons in question had committed the criminal offences in question or any other criminal offence which was subject to public prosecution. The prosecutor held that it could perhaps have been classified as an insult, which was subject to private prosecution. The applicants lodged an objection, which was dismissed by the Appellate Public Prosecutor's Office on 24 August 2017. It held that the reported actions had caused no consequences, nor any deprivation or restriction of anyone's rights, and neither had the publication of the articles promoted or incited hatred, discrimination or violence against any groups based on their religion, nationality or other personal characteristic.

19. On 31 October 2018 the Constitutional Court rejected the applicants' subsequent constitutional appeal, which decision was served on them between 1 and 5 November 2018.

C. The applicants' subsequent public appearances

20. On 11 June 2016 the first applicant publicly denied the Informer's allegations. On 24 August 2016 he publicly criticised the idea of prohibiting organisations financed from abroad as very dangerous and aimed at restricting their work.

21. On 21 June 2016 the second applicant publicly commented on the status of the media in Serbia.

22. On 28 June 2016 the third applicant criticised the ruling party and State officials in a satirical television show.

23. On 30 June 2016 the fourth applicant interviewed one of the human rights activists, who criticised the authorities. On 28 August 2016 she commented on the media and the political situation in Serbia on a television show.

D. Other relevant facts

24. On 6 April 1999 an article, "Ćuruvija welcomed bombs", was published. The text implied that Slavko Ćuruvija, a well-known journalist and newspaper publisher, was a foreign agent who was advocating the bombing of his country. Five days later, on 11 April 1999, he was killed in Belgrade.

25. Following these and other developments from the 90-ies on 5 October 2000 the Serbian transition to democracy and rule of law started after the elections.

26. The Independent Association of Journalists of Serbia has been registering attacks against journalists since 2008. The number of attacks ranged between 23 in 2013 and 189 in 2020. In 2016 there were 69 attacks, nine of which were physical assaults.

27. In 2017 Freedom House reported, *inter alia*, that investigative journalists in Serbia or those critical of the government were frequently smeared in pro-government media as criminals or members of foreign intelligence agencies.

28. In 2021 Freedom House reported that media freedom in Serbia was being undermined by, *inter alia*, editorial pressure from politicians and politically connected media owners, and direct

pressure and threats against journalists. It also reported that the Regulatory Body for Electronic Media had been criticised for a lack of independence, and that journalists had faced physical attacks, smear campaigns and other forms of pressure. Some privately owned national broadcasters and popular tabloids regularly participated in smear campaigns against the political opposition and other perceived opponents of government.

29. The European Parliament resolution of 25 March 2021 on the 2019-2020 Commission reports on Serbia noted that freedom of expression and the independence of the media remained serious concerns which needed to be addressed as a matter of priority, and regretted the deterioration of media freedom and increase in abusive language, intimidation and even hate speech towards independent intellectuals, non-governmental organisations (NGOs), journalists and prominent individuals. It urged the Serbian authorities to take immediate measures to guarantee freedom of expression and media independence, and to ensure proper investigation of these cases.

30. The EU Report on Serbia 2021 noted that limited progress had been made on freedom of expression. The Standing Working Group on the Safety of Journalists continued to help improve the sharing of information between the police, the prosecution and media associations. The government had also established a new working group on the safety of journalists, which was reporting to the Prime Minister and included media representatives. Under the auspices of the new working group, a 24-hour SOS phone line for reporting attacks and pressures on journalists had become operational in March 2021. The Ombudsman had continued his work on establishing a central database of attacks and threats against the media. In December 2020 the Public Prosecutor's Office issued a mandatory instruction for all public prosecutors, ordering urgent action – using the expedited procedure – in cases of threats and attacks against journalists.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW

A. The Constitution (*Ustav Republike Srbije*, published in the Official Gazette of the Republic of Serbia – OG RS – no. 98/2006)

31. Article 46 guarantees the right to freedom of thought and expression.

B. The Criminal Code (*Krivični zakonik*, published in OG RS nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016)

32. Article 128 provides for the criminal offence of a breach of the right to equality. In particular, whoever denies or restricts another person's rights on grounds of ethnicity or different political or other conviction is to be punished by imprisonment of up to three years.

33. Article 138 provides for the criminal offence of endangering the safety of others (*ugrožavanje sigurnosti*). In substance, whoever endangers another person's safety by threatening to attack the life or body of that person or another person close to him or her is to be either fined or imprisoned for up to one year. If the offence is committed against several persons, if it harms the general public or causes other serious consequences, the punishment is imprisonment of between three months and three years.

34. Article 148 provides that whoever denies or restricts another person's freedom of speech or public appearance in an unconstitutional manner is to be punished by imprisonment of up to three years.

35. Article 170 provides for the criminal offence of insult.

36. Article 387 provides for the criminal offence of racial and other discrimination. It provides, *inter alia*, that whoever persecutes organisations or individuals because of their advocating for the equality of people is to be punished by imprisonment of between six months and five years. Whoever disseminates or otherwise makes publicly available texts, images or any other representation of ideas or theories that promote or incite hatred, discrimination or violence against any person or group based on, *inter alia*, their ethnic origin or some other personal characteristic is to be punished by imprisonment of between three months and three years.

C. Public Information and Media Act (*Zakon o javnom informisanju i medijima*, published in OG RS nos. 83/2014, 58/2015 and 12/2016).

37. Article 75 prohibits hate speech. In particular, ideas, opinions or information published in the media must not incite discrimination, hatred or violence against a person or group of persons due to their affiliation or non-affiliation to a nation or other personal characteristics, regardless of whether the publication of the information amounts to a criminal offence.

38. Articles 83 to 100 set out details as regards a response to and a rectification of information. In particular, Articles 83 and 84 provide that a person referred to in that information may request an editor-in-chief to publish a response to or a rectification of untrue, incomplete or incorrect published information. If the editor-in-chief fails to do so, the person in question may file an action against the editor-in-chief seeking the publication of a response or a rectification.

39. Articles 101 to 106 provide for other forms of judicial protection. In particular, Articles 101 to 103 provide that if the publishing of information or a media product (*zapis* – newspapers, radio or television broadcasts, or any other media product) violates, *inter alia*, the prohibition of hate speech, the right to personal dignity, or the right to privacy, a person personally affected (*lično povređeno*) thereby may file a claim against the editor-in-chief of the media in question seeking: (a) the courts to establish that the publishing of the information or media product amounts to a violation of one's right or interest; (b) that the information or media product not be published or republished; and (c) the handover of the media product, or removal or destruction of the published media product (deletion of video and/or audio-recordings, destruction of negatives, removal from publications, and so on).

40. Articles 112 to 118 set out details as regards compensation. In particular, Article 112 provides that a person referred to in the information the publishing of which is forbidden, and who suffers damage as a result of it being published, has the right to compensation for pecuniary and non-pecuniary damage regardless of other legal remedies available in accordance with the Act. A person whose response, rectification or other information has not been published even though it was ordered by a court decision, and who suffers damage as a result, is also entitled to compensation. Articles 113 to 115 provide for the liability of a journalist, editor-in-chief and publisher for the damage caused by publishing the information referred to in Article 112.

41. Article 120 provides that on a request by a claimant in proceedings under Articles 101 and 112 of the Act, a court may order an editor-in-chief to publish a final judgment, without comments and without delay, at his or her own expense.

42. This Act came into force on 13 August 2014 and thereby repealed the Public Information Act which, in substance, contained provisions to the same effect.

D. Electronic Media Act (*Zakon o elektronskim medijima*, published in OG RS nos. 83/2014 and 6/2016)

43. Article 5 provides that the Regulatory Body for Electronic Media is an autonomous and independent regulatory organisation which performs public functions with the aim of, *inter alia*, contributing to the safeguarding, protection and development of freedom of thought and expression. It is functionally and financially independent from State bodies and organisations, media service providers and operators. It is responsible to the Parliament.

44. Article 22 provides that the Regulatory Body oversees the work of media service providers, ensures consistent implementation of this Act, orders measures against media service providers in accordance with the Act, and rules on complaints related to the programme activities (*u vezi sa programskim delovanjem*) of media service providers.

45. Article 26 provides that physical and legal persons have the right to file a complaint to the Regulatory Body in relation to the programme content of a media service provider if they consider that such content offends or jeopardises their personal or general interest. If it finds that the complaint is founded, the Regulatory Body will order measures against the media service provider, that is, it will request the initiation of minor offence, criminal or other proceedings before the competent State body, and instruct the claimant on how he or she can exercise or protect his or her right.

46. Articles 28 and 29 set out details as regards the measures that the Regulatory Body may order against the media service provider and the procedure for ordering them. The measures include a notice (*opomena*), warning (*upozorenje*), temporary ban (*zabrana objavljivanja*) on publishing media content, and a revocation of its license. The Regulatory Body may order these measures regardless of the use of other legal remedies available to the injured or other person, in accordance with the provisions of special Acts. When ordering the measures, the Regulatory Body must comply with the principles of objectivity, impartiality and proportionality. These provisions also apply to media service providers that do not have an obligation to acquire a license (with the exception of the revocation of the licence).

47. Article 42 provides that an administrative dispute can be initiated before the Administrative Court against the decisions of the Regulatory Body.

48. Article 50 provides that media services are to be provided in a manner that respects human rights and in particular an individual's dignity. The Regulatory Body must ensure that the dignity of persons and human rights are respected in all programme content.

49. Article 51 prohibits hate speech. In particular, the Regulatory Body ensures that the programme content of a media service provider does not contain information that incites discrimination, hatred or violence based on, *inter alia*, nationality, religious or political beliefs, membership of political, trade union and other organisations, or other real or assumed personal characteristics.

50. Article 54 provides that a media service provider is responsible for programme content, regardless of whether it was produced by the provider or not.

E. Obligations Act (*Zakon o obligacionim odnosima*, published in the Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 29/78, 39/85, 45/89 and 57/89, the Official Gazette of the Federal Republic of Yugoslavia no. 31/1993, and OG RS no. 18/2020)

51. Article 154 defines different grounds for claiming civil compensation.

52. Article 200 provides, *inter alia*, that anyone who has suffered fear, physical pain or mental anguish as a consequence of a breach of his or her right to reputation, personal integrity, liberty or other personal rights (*prava ličnosti*) is entitled to seek financial compensation.

F. Rulebook on Human Rights Protection in the Media (*Pravilnik o zaštiti ljudskih prava u oblasti pružanja medijskih usluga*, published in OG RS no. 55/2015)

53. The Rulebook was adopted by the Council of the Regulatory Body for Electronic Media (see paragraph 43 above). Its Rule 27 prohibits hate speech. A media service provider may not publish any programme that contains information inciting, glorifying, justifying or diminishing significance of discrimination, hatred or violence against a person or group of persons based on their, *inter alia*, nationality or political beliefs. These prohibitions apply regardless of whether a criminal offence has been committed by publishing programme content.

II. RELEVANT DOMESTIC PRACTICE

A. As regards a reply to and a rectification of information

54. Between 15 January 2018 and 23 December 2020, the High Court (*Viši sud*) in Belgrade delivered eight judgments in which it ruled (sometimes partly) in favour of different claimants and ordered that either a reply to or a rectification of information be published. The judgments relied on the relevant Articles of the Public Information and Media Act and were all upheld as regards the merits by the Court of Appeal (*Apelacioni sud*) in Belgrade between 11 April 2019 and 16 April 2021.

B. As regards the prohibition of hate speech

55. On 28 May and 19 September 2018, the High Court in Belgrade delivered two judgments in which it found that publishing certain information had violated the prohibition of hate speech and ordered the respondent party to publish the judgments. Both judgments were upheld by the Court of Appeal on 23 January 2019 and 20 December 2018 respectively.

56. In particular, on 28 May 2018 the High Court ruled against Informer because of an article entitled "Serbia needs Trump's law", published on 1 February 2017. The article had the overline (*nadnaslov*) "War to foreign mercenaries" and subtitle "The authorities in Serbia must apply the laws applicable in the USA and ban the work of NGOs which receive millions of euros from the West in order to provoke conflicts, divisions and chaos in the country". The article further suggested that the authorities of Serbia should urgently propose bills, as the United States of America had done, which would restrict the work of branches (*agentura*) of foreign NGOs on its territory, whose only task was to provoke conflicts and create chaos in Serbia. That would stop, once and for all, organisations such as the Soros-inspired Šiptar fascist Youth Initiative for Human Rights, which had received 1,004,237 euros in the previous three years for the sole purpose of initiating social conflict in Serbia. The article further stated that the Western NGOs in Serbia were foreign mercenaries working in the interest of their financers, which was often against the interests of Serbia, which was why they were traitors. The court relied on Articles 75, 101 to 103 and 120 of the Public Information and Media Act and found that the text in question contained information the publishing of which was forbidden. More specifically, expressions such as "foreign mercenary", "traitor", "Soros-inspired Šiptar fascist [organisation] ... initiating social conflict in Serbia" amounted to hate speech and in certain sections of society had incited hatred, intolerance, discrimination, even violence, and had been used to discredit the persons to whom they had

referred. The court considered that it was not necessary that the publishing of the information had in fact resulted in violence against a person or group of persons of certain characteristics.

57. On 19 September 2018 the High Court in Belgrade issued another judgment against a respondent party whose name was blacked out. The court found that publishing an article titled "Fascists attack" on 19 January 2017 had violated the prohibition of hate speech, ordered that the judgment be published, and awarded the claimant compensation of 100,000 Serbian dinars, plus statutory interest. The article in question had the overline "Special war begins" and a subtitle "stormtroopers of Soros-inspired Šiptar Youth Initiative crashed into a [ruling party] public discussion [*tribina*] in Beška and interrupted it by swearing at those who were present on account of their Serb mothers". It also suggested that "further similar attacks [were being planned] across the country". The article further stated that this had been done following the orders to this effect of Western embassies, and that "Soros-inspired NGOs in cooperation with Western embassies, NATO Pact, the EU, and also the Šiptar authorities from Priština [were] planning more attacks of this kind across the country. They [were] ready to do all this so that they could create chaos in the country before the elections and accuse the ruling party of violence." The court found that this amounted to hate speech against the Youth Initiative for Human Rights. It found that the text in question was not covered by impartial journalistic reporting, but that it expressed insinuations, speculations, assumptions and conjectures, and presented them as facts and, at the same time, it expressed very serious accusations against the claimants and other NGOs, notably that they had been preparing other similar actions in order "to create general chaos in Serbia before the forthcoming elections", a so-called "special war". The court found that the editor-in-chief had intended to depict the activists of Youth Initiative for Human Rights as "enemies and a danger to the Republic of Serbia and its other citizens" and discriminate against them for their political, that is ideological, beliefs, which amounted to a kind of inciting hatred against them.

C. As regards compensation

58. Between 15 June 2016 and 2 October 2020, the High Court delivered thirteen judgments in which it ruled (sometimes partly) in favour of various claimants and awarded them compensation in respect of non-pecuniary damage for a violation of their honour and reputation, or their dignity and presumption of innocence, caused by untrue and/or forbidden (*nedopuštenih*) information being published about them. The court referred, *inter alia*, to the relevant Articles of the Public Information and Media Act or Public Information Act, and Article 200 of the Obligations Act (see paragraphs 37-42 and 52 above). In eight of those cases the court also ordered the respondent party to publish the judgment in question. Twelve of those judgments were upheld to a large extent by the Court of Appeal between 1 December 2016 and 11 March 2021. There is no information in the case file about one of the judgments in this regard.

59. In particular, on 8 September 2016 the High Court ruled in favour of a claimant and awarded him compensation in respect of non-pecuniary damage caused, *inter alia*, by publishing readers' comments. The court found that the comments contained hate speech which was not permitted under the Public Information Act, and that the respondent party could have made a selection of comments and prevented the publishing of the forbidden ones.

60. On 17 September 2020 the High Court ruled partly in favour of a claimant, awarded him compensation and ordered that the judgment be published. The name of the respondent party and

some parts of the article are blacked out. It appears from the visible parts that the respondent party in question had published a picture of the claimant and stated that "While the Šiptars are threatening war, [blacked-out name] wants blood!", that a certain tycoon was financing and organising non-political party protests which were to set Belgrade on fire, and that the claimant had appeared in the Parliament in a yellow vest and had announced that there would be violence on the streets. The court also considered that the editor of the online edition had not responded adequately in respect of the negative comments that followed the article online.

D. As regards the Regulatory Body for Electronic Media

61. Between 17 December 2014 and 10 May 2021, the Regulatory Body for Electronic Media delivered fifteen decisions in which it issued three notices, three bans on further publishing of the particular content and nine warnings. In all these decisions the media platform in question also had to remove the inappropriate content and publish a statement (*saopštenje*), the content of which was defined by the court. Four decisions were issued against the Pink media company, and one against another media company for having broadcast a programme in which the editor of Informer had insulted another person.

E. As regards criminal offences

62. Between 11 January 2016 and 16 July 2020, the First Court of First Instance (*Prvi Osnovni sud*) in Belgrade delivered ten judgments against various defendants for the criminal offence of insult, two of whom were editors of two different media platforms (including the editor-in-chief of Informer). In eight cases the court fined defendants and in two cases the court issued a reprimand (*sudska opomena*).

63. On 20 January and 20 April 2016, the Supreme Court of Cassation issued two judgments (Kzz. 1203/15 and Kzz. 433/16 respectively) regarding the criminal offence of endangering the safety of others. The court held that an important element of the said criminal offence was that there was a serious, clear and unambiguous threat by an individual (a defendant) that he or she would attack the life or body of another person.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

64. The applicants complained under Article 10 of the Convention that the State had not discharged its positive obligation to protect them from the threats and media campaign against them, which had intimidated and dissuaded them from continuing to express their opinion on public matters. The relevant part of Article 10 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. The parties' submissions

1. *The Government*

65. The Government submitted that the applicants had failed to exhaust all effective domestic remedies. Instead of wrongly submitting a criminal complaint: (a) they should have requested publication of their reply or a rectification of the published information, if necessary by addressing their complaint to the courts; (b) they should have asked the courts to establish whether publishing certain information had violated the prohibition of hate speech or the right to dignity, and they could have sought the removal or destruction of the media product; (c) they could have sought compensation in respect of non-pecuniary damage for a violation of their honour and reputation under the Public Information and Media Act and/or the Obligations Act; (d) they could have lodged a complaint with the Regulatory Body for Electronic Media, indicating a violation of their right to dignity and of the prohibition of hate speech; and/or (e) they could have lodged a private claim for the criminal offence of insult (see paragraphs 38-40, 51-52, 45-46, 48-49, and 35 above, in that order). The Government referred to the relevant domestic case-law in this regard (see paragraph 54-62 above).

66. As the State provided for a number of effective mechanisms for the protection of the applicants' freedom of expression, there had been no violation of the positive obligation stemming from Article 10, and the applicants' complaint was manifestly ill-founded.

67. The Government further submitted that there had been no incitement to violence, threats or physical attacks against the applicants, nor had there been any direct threats in the readers' comments published online. The applicants' comparison of their alleged "persecution" with the case of the murder of a well-known Belgrade journalist, Slavko Ćuruvija, in 1999 was utterly pointless and exaggerated. The article published on 27 May 2016 had expressed an opinion of its author (see paragraph 6 above), and the title of the article of 9 June 2016 could be considered sensationalist (see paragraph 8 above), but could not lead to the conclusion that the applicants had been accused of preparing an assassination of the Prime Minister. In any event, however, the forum to discuss this was not the Court, but rather the domestic courts. Also, the applicants had continued to publicly criticise the ruling party and the highest State officials (see paragraphs 20-23 above). Therefore, their freedom of expression had been neither violated nor restricted.

68. The Government agreed with the conclusions of the High Public Prosecutor and maintained that both the High Public Prosecutor's Office and the police had acted efficiently on the applicants' criminal complaint. As there had been no threats against the applicants, there had been no criminal offence of endangering the safety of others either, as the latter required a direct, clear and unambiguous threat that there would be an attack on another person's life or body (see paragraph 63 above).

69. The Government submitted that the applicants' claim that the atmosphere in which journalists worked in Serbia was generally negative simply could not stand, and that Serbia was making efforts to ensure an adequate response to the endangering of the safety of journalists. They referred to the European Commission's annual report in that regard (see paragraph 30 above). The

Freedom House and European Parliament reports contained general comments and conclusions on media-related problems in Serbia and were thus irrelevant for the outcome in the present case.

2. *The applicants*

70. The applicants contested the Government's submissions and reaffirmed their complaint.

71. They submitted that they had not been obliged to make use of the legal remedies proposed by the Government, as these were mainly civil remedies used in cases where there had been, primarily, a violation of the right to reputation and, as such, they could not address the violation complained of. Notably, the allegations made had amounted to the spreading of ideas and theories advocating hatred, discrimination and violence against the applicants and all those who had been supporting the protests in Serbia. In particular, they had been accused of being traitors and extremists who had been planning "violent demonstrations and revolution", and who had wished to destabilise the State and assassinate the Prime Minister, which had been accompanied by their pictures. Also, the first applicant had been directly accused of personally cooperating with foreign ambassadors and exchanging plans for organising violent protests across Serbia. These accusations had to be read together with the threats written in the comments below the text, as well as the general atmosphere in Serbia. Although harmful to their reputation, those accusations had primarily made them fear for their safety if they were to continue their criticism. By associating them with foreign agencies, the applicants had been prevented from enjoying their right to freedom of expression since they had felt threatened. They had been persecuted and discriminated against simply because they had had different political views and had not supported certain projects. As they had feared potential violence, they had sought protection from the criminal justice system. The aim of such proceedings had not been to repair the damage inflicted on their honour and reputation, but rather to put an end to further persecution and punish those responsible for it.

72. They submitted that the situation in the country justified their fear, and referred to the number of attacks registered and the Freedom House and EU reports on Serbia (see paragraphs 26-29 above). In particular, a pattern of retribution against high-profile critics of the government had contributed to an increasingly hostile environment for free expression and open debate. Both the Informer and TV Pink were considered pro-government media, and it was quite common for these media to lead long smear campaigns against those who criticised the government or public officials. Such campaigns often represented a call for a kind of physical confrontation with such persons, especially when they were accused of destabilising the State and institutions or when they were linked to "foreign agencies", which sometimes ended with the most tragic consequences. They referred to the assassination of Slavko Ćuruvija and maintained that the article written before his assassination was often perceived as representing a media announcement of his murder (see paragraph 24 above). It was therefore highly probable that there could be violence, and in such situations the national authorities had an obligation to carefully assess all the facts and protect the applicants and their freedom of expression.

73. However, the national authorities had not conducted a proper investigation. They had not interviewed all the suspects, nor considered other potential criminal offences subject to public prosecution – such as endangerment of the safety of others or a violation of freedom of speech and public appearance – nor addressed the readers' comments (see paragraphs 33-34, and 9 above, in

that order). By failing to assess all the facts and protect them, the authorities had sent a message to everyone critical of public officials that smear campaigns were allowed in Serbia.

74. Smear campaigns such as the one in the present case had the aim of causing a chilling effect and preventing their "victims", that is the applicants, from criticising publicly. Given the whole context, the nature of the disputed texts and the readers' comments, the applicants had had reason to fear for their safety, which had affected their freedom of expression. Notably, they had stopped openly criticising the said projects and procedures because of their fear. The fact that they had continued to criticise the authorities did not change the fact that their freedom of expression had been endangered during the smear campaign in the media and for a certain period afterwards.

B. The Court's assessment

1. *Admissibility*

75. The Government made an objection of non-exhaustion by referring to several remedies which the applicants should have used. The relevant principles as regards the exhaustion of domestic remedies are set out in *Vučković and Others v. Serbia* (preliminary objection) ([GC], nos. 17153/11 and 29 others, §§ 69-75, 25 March 2014). The Court reiterates, in particular, that if more than one potentially effective remedy is available, the applicant is only required to have used one of them (see *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III). The Court notes in this regard that the applicants made use of a criminal-law remedy, which does not seem to be futile. The Government's objection must therefore be dismissed.

76. The Court notes that the applicants' 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.

2. *Merits*

77. The Court reiterates the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals (see *Özgür Gündem v. Turkey*, no. 23144/93, § 43, ECHR 2000-III; *Appleby and Others v. the United Kingdom*, no. 44306/98, § 39, ECHR 2003-VI; *Dink v. Turkey*, nos. 2668/07 and 4 others, § 106, 14 September 2010; *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, § 59, ECHR 2011; and *Huseynova v. Azerbaijan*, no. 10653/10, § 120, 13 April 2017). In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see *Özgür Gündem*, cited above, § 43).

78. In particular, the positive obligations under Article 10 of the Convention require States to create, while establishing an effective system for the protection of journalists, a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear, even if they run counter to those defended by the

official authorities or by a significant part of public opinion, or even if irritating or shocking to the latter (see *Dink*, § 137, and *Huseynova*, § 120, both cited above; see also *Khadija Ismayilova v. Azerbaijan*, nos. 65286/13 and 57270/14, § 158, 10 January 2019).

79. Turning to the present case, the Court notes that the applicants are journalists and civil-sector activists who took part in protests criticising the demolition of certain houses and installations, a large-scale construction project in Belgrade, and the changes in the management of a regional radio-television station. This was followed by two articles, published on 27 May and 9 June 2016, suggesting that the real organisers and financers of the protests were the European Union and the United States of America, who wanted to "radicalise" the protests with the ultimate aim of overthrowing the Serbian Prime Minister, and that a number of persons from Serbia, including the applicants, were participating in that project. The allegations made in this article were repeated on 28 May, and 10 and 13 June 2016 (see paragraphs 6-12 above). The applicants submitted that these allegations had made them feel threatened, which was why they had resorted to a criminal complaint. They maintained that the national authorities had had an obligation to carefully assess all the facts and protect the applicants, but they had failed to do so (see paragraph 70-72 above).

80. The Court notes that even though the applicants submitted that they had felt threatened following the publication of the above articles and broadcasting of the programmes in question, none of them has ever in fact been subjected to any act of violence (see, *mutatis mutandis*, *Huseynova*, cited above, § 122; contrast *Khadija Ismayilova*, cited above, § 162). They brought their concern and fear to the attention of the authorities by lodging a criminal complaint for discrimination and a breach of the right to equality against several private individuals, which was processed promptly (contrast *Özgür Gündem*, cited above, § 44, where the domestic authorities – which were aware of a series of violent actions against a newspaper and people associated with it – did not take any action to protect the newspaper and its journalists). While it is true that the police did not interview all the persons against whom the complaint had been made, the Court notes that the factual situation was more or less undisputed among the parties and a decision not to interview all of them in such a situation does not seem unreasonable or arbitrary. On the basis of the information collected, the prosecutor rejected the applicants' criminal complaint as there were no grounds to believe that the persons in question had committed any of the alleged criminal offences. Contrary to the applicants' submissions, the prosecutor also held that there were no grounds to believe that any other criminal offence subject to public prosecution had been committed either (see paragraphs 18 and 73 above).

81. The Court also notes that it is not for it to rule on the constituent elements under domestic law of the offences of discrimination and a breach of the right to equality, or any other offence for that matter (see, *mutatis mutandis*, *Fatullayev v. Azerbaijan*, no. 40984/07, § 121, 22 April 2010, and *Dmitriyevskiy v. Russia*, no. 42168/06, § 102, 3 October 2017). It is primarily for the national authorities, in particular the courts, to interpret and apply domestic law (see *De Tommaso v. Italy* [GC], no. 43395/09, § 108, 23 February 2017). The Court's role is rather to review under Article 10 the decisions that domestic courts deliver pursuant to their power of appreciation. In doing so, it must satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts (see *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 143, ECHR 2015, and *Belkacem v. Belgium* (dec.), no. 34367/14, § 29, 27 June 2017). In view of the content of the

articles and television shows in question, and that of the applicants' criminal complaint, the Court is not convinced that the decision of the relevant prosecutor was not based on an acceptable assessment of the relevant facts. The Court observes that the prosecutor went even further, suggesting that the allegations in question amounted perhaps to the criminal offence of insult, which was subject to private prosecution. The applicants did not, however, pursue this avenue.

82. It is further observed that the national legislation provides for a number of other remedies offering the applicants protection of their freedom of expression, had they felt that it had been interfered with. These included, in particular, civil proceedings for a violation of the prohibition of hate speech, as well as civil proceedings for claiming compensation, requesting a reply to and/or rectification of information published, and a number of measures pronounced by the Regulatory Body for Electronic Media (see paragraphs 37-40, 44-47, 49-52 above). The Government submitted abundant domestic case-law for each of the remedies in question. In all of them, the courts and the Regulatory Body ruled in favour of various claimants and ordered that either a reply to or a rectification of information be published; found violations of hate speech and ordered the respondent party to publish the judgments in question; ordered compensation in respect of non-pecuniary damage for a violation of their honour and reputation or their dignity and presumption of innocence caused by untrue and/or forbidden information being published about them; or issued warning and notices or banned further publishing of the particular content (see paragraphs 54-61 above). In some of them the respondent parties were the same media companies against whose editors-in-chief the applicants had lodged their own criminal complaint, and in some of them the courts dealt with third-parties' comments too (see paragraphs 56, and 59-61 above). The applicants did not deny that these other remedies were available to them.

83. The Court also takes note of the reports on the situation in Serbia concerning the freedom of expression and safety of journalists, and the reports of physical attacks and other types of alleged persecution of journalists. However, given the specific circumstances of the present case, the Court considers that the prosecutor's findings were not arbitrary or manifestly unreasonable and nor did they rely on an unacceptable assessment of the relevant facts. It also finds that the respondent State offered a number of other effective means for the protection of the applicants, which they have not made use of.

84. In view of all of the above, the Court does not find that the respondent State failed in their positive obligation to protect the applicants' freedom of expression. There has accordingly been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 6 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Registrar
Jon Fridrik Kjølbro President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Koskelo is annexed to this judgment.
J.F.K.
H.B.

CONCURRING OPINION OF JUDGE KOSKELO

1. I have joined the majority in concluding that there has been no violation of Article 10 in the present case, but I have done so with considerable hesitation. I will briefly set out the reasons for this.
2. The factual background to the case, in a nutshell, is the following. The applicants, as journalists and civil-society activists, exercised their freedoms of expression and assembly in relation to commonplace matters of general interest (see paragraph 5 of the present judgment). In the wake of those activities, they were targeted, on the website of a right-wing movement and in certain pro-government media, with very serious and repeated accusations alleging that the applicants, through their association with protests organised under the banner "Don't let Belgrade d(r)own", were involved in a foreign-led conspiracy by extremists, directed against the elected government and aimed at its overthrow, or even the "assassination" of the Prime Minister.
3. The applicants sought, in vain, to obtain protection by the domestic criminal justice system. According to the competent prosecuting authorities, there was no ground to believe that any criminal offence which was subject to public prosecution had been committed. They considered that the reported actions had had no consequences and entailed no deprivation or restriction of anyone's rights. Nor had the publication of the articles promoted or incited hatred, discrimination or violence against any groups based on their religion, nationality or other personal characteristic. It was acknowledged that the reported acts could perhaps have been classified as an insult, which, however, was not subject to public prosecution. The applicants' subsequent constitutional appeal was rejected.
4. It is well known that the Court's approach has been critical, and restrictive, towards the use of criminal remedies in the context of measures by State authorities to sanction the exercise of freedom of expression. In many situations, there are very well-founded and solid reasons to justify that approach. Indeed, there are obvious risks involved in recourse being had to the repressive penal powers of the State, especially when it comes to interferences in the exercise of criticism directed at institutions or persons in positions of power. That being said, any assessment of the acts or omissions of State authorities, whether in the field of their negative or positive obligations under the Convention, must, however, remain sensitive to the context and adequately differentiated according to the specific circumstances.
5. What is at issue in the present case are accusations directed at the applicants by other private actors, denouncing and discrediting them on account of the protest activities in which they participated. Given the very serious nature of the accusations levelled against the applicants and the general context, it seems well-founded to consider, as the applicants did, that the actions they

complained of went beyond mere insults. Indeed, it appears that freedom of expression was employed against the applicants with a view to suppressing *their* freedoms to act and express their opinions. Thus, the present case is not about any chilling effect that might arise from sanctions applied against those who engage in criticism; it is, on the contrary, about the chilling effect that risks being created through the *failure* to impose sanctions on those who seek to attack others for the usual exercise of *their* freedoms, and who do so not by engaging in an exchange of arguments on the subject matter of the issues addressed but through attempts to stigmatise the opponents as traitors and conspirators, that is to say, enemies of the State, instead of treating them as legitimate participants and interlocutors in the normal affairs and controversies of society. The dangers of such aggressive, potentially toxic and intimidating smear campaigns for the conditions, and the quality, of necessary democratic debates and exchanges of arguments should not be underestimated. After all, the ultimate aim of freedom of expression is to enable and to maintain democracy, not to undermine it.

6. Therefore, it is indeed very important in the interest of protecting democracy to uphold the positive obligations incumbent on the States Parties to create, by establishing an effective system for the protection of journalists as well as members of civil society, a favourable environment for participation in public debate. This should enable the expression of opinions and ideas without fear, even if they may run counter to those defended by the official authorities or by a significant part of public opinion (see *Khadija Ismayilova v. Azerbaijan*, nos. 65286/13 and 57270/14, § 158, 10 January 2019).

7. In this context, the availability of recourse to various civil remedies alone may not be sufficient, especially in terms of the necessary dissuasive effect. I note, for instance, that in the domestic civil judgment mentioned in paragraph 57 of the present judgment, the award of compensation amounted to 100,000 Serbian dinars, equivalent to no more than roughly 850 euros.

8. Even where outright hate speech is not involved, acts amounting to intimidation, smear campaigns or other forms of persistent harassment aimed at others because of their normal exercise of freedoms under Article 10 may reasonably call for a reaction, and protection of the victims, by the criminal justice system. This may be particularly relevant if suppressive actions by some actors or groups directed at those holding and expressing different views become a more general pattern of behaviour. In this regard, one must note with concern the information contained in paragraphs 26-30 of the present judgment relating to the general environment of media freedom and debate in the respondent State.

9. In my view, the circumstances of the case together with the more general context were of such a nature as to create a heightened duty of scrutiny on the part of the domestic authorities in connection with the positive obligations arising for them under Article 10. Given the very limited and superficial reasoning provided (see paragraph 18 of the judgment), I remain in doubt as to whether the domestic authorities, primarily the prosecution service, actually conducted a sufficiently thorough assessment of the applicants' grievances, in particular as regards the offence set out in Article 148 of the Criminal Code. As that provision concerns an offence which is subject to public prosecution, it fell to be considered even if it was not expressly referred to by the applicants themselves.

10. Given the inherent limits of the information accessible in the materials before us, and the necessary caution mandated by the partial view available to us, I have voted in favour of finding no violation despite the doubts expressed above.