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La Corte EDU sulla violazione del diritto alla reputazione in un caso di pubblicazione di notizie denigratorie a danno di un primario

(CEDU, sez. I., sent. 27 aprile 2023, ric. n. 6950/13)

La Corte EDU si pronuncia sul caso di una cittadina azera, la quale ha lamentato la violazione dell'art. 8 della Convezione e, segnatamente, la violazione del diritto alla sua reputazione. Più in particolare, la ricorrente - in seguito alla sua nomina di primario presso l'ospedale centrale del distretto di Gazakh - ha subito, da parte di alcuni quotidiani nazionali, diversi attacchi denigratori. Le notizie divulgate riferivano passate vicende riguardanti il fratello della ricorrente coinvolto anni prima in un tentato *colpo di Stato* e, per questo, condannato all'ergastolo. In seguito a tali pubblicazioni la ricorrente è stata licenziata e di qui non solo la pretesa reintegrazione nel posto di lavoro ma anche l'esperimento di un'azione risarcitoria avviata nei confronti del giornale, che i tribunali nazionali hanno rigettato.
Nel merito i Giudici di Strasburgo hanno osservato che l'art. 8 della Convenzione richiede sempre il giusto contemperamento tra i pertinenti interessi concorrenti che, in questo caso, sono il diritto al rispetto della vita privata e il diritto alla libertà di espressione. Per la Corte, lo scopo principale di tutti gli articoli pubblicati è stato quello di attaccare personalmente la ricorrente, poiché le dichiarazioni non criticavano né le capacità professionali né la sua condotta, e ha ritenuto le brevi argomentazioni fornite dai tribunali nazionali insufficienti a dimostrare se le dichiarazioni rese fossero compatibili con l'etica del giornalismo e se avessero oltrepassato i limiti consentiti della libertà di espressione. A giudizio della Corte, quindi, quel giusto esercizio di bilanciamento tra gli interessi in gioco non è stato adeguatamente operato e, per conseguenza, ha ritenuto violato l'articolo 8 della Convenzione.

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

FIRST SECTION

CASE OF XXX v. AZERBAIJAN
(Application no. 6950/13)

JUDGMENT
STRASBOURG
27 April 2023

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. Azerbaijan,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:
Marko Bošnjak, *President*,
Péter Paczolay,
Krzysztof Wojtyczek,
Alena Poláčková,
Lətif Hüseynov,
Gilberto Felici,
Erik Wennerström, *judges*,
and Renata Degener, *Section Registrar,*
Having regard to:
the application (no. 6950/13) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Azerbaijani national, Ms XXX ("the applicant"), on 14 January 2013;
the decision to give notice to the Azerbaijani Government ("the Government") of the application;
the parties' observations;
Having deliberated in private on 21 March 2023,
Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application mainly concerns the applicant's complaint about the domestic courts' failure to protect her right to her reputation and raises issues mainly under Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1959 and lives in Gazakh. She was represented by Mr E. Sadigov, a lawyer based in Azerbaijan.
3. The Government were represented by their Agent, Mr Ç. Əsgərov.
4. The facts of the case may be summarised as follows.

I. BACKGROUND

5. The applicant's brother, XXX, was the head of the Gazakh regional office of OMON, a special police force established within the Ministry of Internal Affairs of the Azerbaijan Soviet Socialist Republic in 1990. He was arrested and prosecuted in relation to the attempted *coup d'état* in March 1995. He was sentenced to death but, following the abolition of capital punishment in Azerbaijan in 1998, his sentence was commuted to one of life imprisonment, which he is serving to date.
6. By an order of the head physician of the Gazakh District Central Hospital dated 19 August 2011, the applicant was appointed the head physician of that hospital's outpatient clinic.

II. THE DISPUTED ARTICLES

7. Following the applicant's appointment as head physician, several articles about her were published in the *Gündəlik Bakı* newspaper between 23 August and 10 September 2011. The first article was published under the title "Relatives of the government's enemies appointed to posts"

(*Hakimiyyətin düşmənlərinin qohumları vəzifəyə təyin edilir*) with the subtitle "The sister of an OMON member has become Gazakh's head physician XXX is the sister of XXX, who participated in the *coup d'état*" (*OMON-çunun bacısı Qazaxın baş həkimi oldu. Şəhla Əmiraslanova dövlət çevrilişində iştirak edən Elçin Əmiraslanovun bacısıdır*). The article started with some general statements about the appointment to various posts of persons who had previously opposed the State, as well as their relatives. It then mentioned the OMON events and went on to question the applicant's appointment to the post of head physician. The relevant parts read as follows:

> "... When XXX was imprisoned, many of his relatives, including his sister XXX started to ... express her protest in the most severe form ... our goal is not to remind people how XXX went against the State authorities. The issue is that the same XXX was appointed head physician of the outpatient clinic of the Gazakh District Central [Hospital] yesterday. The brother's name is mentioned ... in relation to a crime ... the sister is appointed head physician. It is an interesting contradiction, a real paradox ...
>
> ... [D]ear residents of Gazakh! XXX 's sister XXX will 'serve' you. Many of you know the Gazakh commander of OMON well. For those who do not know XXX, a reminder once again: this is the same XXX who maligned (*daşa basırdı*) the State authorities when XXX was detained.
>
> Interesting, could [the Health Minister] O.S. not find another person to appoint to the post of head physician ...? Maybe he is not aware of this matter? According to the information that we received, eight persons came forward as candidates for the post ... S.H., ..., an experienced doctor, was also among them. It is surprising that XXX's sister XXX has been appointed head physician when there was such a candidate. How does it happen that XXX is appointed when there are eight candidates for that post?
>
> No doubt that the greatest responsibility in this matter falls on R.H., the head of the Gazakh District Executive Authority...What happened to traditions of statehood? ... [A]ccording to what criteria did XXX, sister of XXX who was accused of attempting a *coup d'état* and whose participation in it has been proved, 'excel' in comparison with the other candidates for the post of head physician ... ? Thanks to what qualities does XXX deserve this post?
>
> ... It appears that many have forgotten or 'have been made to forget' XXX's actions in defence of her brother XXX, who was ... convicted in connection with ... the OMON events ...
>
> In any case, given there were a sufficient number of deserving (*layiqli*) candidates ... XXX's appointment shows certain persons' perfunctory attitude towards ... the protection of State interests. It appears that the Health Minister O.S. is not aware of this matter."

8. The second article was entitled "Do R.H. and O.S. take care of OMON members?" (*R.H.-la O.Ş. OMON-çulara qayğı göstərir?*) and had the subtitle "Why has XXX's sister XXX been appointed to the post of head physician?" The article contained similar text to the previous one. Some other parts read as follows:

> "... [The] sister of an OMON member ... works as head physician. ... Health Minister O.S. has approved the order [for the appointment]. The request (*təqdimat*) was made by ... R.H. ...
>
> ... by bringing XXX to this post R.H. has undermined State interests ..."

9. The third article was entitled "One of the twins serves the State, the other the *coup d'état*", had the subtitle "XXX is OMON member's twin sister" and contained similar text to the previous two articles.

10. The fourth article was entitled "Undesirable fact in the Ministry of Health. Sister of OMON member is in office XXX performs her duties". The author of the article noted that "abnormal events"

had occurred in the health system after O.S.'s appointment as the Minister. As an example, the author described the case of K.V., a doctor against whom criminal proceedings for abuse of power had been instituted, and noted that K.V. was now free and working as the deputy director of the Drugs Centre. The author then brought up the applicant's appointment as a second example, using similar expressions and opinions to those appearing in the previous articles.

11. According to the applicant, following the publication of the above-mentioned articles, on 12 September 2011 R.H., the head of the Gazakh District Executive Authority, asked her to write a letter of resignation, which she refused to do.

12. On the same day the applicant was dismissed from the post of head physician and returned to her previous post of physician (*həkim-terapevt*).

III. THE APPLICANT'S ACTION AGAINST HER EMPLOYER

13. On 19 September 2011 the applicant brought proceedings against her employer, asking for reinstatement to the post of head physician and payment of compensation for lost earnings.

14. On 18 November 2011 the Gazakh District Court dismissed the applicant's claims, finding that labour legislation requirements had been breached when she had been appointed head physician. In particular, it held that no written contract had been concluded with the applicant and that the post of head physician did not exist in the hospital's staff schedule.

15. By judgments of 15 February 2012 and 13 July 2012 the Ganja Court of Appeal and the Supreme Court respectively dismissed the applicant's appeals.

IV. THE APPLICANT'S CIVIL ACTION AGAINST THE NEWSPAPER

16. It appears that on 16 September 2011 the applicant asked the editor-in-chief of *Gündəlik Bakı* to issue a retraction, which he refused to do. Following that, on an unspecified date in October 2011 the applicant brought proceedings against him and the authors of the articles. She asked for a retraction and an apology addressed to her and her family members and compensation for pecuniary and non-pecuniary damage. She submitted, among other things, that she had been using the last name "XXX" for the last twenty-six years, following her marriage.

17. On 8 February 2012 the Yasamal District Court dismissed the applicant's claims (no copy of the judgment is available in the case file).

18. The applicant lodged an appeal (no copy is available in the case file), complaining that the first-instance court had failed to examine the circumstances of the case and that it was apparent from the articles and the frequent mention that she was XXX's sister that the authors' sole purpose was to attack her.

19. On 25 May 2012 the Baku Court of Appeal upheld the lower court's judgment. It held that the following were facts:

(i) the applicant's maiden name was XXX;

(ii) XXX was her brother and had been convicted of an offence; and

(iii) she had been appointed to the post of head physician and later dismissed from that post.

It further held that opinions expressed in the articles about the applicant and her brother and her appointment to a new post were value judgments with a sufficient factual basis, without noting specifically which opinions. It noted that those value judgments were protected by the defendants' right to freedom of expression and the right to criticise the work of public officials, including doctors, and that therefore the defendants did not bear any civil liability for expressing those judgments. The court also held that public officials, including doctors, should be more tolerant of criticism compared with others.

20. On 13 August 2012 the applicant lodged a cassation appeal. She submitted that the appellate court had failed to consider that the defendants had abused their right to freedom of expression, resulting in a violation of her right to respect for her private life. The applicant argued that the disputed articles had sought to exaggerate the applicant's appointment and to present it as treason by the State officials who had approved her appointment, because of her brother's conviction. She further submitted that she had been dismissed from her post following the publication of those articles.
21. On 2 October 2012 the Supreme Court dismissed the applicant's cassation appeal, reiterating the appellate court's reasoning.

RELEVANT LEGAL FRAMEWORK

22. The relevant provisions of domestic law were summarised in *Khadija Ismayilova v. Azerbaijan* ((no. 3), no. 35283/14, §§ 24-28, 7 May 2020).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION CONCERNING THE APPLICANT'S RIGHT TO HER REPUTATION

23. The applicant complained that the domestic courts' failure to grant her claims against the newspaper had breached her right to her reputation as guaranteed by Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

24. In the present case, the publications, including their headings, contained disparaging statements about the applicant (contrast *Vučina v. Croatia* (dec.), no. 58955/13, § 38, 24 September 2019). They stated that the applicant did not deserve to be appointed to the post of head physician because of the conviction of her brother, who was portrayed as an enemy of the State, and her alleged reaction to his imprisonment (see paragraphs 7-10 above).
25. The Court reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life. In order for Article 8 to come into play, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012). This requirement covers social reputation in general as well as professional reputation in particular (see *Denisov v. Ukraine* [GC], no. 76639/11, § 112, 25 September 2018). The Court considers that the statements made in the disputed articles affected the applicant's private life to such a degree as to engage Article 8 of the Convention. That provision is therefore applicable to the circumstances arising in the present case.
26. 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

27. The applicant argued that the articles had been written in bad faith and with the intention of persecuting her solely because of her brother's conviction. She further argued that the domestic courts dismissed her claims against the newspaper for the same reason.
28. The Government did not submit any particular arguments in respect of this complaint.

2. The Court's assessment

29. The Court notes that the issue in the present case does not stem from an act undertaken by the State but the alleged inadequacy of the protection afforded by the domestic courts to the applicant in respect of her right to respect for her private life. It reiterates that the positive obligation inherent in Article 8 of the Convention may oblige the State to adopt measures designed to secure respect for private life, even in the sphere of the relations of individuals between themselves. The applicable principles are, nonetheless, similar, and regard must be had to the fair balance that has to be struck between the relevant competing interests (see *De Carvalho Basso v. Portugal* (dec.), no. 73053/14 and 33075/17, § 44, 4 February 2021, with further references).
30. The relevant general principles concerning the fair balance to be struck between the right to respect for private life and the right to freedom of expression were summarised in *Couderc and Hachette Filipacchi Associés v. France* ([GC], no. 40454/07, §§ 83-93, ECHR 2015 (extracts)). In particular, the relevant criteria for the balancing exercise include whether publication contributed to a debate of general interest, the degree to which the applicant was known in society, his or her prior conduct, and the content, form and consequences of the publication.
31. The Court notes that, in the present case, the disputed articles were published a few days after the applicant's appointment as head physician (see paragraph 7 above). The domestic courts did not rule on whether they contributed to any debate on a matter of public interest. In this connection, the Court observes that even though in the fourth article there was some discussion on alleged criminal proceedings against another doctor (see paragraph 10 above), the main purpose of all the articles, as appears from their headings and texts, was to attack the applicant. While questioning and criticising the applicant's appointment as head physician, the authors of the articles emphasised the fact that she was the sister of a person who had been convicted of participation in the attempted *coup d'état*. They presented her appointment as "a real paradox", as showing a "perfunctory attitude towards ... protection of State interests", disrespecting "statehood traditions", an "undesirable fact" and so on (see paragraphs 7-10 above). The articles contained nothing whatsoever concerning the applicant's professional skills as a physician, or any suggestion that she was unfit for the post of head physician because of a lack of any such skills or that she had committed any illegal or unprofessional act during her career. In such circumstances, the Court does not see how those articles, and, in particular, the statements contained therein could have contributed to any debate on a matter of public interest.
32. The Court notes next that despite the statement made in the articles that the applicant had been publicly protesting against the State authorities when her brother was detained, the domestic courts did not make any assessment regarding the applicant's prior conduct and whether she was previously known to the public on account of her alleged protests or for any other reason (compare *Văcean v. Romania*, no. 47695/14, § 41, 16 November 2021). They simply noted that holders of public posts, including doctors, should be more tolerant of criticism. In this connection, the Court notes that it has previously held that a private person can enter the public domain with his or her conduct and association with a public person. However, in those cases the Court also assessed

whether the information disclosed primarily concerned the public figure and did not touch the core of the private person's privacy (see *Dupate v. Latvia*, no. 18068/11, § 55, 19 November 2020).

33. The Court firstly notes that nothing in the case file shows that the applicant has ever sought any public attention (compare *Marina v. Romania*, no. 50469/14, § 76, 26 May 2020). Moreover, it reiterates that, even where a person is known to the general public, he or she may rely on a "legitimate expectation" of protection and respect for his or her private life. Thus, the fact that an individual belongs to the category of public officials cannot in any way authorise the media to violate the professional and ethical principles which must govern their actions or legitimise intrusions into private life, even though such persons exercise official functions (see *Sousa Goucha v. Portugal*, no. 70434/12, § 41, 22 March 2016, with references therein). The domestic courts should therefore have given reasons as to why the simple fact of being a physician reduced the expectation of protection of the applicant's right to respect for her private life (compare *Marina*, cited above, § 67). This was all the more important as the statements in the articles did not criticise the applicant's professional abilities or conduct, but only the applicant personally.

34. With regard to the content, form and consequences of the publications, the Court notes the following. Firstly, although the applicant had not used her maiden name after her marriage, the authors deliberately chose to use that name in order to show her family tie to her brother. As already mentioned, the applicant was frequently referred to as "XXX's sister" in the titles of the articles and throughout their text and her appointment was presented as a failure by the State officials to protect State interests (see paragraph 31 above). The Court also does not overlook the fact that several days after the articles were published, the applicant was dismissed from the post of head physician.

35. When examining the applicant's claims against the newspaper, the domestic courts found that certain elements, such as the applicant's maiden name, her being XXX's sister, his conviction, and her appointment to and later dismissal from the post of head physician, were facts, whereas the expressions used in respect of the applicant personally and her brother were value judgments which had had a sufficient factual basis. The courts further held, without clarifying which statements exactly they considered to be value judgments, that those opinions were protected by the defendants' right to freedom of expression and right to criticise the work of public officials, including doctors (see paragraphs 19 and 21 above).

36. The Court notes that such brief reasoning as was provided by the domestic courts is not compliant with the general principles established under the Court's case-law (see paragraphs 29-30 above) and does not demonstrate that the courts had duly examined whether the statements made about the applicant were compatible with the ethics of journalism and whether they had overstepped the permissible bounds of freedom of expression. Neither does it demonstrate that the courts carried out an adequate assessment of all the relevant circumstances and duly considered the importance and scope of the applicant's right to respect for her private life, which was one of the two Convention rights at stake in the present case, both rights being of equal importance (compare *Khadija Ismayilova* (no. 3), cited above, § 76).

37. Taking into account the domestic courts' reasoning and conclusions in the present case, it cannot be established that they conducted an adequate balancing exercise between the applicant's right to respect for her private life and the newspaper's freedom of expression (contrast *De Carvalho Basso*, cited above, § 53, and compare *Sipoş v. Romania*, no. 26125/04, § 38, 3 May 2011; *Sağdıç v. Turkey*, no. 9142/16, § 44, 9 February 2021; and *Văcean*, cited above, § 54).

38. The foregoing considerations are sufficient to enable the Court to conclude that the respondent State has failed to fulfil its positive obligations under Article 8 of the Convention. There has accordingly been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION ON ACCOUNT OF THE APPLICANT'S DISMISSAL FROM THE POST OF HEAD PHYSICIAN

39. The applicant complained under Article 8 of the Convention that her dismissal from the post of head physician had violated her right to respect for her private life.
40. The Government argued that this complaint had been lodged outside the six-month time-limit. The applicant disagreed, noting that she had submitted the first letter indicating her wish to lodge an application with the Court on 12 January 2013.
41. In the present case, while the first letter indicating the applicant's wish to lodge an application with the Court under Articles 6 and 8 of the Convention was itself dated 12 January 2013, the envelope containing that letter was postmarked 14 January 2013. The Court observes that the civil proceedings concerning the applicant's action contesting her dismissal ended with the Supreme Court's judgment of 13 July 2012. The Court refers to the general principles concerning the calculation of the six-month period summarised in *Sabri Güneş v. Turkey* ([GC], no. 27396/06, §§ 39-42, 29 June 2012). It reiterates that where an applicant is entitled to be served automatically with a copy of the final domestic decision, the object and purpose of Article 35 § 1 of the Convention are best served by counting the six-month period as running from the date of service of the copy of the written decision, irrespective of whether that decision was previously delivered orally (see *Akif Hasanov v. Azerbaijan*, no. 7268/10, § 27, 19 September 2019). However, despite the Government's explicit objection in relation to the six-month time-limit, the applicant, who was represented by a lawyer who should have been aware of the Court's case-law in this regard, neither argued that she had been served a copy of the final judgment on a different date, nor presented any document showing the date of the service of the relevant judgment. The Court recalls that under Rule 47 (§ 3.1 (b)) of the Rules of Court, the application form shall be accompanied by, *inter alia*, copies of documents and decisions showing that the applicant has complied with the time-limit contained in Article 35 § 1 of the Convention. In such circumstances, the Court cannot but conclude that the applicant has not complied with the six-month rule laid down under Article 35 § 1 of the Convention (compare *Sabri Güneş*, cited above, § 60). It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-compliance with the six-month time-limit.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

42. The applicant also complained under Article 14 of the Convention taken together with Article 8 that she had suffered discrimination as a result of the publication of the disputed articles and her dismissal from the post of head physician on the grounds of her brother's political views and criminal conviction.
43. The Government argued that the applicant had failed to raise this complaint before the domestic courts. The applicant disagreed.
44. The Court does not find it necessary to examine this objection for the reasons set out below.
45. The Court firstly notes that in so far the applicant's Article 14 complaint relates to her dismissal from the post of head physician, having regard to its case-law on the lack of an independent existence of Article 14 of the Convention (see *Molla Sali v. Greece* [GC], no. 20452/14, § 123, 19 December 2018) and its conclusion in respect of the applicant's Article 8 complaint concerning her dismissal (see paragraph 41 above), this part of the complaint must be dismissed for non-compliance with the six-month time-limit.
46. As to the part of the complaint relating to the applicant's right to her reputation, having regard to its conclusions under Article 8 of the Convention (see paragraphs 29-38 above), the facts of the case and the parties' submissions, the Court considers that there is no need to decide on the

admissibility and merits of the above-mentioned complaint (compare *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed 40,000 euros (EUR) in respect of non-pecuniary damage.
49. The Government did not submit any comments.
50. The Court considers that the applicant has suffered non-pecuniary damage which is not sufficiently compensated for by the finding of a violation of Article 8 of the Convention. Making its assessment on an equitable basis, it awards the applicant EUR 4,500 in respect of non-pecuniary damage.

B. Costs and expenses

51. The applicant did not submit any claims in respect of the costs and expenses.
52. There is therefore no call to award her any sum under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 8 of the Convention concerning the applicant's right to her reputation admissible and the complaint under Article 8 of the Convention and part of the complaint under Article 14 of the Convention taken together with Article 8 concerning the applicant's dismissal from the post of head physician inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention in respect of the applicant's right to her reputation;

3. *Holds* that there is no need to examine the admissibility and merits of the complaint under Article 14 of the Convention taken together with Article 8 in so far as it relates to the applicant's right to her reputation;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 27 April 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar
Marko Bošnjak President