COUNCIL OF EUROPE EUROPEAN COURT OF HUMAN RIGHTS
SECOND SECTION

CASE OF BODROŽIĆ AND VUJIN v. SERBIA
(Application no. 38435/05)

JUDGMENT
STRASBOURG 23 June 2009

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 Bodrožić and Vujin v. Serbia,

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

Françoise Tulkens, *President*, Ireneu Cabral Barreto, Vladimiro Zagrebelsky, Danutė Jočienė,
Dragoljub Popović, András Sajó, Nona Tsotsoria, *judges*,
and Françoise Elens-Passos, *Deputy Section Registrar*, Having deliberated in private on 2 June 2009, Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 38435/05) lodged with the Court against the State Union of Serbia and Montenegro under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Serbian nationals, Mr Željko Bodrožić and Mr Vladislav Vujin("the applicants"), on 13 October 2005. From 3June 2006, following Montenegro's declaration of independence, Serbia remained the sole respondent in the proceedings before the Court.
2. The applicants, who had been granted legal aid, were represented by Mr V. Lipovan, a lawyer practising in Kikinda. The Government of the State Union of Serbia and Montenegro and, subsequently, the Government of Serbia ("the Government") were represented by their Agent, Mr S. Carić.
3. The applicants alleged a violation of their right to freedom of expression.
4. On 29 August 2007 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1970 and 1966 respectively and live in Kikinda.
6. The applicants are journalists and were employed by the local weekly newspaper

Kikindske.

7. On 9 April 2004 the first applicant published an article criticising several criminal convictions he and another journalist had incurred for defamation. The article was entitled 'They have not punished us much for what we are' ('*Malo su nas kaznili, kakvi smo'*) and, in so far as relevant, read as follows:

"Where will our souls go, we wonder. Are we *Superhiks* [*the most prominent villain from the 'Alan Ford' comic book*] of Kikinda, who take from the poor and give to the rich? Are we arrogant spendthrifts who waste money belonging to all Kikinda citizens, so that poor people have to pay our fines for offensive writing? Has the judge D.K.... punished us too mildly and shouldn't he have satisfied the request of the lawyer S.K. and deservedly ripped us off to the tune of 150,000 dinars? But couldn't our prosecutor, who is surely not a blonde, but is being whistled at by workers on strike, have asked for more, since [another column in the K. newspaper] ruined his reputation acquired over decades, and in particular over the past year or two, when he so 'skilfully' drafted dismissals to all the [']non-workers['] and the opposition from [a local factory]? And what should the citizens who finance our public company do and think? Could they also wonder who gave us the right to write insulting texts so that the judges of Kikinda must punish us?... Do we have the right to deny that people are tired of such a behaviour of ours...? Do we have the right to deny our fellow citizens their wish for a quiet life, free of stress and various court proceedings? Do we have a soul, we wonder out loud, and if we do, where will it go after we've prepared another scandal? We should be ashamed of ourselves."

8. In the same issue, the second applicant was the editor of the page entitled 'Amusement', consisting of anagrams, jokes, a crossword and a horoscope. In the top middle section of the page there was a photo of a blonde woman in her underwear, next to which there was a text, which, in its relevant part, read as follows:

"JPICK and the manager were visited by a blonde the other day. For that occasion the blonde was whistled at by the workers who were not on strike. And she wasn't even a lawyer..."

On the left of the photograph, there was a small box containing three anagrams, the first of which was an anagram of S.K.'s name.

9. Shortly after publication of the above, S.K. instituted private criminal proceedings for insult against the applicants in the Kikinda Municipal Court.

10. On 14 February 2005 the court convicted the applicants of insult. The court fined each of them 12,000 dinars (RSD, approximately EUR 150), ordering them jointly to pay S.K. another RSD 16,000 (approximately EUR 200) in respect of the costs of the proceedings.

11. In its judgment, the first-instance court defined insult as a statement or an action objectively humiliating to a certain individual, constituting an attack on his or her honour. Acknowledging that S.K. was a public figure, the court explained that under domestic law an action done by way of a joke was not a criminal offence as long as that joke did not overstep acceptable boundaries and become insulting. The applicants must have known that S.K. considered their articles insulting, since they had previously been convicted of using identical terms about him. The court took particular note of the fact that the applicants mentioned S.K. directly and indirectly on several different pages of the same newspaper, and concluded that S.K. had proved that those texts had insulted him just by instituting the private criminal proceedings. In particular, the court held as follows:

"Such writing by the defendants demonstrates the intention to demean the private prosecutor [S.K.]. This is so because it is clear that the defendants, in different ways and in different sections [of the newspaper], compared the private prosecutor to a female, which comparison is objectively insulting in society. Namely, in our mentality it is insulting to feminise a man, and jokes about blondes are not in the least flattering, because they portray blondes as stupid people subject to mockery."

12. On appeal, on 4 May 2005 the Zrenjanin District Court upheld the first- instance judgment and its reasoning.

II. RELEVANT DOMESTIC LAW

13. The relevant provisions of the Constitution of the Republic of Serbia 2006 (*Ustav Republike Srbije*; published in the Official Gazette of the Republic of Serbia – OG RS – no. 98/06) read as follows:

Article 170

"A constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been exhausted or have not been prescribed."

14. The Criminal Code of the Republic of Serbia (*Krivičˇni zakon Republike Srbije*; published in OG RS nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89, 21/90, 16/90, 49/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02, 39/03 and 67/03), in so far as relevant, reads as follows:

Article 93

"1. Whoever insults another shall be fined or punished by imprisonment not exceeding three months.
2. Whoever commits an act described in [the above] paragraph ... through the press ... or at a public meeting shall be fined or punished by imprisonment not exceeding six months."

Article 96

"1. ... [no one] ... shall ... be punished for insulting another person if he [or she] does so in a scientific, literary or artistic work or a serious critique, in the performance of his [or her] official duties, his [or her] journalistic profession, as part of a political or other social activity or in defence of a right or of a justified interest, if from the manner of his [or her] expression or other circumstances it is clear that there was no [underlying] intent to disparage.
2. In situations referred to above, ... [the defendant] ... shall not be punished for claiming or disseminating claims that another person has committed a criminal offence prosecuted *ex officio*, even though there is no final judgment to that effect ... , if he [or she] proves that there were reasonable grounds to believe in the veracity of ... [those claims] ..."

15. The General Criminal Code (*Osnovni krivičˇni zakon*; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia - OG SFRY - nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90, the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - nos. 35/92, 37/93, 24/94, 61/01 and OG RS no. 39/03), in so far as relevant, reads as follows:

Article 39

"... 3. If the fine cannot be collected, the court shall order a day of imprisonment for each 200 dinars of the fine, provided that the overall term of imprisonment does not exceed six months.
4. If the convicted person pays only a part of the fine [imposed], the rest shall ... be converted into imprisonment, and if the convicted person [subsequently] pays the remainder of the fine, his [or her] imprisonment shall be discontinued."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

16. The applicants complained that their right to freedom of expression had been violated, contrary to Article 10 of the Convention, which reads in its relevant part 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 ... for the protection of the reputation or rights of others ..."

A. Admissibility

17. The Government invited the Court to reject the application for non-exhaustion of domestic remedies. In particular, they submitted that the applicants had failed to lodge

an appeal with the Constitutional Court under Article 170 of the new Serbian Constitution.
18. The applicants contested that argument, claiming that a constitutional appeal may not be regarded as a remedy they needed to exercise, since the Constitutional Court had been operational only since late 2007, whereas they had lodged their application with the Court in 2005.
19. The Court has already held that this constitutional remedy could not be deemed effective within the meaning of its established case-law under Article 35 § 1 of the Convention (see *Cvetković v. Serbia*, no. 17271/04, § 42, 10 June 2008), at the very least as regards applications lodged with it before 24 November 2007. It finds no reason to depart from such a conclusion in the present case and therefore dismisses the Government's objection.
20. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The Government's submissions

21. The Government submitted that the article was one in a series of articles published by the applicants concerning S.K. In respect of its content, the Government submitted that "comparison of men to women, especially to blonde ones, constituted an attack on the personal integrity and dignity of men, as understood in the social environment which prevails in the respondent State" ("*poređenje muškarca sa ženama, naročito plavušama, predstavlja napad na lič̌ni integritet i dostojanstvo muškarca prema preovlađujućem shvatanju društvene sredine tužene*"). By so doing, the applicants had overstepped the limits of permissible criticism of S.K. and the domestic courts had correctly found that the language used in the first applicant's article as well as in the second applicant's anagram had been offensive and damaging to S.K.'s reputation. Moreover, since there had been no general interest in the applicants' texts, their sole purpose had been to offend S.K.
22. Unlike the domestic courts, the Government did not characterise S.K. as a public figure, submitting that he had been well known as a lawyer only to the inhabitants of the small town of Kikinda. However, given the special position of lawyers in the administration of justice, the Government claimed that it had been necessary to prosecute the applicants for mocking S.K., since further offensive articles about him might have restricted his choice of clients in future cases.

2. The applicants' submissions

23. The applicants submitted that both the domestic courts and the Government had misunderstood the object of their writings. Namely, S.K. was representing the director of a large local factory which had become insolvent. In the first text which the applicants published in this connection, they mentioned that the factory workers whistled at the sight of the management accompanied by S.K., "even though he was not a blonde". In that way, they wished to address humorously the serious unemployment issues of the factory's workers. It appears from the applicant's submissions, although they provided no documents in support, that S.K. had instituted one or more criminal proceedings against them on account of this first text and that the domestic courts had convicted the applicants of insult.
24. The applicants further argued that the object of the texts resulting in their present conviction was a satirical criticism of the courts for imposing absurd criminal

sanctions on journalists, who had merely sought to provoke public reactions to the economic events in their town.
25. Lastly, the applicants agreed with the domestic courts that S.K. had been a public figure and that his threshold of acceptable criticism should therefore be higher than that of a private individual. It is true that he was known only to the population of Kikinda but, given that the newspaper which had published the articles had also been local, the notion of a "public figure" should be interpreted accordingly.

3. The Court's assessment

(a) "Prescribed by law"

26. It was not disputed that the applicants' conviction for insult amounted to an "interference" with their right to freedom of expression and that it was "prescribed by law" under Article 93 of the Criminal Code as worded at the material time (see paragraph 14 above).

(b) "Legitimate aim"

27. It was also common ground this interference with the applicants' rights pursued the legitimate aim of the protection of the rights of others, namely the reputation of S.K. What remains to be established is whether the interference was "necessary in a democratic society".

(c) Necessary in a democratic society"

28. The Court reiterates that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society. Subject to paragraph 2, it is applicable not only to "information" or "ideas" which are favourably received or regarded as inoffensive, but also to those which offend, shock or disturb (see, among many other authorities, *Lepojić v. Serbia*, no. 13909/05, § 73, 6 November 2007, and *Filipović v. Serbia*, no. 27935/05, § 53, 20 November 2007).
29. The Court would further emphasise the essential function which the press fulfils in such a society. Although the press must not overstep certain bounds, particularly in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Dalban v. Romania* [GC], no. 28114/95, § 49, ECHR 1999-VI).
30. It is in the first place for the national authorities to assess whether there is a "pressing social need" for a restriction on freedom of expression and, in making that assessment, they enjoy a certain margin of appreciation (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-...). In cases concerning the press, the State's margin of appreciation is circumscribed by the interests of a democratic society in ensuring and maintaining a free press. The Court's task in exercising its supervisory function is to look at the interference complained of in the light of the case as a whole and to determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see *Vogt v. Germany*, judgment of 26 September 1995, Series A no. 323, pp. 25-26, § 52; *Jerusalem v. Austria*, no. 26958/95, § 33, ECHR 2001-II).
31. In the instant case, the Court takes note of the complex factual background of the applicants' relationship with S.K. and the various criminal proceedings which appear to have consequently taken place. This notwithstanding, the scope of the present application is limited to the applicants' conviction of 14 February 2005.
32. The Court firstly observes that in his text the first applicant implicitly compared S.K. to a blonde woman, and, by way of irony, strongly criticised his previous convictions by the domestic courts. The text read as a whole cannot, however, be

understood as a gratuitous personal insult of S.K. but rather a general disapproval of the domestic courts' practice in punishing journalistic freedom of expression. The first applicant thereby raised an important issue of general interest, which he considered significant for the whole of society and thus open for public debate. The Court reaffirms that, pursuant to its long-standing practice, there is little scope under Article 10 § 2 of the Convention for restrictions on the debate of public interest questions (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 46, ECHR 1999-VIII).

33. As regards the second applicant, he posted an anagram of S.K.'s name in the vicinity of a photograph of a blonde woman and an accompanying text, which did not explicitly mention S.K., but contained certain allusions to him (see paragraph 8 above). The entirety of the second applicant's text being humorous in content and published under the newspaper's 'Amusement' column, cannot, in the Court's view, but be understood as a joke rather than a direct statement maliciously aimed at offending S.K.'s dignity.

34. As to whether S.K. could be regarded as a public figure, the Court reiterates that a private individual lays himself open to public scrutiny when he or she enters the arena of public debate (see *Jerusalem v. Austria*, cited above, §§ 38-39). In the instant case, the parties agreed that S.K., who was an attorney, had represented the management of a factory in a high-profile insolvency case and had therefore become a well-known figure in the town of Kikinda. Given that the articles had been published in that town's local newspaper, the Court accepts the qualification of S.K. as a public figure by the domestic courts. S.K. had entered the arena of public debate and therefore should have had a higher threshold of tolerance towards any criticism directed at him.

35. The Court further needs to examine whether the reasons adduced by the domestic courts in convicting the applicants were “relevant and sufficient” to justify the interference which occurred. The Court is struck by the first argument of the domestic courts in this connection, as later endorsed by the Government, that comparing an adult man to a blonde woman constituted an attack on the integrity and dignity of men. Moreover, the domestic authorities considered such a comparison objectively insulting within their society. However, the Court finds that argument derisory and unacceptable.

36. Secondly, the domestic courts interpreted as offensive the fact that the applicants had mentioned S.K. in different parts of the same issue of the newspaper. Again, the Court must disagree. The applicants' texts obviously contained a certain degree of mockery but could not, in the circumstances of the case, have been considered so insulting as to require the severe sanction of a criminal conviction.

37. Thirdly, by observing that S.K. had already proven the insulting nature of the applicants' texts merely by instituting proceedings against them, the domestic courts implicitly rendered any defence raised by the applicants devoid of any practical effect.

38. In view of the above, the Court considers that there was no “pressing social need” to restrict the applicants' freedom of expression, nor were the reasons adduced by the domestic courts relevant or sufficient to justify that interference.

39. Lastly, the Court reiterates that, when assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account (see *Cumpănă and Mazăre v. Romania*, no. 33348/96, 17 December 2004, §§ 111-124; *Sokołowski v. Poland*, no. 75955/01, § 51, 29 March 2005). In this connection, the Court points out that recourse to criminal prosecution against journalists for purported insults raising issues of public debate, such as those in the present case, should be considered proportionate only in very exceptional circumstances involving a most serious attack on an individual's rights (see, *mutatis*

mutandis, *Azevedo v. Portugal*, no. 20620/04, § 33, 27 March 2008). To hold otherwise would deter journalists from contributing to the public discussion of issues affecting the life of the community and, more generally, hamper the press in carrying out its important role of a “public watchdog”.
40. In the instant case, regard must be had to the fact that not only were the applicants subject to a criminal conviction, but the fine imposed on each of them could, in case of default, be replaced by sixty days' imprisonment (see paragraph 15 above).
41. The foregoing considerations are sufficient for the Court to conclude that the interference with the applicants' right to freedom of expression was wholly disproportionate. Consequently, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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.”
43. The applicants made no claim in respect of pecuniary or non-pecuniary damage. Accordingly, the Court makes no award.
44. However, the applicants, who have been granted legal aid, claimed further reimbursement of costs and expenses incurred before the Court. However, they failed to itemise their claim as required under Rule 60 of the Rules of Court. Accordingly, the Court makes no award under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Dismisses* the applicants' claim for the reimbursement of costs and expenses. Done in English, and notified in writing on 23 June 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos Françoise Tulkens Deputy Registrar President“