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

SECOND SECTION

CASE OF FILIPOVIĆ v. SERBIA

(Application no. 27935/05)

JUDGMENT

STRASBOURG

20 November 2007

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 Filipović v. Serbia,

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

Mrs F. TULKENS, *President*,
Mr A.B. BAKA,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mr V. ZAGREBELSKY,
Mrs A. MULARONI,
Mr D. POPOVIĆ, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 23 October 2007,

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

PROCEDURE

1. The case originated in an application (no. 27935/05) against the State Union of Serbia and Montenegro, succeeded by Serbia on 3 June 2006 (see paragraph 29 below), lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by, at that time, a citizen of the State Union of Serbia and Montenegro, Mr Zoran Filipović ("the applicant"), on 22 July 2005.

2. The applicant was represented before the Court by Mr D. Vidosavljević, a lawyer practising in Leskovac. 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 applicant complained that he had suffered a breach of his right to freedom of expression based on a final civil court judgment rendered against him.

4. On 2 June 2006 the Court decided to communicate the application to the Government. Under Article 29 § 3 of the Convention, it was also decided that the merits of the application would be examined together with its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960 and currently lives in Babušnica, Serbia. At the relevant time, he was employed as a tax inspector and has, as of 2000, been the Vice President of the local branch of the Demo-Christian Party of Serbia (*Demohrišćanska stranka Srbije*).

A. Criminal Proceedings

6. On 21 October 2002 the Municipal Court (*Opštinski sud*) in Babušnica convicted the applicant of criminal defamation (*kleveta*) and ordered him to pay a fine in the amount of 6,000 Yugoslav Dinars ("YUD") plus an additional YUD 25,000 in costs.

7. In the operative part of this judgment the court established: (i) that on 8 March 2001 the applicant had taken part in a "public gathering" (*javni skup*) in the Babušnica Municipal Hall; (ii) that this "gathering" was attended by the Deputy Prime Minister of the Republic of Serbia, the Deputy Minister for Justice and Local Self-Government, as well as more than 80 municipal councillors and other leading local figures; and (iii) that on this occasion the applicant had publicly stated that Mr P.J., at that time the Mayor of Babušnica, "was not the right person for this job", given that he had already "embezzled 500,000 German Marks" (*jer je proneverio 500 000 DM*). The court then concluded that this statement was "untrue" and, as such, capable of "damaging the reputation and honour" of Mr P.J., a well-known and respected local businessman and public servant (*društveno-politički radnik*), and proceeded to find the applicant guilty as charged.

8. In its reasoning, *inter alia*, the Municipal Court relied on two witnesses who, "though members of different political parties", had heard the applicant state that the Mayor had "embezzled" 500,000 German Marks" in 1996, as director of a major State-owned company, but dismissed, as unconvincing, the testimony of at least four others who had stated that the applicant had said that the Mayor had "deprived" (*oštetio*) the State of the same amount in revenue. The court further held that the official minutes of the meeting in question, containing language to the same effect, were of "no greater probative value" because they were composed by a person who was himself merely a "witness", and, finally, that a criminal complaint filed against the Mayor for tax evasion in 1996 had not ultimately resulted in his conviction (see paragraphs 16 and 17 below).

9. On 31 December 2003 the District Court (*Okružni sud*) in Pirot rejected the applicant's appeal and, on the same facts, found him guilty of

the crime of insult (*uvreda*), rather than criminal defamation (*kleveta*), holding that the meeting at issue could not be deemed a "public gathering" within the meaning of the Serbian Criminal Code. The sentence imposed by the Municipal Court, however, was upheld in its entirety and thereby became final.

B. Civil Proceedings

10. On an unspecified date in 2004, the Mayor filed a separate civil compensation claim with the Municipal Court in Babušnica, seeking 300,000 Serbian Dinars ("RSD") for the mental anguish suffered due to the applicant's statement referred to above.

11. On 23 September 2004 the Municipal Court ruled partly in favour of the Mayor, without having heard him in person, and, in so doing, ordered the applicant to pay RSD 120,000 in compensation, together with default interest, plus costs in the amount of RSD 33,400. At that time, this was equivalent to approximately 2,077 Euros ("EUR"), or, in more concrete terms, the applicant's total net salary for the previous six months.

12. In its reasoning, the court relied on the applicant's criminal conviction, as well as the findings of the criminal courts, and held that the Mayor's reputation had indeed been harmed, causing him serious and continuing mental anguish. The court noted that the plaintiff in this case was both a Mayor and a leading local businessman and concluded that adequate financial compensation was called for.

13. On 20 December 2004 the District Court in Pirot rejected the applicant's appeal and, in so doing, fully accepted the reasoning of the Municipal Court, whose judgment thereby became final. The applicant received a written copy of the District Court's decision on 24 January 2005.

14. On 9 March 2005 the applicant paid a total of RSD 153,400 in respect of the compensation awarded against him, the interest accrued and the costs of the civil proceedings.

C. Other relevant facts

15. According to the official minutes of the meeting held in the Babušnica Municipal Hall on 8 March 2001, the Deputy Prime Minister stated that the purpose of this meeting was to "asses the functioning of the municipality" as a whole. He invited the participants to openly share their "critical views" in this respect and explained that, if needed, the Government would consider imposing specific measures aimed at tackling any serious issues.

16. The minutes, thereafter, reflected that the applicant had accused the Mayor of not being "the right person for the job" and that "this ... country deserved someone better". He then added that in 1996, in his capacity as a

tax inspector, he had found "numerous irregularities" with respect to "*Lisca*", a major State-run company headed by the Mayor, and that he had thus filed a criminal complaint, alleging that the Mayor had "deprived the State of 500,000 German Marks" in revenue.

17. The applicant provided the Court with the said criminal complaint, dated 24 June 1996, as well as three separate decisions issued by the Public Revenue Directorate (*Republička uprava javnih prihoda*): two of 22 August 1996 and 2 September 1996, respectively, ordering "*Lisca*" to pay its overdue taxes, and the third, of 25 December 1996, fining the company for its failure to do so.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Obligations Act (Zakon o obligacionim odnosima; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia - OG SFRY - nos. 29/78, 39/85, 45/89 and 57/89, as well as the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - no. 31/93)

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

19. Article 172 § 1 provides that a legal entity, which includes the State, is liable for any damage caused by one of "its bodies".

20. Articles 199 and 200, *inter alia*, state that anyone who has suffered mental anguish as a consequence of a breach of his or her honour or reputation may, depending on its duration and intensity, sue for financial compensation before the civil courts and, in addition, request other forms of redress "which may be capable" of affording adequate non-pecuniary satisfaction.

21. Articles 191 and 205 provide, *inter alia*, that a domestic court may decide to reduce the compensation award taking into account, *ex officio*, the specific financial circumstances of the respondent.

B. Civil Procedure Act 1977 (Zakon o parničnom postupku; published in OG SFRY nos. 4/77, 36/77, 6/80, 36/80, 43/82, 72/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90 and 35/91, as well as the OG FRY nos. 27/92, 31/93, 24/94, 12/98, 15/98 and 3/02)

22. Article 12 § 3 provided that a civil court was bound by a final decision of a criminal court in respect of whether or not a crime had been committed, as well as the criminal responsibility of the defendant.

C. Relevant Supreme Court's jurisprudence in respect of the relationship between a final criminal conviction and a subsequent civil suit for damages

23. A civil court dealing with a compensation claim shall be bound by the criminal court's assessment of the defendant's criminal responsibility. It "shall not [however] be bound" by any of its other findings (*Rev. 1089/90*) and shall be entitled to "assess independently" the defendant's civil liability (*Gž. 1316/67*).

D. Civil Procedure Act 2004 (Zakon o parničnom postupku; published in the Official Gazette of the Republic of Serbia - OG RS - no. 125/04)

24. Articles 3 § 1, 413, 415, 417 and 418 provide that the Public Prosecutor shall, *ex officio* or in response to a party's specific proposal, within a period of three months, have the right to lodge a Request for the Protection of Legality against a final civil court decision, if it transpires that the decision in question was "based on the parties' unlawful dispositions" (*nedozvoljeno raspolaganje stranaka*), i.e. those undertaken in breach of the "binding provisions of domestic law, public order or the rules of morality" (*prinudni propisi, javni poredak i pravila morala*). Should the Public Prosecutor refuse to lodge a request of this sort within the prescribed deadline, the party who had urged him to do so shall, within thirty days, have the right to file its own Request for the Protection of Legality with the Supreme Court.

25. The Civil Procedure Act 2004 entered into force on 23 February 2005, thereby repealing the Civil Procedure Act 1977. Article 491 §§ 1 and 5 of the 2004 Act, however, provides that the 1977 Act shall remain in force, *inter alia*, in respect of all proceedings where the first instance judgment was rendered prior to 23 February 2005 and, further, that any pending Requests for the Protection of Legality shall be dealt with on the basis of the 1977 Act.

E. Relevant constitutional provisions

26. Article 25 of the Serbian Constitution (*Ustav Republike Srbije*) published in the Official Gazette of the Socialist Republic of Serbia - OG SRS - no. 1/90 provided as follows:

> "Everyone shall be entitled to compensation for any pecuniary and non-pecuniary damages suffered due to the unlawful or improper conduct of a State official, a State body or a public authority, in accordance with the law.

Such damages shall be covered by the Republic of Serbia or the public authority [in question]."

27. This Constitution was repealed on 8 November 2006, which is when the new Constitution, published in OG RS no. 98/06, entered into force.

28. The substance of Article 35 § 2 of the "new" Constitution corresponds, in its relevant part, to the above-cited text of the previous Article 25.

F. The succession of the State Union of Serbia and Montenegro

29. The relevant provisions concerning the succession of the State Union of Serbia and Montenegro are set out in the *Matijašević v. Serbia* judgment (no. 23037/04, §§ 22-25, 19 September 2006).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

30. The applicant complained under Article 10 about the breach of his right to freedom of expression, stemming from the final civil court judgment rendered against him.

Article 10 of the Convention, in the relevant part, 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 ... for the protection of the reputation or rights of others ..."

A. Admissibility

1. Compatibility ratione temporis

31. The Government argued that the outcome of the civil proceedings in question was a "logical consequence" of the applicant's prior criminal conviction, which had itself occurred before the respondent State's ratification of the Convention on 3 March 2004. The application as a whole was therefore incompatible *ratione temporis* with the provisions of the Convention.

32. The applicant disagreed.

33. The Court considers that the principal fact of the present case, namely the respondent State's interference with the applicant's freedom of expression, lies in the adoption of the final civil court judgment on 20 December 2004, because it was then that the applicant became obliged to pay the compensation awarded (see, *mutatis mutandis*, *Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, §§ 41 and 42; see also paragraphs 13 and 14 above). Further, although the civil courts were bound by the criminal conviction in terms of whether the applicant had committed the crime at issue, they were free to independently assess the applicant's civil liability, as well as to decide whether to award any compensation (see paragraphs 22 and 23 above and paragraph 49 below).

34. Accordingly, the Government's objection must be dismissed.

2. Exhaustion of domestic remedies

(a) Arguments of the parties

35. The Government submitted that the applicant had not exhausted all effective domestic remedies.

36. In particular, he had failed to file a separate civil claim in accordance with Article 25 of the Constitution, as well as Articles 154, 172, 199 and 200 of the Obligations Act. (The Government provided a final judgment where a domestic court had applied Articles 5 and 8 of the Convention, taken together with Article 200 of the Obligations Act and, in so doing, had granted the plaintiff's civil compensation claim in a matter involving unlawful surveillance, arrest and detention.)

37. Secondly, the Government noted that the applicant had not made use of the Request for the Protection of Legality (an "RPL"), as provided for in Articles 417 and 418 of the Civil Procedure Act 2004.

38. The applicant maintained that he had complied with the exhaustion requirement.

(b) Relevant principles

39. The Court recalls that, according to its established case-law, the purpose of the domestic remedies rule contained in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court.

40. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, *inter alia*, *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11–12, § 27, and *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, pp. 87-88, § 38).

41. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Dankevich v. Ukraine,* no. 40679/98, § 107, 29 April 2003).

42. Finally, the Court reiterates that where there are several effective remedies available, it is for the applicant to choose the remedy to be pursued (see *Airey v. Ireland,* judgment of 9 October 1979, Series A no. 32, p. 12, § 23).

(c) The Court's assessment

43. Even assuming that the applicant could have lodged an RPL, under the Civil Procedure Act 2004 (see paragraph 25 above), the Court considers that this was not an effective remedy in the particular circumstances of the present case, there being no suggestion in the case file that the impugned final judgment was itself based on the *parties'* unlawful dispositions (see paragraph 24 above).

44. In addition, the Government were unable to cite any domestic jurisprudence where a claim based on Article 25 of the Constitution and Articles 154, 172, 199 and 200 of the Obligations Act had been used successfully in a case such as the applicant's (see paragraphs 18-20 and 36 above). In any event, having exhausted the effective remedies in the civil case brought against him, the applicant could not have reasonably been expected to embark upon yet another avenue of unlikely redress (see paragraph 42 above).

45. The Court therefore finds that the applicant's complaint cannot be declared inadmissible for non-exhaustion of domestic remedies under Article 35 § 1 of the Convention. Accordingly, the Government's objection in this respect must be dismissed.

3. Conclusion

46. The Court considers that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and finds no other ground to declare it inadmissible. The complaint must therefore be declared admissible.

B. Merits

1. Arguments of the parties

47. The Government endorsed the conclusions as well as the reasoning of the domestic courts and emphasised that the applicant's claim about the

Mayor's embezzlement was a statement of fact, rather than a value judgment, which was not corroborated by any relevant evidence. Indeed, the Mayor was never convicted of or even charged with this crime in spite of the fact that a criminal complaint had been filed against him.

48. The Government further stated that the applicant's intent was to belittle the Mayor in the presence of the Deputy Prime Minister, which is why he had every right to have his reputation protected, both as a private citizen and as a well-known public figure.

49. The Government noted that the applicant took an active part in the domestic proceedings, that the outcome of the civil case was itself based on his prior criminal conviction, and that the compensation award, assessed independently by the civil courts, was in accordance with the applicant's financial situation, as well as the relevant domestic jurisprudence in such matters.

50. Finally, the Government maintained that the applicant's language had clearly exceeded the limits of free expression and that there were no reasonable grounds for the applicant to believe that his statements were true.

51. The Government thus concluded that the interference with the applicant's freedom of expression was "prescribed by law", "necessary in a democratic society", and undertaken for the protection of the "reputation or rights of others".

52. The applicant reaffirmed his complaint, adding that the compensation awarded was "meant to ruin him financially", as well as to deter him from any future political criticism of the Mayor personally.

2. Relevant principles

53. As the Court has often observed, the freedom of expression enshrined in 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" that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb (see, among many other authorities, the *Castells v. Spain* judgment of 23 April 1992, Series A no. 236, p. 22, § 42, and the *Vogt v. Germany* judgment of 26 September 1995, Series A no. 323, p. 25, § 52).

54. The Court has repeatedly upheld the right to impart, in good faith, information on matters of public interest, even where this involved damaging statements about private individuals (see, *mutatis mutandis*, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III), and has emphasised that the limits of acceptable criticism are still wider where the target is a politician (see *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, § 59). Indeed, while precious for all, freedom of expression is particularly important for political parties and their active members (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, § 46).

55. The Court has also already made clear that account has to be taken of whether the impugned expressions concerned one's private life or one's behaviour in an official capacity (see *Dalban v. Romania* [GC], no. 28114/95, § 50, ECHR 1999-VI) and noted that the nature and severity of the sanction imposed, as well as the "relevance" and "sufficiency" of the national courts' reasoning, were matters of particular gravity in assessing the proportionality of the interference under Article 10 § 2 (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 111, ECHR 2004, and *Zana v. Turkey*, cited above, § 51, respectively).

56. Finally, the amount of compensation awarded must "bear a reasonable relationship of proportionality to the ... [moral] ... injury ... suffered" by the respondent in question (see *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, § 49; see also *Steel and Morris v. the United Kingdom*, no. 68416/01, § 96, ECHR 2005, where the Court held that the damages "awarded ... although relatively moderate by contemporary standards ... [were] ... very substantial when compared to the modest incomes and resources of the ... applicants ... " and, as such, in breach of the Convention).

3. The Court's assessment

57. The final civil court judgment undoubtedly constituted an interference with the applicant's right to freedom of expression. Since it was based on the Obligations Act, however, it was also clearly "prescribed by law" within the meaning of Article 10 § 2 of the Convention (see paragraph 20 above). Lastly, the judgment in question was adopted in pursuit of a legitimate aim, namely "for the protection of the reputation" of another. What remains to be resolved, therefore, is whether the interference was "necessary in a democratic society".

58. In this respect the Court firstly notes that the applicant was a politician who had discussed a matter of some public interest at a closed political meeting where all participants were encouraged by the Deputy Prime Minister to share their critical views as regards the functioning of the municipality (see paragraphs 5, 7 and 15 above). Secondly, the target of the applicant's criticism was the Mayor/director of a major State-owned company, himself a public figure. Thirdly, the civil courts, as well as the criminal courts, concluded that the Mayor had been publicly accused by the applicant of criminal "embezzlement" in the absence of a conviction to that effect (see paragraphs 12, 7 and 8 above, in that order; see also, *mutatis mutandis*, *Dalban v. Romania* [GC], cited above, § 50). Fourthly, the civil courts awarded compensation equal to six months of the applicant's net salary at the material time (see paragraphs 11 and 56 above). Finally, the applicant clearly had a legitimate reason to believe that the Mayor might have been involved in tax evasion (see paragraphs 16 and 17 above) and his

statement, despite containing serious allegations, was not a gratuitous personal attack directed against the Mayor.

59. In view of the above, the Court finds that the interference in question was not necessary in a democratic society. Accordingly, there has been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

60. The applicant also relied on Article 6 but, in so doing, made exactly the same complaint as the one already examined under Article 10. In fact, having failed to refer to any specific procedural issues, it would appear that the applicant considered that there had been an "automatic" breach of his right to a fair hearing based on the fact that he was ordered to pay damages. Having regard to its finding in respect of Article 10, the Court declares this complaint admissible but considers that it does not require a separate examination on the merits (see, *mutatis mutandis*, *Perna v. Italy* [GC], no. 48898/99, §§ 33-34, ECHR 2003-V).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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."

62. The applicant claimed EUR 12,350 for the pecuniary and non-pecuniary damages suffered.

63. The Government described this claim as belated. They added, however, that should the Court accept it and find a violation of the Convention, any financial compensation awarded should be consistent with the Court's own jurisprudence in other similar cases.

64. The Court notes that the applicant's just satisfaction claim was indeed submitted on 11 April 2007, almost six months after the expiry of the original deadline. The applicant has therefore failed to comply with Rule 60 §§ 2 and 3 of the Rules of Court, which is why his claim must be dismissed.

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. *Holds* that it is not necessary to examine separately the complaint under Article 6 of the Convention;

4. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

F. ELENS-PASSOS
Deputy Registrar

F. TULKENS
President