

FOURTH SECTION

CASE OF ŠABANOVIĆ v. MONTENEGRO AND SERBIA

(Application no. 5995/06)

JUDGMENT

STRASBOURG

31 May 2011

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 Šabanović v. Montenegro and Serbia,

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

Nicolas Bratza, *President*,
Lech Garlicki,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges*,
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 10 May 2011,

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

PROCEDURE

1. The case originated in an application (no. 5995/06) against Montenegro and Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Montenegrin national, Mr Zoran Šabanović (“the applicant”), on 19 January 2006.
2. The applicant was represented by Mr J. Pejović, a lawyer practising in Herceg Novi. The Montenegrin Government (“the Government”) were represented by their Agent, Mr Z. Pažin.
3. The applicant complained under Article 10 of the Convention of a breach of his right to freedom of expression stemming from his criminal conviction.
4. On 19 April 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1954 and lives in Herceg Novi.
6. The facts of the case, as submitted by the parties, may be summarised as follows.
 1. The newspaper article and the subsequent press conference
 7. On 6 February 2003 a Montenegrin daily newspaper published an article about the quality of the water in the Herceg-Novı area, entitled “Taps full of bacteria” (*Slavine pune bakterija*). The article stated that all of the current water sources contained various bacteria. These assertions were based on a report produced by the Institute for Health (*Institut za zdravlje*

Crne Gore), which had been requested by the Chief State Water Inspector (*Glavni republički vodoprivredni inspektor*, hereinafter “the Chief Inspector”), apparently with a view to exploring the possibility of connecting additional sources to the water-supply grid. The same article also included a statement by the applicant, at that time the Director of a public corporation called “The Water Supply and Sewage Systems” (*JP Vodovod i Kanalizacija*, hereinafter “the Water Supply Company”) and a member of the Socialist People’s Party (SNP)¹, that he was not familiar with the analysis at issue, but that the water was regularly tested and always filtered before being pumped into the system.

8. On the same day the applicant held a press conference in response to the above-mentioned article. The applicant stated that, firstly, all tap water was filtered before being pumped into the water-supply system and was thus safe for use by the public. Secondly, the Chief Inspector had been promoting the interests of the two private companies which had already been granted licences to develop additional water sources and, lastly, the Chief Inspector had been directed to do so by the Democratic Party of Socialists (DPS)² and the companies in question had themselves obtained their licences unlawfully. The statement was published in several daily newspapers.

2. The criminal proceedings

9. On 7 April 2003 the Chief Inspector lodged a private criminal action (*privatna krivična tužba*) against the applicant for defamation (*kleveta*), claiming that the latter’s statements were untrue and, therefore, harmful to his honour and reputation.

10. On 4 September 2003 the Court of First Instance (*Osnovni sud*) in Podgorica held the main hearing, during which the applicant said that his statement was not defamatory, but that “it was a value judgment, which he could prove”. He stated that he had been informed about the results of the water analysis three days after the press conference, and the analysis clearly stated that the water from the water-supply system was of the necessary quality and was not a danger to health. He explained that there were obviously two reports, one concerning the water sources and one concerning the filtered water. He did not dispute the right of the Chief Inspector to ask for a water analysis, as it was his duty to do so, but the applicant did not think that the analysis of unfiltered water should have been published, but rather the analysis of the filtered water. Finally, he proposed that the court should read the article “Taps full of bacteria” to understand the context in which the impugned statement had been made, and that it should obtain the files concerning other proceedings ongoing at the time between the Water Supply Company and the two private companies in question.

11. At the same hearing the court also heard the Chief Inspector. He stated that he had always worked professionally and that he did not work under anybody’s orders, he himself having filed a criminal complaint against one of the two companies. He stated that he had ordered the analysis at issue after consulting his Minister, who had “supported” him (“*koji [me] je podržao u tome*”). He emphasised that the title of the newspaper article had had nothing to do with him, as newspapers wrote what they deemed appropriate (“*novine pišu [...] po sopstvenom nahođenju*”), although they were contacting him to obtain data. However, he was not interested in what the newspapers had written on this particular issue or why they had not published the analysis of the filtered water (“*nije me interesovalo zašto nijesu objavljivali o analizi tretirane vode...*”), his main concern being to prove that a particular water source was of adequate quality and that it could be used.

12. On the same day the court found the applicant guilty and sentenced him to three months' imprisonment. This sentence, however, was suspended and was not to be enforced unless the applicant committed another crime within a period of two years.

13. In the operative part of the judgment only the following statement was found to amount to defamation, that is, to be "untrue" and "harmful to the honour and reputation of the private prosecutor":

"The Inspector [...] works in the interest and at the request of [the two companies], as directed by the DPS".

14. In its reasoning the court stated that the statement made by the applicant was not supported by facts and rejected the applicant's defence that it was merely a value judgment. In the court's view the applicant had been aware that he might harm the honour and reputation of the private prosecutor and thus had had a defamatory intention (*klevetnička namjera*). The court refused to read the newspaper article or to request the files of the proceedings referred to by the applicant as that would only have delayed the proceedings and, in any event, neither was relevant for the proceedings at issue.

15. On an unspecified date thereafter the applicant lodged an appeal. He stated that, firstly, the Chief Inspector had sought the said analysis in order to examine the possibility of connecting water sources administered by the two private companies to the water-supply grid. Secondly, there were two water analyses, before and after it had been filtered, but the Chief Inspector had provided the newspapers only with the analysis of the unfiltered water. Thirdly, the Chief Inspector himself had not responded to the misleading title of the article stating that the taps were full of bacteria, because he was "not interested" in it. Fourthly, the court had refused to read the newspaper article, without which it was impossible to conclude that his intention had been to defame the private prosecutor. Finally, he did not think it was defamatory to say that a "government official worked as directed by the ruling party", or that his response to such an article could be considered to amount to defamation of the private prosecutor.

16. On 1 November 2005 the judgment of 4 September 2003 was upheld by the High Court (*Viši sud*) in Podgorica, which fully endorsed the reasons given by the Court of First Instance. No effective appeal lay against this judgment to the Court of Serbia and Montenegro (see paragraphs 17-18 and 29 below).

II. RELEVANT DOMESTIC LAW

A. Constitutional Charter of the State Union of Serbia and Montenegro (Ustavna povelja državne zajednice Srbija i Crna Gora, published in the Official Gazette of Serbia and Montenegro no. 1/03)

17. Article 9 § 1 of the Constitutional Charter provided that both member States shall regulate, safeguard and protect human rights in its territory.

18. The relevant part of Article 46 provided that the Court of Serbia and Montenegro shall examine complaints lodged by citizens in cases where an institution of Serbia and Montenegro has infringed their rights and freedoms as guaranteed by the Constitutional Charter, if no other legal redress has been provided.

B. Constitution of the Republic of Montenegro (Ustav Republike Crne Gore; published in the Official Gazette of the Republic of Montenegro – OG RM – no. 48/92)

19. Section 34 § 2 provided for the freedom to publicly express one's opinion.

20. Section 35 § 2 stipulated that citizens have the right to express and publish their opinions via the mass media.

C. Criminal Code of the Republic of Montenegro (Krivični zakon Republike Crne Gore; published in OG RM nos. 42/93, 14/94, 27/94, 30/02, 56/03)

21. The relevant provisions of this Act read as follows:

Section 76 §§ 1, 2 and 4

“Whoever, in relation to another, asserts or disseminates a falsehood which can damage his honour and reputation shall be fined or punished by imprisonment not exceeding six months.

Whoever commits one of the acts described in [the above] paragraph ... through the press, via radio or television ... [, in another manner through the mass media,] ... or at a public meeting shall be punished by imprisonment not exceeding one year.

...

If the defendant proves his claims to be true or if he proves that he had reasonable grounds to believe in the veracity of the claims which he made or disseminated, he shall not be punished for defamation, but may be punished for the offence of insult ...”

Section 80 § 1

“The defendant shall not be punished for insulting another person if he does so in ... a serious critique, in the performance of his official duties, [...] in defence of a right or of a justified interest, or if from the manner of his expression it transpires that there was no intent to disparage.”

D. General Criminal Code (Osnovni krivični zakon; published in Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90, and the Official Gazette of the Federal Republic of Yugoslavia nos. 35/92, 37/93, 24/94)

22. The relevant provisions of this Act read as follows:

Section 51

“... [T]he purpose of a suspended sentence ... is that punishment ... for socially less dangerous acts should not be imposed ... when ... it can be expected that an admonition with a threat of punishment (suspended sentence) ... will ... [be sufficient to deter the offender] ... from committing any [other] criminal acts.”

Section 52 § 1

“In handing down a suspended sentence, the court shall impose a punishment on a person who has committed a criminal act and at the same time order that this punishment shall not be enforced if the convicted person does not commit another criminal act for a [specified] period of time, which cannot be less than one or more than five years in all (period of suspension).”

Section 53 § 4

“In deciding whether or not to impose a suspended sentence, the court shall take into account the purpose of [this] sentence, the personality of the offender, his conduct prior to and following the commission of the criminal act, the degree of his criminal liability, as well as all the other circumstances under which the act was committed.”

Section 54 §§ 1 and 2

“The court shall revoke the suspended sentence [and order its execution] if, during the period of suspension, the convicted person commits one or more [additional] criminal acts for which he is sentenced to imprisonment for a term of or exceeding two years.

If, during the period of suspension, the convicted person commits one or more [additional] criminal acts and is sentenced to imprisonment for a term not exceeding two years or to a fine, the court shall, upon consideration of all the circumstances ... including the similarity of the crimes committed ... decide whether or not to revoke the suspended sentence ... ”.

III. INTERNATIONAL DOCUMENT REFERRED TO BY THE GOVERNMENT

23. The Government referred, *inter alia*, to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted by the UNECE – United Nations Economic Commission for Europe – on 25 June 1998).

24. Section 5 § 1(c) of that convention provides that in the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

IV. OTHER RELEVANT DOCUMENTS

25. On 4 October 2007 the Parliamentary Assembly of the Council of Europe adopted Resolution 1577 (2007), *Towards decriminalisation of defamation*, in which it urged those member States which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant complained under Article 10 of the Convention of a breach of his right to freedom of expression stemming from his criminal conviction. 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 ... for the protection of the reputation or rights of others ...”

A. Admissibility

1. Compatibility *ratione personae*

27. The applicant complained against both Montenegro and Serbia.

28. The Court notes that both member States of the then State Union of Serbia and Montenegro were responsible for the protection of human rights in its territory (see paragraph 17 above). Given the fact that the entire criminal proceedings have been conducted solely within the competence of the Montenegrin courts, the Court finds the applicant’s complaint in respect of Montenegro compatible *ratione personae* with the provisions of the Convention. For the same reason, however, his complaint in respect of Serbia is incompatible *ratione personae*, within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4 of the Convention.

2. Conclusion

29. The Court has already held that an appeal to the Court of Serbia and Montenegro was an ineffective domestic remedy (see *Matijašević v. Serbia*, no. 23037/04, § 37, ECHR 2006-X). It notes that the Montenegrin Government did not raise any objection with regard to the admissibility of the application within the meaning of Article 35 § 1 of the Convention. The Court considers that the applicant’s complaint in respect of Montenegro is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties’ submissions

30. The Government maintained that the applicant’s claim was a statement of fact rather than a value judgment, since the applicant himself stated he could prove it, whereas value judgments were not susceptible to proof (see paragraph 10 above). Furthermore, even where a statement amounted to a value judgment, there must exist a sufficient factual basis to support it.

31. The Government reiterated that there had been no need for the applicant to respond to the article at a press conference since he had already responded in the article itself (see paragraph 7 above). The applicant had misused his freedom of expression by directing the public debate towards the Chief Inspector, aiming primarily to discredit him and present him as corrupt.

32. The Government further relied on various international documents, in particular the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which provides, *inter alia*, that all information with regard to how harm arising from a possible imminent threat to human health may be prevented or mitigated must be disseminated without delay to the public which may be affected thereby (see paragraphs 23 and 24 above).

33. The Government reiterated that freedom of expression entailed the right to receive information, but that it was in the public interest that such information should be true, in particular when it related to a matter such as the quality of drinking water.

34. Lastly, the Government concluded that the restriction on freedom of expression in such a case was necessary in a democratic society, that the criminal sanction was proportionate to the legitimate aim pursued and that, therefore, there was no violation of Article 10 of the Convention.

35. The applicant made belated comments, which, on that account, were not admitted to the file.

2. The Court's assessment

36. 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 of that Article, 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, *Castells v. Spain*, 23 April 1992, § 42, Series A no. 236, and *Vogt v. Germany*, 26 September 1995, § 52, Series A no. 323).

37. The Court has also already upheld the right to impart, in good faith, information on matters of public interest even where the statements in question involved untrue and 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 it has to be taken into account whether the expressions at issue concern a person's private life or their behaviour and attitudes in the capacity of an official (see *Dalban v. Romania* [GC], no. 28114/95, § 50, ECHR 1999-VI). The Court recalls in this connection that senior civil servants acting in an official capacity are subject to wider limits of acceptable criticism than private individuals (see *Thoma v. Luxembourg*, no. 38432/97, § 47, ECHR 2001-III; *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 80, ECHR 2004-XI; *Mamère v. France*, no. 12697/03, § 27, ECHR 2006-XIII; and *Dyundin v. Russia*, no. 37406/03, § 26, 14 October 2008).

38. In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement amounts to a value judgment the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see, among many authorities, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87 *in fine*, ECHR 2005-II).

39. Finally, the Court notes that the nature and severity of the penalty imposed, as well as the “relevance” and “sufficiency” of the national courts’ reasoning, are matters of particular significance when it comes to assessing the proportionality of an interference under Article 10 § 2 (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 111, ECHR 2004, and *Zana v. Turkey*, 25 November 1997, § 51, *Reports of Judgments and Decisions* 1997-VII), and reiterates that Governments should always display restraint in resorting to criminal sanctions, particularly where there are other means of redress available (see *Castells v. Spain*, cited above, § 46).

40. Turning to the present case, the Court notes that the final criminal judgment at issue obviously amounts to an interference with the applicant’s right to freedom of expression. Since the conviction was based on the Criminal Code, however, this interference must be deemed as “prescribed by law” within the meaning of Article 10 § 2 (see paragraph 21 above). Further, the judgment at issue was adopted in pursuit of a legitimate aim, that is, “for the protection of the reputation of others”. The parties have not contested these findings. What remains to be resolved, therefore, is whether the interference was “necessary in a democratic society” or, in other words, whether the criminal conviction was proportionate to the legitimate aim pursued.

41. In this regard, the Court firstly notes that the applicant was responding to a newspaper article the title of which implied that the drinking water was contaminated with various bacteria. The fact that the applicant considered it his duty as the Director of the Water Supply Company to respond to such an article is understandable. Secondly, the main aim when organising the press conference was to inform the public that the water pumped into the system had been filtered and was thus safe for use. Thirdly, even though he also criticised the Chief Inspector, this criticism concerned his behaviour and attitudes in his capacity as an official, rather than his private life. As noted above, senior civil servants acting in an official capacity are subject to wider limits of acceptable criticism than private individuals (see paragraph 37 above). For the Court, the applicant’s remarks, even if it is accepted that they were a statement of fact rather than a value judgment, were not a gratuitous attack on the Chief Inspector but rather, from the applicant’s perspective, a robust clarification of a matter under discussion which was of great public interest.

42. Further, the Court notes that the domestic courts, notwithstanding the applicant’s encouragement to do so, failed to situate his remarks in a broader context, namely the debate generated by the quality of the drinking water in the area concerned. In view of this rather restricted approach to the matter, it can scarcely be said that the reasons given by the domestic courts can be considered relevant and sufficient.

43. Lastly, the Court recalls that while the use of criminal-law sanctions in defamation cases is not in itself disproportionate (see *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 59, ECHR 2007-XI; *Długolecki v. Poland*, no. 23806/03, § 47, 24 February 2009; and *Saaristo and Others v. Finland*, no. 184/06, § 69 *in limine*, 12 October 2010), the nature and severity of the penalties imposed are factors to be taken into account (see, *mutatis mutandis*, *Cumpănă and Mazăre*, cited above, § 111). In this regard, the Court also recalls the Resolution of the Council of Europe, which was adopted in the meantime, calling on the member States which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay (see paragraph 25 above). In the present case, the Court notes with concern that the applicant was given a suspended sentence, which could,

under certain circumstances, have been transformed into a prison sentence (see paragraphs 12 and 22, in particular section 54 quoted therein).

44. In view of the above, especially bearing in mind the seriousness of the criminal sanction involved, and reaffirming its long-standing practice that there is little scope under Article 10 § 2 of the Convention for restrictions on the debate of questions of public interest (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 46, ECHR 1999-VIII), 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. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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.”

46. The applicant claimed damages and costs and expenses in the total amount of 100,000 euros (EUR) after the expiry of the time-limit for submitting Article 41 claims.

47. The Government contested the applicant’s claim as belated, unsubstantiated, inappropriately high and not in line with the Court’s case-law.

48. The Court notes that the applicant’s just satisfaction claim was submitted on 8 December 2010, a month after the expiry of the original deadline on 8 November 2010. The Court further notes that the applicant has advanced no justified reasons for having failed to comply with the requirements of Rule 60 § 2 of the Rules of the Court. In these circumstances the Court considers that his claim should be dismissed.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application in respect of Montenegro admissible, and the application in respect of Serbia inadmissible;
2. *Holds* that there has been a violation of Article 10 of the Convention by Montenegro;
3. *Dismisses* the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 31 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Nicolas Bratza Registrar President

¹ The SNP was an opposition party at the State level.

² The DPS was the major partner in the ruling coalition Government at the State level.

ŠABANOVIĆ v. MONTENEGRO AND SERBIA JUDGMENT

ŠABANOVIĆ v. MONTENEGRO AND SERBIA JUDGMENT