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

FOURTH SECTION

CASE OF FLUX (NO. 2) v. MOLDOVA

(Application no. 31001/03)

JUDGMENT

STRASBOURG

3 July 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 **Flux (no. 2) v. Moldova**,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr J. ŠIKUTA,
Mrs P. HIRVELÄ, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 12 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 31001/03) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by *Flux* (“the applicant”), a newspaper based in Chişinău on 15 September 2003.

2. The applicant was represented by Mr V. Gribincea, a lawyer practising in Chişinău and a member of the non-governmental organisation Lawyers for Human Rights. The Moldovan Government (“the Government”) were represented by their Agent, Mr V. Pârlog.

3. The applicant alleged, in particular, a breach of its right to freedom of expression on account of its having been found guilty of defamation of a politician.

4. On 9 February 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. On 19 June 2002 *Flux* published on its first page the title of an article due to appear in a future issue together with a summary of the article. The title of the summary was “The red millionaires” and it was accompanied by

a big picture of the leader of the Communist Party parliamentary group, Victor Stepaniuc, wearing a top hat.

6. The summary read as follows:

> "The Communists want to sell off piece-meal the Anenii Noi canned food plant
>
> The Anenii Noi plant is the only undertaking in the region which is still alive. The rest of the plants have been sold off piece-meal. Since the Communists came to power, a campaign to liquidate this plant has commenced. Certain members of the Parliament of Moldova wish to dismantle it and sell it off piece-meal. Sources from the plant told our newspaper that the member of Parliament M.A., who is responsible for Anenii Noi County, with the support of the main creditors ... is behind this dirty affair. Having great influence and parliamentary immunity, he wants to fill his pockets following the sale of the plant.
>
> At present the plant is not operating and is making substantial losses, and this situation is being used to maximum advantage by this MP. Since the plant is not operating and is not profitable, the shareholders want to liquidate it. The problem is that the plant could operate if the shareholders did not hinder the plant's staff.
>
> (A detailed article about this affair will be published in the Friday issue on page 5)".

7. The next day, on 20 June 2002, Mr Stepaniuc brought civil defamation proceedings against the newspaper and against the author of the article. He argued, *inter alia*, that:

> "... the defendants disseminated information which is defamatory of me as a citizen, an MP and as the leader of the Communist Party parliamentary group ...
>
> ... the article, which is accompanied by my picture, contains the following defamatory statements: 'The Communists want to sell the Anenii Noi canned food plant off piece-meal' ... 'Since the Communists came to power, a campaign to liquidate this plant has commenced. Certain members of the Parliament of Moldova wish to dismantle it and sell it off piece-meal'.
>
> By publishing this article, the defendants, acted in bad faith, misinforming public opinion about my actions in my capacity as MP and also about the activity of the Communist Party parliamentary group which I represent, accusing us of destroying an enterprise which is part of the national economy."

8. On 21 June 2002 *Flux* published the article announced in its 19 June issue. The article was based on the account of V.N., the deputy Chief Executive Officer of the Anenii Noi canned food plant, and reported on events concerning alleged attempts by a Communist parliamentarian (M.A.), to have the plant declared bankrupt and sold off. It stated, *inter alia*, that the parliamentarian had made use of the Tax Authority and other State bodies for that purpose and that he (M.A.) had told V.N. that his actions were supported by the Communist Party parliamentary group. According to V.N., three other plants from the region had already been declared bankrupt and sold off in the same manner.

9. On 1 August 2002 Judge I.M., who was also President of the Buiucani District Court, ruled in favour of Mr Stepaniuc, relying on the following grounds:

> "From the content and meaning of the article [of 19 June 2002] it is clear that *Flux* and the author made defamatory and false accusations against Mr Stepaniuc, in particular to the effect that he, in his capacity as MP and leader of the Communist Party parliamentary group, had engaged in actions directed at destroying enterprises within the national economy of the Republic of Moldova for personal gain.
>
> In addition, the article was accompanied by a picture of the plaintiff.
>
> The defendants did not present in the article any proof of the truthfulness of their accusations.
>
> In such circumstances, the court considers it necessary to note that any article should be sincere, correct and contain only truthful revelations which correspond to reality and are not based on rumours, anonymous letters or inadequately checked information from unreliable sources.
>
> The defendants, however, did not abide by common sense and unjustly defamed the plaintiff.
>
> Accordingly, the defendants clearly overstepped the limits of constructive criticism of public persons necessary in a democratic society.
>
> In the court's view, the fact that the plaintiff's name was not given in the article is not conclusive, since his picture and the meaning and content of the article make it clear that it is directed against him. Consequently, he was exposed to mental and moral suffering which should be remedied by the defendants.
>
> In establishing the compensation to be paid for non-pecuniary damage, the court shall take into consideration the considerable vehemence of the attack against Mr Stepaniuc, the large readership of the newspaper and the degree of suffering endured by the plaintiff.
>
> The court should also take into consideration the public functions occupied by Mr Stepaniuc, that of MP and leader of a parliamentary group, which should increase the award for moral damage. Therefore the court considers it necessary to award the plaintiff the maximum amount of compensation provided for by the law."

10. The court found the statement: "The Communists want to sell the Anenii Noi canned food plant off piece-meal" to be defamatory and ordered the newspaper and the author to pay the plaintiff 3,600 Moldovan Lei (MDL) (the equivalent of 270 euros (EUR) at the time) and MDL 1,800 respectively. It further ordered the newspaper to issue an apology within fifteen days. The defendants were also ordered to pay the court fees.

11. The newspaper lodged an appeal against the judgment in which it argued, *inter alia*, that the article had been directed against M.A., another MP from the Communist Party parliamentary group and not against Mr Stepaniuc. The latter's picture had been published in order to make it

easy to identify the Communist Party parliamentary group, since he was its President.

12. The applicant also argued that the impugned article was only an abstract of an article to be published subsequently and that the statement found by the first-instance court to be defamatory was merely a subjective conclusion drawn by the author based on the information published in the main article. The applicant further submitted that M.A. had also instituted defamation proceedings against the newspaper and requested that the two actions instituted by Mr Stepaniuc and by M.A. be joined and examined together.

13. The applicant finally argued that Judge I.M. lacked independence and impartiality because he was a friend of Mr Stepaniuc and had been appointed President of the Buiucani District Court by the Communist Party parliamentary group. The majority of the defamation cases between *Flux* and Mr Stepaniuc were examined by him personally and his decisions were stereotyped. In other defamation cases between *Flux* and representatives of the Government, Judge I.M. had always ruled in favour of the latter and had awarded them the maximum amount provided for by law.

14. On 6 February 2003 the Chişinău Regional Court dismissed the appeal as being unfounded. It did not take into consideration the article published on 21 June 2002.

15. The newspaper lodged an appeal on points of law, relying on the same grounds as in its appeal and added, *inter alia*, that the impugned article merely reproduced the opinion of the management of the Anenii Noi canned food plant.

16. On 1 April 2003 the Court of Appeal dismissed the appeal. It stated, *inter alia*, that it was clear that the information published in the article about Mr Stepaniuc did not correspond to reality; moreover, his picture had been attached to the article.

17. It appears that the defamation action brought by M.A. against *Flux* was struck out due to M.A.'s failure to appear before the court.

II. RELEVANT DOMESTIC LAW

18. The relevant provisions of the Civil Code in force at the material time read:

Article 7. Protection of honour and dignity

"(1) Any natural or legal person shall be entitled to apply to the courts to seek the withdrawal of statements which are damaging to his or her honour and dignity and do not correspond to reality, as well as statements which are not damaging to honour and dignity, but do not correspond to reality.

(2) When the media body which circulated such statements is not capable of proving that these statements correspond to reality, the court shall compel the

publishing office of the media body to publish, not later then 15 days after the entry into force of the judicial decision, a withdrawal of the statements in the same column, on the same page or in the same programme or series of broadcasts."

Article 7§ 1. Compensation for moral damage

"(1) The moral damage caused to a person as a result of circulation through the mass media or by organisations or persons of statements which do not correspond to reality, as well as statements concerning his or her private or family life, without his or her consent, shall be compensated by way of a pecuniary award. The amount of the award shall be determined by the court.

(2) The amount of the award shall be determined by the court in each case as an amount equal to between 75 and 200 months' minimum wages if the information has been circulated by a legal person and between 10 and 100 month's minimum wages if the information has been circulated by a natural person."

III. MATERIALS RELIED ON BY THE APPLICANT

19. The Freedom House Organisation 2003 country report for Moldova, insofar as relevant, reads as follows:

"... In 2002, the principle of the rule of law was under challenge in Moldova. This was evidenced by the rising number of cases filed by Moldovan citizens in the European Court of Human Rights and actions taken by the Parliament and government to suppress judicial independence. Also affecting the fragile balance of power among the legislative, executive, and judicial branches of government in 2002 were a series of judicial nominations based on loyalty to the ruling party, the dismissal of the ombudsman, and attempts to limit the independence of the Constitutional Court.

...

In April, the Moldovan Association of Judges (MAJ) signaled that the government had started a process of "mass cleansing" in the judicial sector. Seven judges lost their jobs, including Tudor Lazar, a member of the court of appeals, and Gheorghe Ulianovschi, the chairman of the Chisinau Tribunal. In the case of Lazar, the move was likely revenge for decisions by the court of appeals that favored the Basarabian Metropolitan Church and local oil importers over the government.

The situation worsened when President Voronin refused to prolong the mandates of 57 other judges. The MAJ conveyed a statement on the matter to COE rapporteurs who were in Chisinau at the time on a fact-finding mission. The government instructed the Ministry of Justice to delay court decisions related to the payment of material damages by state institutions. In October, Gheorghe Susarenco, chairman of the Moldovan Association of Judges, stated at a press conference that senior government officials were pressuring judges to issue rulings that favored government bodies.

In December, President Voronin promulgated a constitutional amendment giving him the right to appoint judges. Under the amendment, the head of state will appoint the chairs of courts, their deputies, and lower-ranking judges for four-year terms at the

recommendation of the Higher Council of Magistrates. Parliament will appoint for four-year terms members of the Supreme Court of Justice, including the chief of the Supreme Court of Justice, the prosecutor-general, and the minister of justice. These changes provide evidence that the country's Communist leaders are weakening judicial independence and subordinating this branch of governance to their authority...”

20. The United States Department of State 2003 country report on Moldova read as follows in its relevant parts:

> “... The Constitution provides for an independent judiciary; however, official pressure and corruption of judges remained a problem.
>
> There continued to be credible reports that local prosecutors and judges extorted bribes for reducing charges or sentences.
>
> Following a major reorganization in May, the judiciary consists of three levels: lower courts, courts of appeals, and the Supreme Court. A separate Constitutional Court has exclusive authority in cases regarding the constitutionality of draft and final legislation, decrees, and other government acts. While the Constitutional Court was generally regarded as fair and objective, observers frequently charged that other courts were corrupt or politically influenced.
>
> The Constitution authorizes the President, acting on the nomination of the Superior Court of Magistrates, to appoint judges for an initial period of 5 years. Before being reappointed, judges must undertake specialized judicial training and pass a test evaluated by the Superior Council of Judges. Political factors have played a large role in the reappointment of judges.”

THE LAW

21. The applicant complained under Article 6 of the Convention that no reasons had been given for the judgments of the domestic courts and that Judge I.M. of the first-instance court lacked independence and impartiality. Article 6, in so far as relevant, reads as follows:

> “1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

22. The applicant also complained under Article 10 of the Convention that the domestic courts' decisions had entailed interference with its right to freedom of expression that could not be regarded as necessary in a democratic society. Article 10 reads:

> “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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

I. ADMISSIBILITY OF THE CASE

A. The complaint under Article 6 of the Convention concerning the independence and impartiality of Judge I.M.

23. The Government argued that the applicant had failed to adduce any credible proof in support of its submission that Judge I.M. lacked impartiality and independence. According to them, the mere fact that the applicant had been unsuccessful in proceedings on several occasions before that judge was not sufficient proof of his lack of independence and impartiality. In any event the applicant had at its disposal the possibility to challenge Judge I.M.

24. The applicant argued that Judge I.M. lacked independence and impartiality. While he had obtained tenure in 2000 under the previous Government, he had been appointed President of the Buiucani District Court in 2001 by the Communist Party parliamentary group, which held 71 seats out of 101 and whose leader was Mr Stepaniuc. Since then he had examined four other defamation cases brought by Mr Stepaniuc against the applicant newspaper and had found in all of them for Mr Stepaniuc and awarded the maximum amount possible under the law. According to the applicant it was a strange coincidence that the President of the court should himself have examined the majority of the defamation actions brought by Mr Stepaniuc. This is moreover strange since he had never examined defamation proceedings against *Flux* brought by "ordinary" plaintiffs. In all the cases the actions had been upheld even though Mr Stepaniuc had failed to pay the court fees, an omission which was a formal ground for inadmissibility under the Code of Civil Procedure. Mr Stepaniuc had not even appeared before the court and all of his actions had been examined in his absence, usually at the first hearing. Judge I.M. never put questions to the defendant but kept advancing reasons which were in support of the plaintiff's position, reasons which had never been advanced by the plaintiff himself. This was proof of the "special care" shown by Judge I.M. towards Mr Stepaniuc.

On 18 March 2004 Judge I.M. had been promoted and appointed by Parliament as judge at the Supreme Court of Justice. According to the applicant it was the first time that a judge from a first-instance court had

been promoted directly to the Supreme Court. Moreover, on 14 May 2004 Judge I.M. had been appointed Deputy President of the Commercial Division of the Supreme Court of Justice and on 7 July 2006 he had been awarded a State distinction called *Meritul Civic* by the President of Moldova, who was also the President of the Communist Party of Moldova.

25. The applicant also made reference, *inter alia*, to the reports of the Freedom House Organisation and of the United States Department of State (see paragraphs 19 and 20 above) and concluded that, in view of the general perception of the Moldovan judiciary, the circumstances surrounding the career of Judge I.M. and his behaviour in other similar cases between the applicant newspaper and Mr Stepaniuc, it had grounds for an objectively justified and legitimate fear that the judge in question had lacked independence and impartiality when examining the case.

26. The Court considers that it is not required to examine whether the applicant failed to exhaust domestic remedies since it finds that the complaint is in any event and for the following reasons manifestly ill-founded.

27. The Court reiterates that appointment of judges by the executive or the legislature is permissible, provided the appointees are free from influence or pressure when carrying out their adjudicatory role (see *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, § 79). In the present case it appears that Judge I.M. had tenure and that his employment could not be terminated by the executive or the legislature. The applicant did not adduce any evidence to show that Judge I.M. had been subject to any form of influence or pressure from the executive or legislature. In the light of the above, the Court is unable to conclude that Judge I.M. lacked independence and impartiality, viewed both subjectively and objectively, within the meaning of Article 6 § 1 of the Convention when dealing with the civil action brought against the applicant newspaper. Accordingly, this complaint must be declared inadmissible as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

B. The complaints under Article 1 of Protocol No. 1 and Article 13 of the Convention

28. In its initial application, the applicant newspaper also submitted complaints under Article 1 of Protocol No. 1 and Article 13 of the Convention. However, in its observations on admissibility and merits it asked the Court not to proceed with the examination of these complaints. The Court finds no reason to examine them.

C. Complaints under Articles 10 and 6 of the Convention

29. The Court considers that the applicant's complaint under Article 10 of the Convention and the complaint under Article 6 concerning the insufficient reasons given for the domestic courts' judgments raise questions of fact and law which are sufficiently serious that their determination should depend on an examination of the merits, and that no grounds for declaring them inadmissible have been established. The Court therefore declares the application admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider the merits of these complaints.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

A. The arguments of the parties

1. *The applicant*

30. The applicant argued that the interference was not provided for by law because Moldovan law and case-law did not distinguish between statements of fact and value judgments.

31. The applicant also submitted that the article of 19 June 2002 was merely a summary of the article published on 21 June 2002, which in its turn reflected statements made by a third person, V.N. The title of the summary, for which the newspaper had been penalised, was nothing more than a conclusion drawn by the author from the statements made by V.N. and was thus simply a value judgment supported by a sufficient factual basis.

32. The article had been written in the context of a debate on an issue of distinct public importance, namely the management of State property and alleged abuses by State officials. Moreover, the article had not contained any criticism of Mr Stepaniuc, but only of M.A., who was a parliamentarian belonging to the Communist Party parliamentary group. Mr Stepaniuc's picture had been published only in order to make the parliamentary group easily identifiable. In any event, the margin of appreciation enjoyed by the domestic courts had been very narrow in this case, since the plaintiff in the proceedings was a politician.

2. *The Government*

33. The Government agreed that the facts of the case disclosed an interference with the applicant's right to freedom of expression. The interference was nevertheless justified under Article 10 § 2 of the

Convention. The applicant had been ordered to pay non-pecuniary damages for defamation on the basis of Articles 7 and 7 § 1 of the Civil Code. The interference was thus "prescribed by law" and the law was accessible and foreseeable. It served the legitimate aim of protecting the dignity of Mr Stepaniuc; furthermore, the measure was necessary in a democratic society.

34. The Government pointed to the national authorities' margin of appreciation in assessing the need for interference and submitted that where the Convention referred to domestic law it was primarily the task of the national authorities to apply and interpret domestic law. They contended that in the present case the domestic authorities had not overstepped their margin of appreciation and had made use of it in good faith, carefully and in a reasonable way.

35. The Government further submitted that the reasons given to justify the interference were "relevant and sufficient".

B. The Court's assessment

36. It is common ground between the parties, and the Court agrees, that the decisions of the domestic courts and the award of damages made against the applicant amounted to "interference by [a] public authority" with the applicant's right to freedom of expression under the first paragraph of Article 10. Such interference will entail a violation of Article 10 unless it is "prescribed by law", has an aim or aims that are legitimate under paragraph 2 of the Article and is "necessary in a democratic society" to achieve such aim or aims.

1. *"Prescribed by law"*

37. The Court notes that the interference complained of had a legal basis, namely Articles 7 and 7 § 1 of the Civil Code (see paragraph 18 above). In its judgment in *Busuioc v. Moldova* (no. 61513/00, § 52-54, 21 December 2004), the Court found that these provisions were accessible and foreseeable. Accordingly, the Court concludes that in this case too the interference was "prescribed by law" within the meaning of Article 10 § 2.

2. *"Legitimate aim"*

38. It is not disputed by the parties, and the Court agrees, that the interference served the legitimate aim of protecting the reputation of Mr Stepaniuc. It therefore remains to be examined whether the interference was "necessary in a democratic society".

3. *"Necessary in a democratic society"*

(a) General principles

39. The relevant general principles have been summarised in *Busuioc v. Moldova*, cited above, §§ 56-62, 2004 and in *Savitchi v. Moldova*, no. 11039/02, §§ 43-50, 11 October 2005.

40. In addition to that, the Court recalls that in *Lingens v. Austria* (judgment of 8 July 1986, Series A no. 103, § 42) it held that:

> "[the politician] inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."

(b) Application of the above principles in the present case

41. The Court notes that in essence the applicant newspaper was penalised for publishing a picture of the President of the Communist Party parliamentary group in the context of a summary of a future article containing criticism of that group for alleged involvement in illegal acts. It is possible to say that the juxtaposition of the text and the photograph gave rise to an implication that there was a link between the alleged illegalities and Mr Stepaniuc. Moreover, the summary did not make clear that the main article was to be based on the account of a third person. It was, however, stated that details were to follow in the main article and the summary made clear that it referred to politicians and to political matters.

42. The Court notes that the article was written by a journalist and recalls the pre-eminent role of the press in a democratic society to impart ideas and opinions on political matters and on other matters of public interest (see Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, § 65). The Court also recalls that States enjoy a very narrow margin of appreciation in cases concerning politicians (see paragraph 40 above) and notes that Mr Stepaniuc was a very high-ranking politician at the time of the events. Finally, the Court notes that the summary and the impugned statement were based on information coming from a source which was *prima facie* reliable, namely from the CEO of the plant (see, *mutatis mutandis*, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 68, ECHR 1999-III).

43. The Court notes that the applicant argued in his appeal and in his appeal on points of law that the article of 19 June 2002 was merely an abstract of an article which was to appear on 21 June 2002 and that the impugned phrase "The Communists want to sell off the Anenii Noi canned food plant piece-meal" was merely a conclusion drawn by the author from

the information presented in that article. The information in the main article, in its turn, was based on the account of the plant's CEO and was never found defamatory or untrue (see paragraphs 8 and 17 above). However, the national courts did not pay any attention to the applicant's arguments and did not seek to assess them, apparently treating them as irrelevant and concluding that the impugned statement was untrue and defamatory of Mr Stepaniuc without even reading the main article.

44. The Court recalls that, to require an applicant to prove the truth of his or her statements, while at the same time depriving him or her of an effective opportunity to adduce evidence to support the statements and thereby attempt to establish their truthfulness or to show that their content was not entirely without foundation, constitutes a disproportionate interference with the right to freedom of expression (see, for example, *Busuioc*, cited above, § 88 and *Savitchi v. Moldova*, cited above, § 59).

45. Being mindful of the above, bearing in mind the language used by the newspaper in the impugned statement, the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation and having weighed up the different interests involved in the present case, the Court comes to the conclusion that the interference with the applicant newspaper's right to freedom of expression was not "necessary in a democratic society".

46. Accordingly, the Court concludes that there was a breach of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

47. The applicant newspaper also alleged a violation of Article 6 § 1 of the Convention, arguing that the domestic courts had failed to give reasons for their decisions. As this complaint does not raise a separate issue from that examined under Article 10 above, the Court does not consider it necessary to examine it separately.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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. Pecuniary damage

49. The applicant claimed EUR 278 for pecuniary damage, representing the damages paid by it to Mr Stepaniuc and the court fees which it had had to pay for the examination of its appeals.

50. The Government disagreed with the amount claimed and argued that the applicant should not be entitled to recover it because the proceedings had been fair and ample reasons had been given for the judgments. They asked the court to dismiss the applicant's claim for pecuniary damage.

51. The Court considers the applicant's claim for pecuniary damage to be well founded and awards it in full.

B. Non-pecuniary damage

52. The applicant claimed EUR 18,500 for non-pecuniary damage caused to it by the breach of its Convention rights. In substantiating its claims concerning the non-pecuniary damage related to the breach of Article 10, the applicant argued that it had been obliged to publish a retraction of the impugned statements and relied on previous case-law in Moldovan cases. In particular, it relied on the cases of *Busuioc* (cited above) and *Savitchi* (cited above) in which four and three thousand euros, respectively, were awarded.

53. The Government contested the claim and argued that it was ill-founded and excessive.

54. Having regard to the violation of Article 10 of the Convention found above, the Court considers that an award of compensation for non-pecuniary damage is justified in this case. Making its assessment on an equitable basis, the Court awards the applicant newspaper EUR 3,000.

B. Costs and expenses

55. The applicant's lawyer claimed EUR 2,680 for the costs and expenses incurred before the Court. He submitted a detailed time-sheet and a contract according to which the lawyer's hourly rate was EUR 60. The calculation in the time-sheet did not include the time spent on the complaints under Article 13 and Article 1 of Protocol No. 1 which were subsequently withdrawn by the applicant.

56. He argued that the number of hours spent by him on the case was not excessive and was justified by its complexity and by the fact that the observations had to be written in English.

57. As to the hourly fee of EUR 60, the lawyer argued that it was within the limits of the hourly rates recommended by the Moldovan Bar Association, which were EUR 40-150. He also pointed to the high cost of

living in Chişinău, giving as examples the prices of accommodation and petrol.

58. The Government disagreed with the amount claimed for representation. They said that it was excessive and argued that the amount claimed by the lawyer was not the amount actually paid to him by the applicant. They disputed the number of hours spent by the applicant's lawyer and the hourly rate charged by him. They also argued that the rates recommended by the Moldovan Bar Association were too high in comparison with the average monthly salary in Moldova and pointed to the not-for-profit nature of the organisation Lawyers for Human Rights.

59. The Court reiterates that in order for costs and expenses to be included in an award under Article 41 of the Convention, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Amihalachioaie v. Moldova*, no. 60115/00, § 47, ECHR 2004-...).

60. The reimbursement of fees cannot be limited only to those sums already paid by the applicant to his or her lawyer; indeed, such an interpretation would discourage many lawyers from representing less prosperous applicants before the Court. In any event, the Court has always awarded costs and expenses in situations where the fees were not paid by the applicants to their lawyers before the Court's judgment (see, among other authorities, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 493, ECHR 2004-VII, and *Christian Democratic People's Party v. Moldova*, no. 28793/02, § 85, ECHR 2006-...).

In the present case, regard being had to the itemised list submitted and the complexity of the case, and also to the fact that one complaint was declared inadmissible, the Court awards the applicant EUR 1,800 for costs and expenses.

FOR THESE REASONS, THE COURT

1. *Declares* by a majority inadmissible the complaint under Article 6 § 1 of the Convention concerning the alleged lack of independence and impartiality of Judge I.M.;

2. *Declares* unanimously the remainder of the application admissible;

3. *Holds* unanimously that there has been a violation of Article 10 of the Convention;

4. *Holds* by six votes to one that there is no need to examine separately the complaint under Article 6 § 1 of the Convention;

5. *Holds* unanimously
   (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 the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
   (i) EUR 278 (two hundred and seventy-eight euros) in respect of pecuniary damage;
   (ii) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage;
   (iii) EUR 1,800 (one thousand eight hundred euros) in respect of costs and expenses;
   (iv) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

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

T.L. EARLY Nicolas BRATZA
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Bonello is annexed to this judgment.

N.B.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGE BONELLO

1. In this case the Court could have voiced its views on the pathology of an administration of justice. It did not.

2. The applicant newspaper *Flux* submitted complaints relating to two violations of Article 6 of the Convention. The majority declared inadmissible the first complaint on the lack of independence and impartiality of Judge I.M. A second complaint regarding the alleged failure of the domestic courts to give reasons for their decisions was disposed of by the majority with a finding that this complaint did not raise an issue separate from the freedom of expression complaint under Article 10, and that consequently the Court did not consider it necessary to examine it separately.

3. As the applicant's first Article 6 complaint was declared inadmissible not by a judgment but by a separate 'decision' of the Court, I am restrained from expressing if and why I agreed or disagreed with that decision, finding some comfort in the reflection that it is not the first time that courts trip over semantics on their way to justice. This restraint does not apply to the second complaint which was dealt with by a judgment; this enables me to elaborate and make public the reasons for my dissent.

4. I find it hard to agree with the majority's conclusion that a claim of violation of fair-trial guarantees (deriving from an alleged failure by the domestic courts to give reasons for their decision) raises no separate issue from that of a violation of freedom of expression. The domestic courts had condemned the applicant newspaper to pay damages, plus costs, and to make an apology to a leading government politician. The Court unanimously found these domestic judgments to have been in violation of the applicant's freedom of expression. This 'freedom of expression' finding surely determined an issue totally distinct from that whether the applicant's fair-trial guarantees had been respected or not, and in my view this separate complaint should have been considered and determined separately.

5. The Court enjoys unquestionable discretion to refrain from deciding complaints which, although admissible and meritorious, do not raise issues substantially different from others in which a violation of some Convention guarantee has already been found. By rule of thumb, it can safely be said that if a graver violation has previously been established, the Court would rightly find it futile to determine also a lesser violation arising from the same facts.

6. In the circumstances of the present case I do not consider a possible infringement of the fair-trial guarantees to be meaner in weight or flimsier in value than a breach of freedom of expression. The very particular facts on which this application is based tend to indicate that one core issue to be determined should have been whether the Article 6 fair-trial guarantees had been respected or not.

7. The applicant newspaper claims the domestic courts failed to give reasons on which to base its conviction for libel – not accidentally, not through some genuine pressure-of-work oversight, but inasmuch as the judge who ruled against the applicant lacked independence and impartiality "because he was a friend of Mr Stepaniuc (the plaintiff in the libel proceedings) and had been appointed president of the Buiucani district court by the Communist party parliamentary group" whose leader was the plaintiff in the defamation proceedings against the applicant newspaper.

8. The applicant added that in other defamation cases between *Flux* and representatives of the government, judge I.M. had always ruled in favour of the latter and awarded them the maximum amount provided for by law. By "a strange coincidence" the same judge examined the majority of defamation actions brought by his friend Mr Stepaniuc. All the claims of Mr Stepaniuc had always been upheld by judge I.M. even in those lawsuits in which the plaintiff had failed to pay court fees, which fact, by itself, should have rendered the action procedurally inadmissible. Nor did the fact that the plaintiff consistently failed to appear for the hearing of his court cases have any negative impact on his pending cases – they were all the same examined and determined by judge I.M. usually at the first hearing.

9. These are the plaintiff's allegations of fact to explain why judge I.M. could not be considered independent and impartial and why he failed to give reasons for finding the applicant newspaper liable to maximum libel damages.

10. These allegations on their own, if proved, would be worrying indicators of a questionable detachment of the presiding judge from the litigants – or from one of them. The alert however sounds louder still, as the alleged failure of judge I.M. to give reasons for his decision (a decision the Court unanimously found to have been in violation of the Convention) has to be assessed against a wider historical backdrop. If, as alleged, this failure of the presiding judge marches hand in hand with systemic evidence of feeble guarantees for the independence and impartiality of the judiciary as a whole, the alert should have sounded more inexorably.

11. I am attaching as an appendix brief summaries of several external reports on the state of the judiciary in Moldova, all highly negative and startling. For reasons of balance I wanted to include reports from other authoritative sources denying that the independence of the judiciary in Moldova is a stretcher case. I found none.

12. It is, in my view, against these seemingly universal concerns that the alleged failure by judge I.M. to give reasons should have enticed the Court to take some note. The Court could have asked itself whether a reluctance to reason out an unreasonable decision is the minimum to expect from a self-respecting, hire and fire judiciary. The Court could, or should, have investigated whether this was 'telephone justice' in which the telephone was pointless and the justice hilarious.

13. I find it self-delusory to harness impressive formulas to avoid facing core issues of the administration of justice, and then to feel fulfilled by one dexterous sweep of the debris under the carpet. No doubt irrationally, I believe more than I make-believe. Strasbourg, I thought, has a role to play in fortifying standards, well beyond that of seeking refuge behind legal fictions. In the long run they only energize the determination of those with a talent for finding the independence of the judiciary amusing. Those bent on making the independence of the judiciary obsolete know they need look no further.

14. I would have expected the Court to pounce on this opportunity to give hope to the people of Moldova. To let out some timid whispers for justice politically untainted. I would have expected the Court to have thoroughly investigated if the judgment that condemned the applicant was supported by good reasons or by any reason at all. I would have been gratified had the Court asked how often judge I.M., and other candidates for the heroes of the resistance award, found against the ruling party or its exponents in politically sensitive lawsuits. It would seem that the administration of justice in Moldova respects a number of precepts. I looked for them in Article 6 and could find none of them there.

15. All this alarms me profoundly. I have this old-fashioned prejudice against judges approximately impartial. I respond with inconstant passion to the credo of some politicians that judges fit nicely everywhere, but best of all in their pockets. I find bland, if not inconsequential, the doctrine that justice must not only be done, but should manifestly be seen to be done. Far more relevant, to me, is the doctrine that, for control-freaks to rule undisturbed, injustice should not only be done, but should manifestly be seen to be done.

16. Judge I.M.'s career crashed - from minor district judge to President of the Supreme Court in a span of time shorter than it takes to say 'the party is always right'. In an otherwise bleak panorama, it is comforting to note that the sacrifice of judges who align their energies with the welfare of the ruling political class, does not always cripple their careers.

17. I thought this was the right time for the Court to start panicking. This a self-evident opportunity to detox an administration of justice. Instead I had to witness the Court allowing the Moldovan judiciary the widest margin of depreciation.

APPENDIX

1. According to reports provided by the applicant and not contested by the respondent state, at the relevant time there were a series of nominations to the bench based on loyalty to the ruling party, the dismissal of the Ombudsman, and attempts to limit the independence of the Constitutional Court. The Moldovan Association of Judges had recorded that the government had started a 'mass cleansing' of the judicial sector. Seven judges had been ousted outright and the President of the Republic failed to prolong the mandate of 57 other judges. The Chairman of the Association of Judges declared publicly to the media the "senior government officials were pressurising judges to issue rulings that favoured government bodies".

2. By virtue of a constitutional amendment, the President was given the right to appoint judges and select the chairs of courts, their deputies and lower-ranking judges for four year terms, at the recommendation of the Higher Council of Magistrates. Parliament (by political majority vote) was given the power to appoint for four year terms members of the Supreme Court, including its president, the prosecutor-general and the minister of Justice.

3. Another report, the U.S. Department of State country report on Moldova for 2003, underlined that "official pressure and corruption of judges remained a problem ... observers frequently charged that other courts were corrupt or politically influenced ... political factors have played a large part in the reappointment of judges".

4. The report of the Council of Europe's Commissioner for Human Rights (Com D+1 (2003) 7) has made no mystery of the fact the "the independence of the judiciary in Moldova is a serious worry". It pointed out the exercise of powers of appointment, reappointment and dismissal of

judges vested in the President of the Republic as "a serious interference with the independence of the judiciary". The Commissioner's office delegation had sought in vain to establish what guarantees apply in the procedure leading to the non re-appointment of judges". The report concluded that "it follows that the present presidential practice on appointment and re-appointment of judges does not provide sufficient rule of law guarantees and seems therefore arbitrary ... It is thus urgent that the presidential practice be revised in order to safeguard judicial independence and the rule of law".

5. Similarly, the International Commission of Jurists painted the bleakest of pictures on the functioning of the Judiciary following a joint mission to Moldova with the Centre for the Independence of Judges and Lawyers in February 2004. Its report, dated November 30, 2004, slammed virtually everything relating to the appointment, tenure of office and removal of judges; it found these to be wholly out of line with basic minimum European guarantees for the independence and impartiality of the judiciary, and noted the massive return of "telephone justice" by the executive and the legislative to control the decisions of judges.

6. In the same vein was the statement of the International Helsinki Federation for Human Rights on "Violations' of the Freedom of the Media and the Independence of the Judiciary in Moldova" dated June 10, 2003, which claimed that the Federation was "deeply concerned about the ... gross violations of the freedom of the media and the independence of the judiciary ... the judiciary continues to face excessive political intrusion, the status of judges is insecure due to the re-appointment procedure, the highly questionable overhaul of the judiciary system and precedents of politically motivated extralegal dismissal of judges ... the abolition of the guarantees of a life term for judges and the large number of removals also put additional pressure on the judges ... a basically uncritical mode of operation resulting in further possibilities for executive control over the judiciary and infringements of the separation of powers".

7. A wider spectrum of non-domestic observations on the independence and impartiality of the judiciary in Moldova is to be found in the First Annex to the I.C.J. report mentioned above.